

**PROCEDURES FOR DISPUTE SETTLEMENT UNDER THE WORLD
TRADE ORGANIZATION -- GATT 1994 AND UNDER CHAPTER 19 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**

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I. GATT

In the Final Act of the Uruguay Round of Trade Negotiations,² the contracting parties to the General Agreement on Tariffs and Trade (GATT)³ introduced substantial reform into the GATT dispute settlement process. The member states adopted the Agreement Establishing the World Trade Organization,⁴ which contains within it an Annex 2 entitled Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU).⁵ Disputes under the DSU are to be administered by the Dispute Settlement Body, which is the General Council of the World Trade Organization acting in a specialized role.

Under the procedure for the settlement of disputes that has existed in the GATT since the 1950s, complaints of a member state against another member state alleging a violation of an obligation under the GATT agreement often were referred by the GATT Council to a dispute settlement panel. The panel, after hearings that included submissions by the parties, would prepare a report indicating that the alleged offending state had, or had not, violated its obligations under GATT. The authority for the process derived from Article XXIII of the original 1947 GATT Agreement.⁶ The principle problem with the whole process was that the panel reports were not binding as decisions until *unanimously* approved by the GATT Council. As a result, the losing party could delay or block implementation of the panel's decision. Indeed, delays under the old system constituted a serious impediment to the effective functioning of the dispute settlement system. The most serious flaws in the system included: 1) disuse, 2) delays in the establishment of panels, 3) delays in appointing panel members, 4) delays in the completion of panel reports, 5) uncertain quality and neutrality of panelists and panel reports, 6) blocked panel reports, and 7) non-implementation of panel reports.⁷

The new Dispute Settlement Understanding contemplates that parties to a

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2. *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 INT'L LEGAL MATERIALS 9 (1994) [hereinafter *Uruguay Round*].

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3 [hereinafter GATT]. GATT also refers to the institution that implements the Agreement.

4. *Agreement Establishing the Multilateral Trade Organization (World Trade Organization)*, 33 INT'L LEGAL MATERIALS 13 (1994).

5. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 33 INT'L LEGAL MATERIALS 112 (1994) [hereinafter *Dispute Settlement Understanding*].

6. GATT, *supra* note 3, art. XXIII, ¶ 2, 61 Stat. at A64-A65.

7. William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 81-89 (1987).

dispute will, initially, have resort to consultations between them in order that the parties might settle their disagreements without resort to a formal panel procedure. However, the DSU provides that a complaining party may request the establishment of a panel if, within sixty days after the request for consultations, the parties have failed to reach an agreement.⁸

The composition of the panels is provided for in some detail in Article 8 of the DSU.⁹ In order to assist the parties, the Secretariat is to maintain a list from which panel members may be chosen. Panels can be composed of both governmental and non-governmental individuals, so long as they are well qualified. If the disputing parties cannot agree on the panelists, the WTO Director General may appoint the panel.

Once the panel is established, it takes written submissions and oral arguments of the parties. The panel is to complete its work within six months, which includes the time for consideration of the panel's report by the Dispute Settlement Body.¹⁰

A fundamental change from the old GATT process occurs at this point. As noted above, the GATT Council had to approve the panel report unanimously under the old regime. But under Article 16 of the DSU, a panel report is to be adopted unless there is a consensus in the Dispute Settlement Body *not* to adopt it, i.e., unless there is a reverse consensus.¹¹

A standing Appellate Body has been created under the DSU.¹² Essentially, the creation of an appellate review process is intended to compensate for the loss of a party's ability to block or delay implementation of panel reports. An appeal is limited to issues of law covered in the panel report and the legal interpretations developed by the panel. The appellate proceedings are not to exceed ninety days, and the Appellate Body's decision is to be adopted by the Dispute Settlement Body, unless there is a consensus opposed, within thirty days of the Appellate Body's decision. The Appellate Body itself is to be composed of seven persons appointed by the Dispute Settlement Body. Appeals in a dispute are to be heard by three of the seven members, on a rotating basis.

In the event that a final decision determines that a member state is in violation of a GATT obligation, the normal remedy contemplated by the DSU is that the offending member state is to amend or repeal the domestic law or governmental practice that constitutes the violation. Usually, the panel report will make such a recommendation.¹³ The losing party is required to indicate its intentions with respect to implementation of the recommendations for compliance.¹⁴ The Dispute Settlement Body is to maintain surveillance of the offending state's implementation of the Panel report's recommendations.¹⁵

8. *Dispute Settlement Understanding, supra* note 5, art. 4, ¶¶ 4.5, 4.7 at 116-17.

9. *Dispute Settlement Understanding, supra* note 5, art. 8, ¶¶ 8.1-8 at 118-19.

10. *Dispute Settlement Understanding, supra* note 5, art. 12, ¶ 12.9 at 121.

11. *Dispute Settlement Understanding, supra* note 5, art. 16, ¶ 16.4 at 123.

12. *See Dispute Settlement Understanding, supra* note 5, art. 17 at 123.

13. *Dispute Settlement Understanding, supra* note 5, art. 21, ¶ 21.3 at 125.

14. *Dispute Settlement Understanding, supra* note 5, art. 21, ¶ 21.3 at 125.

15. *Dispute Settlement Understanding, supra* note 5, art. 21, ¶ 21.6 at 126.

In the event that the offending state's measure is not withdrawn, the prevailing state is entitled to compensation by way of the granting of some trade concession by the offending state. If such compensation is not forthcoming then, as a last resort, the prevailing state may, in effect, retaliate by suspending trade concessions or other obligations to the offending party.¹⁶

II. CHAPTER 19 OF NAFTA

Chapter 19 of the North American Free Trade Agreement contains a special dispute settlement process for Antidumping and Countervailing Duty cases.¹⁷ The process provides for binational panels to review domestic final administrative determinations in those cases, thus preempting judicial review.¹⁸ The binational panels will, however, apply the national law of the importing country.¹⁹

Paragraph 5 of Article 1904 contains the unique feature of Chapter 19. It provides that *individuals* can petition for review by a panel. The dispute settlement process is not reserved solely for the state contracting parties. Paragraph 5 provides:

An involved party on its own initiative may request review of a final determination by a panel and *shall, on request of a person who would otherwise be entitled under the law of the importing party to commence domestic procedures for judicial review of that final determination, request such review.*²⁰

Annex 1901.2 sets forth the provisions for the establishment of the binational panels. It requires the parties to maintain a roster of persons to serve as panelists which shall "include judges and former judges to the fullest extent possible."²¹

The standard of review to be used by a binational panel is that of the importing state under its specific domestic laws together with its general legal principles.²² With respect to the United States, the standard of review is contained in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended: whether a determination is "arbitrary, capricious, an abuse of discretion" or unsupported by "substantial evidence on the record."²³

The decisions of the panel are binding on the member states "with respect

16. *Dispute Settlement Understanding, supra* note 5, art. 22 at 126.

17. North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States, Dec. 17, 1992, ch. 19, 32 INT'L LEGAL MATERIALS 296, 682 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

18. *Id.* ch. 19, art. 1904(1) at 683.

19. *Id.* ch. 19, art. 1904(2) at 683.

20. *Id.* ch. 19, art. 1904(5) at 683 (emphasis added).

21. NAFTA, ch. 19, annex 1901.2(1), 32 INT'L LEGAL MATERIALS 687.

22. *Id.* ch. 19, art. 1904(3) at 683.

23. Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1) (Supp. V 1993).

to the particular matter between the parties that is before the panel."²⁴ This appears to restrict the application of the doctrine of *stare decisis* as to such decisions.

Normally the panel functions as a court of final appeal, but Chapter 19 also provides for an "Extraordinary Challenge Procedure" to be utilized in a circumstance where an involved party alleges that "a member of the panel was guilty of gross misconduct, bias or a serious conflict of interest, or otherwise materially violated the rules of conduct, the panel seriously departed from a fundamental rule of procedure, or the panel manifestly exceeded its powers, authority, or jurisdiction."²⁵

In the event that an allegation as set forth, above, has been filed, the parties must establish an extraordinary challenge committee of three members to hear the challenges. The Committee can deny the challenge so that the panel's original decision stands affirmed. Alternatively, the Committee can vacate the original panel decision or reward the case to the panel for action not inconsistent with the Committee's decision.²⁶

24. NAFTA, *supra* note 17, ch.19, art. 1904(9) at 683.

25. NAFTA, *supra* note 17, ch. 19, art. 1904(13) at 684.

26. NAFTA, *supra* note 17, ch. 19, art. 1904(13) at 684.