The United States wishes to put forward suggestions for discussion as to how the dispute settlement system might be improved. The United States has not reached definitive conclusions with respect to the ideas set out below, some of which, it will be observed, are put forward as alternatives for consideration. We encourage a full discussion by all delegations of the advantages and disadvantages of all these ideas, as well as other ideas that delegations may put forward now and in the future, and we reserve the right to suggest new or alternative ideas.

1. An enhanced mediation role for the GATT Director-General or his designee.

The Director-General of GATT or his designee could be empowered and directed to try to mediate a bilateral solution to disputes while the dispute is under bilateral discussion, before the dispute reaches the inherently more confrontational stage of a panel proceeding. At the same time, the mediation function would be separated out from the panel process so as to make clear that the role of the panel is a last resort adjudicatory stage. The GATT would promote the idea that such neutral mediation by a neutral party at an early stage could head off a larger confrontation. A mediator can offer a fresh and objective perspective to a dispute, and the intervention of a mediator may also make compromise resolutions more palatable to domestic constituents in some cases than would solutions arrived at in purely bilateral consultations.

While the mediator would be required to discuss each dispute with the parties and to offer his mediation services, either disputing party should have the right to reject or terminate mediation if it were perceived that the mediation or conciliation phase could result only in needlessly prolonging the dispute settlement process. On the other hand, a voluntary mediation phase, with appropriate safeguards for timing and confidentiality of the process, and under the prodding of a respected neutral mediator, could lead to more timely and less confrontational solutions.
2. A binding arbitration process (entailing no GATT Council or Code Committee approval) as an alternative means of dispute settlement for defined classes of cases, or by prior agreement of the disputing parties on an ad hoc basis.

At present, all GATT disputes fall under essentially the same procedures, whatever the issue. One consequence is that issues that should be relatively simply and easily settled are taking too long and becoming too political because of procedures and practices designed for harder cases.

It might be useful to provide for binding arbitration by a neutral body as a formally available technique of GATT dispute settlement. By binding, it is meant that the arbitrators' decision would not require approval by the GATT Council. A disputing party would still not be compelled to implement the arbitrators' decision, but a party failing to implement such a decision would have to pay compensation or accept retaliation. To safeguard the interests of other contracting parties, it would have to be provided that decisions of such an arbitration process could not bind other contracting parties or prejudice their rights and interests.

Arbitration is a widespread and common form of dispute settlement in international trade. Many commodity and transportation contracts between firms normally provide for impartial arbitration by specialists in those fields. Arbitration provisions may also be found in a number of bilateral intergovernmental trade agreements and in air transport agreements.

Binding arbitration should be available whenever both disputing parties agree, as an alternative to the normal dispute settlement process. In addition, there might be classes of disputes where binding arbitration should be required in lieu of the normal panel process. If arbitration proves workable and useful, use of the device might subsequently be expanded.

3. Binding, enforceable time-tables for the process, including its various stages.

The length of the dispute settlement process, including the myriad opportunities for delay, has at least three negative consequences: it discourages use of dispute settlement procedures for certain short-term issues; it means that considerable trade damage may be suffered in other cases while the process is pending; and it contributes to a pejorative public perception of the GATT.
Subject to mutual agreement of the disputing parties to any extension, there should be time limits for each phase of the dispute settlement process, as well as for the process as a whole. Further, recognizing that such time guidelines as now exist often have not been met, the time limits should be made enforceable. For consultation and mediation phases of the process, the complaining party should have the right to proceed to the next phase within a fixed period of time. Should a party request the establishment of a panel in accordance with the appropriate procedures, it should be automatically established, without debate in Council or delay. In the case of unconsented delays caused by the defending party during the work of the panel or thereafter (e.g. delays in providing written submissions or information requested by the panel), the complaining party should have the right to retaliate for damage caused by the measures at issue during the period of delay, provided that such measures are found to have infringed obligations or otherwise to have caused nullification or impairment.

4. Use of non-governmental experts as panelists.

The use of panelists from third-country governments appears to be a weakness of the current system. It is fundamental to any dispute settlement system that the disputing parties must have reasonable confidence that the arbitrators are fair, competent and neutral. Those working most closely with the GATT may be confident that individuals chosen from third country delegations have generally met these qualifications, often commendably. However, for others, most notably constituents in all countries, the current system will always give rise to the suspicion that governmental representatives are not fully neutral, even if they wish to be. That suspicion in turn makes it easier to block or reject even meritorious panel findings.

In addition, as we have seen in recent months, when the number of concurrent panels increases, it becomes progressively more difficult to obtain the services of eligible first-rate panelists from government delegations, which face many other demands on their time. This is particularly the case in disputes involving multiple parties or numerous interested third parties. Use of governmental panelists also can add to delays in panel proceedings, for the understandable reason that the panelists, particularly those from smaller delegations, face many competing demands on their time.
Accordingly, panelists (and arbitrators) should be chosen exclusively from a roster of neutral non-governmental experts. (This was a recommendation made by the "seven wise men" in the Leutwiler Report as well.) Recognizing that there still is a risk of deficient panelists among non-governmental experts, the roster of available experts should be sufficiently large that bad choices, or at least a repetition of bad choices, can be avoided.

5. An agreement that the terms of reference for all panels should be the same standard terms, to prevent delays occasioned by negotiating terms of reference among the parties to the dispute.

The standard terms of reference most often used in panel proceedings are to examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the complaining party and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the ruling provided for in Article XXIII:2. However, there is no requirement that those terms of reference be used, and the unfortunate practice of establishing terms of reference in consultation with the parties to the dispute has become a common practice, thus unduly delaying the composition of a panel after it has been established by the GATT Council. This extra step in the process, which allows for some discretion and considerable delay, should be eliminated, with departures from the standard terms allowed only where all parties to the dispute agree to such departures. As a corollary, it should be provided that the complaining party must give a short written statement of the measures at issue and the nature of the complaint before requesting establishment of a panel. Such a paper, which in practice is already often provided, would enable all parties to understand the scope of the issue in dispute before the panel began its work and minimize debates in the Council as to whether a party has changed the nature of its complaint relative to matters about which there have been consultations. It would be understood that the complaining party would not be expected to provide detailed justifications in this paper, and the defending party would not be required to respond in writing prior to establishment of the panel.
6. A procedure to deal with the problem of blocking adoption of panel reports.

In the last several years, the blocking of adoption of panel reports has become a serious problem which has shaken confidence in the GATT system as a whole. Only rarely has such blocking appeared to be a result of fundamentally erroneous or inadequate panel conclusions; too often the motivation appears to be that parties are unwilling to accept conclusions they deem adverse to their economic or political interests.

There is a spectrum of procedures that could be considered to deal with this problem in these negotiations. The most extreme solution would be to make panel findings and recommendations binding, without further action by the GATT Council or code Committees. Under such a solution, a panel finding that a practice causes nullification or impairment would by itself give the damaged party a right to suspend concessions or other obligations if the practice were not remedied or compensation agreed. Recognizing that such a solution would afford no check against an erroneous report and would mark a fundamental change in the philosophy of the system, an alternative for consideration might be to provide that panel reports become binding and give rise to rights for the complaining party only if, after consideration by the Council or Committee in some fixed period of time, there is no consensus against adoption of the findings or recommendation in the panel report.

Another approach, that has been discussed previously in the GATT, is to allow decisions on the adoption of panel reports to be taken by a consensus that excludes the parties to the dispute. Finally, the approach set out in item 7 below would address this problem in the way that might be most preferable for all of us — if parties were indeed prepared to honor the affirmation called for.

The United States has not come to any conclusions as to which of these approaches would be both acceptable and effective in addressing the problem. We put forward this spectrum of ideas with the thought that all parties should weigh the advantages and disadvantages of each approach, as well as others that might be devised, recognizing that well-reasoned panel reports have only limited utility if GATT practice continues to allow parties to block adoption of reports or to avoid follow-up action.
7. In addition and/or as an alternative to the ideas in item 6, an affirmation that parties should seek to implement the recommendations resulting from a dispute settlement case, and recognize that failure to do so gives rise to a right to compensation or retaliation.

The changes in the dispute settlement process suggested above should help improve respect for the process, and thus make it easier for disputing parties to accept results. However, we think it is essential that these improvements be accompanied by an explicit new affirmation by all parties that they will use the process to settle disputes, that they will accept the results, and that they recognize that the failure to implement recommendations will give rise to a right to compensation or retaliation for adversely affected parties. These points are inherent in existing dispute settlement rules, but it is evident that, in practice, parties have manifested very different attitudes in many disputes. The more technical or procedural changes suggested above would form the occasion for a new affirmation, as much political as legal, of greatly improved attitudes toward the dispute settlement process.

In short, no system of dispute settlement in GATT will work successfully unless contracting parties come to view dispute settlement not as a contest of wills but as an essential element in the management of the world trading system.