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## The Differences between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement

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THE DIFFERENCES BETWEEN  
THE PANEL PROCEDURES OF THE GATT AND THE WTO:  
THE ROLE OF GATT AND WTO PANELS IN TRADE  
DISPUTE SETTLEMENT

*Petko D. Kantchevski\**

*“Every experienced lawyer knows that  
cases are most often won and lost on  
procedural grounds.”*

*D. Palmeter & P. Mavroidis*

I. INTRODUCTION

In February 1945, the Economic and Social Council of the United Nations (ECOSOC) adopted a resolution and called for a conference to draft a charter for the International Trade Organization. The charter, known as the Havana Charter, concluded in 1948, but never came into effect due to the U.S. Congress' failure to ratify it in 1950. Yet, the General Agreement on Tariffs and Trade (GATT) of 1947,<sup>1</sup> which was designed to be a part of the Havana Charter, came into force in eight states on January 1, 1948 pursuant to a protocol of provisional application.<sup>2</sup> Not only was the GATT “provisional” in nature throughout its entire existence, but its dispute settlement rules were vague and lacked details. In fact, the GATT contained only two provisions on dispute settlement, Articles XXII and XXIII, and neither contained any specific procedure. These dispute settlement provisions formed the basis of both GATT jurisprudence and decisions of the GATT Contracting Parties. The GATT was a multilateral trade instrument that provided a valuable framework for removing barriers

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<sup>1</sup> General Agreement on Tariffs and Trade, opened for signature, October 30, 1947, 55 U.N.T.S. 187, [hereinafter GATT, GATT 1947, or old GATT]. The GATT 1947 should be distinguished from the GATT 1994. For the differences between the two, *see* text accompanying note 117 *infra*.

<sup>2</sup> Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Jan. 1, 1948, 55 U.N.T.S. 308.

to international trade through multilateral trade negotiations called “trade rounds.” The Uruguay Round of Multilateral Trade Negotiations (1986–1994) (hereinafter Uruguay Round) culminated in the creation of an international organization called World Trade Organization (WTO).<sup>3</sup> When the WTO started functioning in the beginning of 1995, it had the chance to fully benefit from the GATT dispute settlement legacy developed over almost half a century.

By reviewing the evolution of the procedural rules from 1947 on and comparing them with the current WTO rules, this Article will assess the differences between the old GATT dispute settlement mechanism and the new WTO system. This analysis will show that the differences are not significant because the WTO system is based largely on what has been learned through the existence of the GATT. Additionally, and most importantly, it will show that the WTO system is heading in the right direction because it is a more sophisticated system compared to that of the GATT.

## II. THE EVOLUTION OF PANEL PROCEEDINGS

### A. *Going from Diplomacy to Legal Adjudication*

When it comes to resolving trade disputes between contracting parties, the dispute resolution mechanisms within the GATT resemble diplomacy more than they do adjudication. In the early years of the GATT, it was the GATT Council Chairman who decided the dispute rulings. Later, *working parties* were organized to deal with disputes under GATT Article XXIII:2. Working parties included the complaining party, the party complained against, and all the interested government representatives. Generally, working parties consisted of about five to twenty delegations, depending upon the importance of the question and the interests involved.<sup>4</sup> These working parties and their members operated by consensus and negotiation—a situation that may correctly be assessed as a political method of dispute settlement.

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<sup>3</sup> Marrakech Agreement Establishing the World Trade Organization, Apr. 15, 1994, LT/UR/A/2 (in the sense of Articles I to XIV) [hereinafter WTO Agreement]. The official text of the WTO Agreement and the agreements annexed to it, which were concluded at the end of the Uruguay Round are to be found in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994), reprinted in GATT Secretariat, *The Results of the Uruguay Round*, 6 (1994).

<sup>4</sup> *Annex on Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement*, GATT B.I.S.D. (26th Supp.) ¶ 6 (1980) [hereinafter *1979 Annex on the Customary Practice of the GATT*].

In 1952, panels of three or five third-party experts from the GATT began hearing disputes arising out of the GATT. The pioneer case decided by a panel is *Treatment by Germany of Imports of Sardines*,<sup>5</sup> which involved Norway and Germany as opposing parties.<sup>6</sup> The parties eventually settled the dispute by mutual agreement,<sup>7</sup> but it became the first serious attempt towards third-party adjudication within the GATT.

In the 1950s and 1960s, the procedural rules of the GATT panels had a limited scope because the method of adjudication remained highly diplomatic, and a large number of the panelists were diplomats, not lawyers. The fact that there was no legal division within the Secretariat of the GATT from 1948 to 1983 confirms that the Contracting Parties attempted to avoid legalism.<sup>8</sup> Interesting evidence of this assertion is found in the annex to the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*<sup>9</sup> of 1979, which provides:

At the Review Session (1955) the proposal to institutionalise the procedures of panels was not adopted by CONTRACTING PARTIES mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT.<sup>10</sup>

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<sup>5</sup> Report of the Panel, *Treatment by Germany of Imports of Sardines*, (Oct. 31, 1952), GATT B.I.S.D. (1st Supp.) at 53 (1953).

<sup>6</sup> In this case, Norway complained that reasonable expectations deriving from tariff negotiations conducted with Germany on the basis of equal tariff treatment of two closely related items (two kinds of sardines which were “like products”) were impaired. It is interesting that the formulation of the claim much resembles a “non-violation complaint, which was rarely used in the old GATT dispute settlement system. Germany was invited to remove the competitive inequality between the products concerned by a Contracting Parties’ Resolution.” GATT B.I.S.D. (1st Supp.) at 30–31 (1953).

<sup>7</sup> A note on the outcome has been published in GATT B.I.S.D. (7th Supp.) at 69 (1959).

<sup>8</sup> In this sense, see ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT*, xiii (Kluwer Law International 1997).

<sup>9</sup> *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1980) [hereinafter 1979 Understanding].

<sup>10</sup> *1979 Annex on the Customary Practice of the GATT*, supra note 4, at 215, footnote to ¶1.

Even in the beginning of the Uruguay Round in 1986, dispute settlement within the GATT remained highly diplomatic. Parties had the opportunity to settle, meaning that, for example, the GATT Parties still had the freedom to accept or reject the proposed panel solution, because adoption of a panel report required a positive consensus among the GATT Council.<sup>11</sup>

The adoption of panel reports by positive consensus of all GATT Parties appears contestable, because from a legal perspective, GATT Article XXV:4 provides, “except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.”<sup>12</sup> The agreement does not prescribe any exceptions to this Article; therefore, in the early years of the GATT, adoption of panel reports required a majority vote.<sup>13</sup> However, in the 1950s, it became a customary practice for Contracting Parties to adopt panel reports by *consensus*. The Ministerial Declaration of 1982 clarified this procedure, stating that “CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes.”<sup>14</sup> At the Ministerial Meeting, the Contracting Parties tried to adopt a proposal, according to which the disputing parties would not have the right to vote on the panel report adoption. As a result, the GATT Parties made an effort to include a “consensus minus two” rule for the adoption of panel reports in the Ministerial Declaration.<sup>15</sup> However, even if the “consensus minus two” rule had been adopted, it would not have solved the problem because one GATT party could easily have found another GATT party to help block the adoption of a report.

On one hand, E.U. Petersmann argues that the majority of decisions on dispute settlement within the old GATT were legally inadmissible. In his view, the Roman law maxim *nemo debet esse iudex in propria causa* (no one should be a judge in his own case) is a general principle of law and is recognized as a principle of

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<sup>11</sup> Under the old GATT practice of taking decisions by consensus, a single formal objection by any Contracting Party, including the respondent, was enough to block the adoption of a panel report.

<sup>12</sup> GATT 1947, *supra* note 1, at art. XXV:4.

<sup>13</sup> See Ernst-Ulrich Petersmann, *Strengthening GATT Procedures for Settling Trade Disputes*, 11 WORLD ECONOMY 55, 74 (1988).

<sup>14</sup> Ministerial Decision on Dispute Settlement of 29 November 1982, L/5424, GATT B.I.S.D. (29th Supp.) at 13, ¶ (x), (1983) [hereinafter 1982 Ministerial Declaration].

<sup>15</sup> Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53, 95–96 (1987).

international law.<sup>16</sup> Therefore, a possible solution to the blockage of a panel report adoption was to exclude the losing party from voting.<sup>17</sup>

On the other hand, the procedural rules of the GATT had evolved over the years, and although the provisions of GATT Articles XXII and XXIII were initially unclear, the GATT Parties increasingly legalized and codified the GATT dispute settlement practice. Since the Kennedy Round of Multilateral Trade Negotiations between 1962 and 1967, a number of decisions and understandings made in 1966, 1979, 1982, 1984, and 1989 codified and supplemented the procedural dispute settlement rules.<sup>18</sup> The most important documents among these are the *1979 Understanding* and its *1979 Annex on the Customary Practice of the GATT*.<sup>19</sup> These documents prescribe that each panel was required to organize its own procedures by holding two or three formal meetings with the parties and inviting parties to present their views in written or oral form. It also permitted any Contracting Party that had a substantial interest in the matter, but who was not directly involved in the dispute (i.e., a third party), to be heard by the panel. Over the years, panels gradually began to follow previous panel findings, creating predictability within the system.

Some of the difficulties of the old GATT dispute resolution mechanism included: (1) delays in the establishment of panels and the adoption of panel reports; (2) “rule shopping” between the general GATT procedure and the special procedure prescribed in the Tokyo Round Agreements, which appeared not to be successful;<sup>20</sup> and (3) increase of non-compliance with the GATT Council rulings, especially in the 1980s. However, the major weakness of the GATT system was that all important matters concerning the dispute settlement procedure had to be decided by a *consensus of* the Contracting Parties. Thus the parties to a dispute, and more particularly the losing party, could block

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<sup>16</sup> Petersmann, *supra* note 13, at 74.

<sup>17</sup> “[A] Chairman of the GATT Council might, arguably, feel entitled likewise to propose that persistent obstruction by the ‘losing’ party alone to the adoption of a panel report does not affect the ‘consensus.’” *Id.* at 74–75.

<sup>18</sup> All these documents can be found in 2 ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 623–42 (WTO 1995).

<sup>19</sup> GATT B.I.S.D. (26th Supp.) at 210 (1979).

<sup>20</sup> Not only “rule shopping,” but also a kind of “forum shopping” existed after the Tokyo Round: the Contracting Parties could choose to bring a case before a panel or before an Anti-Dumping Committee under the Anti-Dumping Code, or before a special panel established by the Subsidies Code, following the procedure prescribed by it.

not only the adoption of a panel report, but also the establishment of a panel.<sup>21</sup>

In the 1980s, the Contracting Parties attempted to solve the problems associated with consensus and tried to prevent blocking the establishment of panels by adopting the *Decision on Improvements to the GATT Dispute Settlement Rules and Procedure* in 1989 (hereinafter 1989 Contracting Parties' Decision). Although this decision was applicable on a provisional basis until the end of the Uruguay Round, it became the basis for the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter DSU),<sup>22</sup> which came into effect on January 1, 1995. The Contracting Parties' Decision made significant changes. For example, it reduced the time limit to reply to consultation requests to ten days, and it shortened the time in which negotiations could be entered into to thirty days. The Contracting Parties' Decision also provided the option of requesting the establishment of a panel if consultations did not solve the dispute within sixty days. However, perhaps its most important improvement was in creating a barrier to block the establishment of a panel. It provided that a decision to establish a panel must be made by the second meeting of the GATT Council after the request first appears on its agenda, unless the council decides otherwise, i.e., by consensus not to establish a panel (the so-called *negative consensus*).<sup>23</sup> However, the Contracting Parties applied all these improvements only provisionally, and one of the major difficulties was that there had been no change in the actual rules at that time.<sup>24</sup>

Another weakness of the GATT dispute settlement system was the possibility for GATT Contracting Parties to take unilateral actions. Furthermore, the confidence in the ability of the GATT dispute resolution mechanism to resolve difficult cases, especially in

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<sup>21</sup> Petersmann expresses a positive opinion on the overall adoption of the panel reports, but emphasizes that since the 1980s there has been "blockage" of an increasing number of reports. Petersmann, *supra* note 13, at 88–89. However, Palmeter and Mavroidis remark that blocking of the reports only occur in very rare cases. See DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* at 9 (2d ed., Cambridge University Press 2004).

<sup>22</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1225 (1994) [hereinafter DSU].

<sup>23</sup> Art. F (a), *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61 (1989).

<sup>24</sup> Indeed, the risk of one party blocking adoption must often have influenced the panel's rulings within the GATT. The three panelists knew that the report also had to be accepted by the "losing" party.

politically sensitive areas, decreased in the 1980s. As a result, individual Contracting Parties preferred to take unilateral and direct action against other parties to enforce their rights rather than invoke the GATT dispute settlement system.<sup>25</sup>

*Japan – Agricultural Products*<sup>26</sup> is a case that illustrates the flaws of the old procedure and the numerous opportunities for the parties, particularly the defendant, to delay the dispute settlement proceedings. Beginning in October 1981, the United States and Japan held informal consultations regarding Japanese agricultural barriers. At that time, diplomatic solutions were favored over recourse to law. Through July 1983, the United States officially submitted requests for consultations within the GATT concerning agricultural restrictions related to thirteen goods. One year later (and more than two years after the U.S. first raised the issue of GATT violations), the parties reached a compromise outside the GATT legal proceedings and signed an agreement in July 1984. The United States agreed to withdraw its complaint for two years, while Japan agreed to liberalize trade on six types of goods. E. Eichmann observes that on the one hand, the solution reached outside of the legal framework was the result of a party's political and trade influence: on the other hand, the solution legitimized an otherwise illegal GATT practice that caused harm to third parties. Consequently, the losers were those parties with less political and economic clout.<sup>27</sup>

The new WTO system tackles the problem mentioned above by legalization. Often referred to as “quasi-judicial,” the new dispute settlement system is based more on law than its predecessor. This Article analyzes many features of the new WTO system, the analysis of which will lead to the conclusion of this Article.

First, a basic feature of the “legalization” of the WTO dispute settlement system is the compulsory jurisdiction of a Dispute Settlement Body (DSB).<sup>28</sup> Member States of the WTO have accepted

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<sup>25</sup> WTO SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 14 (Cambridge University Press 2004) [hereinafter HANDBOOK].

<sup>26</sup> Report of the Panel, *Japan—Restrictions on Import of Certain Agricultural Products*, L/6253 (Nov. 18, 1987), GATT B.I.S.D. (35th Supp.) at 163 (1987).

<sup>27</sup> Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. LAW. 38, 42–48 (1990).

<sup>28</sup> Compulsory jurisdiction is rare in international law because, as a rule, disputes involve sovereign states. The strongest argument in this respect is the optional jurisdiction of the International Court of Justice. The Member States of the UN must recognize the jurisdiction of the Court in order for the court to be competent to hear the respective dispute. As a matter of fact, there are only two global treaties in international law—the WTO Agreement and the United Nations Convention of the Law of the Sea of 1982 (UNCLOS)—which provide for compulsory dispute



in advance the decisions of the DSB, according to Article 23.1 of the DSU, which provides that Members shall have recourse to, and abide by, the rules and procedure of the DSU.<sup>29</sup> An adopted Appellate Body report shall be “unconditionally accepted by the parties to the dispute” on account of Article 17.14 of the DSU.<sup>30</sup> Although this provision refers only to Appellate Body reports, it is also applicable to adopted panel reports because the legal binding force comes from the DSB decision.

Moreover, the compulsory jurisdiction of the DSB concerning the settlement of disputes heavily influences the entire panel process. The automatic character of this process allows the complainant to start the procedure, going from one stage to another, bringing the case to a binding decision by the DSB, even if the respondent is reluctant to cooperate. The will and intention of the other party in this panel process is essential because the major aim of the WTO dispute settlement mechanism is to “secure a positive solution to a dispute.”<sup>31</sup> Unfortunately, a “positive solution” (i.e., a solution that is acceptable to all parties) is not always possible. For this reason, the new mechanism must provide some safeguards for the Members’ rights under the WTO Agreements. Under the new dispute settlement system, the respondent is not permitted to impede the initiation of the panel procedure or to subsequently block the adoption of the panel reports.

Another important element of the WTO dispute settlement system is its legal primacy over all other means of dispute settlement. Unlike the GATT, the DSU firmly stipulates that when a Member seeks redress from a violation of obligations, nullification, or impairment of benefits under the covered agreements, it “shall have recourse to, and abide by, the rules and procedures of this Understanding.”<sup>32</sup> Article 23

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settlement procedures. However, unlike the WTO Agreement, the UNCLOS excludes from its compulsory procedure a number of disputes arising out of the interpretation and application of the Convention. Note that the dispute settlement within the WTO has a unique character. *See, e.g.,* United Nations Convention of the Law of the Sea, Section 3, art. 297 et seq., Montego bay, Dec. 19, 1982, In force Nov. 16, 1994, 21 I.L.M. 1245 (1982).

<sup>29</sup> DSU, *supra* note 22, at art. 17.14.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at art. 3.7.

<sup>32</sup> DSU, *supra* note 22, at art. 23.1. An exception to this rule reads: “Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.” Agreement on the Application of Sanitary and Phytosanitary Measures, Art. 11(3) (Apr. 15, 1994) (often referred to as the SPS Agreement). Reproduced in

of the DSU also precludes the use of other unilateral action for the resolution of WTO-related disputes.<sup>33</sup> Only on the basis of adopted panel or Appellate Body reports can a Member initiate an action against other Members, provided that there is an authorization from the DSB.

Primacy of the WTO dispute settlement procedure also includes primacy over bilaterally agreed settlements. A mutually acceptable solution to a dispute is “clearly to be preferred,”<sup>34</sup> but it may not comply with the WTO rules and may impair the rights of other Members. For this reason, the DSU requires that the settlement of a dispute be consistent with the WTO rules to ensure that agreements do not impair the rights of other Members.

Furthermore, the WTO system encourages parties of a dispute to reach a mutually agreed solution during each stage of the panel process, and it allows the complainant to stop the panel procedure at any given time. If this occurs, parties must notify the DSB and the

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THE LEGAL TEXTS, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 401 (Cambridge University Press & WTO 1999) at 65.

<sup>33</sup> This means that an inconsistency of a trade measure with WTO obligations can be determined only through recourse to the procedure provided in the DSU. However, disputes on trade issues arising out of other international trade agreements, which cover similar matters, may be submitted to other international *fora*. Since identical trade issues may overlap in NAFTA and the WTO Agreements, NAFTA provides that the claimant may choose which forum to use. Once a forum has been chosen, the complainant has chosen a forum, it and cannot bring the same claim to the other forum. Nonetheless, one may argue that even if the complainant submits a claim under the NAFTA, the dispute would not be the same as the alleged violation and must relate to the NAFTA and not the WTO Agreements. Consequently, the forum under the NAFTA will examine whether the measure violates the NAFTA and not the WTO Agreements. Hence, the legal basis to bring a claim will be different. In *Mexico—Soft Drinks*, Mexico challenged the panel’s jurisdiction because, in its view, the dispute was a part of a larger dispute between the United States and Mexico had already been brought under the North American Free Trade Agreement (NAFTA). The panel found that neither the subject matter nor the respective positions of the parties in the dispute were identical under the NAFTA and the WTO. The panel added that:

[E]ven conceding that there seems to be an unresolved dispute between Mexico and the United States under the NAFTA, the resolution of the present WTO case cannot be linked to the NAFTA dispute. In turn, any findings made by this Panel, as well as its conclusions and recommendations in the present case, only relate to Mexico’s rights and obligations under the WTO covered agreements, and not to its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law.

Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 7.15, WT/DS308/R (Oct. 7, 2005).

<sup>34</sup> DSU, *supra* note 22, at art. 3.7, second phrase.

relevant councils and committees.<sup>35</sup> To protect the interests of third parties, the WTO system allows WTO Members the opportunity to raise any points relating to the solution reached when the council or committee convenes.<sup>36</sup> This notification requirement avoids possible interference with other Members' rights due to a bilateral settlement reached outside the panel or the appeal procedure. Interdependence among all WTO Members in the international trading system is inevitable, and this rule strengthens its multilateral character.

Thus the WTO has maintained the settlement feature of the GATT, but is more fair to other parties in the agreement, especially since the DSB is available if one party tries to over assert its political and economic influence in negotiating a settlement.

### *B. A Unified Dispute Settlement System*

Article II:2 of the *Marrakesh Agreement Establishing the World Trade Organization*<sup>37</sup> stipulates that the DSU is an integral part of the WTO Agreement, and more importantly, is binding upon all WTO Members. All Members that are parties to the settlement procedure are bound by the DSB's decision concerning that dispute, thus providing more predictability to WTO Members and minimizing the risk of contradictory decisions. As a result, "opt outs" from WTO Multilateral Agreements and the DSU are no longer possible. This new concept improves and differs from those embodied in the agreements of the Tokyo Round of Multilateral Trade Negotiations (hereinafter Tokyo Round)<sup>38</sup> because the old "GATT à la carte" system allowed Contracting Parties to choose between the general GATT dispute settlement mechanism and the special procedures prescribed by the various agreements concluded in the Tokyo Round.<sup>39</sup>

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<sup>35</sup> *Id.* at art. 3.6.

<sup>36</sup> *Id.*

<sup>37</sup> WTO Agreement, *supra* note 3, at art. II:2

<sup>38</sup> The system embodied in the Tokyo Round agreements are also known as "GATT à la carte."

<sup>39</sup> This practice proved to be unsuccessful. *See* Petersmann, *supra* note 13, at 88–89; *see also* Plank, *supra* note 15, at 89. Several panel reports following the Subsidies Code were legally unsound and not adopted. For instance, the Subsidies Code prescribed in Article 16(2) a two-month period for a panel to deliver its written report to the Committee on Subsidies and Countervailing Measures. Noting the complex legal nature of subsidies, this time-limit seems unrealistic. *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*, GATT B.I.S.D. (26th Supp.) at 56 (1980). *Cf.* Eichmann, *supra* note 27, at 72 and text accompanying note 215. The author comes to a similar conclusion. In addition, the Subsidies Code provided a mandatory conciliation phase under Article XVII, which was unnecessary and only prolonged the process.

This does not mean that the WTO Agreements<sup>40</sup> do not prescribe special rules for dispute settlement. Rather, the difference is that Members will not be able to practice “rule shopping” by choosing the procedure that will best suit them. If there is a special procedure, which complements the general regime, the Members will follow the special procedure because *lex specialis derogate legi generali* (the more specialized norm prevails over the general). Article 1.2 of the DSU confirms this application of special procedures.<sup>41</sup> The Appellate Body has stated in *Guatemala-Cement* that “the rules and procedures of the DSU apply together with the special or additional provisions of the covered agreement,” and if there is a conflict between them, the special or additional provision prevails.<sup>42</sup>

Another advantage of the current WTO dispute settlement system is that it avoids the fragmentation embodied in the earlier GATT dispute settlement mechanism. Currently, all WTO Members are parties to each of the Multilateral Trade Agreements, including the DSU, because it is an integral part of the WTO Agreement. The same requirements are applicable to every potential new Member where the prerequisite for joining the WTO is to become a party to all the Multilateral Trade Agreements. In practical terms, under the current regime, all Members, big or small, have similar rights and obligations. According to the dispute settlement process, all WTO Members are entitled to the same procedure for a given set of circumstances.

### C. The Structural Change

#### 1. The DSB

The WTO dispute settlement system is more precise than the GATT mechanism. Under the old GATT, panels were established by the GATT Council,<sup>43</sup> whereas panels under the WTO system are established by the DSB. The WTO Agreement established the DSB,<sup>44</sup> which consists of representatives from all WTO Members who

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<sup>40</sup> The term “WTO Agreements” includes the agreements and associated legal instruments included in Annexes 1 and 2 to the WTO Agreement, which are binding on all Members.

<sup>41</sup> See DSU, *supra* note 22, at art. 1.2.

<sup>42</sup> Appellate Body Report, *Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico*, ¶ 65, WT/DS60/AB/R (Nov. 2, 1998).

<sup>43</sup> “The Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice.” *1979 Annex on the Customary Practice of the GATT*, *supra* note 4, at ¶ 1, footnote.

<sup>44</sup> WTO Agreement, *supra* note 3, at art. IV:3.

administer the rules and procedures of the DSU. The DSB deals with disputes arising out of the agreements listed in Appendix 1 to the DSU<sup>45</sup>. It also has the authority to establish panels, adopt panel and Appellate Body reports, and monitor their implementation. Thus the DSB has been considered as “the General Council acting in another guise”<sup>46</sup> because it consists of representatives of all WTO Members. More precisely, the DSB is a special body distinct from the General Council because of the following features: 1) the DSB is a specialized body, dealing exclusively with dispute settlement issues; 2) the DSB has its own working procedure distinct from the General Council; 3) the DSB has a distinct chairmanship; and 4) the representatives of the Member states may not be the same as those in the General Council.

## 2. *Decisions of the DSB*

The decisions of the DSB are adopted by *consensus*<sup>47</sup> if no special rule exists. This situation follows the established GATT tradition of decision-making by consensus,<sup>48</sup> which is represented in Article IX: 1 of the WTO Agreement.<sup>49</sup> In practice, the chairperson of the DSB asks whether there are any objections to the adoption of a decision, and if no representative indicates an objection, then the chairperson announces the adoption of the decision. However, a revolutionary feature that differs from the old GATT dispute settlement process is that the most important decisions regarding panel procedure (e.g., the establishment of panels, the adoption of panel reports, or the authorization of retaliatory action) are adopted by *reverse consensus*. Consequently, in order to block the adoption of a panel report, all WTO Members, including the complaining party, must vote against its adoption.<sup>50</sup> This idea will be discussed in further detail under the “Panel Process” Discussion found in Part III of this Article.

Nevertheless, the power of the DSB to deny the establishment of a panel or the adoption of a panel report is considered by some to be

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<sup>45</sup> DSU, *supra* note 22, at 1244, app. 1.

<sup>46</sup> PETER GALLAGHER, *GUIDE TO DISPUTE SETTLEMENT 6* (Kluwer Law International, 2002).

<sup>47</sup> DSU, *supra* note 22, at art. 2.4 n.1. Provides that a decision is taken if no Member, present and voting, formally objects to the proposed decision.

<sup>48</sup> WTO Agreement, *supra* note 3, at art. IX:1 “The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.”

<sup>49</sup> *Id.*

<sup>50</sup> DSU art. 16.4 specifies that the panel report shall be adopted by the DSB within sixty days after its circulation to the Members unless a party appeals or the DSU decides by consensus not to adopt the report. DSU, *supra* note 22.

“more illusory than real”<sup>51</sup> because it is almost impossible for DSB to do so with the new *reverse consensus*. Although the DSB plays a substantial role in the dispute settlement procedure, it is unable to block the establishment of a panel or the adoption of a report. As a result, WTO Members play a less active role in the dispute settlement process than they did within the GATT.

### 3. Clarification of provisions

Panels are authorized to clarify provisions of the WTO Agreements in accordance with customary rules of interpretation of public international law.<sup>52</sup> A decision of the DSB to adopt a panel report binds only the parties to the particular dispute. Article IX:2 of the WTO Agreement provides that only the Ministerial Conference and the General Council of the WTO have “exclusive authority” to adopt interpretations of the WTO Agreement.<sup>53</sup> Therefore, if WTO Members do not agree with the legal reasoning made by a panel, they may ask for an “authoritative interpretation” under Article IX:2 of the WTO Agreement, which is binding on all WTO Members, and on every panel when applying the provision to future cases.

#### D. The Scope of the DSU

##### 1. *Ratione materiae*: what agreements does the WTO cover?

The WTO Agreements contain considerably more legal obligations than the old GATT, such as trade-in services and trade-related aspects of intellectual property rights.<sup>54</sup> Basically, the scope of the DSU is much broader than its GATT counterparts of Articles XXII and XIII.<sup>55</sup> The DSU applies to disputes arising out of the provisions of the “covered agreements” listed in Appendix 1 to the DSU<sup>56</sup> and includes the Multilateral Agreements on the Trade in Goods,<sup>57</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> DSU, *supra* note 22, at art. 3.2.

<sup>53</sup> See WTO Agreement, *supra* note 3, at art. IX:2.

<sup>54</sup> The WTO Agreements also contain a number of new obligations related to trade in goods such as obligations concerning trade-related investment measures (TRIMS), sanitary and phytosanitary measures (SPS), trade in agriculture and textile.

<sup>55</sup> GATT, *supra* note 1, at arts. XXII, XIII.

<sup>56</sup> See DSU, *supra* note 22, app. 1.

<sup>57</sup> These are: General Agreement on Tariffs and Trade 1994; Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade;

“General Agreement on Trade in Services” (GATS),<sup>58</sup> and “Agreement on Trade-Related Aspects of Intellectual Property Rights” (TRIPS).<sup>59</sup> Additionally, the DSU applies to disputes arising out of the WTO Agreement<sup>60</sup> and the DSU itself.<sup>61</sup>

It is worth noting that the DSU may also apply to disputes related to the Plurilateral Trade Agreements (PTA) in Annex 4 of the WTO Agreement,<sup>62</sup> if the parties to each of these agreements adopt a decision setting out the terms for the application of the DSU to the individual agreement.<sup>63</sup> The parties are also required to notify the DSB of the decision taken.<sup>64</sup> Because of this specific feature of the application of the DSU to the PTA, the term “covered agreements” may not always include the PTA. Where the DSB administers dispute settlement issues under a PTA, only Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

In sum, the inclusion of all of the aforementioned agreements in the DSU illustrates the WTO dispute settlement system is significantly broader in scope than the old GATT Articles XXII and XIII.

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Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards.

<sup>58</sup> General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 1168 (1994) [hereinafter GATS].

<sup>59</sup> Agreement on Trade-related Aspects of Intellectual Property Rights, Annex 1C to the WTO Agreement, 33 I.L.M. 1997 (1994) [hereinafter TRIPS].

<sup>60</sup> See WTO Agreement, *supra* note 3, at arts. I–XIV.

<sup>61</sup> DSU, *supra* note 22, at 1226, art. 1.1.

<sup>62</sup> Those are the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. In contrast with the Multilateral Trade Agreements, which are binding on all WTO Members, the Plurilateral Trade Agreements are binding only on those Members that have accepted them and do not create either obligations or rights for the Members that have not accepted them. The International Dairy Agreement and the International Bovine Meat Agreement, which were also included in Annex 4, were terminated at the end of 1997.

<sup>63</sup> The Committee on Government Procurement has taken such a decision. See Notification under Appendix 1 of the DSU, *Communication from the Chairman of the Committee on Government Procurement*, WT/DSB/7 (July 12, 1996).

<sup>64</sup> See DSU, *supra* note 22, at 1244, app. 1.

## 2. *Ratione personae*: who is subject to the WTO?

The WTO Panel Procedure remains as an intergovernmental dispute settlement mechanism whereby only WTO Members may be parties or third parties in a panel process to a trade dispute arising out of a covered agreement. In addition to states, separate custom territories that possess full autonomy of their external commercial relations may also be parties to the WTO Agreement and may become WTO Members.<sup>65</sup> Consequently, Member states and territories can bring forth panel proceedings or be a respondent or third party in a trade dispute.<sup>66</sup> For example, although the European Communities did not constitute a state, yet it participated in a number of WTO proceedings.<sup>67</sup>

The DSU applies not only to measures taken by Member governments, but actions taken by regional and local governments as well. In a footnote to Article 4.2 of the Understanding, it states, “where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.”<sup>67</sup> This Article permits the DSU to cover actions by regional and local governments. Similarly, the “Understanding on the Interpretation of Article XXIV of the GATT 1994”<sup>68</sup> stipulates that each Member must take reasonable measures in ensuring that regional and local governments, as well as authorities within its territories, observe the provisions of the GATT 1994.

Another multilateral agreement that regulates regional and local government action is GATS, which provides in Article I:3 that:

For the purpose of this Agreement:

(a) “measures by Members” means measures taken by:

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<sup>65</sup> WTO Agreement, *supra* note 3, at art. XII:1.

<sup>66</sup> Also note that a metropolitan customs territory of a GATT Contracting Party, though not a party to the GATT, was treated as though it were a Contracting Party for the purposes of the territorial application of the agreement (GATT Art. XXIV). For this reason, GATT Contracting Parties could initiate panel proceedings on behalf of non-member entities—for instance, the Netherlands brought a claim against the US on behalf of the Netherlands Antilles in 1994. Because the old GATT is a part of the GATT 1994, this situation still prevails under the new regime. However, GATT 1994 is legally distinct from the old GATT 1947.

<sup>67</sup> DSU, *supra* note 22, at art. 4.2 n.3.

<sup>68</sup> *Understanding of the Interpretation of Article XXIV of the GATT 1994*, ¶¶ 13 and 14, *reprinted in* 2 ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 793–94 (WTO 1995).



- (i) central, regional or local governments and authorities; and
- (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.

The GATS places Members under the additional obligation of not only ensuring that the central, regional and local authorities are upholding the GATT 1994, but that the non-governmental bodies exercising powers on behalf of the noted authorities are in compliance as well. Therefore, the WTO system regulates this issue in more detail and encompasses a broader scope *ratione personae* than its predecessor.<sup>69</sup>

### III. THE PANEL PROCESS

#### A. *Establishment of Panels*

It is easier to establish panels under the WTO than it is under the old GATT. Through the new rule of *reverse consensus*, the WTO establishes panels without the delays encountered under the GATT. In order to reject the establishment of a panel, all WTO Members, including the complaining party, must vote against establishment. The respondent may not delay the establishment beyond the second meeting of the DSB after the request appears on its agenda by virtue of Article 6.1 of the DSU.<sup>70</sup> If a complaining party so requests, a meeting of the DSB shall convene specifically for this purpose within fifteen days of the request as long as notice is given ten days prior to the meeting.<sup>71</sup>

Parties address panel requests to the Chairman of the DSB. The request must indicate whether consultations were held, must specify

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<sup>69</sup> TRIPS does not contain any provisions in this respect, since intellectual property rights are normally within the competences of the central, rather than the regional or local authorities.

<sup>70</sup> DSU, *supra* note 22, at art. 6.1.

<sup>71</sup> *Id.* at art. 6.1, footnote.

the measures at issue, and must provide a brief summary of the legal basis of the complaint. The request must contain the terms of reference, which define the scope of the dispute and the panel's jurisdiction. Proper elaboration of the terms of reference is vital not only to start the panel proceedings, but also for its outcome.

Under the old GATT, a panel could be established only if consensus among all Contracting Parties existed; therefore, the respondent could easily block the establishment of a panel in the GATT Council. However, in practice this delay continued for only a few GATT Council meetings.<sup>72</sup> Until 1987, the longest debate to establish a panel took four council meetings,<sup>73</sup> which may be explained by the GATT Contracting Parties' desire to respect obligations set forth under the agreement. GATT Members understood that if one violates a rule, another Member would equally do so to the detriment of the former. This is a logical result in both the GATT international trade regime and now in the WTO, where reciprocity of the obligations plays a vital role. Thus under the GATT, the political pressure stemming from violations was sometimes enormous, and deterred future violations even more successfully than a legal obligation. As late as 1989, the *1989 Contracting Parties' Decision*<sup>74</sup> recognized a complainant's right to a panel by introducing *reverse consensus*. This decision was applied on a provisional basis, and the DSU fortunately reaffirmed this right.

### B. Composition of Panels

The WTO Secretariat maintains a list from which panel Members are selected. However, it is not necessary to be on the list to be a potential panel member in a particular dispute. Article 8.3 of the DSU forbids a potential panel member from serving on a panel if he or she is a citizen of a Member-state party to the dispute, or a citizen of a third party, unless the parties agree otherwise.<sup>75</sup> This rule originated from the old GATT dispute settlement process. Because most disputes involve economic powers such as the United States, the European Community, and Japan, P. Pescatore argues that this practice within

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<sup>72</sup> Petersmann, *supra* note 13.

<sup>73</sup> Plank, *supra* note 15, at 64.

<sup>74</sup> The decision was agreed at a Ministerial Meeting in Montreal, Canada as early as December 9, 1988. However, it was formally adopted on April 12, 1989 because the ministers awaited the finalization of some other agreements (including textiles and agriculture). Its formal name is *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of 12 April 1989, GATT B.I.S.D. (36th Supp.) at 61 (1989).

<sup>75</sup> See DSU, *supra* note 22, at art. 8.3.

the GATT acted as a “de facto ban” on publicly known trade specialists from these states.<sup>76</sup> The same argument could be said for the WTO dispute settlement system.

Third-party participation in the panel proceedings has increased under the WTO.<sup>77</sup> However, some disputes involving numerous third parties significantly reduce the number of trade experts who may potentially serve as panel members because of the application of Article 8.3. The DSB gives Members ten days to give notice of their interest in the matter and of their intentions of being third parties. After the deadline expires, the disputing parties and the Secretariat may proceed with the negotiations on the panel composition.

The DSU contains detailed rules on the composition of panels and clarifies the role of the Director-General if the parties fail to agree on the panel's composition. Unlike the WTO, which allows well-qualified non-government individuals to serve on panels, only government officials served in the panels in the first years of the GATT. Within the GATT, panelist selection carried great significance and required approval by both parties. This created concerns that a panelist may favor a particular party. Paragraph 11 of the 1979 *Understanding* specifies that “the members of a panel would preferably be governmental.”<sup>78</sup> The 1979 *Annex on the Customary Practice of the GATT* states that as of 1979, there are only a few cases in which parties agreed to designate non-government experts, considering “the nature and complexity of the matter.”<sup>79</sup> Notably, government officials from GATT delegations in Geneva may find it difficult to ignore their own governments’ economic and political interests,<sup>80</sup> and this may impact the outcome of the panel process. When career diplomats serve as panelists, they may over-emphasize conciliation instead of reaching legal interpretations based on legal norms.<sup>81</sup> With the growing complexity of the rules contained within the GATT framework, the participation of independent trade experts on the panels became

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<sup>76</sup> Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects*, 10 J. INT'L ARB. 27, 30 (1993).

<sup>77</sup> For example, in *EC—Bananas III*, as many as twenty-three parties participated in the panel proceedings. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, DSR 1997: II 589 (Sept. 9, 1997).

<sup>78</sup> *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 212, ¶11 (1980).

<sup>79</sup> *Annex on Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement* GATT B.I.S.D. (26th Supp.) at 217, ¶ 6(iii) (1980).

<sup>80</sup> There have even been instances in the old GATT system in which governments tried to exercise pressure on panelists. In one case, a panelist resigned. See Plank, *supra* note 15, at 81–82.

<sup>81</sup> See Eichmann, *supra* note 27, at 52.

inevitable. The situation changed with the introduction of a roster of non-government panelists in 1984. As in the GATT, WTO panelists serve in their individual capacities and are not permitted to receive instructions or be influenced regarding panel matters.

The time-limits set by the DSU do not allow the parties to delay the formation of a panel, which may comprise of three or five Members. Parties may agree on the composition of a five-member panel within ten days from the establishment of the panel. Panelists “are selected by the parties to examine the particular dispute.”<sup>82</sup> Indeed, in most cases, the parties select the panelists, but this is not always the case. The DSU requires the WTO Secretariat to propose panelists. Parties cannot oppose such proposals except for “compelling reasons.”<sup>83</sup> Thus panel composition remains a peculiarity, distinguishing the GATT and WTO dispute settlement mechanism from arbitration. Judge P. Pescatore emphasizes that the Director-General of GATT, not the parties, proposed the nominations. In his view, this appointment procedure gave panelists “the consciousness of being vested with a mandate emanating from the whole of the GATT community.”<sup>84</sup> Within WTO, this function has remained almost unchanged. While parties may suggest panelists, the WTO Secretariat finalizes the panel’s composition. If the parties cannot agree on who will serve in the panel within twenty days of the establishment of the panel, each party can request the Director-General to appoint its Members. The request shall be made before the Chairman of the DSB who has to notify the Director-General. The latter selects the panelists in consultation with the Chairman of the DSB, the Chairman of the relevant council or committee, and the parties to the dispute. The Chairman of the DSB shall inform the parties about the panel composition no later than ten days after he or she receives the request.

The requirement embodied in the *Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services*<sup>85</sup> improves the quality of panel reports. It takes into account the specific nature of the obligations and commitments in the Agreement regarding dispute settlement and establishes a special roster of panelists. The panelists from the roster may be governmental

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<sup>82</sup> GALLAGHER, *supra* note 46, at 27.

<sup>83</sup> Though in practice Members seem to interpret this provision broadly and oppose nominations very often.

<sup>84</sup> Pescatore, *supra* note 76, at 30–31.

<sup>85</sup> Ministerial Decision adopted by the Trade Negotiations Committee on December 15, 1993. The text of the decision can be found in: THE LEGAL TEXTS. THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 401 (Cambridge University Press & WTO 1999).

or non-governmental individuals with experience in issues related to GATT and/or trade in services. The *Decision* requires panel members in sectoral matters to possess the necessary expertise concerning the sector involved.

In accordance with Article 3.1 of the DSU,<sup>86</sup> the WTO continues the GATT practice of providing preferential treatment to developing countries. Upon request, the DSU will require one panelist from a developing country to be included in the formation of a panel in disputes involving a developing country and a developed country. This provision ensures the independence of panel members and further guarantees that the panel will not issue a power-oriented report.

### C. Consultations

The consultations procedure acts as a mandatory first step to the dispute settlement process and is further developed and codified by the DSU. In order to start the panel procedure, a trade dispute must exist. A dispute is defined as a difference of views between WTO Members concerning their rights and obligations under the “covered agreements” where one member alleges that an action, regulation, or policy (a “measure”) of another member is damaging its interests under the WTO Agreements. However, the existence of a difference by itself is not sufficient to start the procedure. A WTO dispute arises only if the complaining party notifies the DSB and the relevant councils and committees under Article 4.3 of the DSU. The DSU requires written requests for consultations stating the reasons for the request, the measures at issue, and the legal basis for the complaint.<sup>87</sup> The consultation aims at helping disputants reach a mutually acceptable solution; however, consultations must be conducted in good faith before resorting to any further action under the DSU, and Members should attempt to obtain satisfactory adjustment of the matter.<sup>88</sup> Within the panel process, the consultation gives the disputants an opportunity to exchange relevant information and to express their opinions.

In contrast, the wording of the old GATT Article XXIII:1<sup>89</sup> implies that consultations were not a prerequisite for the establishment of a panel. However, the *1979 Understanding*, codifying the GATT customary practice, clarifies this misunderstanding by requiring consultations before resorting to the establishment of a panel. Under

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<sup>86</sup> DSU, *supra* note 22, at art. 3.1.

<sup>87</sup> *Id* at art. 6.2, ¶¶ 1 and 2.

<sup>88</sup> *Id.* art. 4.5.

<sup>89</sup> GATT, *supra* note 1, at art. XXIII:1.

the GATT 1994, consultations may be initiated either pursuant to Article XXII:1 or XXIII:1.<sup>90</sup> If consultations are requested under Article XXIII:1 of GATT 1994, the complainant excludes the possibility of other Members participating in the consultations. However, if the request is made pursuant to Article XXII:1 of GATT 1994, other Members with “substantial trade interest” in the matter may join the consultations if the respondent accepts them. Other multilateral agreements, such as GATS Article XXII:2 and Article 4, paragraphs 1 to 4, of the “Subsidies and Countervailing Agreement,”<sup>91</sup> etc., also provide for consultations.

Compared to the consultations held within the old GATT, the new mechanism is more formalized. One improvement of the DSU is the time limit prescribed for consultation, in which a Member must respond to a request for consultations within ten days, and is required to enter into consultations within thirty days. If the consultations do not settle a dispute within sixty days from the receipt of the request, the complaining party may request the establishment of a panel. Furthermore, if the consulting parties jointly decide that the consultations cannot settle the dispute, then the complaining party is not required to wait for the sixty-day period to run. Likewise, if the Member concerned does not respond within ten days of the request, or does not enter into negotiations within thirty days of the receipt of the request, the complaining party may proceed directly to request the establishment of a panel.

The DSU also provides shorter time limits for consultations in cases of urgency, such as disputes arising over perishable goods. The disputing parties have a duty to “accelerate the proceedings to the greatest extent possible”<sup>92</sup> not only during the consultations, but also during the panel process. Members must enter into negotiations within a period of ten days after the receipt of the request for consultation and proceed to the establishment of a panel if consultations do not settle the dispute within twenty days of the request.

The consultations are made without prejudice to the right of any Member in relation to the panel process; therefore, a complaint cannot use confidential information it received in the panel procedure as evidence against the respondent; however, the provision of Article

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<sup>90</sup> GATT 1994, Annex 1 A to the WTO, April 15, 1994, 33 ILM 1154 (1994).

<sup>91</sup> *E.g.*, the Subsidies and Countervailing Agreement provides additional requirements for consultations to those stated in the DSU.

<sup>92</sup> DSU, *supra* note 22, at art. 4.9.

4.6<sup>93</sup> should not be interpreted literally. If the disputants have kept a record of the topics addressed, they may use the record in the panel process as necessary evidence to assist the panel in concluding precisely what the consultations have covered.

*D. Terms of Reference and Panels' Jurisdiction*

Although the old GATT did not provide any details on terms of reference, the 1979 *Understanding* improves and provides that the terms of reference are “to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII.”<sup>94</sup> The DSU codifies and complements the GATT practice on this matter. Similarly, the standard terms of reference within the WTO provides that a panel shall examine the matter in light of the relevant provisions of the covered agreements and shall make such findings as *will assist* the DSB.<sup>95</sup> The verb *assist* fits better under the old GATT because within the WTO, the *reverse consensus* rule for adoption of reports, panels, and the Appellate Body do more than merely *assist* the DSB.

The terms of reference define the precise claim and determine what matters the panel is authorized to issue its report, e.g., on what subject and against which party. The panel is required to mention the measure complained of (governmental measure, regulation, law, or policy), and the legal basis of the claim (the provisions of the covered agreements concerned).

The terms of reference also contain a notifying function, providing the respondent and the third parties in the panel process sufficient information of the claim in order to respond. No factual finding needs to be stated in the terms of reference because the claimant has the burden to prove or the respondent has the burden to rebut the facts of the case during the panel process.

As a procedural matter, Article 6.2 of the DSU<sup>96</sup> requires the complainant to state in the terms of reference whether consultations were held. The claimant prepares the terms of reference based on the matters discussed. Without prior consultations, a panel request may be dismissed because consultations are a first and mandatory step before

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<sup>93</sup> DSU, *supra* note 22, at art. 4.6. Article 4.6 provides that, “[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.”

<sup>94</sup> 1979 *Annex on the Customary Practice of the GATT*, *supra* note 4, at ¶ 6(ii).

<sup>95</sup> WTO Agreement, *supra* note 3, Annex 2.

<sup>96</sup> DSU, *supra* note 22, at art. 6.2.

the panel process can even commence. Nevertheless, panels have no legal duty to make *ex officio*<sup>97</sup> an enquiry on whether consultations have actually taken place because a case may be heard in the absence of consultations, so long as the respondent does not object. It is possible that consultations have not taken place because the Member failed to provide an answer within the ten day requirement or did not enter into consultations within the thirty day requirement. In such cases, the claimant may proceed directly to the establishment of a panel, but must explain the reason why consultations had not taken place. Direct resort to a panel will also be authorized if the other Member refuses consultations or if the disputants jointly decide that consultations will not resolve the matter.

Article 6.2 of the DSU requires that a “brief summary of the legal basis of the complaint” and an identification of the specific measures at issue be provided in the terms of reference.<sup>98</sup> This means that the relevant legal provisions should be stated in a specific and clear manner, allowing the respondent to organize a proper defense. For instance, since some of the provisions of GATT 1994 contain large compilations, a mere allegation of a violation of Article III will not fulfill the requirement for specificity under DSU Article 6.2.<sup>99</sup> Specificity functions as a vital part of due process and the establishment of the defense by the respondent. Complainants must cite the relevant provisions of the covered agreements and refrain from positing arguments in the terms of reference to support their position. They must also understand the difference between a “claim” and an “argument.” A claim embodies an allegation that the respondent violated a specific provision of a covered agreement. In contrast, complainants put forth arguments to demonstrate the respondent’s violation of a specific provision. The claim is contained in the terms of reference, while the arguments support the claim and may be advanced until the end of the panel hearings.<sup>100</sup>

The DSU does not demand exact identity between the specific measures identified in the request for consultations and those

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<sup>97</sup> The term *ex officio* designates powers exercised by officials by virtue or because of the office they hold.

<sup>98</sup> DSU, *supra* note 22, at art. 6.2.

<sup>99</sup> *Id.*

<sup>100</sup> Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 139, WT/DS98/AB/R (Dec. 14, 1999) (*adopted* Jan. 12, 2000).



mentioned in the request for a panel.<sup>101</sup> Obviously, a measure unrelated to the consultations will not fulfill the mandatory consultation required before resorting to a panel; however, parties may subsequently readjust their scope of reference if new facts are discovered during consultations. These additional measures should correlate with the main issue that is subject to consultations. A request for the establishment of a panel on a matter, which is different from that discussed in the consultations, will likely be inadmissible, but will be decided on a case-by-case basis.

Though ambiguous, Article 7.2 of the DSU<sup>102</sup> requires panels to address the relevant provisions in the covered agreements cited by the parties to the dispute. Panels will consider the provisions mentioned in the terms of reference since the terms submitted by the complainant limit the panel's jurisdiction. For this reason, a panel may not go beyond the subject of the terms of reference, and consider whether measures or actions complained of are inconsistent with other provisions of the covered agreements that are not cited. Even though some provisions are not mentioned in the terms of reference or raised during the proceedings, they can be considered by the panel, e.g., concerning special treatment of developing countries.<sup>103</sup> Similarly, when a complaint alleges a violation of a number of WTO provisions, panels are not obliged to address all the cited provisions. A panel may sufficiently address only those claims necessary to resolve the dispute, resulting in the exercise of judicial economy.

A measure not mentioned in the terms of reference but that appears in a written submission is admissible if it is closely related to the measure involved, and if the respondent is given notice according to due process requirements.<sup>104</sup> However, the panel will not consider

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<sup>101</sup> This was re-affirmed by Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, ¶ 132, WT/DS46/AB/R (Aug. 2, 1999) (adopted Aug. 20, 1999).

<sup>102</sup> DSU, *supra* note 22, at art. 7.2.

<sup>103</sup> DSU, *supra* note 22, at art. 12.11. The DSU requires that panels “shall explicitly indicate the form in which account has been taken of the relevant provisions on differential and more favourable treatment for developing country Members.”

<sup>104</sup> Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.8, WT/DS44/AB/R (Jan. 30, 1998) (adopted April 22, 1998). The panel noted:

[t]o fall within the terms of Article 6.2, it seems clear that a “measure” not explicitly described in a panel request must have a clear relationship to a “measure” that is specifically described therein, so that it can be said to be “included” in the specified “measure.” In our view, the requirements of Article 6.2 would be met in the case of a “measure” that is subsidiary or so

an unrelated measure in a written submission. With regard to non-violation complaints, if the request for the establishment of a panel fails to explicitly mention Article XXIII:1(b), the non-violation complaint will be excluded from the terms of reference. The WTO's advantage over the old GATT system lies in the fact that the complaint requires no consent from the respondent. Under the old GATT, the terms of reference had to be agreed upon by the parties, which provided a good incentive for the respondent to delay the proceedings.

For example, in *Japan – Agricultural Products*, Japan refused to accept the standard terms of reference due to concerns that “the panel would follow strictly legal reasoning, without including the relevant political considerations.”<sup>105</sup> Therefore, the value of the DSU rests in its recognition of the right of the complainant to use standard terms of reference regardless of the respondent's consent under Article 6.3.

The essential significance of the terms of reference is well illustrated by an example from *EC–Tariff Preferences*.<sup>106</sup> This marks the first case submitted to the WTO dispute settlement system concerning tariff preferences for developing countries. The *Contracting Parties' Decision on Differential and More Favourable Treatment* was adopted in 1979.<sup>107</sup> Before this case, the precise relationship between GATT Article I:1 and the Enabling Clause, embodied in the *Decision on More Favourable Treatment*, was unclear. Normally, when a provision makes an exception to the substantive provisions of covered agreements, the burden of proof rests on the party who invokes the application of such an exception. Articles XX and XXI of GATT 1994 contain examples of these types of exceptions. Thus in preparing its claim, the complainant likely views the Enabling Clause as an exception, and consequently fails to mention it in the terms of reference.

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closely related to a “measure” specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.

<sup>105</sup> Report of the Panel, *Japan—Restrictions on Imports of Certain Agricultural Products*, L/6253, (Nov. 18, 1987), GATT B.I.S.D. (35th Supp.) at 163 (1989).

<sup>106</sup> Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries (EC— Tariff Preferences)*, WT/DS246/R (Oct. 28, 2003).

<sup>107</sup> GATT Secretariat, *Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979) [hereinafter *Decision on More Favourable Treatment*].

In this case, the Appellate Body reversed the finding of the panel as to who bore the burden of proof regarding the Enabling Clause. The Appellate Body observed that:

[A] complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency of the GATT 1994, for to do only that would not convey the legal basis of the complaint sufficient to present the problem clearly. In other words, it is insufficient in the WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause.<sup>108</sup>

Thus if the complainant does not identify the Enabling Clause in its claim, the panel lacks authority to find a violation of that clause not mentioned in the terms of reference. Therefore, parties should anticipate all possible scenarios and write them into the terms of reference.

One of the panelists in a dissenting opinion,<sup>109</sup> however, stated that the claim had not been brought under the proper provisions and had to be dismissed. In his/her view, the Enabling Clause was not an affirmative defense to GATT Article I:1; rather, the complainant bore the burden of proving a violation of the Enabling Clause.<sup>110</sup> Therefore, the complaint had to be brought not under GATT Article I:1, but under the Enabling Clause. In practical terms, India would have lost its case if this view had been shared by a majority of the panel.

The jurisdiction of WTO panels is a significant feature in the WTO dispute settlement mechanism because the panel's jurisdiction determines and limits the scope of the Appellate Body. The DSU stipulates that the jurisdiction of the Appellate Body "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."<sup>111</sup> The Appellate Body has stated on numerous occasions that a panel's consideration of the evidence,

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<sup>108</sup> Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 110, WT/DS246/AB/R (Apr. 4, 2004) (adopted April 20, 2004).

<sup>109</sup> See Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries (EC—Tariff Preferences)*, WT/DS246/R (Dec. 1, 2003) (dissenting opinion by one member of the panel, at 152–157).

<sup>110</sup> *Id.* at 156–59.

<sup>111</sup> DSU, *supra* note 22, at art. 17.6.

including its decision on whether a prima facie case has been established, falls outside the scope of the appeal proceedings. The Appellate Body only reviews issues of law. Appellate proceedings do not normally examine factual issues; therefore, an issue not covered by the panel analysis will normally fall outside the scope of appellate review.

In some instances, the Appellate Body has refused to “complete the legal analysis” when the facts had been gathered in the panel process. The panel in *EC – Asbestos*<sup>112</sup> found that the “prohibitive part” of the French Decree did not fall within the scope of the “Agreement on Technical Barriers to Trade” (TBT).<sup>113</sup> However, its articles providing exceptions to the asbestos ban did fall within the TBT. The Appellate Body reversed the panel’s finding that the TBT Agreement did not apply to the part of the Decree regarding the asbestos ban and concluded that the measure, viewed as an integrated whole, constituted a technical regulation under the TBT Agreement. Hence, both the ban itself and the exceptions provided in the French Decree fell within the scope of the TBT. Normally, one would think that the Appellate Body could have completed the legal analysis and examined the consistency of the measure with the TBT agreement; however, the Appellate Body refused to complete the legal analysis. Finally, the Appellate Body came to the conclusion that, “[w]ith this particular collection of circumstances in mind, we consider that we do not have an adequate basis properly to examine Canada’s claims under Article 2.1, 2.2, 2.4 and 2.8 of the TBT Agreement and, accordingly, we refrain from so doing.”<sup>114</sup> It seems that, among other reasons, the major concern of the Appellate Body was the “novel character” of the TBT Agreement. It is evident that the disputing parties advanced the necessary facts in the panel and appeal proceedings, and that the claimant (Canada) made its claims under the TBT Agreement. Therefore, the Appellate Body’s conclusion contradicts the well-established principle of law *Jura novit curia* (it is up to the court to know the law).<sup>115</sup> Furthermore, whether the panel did not make any

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<sup>112</sup> Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products (EC-Asbestos)*, WT/DS135/AB/R, DSR 2001:VIII, 3305 [hereinafter *Measures Affecting Asbestos*].

<sup>113</sup> Agreement to Technical Barriers to Trade (TBT), Annex 1 to the WTO Agreement, *supra* note 3 [hereinafter TBT Agreement].

<sup>114</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/R (Sept. 18, 2000) (adopted April 5, 2001).

<sup>115</sup> For an in-depth analysis of the *EC-Asbestos* case, the application of the TBT Agreement, and a critical approach to the Appellate Body’s findings, see Joost

findings on the issue or not is contestable because it held that the “prohibitive part” of the decree did not fall within the scope of the TBT Agreement, while the exceptions did.

This example illustrates the importance of the scope of panel jurisdiction and the significance of parties making precise requests and arguments to the panel during panel proceedings. If a party has not given all pertinent facts during the panel proceedings, they will be unable to do so during the appeal procedure. Even if a party has presented certain facts and arguments, the Appellate Body may find itself unable to complete the legal analysis.

### *E. Types of Complaints*

Analysis of the varying types of complaints illustrates that the WTO dispute settlement system is broader than other international dispute settlement systems, which adjudicate only violations of agreements. The intent to maintain the negotiated balance of concessions and benefits between WTO Members demonstrates the peculiarity of the system.<sup>116</sup>

Although the conditions for the submission of a legal complaint are provided in the DSU, the legal basis for a complaint is the alleged violation of individually covered agreements. The WTO Agreement clearly illustrates that the GATT 1994 is “legally distinct” from the GATT 1947,<sup>117</sup> but the grounds to bring a complaint under the GATT 1994 are technically the same as the requirements indicated in Article XXIII of the GATT 1947. This is because the reference to “contracting party” in the provisions of GATT 1994 bears the same meaning as “member” in Article XXIII of the GATT 1947. Article XXIII, which has been the basis of the development of the old GATT dispute settlement mechanism for more than 47 years, remains unchanged in the GATT 1994. It provides for three kinds of complaints: (1) violation complaints, (2) non-violation complaints, and (3) situation complaints.

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Pauwelyn, *Cross-agreement Complaints before the Appellate Body: A Case Study of the EC-Asbestos Dispute*, 1 *WORLD TRADE REV.* 63 (2002).

<sup>116</sup> HANDBOOK, *supra* note 25, at 31.

<sup>117</sup> The GATT 1994 consists of: GATT 1947; a number of legal instruments that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement such as protocols and certifications relating to tariff concessions, protocols of accession, decisions on waivers granted under Article XXV of GATT 1947; and decisions of the contracting parties to GATT 1947. It also includes six interpretation understandings and the Marrakesh Protocol to GATT 1994.

### 1. Violation complaints

“Violation complaints” require failure on the part of another Member to carry out its obligations, which results in nullification or impairment of a benefit or impediment of the attainment of any objective.<sup>118</sup> The complainant must contend that another Member has failed to carry out its obligations under GATT 1994. For example, that a violation of a rule has occurred, which causes an impairment (or nullification) of the benefits of a covered agreement.<sup>119</sup> Once a Member establishes a breach of a WTO obligation, the breach triggers the presumption that the violation causes nullification or impairment of benefits. Consequently, the burden of proof shifts to the respondent, who must rebut the charge. This presumption relates only to the result which a measure causes. For example, if a measure is in violation of a WTO rule, it is presumed that it results in nullification or impairment of benefits or impedes the objective of a covered agreement. Thus a complainant must demonstrate a prima facie violation of a provision of GATT 1994.

Only then does the presumption that such violation causes nullification or impairment of benefits arise.<sup>120</sup> The wording of the provision codified in paragraph 5 of the *1979 Annex on the Customary Practice to GATT* and embodied in Article 3.8 of the DSU implies that the presumption is rebuttable,<sup>121</sup> however, this has never been done, neither within the old GATT nor the WTO.

### 2. Non-violation complaints

“Non-violation complaints” require the existence of a measure applied by another WTO Member, even if it does not conflict with GATT 1994, provided that it results in “nullification or impairment of a benefit.”<sup>122</sup> The complexities of international trade relations explain such basis for a complaint. The provision aims at securing the balance of concessions between WTO Members, since a trade commitment

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<sup>118</sup> See Art. XXIII:1, GATT 1994, Annex 1 A to the WTO, 33 ILM 1154 (1994).

<sup>119</sup> Or respectively a violation which causes an impediment of the attainment of any objective of the agreement. However, this second cause of action has been used significantly less often in the old GATT and now in the WTO.

<sup>120</sup> This presumption was codified in the *1979 Annex on the Customary Practice to GATT*. See *1979 Annex on the Customary Practice to GATT*, *supra* note 4, at ¶ 5. The DSU embodies the presumption in Article 3.8. See DSU, *supra* note 22, at art. 3.8.

<sup>121</sup> DSU, *supra* note 22, at art. 3.8.

<sup>122</sup> GATT 1994, at art. XXIII:1(b).

may be frustrated, not only by a measure which is in breach of a WTO rule, but also by a measure consistent with the covered agreements.

State responsibility for injurious acts, which are not prohibited by international law, is subject to debate.<sup>123</sup> In WTO law, the situation is somewhat different. Article 26.1 of the DSU extends and develops the relevant GATT provision. Non-violation complaints were admitted in the old GATT and rightly remain admissible in the new dispute settlement mechanism. The WTO, on the other hand, has a more complete set of rules and may fill gaps when a measure otherwise not prohibited by the agreements impairs trade benefits. The burden to prove “non-violation” complaints is heavier. Three conditions must be proved: (1) the application of a measure by a WTO Member, (2) the existence of a benefit under a WTO agreement,<sup>124</sup> and (3) the nullification or impairment of a benefit due to the application of the measure.<sup>125</sup>

Additionally, the complainant has to present a “detailed justification” to support the claim and must explicitly state in the terms of reference that the claim relates to Article XXIII: 1(b). The panel can only recommend an adjustment and not a withdrawal of the measure. It is noteworthy that the Panel in *Japan – Photographic Film and Paper* inferred that a “non-violation complaint” must refer to some actual harm to the complainant since, in any event, the latter must demonstrate that the measure does *in fact* result in nullification or impairment of expected benefits.<sup>126</sup> In contrast, a “violation complaint” does not require proof from the complainant of actual harm because of the presumption mentioned above. There were only twenty-four non-violation cases from 1947 to 1990 within the old GATT; only

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<sup>123</sup> The ILC's Draft Articles on State Responsibility provide that every internationally wrongful act of a State entails the international responsibility of that State. The articles further provide that if the conduct of a state constitutes a breach of an international obligation, there is an internationally wrongful act. See *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No.10), U.N. Doc. A/56/10 (2001).

<sup>124</sup> GATT jurisprudence has linked such a benefit with reasonable expectations for improved market opportunities due to the concession granted. However, this condition poses a number of legal problems. It is an open question whether such reasonable expectations may be attributable to a third country which did not actually negotiate the tariff concession with the complainant. Likewise, it is unclear how long such expectations would last. See JOHN H. JACKSON ET AL., *THE LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 364 (3d ed. 1995).

<sup>125</sup> This is due to the fact that the presumption of “nullification and impairment of benefits” applicable to “violation complaints” does not apply to “non-violation” and “situation complaints.”

<sup>126</sup> Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.60, WT/DS44/AB/R (Mar. 31, 1998) (adopted Apr. 22, 1998).

seven resulted in affirmative panel rulings, and only three were adopted by the GATT Council.

### 3. *Situation complaints*

“Situation complaints,” listed in Article XXIII:1(c) of GATT 1994, regard any situation that results in “nullification or impairment of a benefit” (or impediment for the attainment of the objective of the agreement).<sup>127</sup> They cover “any other situation” act, or omission, different from a measure, which does not infringe on a provision of GATT 1994 or other covered agreements. Situation complaints have been designed to eliminate possible non-tariff barriers to trade. No GATT panel has ever based its legal finding on such a claim under the GATT. Trade experts have criticized the availability of “situation complaints” in GATT 1994. Taking into account the vague language of GATT Article XXIII:1(c) and the “lack of predictable and justifiable standards for interpreting,” E.-U. Petersmann considers this imprecise type of complaint useless and supports its formal abolition.<sup>128</sup> P. Pescatore suggests that the “legal fantasy” called “situation complaints” should be erased.<sup>129</sup> However, the WTO system did not abolish this type of complaint, but provided some additional requirements. Except for a detailed justification provided by the complainant, if a case also involves matters other than those related to a situation complaint, Article 26.2(b) of the DSU requires that the panel issue a report addressing those matters (i.e., those regarding a violation or a non-violation complaint) and a separate report on the matters that specifically concern the “situation complaint.”

Additionally, the DSU prescribes a special procedure for “situation complaints,” which was applied during the last years of the old GATT on a provisional basis pursuant to the *1989 Contracting Parties’ Decision*.<sup>130</sup> The general procedure provided for in the DSU is applicable only until the panel report is circulated to the parties. However, the special procedure provided in the Decision applies to the subsequent stages following the completion of the panel report; i.e., these special rules apply in lieu of the DSU with regard to adoption, surveillance, and implementation of a *consensual* panel report on a

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<sup>127</sup> GATT 1994, at art. XXIII:1(c).

<sup>128</sup> Petersmann, *supra* note 8, at 173–76.

<sup>129</sup> Pescatore, *supra* note 76, at 41. *But see* GALLAGHER, *supra* note 46, at 17 (finding that not only “situation complaints,” but also “non-violation complaints” are “exotic”).

<sup>130</sup> *Improvements to the GATT Dispute Settlement Rules and Procedures* (Apr. 12, 1989), GATT B.I.S.D. (36th Supp.) at 61 (1989).



“situation complaint.” Therefore, the adoption of a panel report on a situation complaint under the current regime requires the positive *consensus* of all WTO Members. Considering all these peculiarities regarding “situation complaints,” it is likely that these types of complaints will not arise in the near future.

The possibility of bringing a “non-violation” or “situation complaint” indicates that the WTO dispute settlement is broader than other international dispute settlement systems, which adjudicate only violations of agreements. The peculiarity of the system is explained by the intent to maintain the negotiated balance of concessions and benefits between WTO Members.<sup>131</sup> The three types of complaints mentioned above, “violation,” “non-violation,” and “situation complaints,” may allege that a measure has caused either “nullification or impairment of a benefit” or “impediment for the attainment of the objective of the GATT.”<sup>132</sup> Since these three types of actions may result in two different consequences independently of each other, E.-U. Petersmann finds six different types of complaints to exist.<sup>133</sup> Nullification is a sub-category of an impairment, since it completely impairs the benefits from the GATT 1994 or from other covered agreements.

#### 4. *Types of complaints provided in other covered agreements*

In addition, there are some differences between the existing WTO system and the GATT system. The types of complaints provided for in other multilateral agreements on trade of goods are identical to the complaints in GATT 1994, as they make references to Articles XXII and XIII of GATT 1994.<sup>134</sup> If a complaint is brought under a covered agreement other than GATT 1994, the complaint must refer to the relevant agreement for failure to carry out a WTO obligation or for the impairment of a benefit.

Under the current regime, a claim can be based not only on an inconsistency related to the trade of goods, as was the case under the old GATT, but also on any nullification or impairment of benefits from agreements of trades in services and intellectual property rights,

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<sup>131</sup> HANDBOOK, *supra* note 25, at 31.

<sup>132</sup> Art. XXIII:1, GATT 1994, Annex 1 A to the WTO, 33 I.L.M. 1154 (1994).

<sup>133</sup> Petersmann, *supra* note 13, at 72–74. However, complaints brought on the basis of an allegation of “impediment for the attainment of the objective of the GATT” have been used considerably less frequently within the GATT and now within the WTO.

<sup>134</sup> The Multilateral Agreements on Trade in Goods are embodied in Annex 1A to the WTO Agreement, 33 I.L.M. 1154 (1994).

and on rights related to the WTO Agreement and the DSU. However, the GATS distinguishes between only two kinds of complaints—“violation complaints” and “non-violation complaints.”<sup>135</sup> The former does not require nullification or impairment of benefits,<sup>136</sup> and thus there is no need to trigger the presumption of Article 3.8 of the DSU.<sup>137</sup>

The “non-violation” complaint under the GATS is technically the same as that of GATT 1994, except that GATS Article XXIII:3 is more specific. It requires that an impairment or nullification result in a benefit, which the Member “could reasonably have expected to accrue to it under a specific commitment of another Member.”<sup>138</sup> This condition is elaborated by the GATT jurisprudence on “non-violation” cases, and GATS Article XXIII:3 currently specifies this condition.

Under GATT 1994 and the old GATT regime, if the claimant succeeds in proving a non-violation complaint, the respondent is not obliged to withdraw the measure, but can make an adjustment. In contrast, GATS Article XXIII:3 provides that a satisfactory adjustment may include not only a modification of the measure, but also its withdrawal. Therefore, the GATS offers an additional legal remedy with regards to non-violation complaints (withdrawal of the measure) and does not provide for a “situation complaint.”

Although the TRIPS presents the possibility of bringing all types of complaints provided in Article XXIII of GATT 1994 forward, Article 64(3) of the TRIPS specifies that the provisions for “non-violation” and “situation complaints” do not apply in the first five years of entering into the WTO Agreement. Therefore, the TRIPS Council is not able to examine the scope and modalities for such complaints, and may not submit recommendations to the Ministerial Conference. Even though these recommendations have not been submitted, WTO Members have brought “non-violation” and “situation complaints” under the TRIPS.

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<sup>135</sup> GATS, 33 I.L.M. 1168 (1994), at art. XXIII.

<sup>136</sup> See GATS art. XXIII:1, 33 I.L.M. 1168 (1994) at 1183.

<sup>137</sup> DSU, *supra* note 22, at art. 3.8 provides:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

<sup>138</sup> GATS art. XXIII:3, *supra* note 136.

Finally, a complaint based on a violation of the DSU and the WTO Agreement is permissible.<sup>139</sup> In a recent case, a claimant alleged a violation of Article XVI:4 of the WTO Agreement,<sup>140</sup> but had not established it during the proceedings. In another recent case, *US – Safeguards*,<sup>141</sup> the Appellate Body found a violation of Article 11 of the DSU.

The DSU does not permit counter-claims because the use of dispute settlement procedures is not considered a “contentious act,” and complaints and counter-complaints should not be linked.<sup>142</sup> For example, in *Mexico – Soft Drinks*, as Mexico attempted to link a WTO dispute to another dispute between the same parties under the North American Free Trade Agreement (NAFTA), the panel emphasized that under Article 3.10 of the DSU,<sup>143</sup> Members should not link “complaints and counter-complaints in regard to distinct matters.”<sup>144</sup>

The object of a complaint may be a “measure” in the sense of a positive action, such as a violation of a law or regulation, or even a decision attributable to the government. It may be inaction when a WTO rule requires a positive action. A “measure” may be any act of a WTO Member, even if it is not binding, including governmental administrative guidance.<sup>145</sup>

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<sup>139</sup> See WTO Agreement, *supra* note 3, at arts. I–XIV.

<sup>140</sup> Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 23, WT/DS294/AB/R (Apr. 18, 2006) (adopted May 9, 2006).

<sup>141</sup> Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the EC*, ¶ 187, WT/DS166/AB/R (Dec. 22, 2000).

<sup>142</sup> DSU, *supra* note 22, at art. 3.10, last phrase.

<sup>143</sup> DSU, *supra* note 22, at art. 3.10.

<sup>144</sup> Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 7.15, WT/DS308/R (Oct. 7, 2005).

<sup>145</sup> This was confirmed in *Japan—Semiconductors*. In that case, the Japanese Government contended that the measures complained of were not restrictions within the meaning of GATT Article XI:1, because they were not legally binding or mandatory (¶¶ 106–08). The panel found that non-binding measures would be operating in a manner equivalent to mandatory requirements, so that the difference between the measures and mandatory requirements would be “only one of form and not of substance” (¶ 109). Hence, it concluded that the Japanese Government’s measures did not need to be legally binding to take effect, as there were reasonable grounds to believe that there were sufficient incentives for Japanese producers and exporters to conform (¶ 111). Therefore, the Japanese administrative guidance was found to be in violation of GATT Article XI:1. Report of the Panel, *Japan—Trade in Semi-conductors*, ¶¶ 106, 109, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.) at 116 (1989).

### 5. Multiple complaints

Trade measures adopted by a Member often adversely affect numerous WTO Members. This explains why more than one Member may request the establishment of a panel on the same subject matter, i.e., there may be multiple complainants. Article 9.1 of the DSU provides that, whenever feasible, one single panel should examine these complaints, taking into account the rights of all complainants.<sup>146</sup> However, if a considerable amount of time elapses between the filing of the different complaints, then the establishment of a single panel is not feasible.

If several panels have been set up on the same subject matter, Article 9.3 of the DSU provides that the same individuals should serve on each of the panels and the timetables should be synchronized.<sup>147</sup> This rule aims at providing consistency of legal interpretation in the panel reports and avoiding contradictory panel rulings on the same subject matter.

### F. Written Submissions and Hearings

The DSU codifies the established practice of GATT panels regarding panel hearings and written submissions. Article 12 of the DSU and its Appendix 3 on Working Procedures determine the procedural phases and time limits from the establishment of a panel until the issuance of its report. As a general rule, the timeframe may not exceed six months. In cases of urgency, including those relating to perishable goods, the panel is required to issue its report to the parties involved in the dispute within three months. In order to respect the deadlines of this time-sensitive process, the DSU prescribes rigorous time limits and establishes control over the panel.

The WTO system's superior consistency and unification in the overall function of panels surpasses that of the GATT's systems. Panels within the old GATT had to set up their individual working procedures. As of 1985, panels had to follow the *Suggested Working Procedures*, unless the Members of the panel agreed otherwise after consulting the parties to the dispute.<sup>148</sup> Normally, GATT panels received two sets of written submissions and held two substantive meetings with the parties. WTO panels follow the established GATT practice, which started in the 1980s, after the creation of a Legal Office within the GATT Secretariat. A legal officer is assigned in each

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<sup>146</sup> DSU, *supra* note 22, at art. 9.1.

<sup>147</sup> DSU, *supra* note 22, at art. 9.3.

<sup>148</sup> 1989 *Contracting Parties' Decision*, *supra* note 23, at ¶ F(f)(2).

case and attends all panel meetings. Their responsibility is to assist and advise the panelists on procedural and substantive legal questions. This practice deserves support since WTO legal officers and professionals are aware of how all the panels proceed. Furthermore, legal officers never intervene in the oral meetings unless invited to do so, but they are limited to only advising the panelist, who take responsibility in making their final decision.

Within the WTO, a panel first holds a short procedural meeting (organizational meeting) with the parties, establishing the schedule for the panel proceedings. The panel decides the time limits on the first written submissions, the date of the first substantive meeting, the due dates of written replies to questions by the panel, the date for submission of the second written statements, the second substantive meeting, and so forth. Panels are obligated to adopt the working procedure and the timetable within one week after the panel is composed.

### *1. The first written submissions*

Under the GATT practice, parties generally submitted their first written statements simultaneously, but under the WTO, the complainant must submit the first written submission in advance (within three to six weeks) of the responding party's submission.<sup>149</sup> In addition, the DSU in Appendix 3 prescribes detailed working procedures with strict time limits.<sup>150</sup> Both parties have to present the facts of the case and their arguments in the written submissions. After receipt of the complaining party's submission, the respondent has two or three weeks to transmit its first written submission to the panel. This sequence of submitting a brief in advance is superior to simultaneous submission because it allows the respondent to receive notice of the facts and legal arguments regarding the alleged WTO inconsistency in order to organize its defense.

The first written submission of the complainant contains more detailed factual and legal arguments than the request for the establishment of a panel. A panel has no authority to examine a claim that was not included in the panel request because it is beyond the panel's terms of reference. The purpose of the first submission of the

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<sup>149</sup> Appendix 3 to the DSU, Working Procedures, *supra* note 22, at ¶ 12 (a). Additionally, during the proceedings, panels follow the DSU and the Understandings and Decisions of the GATT Contracting Parties of 1979, 1982, 1984, and 1989. These documents (except the DSU) are reproduced in 2 GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE (WTO 1995), at 632–42.

<sup>150</sup> See Appendix 3 to the DSU, Working Procedures, *supra* note 22.

complainant is to substantiate the claim advanced, while the respondent's first written submission is to refute the allegations and arguments of the complainant. The submissions are kept confidential, but parties may decide to disclose their submissions to the public pursuant to Article 18.2 of the DSU.<sup>151</sup>

## 2. *The first substantive meeting*

The WTO system is significantly more open than the GATT system. After the parties exchange first written submissions, the panel holds the first substantive meeting within approximately two weeks. Under the old GATT regime as well as under the WTO, the panel meetings are not open to the public.<sup>152</sup> At the first substantive meeting, the complainant is asked to present its case, in which the complainant usually makes an opening statement that describes the history of the dispute and explains the merits of the case. Then the respondent is asked to present its point of view. During the presentation, the respondent advances arguments in order to defend its own measures. The panelists, usually through the chairman, may ask questions at any time to clarify certain situations or to ask for more factual information. After each session, the parties provide each other with copies of their oral statements.

The Working Procedures is not considered an “all-encompassing” list of procedures, but “simply general procedures designed to assist the panel.”<sup>153</sup> However, panels are not authorized to disregard explicit provisions of the DSU. For example, in *India—Patents*, the complainant tried to advance a new claim under TRIPS Article 63 at the first substantive meeting.<sup>154</sup> Although the respondent objected that the claim was not within the terms of reference, the panel held that all legal claims would be considered if they were made prior to the first substantive meeting. The Appellate Body reversed the panel’s decision by finding that it was not consistent with the letter and spirit of the DSU. It further noted that:

Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the

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<sup>151</sup> DSU, *supra* note 22, at art. 18.2.

<sup>152</sup> See Appendix 3 to the DSU, Working Procedures, *supra* note 22, at 1245, ¶ 2.

<sup>153</sup> YANG GUOHUA, BRYAN MERCURIO & LI YONGJIE, WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION 145 (2005).

<sup>154</sup> Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sep. 5, 1997).

DSU...Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU...A panel cannot assume jurisdiction that it does not have.<sup>155</sup>

After oral statements, parties are invited to respond to questions posed by the panel or the opposing party. Questions are typically distributed in written form, and parties may reserve the right to answer and respond in written form until they receive authorization from their respective governments to answer specific questions. The parties usually submit written answers to the panel and to the other party, even if the question was discussed at the hearing. The deliberations of the panel and the documents submitted to it are confidential.<sup>156</sup> For this reason, third parties are not entitled to receive documents from the proceedings, except the first written submissions. The *1979 Annex on the Customary Practice of the GATT* provides that written memoranda submitted to the panel are considered confidential, but are made available to the parties involved in the dispute.<sup>157</sup> The DSU makes an effort to reduce the confidentiality of the process, only allowing Members to treat information submitted by another member as confidential information.<sup>158</sup> Also, in order to promote transparency in the panel process, the Appendix specifies that if a party submits confidential information in its written submissions to the panel, it shall, upon request of a Member, provide a non-confidential summary that the public may view.<sup>159</sup>

Moreover, under the DSU, panel reports are automatically binding when coupled with the prospect of appellate review, enticing panelists to write more elaborate and comprehensive analysis than those made within the GATT. This regulation induces disputing parties to use every possible avenue in securing more favourable rulings, including the usage of various procedural objections put forward by the disputing parties.

The WTO dispute settlement system is significantly more formalized than the previous GATT mechanism, but not to the extent of civil procedures in the majority of national legal systems. Panels

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<sup>155</sup> Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 92, WT/DS50/AB/R (Dec. 19, 1997).

<sup>156</sup> DSU, *supra* note 22, at 1245, app. 3, ¶ 3.

<sup>157</sup> See *1979 Annex on the Customary Practices of the GATT*, *supra* note 4.

<sup>158</sup> DSU, *supra* note 22, at 1245, app. 3, ¶ 3.

<sup>159</sup> *Id.*

should always consider the principle of good faith when conducting the panel process. Failure of a complainant to strictly comply with the procedural rules in requesting a panel does not necessarily void the process; rather, the panel will likely give additional time to the complainant to remove the discrepancies.

A notable preliminary objection raised by the United States in the panel proceedings relating to *U.S.–Foreign Sales Corporations* illustrates this principle of good faith.<sup>160</sup> In this case, the respondent contended that the European Communities' claim should be dismissed because the request for consultations did not include a "statement of available evidence" as required by Article 4.2 of the Subsidies and Countervailing Measures (SCM). The United States further contended that the request was defective because it could not form the basis for a panel proceeding. The panel rejected the preliminary objection stating that no specific provision of the DSU or the SCM Agreement would require dismissal of a claim under Article 3 of the SCM Agreement as a consequence of failure to comply with Article 4.2.<sup>161</sup>

On appeal, the United States insisted that the consequence of a failure to include a "statement of available evidence" under Article 4.2 of the SCM Agreement had to be the dismissal of the European Communities' claim under Article 3 of the same agreement. The Appellate Body found the requirement of Article 4.2 supplemented the conditions of Article 4.4 of the DSU. Since the issue of whether a measure is a prohibited subsidy often requires a detailed examination of facts, they decided the request for consultations had to satisfy the requirements of both provisions. The Appellate Body further observed that this requirement presented "available evidence of the character of the measure as 'subsidy' that must be indicated, and not merely evidence of the existence of the measure."<sup>162</sup>

Despite the defect in the request for consultations, the Appellate Body recognized that the United States had still participated in them.<sup>163</sup> The first occasion in which the United States objected to the request for consultations was in the panel proceedings. The Appellate

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<sup>160</sup> Panel Report, *United States—Tax Treatment of "Foreign Sales Corporations,"* (FSC), WT/DS108/R, (Oct. 8, 1999), as modified by the Appellate Body Report, *United States—Tax Treatment of Foreign Sales Corporations (FCS)*, WT/DS108/AB/R (Feb. 24, 2000) (adopted on Mar. 20, 2000).

<sup>161</sup> Panel Report, *United States—Tax Treatment of "Foreign Sales Corporations,"* (FSC), WT/DS108/R, (Oct. 8, 1999), at ¶ 7.10.

<sup>162</sup> Appellate Body Report, Appellate Body Report, *United States—Tax Treatment of Foreign Sales Corporations (FCS)*, WT/DS108/AB/R (Feb. 24, 2000) (adopted on Mar. 20, 2000), at ¶ 161.

<sup>163</sup> And perhaps, as the panel asserted, the respondent consciously chose not to seek clarification. Panel Report, *supra* note 161, at ¶ 7.10.



Body rejected this objection because the respondent had various opportunities to raise objections during consultations that lasted almost a year. More significantly, the United States did not raise the objection during the two DSB meetings where request for the establishment of a panel was on the agenda. For this reason, the United States acted as if it had accepted the establishment of the panel. Consequently, the United State's behavior exemplified the meaning of an *estoppel*.

In an effort to reduce frivolous objections, the Appellate Body emphasizes that both the complainant and the respondent possess an obligation to comply with the requirements of the DSU and other covered agreements in *good faith* and added:

By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the Complaining Member, and to the DSB or the Panel, so that correction, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.<sup>164</sup>

Thus the current WTO system provides a higher level of transparency, though the overall increased complexity from the additional procedural objections might leave some yearning for the more simple GATT procedures.

### 3. *Second written submissions*

After the first substantive meeting, the parties have two to three weeks to send their second written submissions. During this time, parties have the opportunity to respond to the first written submission of the other party and to rebut the facts and arguments advanced by it at the first substantive meeting. Unlike the first written submissions,

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<sup>164</sup> Appellate Body Report, *United States—Tax Treatment of Foreign Sales Corporations (FCS)*, WT/DS108/AB/R (Feb. 24, 2000) (*adopted* on Mar. 20, 2000), at ¶ 166.

the second written submissions have to be sent in by the parties at the same time.

#### 4. *The second substantive meeting*

After the panel has determined a broad outline of the case in the first meeting, it reconvenes for a second substantive meeting with the parties. This meeting, which is usually held within one month of receiving the second written submission rebuttals, provides another opportunity for the panel to engage in fact-finding with the parties.<sup>165</sup> Having this second opportunity to ensure the facts are correct is important because the Appellate Body will review only points of law. Though the purpose of the first substantive meeting is mainly about noting the issues in which the panel is concerned and of the arguments of the other party, the second substantive meeting provides a forum in which the parties can concentrate the debate on specific disagreements on the facts or on legal interpretation.<sup>166</sup>

As mentioned earlier, the current process is becoming less concerned with confidentiality than the earlier agreements. Paragraph 10 of Appendix 3 of the Working Procedures to the DSU commands “in the interest of full transparency” that all presentations, rebuttals, and statements be made in the presence of the other party.<sup>167</sup> Moreover, each party’s written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.<sup>168</sup>

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<sup>165</sup> However, the Working Procedure states that the second substantive meeting should be held one to two weeks after the receipt of the rebuttals. DSU, *supra* note 22, Appendix 3, at ¶ 12(d).

<sup>166</sup> Hudec suggests a further legalization of the panel process in regard to the panel hearing. In his view, similarly to hearings at national courts, panels should question the parties on the most vulnerable points of their argumentation. Currently, based on the GATT legacy, the panels serve to assist the disputing parties, and there is considerable control on behalf of the parties on the panel proceeding. “The best way to develop the facts is to obtain the parties’ agreement to them, and this usually requires questioning by the panel to fill in the gaps – questioning that the party being questioned would often prefer not to answer fairly and fully: Full development of the legal side of the case often requires similar questioning, just as judges in civil litigation find it valuable to sharpen their understanding of legal issues by probing apparent weak points in each party’s legal arguments.” Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, PSIO Occasional Paper, WTO Series Number 11, IUHEI–Geneva 1998 at 50 [hereinafter *An Overview*].

<sup>167</sup> DSU, *supra* note 22, at 1246, app. 3, ¶ 10.

<sup>168</sup> *Id.*

One of the main proposals for reform in the panel process is to open panel hearings to the public. Since this process is confidential under the current regime, such a proposal implies a major change to the system. While this change may increase the legitimacy of the WTO dispute settlement mechanism, it is likely to have a negative impact on the party's behavior because it would not contribute to reaching a "positive solution" to a dispute, which is the major aim of the WTO dispute settlement mechanism. Furthermore, the parties will be reluctant to publicly submit confidential business information. Moreover, if things work well, there is no need to change them. This kind of practice could be supported, however, if the disputing parties see no obstacles in making the hearings of a particular dispute public. Moreover, Member States should be encouraged to follow this kind of practice, as it will make the panel process more transparent.<sup>169</sup>

Whether confidential or not, the second substantive meeting usually marks the end of submitting any further written submissions, though there are some occasions where the parties have been allowed to send a third set of written submissions due to unusual circumstances.<sup>170</sup>

Such was the case in *EC – Customs*, where the claimant (the United States) presented new evidence at the second substantive meeting. The European Communities argued that the evidence contained in section III of the United States' oral statement was "new," submitted too late, and should therefore be found inadmissible by the panel. The United States asserted that the evidence constituted "evidence necessary for the purposes of rebuttals" within the meaning of paragraph 12 of the Working Procedures adopted for the particular dispute.<sup>171</sup> The panel decided to admit the evidence submitted by the United States without concluding whether the evidence in question

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<sup>169</sup> There have already been a few precedents in this respect. Recently, the parties and the panel in *US—Continued Suspension* and *Canada—Continued Suspension* WT/DS 320R (Sept. 2006); WT/DS 321/R (Oct. 2006) agreed to make public the hearings of the panels. The disputes are linked to a broader dispute between the parties (i.e. the *EC—Hormones* case). In the present cases, the EC contends that the United States and Canada should have removed their retaliatory measures since the EC had removed the measures found to be inconsistent with WTO in the *EC—Hormones* case. The EC claims against the United States include violations of GATT, art. I, II (1994) and DSU, art. 21.5, 22.8, 23.1, and 23.2 (a), (c).

<sup>170</sup> E.g., Interim Report, *EC—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/INTERIM, WT/DS292/INTERIM, WT/DS293/INTERIM, (Feb. 7, 2006). Due to the complex nature of the legal and factual issues of the case, the parties were allowed to transmit a third written submission.

<sup>171</sup> Panel Report, *European Communities—Selected Customs Matters*, ¶ 7.65, WT/DS315/R (June 16, 2006).

could be characterized as “new” factual evidence or as evidence “necessary for purposes of rebuttals” within the meaning of paragraph 12 of the Working Procedures.

The panel emphasized that its decision only related to the admissibility of evidence referred to by the United States in section III of its oral statement at the second substantive meeting, and that it had “no bearing on the weight, if any, that the Panel may ultimately attribute to such evidence.”<sup>172</sup>

### *G. The Interim Review Stage*

Under the old GATT, the panel issued a descriptive section of the draft report after the second substantive meeting. This report included an introduction to the case, its factual content, and the legal arguments put forward by the parties. This phase was useful because it provided an opportunity for the panel to see if it had correctly assessed the facts of the case and understood the parties’ arguments.<sup>173</sup>

The DSU developed a similar innovation for the final stages of the panel procedure—the Interim Review Stage. This stage consists of two phases. The first phase provides parties with an opportunity to comment on the descriptive part of the panel report, while the second phase allows the parties to comment on the entire panel report draft.

Panels issue the descriptive part of the report after the second substantive meeting, which summarizes the facts and arguments raised by the parties in the course of the proceedings. The parties may submit comments on the descriptive part pointing out whether certain facts and arguments have been precisely recorded. This should be done within the time limit established by the panel, normally within two weeks after receipt of the descriptive part of the report.<sup>174</sup> This first phase is the last opportunity to correct any factual errors in the panel report.

Approximately two to four weeks after the deadline for receipt of comments on the descriptive part, the panel issues an interim report.<sup>175</sup> The interim report contains both the descriptive part and the findings of the panel. Parties must submit written comments on the interim report within one week of its publication. However, if no comments are received, then the interim report becomes final.

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<sup>172</sup> *Id.*

<sup>173</sup> See HANDBOOK, *supra* note 25, at 69.

<sup>174</sup> DSU, Appendix 3, ¶ 12(f).

<sup>175</sup> See Appendix 3 to the DSU, Working Procedures, *supra* note 22, at ¶ 12 (g). Panelists dealing with lengthy and complex legal issues usually need more time to complete the interim report.

In practice, parties receive the interim report first and then translations are circulated among WTO Members. The parties possess the right to make comments and request additional meetings on the “precise aspects of the interim report”<sup>176</sup> raised in the written comments.<sup>177</sup> Additional evidence is inadmissible during this stage.

In *India – Automotive Industry*, the panel accepted new evidence that India presented at the interim review stage. Although the new evidence submission arrived too late, the panel nonetheless accepted the evidence because it “sought to confirm the official status of the measure as it had already been argued and discussed during the proceedings.”<sup>178</sup> It is also acknowledged that new arguments are permissible during the interim stage if they are made “in the context of a request for review of precise aspects of the interim report.”<sup>179</sup>

### 1. Issues raised by the interim review stage

The DSU requires the panel to include a discussion of the arguments brought forth during the interim review stage in the findings of the final report. Panels take into account the observations made by the parties on specific points. In practice, the final panel report contains this additional information in a special section entitled “Interim Review.”

Shortly after the introduction of the interim review stage, some scholars expressed doubts about its positive role. For example, Hudec argues that the interim review stage model is useless in WTO panels because it is an imitation of the Canada-United States Free Trade

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<sup>176</sup> This was confirmed by the panel report in *Australia–Salmon*. Australia requested a review of the entire report as “a large part of the legal reasoning of the interim report was not based on an objective assessment of the matter before the Panel.” The panel disagreed with the complainant and only reviewed the interim report “in light of the comments made by the parties which relate to ‘precise aspects’ of the interim report.” Panel Report, *Australia—Measures Affecting Importation of Salmon*, ¶ 7.3, WT/DS18/R (June 12, 1998).

<sup>177</sup> DSU, *supra* note 22, at art. 15.2, second sentence. Such an additional meeting at the interim review stage was held in the *EC–Hormones* case. The panel emphasized that only “precise aspects” of the interim report, identified in the written comments, may be subject to review. Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, part VII, ¶ 7.1, WT/DS48/R/CAN (Aug. 18, 1997).

<sup>178</sup> Panel Report, *India—Measure Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R (Dec. 21, 2001) at ¶ 6.54. It should be remembered that the question of admitting evidence is very different from the question of how much weight the evidence is going to receive.

<sup>179</sup> Panel Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/R (Mar. 31, 2000) at ¶ 5.18.

Agreement (CUSTA) and NAFTA, where the needs of the stage are very different than the needs under the DSU. In both CUSTA and NAFTA, says Hudec, panel members are all non-governmental lawyers and academics who lack any formal connection with the international institutions in question. Moreover, the permanent secretariats of these institutions do not offer panels any substantive legal advice, and panels hold only one hearing.

Among other arguments supporting this thesis are that the WTO panels are supported by legal professionals from the WTO Secretariat, the process involves two or three substantive meetings, and panel decisions may be appealed before the Appellate Body. Hudec notes that “[a] specific change in the panel procedure that has enlisted considerable support is a proposal to delete the ‘interim report’ stage of the panel process,” suggesting that by removing the interim review stage, panels will have more time to prepare their reports.<sup>180</sup>

P. Pescatore also critiques the interim review stage. Initially, he suggests that the development of the rules and procedures, such as the interim review stage, increases the procedure required by the panel, and promotes a “countervailing tendency of governments to regain control of the system at all stages” by influencing the panel’s deliberations and legal argumentation. He further asserts that this influence not only jeopardizes the panelists’ independence, but may also unbalance the final report because the panel must comment on all objections made by the parties at this late stage.<sup>181</sup>

The interim review stage during the first years of the DSU brought with it exaggerated fears for several reasons. Firstly, the new WTO framework includes a number of new substantial legal obligations. Additionally, the types of cases put forward not only present complex legal issues, they also require heavy documentation—a daunting combination. . That being said, the interim review stage does spare the parties from future headaches owing to a surprising final panel report by offering them an opportunity during the interim, to voice their concerns over any indications of the panel’s unsound reasoning. However, Hudec also suggests that the interim review stage discourages the losing party from raising its objections because the panel will correct its error and as a consequence, the party will lose “a

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<sup>180</sup> Hudec, *An Overview*, *supra* note 166, at 53–54. See also Andrew Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT’L ECON. L. 277 (1998).

<sup>181</sup> Pescatore, *supra* note 76, at 39–41. It should be noted that this article was written in 1993 when the Uruguay Round was in progress and the DSU was not yet in force.

weapon on appeal.”<sup>182</sup> Although this argument appears plausible, an opposing side may advance in support of the opposite view. On one hand, if a party does not raise its objections, the panel will have additional time to concentrate on the preparation of the report. However, on the other hand, if the party raises its objections, it will be even better since the panel will be able to correct its legal reasoning at an early stage. Therefore, the Appellate Body will only have to confirm the panel’s corrected legal argument. In sum, because the panel’s decision may not be appealed, the interim review stage helps correct any unconvincing legal interpretations.

Moreover, the interim review stage is confined to both the time limits established by Article 12.8 of the DSU,<sup>183</sup> and the policy that parties are not allowed to advance any further evidence or discuss the substance of the case.<sup>184</sup> These requirements both guarantee that panels are not overloaded with new legal work at this stage and that no undue burden will be placed on the panelists. Despite Hudec’s assertions, the interim review stage does slow the panel process, but is actually a tool to ease the panels’ efforts in reaching more convincing legal interpretations and to improve the quality of their panel reports within the given time limits.

Furthermore, the submission of written comments is a legal right. If the parties fail to send in comments within the time limit established by the panel, the interim report is considered final and is circulated to the Members. Whether or not the interim review stage fulfills the WTO Members’ expectations as embodied in the DSU requires a detailed study of WTO cases over an extended period. The panel reports from the first years of the WTO do indicate that the interim review stage, rather than being an additional burden on the panel, is a useful innovation that results in more well- reasoned reports.

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<sup>182</sup> Hudec, *An Overview*, *supra* note 166, at 54.

<sup>183</sup> Six months is provided for the panel to complete its report, or three months in cases of urgency.

<sup>184</sup> New evidence cannot be introduced during the interim review stage. In *EC—Customs*, in its comments on the Interim Report, the European Communities referred to a number of exhibits that it had not relied upon previously during the panel proceedings. The complainant (the United States) objected by stating that “new evidence during the interim review stage of the Panel’s proceedings is entirely impermissible and the Panel should give no consideration to that evidence.” The panel found that Article 15.2 of the DSU clearly indicated that “the purpose of the interim review stage of the Panel’s proceedings is to review ‘precise aspects’ of the Interim Report.” Therefore, pursuant to Article 15.2 of the DSU, the panel was precluded from taking into consideration evidence not reflected in the Interim Report. Panel Report, *EC—Selected Customs Matters*, ¶¶ 6.3–6.6, WT/DS315/R (June 16, 2006).

## 2. *Third parties and amicus briefs*

*a. Third parties.* Third-party participation in panel proceedings increased considerably within the WTO as compared to that within the GATT. In the WTO, participation of third parties in consultations is allowed only for WTO Member States, and additionally, depends on the will of the main disputing parties. However, third party participation in panel proceedings cannot be rejected if the party demonstrates a “substantial interest in the matter.” In practice, panels apply a broad interpretation to the meaning of substantial interest, and each Member with a vested interest in a DSB matter to the DSB takes part in the panel proceedings.

The DSU grants third parties limited procedural rights. Under the DSU, third parties receive an opportunity to be heard and make written submissions to the panel. The panel report reflects these submissions and notifies parties of their existence.<sup>185</sup> Third parties receive the main parties’ first written submissions, but can only attend panel sessions by invitation. The Appendix specifies that a third party that has given notice of its interest in a dispute shall be invited in writing to present its view during a session of the first meeting set aside specially for that purpose.<sup>186</sup> In this meeting, the party may answer questions advanced by the panel or other parties. After the end of the session, third parties do not attend other sessions or meetings in the framework of the proceedings.

*b. Amicus curiae briefs.* The recent trend of amicus curiae briefs (non-governmental organizations and individuals submitting unsolicited briefs) is subject to a broad debate since such submissions did not exist within the old GATT dispute settlement mechanism.

For example, amicus briefs have been filed in *US – Reformulated Gasoline*,<sup>187</sup> in *EC – Hormones*,<sup>188</sup> and in subsequent cases. In *US – Shrimps*, the panel interpreted Article 13 of the DSU to mean (even though it had authority to seek information from non-governmental source) that it would be “incompatible” with the DSU to accept and take into account such unsolicited information. For this reason, if any

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<sup>185</sup> DSU, *supra* note 22, at art. 10.2.

<sup>186</sup> DSU, *supra* note 22, at 1245, app. 3, ¶ 6.

<sup>187</sup> Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996).

<sup>188</sup> *ee* Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, WT/DS48/R/CAN (Aug. 18, 1997) as modified by Appellate Body Report, WT/DS26/48/AB/R, (*adopted* Feb. 13, 1998).



party relies on such submissions, it could include them in its own submissions.<sup>189</sup>

The Appellate Body reversed this finding by stating that acceptance of unsolicited information by a panel is not incompatible with the DSU. A panel has discretion to accept or ignore information and advice submitted to it, regardless of whether it had been requested by the panel or not.<sup>190</sup> The Appellate Body has also observed that access to the dispute settlement system under the covered agreements is not available to individuals and organizations, but only to WTO Members.

In emphasizing the difference between third parties in the panel process and amicus briefs, the Appellate Body notes that third parties have a legal right to make submissions to the panel and a legal right to have them considered by the panel. As a consequence, “a panel is obliged in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.”<sup>191</sup> Hence, panels have no obligation to consider amicus briefs, but may do so at their discretion.

After *US – Shrimps*, amicus briefs have been filed in a number of cases. In *EC – Asbestos*, the Appellate Body elaborated on an additional procedure for filing amicus submissions. Although this procedure was used specifically for that appeal only, it has provided numerous requirements, *inter alia*, that the brief shall indicate “in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to the dispute.”<sup>192</sup> The Appellate Body has received seventeen applications pursuant to the additional procedure. For one reason or another, the Appellate Body has denied the right to file a written brief in all of them.

The stringent requirements set by the Appellate Body for submitting amicus briefs create a number of legal problems, thereby cancelling the significance of these submissions. One problem is that such submissions are not provided for explicitly in the DSU and other WTO Agreements. Additionally, the disapproval of some WTO Members and, more particularly, of a number of developing Members,

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<sup>189</sup> Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 7.7–7.8, WT/DS58/R (May 15, 1998).

<sup>190</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 108, WT/DS58/AB/R (Oct. 12, 1998).

<sup>191</sup> *Id.* at ¶ 101.

<sup>192</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products (EC-Asbestos)*, WT/DS135/AB/R (adopted Apr. 5, 2001, at ¶¶ 52).

is evident. Their view is that allowing the filing of unsolicited information deprives a panel from the right to decide the kind of information that is needed. Therefore, they believe if no one requests such information, then these briefs should not be accepted. Another problem is that in order to file these submissions, applicants must know the disputing parties' views in order for the amicus briefs to not repeat what has already been submitted by the parties or third parties. The WTO dispute settlement system, however, remains "intergovernmental," and the panel and appeal proceedings are confidential, and most States would be reluctant to reveal confidential information anyway. Moreover, these submissions are often biased and contradict the Member government's positions. Finally, allowing extensive submissions also creates a heavy burden on panels and the Appellate Body. Considering the numerous requirements elaborated by the Appellate Body in *US – Shrimps*, and the fact that no single panel or the Appellate Body ever based its findings on amicus briefs, it appears the debate on such submissions is "much ado about nothing."<sup>193</sup>

#### IV. SPECIAL PROCEDURAL RULES FOR DEVELOPING COUNTRIES

Developing countries have increased their participation in the panel proceedings in recent years. For example, in 2001 seventy-five percent of all complaints were filed by developing countries.<sup>194</sup> Also, developing WTO Members often take part in panel proceedings as third parties. Rules on special and differential treatment for developing countries are elaborated either as substantive WTO provisions (e.g., longer time for implementation of certain obligations) or procedural dispute settlement rules (e.g., faster procedure, longer time limits).

The DSU recognizes the special needs of developing countries by including rules unique to developing countries participating in panel proceedings. At the stage of the panel composition, if a dispute is between a developed and a developing country, the latter may request the appointment of at least one panelist from a developing country Member.<sup>195</sup>

In examining a complaint against a developing country Member, the panel shall afford the respondent more time to prepare its defenses,

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<sup>193</sup> Petros C. Mavroidis, *Amicus Curiae Briefs before the WTO: Much Ado about Nothing*, in *EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN*, 317–30 (Armin von Bogdandy, Petros C. Mavroidis & Yves Meny eds. 2002).

<sup>194</sup> Data provided in GUOHUA, MERCURIO & YONGJIE, *supra* note 153, at 110.

<sup>195</sup> DSU, *supra* note 22, at art. 8.10.

if necessary.<sup>196</sup> Thus upon request of a developing country, the panel should set up longer time periods than those provided in the DSU and the Working Procedure Annex. If a developing Member raises a question on special and differential treatment within the panel proceedings regarding both substantive and procedural rules, the panel is obligated to indicate in the panel report the form in which these rules have been taken into account pursuant to Article 12.11 of the DSU.<sup>197</sup>

In addition, when a developing Member brings proceedings against a developed Member, the former may choose to apply the accelerated procedure under the *Contracting Parties' Decision of 5 April 1966*.<sup>198</sup> These rules originated from the old GATT dispute settlement mechanism, and remain applicable within the WTO due to an explicit reference in Article 3.12 of the DSU.<sup>199</sup> However, except for a few cases, developing Members have not invoked the provisions of the decision. These proceedings have only been requested in six instances under the old GATT.<sup>200</sup>

If a developing country resorts to the *1966 Decision*, Articles 4, 5, 6 and 12 of the DSU do not apply, and the rules of the decision apply instead. The *1966 Decision* provides that if consultations between the parties fail, the developing country may solicit the offices of the WTO Director-General to conduct consultations between the disputants.<sup>201</sup> If the consultations do not settle the dispute within two months, the Director-General must prepare a special report on the actions he has taken at the request of either party. In regards to the panel stage, the decision requires the panel to complete its report in only sixty days (in contrast with the normal six-month time limit for completion of the panel report).<sup>202</sup> In addition, the panel shall pay due regard to all circumstances relating to the challenged measure and its impact on the economic development of the developing Member.<sup>203</sup>

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<sup>196</sup> Such additional time to prepare its first written submissions was granted to India. Panel Report, *India—Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, ¶ 5.8–5.10, WT/DS90/R (Apr. 6, 1999).

<sup>197</sup> DSU, *supra* note 22, at art. 12.11.

<sup>198</sup> Conciliation, Procedures Under Article XXIII (Apr. 5, 1966), GATT B.I.S.D. (14th Supp.), at 18 (1966) [hereinafter *1966 Decision*].

<sup>199</sup> DSU, *supra* note 22, at art. 3.12.

<sup>200</sup> 2 GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 765 (WTO 1995).

<sup>201</sup> *1966 Decision*, *supra* note 199.

<sup>202</sup> See *1966 Decision*, *supra* note 199, at 19, ¶ 7.

<sup>203</sup> See *1966 Decision*, *supra* note 199, at 19, ¶ 6.

All procedural rules applicable to developing Members also apply to least-developed WTO Members. In addition, there are a few rules in the DSU specifically for least-developed Members. When consultations have not settled a dispute involving a least-developed country, the director-general or the chairman of the DSB shall, at the request of the least developed country, “offer good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made.”<sup>204</sup> Article 24 of the DSU<sup>205</sup> requires Members to exercise due restraint when initiating dispute settlement proceedings against a less developed country. Such restraint is exercised when rulings are not implemented within a reasonable period of time, and a Member requests compensation for or authorization to suspend obligations against a least-developed country.<sup>206</sup> Least-developed countries receive special consideration at all stages of the dispute settlement procedures. Finally, the WTO Secretariat provides legal advice and assistance on dispute settlement to both developing and least-developed Members.<sup>207</sup>

## V. IMPORTANT ISSUES OF THE PANEL PROCESS

### A. *The Burden of Proof*

The issue of the burden of proof was less significant within the old GATT dispute settlement system, most likely because disputing parties often presented panels with agreed-upon facts. Under the old GATT, the burden of proof was considered as “more [of] an intellectual concept than a practical one” because panels questioned both parties, giving neither one nor the other the benefit of the doubt.<sup>208</sup>

However, the WTO incorporated at least two rules regarding the burden of proof from the old GATT system. First, the complainant party must prove the violation it alleges. Second, a respondent who invokes general exceptions under GATT Article XX must prove that the conditions related are fulfilled.<sup>209</sup> In the WTO panel process, the question of who bears the burden of proof is critical because unlike the early years of the GATT, the disputing parties within the WTO contest

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<sup>204</sup> DSU, *supra* note 22, at art. 24.2.

<sup>205</sup> DSU, *supra* note 22, at art. 24.

<sup>206</sup> DSU, *supra* note 22, at art. 24.1, last sentence.

<sup>207</sup> DSU, *supra* note 22, at art. 27.2.

<sup>208</sup> In this sense, see Plank, *supra* note 15, at 78.

<sup>209</sup> On the burden of proof in the GATT and the WTO, see Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?* 1 J. INT'L ECON. L. 227 (1998).

numerous facts and evidence in the panel proceedings, and the allocation of the burden of proof may decide the outcome of the case. The DSU does not contain specific rules regarding the burden of proof in panel proceedings; however, this is important because in cases where certain facts are questionable during the proceedings, a panel will rule in favor of the party who does not bear the burden of proof.

The Appellate Body emphasizes that the party who asserts a fact must prove it. In other words, the burden of proof for a fact rests upon the party who asserts that fact.<sup>210</sup> Thus a complainant alleging inconsistency with a WTO agreement must prove its claim; however, no exact standard for the level of proof exists. The Appellate Body has clarified that the complainant must present evidence sufficient to make a *prima facie* case that the claim is true.<sup>211</sup> In turn, the respondent has to rebut the claim. When invoking an exception to a particular provision, the respondent carries the burden of proving that the requirements for such an exception are met.<sup>212</sup>

Articles XX and XXI of the GATT 1994 provide examples of applicable exceptions.<sup>213</sup> WTO jurisprudence further clarifies some specific items regarding the burden of proof. For instance, the Enabling Clause provided by the *Decision on More Favourable Treatment* is not a typical exception to Article II of GATT 1994. Thus the claimant has to invoke the Enabling Clause and demonstrate the measure's inconsistency with it. Likewise, the link between Articles 5(1) and 5(7) of the SPS Agreement<sup>214</sup> is not a rule-exception relationship. As the panel in *EC – Biotech Products (“GMOs”)* stated, Art. 5(7) sets forth a right, not an exception, to Article 5(1).<sup>215</sup> Thus the burden of proof rests with the complainant to demonstrate the inconsistency of the measure with Article 5(7). In other words, the complainant must demonstrate that the respondent did not fulfil one of the four requirements stated in the provision.<sup>216</sup>

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<sup>210</sup> Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (Apr. 25, 1997) (adopted May 23, 1997), part IV, at 12 *et seq.*

<sup>211</sup> *Id.*

<sup>212</sup> Such exceptions are, for instance, those provided for in Articles XX and XXI of the GATT 1994.

<sup>213</sup> GATT 1994, Annex 1 A to the WTO, 33 I.L.M 1156 (1994).

<sup>214</sup> Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Annex 1 to the WTO Agreement, reproduced in *THE LEGAL TEXTS. THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 401 (Cambridge University Press & WTO 1999) at 59.

<sup>215</sup> Interim Report, *EC—Biotech Products (GMOs)*, ¶ 7.2988.

<sup>216</sup> The four requirements are: 1) the measure is imposed in respect of situation where “relevant scientific evidence is insufficient;” 2) the measure is imposed on the

## 1. Evidence

Neither the old GATT System, nor the DSU, contains any specific provisions concerning evidence in the panel procedure. Rather, the WTO dispute settlement relies on rules established by international law and other international tribunals. Panels have discretion on the type of evidence deemed acceptable and the weight given to each piece of evidence. Panels may use their own discretion and investigate the facts without request from any party. A panel must base its findings only on the evidence submitted by the parties, but may seek information from any relevant source. However, this does not mean that a panel is allowed to carry out the case. In order for the panel to search for additional information, the claimant must first establish a prima facie case by presenting evidence sufficient to raise a presumption of fact or to establish the fact in question.

A panel may seek technical information, when it considers this appropriate, by establishing an expert review group or consulting individual scientific experts as set forth in Appendix 4 to the DSU.<sup>217</sup>

A panel may also consult experts on an individual basis. Individual scientific experts were consulted for the first time in *EC – Asbestos*.<sup>218</sup> In this case, the panel found that it had the right to consult individual experts, despite the respondent's objection and argument that a panel may consult experts only through an expert review group under Appendix 4 to the DSU.<sup>219</sup>

Although the DSU does not prescribe specific time limits for submitting evidence, panels are obligated to respect the principle of due process throughout the panel procedure, and to ensure that they give parties an adequate opportunity to respond to the evidence. Normally, the deadline for submitting evidence is during the end of the first substantive meeting, but depending on the circumstances, evidence can be accepted by the panel at a later time. The panel may

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basis of available pertinent information; 3) the Member "seek[s] to obtain additional information necessary for a more objective assessment of risk;" and 4) the Member "review[s] the measure accordingly within a reasonable period of time." Art. 5.7 of the SPS Agreement, Annex 1 to the WTO Agreement, reproduced in *THE LEGAL TEXTS. THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 401 (Cambridge University Press & WTO 1999) at 59.

<sup>217</sup> DSU, *supra* note 22, Appendix 4.

<sup>218</sup> Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products (EC-Asbestos)*, WT/DS135/R (Sept. 18, 2000) as modified by Appellate Body Report, WT/DS135/AB/R (July 25, 2000) (*adopted* Apr. 5, 2001).

<sup>219</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products (EC-Asbestos)*, WT/DS135/AB/R (March 12, 2001) (*adopted* Apr. 5, 2001) at ¶ 147.

grant a time extension if the party shows there is a good cause for submitting the evidence and if the evidence is needed to respond to rebuttal arguments.

## 2. *Rules of interpretation and the applicable law*

The DSU requires panels to state in the report the findings of facts, the applicability of relevant provisions, and the basic rationale and recommendations of the findings. According to Article 11.1 of the DSU, “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”<sup>220</sup>

Despite this objective requirement, appeals grounded in the argument that “the panel has failed to make an objective assessment of the facts” have been quickly dismissed by the Appellate Body in several cases. In *United States – Zeroing*, the European Communities contended that the panel acted inconsistently with Article 11 of the DSU by demonstrating “insufficient reasoning” and not making an objective assessment of the facts.<sup>221</sup> The Appellate Body rejected the claim, emphasizing that a claim under Article 11 of the DSU is a “very serious allegation” and that a challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments.<sup>222</sup> Moreover, “not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts.”<sup>223</sup> Thus the Appellate Body rejected the claim because it was “vague and mentioned only in passing in its appellant’s submission.”<sup>224</sup>

Apart from making an objective assessment of the facts, panels shall apply the relevant legal provisions. The applicable law in the panel proceedings within the old GATT was quite straightforward because GATT panels normally applied the provisions of the GATT only. This question, however, is much more complicated under the WTO in light of the much broader trade issues covered by the WTO agreements. The connection between the WTO law and international

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<sup>220</sup> DSU, *supra* note 22, at art. 11.1.

<sup>221</sup> Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 251, WT/DS294/AB/R (Apr. 18, 2006) (adopted May 9, 2006)..

<sup>222</sup> *Id.* at ¶ 253.

<sup>223</sup> *Id.* at ¶ 254.

<sup>224</sup> *Id.*

law is obvious. While some WTO agreements refer to other disciplines of international law (e.g., Article XX of GATT 1994), other WTO provisions make a direct link with particular treaties that are outside the WTO law (e.g., Article 1 (3) of TRIPS). In his analysis on Article 7 of the DSU, Pauwelyn concludes that rules of international law can be applied in the panel proceedings unless the WTO agreements explicitly deviate or contract out of this other law.<sup>225</sup>

The DSU in Article 3.2 establishes a direct link with international law by explicitly providing that the WTO dispute settlement system aims at preserving the rights and obligations of Members under the covered agreements, and at clarifying “the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”<sup>226</sup> The old GATT did not contain such a provision.

Scholars have expressed different opinions on whether or not substantive non-WTO rules may apply in panel proceedings. Some authors assert that international law rules may not be applied as an autonomous source of law, arguing that only customary rules of interpretation may be considered by panels and the Appellate Body.<sup>227</sup>

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<sup>225</sup> Among the many arguments supporting his thesis, Pauwelyn notes that, unlike Article 293 of the Law of the Sea Convention (UNCLOS), Article 1131 of NAFTA, and Article 38 of the ICJ Statute, the DSU does not make an explicit reference to other rules of international law. Then he explains why this is the case:

[G]iven the nature of the WTO Agreement as a treaty under public international law, there was no need for the DSU to do so. On the contrary, the principle is that all other international law continues to exist next to the WTO treaty unless the WTO treaty explicitly deviates or contracts out of this other law. In other words, there was no need for Article 7 of the DSU to explicitly include also other rules of international law as part of the applicable law before WTO panels; to the extent that those other rules were not deviated from in the WTO treaty, this is automatically the case.

Joost Pauwelyn, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merit*, 6 J. WORLD TRADE 997, 1002 (2003). See also Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against ‘Clinical Isolation’ in WTO Dispute Settlement*, 33 J. WORLD TRADE 87 (1999); Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, 35 J. WORLD TRADE 1081 (2001); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am. J. Int’l L. 535 (2001) (further discussing applicable law in the panel proceedings).

<sup>226</sup> DSU, *supra* note 22, at art. 3.2.

<sup>227</sup> See Joel P. Trachtman, *The Domain of the WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333 (1999) (suggesting a narrow interpretation of the DSU provisions with regard to the applicable law in panel proceedings).



Other commentators suggest a broader interpretation of Article 7 of the DSU. A distinction is made between Article 1.1 of the DSU and Article 7 of the DSU, with the former outlining the jurisdiction of panels and the latter relating to the law that panels may apply to a particular dispute.<sup>228</sup> It is clear that panels must decline jurisdiction pursuant to Article 1.1 of the DSU if a dispute does not involve matters within the covered agreements (i.e., is not a WTO dispute).<sup>229</sup> However, even in this case, examination of other rules of international law (non-WTO rules) is needed in order to determine the lack of jurisdiction. In short, the choice of law process in the WTO is significantly more complex as the panel looks to not only apply WTO provisions, as was done in the GATT, but also must examine other related non-WTO rules of international law.

Though the process is much more cumbersome, it should be supported as a significant improvement from the GATT. According to Article 7.1 of the DSU, panels and the Appellate Body shall examine the matter “in the light of the relevant provisions in . . . the covered agreement[s] cited by the parties to the dispute.”<sup>230</sup> Pauwelyn finds that this provision imposes an obligation on panels to address and apply certain WTO rules; however, it does not preclude panels from applying other non-WTO rules of international law in particular circumstances.<sup>231</sup>

### 3. Panels giving deference to developing countries

In a recent case, the small country, Antigua and Barbuda, initiated panel proceedings against the largest trading nation, the United States.<sup>232</sup> Even though the Appellate Body has reversed a large part of the panel findings, Antigua and Barbuda won on essential points of the legal battle. *Inter alia*, the Appellate Body confirmed the panel’s finding that the application of the U.S. Horse-racing Act was contrary to the U.S. obligations under the GATS. In sum, and in contrast to the GATT, the WTO panel process has greatly advanced the deference

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<sup>228</sup> See generally Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J. WORLD TRADE 499 (2001).

<sup>229</sup> DSU, *supra* note 22, at art. 1.1.

<sup>230</sup> DSU, *supra* note 22, at art. 7.1.

<sup>231</sup> Pauwelyn, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merit*, 6 J. WORLD TRADE 997 (2003) at 1000-1001.

<sup>232</sup> See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) as modified by Appellate Body Report, WT/DS285/AB/R (*adopted* Apr. 20, 2005).

given to developing countries in an effort to be sensitive to their special circumstances.

#### 4. Time limits and other requirements in preparing the panel report

The panel starts preparing the report after the hearings are over, and all written submissions and rebuttals have been received. The panel makes an objective assessment of the matter before including the facts of the case and the applicability of and conformity with the relevant covered agreements. The panel must also make findings that will assist the DSB in giving the rulings provided for in the covered agreements.<sup>233</sup> Lastly, and as mentioned earlier, all conclusions drawn by the panel in its report must be reasoned.

In addition to these requirements, Article 12.8 of the DSU provides that the period in which the panel must conduct its examination may not exceed six months from the date on which the composition and terms of reference are agreed upon to the issuance of the final report to the parties of the dispute.<sup>234</sup> In cases of urgency, including those relating to perishable goods, panels are to aim at issuing its report within three months. If a panel is unable to complete its report within six months (or three months, if applicable), it must inform the DSB in writing of the reasons for the delay, and indicate an estimated date of issue.

The DSU further stipulates that the period should not exceed nine months in any case from the time the panel is established to the circulation of the report to WTO Members. In many cases, however, the time limits established by the DSU for completion of a panel report are unrealistic. Panels need more time to prepare their reports based on the reasoning requirements described above. For instance, in the *EC – Asbestos* case, the time between the establishment of the panel and the issuance of the panel report to the parties was more than 19 months.<sup>235</sup> It would be overly ambitious to expect the panel to finish its report on *EC – Biotech Products (GMOs)* in six months, since the interim report alone amounted to more than 1,000 pages.<sup>236</sup>

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<sup>233</sup> DSU, *supra* note 22, at art. 11.

<sup>234</sup> DSU, *supra* note 22, at art. 12.8.

<sup>235</sup> Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products (EC – Asbestos)*, WT/DS135/R (Sept. 18, 2000).

<sup>236</sup> See Interim Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (GMOs)*, WT/DS291-291-293/INTERIM (Feb. 7, 2006).

### 5. Adoption of panel reports

The current WTO process for adopting panel reports is, in large part, a result of the fortuitous abolition of the veto power in the adoption of panel reports under the old GATT. The main reason for this change was the adoption of Section 301 of the U.S. Trade Law in 1988, which allowed unilateral trade sanctions when the United States considered (unilaterally) other GATT Members in violation of their GATT obligations.

The other GATT Members viewed this legislation as a threat, and the United States, in response, complained of the weak and slow dispute procedure, which did not efficiently protect U.S. trade interests. As a consequence, they reached a compromise—no veto power to block the most important decisions in the framework of the dispute resolution mechanism (establishment of panels, adoption of panel reports, and authorisation for retaliation), and no unilateral action by WTO Members to decide trade disputes between them.<sup>237</sup>

In the WTO, after a panel has completed its report and has distributed it to the WTO Members, the DSB must adopt it in order for the report to become binding on the disputing parties. The panel report is put on the agenda of the DSB at the request of either disputing party, at which point, every WTO Member has the right to make comments and express opinions concerning the report at the DSB meeting. According to the DSU, the DSB must adopt a panel report not earlier than twenty-days, but not later than sixty days after the date of its circulation to WTO Members, unless one of the disputing parties (the complainant or the respondent, but not third parties) appeals to the Appellate Body.<sup>238</sup>

If there is no appeal, the DSB adopts the panel report, unless a *reverse consensus* arises against its adoption. Under the old GATT, because of the rule of positive consensus, even one single formal objection by a WTO Member was enough to block adoption. In contrast, under the WTO, even a majority against the panel report is not enough to prevent its adoption. After the adoption of the report, the dispute settlement procedure goes into the stage of implementation of the DSB's ruling.

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<sup>237</sup> This compromise also led to the inclusion, upon the insistence of developed countries, and more particularly the United States, of new disciplines within the scope of the WTO, such as intellectual property and trade in services.

<sup>238</sup> In the case of an appeal, the Appellate Body report, together with the panel report as modified by the Appellate Body, will be adopted within thirty days after its circulation to the WTO Members. Technically, the procedure for adoption is the same as that for a panel report.

## VI. CONCLUSIONS

The differences between the panel procedures of the GATT and the WTO should not be overestimated. The WTO panel procedure relies heavily on the practice created during the forty-seven-year existence of the old GATT. It would be insufficient to describe the old GATT dispute settlement procedure solely as “diplomatic,” although it is true that in the first thirty years of the GATT, the panel procedure mainly was of a diplomatic character.

In the 1970s, this diplomatic approach to dispute resolution became inadequate due to the increase of complicated and politically sensitive disputes. This change toward legalization was even more significant in the last fifteen years of the GATT’s existence. Hudec aptly describes this evolution by stating that after 1980, the system “transformed itself into an institution based primarily on the authority of legal obligation.”<sup>239</sup> Therefore, it is not surprising that a more legalistic system emerged after the Uruguay round. However, the legalization of the dispute settlement system cannot be explained solely as a passage from “more politics” in the first years of the GATT to “more law” with the creation of the WTO. Rather, the legal advancements in the panel procedure have been the product of a bidirectional interaction between law and politics. The added complications of trade issues and more extensive legal obligations have created the need for a stronger dispute settlement system that is able to preserve the rights and obligations of WTO Members under the agreements.<sup>240</sup>

Though the GATT panel procedure in the 1980s became more legalized and some procedural improvements were made, it was entirely optional. However, the political pressure to comply with the panel rulings was considerable and helped facilitate efficiency of the procedure. The GATT mechanism was successful, and there is good reason to believe that its successor, the WTO dispute settlement system, will be successful too.

The new WTO panel procedure, theoretically, is much more detailed and improved. The panel reports under the WTO are also more detailed and specific compared to panel reports under the GATT

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<sup>239</sup> Hudec, *An Overview*, *supra* note 166, at 9.

<sup>240</sup> See generally Joost Pauwelyn, *The Transformation of the World Trade*, 104 MICH. L. REV. 1 (2005) (challenging the traditional view of the evolution of the world trading system, which is often explained as a “unidirectional process of legalization focused exclusively on the system’s normative structure” and proposing a bidirectional interaction between law and politics).

1947, and especially those from the first years of the GATT's existence, which "did not always express clear legal results."<sup>241</sup>

The increase of the number of disputes, which have been brought before the WTO in its first years reveals the strong trust WTO Members have in the settlement system. Under the old GATT, many States refrained from starting panel proceedings and abstained from wasting financial resources because they believed the respondent party might block the adoption of the report once the panel process was completed. In the WTO, a large number of cases have been settled before the stage of panel composition possibly because complaints have been used as a negotiating instrument.<sup>242</sup> Thus in light of the compulsory dispute settlement process, a mere threat to resort to the system can induce compliance in some cases.

The GATT legacy still has a considerable impact on WTO panel proceedings. Panelists are still approved by the parties in most cases, secretariat officials are considered servants of the governments rather than of the panels, and the parties exercise a significant control over the panel process. This facet of party control has made some legal scholars suggest a more active role for panelists and the secretariat. The main proponent of a further legalization of the panel process is Hudec, who advocates transition from "party control" to an "independent control" model.<sup>243</sup> This seems a logical continuation of the evolution of the panel process. A rule-based system with clear rules is a step in the right direction because this kind of system will create predictable conditions for business decisions and long-term investments. If the political support remains as strong as it has been since the creation of the GATT in 1947, then the WTO dispute settlement system may correctly be considered the most efficient interstate dispute settlement system in international law.

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<sup>241</sup> HANDBOOK, *supra* note 25, at 57.

<sup>242</sup> Hudec, *An Overview*, *supra* note 166, at 34 (estimating that of the eighty-four disputes filed between January 1, 1994 and January 1, 1998 only forty-four percent have resulted in the appointment of a panel).

<sup>243</sup> In his opinion panels should have a structure similar to that of the Appellate Body because its members are permanent, which avoids the constraints put on the *ad hoc* panelists chosen by the parties. Moreover, the Staff of the Appellate Body is their servant and not the servant of governments. In sum, "[t]his is what might be called 'judicial independence.'" Hudec, *An Overview*, *supra* note 166, at 51–53.

VII. TABLE: THE DIFFERENCES BETWEEN THE GATT  
AND THE WTO PANEL PROCEDURES

<b>GATT</b>	<b>WTO</b>
<ul style="list-style-type: none"> <li>- In the first years of the GATT, the character of the dispute settlement system was diplomatic, although it slowly evolved toward a legalized system.</li> <li>- After the Tokyo Round, the dispute settlement was fragmented.</li> </ul>	<ul style="list-style-type: none"> <li>- The WTO has detailed procedures for the various stages of the dispute settlement including specific time frames.</li> <li>- The WTO Dispute Settlement System is an integrated framework that applies to all covered agreements.</li> </ul>
<p><b>Consultations</b></p> <ul style="list-style-type: none"> <li>- Consultations are derived under GATT Article XXII or XXIII.</li> </ul>	<p><b>Consultations</b></p> <ul style="list-style-type: none"> <li>- Consultations are derived under the DSU and one or more of the covered agreements. These consultations are more formalized, and have specific time limits.</li> </ul>
<p><b>Establishment of a panel</b></p> <ul style="list-style-type: none"> <li>- Consensus in the GATT Council is needed for the establishment of a panel.</li> </ul>	<p><b>Establishment of a panel</b></p> <ul style="list-style-type: none"> <li>- Panel establishment cannot be blocked (reverse consensus in the DSB).</li> </ul>
<p><b>Panel Composition</b></p> <ul style="list-style-type: none"> <li>- In the first years of the GATT, there was no rule to avoid a stalemate when the parties disagreed on the composition of the panels.</li> </ul>	<p><b>Panel Composition</b></p> <ul style="list-style-type: none"> <li>- There are specific rules (solutions) in the DSU when there is no agreement between the disputing parties, regarding the composition of the panel.</li> </ul>
<p><b>Terms of Reference</b></p> <ul style="list-style-type: none"> <li>- Terms of reference had to be approved by the GATT Council after the disputing parties had agreed on them.</li> </ul>	<p><b>Terms of Reference</b></p> <ul style="list-style-type: none"> <li>- There are standard terms of reference, which are to be used if the parties cannot agree on the terms of reference within 20 days from the panel's establishment.</li> </ul>
<p><b>First Written Submissions</b></p> <ul style="list-style-type: none"> <li>- The first written submissions were usually transmitted simultaneously by both parties under the old GATT.</li> </ul>	<p><b>First Written Submissions</b></p> <ul style="list-style-type: none"> <li>- Under the WTO, the claimant sends in its written submissions two to three weeks in advance of the respondent.</li> </ul>
<p><b>First Substantive Meeting</b></p> <ul style="list-style-type: none"> <li>- Under the GATT, the parties often presented the panel a set of facts they agreed upon (so-called "cluster of undisputed facts")</li> </ul>	<p><b>First Substantive Meeting</b></p> <ul style="list-style-type: none"> <li>- Under the WTO, the parties use every occasion to object to facts and arguments presented by the other party; as a consequence, there are many procedural objections.</li> </ul>
<p><b>Third Party Participation</b></p> <ul style="list-style-type: none"> <li>- No third party participation in panels.</li> </ul>	<p><b>Third Party Participation</b></p> <ul style="list-style-type: none"> <li>- There is significantly more participation by third parties (including amicus briefs, and use of experts' group or individual expert's advice). This is because there are more complex legal issues and because almost all complaints are brought under two or more covered agreements.</li> </ul>
<p><b>Submission of the Descriptive Part of the Panel Report</b></p> <ul style="list-style-type: none"> <li>- As of the 1970s, panels started transmitting the descriptive part of the report to the parties. There is no Interim Review Stage under the GATT.</li> </ul>	<p><b>Interim Review Stage</b></p> <ul style="list-style-type: none"> <li>- Submission of the descriptive part of the panel report is given to the parties. Comments are transmitted within two weeks.</li> <li>- There is an Interim Report that is</li> </ul>

GATT	WTO
	<p>submitted to the parties (includes the descriptive part and the panel's findings). Comments on this report may be submitted to the panel.</p> <ul style="list-style-type: none"> <li>- The parties may ask for an additional panel meeting within one week to discuss specific aspects of the report. This meeting is to be held within one or two weeks.</li> <li>- The discussion at the interim review stage shall be included in the final report.</li> </ul>
<p><b>Final Panel Report</b></p> <ul style="list-style-type: none"> <li>- There are no particular time limits. Reports were completed within a period of three to nine months from the panel's establishment in most cases.</li> </ul>	<p><b>Final Panel Report</b></p> <ul style="list-style-type: none"> <li>- The panel report shall be issued to the parties within two weeks after the additional meeting requested at the interim stage.</li> <li>- The report is to be circulated to the parties within six months from panel's composition, three months in cases of urgency.</li> </ul>
<p><b>Panel Report Adoption</b></p> <ul style="list-style-type: none"> <li>- There is no automatic adoption of panel reports. Consensus is needed in the GATT Council.</li> </ul>	<p><b>Panel Report Adoption</b></p> <ul style="list-style-type: none"> <li>- Adoption of the panel report cannot be blocked.</li> <li>- Automatic adoption in the WTO, DSB by <i>reverse consensus</i> within 60 days.</li> <li>- Panel reports are more detailed and legally reasoned. There is a possibility for appeal before the Appellate Body.</li> </ul>
<p><b>Implementation</b></p> <ul style="list-style-type: none"> <li>- The Contracting Parties "should" keep the matter on which they have been given a ruling under close watch.</li> </ul>	<p><b>Implementation</b></p> <ul style="list-style-type: none"> <li>- There is a stronger mechanism for monitoring the implementation of DSB's rulings.</li> <li>- The Member concerned informs the DSB of its intention regarding the implementation of the ruling at a DSB meeting within 30 days of the adoption.</li> <li>- The issue of implementation is placed on the BSD agenda after six months and remains on it until the issue is resolved.</li> <li>- The Member provides a status report of its progress on the implementation of the ruling at each such DSB meeting.</li> </ul>