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# The Post-Tokyo Round GATT Role in International Trade Dispute Settlement\*

by  
Kevin M. Harris\*\*

## I INTRODUCTION

International trade is an essential concomitant of economic growth and development. Its expansion and liberalization has been one of the major factors contributing to the prosperity of the world economy in the postwar era. However, the international trade system has not escaped the effects of the exogenous shocks which dislocated the international economic order during the 1970s. The past decade has therefore witnessed the rebirth of protectionism and the adoption of mercantilist foreign trade strategies by many states.<sup>1</sup> The early 1980s have experienced first a stagnation and then an absolute decline in the value of international trade.<sup>2</sup> Given these difficult circumstances, international economic conflict and international trade disputes are virtually inevitable. It thus becomes imperative that there be an effective international trade dispute system to resolve these conflicts, prevent their escalation, and avoid a recurrence of the beggar-thy-neighbor economic warfare which aggravated the Depression of the 1930s.

The General Agreement on Tariffs and Trade (GATT) provides the only multilateral forum for the settlement of international trade disputes between governments. This article will examine the operation of the GATT dispute-settlement system, its functional background, and its contemporary jurisprudence. Primary emphasis will be accorded to the post-Tokyo Round GATT experience, to evaluate whether the reforms implemented by the Tokyo Round are adequate to sustain the

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1. See Cohen and Zysman, *The Mercantilist Challenge to the Liberal International Trade Order*, 1 INT'L TAX & BUS. LAW. 1 (1983).

2. The value of world trade declined by one percent in 1981 and by six percent in 1982. GATT Press Release No. 1333 (Mar. 4, 1983) at 3.

dispute settlement system in the face of this contemporary challenge. Finally, the desirability of, and necessity for, future reform of the GATT dispute settlement system will be examined.

## II FUNCTIONAL BACKGROUND

Despite an historical legacy as an institutional orphan, the GATT has developed into the organizational framework for international trade relations, responsible for the successful supervision of a series of seven multilateral trade negotiations during the past three and a half decades.

The GATT is premised upon several fundamental norms and governing principles.<sup>3</sup> These substantive norms included a non-discrimination norm, which mandates Most-Favored-Nation (MFN) treatment,<sup>4</sup> a liberalization norm, for the progressive limitation and reduction of tariffs, a reciprocity norm for the exchange of trade concessions, a safeguard norm for the waiver of GATT obligations in situations of economic difficulties,<sup>5</sup> and a development norm for the preferential treatment of developing countries.<sup>6</sup> These fundamental substantive norms are accompanied by several procedural norms or governing principles. These procedural norms include a multilateralism norm, which ensures collective decision-making by consensus, a major interests norm, or the preeminence of major powers, and a set of consultation and conciliation procedures.

The interaction of these procedural norms can be seen in the institutional structure of the GATT. GATT has transcended the original fiction that it was not an international organization, and several institutional organs have evolved. The multilateralism norm is primarily expressed in the Contracting Parties, the collective body of the GATT membership. Decision-making in the Contracting Parties is conducted by majority vote, with a voting principle of one-State, one-vote. There is no weighted voting as in other international economic organizations such as the IMF or the World Bank, nor is a veto power granted to major powers. The Contracting Parties possess broad but vague powers to take joint action, but these powers have not been significantly exercised in practice.

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3. These norms are evaluated in Finlayson & Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, 35 INT'L ORG. 561 (1981).

4. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, Art. I:1, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (*entered into force* Jan. 1, 1948).

5. Article XII (balance of payments restrictions); Article XVIII B (quantitative restrictions); Art. XIX (general escape clause), *supra*, note 4.

6. Part IV (Articles XXXVI-XXXVIII), *supra* note 4.

GATT is administered by a relatively small Secretariat, headed by a Director-General. The Secretariat has been constrained by a modest budget and limited functions, but it has assumed a catalytic role in trade negotiations due to the leadership of a series of exceptionally talented Directors-General. The Secretariat and the Director-General have gradually developed an autonomous position which allows the presentation of a GATT viewpoint on trade policy issue. This development holds important implications for the dispute-settlement process, since the Secretariat possesses the impartiality and independence which are indispensable to a body vested with dispute-resolution authority.

A third element of the GATT institutional structure is the Council of Representatives. The Council has a membership open to all of the Contracting Parties, meets on a monthly basis, and is responsible for inter-sessional procedures. The Council has been described as the "central organ of the GATT."<sup>7</sup> The Council also has a significant role in the dispute-settlement system. Complaints which cannot be settled through bilateral consultations are submitted to the Council for further action.

A fourth GATT institution, one which reflects the major interests norm, is the Consultative Group of Eighteen. The Consultative Group membership varies annually, but major economic powers such as the EEC, Japan, and the U.S. are continuously represented. The Consultative Group serves as a forum for international trade policy formulation. This policy formulation role includes dispute-avoidance and dispute settlement roles.

The Group is also intended to enable GATT's member states to prevent, whenever possible, trade problems from growing to the point of disputes which might threaten not only trade relations between specific countries, but also the multilateral trading system as a whole, and to discuss ways of resolving such disputes if they do occur.<sup>8</sup>

Modification of the GATT institutional structure is inhibited by a rather rigid amendment process.<sup>9</sup> GATT has been successfully amended on several occasions, but Professor Jackson has noted that in general, "[a]mending the GATT is difficult if not impossible."<sup>10</sup> Amendments of Part I of the GATT (Articles I-II) require unanimous

7. K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 338-339 (1970). This work, along with J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969), R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975), and E. MCGOVERN, *INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY* (1982), are the major English-language treatises on the GATT.

8. GATT SECRETARIAT, *GATT ACTIVITIES in 1981* 25 (1982).

9. Art. XXX, *supra* note 4.

10. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 *LAW & POL. INT'L BUS.* 21, 32 (1980).

approval by the Contracting Parties. Amendment of the other provisions of the GATT requires a two-thirds majority, but such amendments are not binding upon Contracting Parties which decline to accept them. An alternative amendment procedure is the adoption of separate codes or protocols, but the use of this procedure creates a network of differential obligations among the GATT membership, and is conceivably in derogation from the unconditional MFN principle.

A final institutional aspect of the GATT which holds implications for the dispute-settlement system is the legal nature of GATT obligations. Although GATT is an international agreement, which theoretically should impose binding obligations upon its signatories, the GATT has traditionally been regarded as an example of soft law.<sup>11</sup> As such, it imposes only an obligation to negotiate, and not an obligation which compels compliance with GATT rules. This disregard for the binding enforceability of GATT obligations has been analyzed in terms of a dichotomy between what has been varyingly described as legalist and anti-legalist viewpoints,<sup>12</sup> legalism and pragmatism,<sup>13</sup> and rule-oriented and power-oriented diplomacy.<sup>14</sup> Dam points out that this dichotomy presents a "false antithesis"<sup>15</sup> and that the conflicting imperatives of legalism and pragmatism are reconcilable. Professor Jackson is more critical of "pragmatic" approaches to GATT obligations, but goes on to recognize a distinction between norms of obligation and norms of aspiration.<sup>16</sup> A norm of obligation is a legal norm one is obligated to follow, while a norm of aspiration is a desirable mode of conduct which is not obligatory.<sup>17</sup> States may be less inclined to comply with norms of aspiration, and thus pragmatic behavior may reflect the weak substantive content of the normative rule instead of a disregard for legal obligations. Moreover, every legal system contains a component of pragmatism, and pragmatic behavior is not inherently subversive of legal obligation. Walker noted that "pragmatism is a matter of emphasis; and as emphasis it is neither preclusive nor incompatible with the progressive enlargement of the rule of law. Differences do arise, sometimes troublesome ones, that staunch pragmatists can recognize to be suited to legal decision by adjudicatory process."<sup>18</sup>

11. See Kolasa, *Law-Making and Law-Enforcing for International Trade: Some Reflections on the GATT Experience*, PRINCETON WORLD ORDER STUDIES PROGRAM 32 (1976). See generally Seidl-Hohenveldten, *International Economic 'Soft Law'*, 163 RECUEIL DES COURS 165 (1979).

12. Hudec, *GATT Dispute-Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 151 (1980).

13. K. DAM, *supra* note 7, at 3-5.

14. Jackson, *supra* note 10, at 27.

15. K. DAM, *supra* note 7, at 4.

16. J. JACKSON, *supra* note 7, at 761.

17. *Id.*

18. Walker, *Dispute-Settlement: The Chicken War*, 58 AM. J. INT'L L. 671 (1964).

The textual structure of the dispute-settlement procedures of the GATT is a synthesis of the contending premises of legalism and pragmatism. There is no single dispute-settlement clause, but rather a variety of procedures which require consultation, notification, and conciliation, the GATT euphemism for dispute-settlement. There are nineteen separate clauses in the GATT which require consultation between contracting parties on the administration or enforcement of trade policy measures.<sup>19</sup>

The widespread usage of consultation demonstrates the overall emphasis of the GATT upon bilateral settlement of disputes as a prerequisite to the invocation of the multilateral dispute-settlement mechanism. The primacy of consultation also reveals the preference of the drafters of the GATT for informal diplomatic negotiations over contentious judicial or quasi-judicial proceedings. While a diplomatic solution is always preferable to an escalation of disputes to the judicial plane, it is questionable whether complex international economic and trade issues are truly susceptible to settlement by traditional diplomatic procedures.

The central consultation clause of the GATT is Article XXII, which provides for both bilateral<sup>20</sup> and multilateral<sup>21</sup> consultation upon any matter affecting the operation of the GATT. Article XXII:1 provides that "sympathetic consideration" be accorded in consultation proceedings, certainly a highly subjective standard, but one that is again suggestive of the GATT predilection for diplomatic discretion and the associated desire to avoid contentiousness and confrontation. Article XXII:2 provides for the intervention of the Contracting Parties in consultation proceedings for which a satisfactory solution has not been reached under Article XXII:1. While Article XXII is not a formal prerequisite to the invocation of the conciliation procedures of Article XXIII, GATT practice has generally required exhaustion of the consultation remedy of Article XXII before Article XXIII conciliation proceedings can be initiated.

Article XXIII is the core of the GATT dispute-settlement system. Article XXIII:1 is essentially repetitive of Article XXII. It provides that a contracting party may make written representations or proposals to other contracting parties, the actions of which have resulted in the nullification or impairment of any benefit accruing directly or indirectly to the complaining party under the GATT. Nullification or impairment may result from the breach of GATT obligations,<sup>22</sup> the

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19. The consultation requirements are listed in Jackson, *supra*, note 7, at 165 n.1.

20. Article XXII:1, *supra* note 4.

21. Article XXII:2, *supra* note 4.

22. Article XXIII:1(a), *supra* note 4.

application of "any measure,"<sup>23</sup> or "the existence of any other situation."<sup>24</sup> Article XXIII:1 is generally a prerequisite to the invocation of Article XXIII:2, except for situations arising under Article XXIII:1(c), which may be directly referred to the Contracting Parties. Article XXIII:2 provides that once a matter has been referred to the Contracting Parties, they should promptly investigate the matter, and make an appropriate ruling or recommendation. In a sufficiently serious situation, the Contracting Parties may authorize the suspension of concessions to the contracting party against which the complaint has been brought. The application of this suspension power has been seldom considered, and actually exercised only once. The application of Article XXIII has been hampered by the extraordinarily ambiguous meaning of nullification or impairment. If nullification or impairment may result not only from direct violations of GATT obligations, but also from "any measure" or "the existence of any other situation," little behavioral guidance is given to contracting parties as to the proper commercial policy to avoid complaints alleging nullification or impairment of benefits due other contracting parties. Simultaneously, a considerable degree of discretion is given to the Contracting Parties in the interpretation of GATT obligations.

The ambiguity of the nullification or impairment standard has been partially alleviated by the development of the concept of *prima facie* nullification or impairment. An official codification of GATT dispute-settlement practice states that an infringement of GATT obligations is considered a *prima facie* case of nullification or impairment. This "would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations."<sup>25</sup> Professor Jackson has identified two other situations which are considered to give rise to *prima facie* nullification or impairment. First, the imposition of quantitative restrictions, even if justified under the safeguard provisions of Articles XII or XIV, is also considered a *prima facie* nullification or impairment. Secondly, the introduction or increase of domestic subsidies which counteract the value of previous tariff concessions are considered another example of *prima facie* nullification or impairment.<sup>26</sup>

There are several other provisions of the GATT which relate to the dispute-settlement system. The most notable is that notification of

23. Article XXIII:1(b), *supra* note 4.

24. Article XXIII:1(c), *supra* note 4.

25. AGREED DESCRIPTION OF THE CUSTOMARY PRACTICE OF THE GATT IN THE FIELD OF DISPUTE SETTLEMENT, ANNEX TO UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE, MTN/FR/20/Rev. 2 at 3/10. [hereinafter cited as ANNEX]

26. J. JACKSON, *supra* note 7, at 182.

restrictive or potentially restrictive trade policy measures is required by several articles.<sup>27</sup> In theory, a notification requirement should serve a dispute-avoidance function, by providing other contracting parties with advance warning of potential trade restrictions, and also by reminding the notifying government of its GATT obligations. In practice, compliance with the notification requirement has been sporadic, since the notification requirement has been viewed as a self-incrimination obligation.

### III

#### THE GATT DISPUTE-SETTLEMENT SYSTEM IN PRACTICE: THE PRE-TOKYO ROUND ERA

The dispute-settlement procedures actually utilized by GATT have not strictly corresponded to the terms of the General Agreement described above, and considerable improvisation has occurred in the evolution of dispute-settlement techniques in GATT practice. The first of these improvisations was the formation of working parties to assist in the settlement of disputes. Working parties were initially used as early as the third GATT session in 1950. Working parties commence upon the reference of a dispute by the Contracting Parties. The membership of a working party consists of representatives of interested contracting parties, including the parties to the dispute. A working party engages in a pronounced effort for negotiation and compromise, and functions almost as an institutionalized mediation procedure. Upon the conclusion of its deliberations, the report of a working party is usually adopted by the Contracting Parties. However, a working party report has no binding effect. "The reports of working parties are advisory opinions on the basis of which the Contracting Parties may make a final decision."<sup>28</sup>

By 1952, the working party had been supplemented by the second major innovation in GATT dispute-settlement practice, the panel procedure. As Walker noted, "(t)he panel was an improvisation, not explicitly provided for or implicitly envisaged by the wording of GATT and not copied from any precedent in GATT's annals."<sup>29</sup> Panels differ from working parties in several respects. First, parties to the dispute or their nationals are not represented on a panel. Secondly, panel members act in their individual capacities, and not as representatives of gov-

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27. Article XII:4 (balance of payments restrictions); Article XVI:1 (subsidies); Article XVII:4 (state trading enterprises); Article XVIII:14 (governmental assistance to economic development); Article XIX:2 (emergency action on imports of particular produces); Article XXIV:7 (customs unions and free trade areas), *supra* note 4.

28. ANNEX, *supra* note 25, at 3/11.

29. Walker, *supra* note 18, at 683.

ernment, although most panel members have been selected from the ranks of foreign trade ministries. While these differences may appear inconsequential, Professor Jackson views the development as "very significant in that it represents a step toward greater respect for objective international legal obligations and step away from the political bargaining among nations. The panel has more of the flavor of an international court operating independently, not accountable to specific nations."<sup>30</sup>

A panel generally follows a similar procedure to that of a working party. Following the appointment of a panel of three or five members by the Council, the panel consults with the parties to the dispute. The parties to the dispute make oral presentations of their positions, sometimes supplemented with written briefs and documents. Other interested parties may also present their views on the dispute. A panel may undertake independent investigation of the dispute by consulting with outside experts or with the Secretariat. A panel issues recommendations to the parties to the dispute upon reaching a conclusion as to the law and facts. The panel proceeding may terminate at this point if a mutually satisfactory solution can be arrived at. If not, and the panel's efforts at conciliation prove unsuccessful, the panel submits a report to the Contracting Parties. If the panel report is generally accepted the Council may then adopt the report. In general, a panel avoids an adjudicatory approach, since its function is only to "review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters."<sup>31</sup> There are several important defects in the panel procedure. The ambiguous legal status of the panel engenders a lack of faith in their fairness, while the poorly defined implementation of panel reports allows parties to the dispute to disregard or to ignore panel conclusions. Finally, the consensual nature of the panel proceeding affords numerous possibilities for delay and obstruction of the proceedings by an uncooperative party to the dispute.<sup>32</sup>

A defect common to both the working party and panel procedures is the virtual absence of enforcement powers and sanctions for non-compliance. Under Article XXIII:2, the Contracting Parties may authorize an injured contracting party to suspend concessions to a contracting party which has nullified or impaired benefits accruing to the complainant. There are no true multilateral enforcement powers, and bilateral retaliation is the heart of the GATT enforcement system. The Article XXIII:2 authorization to suspend concessions is essentially an

30. Jackson, *supra* note 7, at 174.

31. ANNEX, *supra* note 25, at 3/9.

32. Lipson, *The Transformation of Trade: The Sources and Effects of Regime Change*, 36 INT'L ORG. 747 (1982).

institutionalized retorsion procedure. Retorsion is generally an ineffective and often counterproductive remedy in international law, and the Article XXIII:2 procedure is little different in this regard.

The GATT dispute-settlement system operated fairly effectively during the 1950s, even in the absence of an effective sanction system. The dispute-settlement system then succumbed to desuetude during the 1960s, as the traditional conciliation techniques proved incapable of resolving serious North-South and transatlantic trade disputes.<sup>33</sup> However, renewed recourse to the dispute-settlement system was stimulated by the prolonged international economic disorder which commenced during the 1970s. The breakdown of the Bretton Woods international monetary system, the ascendance of OPEC and the consequent disruption of balance of payments financing mechanisms, export surges by the newly industrializing countries of East Asia, and the rise of the new protectionism all combined to produce a stagflationary world economy characterized by high inflation and low growth. In this unstable international economic environment, numerous commercial conflicts were bound to arise. This prevalence of economic instability and commercial conflict enhances the imperative for an efficient dispute-settlement system for international trade.<sup>34</sup>

One of the most prominent examples of the inability of the traditional GATT dispute-settlement system to cope with the more aggravated commercial conflicts of the past decade has been the Domestic International Sales Corporation (DISC) controversy. The DISC system was introduced into the U.S. Internal Revenue Code by the Revenue Act of 1971, ostensibly as a means to improve the U.S. balance of payments deficit.<sup>35</sup> The DISC system essentially provides for the deferral of tax on fifty percent of export income which is channeled through

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33. The most prominent international trade dispute along North-South lines was a complaint brought by Uruguay in 1961 (L/1647). The Uruguayan complaint was less a specific complaint than an indictment of the systemic asymmetry of international trade relations, identifying 562 alleged trade restrictions maintained by 15 developed countries. It was eventually discontinued without being resolved. The most prominent transatlantic trade dispute in this period was the celebrated Chicken War, involving EEC trade restrictions on U.S. poultry exports. Retaliatory U.S. trade restrictions were later imposed on EEC exports. See Lowenfeld, *Doing Unto Others. . . . The Chicken War Ten years After*, 4 J. MAR. L. & COMM. 599 (1973); Vignes, *Le Fonctionnement d'une Procédure de Conciliation: A Propos de la Guerre des Poulets*, 1963 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 473 (Centre National de la Recherche Scientifique).

34. The GATT Secretariat notes that "[t]he GATT rules, especially the procedures for conciliation and dispute-settlement, are even more important in time of economic difficulty than they are when the world economy is booming." GATT SECRETARIAT, GATT ACTIVITIES in 1980 6 (1981).

35. I.R.C. §§ 991-997, added by Revenue Act of 1971, Pub. L. No. 92-178, §§ 501-507, 85 Stat. 497. For descriptions of the operations of a DISC, see Note, *Export Promotion Through Tax Incentives: The Future of DISC under the GATT Subsidies Code*, 20 VA. J. INT'L L. 171 (1979); Note, *Domestic International Sales Corporations (DISCs): How They Provide a Tax Incentive for Exports*, 14 VAND. J. TRANSNAT'L L. 535 (1981).

a DISC subsidiary of the exporting corporation. Eligibility and qualification requirements for DISC treatment are easily satisfied, and an exemption from the U.S. global system of income taxation is thereby created.<sup>36</sup> Most economic analyses of the value of the DISC system suggest that the putative economic benefits of DISC are greatly exaggerated. Bergsten, Horst and Moran state that, "[w]e conclude that DISCs add far less to net U.S. production, investment or the balance of payments than proponents claim and that DISCs overcompensate for the tax advantages of deferral in most instances."<sup>37</sup>

While DISC may provide only a dubious economic benefit for the U.S. export sector, the EEC nevertheless brought a complaint in May, 1973 that DISC constituted an export subsidy in violation of Article XVI of the GATT.<sup>38</sup> This in itself was noteworthy as the first EEC complaint brought under the Article XXIII procedure. The U.S. rapidly submitted a counter-complaint that the territorial tax systems of Belgium, France, and the Netherlands, which exempt foreign source income from domestic taxation, were also export subsidies in violation of Article XVI. One of the more egregious examples of delay in the panel selection procedure then ensued. Agreement as to the composition of a panel to hear the dispute was not reached until 1976, when both parties accepted the inclusion of outside experts in the panel. The inclusion of outside experts was an important development, as previous panel membership had generally been restricted to those "who are knowledgeable in the mysteries and folkways of GATT lore, sometimes termed the priesthood."<sup>39</sup> This prior limitation of panel membership to cognoscenti aware of the often arcane GATT rules and procedures was coupled with a preference for panelists from neutral countries. As a result, there has been an extremely limited pool of potential panelists available for service in GATT dispute-settlement proceedings, often drawn from the ranks of Swiss and Scandinavian foreign trade ministries.

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36. I.R.C. § 992 defines the qualifying requirements for DISC status. It provides that any corporation which elects DISC treatment, has only one class of stock having a certain minimum value, and 95% of the gross receipts and gross assets of which qualify as qualified export receipts and qualified export assets, is eligible as a DISC. I.R.C. § 993 defines the terms 'qualified export receipts' and 'qualified export assets'.

37. BERGSTEN, HORST & MORAN, *AMERICAN MULTINATIONALS AND AMERICAN INTERESTS* 206 (1978).

38. Article XVI:2 acknowledges the deleterious effects of export subsidies, but the operative rule of Article XVI:3 does not prohibit their use. Instead, contracting parties "should seek to avoid the use of subsidies on the export of primary products." If export subsidies are nevertheless used, "such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product." See generally Low, *The Definition of Export Subsidies in GATT*, 16 J. WORLD TRADE L. 375 (1982).

39. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 756 (1978).

The panel hearing the DISC dispute submitted a set of four reports in 1977.<sup>40</sup> The panel concluded that the income tax practices of all of the parties to the dispute were in violation of Article XVI. However, a new impasse resulted, as the Council was unable to decide how to dispose of the panel reports. Negotiations continued between the U.S. and the EEC Member States involved as to the resolution of the DISC controversy, but they were de-emphasized during the concluding negotiations of the Tokyo Round. The Carter Administration favored the repeal of the DISC system and Department of Treasury officials apparently conceded to their European counterparts that DISC was incompatible with the GATT obligations of the U.S. under the new Subsidy and Countervailing Measures Code of the Tokyo Round.<sup>41</sup> The effect of these bilateral negotiations was to delay resolution of the DISC dispute until after the 1980 U.S. presidential election. Negotiations resumed after the assumption of power by the Reagan Administration, and an agreement was finally reached, culminating in a GATT Council decision in December, 1981.<sup>42</sup>

The GATT Council decision adopted the four panel reports, subject to a brief Understanding, which consisted of three elements. First, economic activity outside the territory of the exporting country need not be subjected to taxation. This in effect validated the European territorial systems of taxation and their exemption of foreign source income from taxation.<sup>43</sup> Second, Article XVI:4 was understood to require arms-length pricing.<sup>44</sup> Third, Article XVI:4 was understood

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40. GATT Doc. L/4422, Basic Instruments and Supplementary Documents (23rd Supp. 1977) [U.S.] [hereinafter BISSD]; GATT Doc. L/4423, BISSD 23rd Supp. 114 (1977) [France]; GATT Doc. L/4424, BISSD 23rd Supp. 127 (1977) [Belgium]; GATT Doc. L/4424, BISSD 23rd Supp. 137 (1977) [The Netherlands]. For a summary and analysis of the panel reports, see Note, *GATT: DISC and Other Discriminatory Income Taxes*, 11 J. WORLD TRADE L. 564 (1977).

41. The "Hufbauer Agreement" between U.S. Treasury Deputy Director for International Taxation Gary Hufbauer and European officials was later repudiated by then-U.S. Trade Representative Reuben Askew. The Hufbauer Agreement is reprinted in *Treasury Took View that DISC violated GATT*, TAX NOTES 453, Aug. 2, 1982. Item (e) of the Illustrative List of Export Subsidies of the Tokyo Round Subsidy and Countervailing Measures Agreement includes as an export subsidy "[t]he full or partial exemption, remission or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprise." Although footnote 2 to Item (e) states that it does not prejudge the disposition of the DISC panel report, it has been concluded that "[i]tem (e) and the first sentence of footnote 2, which prescribe deferrals of direct taxes without an appropriate interest charge, appear to make DISC illegal under the [Subsidies] Code." Kwako, *Tax Incentives for Exports, Permissible and Proscribed: An Analysis of the Corporate Income Tax Implications of the MTA Subsidies Code*. 12 LAW & POL'Y INT'L BUS. 677, 707 (1980).

42. GATT Doc. L/5271, BISSD 28th Supp. 114 (1982).

43. The GATT Council decision may have relied upon, or been influenced by, the European defense that their territorial systems of taxation had been adopted in the early 20th Century and therefore were saved by the grandfather clause of the Protocol of Provisional Application, 61 Stat. A2051, 55 U.N.T.S. 308 (1947).

44. Article XVI:4 provides that "contracting parties shall cease to grant either directly or

not to "prohibit the adoption of measures to avoid taxation of foreign source income."<sup>45</sup> Several other contracting parties objected to the bilateral nature of the understanding, considering it an usurpation of the Council's dispute-settlement role in a dispute the consequences of which were by no means solely bilateral.<sup>46</sup> These objections were apparently overcome by employment of rather ambiguous qualifying language that the "adoption of these reports together with the understanding does not affect the rights and obligations of contracting parties under the General Agreement."<sup>47</sup>

The U.S. failed to immediately implement the GATT Council decision through revision of the DISC provisions in the Internal Revenue Code. Canada therefore requested that the U.S. notify the DISC system as an export subsidy, in accordance with the notification requirement of the Subsidies and Countervailing Measures Agreement of the Tokyo Round.<sup>48</sup> The U.S. refused to do so, and the DISC dispute flared anew. The EEC then brought a complaint at the June, 1982 GATT Council meeting, requesting that the U.S. modify the DISC system in order to bring it into compliance with Article XVI:4. The U.S. asserted in response that DISC is actually consistent with Article XVI:4, and that the December 1981 GATT Council decision had exonerated DISC.<sup>49</sup> This position was rather untenable, since section 994 of the Internal Revenue Code overrides the general arms-length pricing rule of section 482 in the DISC context,<sup>50</sup> and the Understanding had specifically required arms-length pricing. The U.S. was reportedly "to-

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indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market."

45. GATT Doc. L/5271, *supra* note 42.

46. The objecting contracting parties included Australia, Argentina, Brazil, Chile, and Jamaica. See *GATT Council Forges Export Incentive Compromise*, TAX NOTES, 1149, Nov. 9, 1981.

47. GATT Doc. L/5271, *supra* note 42.

48. Article 7 of the Subsidies and Countervailing Measures Agreement requires that signatories must provide information on the nature and the extent of any subsidy in response to a written request for such information by another signatory. The signatories include Canada, the EEC, and the U.S.

49. 15 GATT FOCUS 1 (1982).

50. § 482 is the general arms-length pricing provision of the Internal Revenue Code. It authorizes the distribution, apportionment, or allocation of gross income, credits or allowances between related taxpayers where such action is necessary to prevent tax evasion or to clearly reflect the respective incomes of the related taxpayers. § 994 provides for a special inter-company transfer pricing rule for the sale of export property to a DISC by a related taxpayer. Under § 994(a), a permissible transfer price for such a transaction may not give rise to taxable income exceeding the greatest of "1) 4% of the qualified export receipts on the sale of such property by the DISC plus 10% of the export promotion expenses of such DISC, 2) 50% of the combined taxable income of the DISC and the related taxpayer plus 10% of the DISC's export promotion expenses, or 3) taxable income based upon the sale price actually charged (subject to § 482)." These 4% and 50% rules in effect provide safe harbors which substitute for the arms-length pricing rule of § 482.

tally isolated" on this issue.<sup>51</sup> The EEC renewed its complaint concerning DISC at the July, 1982 GATT Council meeting.<sup>52</sup> The U.S. Government then began to recognize the necessity of replacing the DISC system, although an admission by U.S. Trade Representative Bill Brock that DISC is indeed in violation of GATT obligations was later retracted.<sup>53</sup> Proposed legislation was introduced into Congress to replace the DISC system, but these bills have not yet been enacted.<sup>54</sup> Finally, after almost a year of controversy over the interpretation of the December, 1981 GATT Council decision, the U.S. made a commitment at the October, 1982 GATT Council meeting to replace the DISC system. The U.S. Treasury has recently announced a proposed revision of the DISC system, but its prospects of Congressional enactment are as yet uncertain.<sup>55</sup> Thus, at the time of this writing, the DISC dispute remains unsettled after a decade of dispute-settlement proceedings within GATT.

The DISC dispute holds several important implications for the functioning of the dispute-settlement system. The DISC dispute was certainly exceptional in terms of its duration and intractability, but it was not unique in this regard, and may serve as a regrettable precedent for particularly obdurate obstructionism in future GATT dispute-settlement proceedings. The DISC dispute also illustrated several critical flaws in the present dispute-settlement procedures. These include the potential for delay in the selection of a panel, the potential for delay in the adoption of a panel report by the Council, the lack of an effective implementation procedure following a GATT Council decision, and finally, the lack of an authoritative settlement of the issue in controversy. If the issues in controversy had been authoritatively decided, the U.S. would not have been able later to maintain that DISC had been exonerated and was actually consistent with Article XVI:4. The DISC dispute also illustrated the consequences of a disjunction between procedural and substantive rules. If a dispute-settlement system does not exercise an interpretive function where there is dissensus as to the application of the substantive rules, there will be little incentive for compliance for contracting parties which may continue to assert their own differing interpretations of the substantive rules. Auto-interpretation

51. *DISC Again Under Attack Before GATT Council*, TAX NOTES, July 5, 1982, at 81.

52. 16 GATT FOCUS (1982).

53. *Brock Says U.S. Must Devise New System to Aid Exports*, TAX NOTES, Aug. 16, 1982, at 650.

54. S. 2708, The Export Sales Corporation Act of 1982, 97th Cong., 2nd Sess., Cong. Rec. S7895-98 (1982), reprinted in *Boren on DISC and GATT*, TAX NOTES, July 21, 1982, at 271.

55. The new system was announced in *Administration Unveils Tax Alternative to Domestic International Sales Corporation (DISC)*, Dept. of the Treasury Press Release, Mar. 9, 1983. See also N.Y. Times, Feb. 23, 1983, at 32, Wall St. J., Feb. 23, 1983, at 27, N.Y. Times, Mar. 10, 1983, at 29.

may be a fundamental feature of the international legal system as a whole, but it can have only a destructive effect upon a system for the settlement of disputes about conflicting interpretations of international legal obligations. This is precisely what has happened in the DISC dispute. The December 1981 GATT Council Meeting was a deliberately ambiguous diplomatic compromise, but this failure to clearly delineate the substantive rule governing tax incentive export subsidies allowed the U.S. to disregard and even deny the effect of the GATT Council decision. Five years ago, Professor Jackson forecast that "[t]here appears to be no way to avoid damage to the prestige of the GATT and its dispute-settlement procedures in these cases." (DISC and the related cases.)<sup>56</sup> After a further half-decade of inconclusive negotiations and dispute-settlement proceedings this prognosis has been proven correct.

#### IV

#### THE GATT DISPUTE-SETTLEMENT SYSTEM IN PRACTICE: THE POST-TOKYO ROUND ERA

The DISC dispute spanned a decade during which the substantive norms and procedural rules of GATT were significantly modified by the Tokyo Round Multilateral Trade Negotiations (herein Tokyo Round or MTN). The Tokyo Round was the seventh and most recent trade liberalization negotiation conducted under GATT auspices. It was concluded in November, 1979, and took effect on January, 1980, except for two separate non-tariff barrier codes which took effect a year later. The Tokyo Round resulted in a major tariff liberalization, amounting to a thirty-four percent reduction of the weighted average tariff of the major trading countries.<sup>57</sup> A second major accomplishment was the negotiation of a set of ten codes or agreements for the regulation of non-tariff barriers to trade.<sup>58</sup>

The Tokyo Round also resulted in significant changes in the structure of the GATT dispute-settlement system. President Carter in-

56. J. JACKSON, *supra* note 7, at 779.

57. GATT SECRETARIAT, GATT ACTIVITIES in 1979 19 (1980).

58. The non-tariff barrier codes are the Agreement on Technical Barriers to Trade; the Agreement on Government Procurement; the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII [hereinafter cited as the Subsidies and Countervailing Measures Agreement]; the Arrangement Regarding Bovine Meat; the International Dairy Arrangement; the Agreement on Implementation of Article VII [hereinafter cited as the Customs Valuation Agreement]; the Agreement on Import Licensing Procedures; the Agreement on Trade in Civil Aircraft; the Agreement on Implementation of Article VI [hereinafter cited as the Revised Anti-Dumping Code]; and the Framework Agreement, in BISD 26th Supp. 8-189 (1980). See generally THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: SUPPLEMENTARY REPORT BY THE DIRECTOR-GENERAL OF GATT (1980); Graham, *The Results of the Tokyo Round*, 9 GA. J. INT'L &

formed Congress in his message transmitting the Tokyo Round Agreements for ratification that the implementation of these agreements would "tighten procedures for handling international trade disputes."<sup>59</sup> However, other observers, such as the Brandt Commission, voiced less sanguine attitudes. "It remains to be seen whether this (dispute-settlement) machinery will be used and sufficiently respected to provide a fairer and more predictable trading environment."<sup>60</sup> The major changes in dispute-settlement procedures effected by the Tokyo Round were the adoption of an Understanding Regarding Notification, Consultation, Dispute-Settlement and Conciliation (herein Understanding)<sup>61</sup> as a part of the Framework Agreement, as well as the adoption of separate dispute-settlement provisions for each of the individual non-tariff barrier codes.

The purpose of the Understanding was the codification and clarification of previous GATT dispute-settlement practice. It is essentially a reaffirmation of the "basic GATT mechanism"<sup>62</sup> but provided a more precise description of its mode of operation. The Understanding reiterated the notification and consultation obligations. It also provided for an additional undertaking for notification of the adoption of trade policy measures which affect the operation of the General Agreement. It included exhortations of contracting parties to expedite the consultation process and to accord special attention to LDC concerns.

The understanding restated customary dispute-settlement practice in an accompanying Annex.<sup>63</sup> In addition, it made several improvements in the operation of dispute-settlement procedures. It emphasized that dispute-settlement is not a contentious act, and that there should be no linkage between complaints and counter-complaints. The Understanding stream-lined panel procedures, by providing for rosters of potential panel members, by emphasizing their independence, clarifying their information-gathering role, describing the proper contents of panel reports, and suggesting deadlines for the formation of panels, for the approval of nominations of panel members and for the submission of panel reports.

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COMP. L. 153 (1979); Heller, *International Trade: GATT Tokyo Round*, 20 HARV. INT'L L.J. 695 (1979); Note, *GATT: A Legal Guide to the Tokyo Round*, 13 J. WORLD TRADE L. 436 (1979).

59. H.R. Doc. No. 153, 96th Cong., 1st Sess. 4 (1979).

60. INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES, NORTH-SOUTH: A PROGRAMME FOR SURVIVAL, REPORT OF THE INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES 179 (1980). The second Brandt Commission report called for "further . . . strengthening of procedures and powers to provide an effective mechanism for settling international trade disputes." INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES, COMMON CRISIS, REPORT OF THE INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES 157 (1983).

61. GATT Doc. MTN/FR/W/20/Rev. 2.

62. *Id.* at 3/1.

63. ANNEX, *supra* note 25.

The Understanding recognized the multilateral nature of many bilateral trade disputes by providing for a limited right of intervention by third parties, who are given both an opportunity to be heard by panels, and a right to inquire as to the terms of "mutually satisfactory solutions" between parties to a dispute.

The Understanding did not set a deadline for action by the Contracting Parties upon panel reports, but stated that reports should be given "prompt consideration" and acted upon within a "reasonable period of time." The absence of a deadline for action by the Contracting Parties is clearly deferential to the consensus concept, but this still permits obstruction of the implementation of panel reports. An expedited panel procedure is of limited utility if the contracting party against which a complaint is lodged may still block implementation of a panel report at the Contracting Parties level.

The Understanding also entrusted the Contracting Parties with a surveillance function, both to "conduct a regular and systematic review of developments in the trading system"<sup>64</sup> and to monitor compliance with its rulings or recommendations. The term surveillance function may be derided as constituting merely an elegant euphemism for watching helplessly. However, Professor Hudec has advocated the value of a surveillance approach, citing the successful operation of the Textile Surveillance Body in the administration of the Multifibres Arrangement.<sup>65</sup>

Finally, the Understanding including a commitment by the GATT Secretariat to furnish technical assistance to LDCs in dispute-settlement proceedings. Many LDCs lack the investigative resources to obtain the empirical data which are necessary to substantiate a complaint, and the technical assistance of the GATT Secretariat could conceivably facilitate LDC recourse to the dispute-settlement system.

Continued dissatisfaction with the structure of the dispute-settlement system as envisaged in the Understanding was demonstrated by its clarification in the Ministerial Declaration of the November, 1982 session of the Contracting Parties.<sup>66</sup> The Ministerial Declaration reaffirmed the basic framework of the Understanding, but noted that "there is scope for more effective use of the existing mechanism and for

64. Understanding, *supra* note 61, at 3/7.

65. Hudec, *supra* note 12, at 168. The Textile Surveillance Body (TSB) reviews restrictions on textile trade and provides a forum for dispute-settlement. "In cases of dispute an important aim of the TSB is to lend its good offices in pursuit of conciliation and, where appropriate, to make such recommendations to the countries concerned as may help to bring about a resolution of the problem." GATT SECRETARIAT, GATT ACTIVITIES IN 1981 31 (1982).

66. 18 GATT FOCUS 2 (1982). The Ministerial Declaration was the first session of the Contracting Parties held at the Ministerial level since the Tokyo Declaration of 1973 which commenced the Tokyo Round.

specific procedural improvements.”<sup>67</sup> The Ministerial Declaration recorded agreement upon ten specific procedural improvements. These procedural improvements affected all phases of the dispute-settlement procedure, including the roles of the Director-General, the Secretariat, panels, the Council, and the Contracting Parties. While the Director-General’s good offices role was limited in the Understanding to disputes between developed and less-developed contracting parties, the Ministerial Declaration explicitly provides that the good offices of the Director-General or his nominee(s) could be sought by any party to the dispute.<sup>68</sup>

The Understanding suggested a deadline of thirty days for the formation of panels, adding that “[t]he panel should be constituted as promptly as possible.”<sup>69</sup> Promptitude may sometimes acquire a time-less quality in international organizations, and the Ministerial Declaration instructs the Director-General to inform the Council when the time limits for the establishment of a panel have not been met.<sup>70</sup>

The Understanding had also ambiguously stated that the coverage of expenses for panel members “should be considered within the limits of budgetary possibilities.”<sup>71</sup> This hardly provided explicit authorization for covering the expenses of panel members, and the Ministerial Declaration corrected this ambiguity, by providing that the expenses of panel members be met from the GATT budget.<sup>72</sup>

The role of the Secretariat in dispute-settlement was expanded through the conferral of responsibility for assisting panels with the legal, historical, and procedural aspects of disputes.

The Ministerial Declaration made two minor modifications in panel procedures. The Understanding had not required definite terms of reference for panels, noting vaguely that the normal terms of reference are “to examine the matter and to make such findings as will assist the Contracting Parties in making the recommendations or ruling provided for in paragraph 2 of Article XXIII.”<sup>73</sup> The Ministerial Declaration supplemented these terms of reference by providing that a panel should make a clear finding as to contraventions of GATT provisions or the nullification or impairment of benefits accruing under GATT.<sup>74</sup> The Ministerial Declaration also empowered panels to provide advice to the Contracting Parties as to possible recommendations or rulings to

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67. *Id.* at 4.

68. Ministerial Declaration, *supra* note 66, at para. i.

69. Understanding, *supra* note 61, at 3/4.

70. Ministerial Declaration, *supra* note 66, at para. ii.

71. Understanding, *supra* note 61, at 3/4, n.2.

72. Ministerial Declaration, *supra* note 66, at para. iii.

73. Understanding, *supra* note 61, at 3/12.

74. Ministerial Declaration, *supra* note 66, at para. v.

resolve the dispute, as well as to notify the Council of any undue delay in their proceedings.<sup>75</sup> These reforms were designed to prevent the practice of framing panel reports in the form of cryptic compromises which allowed both parties to the dispute to claim that their respective positions had been vindicated. While such outcomes allowed both parties to the dispute to save face, the Delphic nature of these pronouncements often failed to elucidate the meaning of the substantive rule in controversy.

The Ministerial Declaration considerably elaborated upon the role of the Contracting Parties, traditionally the weakest part of the dispute-settlement system. It mandated improved follow-up procedures, requiring that the Council periodically review compliance with its recommendations. Contracting Parties to which recommendations are addressed are required to report upon their compliance or to explain their failure to implement the Council recommendation.<sup>76</sup> An additional modification of the role of the Council is the provision for Council allowance of a grace period for contracting parties to take action before the issuance of rulings or recommendations.<sup>77</sup> The Council soon thereafter noted that these changes "strengthened its responsibilities for dispute-settlement."<sup>78</sup> However, these modifications of Council follow-up powers do little to promote an effective sanction system other than accentuate the mobilization of shame against contracting parties not in compliance with Council recommendations. The sole discussion of sanctions in the Ministerial Declarations mentions that further actions by the Contracting Parties might include either a recommendation for compensatory adjustment or authorization for suspension of concessions under Article XXIII:2.<sup>79</sup>

The most controversial proposal to reform the dispute-settlement procedure examined at the November, 1982 Ministerial Session concerned the danger of obstructionism by non-cooperative contracting parties. GATT Director-General Arthur Dunkel proposed that the traditional consensus rule be modified so that a defendant contracting party could not obstruct the bringing of a complaint against it.<sup>80</sup> This initiative was supported by the U.S., but the EEC refused to abandon the consensus requirement.<sup>81</sup> As a result, the Ministerial Declaration recorded a virtually meaningless compromise that "[t]he Contracting Parties reaffirmed that consensus will continue to be the traditional

75. *Id.* at para. vi.

76. *Id.* at para. viii.

77. *Id.* at para. vii.

78. 19 GATT FOCUS 1 (1983).

79. Ministerial Declaration, *supra* note 66, at para. ix.

80. *ECONOMIST*, Nov. 13, 1982, at 79.

81. *Wall St. J.*, Nov. 30, 1982, at 16.

method of resolving disputes; however they agreed that obstruction in the process of dispute-settlement shall be avoided.<sup>82</sup>

An elementary principle of most legal systems is that *Nemo debet esse iudex in propria causa*.<sup>83</sup> The consensus rule of the enforcement stage of the GATT dispute-settlement system essentially allows such self-judgment, since a contracting party, acting in dual roles as defendant and as a member of the GATT Council, may obstruct enforcement proceedings. One of the most salutary reforms in the evolution from working parties to panels was the removal of parties to the dispute from the adjudicative stage of the dispute-settlement process. A comparable removal of parties to the dispute from Council deliberations regarding the disposition of their case is an essential prerequisite to the development of an effective procedure for the implementation of Council recommendations.

One of the most notable characteristics of the dispute-settlement provisions of the Tokyo Round non-tariff barrier agreement is what Professor Jackson has described as the "Balkanization or 'fragmentation' of the dispute-settlement process."<sup>84</sup> There is no single unified dispute-settlement procedure, and each of the individual agreements contains its own procedure. Professor Graham has contended that the "separability" of dispute-settlement procedures is actually desirable, since this lessens the risk of damage from failure of one code to the remaining dispute-settlement procedures.<sup>85</sup> However, while "Balkanization" may have such damage-limitation function in case of the failure of a single code, it may also aggravate the likelihood of failure, in the absence of an authoritative and prestigious dispute-settlement tribunal.

The dispute-settlement system of each non-tariff barrier agreement is administered by a Committee of signatories of the agreement. The mandates for each of the Committees are fairly similar. Each is authorized to meet no less than once or twice per year, to establish subsidiary bodies or organs for technical matters, and in some instances to exercise information-gathering powers.<sup>86</sup> Most of the agreements provide for bilateral consultations between parties to an incipient dispute before it is referred to the relevant Committee for settlement.<sup>87</sup> How-

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82. Ministerial Declaration, *supra* note 66, at para. x.

83. No one ought to be a judge in his own cause.

84. J. JACKSON, *supra* note 10, at 44.

85. *Multilateral Trade Negotiations: Dispute Settlement*, 74 PROC. AM. SOC'Y INT'L L. 129, 136 (1981).

86. Revised Anti-Dumping Code, *supra* note 58, at Art. 14:3; Subsidies and Countervailing Measures Agreement, *supra* note 58, at Art. 16:3.

87. Customs Valuation Agreement, *supra* note 58, at Art. 19; Agreement on Government Procurement, *supra* note 58 at Art. VII:3-5; Revised Anti-Dumping Code, *supra* note 58, at Art.

ever, the Import Licensing Procedures Agreement provides only that consultation and dispute-settlement are subject to the procedures of Articles XXII and XXIII.<sup>88</sup>

Consultations must be initiated "promptly"<sup>89</sup> or as "quickly as possible"<sup>90</sup> upon the request by a party. With the exception of the Subsidies and Countervailing Measures Agreement,<sup>91</sup> there are no deadlines for the requisite length of consultations before more formal conciliation or dispute-settlement proceedings may be commenced. The ambiguous nullification or impairment standard is retained as the substantive threshold for the initiation of consultations, and parties are required to accord sympathetic consideration to complaints brought in bilateral consultations.

The conciliation provisions of the MTN agreements are again highly similar. Conciliation proceedings are begun by the administering Committee within thirty days of the receipt of a receipt,<sup>92</sup> or in the case of the Subsidies and Countervailing Measures Agreement, "immediately."<sup>93</sup> The objective of conciliation is varyingly described as to encourage or to facilitate a mutually acceptable or a mutually satisfactory solution.

Both the Customs Valuation Agreement and the Technical Barriers to Trade Agreement provide for an alternative dispute-settlement procedure for questions of a technical nature which have not been resolved through consultations or conciliation.<sup>94</sup> Disputes which have

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15:1-2; Subsidies and Countervailing Measures Agreement, *supra* note 58, at Art. 12; Agreement on Technical Barriers to Trade, *supra* note 58, at Art. 14:1-2.

88. Agreement on Import Licensing Procedures, *supra* note 58, at Art. 4:2.

89. Revised Anti-Dumping Code, *supra* note 58, at Art. 15:2; Customs Valuation Agreement, *supra* note 58, at Art. 19:2; Agreement on Government Procurement, *supra* note 58, at Art. VII:4; International Dairy Arrangement, *supra* note 58, at Art. IV:5; Agreement on Technical Barriers to Trade, *supra* note 58, at Art. 14:1.

90. Subsidies and Countervailing Measures Agreement, *supra* note 58, at Art. 12:5.

91. Article 13:1 of the Subsidies and Countervailing Measures Agreement provides for a deadline of thirty days for consultation concerning complaints alleging violations of the Agreement. Article 13:2 provides for a sixty day deadline for consultations concerning complaints alleging injury to domestic industry, nullification or impairment of benefits, or serious prejudice to the interests of the complaining party.

92. Revised Anti-Dumping Code, *supra* note 58, at Art. 15:3; Customs Valuation Agreement, *supra* note 58, at Art. 20:1; Agreement on Government Procurement, *supra* note 58, at Art. VII:6; Agreement on Technical Barriers to Trade, *supra* note 58, at Art. 14:4.

93. Subsidies and Countervailing Measures Agreement, *supra* note 58, at Art. 17:1.

94. The Technical Committee of the Customs Valuation Agreement may provide assistance to the parties to the dispute during the consultations stage (Article 19:3) as well as have technical questions referred to it by the Committee of Signatories (Article 20:2). The Technical Committee is given a three month deadline to report to the Committee. Technical questions may also be referred to the Customs Cooperation Council (CCC) in Brussels (Article 18:2). The technical question dispute-settlement role of the CCC is noted in Sherman, *Reflections on the New Customs Valuation Code*, 12 LAW & POL'Y. INT'L BUS. 119, 156 (1980). The Agreement on Technical Barriers to Trade provides for the referral of questions of a technical nature which have not been

not been resolved through consultation, conciliation, and for the two latter agreements, the technical question procedures, are finally referred to a panel.

Parties have the right to a panel if conciliation proves unsuccessful after three months, or after thirty days under the Subsidies and Countervailing Measures Agreement.<sup>95</sup> The principle of a legal right to a panel which can be invoked upon the failure of consultation and conciliation proceedings is an important development. There is no corresponding right under Article XXIII, and the formation of panels under Article XXIII is always subject to the discretion of the Contracting Parties. The automatic right to a panel under the MTN agreements therefore expands access to the dispute-settlement system and reduces the potential for obstruction. Panel procedures under the MTN agreements follow essentially the same pattern. Each code provides for terms of reference for panels, rosters of potential panel members, and a four month panel report deadline.<sup>96</sup> The only significant exception is the revised Anti-Dumping Code, which provides that panel procedures should be governed, *mutatis mutandis*, by the Understanding.<sup>97</sup>

Finally, the MTN agreements provide for enforcement of panel reports by the respective administering Committees. Generally, the Committees are empowered to act within thirty days of the receipt of a panel report. Action may involve a statement of the facts, or the issuance of recommendations or rulings.<sup>98</sup> In the event of non-compliance by a party to which a recommendation or ruling is addressed, the non-complying party is required to explain its failure to implement the recommendation or ruling.<sup>99</sup> The Committee may also exercise surveillance over the degree of compliance with its recommendations or rulings, as well as authorize the suspension of obligations due to parties not in compliance with its directives.<sup>100</sup>

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resolved under consultation or conciliation to a technical expert group. The technical expert group may examine the matter, consult with the parties to the dispute, make findings of fact and of scientific judgment (Article 14:9), and make a report to the Committee of Signatories, within six months of the date of referral of the technical issue (Article 14:11).

95. Subsidies and Countervailing Measures Agreement, *supra* note 58, at 17:3.

96. Article 18:2 of the Subsidies and Countervailing Measures Agreement provides for a briefer deadline of ninety days from the date of request for a panel and sixty days from the date of its establishment.

97. Revised Anti-Dumping Code, *supra* note 58, at Art. 15:7. The Understanding takes a more tolerant view of panel report deadlines, allowing three months for their submission.

98. Customs Valuation Agreement, *supra* note 58, at Art. 20:7; Agreement on Government Procurement, *supra* note 58, at Art. VII:44; Agreement on Technical Barriers to Trade, *supra* note 58, at Art. 14:9.

99. Customs Valuation Agreement, *supra* note 58, at Art. 20:8; Agreement on Government Procurement, *supra* note 58, at Art. VII:12; Agreement on Technical Barriers to Trade, *supra* note 58, at Art. 14:20.

100. Customs Valuation Agreement, *supra* note 58, at Art. 20:9; Agreement on Government

One of the particularly ambiguous aspects of the MTN agreements dispute-settlement procedures is their relationship to the Article XXII and XXIII procedures of the GATT itself. Three of the MTN agreements, the Anti-Dumping Agreement, the Customs Valuation Agreement and the Technical Barriers to Trade Agreement, provide for an exhaustion of remedy requirement that the agreement's dispute-settlement procedures be utilized before recourse is made to Articles XXII and XXIII.<sup>101</sup> However, there is no such requirement under the other MTN agreements, and their relationship to Articles XXII and XXIII has been described as "unsettled."<sup>102</sup> It has been suggested that the absence of a reference to GATT dispute-settlement procedures in the other agreements implies that the MTN procedures are exclusive and preclude recourse to Articles XXII and XXIII.<sup>103</sup>

Despite the procedural parallels and similarities between the dispute-settlement systems of the MTN agreements, there has been considerable variation in the extent to which they have been utilized during the early 1980s. No actions have been brought under the Revised Anti-Dumping Code,<sup>104</sup> or the Customs Valuation Agreement,<sup>105</sup> and only one has been brought under the Government Procurement Agreement.<sup>106</sup> However, the Subsidies and Countervailing Measures Agreement Committee has been inundated with complaints and "frequent recourse to the conciliation and dispute-settlement machinery."<sup>107</sup> This frequency reflects the prominence of export subsidies as the primary weapon of international economic competition in the early

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Procurement, Art. VII:13-14; Subsidies and Countervailing Measures Agreement, *supra* note 58, at Art. 18:9; Technical Barriers to Trade Agreement, *supra* note 58, at Art. 14:20-21. A proposal which would have required implementation of panel decisions in a specified time period was rejected in the negotiation of the Government Procurement Agreement. See Pomeranz, *Toward a New International Order in Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1263, 1288 (1979).

101. Revised Anti-Dumping Code, *supra* note 58, at Art. 15, n.1; Customs Valuation Agreement, *supra* note 58, at Art. 20:11; Agreement on Technical Barriers to Trade, *supra* note 58, at Art. 14:23. The latter are also the only two MTN agreements which have procedures for resolution of technical disputes.

102. deKieffer, *GATT Dispute Settlement: A New Beginning in International and U.S. Trade Law*, 2 NW. J. INT'L L. & BUS. 317, 322, n.17 (1980). Similarly, McRae and Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT'L L. 51, 82 (1983), note the "probability of legal conflict between the new mechanisms and GATT."

103. Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective*, 19 COMM. MKT. L. REV. 5, 17 (1982); Flory, *Les Accords du Tokyo Round du GATT et la Reforme des procédures de règlement des Differends dans le Systeme Commercial Interetatique*, 86 REV. GEN. DROIT INT'L PUB. 235, 252 (1982).

104. GATT Doc., BISD 28th Supp. 50 (1982).

105. GATT Doc., BISD 28th Supp. 42 (1982); 19 GATT FOCUS 4 (1983).

106. The first panel proceeding under the Government Procurement Agreement began in February, 1983, involving a U.S. complaint in regard to government procurement practices of EEC Member States.

107. 17 GATT FOCUS 4 (1982).

1980s, with subsidies in widespread usage in sectors ranging from aerospace to specialty steels to agriculture.

Frequent recourse to the dispute-settlement procedures of the Subsidies and Countervailing Measures Agreement has been accompanied by expanded usage of the Article XXIII dispute-settlement procedures. In 1980, thirteen disputes were brought before the Council, the greatest number of disputes heard in the three decades of GATT dispute-settlement. In 1981, a new record was set as seventeen disputes were brought before GATT. In 1982, twelve disputes were brought, again a historically high level of dispute-settlement activity. This quantitative increase may indicate confidence in the operation of the dispute-settlement system, but it also reflects the present degree of tension in the international trading system as a whole. The dangerous level of tension now present in international trade relations has been manifested by the development of three categories of disputes which have not been, and may not by their very nature be amenable to settlement.

The first of these categories involves disputes over agricultural export subsidies, the use of which has destabilized international trade in agricultural commodities. The primary culprit in this connection is the EEC, whose Common Agricultural Policy has stimulated surplus production of several agricultural commodities.

The EEC export subsidy system was first challenged in parallel complaints brought by Australia and Brazil. The complaints were initially submitted to the Council in September, 1978, and a panel was formed to examine the complaints in November, 1978. The gravamen of the complaints was that the EEC export subsidy system has procured an EEC export market in sugar in excess of the equitable share permissible under Article XVI:3,<sup>108</sup> resulting in serious prejudice or the threat thereof under Article XVI:1<sup>109</sup> and the consequent nullification of impairment of benefits accruing to Australia and Brazil. The Australian complaint also alleged that the EEC had failed to comply with the notification requirement of Article XVI:1. The Brazilian complaint made the additional allegation that the EEC sugar export subsidy system was

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108. For a description of Article XVI:3, see *supra* note 38. The EEC sugar export subsidy system essentially involves the payment to exporters of refunds of the difference between world market prices and the EEC intervention price. The latter is the price at which Member State intervention agencies are under an obligation to purchase domestically manufactured sugar. "With the aid of export subsidies the Community increased its share of the world market from 4.7% in 1973 to 20% in 1979. Smith, *EEC Sugar Policy in an International Context*, 15 *J. WORLD TRADE L.* 95, 103 (1981).

109. Article XVI:1 requires that contracting parties which maintain export subsidies shall notify the Contracting Parties of the extent, nature, and effects of the subsidization. Where serious prejudice to interest of other contracting parties "is caused or threatened by any such subsidization, the contracting party granting the subsidy shall . . . discuss . . . the possibility of limiting the subsidization."

in violation of obligations owed to Brazil, as a developing country, under Part IV of the General Agreement.

The panel submitted its report in November, 1979, concluding that serious prejudice had been caused or threatened to Australia and Brazil, although it was unable to conclude that the EEC has obtained more than an equitable share of world exports in terms of Article XVI:3.<sup>110</sup> The panel finding that serious prejudice has been caused or threatened to Australia and Brazil imposed an obligation on the EEC under Article XVI:1 to "discuss the possibility of limiting the subsidization." Bilateral discussions ensued, but were fruitless during the next year, and the Director-General referred the dispute to a working party to negotiate limits to the subsidization in November, 1980. The working party was unable to reach agreement, with the EEC representative insistent that certain administrative modifications of the sugar export subsidy system had brought it into compliance with Article XVI:3.<sup>111</sup> However, the other participants in the working party "found that the EEC had not advanced any meaningful possibility of limiting the subsidization."<sup>112</sup> The dispute remained unresolved in 1981, and in September of that year a new working party was appointed to re-examine the situation. It reported to the Council in March, 1982 that there were "widely differing views" between the EEC and the other participants in the working party.<sup>113</sup> The Council adopted the working party report and decided to close the cases, despite the expression of disappointment and concern by the complainants and by interested third parties. Australia stated that this failure to resolve the dispute would weaken the dispute-settlement procedure and impair the credibility of GATT.

The complaint was then renewed by a direct request to the EEC Commission by ten interested sugar-exporting countries in April, 1982, for consultations. Although GATT was officially notified of the direct request, it was basically being bypassed because its implementation of the November, 1979 panel decision had been completely ineffective. A joint set of bilateral consultations were held in September, 1982 but no satisfactory agreement was reached. The GATT dispute-settlement procedure has failed to resolve the EEC sugar export subsidies dispute partly because of the infirmities of the substantive standard governing export subsidies. In the aftermath of this debacle a pessimistic evaluation of the GATT regulation of export subsidies suggested that Article

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110. GATT Doc., BISD 26th Supp. 290 (1980). The panel report is summarized and analyzed in Smith, *GATT: EEC Sugar Export Refunds Dispute*, 15 J. WORLD TRADE L. 534 (1981).

111. GATT Doc., BISD 28th Supp. 89 (1982).

112. *Id.*, at 89-90.

113. 13 GATT Focus 2 (1982).

XVI has now become merely an "empty gesture."<sup>114</sup>

The defects of the substantive standard were not improved by the adoption of the Subsidies and Countervailing Measures Agreement, Article 10:1 of which basically repeats Article XVI:3 in a more abbreviated form. The same difficulties have therefore arisen in the settlement of disputes regarding export subsidies under the Subsidies and Countervailing Measures Agreement. A comparable U.S. complaint against EEC export subsidies for pasta and wheat flour was brought before the Subsidies and Countervailing Measures Committee in December, 1981. The complaint reached the panel stage in late 1982 after consultation and conciliation proceedings proved unsuccessful. The panel reports were inconclusive, and were sharply criticized by U.S. Trade Representative Bill Brock, who warned that the panel's failure cast serious doubt on the effectiveness of GATT's dispute-settlement process.<sup>115</sup>

The failure to resolve the wheat flour and pasta export subsidies dispute has led to costly economic consequences. Both parties to the dispute have escalated the conflict through retaliatory trade measures. The U.S. undertook the sale of 1 million tons of wheat flour to Egypt, a traditional EEC market, in January, 1983. The EEC responded in February, 1983 with a highly subsidized sale of 1.2 million tons of wheat to China, which has been a major U.S. market since the normalization of Sino-American relations.<sup>116</sup> This cycle of retaliatory trade measures illustrates a dramatic failure of the dispute-settlement procedure, and has prompted discussion of a transatlantic trade war.<sup>117</sup>

A second category of disputes which have contributed to the breakdown of the GATT dispute-settlement system in the early 1980s are disputes concerning economic sanctions employed in international political conflicts. One leading example of this politicization of the dispute-settlement system was the Polish complaint concerning U.S. suspension of MFN treatment for Polish exports, imposed in retaliation for the December, 1981 imposition of martial law and prohibition of Solidarity in Poland. The U.S. defense to this complaint was that Poland had not met its own GATT obligations to increase imports under the Protocol by which it had acceded to the GATT.<sup>118</sup> This dispute highlighted the problems underlying participation by the Socialist

114. Phegan, *GATT Art. XVI: 3: Export Subsidies and Equitable Share*, 16 J. WORLD TRADE L. 251, 264 (1982).

115. N.Y. Times, Mar. 3, 1983, at 32. More expressive language was utilized by Sen. William Roth, (R-Del.) who denounced GATT as a "paper mouse." Wall St. J., Mar. 31, 1983, at 26.

116. ECONOMIST, Feb. 26, 1983, at 40.

117. See e.g., Graham, *Global Trade: War & Peace*, 50 FOREIGN POL'Y, 124 (1983). European reactions are described in *L'Europe au banc des accusés: Guerre Commerciale en Occident*, Le Monde Diplomatique, Jan., 1983, at 1.

118. 17 GATT FOCUS 1 (1982).

states of Eastern Europe in the GATT.<sup>119</sup>

A second example of the politicization of the GATT dispute-settlement system was the Argentine complaint against Australia, Canada and the EEC for the imposition of economic sanctions during the Falkland/Malvinas conflict.<sup>120</sup> The Council did not address the merits of the Argentine complaint, since Article XXI(b)(iii) of the General Agreement allows contracting parties to impose trade restrictions during the time of war or other emergency in international relations.<sup>121</sup> The Council therefore dealt with the dispute through the adoption of procedural rules for the application of Article XXI.<sup>122</sup> Given the prevalence of economic sanctions in the contemporary international political environment, GATT hardly seems to be an appropriate forum for the settlement of the economic consequences of political conflicts. The Argentine and Polish complaints therefore pose a dangerous potential for further politicization of international trade disputes, which can only undermine the already unstable dispute-settlement system.

A third category of disputes which threatens the integrity of the GATT dispute-settlement system are broad indictments of the economic and trade policies of other contracting parties. The Uruguayan complaint was an early example of this category of structural complaint, and its unsatisfactory disposition demonstrates that the GATT system cannot effectively cope with, much less settle, such disputes. The GATT Secretariat has voiced misgivings about such complaints, noting that "[i]n some cases it seemed that the issues raised might be too wide in scope, and too important in terms of policy, to be dealt with by the semi-judicial panel procedures."<sup>123</sup> However, a wide-ranging structural dispute of this type arose during the course of 1982 between the EEC and Japan. European frustration with limited access to Japanese import markets and surging Japanese exports to the EEC was ex-

119. The state monopoly of foreign trade in a non-market economy poses serious difficulties for the interpretation of GATT obligations, and all of the East European states have negotiated special accession protocols to GATT. Presently, Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia are contracting parties of GATT, while Bulgaria holds observer status. The Soviet Union has recently applied for observer status at GATT, provoking U.S. concerns about further politicization of GATT on East-West trade issues. *N.Y. Times*, Jan. 25, 1983, at 31. *See generally*, Grzybowski, *Socialist Countries in GATT*, 28 *AM. J. COMP. L.* 539 (1980); KOSTECKI, *EAST-WEST TRADE AND THE GATT SYSTEM* (1979).

120. The EEC approved a total ban on Argentine imports on April 10, 1982. 25 *O.J. Eur. Comm.* (No. L 102) (1982). The ban was extended on May 24 by all EEC Member States except Ireland and Italy. The embargo was lifted on June 20, several weeks before the official termination of hostilities in the South Atlantic.

121. Article XXI(b)(iii) states that "[n]othing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations."

122. 18 *GATT FOCUS* 8 (1982).

123. *GATT SECRETARIAT, GATT ACTIVITIES IN 1981* 6 (1982).

acerbated by a \$10.6 billion bilateral trade deficit in 1982.<sup>124</sup> Japanese import liberalization and export restraint measures were perceived to be inadequate, and bilateral discussions were engaged in between senior EEC and Japanese officials. After the results of these bilateral discussions were found to be unsatisfactory, the EEC Council of Ministers informed Japan in March, 1982 of its wish for Article XXIII consultations.<sup>125</sup> This request was communicated to the Japanese GATT delegation in early April, 1982. The EEC requested Japan to "take measures to rapidly improve the situation," the situation being opaquely defined as Japan's low propensity to import manufactured goods.<sup>126</sup> The first round of Article XXIII:1 consultations between the EEC and Japan was held in mid-May, 1982, in which the EEC "presented a detailed case, pointing out the features of the Japanese economy which hindered access to the country's markets."<sup>127</sup> In addition, a specific complaint concerning Japanese copper purchasing practices was brought for consultations.<sup>128</sup> New Japanese trade liberalization measures were announced later in May, 1982, but the EEC continued to regard these as insufficient token concessions, and further Article XXIII:1 consultations were held in July, 1982. In this second stage of consultations, the Japanese sought to refute the critical EEC analysis of the "particular characteristics of Japan's economic structures and policies,"<sup>129</sup> but no accord was reached. A third round of Article XXIII:1 consultations were held in October, 1982, but there was still an "absence of any significant progress in the consultations."<sup>130</sup>

The EEC was throughout 1982 itself divided by an internal debate as to the formation and conduct of an appropriate foreign economic policy towards Japan.<sup>131</sup> However, by mid-December, 1982, the EEC Council of Ministers overcame West German objections and agreed to advance proceedings against Japan in GATT to the Article XXIII:2 level. In April, 1983, the EEC therefore submitted a request for a working party to examine whether Japanese trade practices are excessively restrictive. Japan resisted the request, contending that such a wholesale structural complaint would set a dangerous precedent for the

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124. N.Y. Times, April 12, 1983, at 46.

125. Bulletin of the European Communities [hereinafter cited as Bull. EC] 3-1982, point 2.2.35.

126. Bull. EC., 4-1982, point 2.2.39.

127. Bull. EC., 5-1982, point 2.2.43.

128. Bull. EC., 5-1982, point 2.2.47.

129. Bull. EC., 7/8-1982, point 2.2.55.

130. Bull. EC., 10-1982, point 2.2.37.

131. The internal division within the EEC was essentially between West Germany, which favored further negotiations with Japan, and France, which has supported strong direct action against Japanese imports through the adoption of protectionist measures.

GATT dispute-settlement system.<sup>132</sup> Formation of a working party has been delayed pending the outcome of further consultations. While one commentator observed that "[t]aking the dispute to GATT was a step in the right direction,"<sup>133</sup> it is by no means certain that the GATT dispute-settlement system is capable of resolving such a structural trade dispute. The submission of such structural trade complaints presents a difficult dilemma for the GATT dispute-settlement system. Failure to resolve the dispute will discredit the prestige of GATT, yet virtually any outcome which would satisfy the EEC would be unacceptable to Japan, and vice-versa. GATT simply does not have the capacity to alleviate the trade consequences of differential rates of economic and industrial development. Any attempt to do so will inevitably prove to be more destructive to GATT's organizational competence than beneficial to the realignment of international trade flows.

## VI

### CONCLUSION: THE MERITS OF REFORM

This survey of the evolution and present state of the GATT dispute-settlement system suggests that continued reform efforts are necessary to restore the capacity of GATT to effectively resolve international trade disputes. This recognition of the necessity for institutional reform has been expressed in a series of reform proposals made throughout the course of the 1970s. A pause in the formulation of reform proposals followed the conclusion of the Tokyo Round, which allowed a trial period for the evaluation of its implementation. A sufficient trial period has now elapsed, and it seems possible to conclude that while the substantive accomplishments of the Tokyo Round were valuable, the MTN effected little improvement, and perhaps even some regression in the operation of the dispute-settlement system. Moreover, those areas of substantive rule-making left incomplete, notably agricultural trade, safeguards, and subsidies, seem the most susceptible to the development of international trade disputes. The salience of these and other international trade conflicts in the early 1980s mandates a renewed imperative for reform of the dispute-settlement system. The continuing applicability of several of the reform proposals of the 1960s and 1970s in the changing circumstances of the 1980s should now be examined.

There have been essentially two types of reform proposals made for the improvement of the GATT dispute-settlement system. The first

132. Wall St. J., Jan. 11, 1983, at 39.

133. Brittan, *A Very Painful World Adjustment*, 61 FOREIGN AFF. 541, 547 (1983). However, Malmgren, quoted in Bergsten and Cline, *Trade Policy in the 1980s*, in 3 POLICY ANALYSES IN INTERNATIONAL ECONOMICS 21 (1982), states that the EEC complaint "is so sweeping (attacking the very way of doing business in Japan) that it amounts to an abuse of the GATT, an exercise in

is an expansion of the administrative capacities of the existing system, especially the GATT Secretariat, thus enhancing its ability to avert disputes and exercise surveillance over the international trade system. This corresponds to a more "pragmatic" viewpoint on the nature of the GATT dispute-settlement system. The second, more ambitious, type of reform proposal involves the judicialization of the dispute-settlement system. This of course, reflects a more legalist approach to GATT procedural reform.

Many of the proposals for administrative reform focus upon the role of the GATT Director-General and the Secretariat. Dam suggested that an information-gathering role for the Secretariat could assist in the ascertainment of solutions to factual disputes, and a "very considerable improvement in the dispute-settlement procedures of the GATT might be achieved."<sup>134</sup> Dam makes a further analogy to the integrative efforts of the EEC Commission, noting that the GATT Secretariat could well aspire to such a role.<sup>135</sup> This proposal was to some extent adopted in the Understanding, which provided that the Secretariat could furnish assistance to panels on the historical and procedural aspects of disputes. The Ministerial Declaration further expanded this function, as well as enhancing the good offices role of the Director-General. However, GATT Directors-General have seldom displayed the initiative and independence exercised by the IMF Director-General or the World Bank President in their oversight of the international monetary and development finance systems. It is unlikely that the GATT Director-General could assume such an active role, even within the limited context of dispute-settlement.

Despite the proliferation of MTN dispute-settlement procedures, Professor Jackson has made the further suggestion of the "development of secretariat services specializing in dispute-settlement, and a model set of effectively procedural rules that can be offered for adoption by various MTN dispute panels."<sup>136</sup> These suggestions would superimpose a more uniform structure on the fragmented nature of the dispute-settlement system. However, it is questionable whether such procedural reforms alone will be sufficient to preserve the integrity of the dispute-settlement system in the present era of aggravated international trade tensions.

It therefore seems desirable to examine the merits of a more comprehensive effort at reform which could include the establishment of a judicial body with jurisdiction over inter-government trade disputes.

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bringing an essentially imprecise and ill-defined complaint in order to demonstrate that GATT cannot act so that there will be justification for actions outside the GATT."

134. K. DAM, *supra* note 7, at 374.

135. *Id.* at 375.

136. Jackson, *supra* note 10, at 58.

Several proposals for such a judicial approach were made during the course of Tokyo Round. An American Society of International Law study panel recommended the formation of a new World Trade Organization, with a single, uniform dispute resolution procedure. The dispute resolution procedure would encompass consultation, conciliation, mediation, and finally recourse to an impartial tribunal which would make factual findings, legal conclusions, and recommendations as to appropriate remedies. The tribunal reports would be published and referred to a committee or council for implementation.<sup>137</sup>

A similar proposal was endorsed by an American Bar Association resolution which advocated the resolution of international trade disputes by an impartial panel which published its opinions.<sup>138</sup> The Atlantic Council has advanced a somewhat differing proposal for a Code of Trade Liberalization to which major trading nations, a category essentially coextensive with the OECD membership, would be parties.<sup>139</sup> The Code would be administered by an Executive Committee which would be empowered to issue decisions as to the rights and obligations of parties under the Code. The use of panels would be retained, but an advantageous procedural reform would be that GATT could commence dispute-settlement on its own initiative, instead of waiting for a complaint to be brought by a contracting party.

The most elaborate proposal for a judicial body for international trade dispute-settlement is that made by Professor Jackson, in his Outline of a Protocol for the Resolution of Trade and Economic Disputes.<sup>140</sup> Jackson's Protocol would establish a Council for Dispute Procedure, with a membership consisting of the parties to the Protocol. The Council would be presided over by a Director, presumably the Director-General of GATT. The Council Director would be empowered to initiate consultation and mediation proceedings, as well as recourse to panel proceedings. Panels would issue binding decisions which the parties to a dispute would be under an obligation to accept. Panel decisions would be implemented through recommendations issued by the GATT Contracting Parties, the Protocol Council, or another appropriate body.<sup>141</sup> The Council Director would be responsible

137. PANEL ON INTERNATIONAL TRADE POLICY AND INSTITUTIONS, REMAKING THE SYSTEM OF WORLD TRADE: A PROPOSAL FOR INSTITUTIONAL REFORM, 12 STUDIES IN TRANSNATIONAL LEGAL POLICY 33-35 (1976).

138. ABA Res. No. IC-2-78-316 B, Report No. 102 (1978).

139. GATT PLUS: A PROPOSAL FOR TRADE REFORM, REPORT OF THE SPECIAL ADVISORY PANEL TO THE TRADE COMMITTEE OF THE ATLANTIC COUNCIL (1976), summarized in *GATT Plus: A Proposal for Trade Reform*, 13 ATL. COMM. Q. 323 (1975), discussed in *New Directions in International Trade Policy*, 69 PROC. AM. SOC'Y INT'L L. 128-132 (1975).

140. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 13-21 (1979).

141. This could presumably include the Committees which administer the MTN Agreements.

for surveillance of compliance with panel decisions, and would have the power to initiate dispute proceedings against parties not in compliance. The Council Director may even entertain and act upon complaints by private parties in this phase of the dispute-settlement procedure.

An international tribunal for the settlement of international trade disputes would possess several advantages over the present dispute-settlement non-system. An impartial, prestigious tribunal could serve as a neutral arbiter of international trade disputes, enhancing compliance with its decisions and arresting the politicization of the dispute-settlement system. The formation of such a tribunal would constitute a triumph of the rule of law over power diplomacy in international relations and would contribute to the codification of a jurisprudence of international economic law. An international tribunal would serve as a mutually acceptable mechanism for the resolution of bilateral disputes which otherwise would inexorably develop or degenerate into unnecessary political conflicts. The formation of such a judicial institution would be an important symbolic display of multilateral commitment to the preservation of the Ricardian model of free trade according to comparative advantage and the corresponding rejection of protectionism. Finally, on a more general level, the establishment of an international trade tribunal would represent a reaffirmation of a "crumbling" component of the international legal order.<sup>142</sup> Much of the postwar international legal order, especially its economic dimensions, is becoming obsolete in the contemporary environment of the 1980s. A systematic approach to institutional reform of international trade relations is a fundamental prerequisite to the restructuring of an international legal order which will be conducive to world economic development and growth in the final decades of the 20th century and beyond.

Several objections to a judicial approach to international trade dispute-settlement may be anticipated. A judicial approach may be considered to be legally undesirable, institutionally infeasible, and politically unrealistic or utopian. A major legal objection to the formation of a judicial body for the resolution of international trade disputes lies in its possible usurpation of the role of the International Court of Justice (ICJ). The underutilization of the ICJ is widely recognized,<sup>143</sup> yet will only be exacerbated by the formation of a new tribunal under the Law of the Sea treaty. Further fragmentation of the international legal order along functional lines would accelerate the erosion of the role of the ICJ. However, the creation of an international trade tribu-

142. The metaphor is adopted from Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93 (1978).

143. See L. GROSS, *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* (1976).

nal under GATT auspices need not be incompatible with the continued primacy of the ICJ in the international legal order. The existence of an international trade tribunal need not preclude recourse to the ICJ by states which so choose, and the ICJ would therefore not be ousted of concurrent jurisdiction over international commercial disputes. An international trade tribunal under GATT auspices would be a judicial body with a limited, specialized competence, more comparable to the World Bank International Center for the Settlement of Investment Disputes (ICSID) than a potential rival to the ICJ.

A second legal problem for an adjudicatory approach to GATT dispute-settlement is what Professor Hudec has described as the "wrong case problem."<sup>144</sup> The wrong case problem involves the submission of complaints to GATT which are not amenable to dispute-settlement, where as a result governments will refuse to comply with GATT rulings or decisions. Many of the disputes discussed at length in this article, the DISC dispute, the agricultural export subsidies disputes, and the EEC complaint about the structure of the Japanese economy, are examples of wrong cases. A dispute-settlement system which endeavors to solve wrong cases will inevitably fail, with deleterious consequences for its credibility and prestige. The wrong case problem is an undeniable difficulty for an adjudicatory approach to GATT dispute-settlement. However, it is a problem inherent in all forms of international litigation, where compliance ultimately rests upon the good faith of the parties to the dispute. The normative force of a judicial decision may eventually prevail in even the most egregious of wrong cases, as is shown by the recent denouement of the DISC dispute.

Objections to judicial reform of the GATT dispute-settlement system on the grounds of institutional infeasibility and political unreality are closely linked, and can be examined together. The primary institutional obstacle to a judicial reform of the GATT dispute-settlement system is the rigidity of the amendment process.<sup>145</sup> This rigidity requires virtual consensus for the implementation of amendments and therefore makes it politically unrealistic to effectuate amendments in the absence of unanimous support. A proposal for judicial reform of the dispute-settlement system is highly unlikely to command unanimous support and thus could not be implemented through the amendment process. Moreover, even unanimous support will not ensure the ratification and implementation of proposed amendments, as is shown by the failure of the 1955 Review Session.<sup>146</sup> For these reasons, many

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144. Hudec, *supra* note 12, at 159-167.

145. See text accompanying note 9, *supra*.

146. The 1955 Review Session attempted to establish an Organization for Trade Cooperation

previous reform proposals have been framed in the form of Protocols. The principal advantage of the Protocol format is that those states which desire to strengthen the dispute-settlement system may do so *in-ter se*, without being compelled to compromise the magnitude of the reform to obtain universal adherence. While the Protocol format provides an adequate institutional vehicle for the implementation of such reform, its international political dynamics remain problematic.

The EEC, and to a lesser extent Japan, have steadfastly opposed any judicialization of the GATT dispute-settlement system, continuing as firm proponents of pragmatic approaches to dispute-settlement. The establishment of an adjudicatory approach during the negotiation of the Tokyo Round was prevented by what has been described as "violent resistance by the Europeans and the Japanese."<sup>147</sup> European commentators were generally supportive of this position, favoring what were considered as more cautious and practical attitudes to reform of the GATT dispute-settlement system.<sup>148</sup> However, it is questionable whether there is any principled basis underlying the preference for pragmatic approaches. Rather, the predilection for pragmatism in international commercial relations reflects the ability to successfully utilize power politics to obtain favorable outcomes in international trade disputes. A judicial approach would make international trade dispute-settlement more a question of treaty interpretation and less a function of political and economic power. It is consequently opposed by those whose disproportionate economic and political influence would be diminished as a result.

Resistance by the EEC to the adoption of an adjudicatory approach to dispute-settlement has continued to be present in the early 1980s context of escalated international commercial conflict. Former EEC Ambassador Roland de Kergolay warned in early 1982 that a U.S. preoccupation with the revision of GATT rules would set a dangerous precedent which "risks straining the dispute-settlement process in the GATT."<sup>149</sup> This prediction was borne out at the GATT Ministe-

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(OTC) to administer the GATT. The necessary amendment of GATT to create the OTC was never ratified. See Bronz, *An International Trade Organization: Second Attempt*, 69 HARV. L. REV. 440 (1956).

147. *Reform of the International Trading System: Especially Dispute-Settlement*, 84 F.R.D. 590, 592 (1980).

148. See Meng, *Streitbeilegung im GATT*, 41 ZÄoRV 69, 102 (1981). See also Flory, *Les Accords du Tokyo Round et la Reforme du Systeme Commercial Multilateral du GATT*, 1979 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 579, 597. (Centre National de la Recherche Scientifique) Flory concludes that the U.S. and Canadian advocacy of "jurisdictionalisation" of the dispute-settlement system was rejected in favor of the EEC preference for pragmatism and flexibility.

149. *Protectionism: Outlook for the '80s: The European Community Outlook*, EUROPEAN COMMUNITY NEWS No. 13/82, May 27, 1982.

rial meeting in November, 1982, where reform of the dispute-settlement system was one of the more controversial topics. An EEC summation of the meeting noted that it ended "with those who had overambitious objectives (Australia, Canada, and the U.S.) being somewhat disillusioned."<sup>150</sup> Similarly, "a number of developing countries expressed their disappointment."<sup>151</sup> The inflexible EEC intransigence which led to such a disappointing outcome of the Ministerial meeting has prompted a U.S. reassessment of potential methods for the institutional restructuring of GATT.<sup>152</sup>

U.S. foreign economic policy officials are now constructing a new strategy for international trade policy. Reorganization of the U.S. foreign trade bureaucracy into the proposed Department of International Trade<sup>153</sup> should be accompanied by a comparable initiative for GATT institutional reform. An important consideration in the formulation of such a new strategy for GATT institutional reform should be a recognition of the congruence of interests of the "disillusioned" with those of the "disappointed." An alliance of the U.S. with like-minded countries to advocate a reformed GATT dispute-settlement system would exhibit a principled U.S. commitment to both free trade<sup>154</sup> and the rule of law in international relations. A U.S. initiative for the institutional reform of GATT would probably gain favorable response from both developing countries and from non-EEC developed countries.<sup>155</sup> The forma-

150. Bull. EC. 11-1982, point 1.1.1.

151. *Id.*, at point 1.1.2. Disillusionment and disappointment are perhaps diplomatic understatements of the depth of the dissatisfaction of some participants. One French observer commented that the Ministerial Meeting was the "Waterloo of the GATT." Brossard, *Mastering the World Economy*, 61 FOREIGN AFF. 745, 747 (1983).

152. Wall St. J., Mar. 31, 1983, at 26.

153. The Trade Reorganization Act of 1983, S. 121, 98th Cong., 1st Sess., 129 CONG. REC. (1983), was introduced on January 26, 1983, by Sen. William Roth(R-Del.) with the support of the Reagan Administration. It would consolidate foreign trade policy in a Cabinet-level Department of Trade, abolishing the Office of the U.S. Trade Representative and transferring the foreign trade policy functions of the Department of Commerce to the new Department of Trade. Compare Lodge & Glass, *U.S. Trade Policy Needs One Voice*, 83 HARV. BUS. REV. 75 (1983) (advocating strengthening of the Office of the U.S. Trade Representative) with Graham, *Global Trade: War and Peace*, 50 FOREIGN POL'Y 124, 135 (1983) (proposing creation of a Department of Trade and Industry).

154. The centrality of the free trade ideal as an international economic policy objective has recently been profoundly challenged in a provocative analysis which suggests that "Free trade is almost a sideshow." Reich, *Beyond Free Trade*, 61 FOREIGN AFF. 773, 788 (1983). However, the conclusion Reich derives from this analysis of the conceptual and institutional bankruptcy of the multilateral trade system is that a "formal court-like apparatus for fact-finding and disposition of trade disputes will prove to be less useful than an ongoing process of political debate and negotiation, in which all sides are permanently engaged." *Id.* at 804.

155. Many developing countries favor improved GATT dispute-settlement procedures. See UNCTAD Secretariat, *Recent Developments in International Trade Relations*, UNCTAD Doc. TD/B/948, (1983), at 4. In addition, many non-EEC developed countries, notably Australia and Canada, are similarly dissatisfied with the status quo.

tion of such a broad-based coalition would also counteract the traditional EEC dominance of GATT and provide opportunities for the reassertion of a U.S. leadership role in the design and creation of international economic organization. Finally, such a strategy of functional alliances on international trade issues could also be utilized in the promotion of other U.S. foreign economic policy objectives, such as the expansion of the scope of GATT to encompass international trade in high-technology goods, services, and trade-related investment practices. This ensemble of international trade issues, together with safeguards and trade in agricultural commodities, can and should become elements of an agenda of an eighth round of multilateral trade negotiations in the mid-1980s.<sup>156</sup> The establishment of a judicial dispute-settlement system for international trade should merit serious consideration during these negotiations, as a means both to strengthen GATT and to promote more harmonious international trade relations.

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156. See Bergsten and Cline, *Trade Policy in the 1980s*, 3 POLICY ANALYSES IN INTERNATIONAL ECONOMICS 70 (1982) for a similar conclusion that it "will be necessary to launch another major international negotiation — an 'MTN' for the 1980s." These predictions have been partially realized in the Williamsburg Declaration on Economic Recovery, which stated that "We should work to achieve further trade liberalization negotiations in the GATT, with particular emphasis on expanding trade with and among developing countries. We have agreed to continue consultations on proposals for a new negotiating round in the GATT." *reprinted in* N.Y. Times, May 31, 1983 at 36. The prompt implementation of this agreement will be essential to the accomplishment of the Declaration's goals of a halt to protectionism and the promotion of economic recovery.