

The World Trade Organization Dispute Settlement Mechanism*

The Uruguay Round's new dispute settlement mechanism represents the new teeth of the World Trade Organization (WTO). "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system," states the Understanding on Rules and Procedures Governing the Settlement of Dispute.

In the Final Act, WTO members have committed themselves not to take unilateral action against perceived violations of the trade rules. Instead, they have pledged to seek recourse in the new dispute settlement system, and abide by its rules and procedures.

The Understanding emphasizes that prompt settlement of disputes is essential to the effective functioning of the WTO. Thus, it sets out in great detail (27 sections totalling 143 paragraphs plus four appendices) the procedures and the timetable to be followed in resolving disputes -- in contrast with the current General Agreement on Tariffs and Trade (GATT), whose dispute settlement mechanisms are contained in just

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two provisions, Articles XXII and XXIII. The existing GATT procedures have been built up over time through the evolution of customary practice, and were later codified in decisions by GATT contracting parties -- notably, the 1979 Understanding and a provisional streamlining of the system in the 1989 Improvements following the Mid-Term Review of the Round.

Under the WTO, there will be one Dispute Settlement Body (DSB) dealing with disputes arising from any agreement contained in the Final Act. Thus, the DSB will have the sole authority to establish panels; adopt panel and appellate reports; maintain surveillance of implementation of rulings and recommendations; and authorize retaliatory measures in cases of non-implementation of recommendations. This is a significant improvement over the current GATT where dispute settlement is fragmented between the Council and the various Tokyo Round Committees.

Other important new features distinguish the WTO mechanism from that of the GATT. In the WTO, there has to be a consensus against the establishment of panels or adoption of panel reports for these decisions not to be made. The reverse is true for the current system. Thus, parties to a dispute under the new system can no longer block these decisions. Another new feature is the possibility of appealing panel decisions to the standing Appellate Body. In line with the new integrated nature of the WTO mechanism, complainants, as a last resort, may take retaliatory action -- suspend concessions -- under an agreement different from the one covering the dispute against a member which has not implemented the recommendations adopted by the panel.

The following briefly describes the various stages involved in settling disputes within the WTO:

1. Consultations

The aim of the WTO dispute settlement mechanism is "to secure a positive solution to a dispute." Thus, developing a mutually acceptable solution consistent with WTO provisions to a problem between members is encouraged throughout the dispute settlement process.

The first stage of settling disputes is the holding of consultations among the members concerned. Any member should reply promptly (within 10 days) to a request for consultations, and enter into consultations within 30 days from the date of request. To ensure transparency, any

request for consultations should be transmitted to the DSB in writing, providing the reasons for the request, including identification of the measure at issue and the legal basis for the complaint.

In the event that consultations fail, and if parties so agree, the case can be brought to the WTO Director-General, who, acting in an *ex-officio* capacity, will be ready to offer good offices, conciliation, or mediation to settle the dispute.

2. Establishment of Panels

If the members concerned do not respond to a request for consultations within 10 days or if the consultations fail to arrive at a solution after 60 days, the complainant can ask the DSB to establish a panel to examine the case.

The establishment of a panel is almost automatic. The procedures require that the DSB should establish a panel no later than the second time it considers the panel request, unless there is a consensus against the decision. This means that the government, which is the subject of the complaint, cannot block the establishment of the panel.

The determination of the panel's terms of reference as well as its composition is also straightforward. The Understanding provides for standard terms of reference that mandate the panel to examine the complaint in the light of the agreement cited, and to make findings that will assist the DSB in making recommendations or in giving rulings provided for in that agreement. The panel may operate under different terms of reference, if the parties concerned so agree.

The panel is to be constituted within 30 days of its establishment. The WTO Secretariat will suggest the names of three potential panelists to the parties to the dispute, drawing whenever necessary on a list of qualified persons (including, for example, those who have previously participated in panel proceedings, or have been representatives to GATT, or have taught international trade law). If the parties cannot agree on the panelists within 20 days from the establishment of the panel, at the request of either party, the Director-General, in consultations with the DSB chairman and the chairman of the relevant committee or council, will appoint the panelists. The panelists will serve in their individual capacities and will not be subject to government instructions.

For cases involving several complaints, the Understanding provides that a single panel should examine such complaints whenever feasible.

Should more than one panel be established to examine complaints relating to the same matter, the same persons will serve as panelists on each of the separate panels.

3. Panel Procedures

The Understanding provides that the period within which the panel will conduct its examination of the case -- that is, from the time the terms of reference and composition of the panel are agreed to the time the panel's final report is given to the parties to the dispute -- should not exceed six months. In case of urgency, including those cases relating to perishable goods, the time frame is shortened to three months. In no case should the period from the establishment of the panel to the circulation of the report to the members exceed nine months.

Detailed working procedures for the panel are set out in the Understanding as follows:

- Within a week after agreement on the terms of reference and composition of the panel, the panel is to fix the timetable for its work in consultation with the parties concerned.
- Each party to the dispute is to transmit to the panel its submission on the facts and arguments in the case, in advance of the first substantive meeting.
- At the first substantive meeting with the parties, the panel will first ask the complainant to present its case. The responding party will then present its defense. Third parties who have notified the panel of their interests in the dispute will also be invited to present their views.
- Formal rebuttals are to be made at the second substantive meeting, at which the respondent takes the floor first, followed by the complainant. The panel may at any time ask questions to the parties and request for detailed clarifications.
- In cases where a party raises scientific or other technical matters, the panel may appoint an expert review group to provide an advisory report.
- The panel submits the descriptive (factual and argument) sections of its report to the parties, giving them two weeks to comment.
- The panel submits an interim report, including its findings and conclusions, to the parties, giving them one week to request a review. The period of review should not exceed two weeks.

during which, the panel may hold additional meetings with the parties.

- o The panel submits its final report to the parties. Three weeks later, the report will be circulated to WTO members.

The Understanding provides that in the event of a conclusion that the measure in question is inconsistent with the terms of the relevant WTO agreement, the panel shall recommend the member concerned to make the measure conform with that agreement. It may also suggest ways of implementing the recommendations through the measure.

4. Adoption of Panel Reports

The WTO procedures provide that a panel report is to be adopted by the DSB within 60 days of issuance, unless one party notifies its decision to appeal or a consensus emerges against the adoption of the report.

The DSB cannot consider the adoption of a panel report earlier than 20 days after it has been circulated to members. Members which have objections to the report are required to state their reasons in writing, for circulation before the DSB meeting, where the panel report will be considered.

5. Appellate Review

A new feature of the WTO dispute settlement mechanism gives the possibility of appeal to either party in a panel proceeding. However, any appeal shall be limited to issues of law covered in the panel report and the legal interpretation developed by the panel.

All appeals will be heard by the standing Appellate Body to be established by the DSB. This Appellate Body will be composed of seven persons -- broadly representative of the WTO membership -- who will serve four-year terms. These members are persons of recognized standing in the field of law and international trade and not affiliated with any government.

Three members of the Appellate Body sit at any one time to hear appeals. They can uphold, modify, or reverse the legal findings and conclusions of the panel. As a general rule, the appeal proceedings are not to exceed 60 days but in no case shall they exceed 90 days.

Thirty days after issuance, the Appellate Body's report is to be adopted by the DSB and unconditionally accepted by the parties to the dispute -- unless there is a consensus against its adoption.

6. Implementation of Recommendations

The Understanding stresses that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes [for] the benefit of all members."

At a DSB meeting held within 30 days of the adoption of the panel or appellate report, the party concerned must state its intentions in respect of the implementation of the recommendations. If it is impractical to comply immediately, the member will be given a "reasonable period of time," which will be set by the DSB, to do so. If it fails to act within this period, it is obliged to enter into negotiations with the complainant in order to determine a mutually acceptable compensation.

If, after 20 days, no satisfactory compensation is agreed, the complainant may request authorization from the DSB to suspend concessions or obligations against the other party. That procedures provide that the DSB should grant this authorization within 30 days after the expiration of the "reasonable period of time," unless there is consensus against the request.

If the member concerned objects to the level of suspension, the matter will be referred to arbitration. This will be carried out by the panel members, and if this is not possible, by an arbitrator appointed by the WTO Director-General. Arbitration should be completed within 60 days from the expiration of the "reasonable period of time," and the resulting decision should be accepted by the parties concerned as final and not subject to another arbitration. The DSB, upon request, then authorizes the suspension of concessions consistent with the findings of the arbitrator, unless there is a consensus to reject the request.

In principle, concessions should be suspended in the same sector as that in issue in the panel case. If this is not practicable or effective, the suspension can be made in a different sector of the same agreement. In turn, if this is not effective or practical, and if the circumstances are serious enough, the suspension of concessions may be made under another agreement.

In any case, the DSB will keep under surveillance the implementation of adopted recommendations or rulings, and any outstanding case will remain on its agenda until the issue is resolved.