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# Dispute Settlement in the WTO: Policy and Jurisprudential Considerations

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## 1. THE POLICIES OF DISPUTE SETTLEMENT PROCEDURES

For a variety of reasons, dispute settlement procedures have been growing in importance as an essential part of international economic relations and the diplomacy for those relations. The last decade of GATT, 1985-1994, saw greatly increased attention to the dispute settlement procedures, and that attention continued to increase after the Uruguay Round treaty introduced numerous reforms in those procedures. Both WTO and important national leaders have lauded the dispute settlement procedures in the WTO, making them almost the centerpiece of the new Organization. For example, WTO Director General Renato Ruggiero said in a September 30, 1996 Special Report concerning to preparations for the first Ministerial Conference in December 1996 in Singapore:

> "One success that stands out above all the rest is the strengthening of the **dispute settlement** mechanism. This is the heart of the WTO system. Not only has it proved credible and effective in dealing with disputes, it has helped resolve a significant number at the consultation stage. Furthermore, developing countries have become major users of the system, a sign of their confidence in it which was not so apparent under the old system."

Officials of the United States have several times expressed satisfaction with the procedures and noted their importance in U.S. diplomacy.

However, throughout the history of GATT, and now in the WTO, there has been some ambivalence about the appropriate role of dispute settlement procedures. To over-generalize a bit, there were roughly two viewpoints: one view favors a "negotiation" or "diplomacy" oriented approach that dispute settlement procedures should not be juridical or "legalistic," but should simply be procedures that would assist negotiators to resolve differences through negotiation and compromise. Another approach

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views the dispute settlement procedure as a relatively disciplined juridical process by which an impartial panel could make objective rulings about whether or not certain activities were consistent with GATT obligations.

This author has suggested that the rule oriented approach, particularly as to international economic affairs, has considerable advantage. It is this approach that focuses the disputing parties' attention on the *rule*, and on predicting what an impartial tribunal is likely to conclude about the application of a rule. This in turn will lead parties to pay closer attention to the rules of the treaty system and can lead to greater certainty and predictability which is essential in international affairs, particularly *economic* affairs driven by market-oriented principles of decentralized decision making, with participation by millions of entrepreneurs. Such entrepreneurs need a certain amount of predictability and guidance so that they can make the appropriate efficient investment and market development decisions.

With a rule-oriented approach, then, there often could be some reduction in risk for the various decisions and for longer term planning. Thus, the need for a higher rate of return to accommodate the "risk premium" of a venture would be reduced, and therefore the risk premium lowered. This should result in a general increase in the efficiency of various economic activities, contributing to greater welfare for everyone.

The phrase "rule orientation" is used here to contrast with phrases such as "rule of law," and "rule based system." Rule orientation implies a less rigid adherence to "rule" and connotes some fluidity in rule approaches which seems to accord with reality, (especially since it accommodates some bargaining or negotiation). Phrases that emphasize too strongly the strict application of rules sometimes scare policy makers, although in reality they may amount to the same thing. Any legal system must accommodate the inherent ambiguities of rules and the constant changes of practical needs of human society. The key point is that the procedures of rule application, which often center on a dispute

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Footnotes and references have been omitted and are available from the author on request.

settlement procedure, should be designed so as to promote as much as possible the stability and predictability of the rule system. For this purpose the procedure must be credible, "legitimate," and reasonably efficient (not easy criteria).

We will explore in this paper the rule system of the WTO as reflected mainly in the new and innovative WTO dispute settlement procedures. To do this appropriately, however, requires some retrospective look at the history of GATT on this subject, partly because to understand this history is to greatly enhance the understanding of the WTO procedures. Also important is that the WTO Charter explicitly provides that the WTO shall be "guided by" GATT history, and one purpose of this provision is to preserve the "jurisprudence of GATT," which is mostly represented by the GATT dispute settlement reports.

In considering the WTO dispute processes, the goal is not just to describe the procedures and the practice under them, but also to probe a number of fairly fundamental jurisprudential questions about these procedures. Some of these questions have been apparent for some time; others have only begun to emerge during the early years of actual application of the WTO Agreement. These questions include the following (but this is by no means a complete inventory):

1) Is the process primarily rule-oriented or diplomacy-negotiation oriented (an issue with 40 years of history)?

2) What should be the "standard of review" or "margin of appreciation" to be applied by dispute panels in reviewing national government decisions called into question by a dispute complaint?

3) How should the panel process treat questions of fact?

4) What is the legal obligation of national governments to submit to the dispute procedures of the WTO?

5) How should procedural and "preliminary" questions be decided in the WTO system? Must these go to a panel which must be constituted, or will there develop a process or practice for some of these questions to be handled by standing institutions?

6) What is the relationship of the WTO jurisprudence to the concepts of general international law?

7) In particular, what should be the approach of the panels about treaty interpretation, including the sensitive issue of relying on preparatory work?

8) What is the legal obligation resulting from a dispute process final adopted report? Is there an obligation to perform the adopted recommendations of the dispute report, or is there only an obligation to "compensate" for non-performance?

9) What is the fundamental role of the new Appellate Body? Is it the equivalent of a constitutional court? How cautious or "judicially restrained" should it be?

These are some of the questions to be addressed in the following sections.

## 2: THE GATT DISPUTE SETTLEMENT PROCEDURE AND ITS EVOLUTION

As indicated in the previous section, one of the interesting and certainly more controversial aspects of the GATT as an institution was its dispute-settlement mechanism. It is probably fair to say that this mechanism was unique. It was also flawed, due in part to the troubled beginnings of GATT. Yet these procedures worked better than might be expected, and some could argue that in fact they worked better than those of the World Court and many other international dispute procedures. A number of interesting policy questions are raised by the experience of the procedure, not the least of which is the question already mentioned as to what should be the fundamental objective of the system -- to solve the instant dispute (by conciliation, obfuscation, power-threats, or otherwise), or to promote certain longer term systemic goals such predictability and stability of interpretations of treaty text.

The difference of opinion about the basic purpose or goals of the dispute settlement process in the GATT system has not often been explicit, and the same individuals sometimes express a preference for opposite poles of this difference without realizing it. Of course, the matter is more one of appropriate balance along a spectrum than it is of choosing one extreme or the other. Nevertheless, it is important to understand the difference and to describe the dichotomy helps to do so.

There are at least two important questions: one historical, one of future policy. The historical question is whether the GATT preparatory work and practice through its decades established a goal of dispute-settlement more oriented towards "conciliation and negotiation" or toward "rule orientation." The future policy question is, which of these *ought* to be the goal?

With regard to the first question, the record is somewhat mixed. Despite the many statements of some writers and diplomats that the GATT is merely a "negotiating forum" primarily designed to "preserve a balance of concessions and obligations," there is considerable historical evidence to the contrary. At least one draftsman of GATT said at the preparatory meetings that the Agreemen ". . . should deal with these subjects in precise detail so that the obligations of member governments would be clear and unambiguous. Most of these subjects readily lend themselves to such treatment. Provisions on such subjects, once agreed upon, would be self-executing and could be applied by the governments concerned without further elaboration or international action."

The original intention was for GATT to be placed in the institutional setting of the International Trade Organization (ITO), and the draft ITO Charter called for a rigorous dispute-settlement procedure which contemplated effective use of arbitration (not always mandatory, however), and even appeal to the World Court in some circumstances. Clair Wilcox, Vice-Chairman of the U.S. Delegation to the Havana Conference, notes that the possibility of suspending trade concessions under this procedure was ". . . regarded as a method of restoring a balance of benefits and obligations that, for any reason, may have been disturbed. It is nowhere described as a penalty to be imposed on members who may violate their obligations or as a sanction to insure that these obligations will be observed. But even though it is not so regarded, it will operate in fact as a sanction and a penalty. . . ." He further notes the procedure for obtaining a World Court opinion on the law involved in a dispute, and says, "A basis is thus provided for the development of a body of international law to govern trade relationships."

Although the ITO Charter would have established a rather elaborate dispute-settlement procedure, the GATT had only a few paragraphs devoted to this subject. One can argue that there are a

number of “dispute settlement” procedures distributed throughout the GATT (raising the issue of what we mean by that phrase), but the central and formal procedures clearly are those found in Articles XXII and XXIII. The first of these simply establishes the right to consult with any other contracting party on matters related to the GATT -- a right which does not impose a major obligation, but which is nevertheless useful. Such language should be interpreted to rule out the all too frequently heard argument against allowing a request to consult on some potential legislative or executive action, namely that the matter was “premature.”

Article XXIII was the centerpiece for dispute settlement in GATT. It also provided for consultation as a prerequisite to invoke the multilateral GATT processes. Three features of these processes can be stressed: (1) they were usually invocable on grounds of “nullification or impairment” of benefits expected under the Agreement, and did *not* depend on actual breach of legal obligation; (2) they establish the power for the CONTRACTING PARTIES not only to investigate and recommend action, but to “give a ruling on the matter”; and (3) they gave the CONTRACTING PARTIES the power in appropriately serious cases to authorize “a contracting party or parties” to suspend GATT obligations to other contracting parties. Each of these features has important interpretations and implications, and although Article XXIII does not say much about them, the procedures followed to implement these principles have evolved over the four decades of practice into a rather elaborate process.

Originally the key to invoking the GATT dispute-settlement mechanism was almost always “nullification or impairment,” an unfortunately ambiguous phrase, and one that might connote a “power” or “negotiation” oriented approach. It was neither sufficient nor necessary to find a “breach of obligation” under this language, although later practice has made doing so important, as we shall see. An early case in GATT defined the nullification or impairment (N or I) phrase as including actions by a Contracting Party which harmed the trade of another, and which “could not reasonably have been anticipated . . .” by the other at the time it negotiated for a concession. Thus the concept of “reasonable expectations” was introduced, which is almost a “contract” type concept. But even this elaboration is

ambiguous.

At the beginning of GATT's history, disputes were generally taken up by the diplomatic procedures. At first they were dealt with at semi-annual meetings of the CONTRACTING PARTIES (CPs). Later they would be brought to an "intercessional committee" of the CPs, and even later were delegated to a working party set up to examine either all disputes, or only particular disputes brought to GATT.

However, around 1955 a major shift in the procedure occurred, largely because of the influence of the then Director General, Eric Wyndham-White. It was decided that rather than use a "working party" composed of nations (so that each nation could designate the person who would represent it, subject to that government's instructions), a dispute would be referred to a "panel" of experts. The three or five experts would be specifically named and were to act in their own capacities and not as representatives of any government. This development, it can be argued, represented a shift from primarily a "negotiating" atmosphere of multilateral diplomacy, to a more "arbitrational" or "judicial" procedure designed to arrive impartially at the truth of the facts and the best interpretation of the law. Almost all subsequent dispute procedures in GATT (and the new WTO) have contemplated the use of a panel in this fashion.

In 1962 an important case was brought by Uruguay, alleging that various practices of certain industrial countries were violations of the GATT obligations. The Panel grappled with the language of Article XXIII which called for "nullification or impairment" as the basis of a complaint, but the Panel decided to push the jurisprudence beyond the language, and determined in its report that any "violation" of the GATT would be considered a "prima facie nullification or impairment" which required a defending Contracting Party to carry the burden of proving that nullification or impairment did NOT exist. This case, followed by many subsequent GATT dispute panels, reinforced a shift in the focus of GATT cases towards the treaty obligations of the GATT, i.e., in the direction of rule orientation. The panels still talked about the need to facilitate settlements and sometimes the panels acted like mediators.

But in some cases occurring much later, panels which tried too much to "mediate" were criticized for not developing more precise and analytical "legal" approaches.

During the Tokyo Round negotiation, there was some initiative taken to improve the dispute settlement processes of the GATT. The so-called "Group Framework Committee" of the negotiation was given this task, among others. However, partly because of the strong objection of the European Community (EC) to any changes in the existing procedures, this effort did not get very far. The result was a document entitled, "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance," which was adopted by the CONTRACTING PARTIES at their thirty-fifth Session in Geneva, November 1979.

This Understanding described the procedures of the GATT dispute settlement, noting the requirement of consultation as the first step, and providing explicit recognition of a conciliation role for the GATT Director General (almost never utilized). If these steps did not result in a settlement, then there was provision for a panel process (on decision of the CONTRACTING PARTIES usually acting through their "Council"). There was some ambiguity whether the complaining party had a *right* to a panel process. If the process went forward, there was provision for oral and written advocacy from the disputants, and a written report by the panel. The Understanding reinforced the concept of the *prima facie* nullification or impairment and permitted the use of nongovernment persons for panels while stating a preference for government persons.

The procedure under GATT was for the panel to make its report and deliver it to the "Council" which was the standing body of the GATT, which met regularly and disposed of most of the business of GATT. (This body was not provided in the GATT text, but arose through practice and decision of the CONTRACTING PARTIES.) The practice then became firmly established that if the Council approved the report by consensus, it became "binding". If it did not approve, then the report would not have a binding status. The problem was "consensus". In effect, the procedure which relied on consensus meant that the nation which "lost" in the panel and might otherwise be obligated to follow the panel obligations,

could "block" the council action by raising objections to the consensus. Thus, the losing party to the dispute could avoid the consequences of its loss. This "blocking" was deemed to be the most significant defect in the GATT process.

Subsequent to the 1979 Understanding, there was continued dissatisfaction in GATT about the dispute-settlement procedures. At the 1982 Ministerial Meeting, a new attempt to improve them was made, again with modest success. The resulting resolution suggests the possibility of departing from the tradition of requiring a consensus to approve a panel report, so that the "losing" party could not block or delay that approval, but subsequent practice did not seem much improved. Later, many GATT members continued to talk of the need for improving procedures, and this subject was included in the Punta del Este Declaration, establishing the framework for the eighth (Uruguay) round of trade negotiations.

In the 1980s, as the procedures became more legally precise and juridical in nature, there developed the idea that there were two types of cases in GATT: the violation cases (based on the prima facie concept), and certain "non-violation cases," which were cases not involving a violation, but nevertheless alleging "nullification or impairment". In fact, the non-violation cases have been relatively few in the history of GATT. One group of scholars has indicated that there are only from three to eight cases of this type in the history of GATT (out of several hundred total cases.) Nevertheless, some of these non-violation cases have been quite important.

A 1988 panel report pushed the prima facie concept even one step further. The case was a complaint (sometimes called the "superfund" case) by the EC, Mexico, and Canada against the United States for the effects of the U.S. 1986 tax legislation which taxed imported petroleum products. Since the tax on imported products was admittedly higher than that for domestic products, the United States. did not deny that the Article III national treatment obligation had been violated. But the United States then prepared to prove that the small tax had not caused nullification or impairment, by using trade flow statistics to show that no effects on the flow occurred because of the tax. The panel refused to examine this proof. It noted that "there was no case in the history of the GATT in which a Contracting Party had

successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment." It then also noted "although the CONTRACTING PARTIES had not explicitly decided whether the presumption . . . could be rebutted, the presumption had in practice operated as an irrefutable presumption." The panel said that Article III:2, first sentence, "obliges the contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects. . . . A change in the competitive relationship contrary to that provision must consequently be regarded ipso facto as a nullification or impairment of benefits accruing under the General Agreement." Therefore, the panel concluded, a demonstration that a measure was inconsistent with Article III:2 first sentence has no or insignificant effects would ". . . in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."

When one reflects on this history of the GATT dispute settlement process, some generalizations seem both apparent and quite remarkable. With very meager treaty language as a start, plus divergent alternative views about the policy goals of the system, the GATT, like so many human institutions, to some extent took on a life of its own. Both as to the dispute procedures (a shift from working parties to panels), and as to the substantive focus of the system (a shift from general ambiguous ideas about "nullification or impairment," to more analytical or "legalistic" approaches to interpret rules of treaty obligation), the GATT panel procedure became more rule oriented. The oil fee case may perhaps be a high water mark in this regard, since it arguably turns the treaty language "on its head." That is, by stating that a "prima facie case" cannot be rebutted, it makes the "presumption" of nullification or impairment derive ipso facto from a violation, thus almost discarding the nullification or impairment concept in favor of a focus on whether or not a "violation" or "breach" of obligation exists.

The GATT jurisprudence was thus brought almost full circle by the evolutionary case by case process of the procedure. However, before one accepts completely this conclusion, it must be said that it

is not clear that the implications of the oil fee case -- non rebutability -- will be pursued in the future. The language of the Dispute Settlement Understanding (DSU) largely copied from the 1979 Understanding on Dispute Settlement still states that the prima facie N or I creates a presumption so that then "it shall be up to the Member against whom the complaint has been brought to rebut the charge." This may lead panels to back away from some of the implications of the oil fee panel under GATT.

The GATT process still had a number of problems, mostly due to the "birth defects" resulting from the flawed GATT origins. These flaws included:

- sparse language with little detail about goals or procedures;
- imprecise power of the Contracting Parties concerning supervision of the dispute settlement process, leading to the practice of requiring consensus for many decisions which gave rise to two "blocking" defects, whereby a Contracting Party unwilling to submit the dispute procedure or unwilling to accept a panel report could block a decision by raising an objection which then prevented "consensus";
- the first blocking potential could occur at the time of request for a panel procedure by a complaining party; the defendant sometimes would block this decision, although by about the mid 1980s such a blocking vote became very diplomatically difficult to use;
- the second and more serious blocking problem would occur at the time the GATT Council (or a committee for one of the Tokyo Round agreement procedures) would be asked to "adopt" a panel report. As mentioned above, the losing party could object, defeat the consensus, and thus block the adoption of a report. During the 1980s various attempts to fix this problem were proposed, but none succeeded.
- because there were separate dispute settlement procedures in various Tokyo round specific "code" agreements, dispute settlement procedures were fragmented; also some disputes would occur over which procedure to use; and
- there had been several unfortunate instances of a contracting party government interfering with

potential panel decisions by inappropriately pressuring a particular panelist

Not all of these problems have been solved, of course, but the next section will explore how the Uruguay Round Dispute Settlement Understanding (DSU) has measurably improved the system.

Despite these various problems and defects, however, the GATT dispute settlement process was admired enough that various trade policy interests sought to bring their subjects under it. This was one of the motivations which led both the intellectual property interests and the services trade interests to urge those subjects to be included in the Uruguay Round (UR). The UR result, of course, applies the new DSU procedures to those subjects. In addition, both the U.S.-Canada free trade agreement, and the subsequent NAFTA (North American Free Trade Agreement with U.S., Canada and Mexico) largely adopted the GATT type processes and language (and for certain cases establishing even more powerful procedures.)

## 3. THE URUGUAY ROUND DISPUTE SETTLEMENT UNDERSTANDING AND OUTLINE OF PROCEDURE

The new text solves many, although not all, of the issues that plagued the GATT dispute settlement system. It accomplishes the following:

1) It establishes a unified dispute settlement system for all parts of the GATT/WTO system, including the new subjects of services and intellectual property. Thus, controversies over which procedure to use will not occur.
2) It clarifies that all parts of the Uruguay Round legal text relevant to the matter at issue and argued by the parties can be considered in a particular dispute case.
3) It reaffirms and clarifies the *right* of a complaining government to have a panel process initiated, preventing blocking at that stage.
4) It establishes a unique new appellate procedure that will substitute for some of the former procedures of Council approval of a panel report. Thus, a panel report will effectively be deemed adopted by the new Dispute Settlement Body (DSB), unless it is appealed by one of

the parties to the dispute. If appealed, the dispute will go to an appellate division. After the Appellate Body has ruled, its report will go to the DSB, but in this case it will be deemed adopted unless there is a consensus *against* adoption, and presumably that negative consensus can be defeated by any major objector. Thus the presumption is reversed, compared to the previous procedures, with the ultimate result that the appellate report will come into force as a matter of international law in virtually every case. The opportunity of a losing party to block adoption of a panel report will no longer be available.

The DSU is designed to provide a single unified dispute settlement procedure for almost all the Uruguay Round texts, however there remain some potential disparities. Many of the separate documents entitled "agreements"including the GATT in Annex 1A and certain other texts such as the subsidies "code," or the textiles text, have clauses in them relating to dispute settlement. But the DSU Article 1 provides that the DSU rules and procedures shall apply to all disputes concerning "covered agreements" listed in a DSU Appendix, so presumably this trumps most of the specific dispute settlement procedures. However, even the DSU provisions allow for some disparity. For example parties to each of the plurilateral agreements (Annex 4) may make a decision regarding dispute settlement procedures and how the DSU shall apply (or not apply?). In addition another DSU appendix specifies exceptions for certain listed texts. Thus the goal of uniformity of dispute settlement procedures may not be 100% achieved. Actual practice will determine to what degree this may be a problem.

As of October 1997, there have been more than 100 complaints initiated under the new dispute settlement process. That is two or three times the normal rate of application for dispute settlements, as witnessed and experienced in the later years of GATT. Perhaps this is a tribute to the new process. These complaints involved about 69 discrete cases, (because many complaints now have multiple complainants). Already, there are 19 cases that seem settled, which is a very encouraging aspect of the new process. Indeed, the tendency towards settlement is partly influenced by the automaticity of the system mentioned earlier.

Although the DSU text has clauses that arguably go both ways, if you read the DSU through carefully and inventory the clauses that are relevant, you can easily come to the conclusion that the DSU opts for the rule-oriented procedure. After several years of appeals and with an Appellate Body that obviously seems to lean towards that direction very strongly, this will likely be even more definitive. In a later section we explore this further.

The issue of a nation-state's participation in an international dispute settlement procedure poses sovereignty questions of a different sort. If a nation has consented to a treaty and the norms it contains, why should it object to an external process which could rule on the consistency of nations actions with the treaty norms? It might be argued that such objections manifest a lack of intent to follow the norms, sort of accepting the treaty with fingers crossed behind the back. Indeed, there may be some elements of this thinking in this context. However, it could also be suggested that a nervousness about international dispute procedures reflects a government's desire to have some flexibility to resist future strict conformity to norms in certain special circumstances, particularly circumstances that could pose great danger to the essential national objectives. This is sort of an "escape clause" idea where a nation could accept norms with sincere intent to follow them except in the most severe and egregious cases of danger to the nation or to its political system. (Candidly though, it may also be noted that danger to the political fortunes of the ruling party in such nation may take on great weight in these considerations.)

Apart from these "escape clause" notions, however, there is an institutional concern that the dispute procedures may not be objective, may be subject to procedural irregularities, overreaching or may have other important defects that even other nations would recognize, but which are not redressed by the treaty or its institutional structure. This danger, either at the outset or developing at some later time, could legitimately constrain a nation's willingness to enter into stringent commitments to a dispute settlement procedure.

Clearly some of these considerations played a part in the U.S. "Great Sovereignty Debate of 1994." The objections raised to dispute procedures may thus not be objections to the substance of the

rules discussed in the previous sub-part, but may be objections to the nature, stringency, or automaticity of the enforcement mechanisms for those rules. Since international institutions are generally less sophisticated or elaborate than most national institutions, various problems can be feared, such as the difficulty of changing treaties and treaty norms that can become seriously out of date, or the methods of filling in the details for seriously ambiguous text which is often associated with treaties drafted by many countries. The text of the WTO "Charter" suggests some of these worries; for example the super-majority procedure included in that text for decisions on "formal interpretations." Likewise the DSU reflects a number of hedges and concerns about international dispute settlement.

The major change is the elimination of "blocking" when the DSB considers the report. Since the report is deemed adopted unless there is a "consensus" against adoption (the "reverse consensus"), and since the "winning party" could always object, the adoption is considered to be virtually automatic. The "quid pro quo" for this automaticity, however, is the appeal which is now for the first time allowed. If an appeal is taken, then the report is not "adopted"; instead an appellate division of three individuals drawn from a permanent roster of seven individuals (with renewable four year staggered terms), considers the first level report, receives arguments from the parties, and writes its own report. This report also is sent to the DSB where the same "reverse consensus" rule applies to adoption, again making it virtually certain to be adopted. It is this "automaticity" that scares some diplomats and critics of the WTO system, although in many other international tribunals "automaticity" in the sense of no opportunity to block a report, also exists.

The DSU then has a series of detailed rules regarding an "enforcement" phase if a losing party acts unwilling to carry out the "recommendations" of the report as adopted by the DSB. These rules provide for "compensation" with trade measures, and for certain other pressures such as continuous monitoring to enhance the implementation of the dispute results.

In the U.S. 1994 debate, some interests testified that the United States should include in its implementing legislation certain measures regarding dumping law, even if those would appear to be

vulnerable to dispute procedure challenges at some future time. Other witnesses argued against the WTO, partly because the dispute procedure was "tougher," and no longer permitted a single nation to "block" acceptance of a dispute report. There was criticism of the GATT panels ("decisions by three faceless bureaucrats in Geneva"), and thus of the likely form of the WTO process. Criticism was also targeted at the secrecy of the procedures, the lack of opportunity of private groups (non-government organizations etc.) to offer views and evidence, the worry about conflict of interest of the panelists, a worry that the WTO secretariat lawyers would be biased and have too much influence on the panels and appeals, etc. Indeed, although there has been important efforts to "open up" the WTO procedures (even those relating to decision making discussed above), many constructive critics of the WTO feel there is much more that must be done.

A very important consideration affecting a nation's willingness to accept the WTO dispute procedures is that nation's view of the way the treaty and its institutions should play a role in its international economic diplomacy. The United States. (as well as many other nations) often has expressed the view that the GATT and now WTO treaty texts are vitally important to improving a "rule oriented" international economic system, which should enhance the predictability and stability of the circumstances of international commerce and in turn should allow private entrepreneurs to better plan for longer term investment and other decisions. In short, a basic goal is to reduce the "risk premium" associated with commerce between nations with vastly differing governmental and cultural structures. If a nation wishes to benefit from these policies, then it becomes difficult to oppose dispute procedures when they impinge on it. There is a "reciprocity" element in these conditions, and this must be taken into account in reflecting on the weight to be given "sovereignty objections."

The United States has explicitly made these considerations part of its diplomacy and has often expressed the view that the rules of GATT and the WTO are vital for U.S. commerce, particularly U.S. exports. The United States was the most frequent initiator of dispute settlement procedures in GATT and continues in the WTO with the same approach. It learned very early in the WTO history that to appear to

"thumb its nose" at the dispute procedures posed very serious diplomatic risks to its status in the WTO and therefore to the potential usefulness of the WTO to the U.S.

How does all this fit the "sovereignty objections"? Again, it is abundantly clear that "sovereignty" is not a unitary concept, but is rather a series of particular considerations centered around the problem of allocation of power. Thus when objection is made to the United States accepting the WTO because of the WTO dispute settlement procedures, the specific ("decomposed") issues of that objection are substantially different from those regarding the problem of treaty norm application, or the institutional structure of decision making. In addition, the sovereignty objection really could be a series of specific objections about the nature or details of the dispute procedure. These in turn must be considered in the aggregate (unless there were options which allowed a nation to accept some details but not others), and that aggregate weighed against the policy advantages of belonging. "Sovereignty" thus is not a magical wand that one waives to ward off any "entanglement" in the international system, but rather is a policy weighing process. The policies most often regard the question of allocation of power: should this nation accept the obligation to allow certain decisions affecting it (or its view of international economic relations) to be made by an international institution rather than retaining that power in the national government?

As "heroic" as they may appear, the dispute procedures of the WTO have a number of features which are obviously designed to "protect sovereignty" of the WTO members, and prevent too much power being allocated to the dispute process. Many different illustrations could be described here, including by way of example: (1) the obligation to comply with a dispute ruling; (2) the legal precedent effect of a dispute report; (3) the standard of review by which the WTO panels examine national government actions; and (4) the broad question of "judicial activism" or worries about panels stretching interpretations to achieve certain policy results which they favor.

The DSU provides some of the procedures for appeals, in particular that appeals will be considered by appellate divisions of three of the seven Appellate Body members, which shall be limited

to issues of law covered in the first level panel report and legal interpretations developed by the initial panel in the case; the implication that the appellate division shall only consider issues appealed; and that the appeal may "uphold, modify or reverse the legal findings and conclusions of the panel." Opinions expressed in the appellate report shall be anonymous, and the proceedings shall be confidential.

A potentially significant practice for the appeals work has developed which is sometimes described as the "collegiality principle." While only three Appellate Body members sit on any division, all the other four members are kept informed, receive the relevant documents, and at a certain point in the proceeding gather together in Geneva to discuss the case. By this means the appeal division members receive the advice and judgments of the combined wisdom of other Appellate Body members. Also this process can be important to developing not only a spirit of valuing high quality legal work but in addition should promote an important sense of consistency and continuity among appellate members for future cases which arise.

At the outset and continuing at present, the Appellate Body members are "part time," and work when called upon for appeals and other collegiality or governance (rule making) meetings. But appellate members often must spend 30 or more days in Geneva for each process they sit on, and, with an increasing number of appeals, the work load of these members begins to approach full time. Thus questions are being asked whether the members should be full time, exclude other occupations, and probably reside in Geneva. The fact that the WTO officials assigned a separate office to each of the seven members suggests the possibility that this problem was foreseen at the outset. Time will tell whether full time status and compensation will really occur.

## 4. THE ROLE OF THE DISPUTE SETTLEMENT BODIES: DEFERENCE, JUDICIAL ACTIVISM, CREATIVITY

There are a number of interesting "jurisprudential" subjects involved in the new WTO dispute settlement procedure, a few of which we discuss here.

*a) WTO Jurisprudence Relation to General International Law*

The first Appellate Body report is an extraordinarily interesting one, even apart from the substance of what it was addressing, (the environmental protection matters of U.S. regulation and how they related to at least three different clauses in the GATT, most particularly Article XX of GATT). The flavor of that report is significant. Among other things, the report definitely says that this process and the GATT and WTO generally are a part of "international law" as such. (There has been some dispute as to whether it was a "separate regime," sort of sealed off from normal concepts of international law, but the Appellate Body explicitly states that the WTO is part of international law, and it goes on to engage international law principles of treaty interpretation very deeply referring to the "Vienna Convention on the Law of Treaties"). Arguably this suggests an endorsement of the rule-oriented concept.

*b) The Standard of Review*

A second important issue is that of the standard of review. This section does not address the standard of review of the Appellate Body when it reviews the first level report. Instead it addresses the degree to which the WTO dispute settlement process as a whole, both panel and appellate levels, should second guess national government administrative decisions that relate to treaty clauses in the Uruguay Round.

*c) Judicial Restraint or Activism*

Another "fundamental principle of WTO jurisprudence" is the question of how much "judicial activism," or "judicial restraint" should be exercised by the international system. This question obviously relates to the standard of review, but there are other concepts and ideas that are involved, including how far should an international body "push the envelope" of interpreting ambiguous clauses to suit certain policy preferences, possibly preferences of the panel or appeal body alone, or possibly policy preference that these detect that the negotiators, or currently the governments have? Again the DSU has some interesting clauses on this. Article 3, par. 2 says:

> "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

What does that mean? Arguably it resonates in the direction of a caution to the panels and appeal divisions to use "judicial restraint" and not to be too activist. Of course the U.S. Congress feels quite strongly about that, and in the U.S. Dole Commission proposal, the language "rights or obligations" is picked up again. It is also included, incidentally, in the WTO Charter. So this notion of restraining changes in the rights and obligations of the nation states is quite prevalent in the system.

d) Non-Violation Cases

One potentially very troublesome issue is involved in the unique special attention given to "non-violation" cases. Under the GATT, this attention developed through practice by the language in the GATT text, including the phrase "nullification or impairment" (as discussed above.) This language has been carried into the WTO, and for the first time, a separate type procedure under the DSU has been designed, as the route to take when a non-violation case is pursued. One problem with non-violation cases is the generality of the language "nullification or impairment," which creates great ambiguity about what would be an appropriate way to analyze these cases and to determine when one nation had some sort of right of relief from another nation. It is interesting that in the DSU rules for non-violation cases, there are no similar clauses to those in the violation cases that would suggest that there is an obligation to actually perform recommendations, that is, to bring one's law into consistency with the international rule. The relief allowed under the DSU is merely "negotiation for appropriate compensation". This makes sense, since the basis of a non-violation case is *not* the alleged inconsistency of national laws or practices with an international rule.

## 5. CONCLUSIONS AND THE ISSUE OF RULE ORIENTATION IN THE NEW DISPUTE SETTLEMENT PROCEDURE

What conclusions and perceptions can we make about the new dispute settlement procedures and the experience so far? Perhaps two tentative conclusions (pending more experience and practice under the WTO) can be put forth. First, it seems reasonably clear that the new procedures tend rather strongly

(so far) towards a rule oriented approach. Second, the new procedure clearly has some impact on the "sovereignty" issue, but that is complex.

Regarding rule orientation, there are two ways to analyze the WTO dispute settlement process: the implication of the DSU rules, and the actual practice and the cases.

The language of the DSU is a bit equivocal. On the one hand there is language that arguably emphasizes the rules, such as Article 3:2 which states, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of public international law." The discussion above emphasizing the "obligation to perform" can also be seen as evidence of a rule approach, as also can the procedures that now prevent blocking and the general thrust of the appellate process and opportunity. The experiences of the first stage panels and appellate divisions further seem to emphasize a more "judicial" approach to disputes. The prima facie nullification or impairment principles are restated in the DSU.

On the other hand, some of the old language of GATT suggesting "negotiation" and diplomacy approaches might be read as perpetuating some of the opposing earlier views of GATT. DSU Article 3:4 says, "Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter . . .," but it does go on to say "in accordance with the rights and obligations . . ." of the DSU and the covered agreements. The DSU also requires settlements to be consistent with the agreements, and to be reported to the relevant WTO bodies.

Turning to the actual practice so far, one can also detect a pretty strong rule-oriented approach. The appeal case reports so far read much more like a judicial opinion of a national court than did some of the much earlier GATT cases. Indeed, several appellate reports emphasize the general international law nature of these cases, and indicate an attempt by the appellate divisions to carefully and precisely address the legal issues, including some of the procedural issues covered in the Appellate Body's own "working procedures.

There is also some interesting additional evidence that the first-stage panels are more concerned with the possible views of the Appellate Body and the risk of being overturned on appeal, than they are with a possible vote by the DSB to whom dispute reports are formally submitted. Since the DSB virtually cannot overturn the report, this seems natural. But an additional phenomenon has been noticed: this "rule orientation" emphasis seems to be influencing the selection of panelists for first stage proceedings, since disputing governments (it is said) wish to have panelists that perform their duties without being overruled on appeal or at least who can write a legal report that can help persuade the appeal division they are correct. Likewise, the participating governments are finding the process requires them to be much more "legalistic" in their advocacy, to the extent of feeling the need to seek non-government expertise to assist them in cases. To some extent one can also perceive an important shift in attitudes of diplomats and officials who are participating in the WTO/GATT system, often in negotiations for rule formulation or for settlement of disputes. It seems to some observers that the diplomats find it useful or necessary to take much more account of the dispute settlement procedures in their negotiations. A threat to bring a dispute settlement process is deemed a worthwhile "bargaining chip," as news reports note. To some extent this is unsettling to traditional diplomats who worry that their power to defend their country's interests has been diminished or put into the hands of lawyers rather than diplomats or politicians.

As to issues of sovereignty, it is important not to view this subject as one all embracing issue, but rather to desegregate certain features of the dispute settlement process, as noted above. One can perceive different attributes of the system having different approaches, possibly some of them leading in contrary directions on such issues. Issues such as those discussed as "jurisprudential" can have importance for the issues of "sovereignty," weakening the international system thus yielding more to national "sovereignty," or on the contrary strengthening the international system. Some of the following are relevant in this regard:

- the type of persons selected as panelists and their prior experiences;

- the lack of interim measures in the WTO dispute procedures (weakening the international system);
- the DSU language that admonishes against "changing the rights and obligations" of members;
- obligation to perform rather than merely compensate; and
- relative lack of remedies such as monetary compensation, refunds of improper duties, etc.

Finally, one can ponder what the future will bring regarding these important questions. It seems likely that as time goes on, the WTO dispute settlement system will face more and more "jurisprudential" issues, many of which have often been faced in national legal systems. Thus we may see concepts expressed in terms used by the U.S. Supreme Court, or the European Court of Justice, such as "standing," or "justiciability," or "ripeness" or "mootness" playing roles in various proceedings.

The evolution of the practice of the dispute settlement procedures can be very important, and could, as often has been the case of major national and international tribunals, lead to results not easily to have been anticipated by the original draftspersons of the treaty clauses or by governments which accepted them. But that, after all, is a phenomenon that coexists with the human spirit. The direction of these developments will also be strongly influenced by how well the new institutions perform their role in the world economic system. If they do well, they will gain greater credibility and thus likely gain greater leeway to exercise more power in a responsible way not necessarily fully contemplated by the treaty language itself.