Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism: The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes

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Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism

The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes

Gabrielle MARCEAU*

I. INTRODUCTION

Dispute settlement mechanisms are conceived to ensure the respect of negotiated rules. In an organization such as the World Trade Organization (WTO), where all countries are equal and subject to the same rights and obligations, a dispute settlement mechanism necessarily requires impartial interpretation of the applicable rules and a fair and independent administration of the dispute settlement procedures. The impartiality and independence of the persons involved in the new dispute settlement mechanism of the WTO have acquired even greater importance as the conclusions of panels and the Appellate Body are now binding. Indeed, Members, having forgone their right to block the adoption of a panel/Appellate Body report, must do their utmost to guarantee the highest quality of the new mechanism in order to ensure confidence therein. There were no doubts among the considerations which, before the entry into force of the WTO, led the United States to propose the adoption of a set of Rules of Ethical Conduct for Dispute Settlement.

Although all countries favoured the highest level of ethics from all those involved in the WTO dispute settlement mechanism and the most rigorous impartiality of the dispute settlement system itself, the negotiations of this set of “Rules of Ethics” proved to be very sensitive and difficult. Rules on the “ethical conduct” of persons involved in the dispute settlement mechanism involve an assessment of the behaviour of people with different cultures, with very different traditions, and therefore with a different appreciation of concepts such as appearance of bias, direct and indirect conflict of interest, impartiality or independence. These sensitive negotiations were chaired by Ambassador Armstrong from New Zealand. After numerous working sessions over a period of two years, the Members of the WTO, acting as the Dispute Settlement Body

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In preparing this article, the author is indebted to the full assistance and contribution of Ambassador Wade Armstrong, who was Permanent Representative of New Zealand to the United Nations and the WTO from 1944-1998. He was Chairman of the Negotiating Group for the Rules of Conduct in 1994-1996, Chairman of the TRIPS Council in 1996 and Chairman of the Dispute Settlement Body in 1997.
The WTO Rules of Conduct, designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DSU, are the most elaborate and sophisticated of such rules applicable to participants in any international dispute settlement process. This article attempts to relate some aspects of their negotiation, describe their functioning and suggest analytical interpretations of some of their provisions. However, the negotiation of these Rules of Conduct also deserves attention because they constitute a good example of (1) the power and sensitivity of the "consensus" decision-making process of the General Agreement on Tariffs and Trade (GATT) and WTO which resulted in a balanced and well-considered framework of rights and obligations, and (2) the strong determination of WTO Members to maintain an efficient and effective dispute settlement mechanism for their trade disputes. Both of these characteristics of the GATT and now the WTO systems were, indeed, apparent in the approach of the negotiators.

This article first looks at the historical background of these negotiations including the need, under the old regime of the GATT dispute settlement, for more precise rules on confidentiality and other aspects of the impartiality of its adjudicators. Some of the past lacunae were corrected with the new provisions of the DSU. However, these provisions were apparently considered insufficient by the United States (at least as far as their enforcement was concerned), who proposed during the last months of the Preparatory Committee for the entry into force of the WTO, the adoption of what was then called a "Code of Ethics". Taking into consideration existing sets of similar rules applicable in other fora and the specific characteristic and need of the WTO dispute settlement mechanism, Ambassador Armstrong was to lead this informal working group through most difficult negotiations to the adoption of a balanced set of provisions intended to ensure and enhance confidence in the new dispute settlement mechanism of the WTO.

The second part of this article is concerned with some specific negotiating strategies which reveal the highly sensitive character of these Rules of Conduct, which were initially seen by some participants as a potential threat to the efficiency of the new binding and automatic rules of the DSU. The various interests involved in this process and the evolution of the Members' positions should shed light on the parameters of the obligations contained in this new legal instrument of the WTO.

Finally, the third part of this article focuses on the main provisions and the main issues of the Rules of Conduct, presented chronologically as they surfaced during the negotiations. The reader should then understand the overall functioning of these new provisions and the main issues of the Rules of Conduct.
Rules of Conduct and their development, and better grasp the scope of the solutions negotiated to address the difficulties arising from different understandings of what constitutes a conflict of interest or independence and impartiality.

II. BACKGROUND

A. HISTORICAL BACKGROUND

1. The Need for Rules on Confidentiality and Other Rules of “Ethics”

A few times during the GATT years, the issue of the confidentiality and impartiality of the dispute settlement process and its adjudicators was raised. For instance, even following the conclusion of the Uruguay Round, at the GATT Council’s meeting of 21 June 1994 Canada raised the issues of confidentiality of proceedings, the conduct of panelists and the impartiality of the panel process, and questioned the adequacy of the existing procedures. To avoid undermining the panel process, it proposed the adoption of a Code of Conduct for panelists “which could be done with a view to clarifying, or codifying, GATT practice without reopening the text of the DSU”. This proposition was strongly supported by the European Communities and Norway. For the United States, the new dispute settlement mechanism and its integrity became, during 1994, a matter of Congressional interest during consideration of WTO membership.

2. The US Proposal

On 9 November 1994, the United States circulated to the participants in the Subcommittee on Institutional, Procedural and Legal Matters (IPL) of the Preparatory Committee for the WTO the text of a proposed “Code of Ethics for the Settlement of Disputes”, which would be applicable to all persons involved in the dispute settlement processes of the WTO. The representative of the United States discussed the need to ensure “the integrity of proceedings conducted under the Dispute Settlement Understanding …… The ethical code was designed to complement the operation of the DSU”. On 18 November 1994, Ambassador Armstrong was formally asked to chair informal consultations with a view to reaching consensus on a final draft. All interested delegations were invited to participate. Although the US proposal was supported in principle by several delegations, this was the beginning of a negotiation which was to last more than two years. The first open-ended informal consultations took place on 23 November 1994 and an initial revised text was circulated in early December.

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2 See C/M/273, at point 9, p. 15 of the Minutes.
3 See Document PC/IPL/W/12.
4 Para. 20-26 of PC/IPL/M/8.
After several sessions of informal consultations, it became clear that the negotiation of a text could not possibly be completed before the entry into force of the WTO on 1 January 1995. At the first WTO General Council Meeting on 31 January 1995, the Chairman K. Kesavapany, Ambassador for Singapore, proposed that the General Council adopt the report of the Preparatory Committee as a whole, "on the understanding that the adoption of the report would mean that '... the establishment of the Appellate Body and the Rules of Ethics were referred to the Dispute Settlement Body'".6

At the first meeting of the DSB on 10 February 1995, the Chairman recalled that the Preparatory Committee had forwarded the work done on draft Rules of Conduct to the WTO as a possible basis for further work. "The Chairman then proposed that the DSB invite Ambassador Armstrong to pursue informal consultations with the view of concluding a final draft Code of Conduct for consideration by the DSB before 24 March 1995."7 This was agreed by the DSB.8 It should be remembered that at the same time, WTO Members were in the process of selecting the members of the Appellate Body and it was informally understood that these Rules of Ethical Conduct would be applicable to them. Therefore, it was urgent that the Rules of Conduct be finalized so that they could bind the members of the Appellate Body. As it happened, the negotiation of the Rules of Conduct would not, however, be completed until 3 December 1996 (although they were incorporated by the Appellate Body into its Working Procedures at an earlier date, subject to their final revision).9

During almost two years, the open-ended informal group of WTO Members met on numerous occasions and the active participation of many delegations led to a final draft text of the Rules of Conduct which arguably improved the initial US proposal, taking into account the concerns of many Members in a common effort to strengthen the rules of, and confidence in, the WTO dispute settlement system.

(a) The content of the initial US proposal

The content of the initial US draft Rules of Ethical Conduct for the DSU was quite different from the eventual set of Rules of Conduct. Although the general structure of presentation appears similar, important substantive changes to rights, obligations and presumptions and much greater procedural precision were introduced by the negotiations. The proposal contained seven sections. The preamble affirmed the importance of the integrity and impartiality of the DSU proceedings to increase confidence in the dispute settlement system.

The US proposal referred to the 1994 Marrakesh Declaration, where Ministers

6 WT/GC/M/1 at p. 7.
7 WT/DSB/M/1 at p. 2.
8 The DSB took note of the statements and agreed that informal consultations be pursued ... with a view to concluding a final draft Code of Conduct for consideration by the DSB no later than 24 March 1995. As note 7, above, at p. 3.
welcomed “the stronger and clearer legal framework they have adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism”. The document stated that in order to achieve a “reliable” dispute settlement mechanism, it was essential that the integrity and impartiality of proceedings conducted under the DSU be maintained. It also referred to the avoidance of conflicts of interest mentioned in Article 17.3 of the DSU in relation to the Appellate Body and the impartiality of the WTO Secretariat specifically addressed in Article 27.2 of the DSU (in relation to the manner in which legal advice and assistance are provided by the Secretariat to developing country Members).

The document further stated that “in addition to these specific provisions, the operation of the DSU should be further strengthened by Rules of Ethical Conduct adopted by the appropriate WTO body that would apply generally for the settlement of disputes”. The intention of this US proposal was for:

“These rules to ensure that each person serving on a panel or the Appellate Body, as well as Secretariat officials serving such persons, avoid impropriety and the appearance of impropriety and observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.”

This reference to “impropriety and the appearance of impropriety” was to be a source of controversy and the object of long negotiations.

The document concluded by referring to what were considered to be the three main purposes of this Code of Ethical Conduct, which are repeated in Section II entitled “General Principles”:

“(1) The rules are designed to ensure strict adherence to the rules and procedures that were negotiated in the Uruguay Round and codified in the DSU. They would in no way modify the basic rights and obligations of Members with respect to dispute settlement under the WTO.

(2) The rules provide for disclosure to the WTO Members involved in a dispute by panelists, the Appellate Body or Secretariat officials of pertinent information before dispute settlement proceedings are underway so that potential conflicts of interest can be avoided. Draft disclosure statements to be used for this purpose have been attached.

(3) Panelists, Appellate Body members and Secretariat officials would be required to take care in the performance of their duties during dispute settlement proceedings to adhere to the rules of ethical conduct in order to maintain their independence and avoid creation of potential conflicts of interest. The WTO Members would provide (by means of a separate decision, a draft of which is attached)10 for the disqualification of any panelist, Appellate Body member or Secretariat official committing a material violation of the rules.”

10 See Annex 2.
(b) Comments on the initial US proposal for a Code of Ethical Conduct

Three important aspects of this initial US proposal were to be modified by the negotiations.

First, in the US proposal, "appearance of impropriety" as well as "apprehension of bias" would have constituted a violation of the Rules of Ethical Conduct, would have had to have been disclosed and would have been sufficient to justify the disqualification of anyone covered by the Rules of Ethical Conduct. This issue of the "appearance" became a cornerstone of the negotiations as it was most relevant at all stages of the process: at the initial stage when persons were requested to disclose their situation, during the dispute process as there was an on-going obligation to maintain the standards of the Rules of Conduct, as a condition for initiating a disqualification challenge process and as a criterion for the disqualification of a covered person. In the final Rules of Conduct, appearance of impropriety is not mentioned in the text and violation of the Rules of Conduct may lead to disqualification only if it also affects the impartiality and integrity of the dispute settlement mechanism. The question of perception (or "appearance") still exists in relation to the term "give rise to justifiable doubt as to" (Section III) which relates to self-disclosure and general behaviour.

Second, in the US draft, upon a party's allegation of a violation of the Rules of Ethical Conduct, a covered person was to be disqualified unless the Director-General was to decide that there had been no violation. In addition, if parties agreed, they had full authority to disqualify any covered person. After two years of negotiation, the disqualification challenge procedure was further institutionalized, all persons concerned were guaranteed the right to be heard, criteria for the initiation of a challenge and those for disqualification were tightened, while the time allowed for the entire challenge process was limited to 15 days.

Third, all persons involved in the dispute settlement process would have been subject to exactly the same obligations and the same procedures. The final text of the Rules of Conduct envisages four types of persons subject to the Rules of Conduct but in different ways: members of the Appellate Body and their staff; panelists, experts and arbitrators; members of the Textiles Monitoring Body (TMB); and the members of the Secretariat involved in the specific dispute settlement process. Although all such persons are covered by the same governing principles against conflicts of interest, and requirements of impartiality, independence and confidentiality, they do not have to disclose the same matters to the same authorities and, if challenged, are subject to different procedures.

B. Existing relevant provisions

Before discussing the evolution of the negotiations, it should be remembered that the DSU contained certain provisions on the qualities and requirements expected from panelists, members of the Appellate Body, Secretariat staff and others involved in the
dispute settlement process of the WTO. Other international agreements also contained similar rules which were helpful in trying to identify the best way to describe certain actions or behaviour considered unacceptable or threatening to the integrity of the dispute settlement mechanism.

The Obligations Existing in the DSU

The WTO Agreement contains relevant provisions dealing with the obligations of panelists, members of the Appellate Body and staff members of the WTO Secretariat.

(a) Panelists

According to Article 8.2 of the DSU, panelists must be independent and serve in their individual capacity and, in this context, Members shall not give panelists instructions nor seek to influence them (Article 8.9 of the DSU). Individuals cannot act as panelists if they are citizens of parties or third parties, absent agreement of the parties (Article 8.3 of the DSU). Panelists cannot have ex-parte communications (Article 18.1 of the DSU) and cannot make public statements on the case (Article 18.2). Moreover, submissions and deliberations are confidential (Article 18.2) and decisions are anonymous (Article 14.3). Finally, it is also stated in Article 11 of the DSU that panels should make an objective assessment of the facts and the law, which implies the objectivity of the panelists.

(b) Members of the Appellate Body

Article 17.3 of the DSU provides that members of the Appellate Body shall not be affiliated with any government or participate in the consideration of any dispute that would create direct or indirect conflict of interest. Article 17.10 provides that the proceedings of the Appellate Body are confidential. The provisions of Article 18 on the confidentiality of written submissions and the prohibition of ex-parte communications are also applicable to the members of the Appellate Body. Opinions expressed by Appellate Body members are to be anonymous (Article 17.11 of the DSU).

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11 According to art. 8.1 of the DSU, panelists must be "well-qualified governmental and/or non-governmental individuals" (including those who have served on or presented a case to a panel, Member's delegates and those of GATT 1947, a representative to a council or committee, a Secretariat officer, those that have taught or published on international trade law or policy, or a senior trade policy official of a member) and of diverse background with wide spectrum of experience (art. 8.2 of the DSU).

12 See art. 17.3, which also provides that they shall be recognized authorities, with demonstrated expertise in law, international trade and the subject-matter of the covered agreements generally, that they shall be available at all times and on short notice and that they shall stay abreast of dispute settlement activities and other relevant activities of the WTO.
(c) **Staff members of the WTO Secretariat**

Article VI.4 of the WTO Agreement defines the qualities, duties and obligations of staff members of the WTO Secretariat. Responsibilities of staff members are exclusively international in character. In discharge of their duties, they shall not seek to accept instructions from any government or other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. As with panelists, it is envisaged that Members shall respect the international character of the responsibilities of the staff and shall not seek to influence them in the discharge of their duties. Finally, Article 27.2 of the DSU refers explicitly to the "continued impartiality of the Secretariat" when it states that a WTO legal expert "shall assist developing country Members in a manner ensuring the continued impartiality of the Secretariat".

Therefore, one could argue that the WTO Agreement and the DSU themselves imposed on panelists, members of the Appellate Body and staff members of the WTO, the obligation to the independent and impartial, to respect the confidentiality of dispute settlement proceedings and to avoid conflicts of interest. This aspect becomes relevant when considering whether the Rules of Conduct constituted an amendment to the DSU for the adoption of which Members would, arguably, have to follow special voting requirements. However, it was the view of all Members participating in the open-ended working group that the Rules of Conduct could not modify the rights and obligations of Members, negotiated in the Uruguay Round texts. Indeed, one may read into the first stated purpose of the Rules of Ethical Conduct proposed by the United States: “The rules are designed to ensure strict adherence to the rules and procedures that were negotiated in the Uruguay Round and codified in the DSU . . .”

It should also be noted that other sets of similar rules dealing with the independence and impartiality and conflicts of interests of adjudicators exist in other international fora.13

III. THE NEGOTIATING HISTORY

The negotiation of the text, with hindsight, involved three broad phases. The first from November 1994 to April 1995, was a process of working through text, with initial comments on the US proposal, providing a basis to move quite quickly towards December 1995 to an initial Chairman’s draft, with key areas of differences being

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13 See, for example, the relevant provisions of the Code of Conduct under the Canada–US Free Trade Agreement; the Code of Conduct under the North American Free Trade Agreement; the Rules of the European Court of Justice; the World Intellectual Property Organization (WIPO) Rules on the Challenge of Arbitrators; the Rules applicable to the Iran–US Tribunal; the United Nations Conference on Trade and Development Rules on Arbitration; the American Arbitration Association/ American Bar Association (AAA/ABA) Code of Ethics; the IBA Code of Ethics; the International Chamber of Commerce (ICC) Rules dealing with qualifications and challenge procedure of panelists; the ICSID Rules dealing with the qualifications of judges; the relevant rules of the Convention of the Permanent Court on Arbitration and those of the Optional Rules on Arbitration between International Organizations and Private Parties or for Disputes between Two States and those of the International Convention on the Settlement of Investment Disputes (ICSID) Tribunal address conflicts of interests of panelists. These panelists, arbitrators and judges sign a disclosure statement against conflicts of interest before their entry into function.
identified and explored. The second phase broadly ran from the presentation to the Chairman by Brazil on behalf of the group of Latin American countries (Grulac) of language, drawn on a revised chairman’s text, which some delegations initially saw as an attempt to stall the negotiation, but which in fact was helpful to the Chairman as it provided crucial and constructive impetus to the negotiations. It cleverly unlocked the gate to a solution, by identifying the final structure of the Draft Rules of Conduct and the need for different provisions to apply to the different participants in the system. In large measure, the negotiation was concluded by October 1995, the outstanding issue at that time concerning the application of the rules of conduct to the TMB, an issue which was to take approximately one year to resolve.

During the process of these negotiations, the engagement of delegations was a significant feature. Initial interest in the US proposal, and concern to ensure that it did not resolve in ways in which the dispute settlement mechanism could be undermined, led over time to a wide appreciation of the potential benefits of the Rules of Conduct as a safeguard for participants in the dispute settlement system against unfounded claims of bias and, thus, as an additional buttress to the integrity of the dispute settlement system.

The process of informal working group meetings, focusing on an Article-by-Article consideration of successive drafts from the Chairman—or of Chairman’s language for potential Articles—was supplemented by a process of putting questions to delegations in order to understand fully the nature of their interest and objectives in respect of specific elements of the draft text. This proved particularly helpful in terms of advancing discussion and text on, for example, the role of the secretariat; as well as on the issues of scope and appearance; and the standard of evidence and procedures required under Section VIII on challenges. Among the most difficult issues to resolve was that concerning the criteria for a decision to disqualify a covered person (Section VIII:1, 2), especially in cases of non-disclosure, i.e. when a matter was not disclosed to the relevant authorities. The Chairman spent many hours trying to find a solution to this issue.

An example of the concerns which had to be resolved concerned the staff of the Secretariat involved in the dispute settlement process. Initially, some Members wished to exclude the staff of the Secretariat from the ambit of the Rules of Conduct. However, further discussions isolated their concern as being that the Rules of Conduct should not inhibit the Secretariat from playing its traditional role, in providing informal guidance to Members on dispute settlement precedents, etc. This point has been clarified within the text of the Rules of Conduct (Section IV:2). Further concerns arose over the need to recognize that the Director-General has responsibility for the employment and suspension of the Secretariat staff and that the appropriate way of dealing with them was through Staff Regulations. Thus, the final text provides a flexible solution in this area and also recognizes the Director-General’s role (as well as the interest of Members in transparency) in dealing with the challenges of Secretariat staff.

The issue of the TMB was identified early in the negotiations as one which would need to be addressed, but it was set to one side by mutual agreement while the
outstanding issues were successively resolved. The course of negotiations on this issue was influenced, not unexpectedly, by developments elsewhere within the WTO, pertaining to the textiles sector and, *inter alia*, the relationship between the DSU and the Agreement on Textiles and Clothing. Discussions with key delegations and Ambassador Armstrong on this outstanding issue of the TMB members, were intensified in late 1995, but progressed only slowly from early to mid 1996, before the Chairman was able, with the co-operation of all the key delegations, to conclude the negotiations in late 1996.

IV. THE RULES OF CONDUCT FOR THE DSU: THE MAIN ISSUES

A. THE GENERAL FUNCTIONING OF THE RULES OF CONDUCT FOR THE DSU

In the previous section, the birth of the WTO Rules of Conduct for the DSU was outlined. This section offers a general description of the content and functioning of the final text of the Rules of Conduct. This should facilitate an understanding of the issues raised during the negotiations and the evolution of the draft.

The WTO Rules of Conduct act in two ways: they impose certain requirements on persons participating in the dispute settlement processes of the WTO which, if respected, provide protection against potential challenges. The Rules of Conduct as they stand today cover four groups of people (Section IV) who are dealt with in different ways: (1) panelists, experts listed in Annex 1a and arbitrators listed in Annex 1b; (2) members of the Appellate Body (and its support staff); (3) staff members of the WTO Secretariat; and (4) TMB members. Throughout the text, the three first groups are called “covered persons”.

The covered persons are subject to the same general obligations: to be independent and impartial, to avoid direct or indirect conflicts of interest and to maintain confidentiality (Section II). These obligations are already contained in the DSU. To ensure that these obligations are respected, each covered person is expected to (Section III) (1) adhere strictly to the provisions of the DSU; (2) disclose the existence or development of any interest, relationship of matter that is likely to affect or give rise to justifiable doubts as to his or her independence or impartiality; (3) take due care to avoid any direct or indirect conflicts of interest in respect of the subject-matter of the proceedings; (4) consider only issues raised in, and necessary to fulfil his or her responsibilities within, the dispute settlement proceeding and not delegate this responsibility to any other person; (5) not incur any obligation or accept any benefit that could (interfere with or) give rise to justifiable doubts as to proper performance.

Members of the TMB are not “covered persons” as such (within the meaning of the Rules of Conduct), but their behaviour is referred to in the text of the Rules of Conduct. Section V of the text on Rules of Conduct is reserved for the TMB and
provides that members of the TMB shall discharge their function on an *ad personam* basis, in accordance with the provisions of Article 8.1 of the Textiles and Clothing Agreement and the rules of procedure of the TMB, so as to preserve the integrity and the impartiality of the proceedings of the TMB. Staff of the TMB, including the Chairman of the TMB, are "covered persons" as any other staff members of the Secretariat.

A self disclosure obligation is imposed on covered persons when they join the dispute settlement process, but this obligation continues until the adoption of the panel and Appellate Body reports. Covered persons generally are asked to disclose any information which is "likely to affect or give rise to justifiable doubts as to their independence or impartiality". The wording of the matters to be disclosed and consequently that could lead to a disqualification process was the object of very long debates during the negotiations. There are various methods of self-disclosure, depending on the covered person. TMB members are not subject to the Rules of Conduct's disclosure obligation, but (as the footnote to Section V indicates) are covered by the working procedures of the TMB.

The Rules of Conduct also contain (in Section VIII) a comprehensive procedure to challenge and possibly disqualify a covered person where there is evidence of a material violation of the obligations contained in the Rules of Conduct which may impair the integrity and impartiality of the dispute settlement mechanism. Any challenge process must be completed within 15 working days of its initiation and a covered person remains in function until his or her disqualification is decided. The challenge process varies with the covered person. For panelists, experts and arbitrators (Section VIII: 5–10), a complaint is lodged with the Chair of the DSB who would then consult the covered person and the parties. The Chair of the DSB, in consultation with the Director-General and the Chair(s) of other relevant Councils, would decide whether there has been a material violation by the panelist (expert or arbitrator). For Appellate Body members and their staff (Section VIII: 14–17) a complaint is lodged with the Appellate Body which will take the final decision. For Secretariat staff (Section VIII: 11–13), a complaint is lodged with the Director-General who, if necessary, will take appropriate disciplinary action in accordance with the Staff Regulations.

If the appointment of a covered person is revoked or if that person is excused or resigns, the replacement of such a covered person must be ensured and timetables of the panel or Appellate Body process are to be readjusted accordingly.

The final text of the Rules of Conduct and the procedures it contains are quite different from the initial US proposal and reveal important concerns of WTO Members with regard to the very nature of the dispute settlement mechanism and the role of parties involved. The purpose of the next section of this article is to try to identify and understand these differences of views in order to understand better the scope of the rights and obligations contained in these new Rules of Conduct.
B. THE MAIN ISSUES DURING THE INITIAL STAGE OF NEGOTIATION

In this section the main points of contention and issues of the negotiations are discussed. At the first meeting of the working group of informal consultations for the Rules of Conduct that took place in November 1994 (i.e. during the Preparatory Committee of the WTO), some 20–25 representatives of GATT delegations came. Representatives were invited to give general comments on the US proposal. From the very beginning, some countries expressed doubts as to the relevance and the need for such set of Rules of Conduct. Others favoured the approach but expressed doubts as to the means used to guarantee the so-called ethical conduct of those involved in the WTO dispute settlement process. Delegations focused quickly on the important issues and participants identified early a series of points of contention that can be listed as follows.

1. Appearance of Bias and Appearance of Impropriety

Many participants raised strong doubts and opposition to concepts such as "apprehension of bias and appearance of impropriety" as being too subjective. Some alleged that it was inconsistent and would either unreasonably inhibit panelists (being delegates they may continue to meet with representatives of parties to disputes during the panel process) or lay them open to unfair allegations.

2. Independence and Impartiality

There were also numerous comments on the definition of independence and impartiality, as the US proposal was drafted in terms of "panelists shall do ..." and "panelists shall not do ...". Comments were made that more emphasis should be placed on systemic issues and on the importance of the impartiality of the dispute settlement mechanism as a whole, not only that of the individuals involved.

3. Scope

There was debate on whether the Appellate Body members and its staff should be covered or not; on the role of the experts and arbitrators provided in the DSU or covered agreements (an issue which required extensive discussion); and on the Secretariat (see below).

4. Matters to be Disclosed

The extent of matters to be disclosed was also controversial, especially as the US proposal referred to "any interest, relationship or matter that is likely to affect that person’s independence or impartiality or that might reasonably create an appearance of
impropriety or an apprehension of bias in the proceeding”, a wording considered to be too subjective. Most delegations emphasized the fact that concepts such as “impropriety” will always vary, depending on societies, different legal systems and social norms. In this context, it was proposed that the word “Ethics” or “Ethical Conduct” be dropped from the title as it suggested a rather judgemental assessment of what is (and is not) “ethical” in dispute settlement, whereas the yardstick should be whether the working of the DSU would be adversely affected by the behaviour in question.

5. The Timing of Complaints

The absence of time-limits for complaints to be raised was also a matter of disagreement as it could lead to complaints being raised when a losing party was dissatisfied with the results of a panel or Appellate Body report. This concern is given specific weight in the final text.

6. Confidentiality

Many delegations emphasized the need to focus more on the obligation to respect the confidentiality of the proceedings.

7. The Challenge Process

The challenge process was considered to be inadequate, especially as the US proposal provided for an automatic disqualification of any covered person if parties agreed or unless the Director-General was of the opinion that there was no such violation of the Rules of Ethical Conduct. The need to ensure “due process” in terms of the quality and nature of “evidence” and the challenged person having the opportunity to present his or her views, and the need for impartial involvement (beyond the parties) in decision-making on the challenge, etc. were issues hinted at, but developed in full later. Many countries worried that the challenge process would delay the new time-limits of the dispute settlement mechanism. In this context, they insisted that the new set of Rules ought to be fully consistent with the DSU.

8. Different Rules for the Appellate Body

Some representatives, including several Grujac Members were of the view that the members of the Appellate Body should be subject to a different process.

9. Coverage of the Staff Members of the WTO Secretariat

Some countries raised objections to having the Secretariat staff subject to exactly
the same obligations as panelists. There were also concerns that to limit actions of staff members of the Secretariat would prejudice developing countries' access to the Secretariat's support.

Although the Chairman concluded the initial meeting with optimism as Members were broadly willing to explore these issues, the comments made suggested a long and laborious negotiation ahead.

C. **The Development of the Text of the Rules of Conduct**

As much as possible, each Section of the existing text of the Rules of Conduct will now be addressed and the issues of the negotiation of each Section will be dealt with and, as far as possible, described chronologically. However, as the final draft of the WTO Rules of Conduct is significantly different from the initial US proposal, the discussion will need to refer to different Sections as they existed from the initial US proposal. Indeed some sections have disappeared, such as a section on Independence and Impartiality and one on Application to Other Persons, while three new sections on Observance of Governing Principles, Scope and the TMB were introduced. Moreover, certain issues, such as the debate on “appearance of bias and impropriety”, affected every stage and many aspects of the Rules of Conduct. As much as possible, however, the issues are presented by subject matter under each separate section of the WTO Rules of Conduct.

After the initial meeting where delegations had been invited to make general comments on the US proposal, the Chairman decided to submit his own revised draft taking into account the comments made by delegations. Indeed, as mentioned above, the entire negotiation was done around Chairman's drafts following comments and suggestions on specific issues identified by the Chairman before each meeting. Ambassador Armstrong first asked for comments on the first Sections, the Preamble and the General Principles.

1. **The Title**

On the Chairman's first draft the word “Ethical” (Rules of [Ethical] Conduct) in the title was bracketed and reference was made to the Dsu. At the second meeting (in December 1994) the title was agreed to be “Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes”, i.e. the Rules of Conduct for the Dsu.

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14 As discussed above, the only drafts and proposal put forward were those of the Chairman which allowed him to keep control of this very sensitive negotiation.

15 However, in everyday discussions it is variously referred to, including as the “Code of Ethics”.

2. **The Preamble**

The new Preamble proposed by the Chairman at the second meeting referred to four elements:

1. the importance of the dispute settlement mechanism as stated in the Marrakesh Declaration;
2. the need to ensure the integrity and impartiality of the proceedings in order to achieve "a more effective and reliable" dispute settlement mechanism;
3. the necessity for Members to adhere to the rules of the DSU and to avoid any issue of the Rules of Conduct to the detriment of the new dispute settlement mechanism and its time-limits;
4. the need to strengthen the rules of the DSU in ensuring that the integrity and impartiality of those involved in the WTO proceedings would enhance confidence in the dispute settlement mechanism.

Delegations agreed generally with the ideas and expressed the following two general comments.

First, that there should be a reference to the integrity, impartiality and confidentiality of the dispute settlement mechanism as such, rather than only to the obligations of individuals concerned to respect these principles which should be viewed rather as a consequence of this systemic consideration. It was felt that the obligations of the individuals involved in the dispute settlement process (to be and to remain independent and impartial) should be mentioned in the core of the text as a governing principle.

Second, that there should be a reference to the GATT practice in order to maintain and protect the Secretariat staff who provide advice and legal information to delegations and who are often involved in related dispute settlement.

At the end of January 1995, the Chairman submitted a draft text which is today's Preamble except for an additional paragraph which reads: "Confirming that the Rules of Conduct shall in no way modify the rights and obligations of Members under the DSU" (emphasis in original). This last paragraph was a response to many developing countries' concern that the rights and obligations they had gained during the Uruguay Round negotiations should in no way be reduced by the Rules of Conduct. One Member insisted that when referring to the DSU, mention should be made to the "rules" of the DSU (not only to the procedures) as the DSU contains substantive obligations, such as those mentioned in Article 23. Later on, the Chairman suggested that this fourth paragraph should instead be inserted in the Section on General Principle (which later became Governing Principle) in order to make this obligation *vis-à-vis* the DSU even clearer. The last sentence of the paragraph on Governing Principle now reads: "These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein."
3. The General Principle

One of the most difficult elements of the negotiation was the reference, in the Section on General Principle of the US proposal to “appearance of impropriety” and “apprehension of bias”, as a matter to be disclosed and as a criterion for disqualification. Many delegations, and especially some Latin American countries, were strongly opposed to what they considered too subjective a criterion to determine whether one’s behaviour or actions were inconsistent with impartial behaviour and an impartial dispute settlement mechanism. These countries considered that WTO dispute settlement, maybe contrary to what was the case under GATT dispute settlement mechanism, was not only a matter for the parties involved in a particular dispute, but (because of the automatic adoption of panel and Appellate Body reports) constituted a systematic issue for all WTO Members. This also explained the opposition to the provision in the US proposal allowing two parties to agree on the disqualification of any person covered by the Rules of Conduct. Delegations also disagreed with any form of presumption in favour of disqualification, as it was initially envisaged. These two considerations were present from the very first discussions on this set of Rules of Conduct.

The Chairman’s first draft contained an alternative proposal on the General Principle in which he sought to address the difficult concept of “appearance of impropriety and apprehension of bias”:

“The governing principle of these rules is that each person serving on a panel or the Appellate Body (hereinafter panelist) shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved ...”

This principle is to be observed by means of: (1) a duty to disclose the existence of any interest, relationship or matter that is likely to affect that person’s independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias; (2) care in the performance of duties to maintain independence and avoid creation of an appearance of impropriety or an apprehension of bias, and (3) adherence to the provisions of the DSU.

An appearance of impropriety or an apprehension of bias is created where a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that the affected person’s ability to carry out his or her duties with integrity, impartiality and competence is impaired.”

Many delegations objected to any reference to such concepts of “appearance of bias” and “apprehension of impropriety” as being too subjective. The United States took the position that “appearance” is a fundamental element when the US government is selecting a panelist or is requested domestically to justify a panel report. A number of countries supported the United States and considered the references to a “reasonable person” and a “reasonable inquiry” to be justified, arguing that there is always some subjective element in the concept of impartiality. They referred to the old saying that
"Justice must not only be fair but also be seen to be fair." One of these countries also suggested that after stating the governing principle, the text should express the expectations in order to ensure the observance of the principles, that is persons should (1) disclose, etc. (2) take due care, etc. and (3) adhere, etc. It was also proposed that the Rules should also be applicable to experts and arbitrators and the concepts of independence, impartiality and conflict of interest should not be defined but should be contained in some illustrative Annex.

All delegations insisted that the Section on the General Principle include reference to the confidentiality of proceedings. Delegations appeared to hesitate as to whether the focus of the General Principle should be on the impartiality of the persons involved or the system as such. One Member suggested that the General Principle should distinguish the obligations of two different groups: (1) those who decide: panelists, arbitrators and members of the Appellate Body, and (2) the advisors such as experts, technical support and legal advice.

The section on the General Principle was eventually divided into two parts: the Governing Principle and the [Means for] Observance of the Governing Principle. It was understood that the Governing Principle would refer to the purpose of the Rules of Conduct, that is to ensure that all those involved in the dispute settlement mechanism be impartial, independent, without conflict of interest and respectful of the confidentiality of the proceedings. The Observance of the Governing Principle would refer to the means to ensure that the Governing Principle is observed. In that context, it was decided that reference should be made to "expectations": "each covered person is expected to ...". This drafting change took place in parallel with the decision to draw within the Observance Section elements of the deleted Section on Independence and Impartiality.

4. The Old Section on Independence and Impartiality

The US proposal contained a Section on "Independence and Impartiality". There were numerous discussions on the meaning and scope of these concepts. In international arbitration, "independence" refers to the relationship between the parties and the arbitrators, whereas the arbitrator's "impartiality" requires a judgment that relates more to the substance of the dispute. The objective nature of independence is usually opposed to the subjective nature of impartiality.16 Redfern, Hunter and Smith write:

"The concept of dependence is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. By contrast, the concept of "partiality" may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute. Impartiality is thus a much more abstract concept than independence, in that it involves primarily a state

of mind which presents special difficulties of measurement. Actual bias is something fairly easily recognised, albeit difficult for a challenging party to prove.”17

This inherently subjective nature of impartiality and the difficulties in proving actual bias, which would be the result of a lack of independence or impartiality, would seem to be the reason why international arbitration conventions usually refer to circumstances leading a reasonable person to think that specific behaviour was biased. Dohaney writes that:

“The term independence measures the relationship between the arbitrator and the parties. ... It is a test for the appearance of bias, not its actual presence. Thus although it is possible for someone who is closely related to a party, in a party’s employ, or a close friend of a party, to be able to judge that party’s case without bias towards that party, the other party in the matter would likely doubt the impartiality of the arbitrator under the circumstances.”18

These two concepts are, therefore, different and it was indeed decided to maintain both. In an effort to limit the focus of disagreement on such concepts and the related subjective aspect of “appearance of bias” or “apprehension of impropriety”, the Chairman proposed that the types of behaviour referred to in the US proposal which ought to be disclosed, should be contained in a separate Annex, possibly in an illustrative list of activities that should be disclosed. More general concepts would be maintained in the core of the text. Discussions among Members led to the conclusion that there were four basic aspects of behaviour that were going to be required by the Rules of Conduct: independence, impartiality, absence of direct or indirect conflict of interests and respect for the confidentiality of proceedings. Soon it became clear that any language used in the provision referring to what ought to be disclosed was going to be relevant for the section relating to what criteria could be used for the disqualification of a covered person.

There were numerous meetings on how to describe the scope of the Rules of Conduct in terms of what should be disclosed and which behaviour should be prohibited. In order to help Members, a note which examined the language used in other international instruments dealing with the impartiality, bias and appearance of impartiality (or bias) of adjudicators of international disputes was made available.

This note revealed that there are two types of international agreements which address the issue of ethics and impartiality (and independence) of adjudicators: arbitration conventions and codes of ethics (or codes of conduct). Some of these rules may be specific to disputes for a particular tribunal or institution and some may be of multiple application with the consent of the parties. The language used in these international conventions addressing the issue of independence and impartiality of adjudicators all reflect some subjective elements of impartiality and the realistic difficulties in proving an actual bias. To give a few examples of the wording used in other international conventions, one may refer to the following examples.

18 S. Dohaney The Independence and Neutrality of Arbitrators, 9 J.Int.Arb. 4 December 1992, at p. 32.
Article 9 of the UNCITRAL Rules states:

"A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" (emphasis added).

Article 10 continues:

"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence" (emphasis added).

The ICC Rules of Conciliation and Arbitration can be used for conflicts brought before the ICC and for other disputes. The provisions dealing with the qualification of arbitrators and challenge procedures state:

"... Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court all facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."

The Rules of Arbitration of the Permanent Court of Arbitration when Only One Party is a State, and those when Two Parties are States, contain similar obligations:

"Article 9: A prospective arbitrator shall disclose to those who approach him/her in connection with his/her possible appointment any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. ...

Article 10: Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence" (emphasis added).

The WIPO Arbitration Rules applicable to arbitration disputes under the WIPO Convention state:

"Impartiality and independence

Article 22

(a) Each arbitrator shall be impartial and independent.
(b) Each prospective arbitrator shall, before accepting appointment, disclose to the parties, the Center and any other arbitrator who has already been appointed any circumstances that might give rise to justifiable doubt as to the arbitrator's impartiality or independence, or confirm in writing that no such circumstances exist.
(c) If, at any stage during the arbitration, new circumstances arise that might give rise to justifiable doubt as to any arbitrator's impartiality or independence, the arbitrator shall promptly disclose such circumstances to the parties, the Center and other arbitrators.

Challenge of Arbitrators

Article 24

(a) Any arbitrator may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence.
(b) ..." (emphasis added).

The AAA International Arbitration Rules, which can be used in any private or public arbitration, state that:
"Challenge of Arbitrators

Article 7

Unless the parties agree otherwise, arbitrators acting under these rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Article 8

1. A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence ...

National arbitration legislation was also examined. For instance, in England the test of impartiality in an arbitration tribunal has recently been considered to be one of reasonable suspicion of bias as opposed to a requirement of real likelihood of bias. This is consistent with the standard expressed in the old case of Rex v. Sussex Justices (Ex parte McCarthy), that it is "of fundamental importance that justice not only be done, but should manifestly and undoubtedly be seen to be done". Article 180(1)(c) of the Swiss International Arbitration Law provides for the challenge of an arbitrator "if circumstances give rise to justifiable doubts as to his independence".

After exhaustive discussion in the working group, it was concluded that the inherently subjective nature of impartial (or biased) behaviour has been addressed in most international conventions by making reference to circumstances leading a party to have "justifiable doubts" as to impartiality. This wording appeared to be in line with a proposal by one Member which favoured the expression "is likely to affect or gives rise to justifiable doubts".

At that point, the Chairman decided to divide the Section on the General Principle into two parts. The first part was to become the Governing Principle and the language used was to be mandatory, i.e. "shall": "Each covered person shall ...." There was a reference to the purpose of such governing principle "so that ... the integrity and impartiality of the dispute settlement mechanism is maintained". This explicit reference to the purpose of the Rules of Conduct, the maintenance of the impartiality of the dispute settlement mechanism, was going to become an additional prior condition necessary for a party to initiate a disqualification challenge process.

The other part of the old Section on the General Principle was to become the Observance of the Governing Principle and was to contain the means through which the Governing Principle of the Rules would be respected. All delegations agreed to use the language referring to expectations from those persons covered by the Rules of Conduct so that each covered person "is expected to" (1) adhere strictly to the DSU, (2) disclose any matter that would affect or give rise to justifiable doubts as to that person's independence or impartiality, (3) avoid direct or indirect conflict of interest (including not incurring obligations or accepting benefits which could give rise to justifiable doubts.

20 As note 19, above, at p. 328.
as to the proper performance of that person’s dispute settlement duties), and (4) maintain confidentiality. It was also decided that the Section on Independence and Impartiality would disappear, but that an Illustrative list of the type of information that could be disclosed pursuant to these expectations would be developed in Annex 2.

5. **The Scope (coverage)**

The issue of who was going to be covered by the Rules of Conduct was fundamental for the United States and others who considered that anyone who could affect the dispute settlement process should be covered by the Rules of Conduct, so as to ensure the impartiality of the dispute settlement mechanism as a whole. These Members wanted the Rules of Conduct to have the widest scope possible. Delegations generally agreed with this principle of a wide scope of application, although many were of the view that all covered persons should not be treated the same way by the Rules of Conduct. This led the Chairman to suggest, and the delegations to agree to, the introduction of a new Section on Scope, in which persons covered by the Rules of Conduct would be identified.

The issue of the Scope subsumed two important bones of contention: persons involved in the TMB process and the staff members of the Secretariat. Early in the negotiations, one Member claimed that the Rules of Conduct should apply to the persons involved in the TMB process, which was part of the WTO dispute settlement process. Importing and exporting countries of textiles took opposed positions and this TMB issue triggered an additional year of negotiations. As to the application of the Rules of Conduct to staff members of the Secretariat, most delegations were of the view that some rules should apply to those staff members involved in the dispute settlement process but delegations disagreed as to the extent of such coverage and the manner in which to deal with any need to discipline staff members. An additional element complicated the negotiation of the special rules for staff members, i.e. the reservations by some staff of the WTO Secretariat.

(a) **Panelists, arbitrators and experts**

In the initial US proposal, the provisions were drafted with reference to panelists and members of the Appellate Body. A Section VI Application to Other Persons expanded the application of the Rules of Ethical Conduct to arbitrators:

“VI. Application to Other Persons

A. These Rules shall also apply to persons serving as arbitrators pursuant to Articles 21.3(c) or 22.6 of the DSU, providing information or technical advice under Article 13.2 of the DSU, or providing administrative or legal support under Article 17.7 of the DSU.”

Right from the beginning, Members had serious doubts as to whether all persons involved in the dispute settlement process should be treated in the same manner and be
subject to the same obligations. Chairman Armstrong put the question very clearly to
deleagations:

"In addition to panelists and members of the Appellate Body, should the Rules of Conduct
be made applicable to arbitrators (and if so which ones amongst those envisaged in the DSU
and other WTO agreements), experts (and which ones) and staff members of the Secretariat,
and if so, in which manner and to what extent should the obligations for these different
persons apply?"

A list of provisions referring to arbitrators and experts was submitted to participants,
all of which are now referred to in Annex 1a and 1b of the Rules of Conduct, except
the arbitrators mentioned in Article 19.4 and Annex II of the Agreement on the
Implementation of Article VII of the GATT 1994 (Customs Valuation). Article 19.4 of
the Customs Valuation Agreement provides that a panel may request technical expertise
from the Technical Committee on Customs Valuation of the World Customs
Organization. All participants were of the view that the experts from that body, which
was established under the auspices of the World Customs Organization, should not be
covered by the Rules of Conduct as they are already covered and governed by a set of
rules established by the government.

This is to say, therefore, that arbitrators and experts referred to in DSU and in other
specific WTO agreements (most of which are mentioned as specific provisions in
Appendix 2 of the DSU) are covered by the Rules of Conduct exactly as panelists are
covered.21 On the other hand, specialists under the Preshipment Inspection Agreement
(Psi) who are not covered by the DSU, would not automatically be covered by the Rules
of Conduct.

(b) Members of the Standing Appellate Body

From the very beginning, some delegates raised the issue as to whether it would be
acceptable to subject the members of the Appellate Body to the same set of rules and
process as panelists and staff members of the Secretariat. Some argued that the Appellate
Body should decide for itself how to behave and when to discipline one of its members.
Considering the standing that these judges would have, some delegations asked if it
would be appropriate to subject their behaviour to so much scrutiny. Other delegations
were concerned not to provide any means to jeopardize the independence of the
Appellate Body but wished to have these “judges” be subject to some similar principles
of independence and impartiality, taking into account the fact that they would not
necessarily be working exclusively for the Appellate Body.

21 The difference, however, with panelists is that whereas parties must agree on panelists (except in the
circumstances of art. 8.7 of the DSU), parties do not have to approve experts or arbitrators who would be selected
by a panel (such as in the Hormones case) or nominated by the Director-General (such as those arbitrators nominated
by the Director-General pursuant to art. 21.4 of the DSU in Bananas II or Japan: Taxes on Alcoholic Beverages). These
experts and arbitrators could always be challenged by a party convinced that the said person had not disclosed
something that would constitute a violation of the Rules of Conduct or is behaving in a manner inconsistent with
the Rules of Conduct.
Resolution of this issue was helped by the Grulac proposal for a three-track approach which allowed more flexibility in the administration of the Rules of Conduct. It was then agreed that the members of the Appellate Body would disclose to themselves collectively. This is why it was written that the disclosure was to be made to the Standing Appellate Body. The decision to disqualify one of their own would also be taken by the members of the Appellate Body collectively and, apart from the parties, for reasons of transparency, they would inform the DSB and provide relevant information.

A long debate concerned the consideration that the Appellate Body should give to the parties' arguments and allegations. The initial US proposal gave the parties the right to agree on the disqualification of any covered person including members of the Appellate Body, but this was opposed by many participants. Then remained the issues of whether the Appellate Body ought to take into account the arguments raised by the parties in support of their allegation of conflicts of interest, whether the Appellate Body should have a formal hearing with the parties, whether any decision should be justified and, if so, to what extent. It was finally decided that:

"16. It shall be for the Standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard.

17. The Standing Appellate Body shall inform the parties to the dispute and the Chair of the DSB of its decision, together with relevant supporting information."

(c) Staff members of the WTO Secretariat

The issue of the staff members of the Secretariat was extremely complicated. The initial US proposal envisaged the staff members of the Secretariat involved in a dispute disclosing any opinion they had given on the merits of a case. Many delegations opposed the second paragraph of Section VI on "Application to Other Persons" of the US proposal which read:

"A. ... They [Rules of Ethical Conduct] shall also apply to Secretariat officers designated to assist in a panel proceeding.

B. The disclosure statement made under Section IV above by a Secretariat officer designated to assist in a panel proceeding shall include his or her involvement in any past disputes involving the same or similar subject-matter. A Secretariat official who has provided advice to a Member concerning the measures at issue in a dispute may not participate in the panel proceeding."

From the beginning of the negotiations, developing and some developed countries were of the view that to force members of the Secretariat to disclose any information they may have provided to delegations, before such staff members could be considered for participation in any dispute settlement process, would lead staff members to refuse to help countries for fear of being considered to be in violation of the Rules of Conduct when requested to assist panelists in a dispute. At the same time, all Members wanted
the Secretariat staff to be covered by obligations of independence and impartiality, although some Latin American Members considered that they were already subject to these obligations through application of Article VI of the WTO Agreement and through the application of the Staff Rules and Regulations. It was proposed, and many delegations supported that view, that it should be for the Director-General to represent the staff of the WTO vis-à-vis Members who should not be entitled to challenge individuals directly. Major developed countries had different views on this issue; some took the position that staff members should be subject to rules contained in the Staff Regulations and their disclosure should be made to the Director-General. The difficulties over this issue may have been what finally provoked the so-called Grulac proposal for a three-track approach to the Rules of Conduct: panelists (experts and arbitrators), Appellate Body members and staff, and staff members of the Secretariat.

After the Chairman introduced the Grulac proposal for a three-track approach, it was easier to envisage a separate disclosure (and challenge process) for the Secretariat staff. After several meetings on this issue, it was therefore agreed that:

- staff members must be covered by the general obligations of independence, impartiality, absence of conflict of interest and confidentiality; however this could be done through the Staff Regulations; in the case of an allegation of violation of the Rules of Conduct, the Director-General would take appropriate measures under the Staff Regulations;
- access to staff members should not be impeded; the GATT practice should be maintained for all Members (this is especially important for developing countries who often consult members of the Secretariat);
- staff members should be subject to a disclosure obligation in case of conflict, especially those who have kept some link with their government, but they would make their disclosure to the Director-General;
- Members should avoid to politicize the disclosure and disqualification process, which should remain administrative in nature; this process should not be used as a means for Members to choose who would be working on their case.

The Chairman, therefore, suggested that staff members would be subject to the same general obligations, and would be “covered persons”, but they would make their disclosure to the Director-General. If a Member wanted to challenge a staff member, the complaint would be made to the Director-General who would then impose disciplinary measures as necessary. There was strong opposition to these provisions within parts of the Secretariat itself, as can be expected from any bureaucracy. Two issues were sensitive.

First, was the subject of disqualification. What was it that staff members should disclose and how could delegations deal with the fact that the Staff Regulations were not yet adopted? On the disclosure obligation, it was first proposed that Staff members disclose only (1) their participation in earlier formal consideration of the specific measure at issue, (2) any formal advice under Article 27.2 of the DSU (technical
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co-operation) and (3) any involvement with the dispute as an official of a Member. However, one developing country insisted and won general support, that Staff members be subject to exactly the same obligations as all other covered persons. It was decided, therefore, that they would be covered by the general obligation (now Section IV.1) to disclose "any information that is likely to affect or give rise to justifiable doubts as to their independence or impartiality".

The second bone of contention was whether informal discussions with a Member's representative on an issue that comes before a panel should be disclosed. It was decided that staff members do not provide formal advice but general legal information, which in any case is not provided on a personal basis. Accordingly, information offered to delegations on a day-to-day basis would not be covered by the scope of paragraph IV of the Annex 2 containing the Illustrative List (i.e. considered statement of personal opinion) discussed hereafter. (On the other hand, it is always possible for a staff member to consider that such legal information would affect his or her impartiality and, as such, should be disclosed.) This part of the Secretariat's function was considered of general importance and to protect the right of all countries to continue to have access to members of the Secretariat, a paragraph 2 was added to the Section IV on Scope:

IV:2. The application of these Rules shall not in any way impede the Secretariat's discharge of its responsibility to continue to respond to Members' requests for assistance and information.

It was also decided that pending the adoption of the Staff Regulations, staff members would be subject to the Rules of Conduct and that the Staff Regulations would contain the standard provision which is now mentioned in the footnote ** to Section VI:4(c). The risk of having too many people disqualified for assisting panels or other dispute processes led to the introduction of the last paragraph of that footnote which would appear to envisage the cases where the Director-General would assign a staff member to assist a panel in situations where a conflict of interest would not be sufficiently material to warrant a non-assignment. An important element is the reference to the consideration of the limited resources of the Secretariat which reflects discussion in the working group:

"When the Director-General, in the light of his consideration, including of available Secretariat resources, decides that a potential conflict of interest is not sufficiently material to warrant non-assignment of a particular member of the Secretariat to assist in a dispute, the Director-General shall inform the panel of his decision and of the relevant supporting information."

Notwithstanding all the opposition by some staff members of the Secretariat, the Rules of Conduct have not in any manner so far impeded the functioning of the Secretariat or panels.
(d) The TMB

The issue of the application and the applicability of the Rules of Conduct to actions and behaviour of members of the TMB was raised early in the negotiations by one textile-exporting delegation which suggested that the wording of the text should be clarified so that persons involved in the TMB process would also be governed by the Rules of Conduct. On 15 March 1995, this Member submitted a proposed undertaking to be signed by all members of the TMB. The issue was sensitive and Ambassador Armstrong suggested that it be set aside to be dealt with later and separately. This was accepted. By the end of summer 1995, there was a consensus on all provisions of the Rules of Conduct except for the issue of the TMB. At that time, as discussed above, provisions of the Rules of Conduct had been introduced into the Working Procedures of the Appellate Body. However, it was clear that some consensus had to be reached on the TMB issue before the Rules of Conduct could be adopted by the DSB. This led Ambassador Armstrong to resume a series of consultations from May to November 1996, initially with six main importers and exporters of textile products, which led to a solution.

6. The Self-Disclosure Requirement (disclosure obligation)

Members always agreed that one of the means to ensure the integrity and impartiality of the dispute settlement mechanism was to require any covered person to disclose any information that would affect that person’s impartiality and independence. Setting aside the very difficult issue of the scope of this obligation, and the decision not to refer to “appearance of bias or apprehension of impropriety”, as discussed previously, it was understood that disclosure would have to be done before a covered person formally participates in a dispute settlement process. Importantly, this disclosure obligation ought to be a continuing obligation during the entire dispute settlement process. The issue of the disclosure obligation included procedural aspects (how to disclose and to whom) but also very substantive aspects, such as what to disclose, when and what the consequences for failing to do so would be.

The Chairman circulated a draft Illustrative List of the type of information (fairly similar to today’s list in Annex 2) that should or could be disclosed. The Chairman asked whether such a list should be binding or simply illustrative and whether covered persons should be obliged to sign the disclosure statement and, if so, what the statement should provide for.

On the issue of the Illustrative List, delegations agreed on the following points:
- The privacy of panelists and others should be respected and this should be balanced with the need to receive all the necessary information.
- The information received should be kept confidential.
- The list should be illustrative and the criteria for what ought to be disclosed should be whether such information would affect that person’s impartiality.
Therefore, any information not mentioned in the Illustrative List could still be the object of disclosure if the covered person considered that it could affect his or her impartiality.

- Concerning professional interest, there should not be too much emphasis on participation in previous cases.
- Some delegations were of the view that more emphasis should be put on previous publications, as these could reveal strongly held positions, whereas others considered that publications were simply evidence of expertise in the field.

Suggestions that a different Illustrative List should be used for the staff members were rejected in a later session. There appeared to be broad support for a list because although it was illustrative, it would first help panelists and other covered persons to identify possible conflicts of interests and it should thereby reduce the possibility of later challenges which could be damaging to the dispute settlement process.

On the issue of whether the covered person should sign a disclosure statement and whether there should be some statement that he or she had read the Rules of Conduct, all delegations agreed that panelists should sign a disclosure statement before getting involved in the dispute settlement process and the disclosure should contain some statement that the person had read the Rules Conduct and that he or she understood that any information that may affect one's impartiality should be disclosed.

Some delegations were of the opinion that the disclosure obligation would be the occasion for panelists to think about potential problems but also the occasion to remove ambiguity, as anything which had been disclosed could not be the basis for an eventual challenge.

It remained to be determined to whom the disclosure should be made. With the three-track approach, the solution appeared more simple: different covered persons would disclose to different authorities:

"... all covered persons described in paragraph VI.1(a) and VI.1(b) shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List, if relevant."

Therefore, it was decided that all panelists, arbitrators and experts, prior to confirmation of their appointment, should complete the standard disclosure form. The information would be disclosed to the Chairperson of the DSB for consideration by the parties to the dispute.

Members of the Standing Appellate Body and staff serving on the Standing Appellate Body selected to hear the appeal of a particular case would complete the standard disclosure form. The information would be disclosed to the Standing Appellate Body for its consideration as to whether the person concerned should be involved in a particular appeal.

When being considered to assist in a dispute, Staff members of the Secretariat
would specifically disclose to the Director-General for his consideration any information regarding their participation in earlier formal consideration of the specific measure at issue in a dispute under any provisions of the WTO Agreement, including through formal legal advice under Article 27.2 of the DSU, as well as any involvement with the dispute as an official of a WTO Member government or otherwise professionally, before having joined the Secretariat.

It is also important to note that the obligation is entitled "self-disclosure", that is to say it is self-determined as it is for each covered person to decide whether a matter should be disclosed. Finally, it was also agreed that the disclosure should be made in any case before a dispute process is initiated, but that this disclosure obligation should remain throughout the process in case a change of circumstances affected that person's impartiality or independence. Then surfaced again the issue of the consequences for a party of withholding information during the dispute process that could lead to the disqualification of a covered person, further discussed below.

7. Confidentiality

Respect of confidentiality was always an important feature of these negotiations. Although the DSU refers in numerous Articles to the obligations of Members to respect confidentiality and emphasizes the confidentiality of the dispute settlement process, it was considered necessary that respect of confidentiality be mentioned in the Preamble, the Governing Principle and in the Section on the Observance of the Governing Principle. Yet Members insisted that an additional separate Section on Confidentiality be maintained. It can be argued that this Section on Confidentiality clarifies existing provisions of the DSU in providing that no covered person shall make any statements on WTO proceedings or the issues in dispute in which that person is participating, until the report of the panel or the Standing Appellate Body has been declassified.

8. The Challenge Process (Procedures Concerning Subsequent Disclosure and Possible Material Violations)

The challenge process was in fact the core of the Rules of Conduct. Although one could argue that the obligation of independence, impartiality, absence of conflict of interest and confidentiality already existed in the language of the DSU and the WTO Agreement, this was not the case for the disclosure obligation and even less so for the right for a party to ask for the disqualification of a covered person, i.e. the so-called "challenge process". As mentioned, the initial US proposal contained a very brief Section on Procedure for Disqualification, while the thrust of the procedure was contained in a draft decision to be adopted by the DSB.
(a) *Criteria for the initiation of the process (Section VIII:1)*

After several meetings, it became clear that some delegations would insist that a violation of the Rules of Conduct should not necessarily lead to the disqualification of the covered person. After many negotiation sessions, it was finally agreed that two conditions would be necessary for a challenge process to be validly initiated. There must be a high level of proof to initiate the process—hence "evidence" of a "material" violation of one of the obligations of the Rules of Conduct. In addition, and most importantly, there must be an allegation that such violation may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism. Only if these two conditions exist can a party initiate a challenge process.

(b) *Criteria for the decision to disqualify a covered person (Section VIII:1, 2)*

The text of the Rules of Conduct does not contain a specific list of criteria to be used by the relevant authorities for deciding whether to disqualify a covered person. There is, however, the Illustrative List of information that may affect the impartiality of a person and which, therefore, could be used as criteria when deciding whether a person has not been impartial or independent or whether there is direct or indirect conflict of interest. Therefore, it will be for each case to be decided on its specific facts.

A number of delegations expressed great difficulties with the idea that failure to disclose a matter that arguably could or should have been disclosed, could in itself constitute automatically a violation of the Rules of Conduct. Many delegations insisted that the disclosure obligation was self-determined and that it would be trivial to disqualify someone just because he or she failed to understand that certain information could be relevant to the dispute. On the other hand, other Members insisted that disclosure constitutes an obligation contained in the Governing Principle and an expectation explicitly referred to in the Section on Observance of the Governing Principle. At the end, the latter countries, including the United States and the European Communities finally agreed that the failure to disclose would not as such constitute a violation of the Rules of Conduct, unless there was also evidence that the matter not disclosed constituted a "material" violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests, and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby. This is now stated in Section VIII:2 of the Rules of Conduct.

This paragraph 2 means that in cases where one party alleges that a covered person has failed to disclose a fact, i.e. a violation of the Rules of Conduct which makes disclosure mandatory, there must be three elements for a person to be disqualified: (1) there must be evidence of the failure to disclose, (2) there must be proof that the non-disclosed matter in fact constitutes a violation of one of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests,
and (3) there must be evidence that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.

(c) **Withholding information (Section VIII:3)**

Another subject of very long negotiations was the issue of when such relevant information regarding a possible violation ought to be submitted. The fear was that information could be misused. In other words, could a party have evidence that a covered person is violating the Rules of Conduct and wait for the end of the dispute settlement process to raise the issue if that party is dissatisfied with the results of the Panel or Appellate Body reports? To deal with this concern, delegations suggested a series of time-limits within which such evidence should be brought to the attention of the covered person and the other party. One argument was that there was no means to control when exactly a party can be considered to be well informed of a situation so as to lodge a complaint and that to force parties to complain too rapidly about dubious situations would only lead to frivolous complaints. Therefore, it was decided that compromising evidence should be brought to the appropriate authority “at the earliest possible time”. As further reassurance against possible misuse, an additional paragraph in the final text provides that: “When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier and this explanation shall be taken into account in the procedures initiated in paragraph VIII:1.” (For instance, one could argue that the withholding of information by a party should be considered as evidence that the dispute settlement mechanism has not been impaired and, therefore, that the second condition for disqualification is not met.)

(d) **The role of the parties in the disqualification decision-making process (Section VIII:8)**

In the initial US proposal, parties could agree whether to disqualify a covered person. This issue was battled over until the last minute, and indeed, setting aside the negotiations on the TMU, this aspect was the last point of contention resolved. Major countries and others argued that the dispute belongs to the parties and, for instance, parties can settle a case without taking into consideration the rights of third parties. They further argued that to refuse parties the right to disqualify a person, when they had selected that person, went against the principle and the practice of the GATT/WTO dispute settlement and would only lead to the absurd result where one of the said parties would withdraw and then re-initiate such a case and select different panelists. The response to this argument was that it was wrong to see the new WTO dispute settlement mechanism as a matter for the parties only. Throughout the DSU, Members were given the right to control disputes and the implementation of panel reports. It would be unreasonable to deny the systemic impact of any disqualification. The response to the alleged threat of withdrawal from a case and its subsequent re-initiation, was simply that
RULES ON ETHICS FOR THE NEW WTO DISPUTE SETTLEMENT MECHANISM

if parties wanted to misuse the system they would bear the blame; if the Rules of Conduct were to authorize such "conspiracy" of the parties, it would be the entire WTO system that would be to blame! The reputation of the panelists was also at stake and the integrity of the system was not to become hostage to possible disqualification frivolities. It was finally decided that when parties agree that a material violation of the Rules of Conduct has occurred, it would be expected that the disqualification of the panelist would be confirmed, but an additional condition was imposed: such disqualification ought to be consistent with maintaining the integrity of the dispute settlement mechanism.

To ensure that this principle was clearly understood, appropriate language was inserted at the beginning of paragraph VIII:8:

"In all cases the Chair of the DSB, in consultation with the DG and the Chairs of the other Councils, would decide whether a violation of the Rules had occurred. Where the parties agree that a material violation has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person would be confirmed."

This is to say that the Chair of the DSIB, in consultation with the DG and the other Chairs of the WTO councils, always has the last say on the disqualification of panelists.

It should be noted that for the disqualification challenge of a member of the Appellate Body or its staff, the parties' agreement is not a consideration in the disqualification process. The only obligation imposed on the Appellate Body in this regard is to provide the parties with a "reasonable opportunity to be heard" (Section VIII:16).

Concerning the criteria for disqualification of a staff member of the Secretariat, the Director-General maintains full discretion to take any appropriate action in accordance with the Staff Regulations.

(e) The right of the challenged person to be heard (Secretariat, panelists, experts, arbitrators and Appellate Body)

Delegations were most concerned that the covered person not be taken by surprise by any allegation of a violation of the Rules of Conduct and that principles of natural justice be respected. Otherwise, no-one would ever agree to serve as a panelist. Thus, the different procedures for the three different types of covered person provided for an obligation on the decision-making authority to ensure that the covered person is well informed of the evidence submitted against him or her, and that that person is consulted on the issue before the matter is decided. Therefore, all relevant evidence ought to be exchanged by all concerned parties.22 This would

22 See Section VIII:6, 7 and 8 for panelists, experts and arbitrators; Section VIII:11 and footnote *** for staff members of the Secretariat; and Section VIII:14, 15 and 16 for the Appellate Body members and staff.
ensure an authentic adversarial process. It was also decided after extensive discussion that only the parties could complain about any violation of the Rules of Conduct. If any other Member were in possession of such evidence, it should bring it to the attention of one of the parties.

(f) The challenge procedures (Section VIII)

After the introduction of the three-track proposal, the challenge procedure varies with the type of covered person:

- For panelists, experts and arbitrators (Section VIII:5-10), evidence of a material violation of the Rules of Conduct is to be lodged with the Chair of the DSB, who would then consult the covered person and thereafter the parties. A decision would be taken by the Chair of the DSB, in consultation with the Director-General and the chair(s) of other relevant councils.

- For Appellate Body members and staff (Section VIII:14-17) evidence of a material violation of the Rules of Conduct is to be provided to the other party and thereafter to the Appellate Body and the person concerned; and a decision is taken by the Appellate Body. The persons concerned and the parties could be heard and the decision would be reported to the parties and the Chair of the DSB, with relevant supporting information.

- For Secretariat staff (Section VIII:11-13), evidence of a material violation of the Rules of Conduct is to be lodged only with the Director-General, who shall provide it to the staff member; consult with the staff member who is challenged and with the panel; if necessary, take appropriate disciplinary action in accordance with the Staff regulations; and inform the parties to the dispute, the panel and the Chairperson of the DSB.

(g) Time-limits

From the beginning, developing countries insisted on a very fast process. This was generally agreed and Chairman Armstrong proposed four means to ensure the process is as rapid as possible. First, it was decided that the entire challenge process would have to be completed within 15 working days, that is three weeks. Second, to ensure the efficient continuation of the panel or Appellate Body process, the person who is the object of the challenge process would continue his or her function until his or her disqualification is decided. Third, after a covered person is disqualified, excused or resigns, the procedures for the appointment of a replacement would follow the DSU procedures for his or her nomination but in half the time envisaged in the DSU. Finally, flexibility was given to the relevant bodies (panel, Appellate Body or arbitrator) to perform any necessary modifications to their working procedures.
9. The TMB

As mentioned before, the issue of the TMB had been set aside with the understanding that nothing was agreed until the entire Rules of Conduct were agreed upon. In autumn 1995 there was consensus on all aspects of the Rules of Conduct except the TMB issue. For one major textile exporter, settling the issue of the TMB was fundamental for the adoption of the Rules of Conduct by the DSB. In autumn 1995, Ambassador Armstrong initiated a series of exhausting negotiation sessions within a smaller group of textile exporters and importers on the relationship between the rules of conduct and the TMB.

There were three main issues related to the TMB. A first and general one which never received any answer was whether the TMB process is part of the WTO dispute settlement mechanism and whether persons involved in the TMB process should therefore be covered by the Rules of Conduct as any other participant in the WTO dispute settlement mechanism. A second issue was whether the actions and behaviour of the members of the TMB could be referred to in the text of the Rules of Conduct and covered by some of its provisions. A final point was how to co-ordinate any such provisions relating to members of the TMB in the Rules of Conduct with the existing working procedures of the TMB and with on-going negotiations in the Council for Trade in Goods to further describe the obligations of the TMB members to act on an ad personam basis.

This small group of six delegations examined whether the TMB members, the Chairman and staff of the TMB should be covered by the obligations of the Rules of Conduct, and, if so, to what extent (taking into account the fact that members of the TMB are nominated for five years and considering that the TMB process can always lead to a formal dispute settlement process under the DSU). The delegations met numerous times in an effort to agree whether or not the TMB process was part of or distinct from the dispute settlement process of the WTO. Finally, negotiators agreed not to agree and decide to change their approach. They looked for a viable solution concerning the three categories of people involved in the TMB process, i.e. the TMB members, the Chairman of the TMB and the staff of the TMB.

It was finally agreed that the Chairman of the TMB and the other members of the Secretariat assisting the TMB would be fully covered by the Rules of Conduct, as any other staff members of the Secretariat. As any other staff member, their disclosure obligation would be made to the Director-General, they could be challenged by a party, but complaints could only be made to the Director-General, who would handle the matter according to the WTO Staff Regulations. The members of the TMB would not strictly be covered by all the provisions of the Rules of Conduct, but expectations of their conduct would be discussed in the Rules of Conduct within the parameters of a new Section V on the TMB. In that Section V the language of the rules of procedures of the TMB was used together with an explicit reference to preserving the integrity and impartiality of the proceedings of the TMB.
It is in that context that the concept of “covered persons” was formally introduced. The Chairman of the TMB and its staff would be “covered persons” as any other staff member of the Secretariat. Members of the TMB would not be “covered persons”, but would be referred to in a separate paragraph 3 under the Section: “Rules apply to the members of the TMB to the extent prescribed in Section 5”. Accordingly, a new Section 5 entitled “Textiles Monitoring Body” was introduced into the Rules of Conduct:

“V. Textiles Monitoring Body

1. Members of the TMB shall discharge their functions on an *ad personam* basis, in accordance with the requirement of Article 8.1 of the Agreement on Textiles and Clothing, as further elaborated in the working procedures of the TMB, so as to preserve the integrity and impartiality of its proceedings”.

The footnote ‘1’ refers to the current TMB rules of procedure, Article 1.4:

“These working procedures, as adopted by the TMB on 26 July (G/TMB/R/1), currently include, *inter alia*, the following language in paragraph 1.4: In discharging their functions in accordance with paragraph 1.1 above, the TMB members and alternates shall undertake not to solicit, accept or act upon instructions from governments, nor to be influenced by any other organisations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an *ad personam* basis. Should serious doubts arise during the deliberations of the TMB regarding the ability of a TMB member to act on an *ad personam* basis, they shall be communicated to the Chairman. The Chairman shall deal with the particular matter as necessary.”

As the TMB is master of its own procedures, even the introductory phrases of this footnote required careful negotiation to balance the competing interests. Accordingly, as the TMB members are explicitly covered by Section 5 only, section II, on the Governing Principle was amended so that the expression “person covered” refers to the persons listed in paragraph 1 of Section IV on Scope, which does not include the TMB members (who are mentioned in paragraph 3 of Section IV on Scope).

This is to say that TMB members are not subject to the disclosure obligation nor to the challenge process of the Rules of Conduct, but TMB members are, through the application of the Rules of Conduct, subject to the obligations and principles which were negotiated in the TMB context with an explicit reference “so as to preserve the integrity and impartiality of its proceedings”.

V. THE ADOPTION OF THE RULES OF CONDUCT BY THE DSB

Finally, after three open-ended meetings with all interested delegations where he reported the results of the negotiations on the TMB issues, Chairman Armstrong announced at the DSB meeting of 20 November 1996, 23 that consensus had been reached amongst participants of the negotiations of the Rules of Conduct on a final draft

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23. WT/DSS/M/26.
text. There remained a question as to which WTO body should adopt these Rules of Conduct.

On the one hand, it was clear that the Chairman had received his mandate from the DSB and that, therefore, he should report to the DSB where the Rules of Conduct for the DSU should be adopted by consensus (see Article 2.4, note 1 of the DSU). It would also have been possible for the General Council to approve such Rules of Conduct, if so requested by a Member, and the decision process should still be by consensus. Article iv:1 of the WTO Agreement states:

"The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement" (emphasis added).

It was finally decided with the legal pragmatism traditional in the GATT/WTO that the DSB would adopt the Rules of Conduct. Their proposed adoption was put on the agenda of the DSB meeting of 3 December 1996 when consensus was reached. The Appellate Body soon after circulated document WT/DSB/RC/2, in which it declared that the entire newly adopted Rules of Conduct, including Section V on the TMB, were now part of the Working Procedures of the Appellate Body.

From the day of their adoption, these Rules of Conduct became binding upon Members. They become part of the contract between panelists and the WTO once panelists are selected for a panel. Finally, the staff members of the Secretariat were bound by the Rules of Conduct from the day of their adoption. When Staff Regulations are adopted by the General Council, the content of the footnote to Section iv:4(c) of the Rules of Conduct text will be an integral part of the Staff Regulations and, as such, will bind members of the staff contractually as well.

VI. Conclusion

If the new dispute settlement rules of the WTO are a success story, the same can be said of the Rules of Conduct for the DSU. The Rules of Conduct constitute by far the most detailed and sophisticated set of provisions imposing obligations of impartiality and independence on persons involved in an international dispute settlement process. Considering that the dispute settlement rules of the WTO are an extremely powerful system for resolving trade disputes, ensuring the impartiality of those involved in any dispute settlement process can be seen as a necessity. Indeed, it is essential to ensure its viability. The WTO Members once again proved that their tradition of consensus, which may appear to slow down certain negotiations, ensures that the content of the rules negotiated take into account, as far as possible, the interests and the needs for all those concerned.
RULES OF CONDUCT FOR THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (WT/DSBRC/1) adopted by the DSB on 3 December 1996

I. Preamble

Members,

Recalling that on 15 April 1994 in Marrakesh, Ministers welcomed the stronger and clearer legal framework they had adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism;

Recognising the importance of full adherence to the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DsU") and the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947, as further elaborated and modified by the DsU;

Affirming that the operation of the DsU would be strengthened by rules of conduct designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DsU thereby enhancing confidence in the new dispute settlement mechanism;

Hereby establish the following Rules of Conduct.

II. Governing Principle

1. Each person covered by these Rules (as defined in paragraph 1 of Section IV below and hereinafter called "covered person") shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved. These Rules shall in no way modify the rights and obligations of Members under the DsU nor the rules and procedures therein.

III. Observance of the Governing Principle

1. To ensure the observance of the Governing Principle of these Rules, each covered person is expected (1) to adhere strictly to the provisions of the DsU; (2) to disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality; and (3) to take due care in the performance of their duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject-matter of the proceedings.

2. Pursuant to the Governing Principle, each covered person shall be independent and impartial, and shall maintain confidentiality. Moreover, such persons shall consider only issues raised in, and necessary to fulfil their responsibilities within, the dispute settlement proceeding and shall not delegate this responsibility to any other person. Such person shall not incur any obligation or accept any benefit that would in anyway interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties.

IV. Scope

1. These Rules shall apply, as specified in the text, to each person serving: (a) on a panel; (b) on the Standing Appellate Body; (c) as an arbitrator pursuant to the provisions mentioned in Annex "1a"; of (d) as an expert participating in the dispute settlement mechanism pursuant to the
provisions mentioned in Annex “1b”. These Rules shall also apply, as specified in this text and the relevant provisions of the Staff Regulations, to those members of the Secretariat called upon to assist the panel in accordance with Article 27.1 of the DSU or to assist in formal arbitration proceedings pursuant to Annex “1a”, to the Chairman of the Textiles Monitoring Body (hereinafter called “TMB”) and other members of the TMB Secretariat called upon to assist the TMB in formulating recommendations, findings or observations pursuant to the WTO Agreement on Textiles and Clothing; and to Standing Appellate Body support staff called upon to provide the Standing Appellate Body with administrative or legal support in accordance with Article 17.7 of the DSU (hereinafter “Member of the Secretariat or Standing Appellate Body support staff”), reflecting their acceptance of established norms regulating the conduct of such persons as international civil servants and the Governing Principle of these Rules.

2. The application of these Rules shall not in any way impede the Secretariat’s discharge of its responsibility to continue to respond to Members’ requests for assistance and information.

3. These Rules shall apply to the members of the TMB to the extent prescribed in Section v.

V. Textiles Monitoring Body

1. Members of the TMB shall discharge their functions on an ad personam basis, in accordance with the requirement of Article 8.1 of the Agreement on Textiles and Clothing, as further elaborated in the working procedures of the TMB, so as to preserve the integrity and impartiality of its proceedings.*

VI. Self-Disclosure Requirements by Covered Persons

1. (a) Each person requested to serve on a panel, on the Standing Appellate Body, as an arbitrator, or as an expert shall, at the time of the request, receive from the Secretariat these Rules, which include an Illustrative List (Annex 2) of examples of the matters subject to disclosure.

(b) Any member of the Secretariat described in paragraph iv:1, who may expect to be called upon to assist in a dispute, and Standing Appellate Body support staff, shall be familiar with these Rules.

2. As set out in paragraph iv:4 below, all covered persons described in paragraph vi:1(a) and vi:1(b) shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List, if relevant.

3. These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on panels, the Standing Appellate Body, or in other dispute settlement roles.

4. (a) All panelists, arbitrators and experts, prior to confirmation of their appointment, shall complete the form at Annex 3 of these Rules. Such information would be disclosed to

* These working procedures, as adopted by the TMB on 26 July 1995 (G/TMB/R/1), currently include, inter alia, the following language in paragraph 1.4: “In discharging their functions in accordance with paragraph 1.1 above, the TMB members and alternates shall undertake not to solicit, accept or act upon instructions from governments, not to be influenced by any other organizations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an ad personam basis. Should serious doubts arise during the deliberations of the TMB regarding the ability of a TMB member to act on an ad personam basis, they shall be communicated to the Chairman. The Chairman shall deal with the particular matter as necessary.”
the Chair of the Dispute Settlement Body ("DSB") for consideration by the parties to the dispute.

(b) (i) Persons serving on the Standing Appellate Body who, through rotation, are selected to hear the appeal of a particular panel case, shall review the factual portion of the Panel report and complete the form at Annex 3. Such information would be disclosed to the Standing Appellate Body for its consideration whether the member concerned should hear a particular appeal.

(ii) Standing Appellate Body support staff shall disclose any relevant matter to the Standing Appellate Body, for its consideration in deciding on the assignment of staff to assist in a particular appeal.

(c) When considered to assist in a dispute, members of the Secretariat shall disclose to the Director-General of the WTO the information required under paragraph VI:2 of these Rules and any other relevant information required under the Staff Regulations, including the information described in the footnote.

5. During a dispute, each covered person shall also disclose any new information relevant to paragraph IV:2 above at the earliest time they become aware of it.

6. The Chair of the DSB, the Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel process and its enforcement procedures, if any, are completed.

VII. Confidentiality

1. Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. No covered person shall at any time use such information acquired during such deliberations and proceedings to gain personal advantage or advantage for others.

2. During the proceedings, no covered person shall engage in ex parte contacts concerning matters under consideration. Subject to paragraph VII:1, no covered person shall make any statements on such proceedings or the issues in dispute in which that person is participating, until the report of the panel or the Standing Appellate Body has been derestricted.

VIII. Procedures Concerning Subsequent Disclosure and Possible Material Violations

1. Any party to a dispute, conducted pursuant to the WTO Agreement, who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such information to the Director-General in accordance with the following draft provision to be included in the Staff Regulations:

"When paragraph VII:4(c) of the Rules of Conduct for the DSB is applicable, members of the Secretariat would disclose to the Director-General of the WTO the information required in paragraph VI:2 of these Rules, as well as any information regarding their participation in earlier formal consideration of the specific measure at issue in a dispute under any provisions of the WTO Agreement, including through formal legal advice under Article 27.2 of the DSB, as well as any involvement with the dispute as an official of a WTO Member government or otherwise professionally, before having joined the Secretariat."

The Director-General shall consider any such disclosures in deciding on the assignment of members of the Secretariat to assist in a dispute.

When the Director-General, in the light of his consideration, including of available Secretariat resources, decides that a potential conflict of interest is not sufficiently material to warrant non-assignment of a particular member of the Secretariat to assist in a dispute, the Director-General shall inform the panel of his decision and of the relevant supporting information."
evidence to the Chair of the DSB, the Director-General or the Standing Appellate Body, as appropriate according to the respective procedures detailed in paragraphs VIII.5 to VIII.17 below, in a written statement specifying the relevant facts and circumstances. Other Members who possess or come into possession of such evidence, may provide such evidence to the parties to the dispute in the interest of maintaining the integrity and impartiality of the dispute settlement mechanism.

2. When evidence as described in paragraph VIII.1 is based on an alleged failure of a covered person to disclose a relevant interest, relationship or matter, that failure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.

3. When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier and this explanation shall be taken into account in the procedures initiated in paragraph VIII.1.

4. Following the submission of such evidence to the Chair of the DSB, the Director-General of the WTO or the Standing Appellate Body, as specified below, the procedures outlined in paragraphs VIII.5 to VIII.17 below shall be completed within fifteen working days.

Panelists, Arbitrators, Experts

5. If the covered person who is the subject of the evidence is a panelist, an arbitrator or an expert, the party shall provide such evidence to the Chair of the DSB.

6. Upon receipt of the evidence referred to in paragraphs VIII.1 and VIII.2, the Chair of the DSB shall forthwith provide the evidence to the person who is the subject of such evidence, for consideration by the latter.

7. If, after having consulted with the person concerned, the matter is not resolved, the Chair of the DSB shall forthwith provide all the evidence, and any additional information from the person concerned, to the parties to the dispute. If the person concerned resigns, the Chair of the DSB shall inform the parties to the dispute and, as the case may be, the panelists, the arbitrator(s) or experts.

8. In all cases, the Chair of the DSB, in consultation with the Director-General and a sufficient number of Chairs of the relevant Council or Councils to provide an odd number, and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, would decide whether a material violation of these Rules as referred to in paragraphs VIII.1 and VIII.2 above has occurred. Where the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed.

9. The person who is the subject of the evidence shall continue to participate in the consideration of the dispute unless it is decided that a material violation of these Rules has occurred.

10. The Chair of the DSB shall thereafter take the necessary steps for the appointment of the person who is the subject of the evidence to be formally revoked, or excused from the dispute as the case may be, as of that time.

Secretariat

11. If the covered person who is the subject of the evidence is a member of the Secretariat, the party shall only provide the evidence to the Director-General of the WTO, who shall forthwith provide the evidence to the person who is the subject of such evidence and shall further inform the other party or parties to the dispute and the panel.
12. It shall be for the Director-General to take any appropriate action in accordance with the Staff Regulations.***

13. The Director-General shall inform the parties to the dispute, the panel and the Chair of the DSB of his decision, together with relevant supporting information.

Standing Appellate Body

14. If the covered person who is the subject of the evidence is a member of the Standing Appellate Body or of the Standing Appellate Body support staff, the party shall provide the evidence to the other party to the dispute and the evidence shall thereafter be provided to the Standing Appellate Body.

15. Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2 above, the Standing Appellate Body shall forthwith provide it to the person who is the subject of such evidence, for consideration by the latter.

16. It shall be for the Standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard.

17. The Standing Appellate Body shall inform the parties to the dispute and the Chair of the DSB of its decision, together with relevant supporting information.

* * *

18. Following completion of the procedures in paragraphs VIII:5 to VIII:17, if the appointment of a covered person, other than a member of the Standing Appellate Body, is revoked or that person is excused or resigns, the procedures specified in the DSU for initial appointment shall be followed for appointment of a replacement, but the time periods shall be half those specified in the DSU.**** The member of the Standing Appellate Body who, under that Body's rules, would next be selected through rotation to consider the dispute, would automatically be assigned to the appeal. The panel, members of the Standing Appellate Body hearing the appeal, or the arbitrator, as the case may be, may then decide after consulting with the parties to the dispute, on any necessary modifications to their working procedures or proposed timetable.

19. All covered persons and Members concerned shall resolve matters involving possible material violations of these Rules as expeditiously as possible so as not to delay the completion of proceedings, as provided in the DSU.

20. Except to the extent strictly necessary to carry out this decision, all information concerning possible or actual material violations of these Rules shall be kept confidential.

IX. Review

1. These Rules of Conduct shall be reviewed within two years of their adoption and a decision shall be taken by the DSB as to whether to continue, modify or terminate these Rules.

Annex 1a

Arbitrators acting pursuant to the following provisions:
- Articles 21.3(c); 22.6 and 22.7; 26.1(c) and 25 of the DSU:

*** Pending adoption of the Staff Regulations, the Director-General would act in accordance with the following draft provision for the Staff Regulations: "If paragraph VIII:11 of the Rules of Conduct for the DSU governing the settlement of disputes is invoked, the Director-General shall consult with the person who is the subject of the evidence and the panel and shall, if necessary, take appropriate disciplinary action."

**** Appropriate adjustments would be made in the case of appointments pursuant to the Agreement on Subsidies and Countervailing Measures.
- Article 8.5 of the Agreement on Subsidies and Countervailing Measures;
- Articles XXI.3 and XXII.3 of the General Agreement on Trade in Services.

**Annex 1b**

Experts advising or providing information pursuant to the following provisions:
- Article 13.1; 13.2 of the DSU;
- Article 4.5 of the Agreement on Subsidies and Countervailing Measures;
- Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures;
- Article 14.2; 14.3 of the Agreement on Technical Barriers to Trade.

**Annex 2: Illustrative List of Information to the Disclosed**

This list contains examples of information of the type that a person called upon to serve in a dispute should disclose pursuant to the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Each covered person, as defined in Section IV:1 of these Rules of Conduct has a continuing duty to disclose the information described in Section VI:2 of these Rules which may include the following:

(a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;

(b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);

(c) other active interests (e.g. active participation in public interest groups or other organizations which may have a declared agenda relevant to the dispute in question);

(d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

(e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).

**Annex 3: World Trade Organization Disclosure Form**

I have read the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Rules of Conduct for the DSU. I understand my continuing duty, while participating in the dispute settlement mechanism, and until such time as the Dispute Settlement Body (DSB) makes a decision on adoption of a report relating to the proceeding or notes its settlement, to disclose herewith and in future any information likely to affect my independence or impartiality, or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism; and to respect my obligations regarding the confidentiality of dispute settlement proceedings.

Signed:  
Dated: