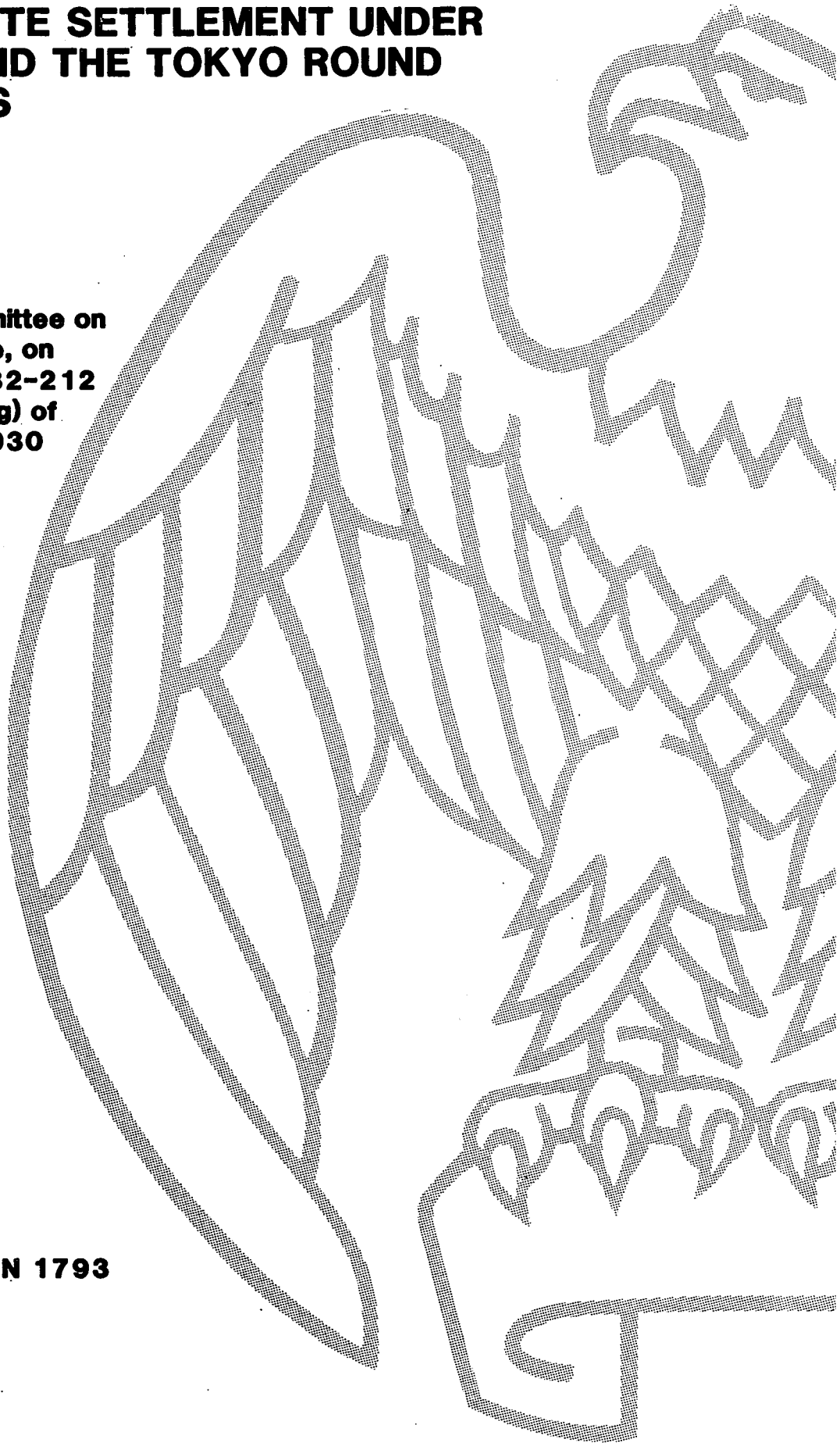
REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS



Report to the Committee on Finance, U.S. Senate, on Investigation No. 332-212 Under Section 332(g) of the Tariff Act of 1930

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PREFACE

On June 7, 1985, the U.S. International Trade Commission instituted investigation 332-212, "Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements." The investigation was instituted by the Commission at the request of the Committee on Finance of the United States Senate under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)).

The Committee requested that the Commission (1) review the development of the GATT dispute settlement mechanisms and their relationship to U.S. trade laws; (2) summarize the disputes that have been addressed by the GATT and the code committees; and (3) outline the strengths and weaknesses in the process as perceived by major participants. The report's review of the dispute settlement mechanisms includes, among other things, consideration of the types of products and trade barriers concerned, the pattern of individual countries' involvement, the conditions leading to success or failure of the process, and the record on implementation of the GATT and code committee findings. The study also examines the differences in views of the major participants on the purpose of these mechanisms and on the manner in which the process should operate to achieve the desired goals.

The Commission received the request on May 2, 1985. Public notice of the investigation was given by posting a copy of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of June 12, 1985 (50 F.R. 24716). Written submissions were received from interested parties although no public hearing was held.

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EXECUTIVE SUMMARY

Introduction

The General Agreement on Tariffs and Trade (the General Agreement or GATT 1/) is a multilateral agreement setting forth basic rules its signatories have agreed to apply in taking actions affecting international trade. Its aim is progressive trade liberalization based on the principle of nondiscriminatory treatment and the reduction of tariffs and other barriers to trade. While the GATT is generally viewed as having succeeded in fostering global growth by encouraging countries to dismantle their trade restrictions, some observers have criticized the GATT and its dispute settlement mechanisms as being ineffective in dealing with the complex trade problems facing the world today.

The principal dispute settlement provisions of the General Agreement are found in articles XXII and XXIII. A contracting party 2/ is entitled to pursue certain procedures if it believes that its trading interests are being harmed by violations of the GATT rules or by any other actions that nullify or impair the benefit of concessions afforded it by other members. A contracting party has the right to seek consultations with the party or parties concerned and, if these fail, to request consideration of its complaint by the Contracting Parties (comprising the members acting jointly).

The United States is currently involved in a large number of GATT disputes, and, in several of these cases, procedural or other obstacles seem to have stalled them short of a satisfactory resolution. As a result, the United States has indicated that it will seek reform of the GATT's dispute settlement procedures in the forthcoming round of multilateral trade negotiations (MTN's). Three main problems with the GATT resolution process have been claimed: the time required to complete a case is too long; there are too many opportunities for the "defendant" country to obstruct the process; and the complainant party is often unable to ensure implementation of

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1/ Hereinafter, the common convention is observed that the term "GATT" is used to refer to the organization or collectively to the organization and the legal instruments, while the term "General Agreement" is used to refer specifically to the agreement.

2/ In this report, the conventional practice is followed of using the term "Contracting Parties" (with capitalization) to refer to the parties to the General Agreement acting formally as a body. References to individual contracting parties or to several contracting parties are uncapitalized.

GATT decisions, once reached. These weaknesses have concerned many U.S. observers, who fear that an inability by the GATT to handle trade disputes may force countries to seek alternatives that are inconsistent with the GATT's overall objective of removing distortions to the international exchange of goods.

The Senate Finance Committee asked the Commission to examine the record of operation of the GATT's dispute settlement procedures and to identify both institutional and functional obstacles evident from its operation. The Commission reviewed the evolution of the GATT's dispute settlement procedures, the record of their operation, and the views of major participants and interested U.S. parties.

Development of the Dispute Settlement Procedures in the GATT and Tokyo Round Nontariff Measure Agreements, and Provisions of U.S. Law Relating to Trade Agreement Rights

In the GATT's early history, dispute settlement was initiated when complaints were deposited at sessions of the Contracting Parties. These disputes were handled in an ad hoc fashion and were sometimes simply referred to the Chairman for rulings. As more complaints were presented to the GATT, the custom of setting up working parties of the disputants and other interested parties developed. Eventually, a more formal system evolved. It is now customary practice for the Contracting Parties to set up a panel of independent experts to examine disputes and to draw upon the information and conclusions of the panel in recommending a solution to the disputing parties. The panelists are representatives of countries not party to the dispute, and they are expected to serve independently rather than as representatives of their governments.

In the late 1970's, the GATT dispute settlement procedures were reexamined in conjunction with other proposals for institutional reform during the Tokyo round of multilateral trade negotiations. Proposals for changes in the dispute settlement mechanisms ranged from minor procedural improvements to recommendations by developing countries to strengthen their ability to benefit from the process. Despite their divergent views, the Contracting Parties adopted an "Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance" (the Understanding) on November 28, 1979. This document and its annex contributed significantly to standardizing dispute settlement and formally recognized the panel process.

The dispute settlement process as it now operates has five main stages:

(1) Consultation and conciliation.--A complaining party first attempts to settle the dispute through bilateral consultations requested under articles XXII and XXIII:1 of the General Agreement. The parties to which such a request is addressed are directed to give it their "sympathetic consideration." If that effort fails to produce an acceptable result, the parties may then seek the good offices of the Director-General, or other parties, for conciliation.

(2) Establishment and formation of panels.--If consultations do not yield a solution, a complaining party can request the establishment of a panel. The decision to establish a panel is taken by a consensus that includes the disputing parties. After the panel is authorized, the parties must agree on the panel's members and terms of reference.

(3) Deliberations of panels.--The panel requests information from parties and holds meetings to consider their information and arguments. According to the 1979 Understanding, the panel should continue to give the parties "adequate opportunity to develop a mutually satisfactory solution." If no settlement is obtained, the panel writes a report on its assessment of the facts and conclusions. The report is first given to the disputing parties for comment. If, after reviewing the report, the parties arrive at a bilateral resolution, the original report is set aside and a report simply noting such settlement is circulated.

(4) Consideration of findings and recommendations.--If a bilateral settlement is not reached, the panel's findings are circulated and considered at an upcoming meeting of the GATT Council for a decision on whether to adopt the report. The decision is made by consensus that includes the disputing parties. Usually concurrent with report adoption, the recommendations to the disputing parties are also adopted. Panel reports often suggest recommendations for consideration at these meetings. The Council may adopt some or all the recommendations suggested by the panel or develop others.

(5) Followup and implementation.--If the panel findings are adopted, the party complained against decides whether and in what fashion to comply--usually in consultation with the complaining party. If the complaining party is not satisfied with these efforts, it may raise the matter again for consideration of the Contracting Parties. As a last resort, the complaining party may request authorization to suspend certain of its concessions or other obligations with respect to the party complained against.

Additional mechanisms for dispute settlement evolved with the conclusion during the Tokyo round of nine agreements (commonly referred to as "codes") covering nontariff measures (NTM's). Dispute settlement mechanisms under these codes generally follow the same steps and procedures outlined above, but some contain procedures that are more rigorous than those in the General Agreement, such as recommended timetables for the resolution of disputes.

The dispute resolution procedures of the GATT and NTM codes are open only to the governments of signatory countries. However, under U.S. law indirect access is available to private parties. Section 301 of the Trade Act of 1974 creates a unique relationship between U.S. law and the GATT dispute settlement process by permitting private parties to present a petition concerning trade

problems to the U.S. Government. The Government may then decide to direct these concerns into the dispute settlement process of the GATT, if warranted. Many recent GATT cases have developed out of section 301 petitions, and these claims account for a substantial portion of the total cases that have yet to be resolved.

Summary of Dispute Settlement Activity

In order to assess the effectiveness of the GATT dispute settlement process, the Commission examined 84 disputes that were referred to the Contracting Parties under article XXIII:2 or to panels established by the committees of the Tokyo round NTM codes. A profile of these cases was developed, showing changes in the pattern of use of the process by country, type of product, and type of complaint brought since 1948 and in the last decade.

The record shows that resort to the formal dispute resolution process has increased substantially in the last decade. One-half of the 84 complaints reviewed were filed after 1975 and one-third were filed after the conclusion of the Tokyo round in 1979. The United States and the European Community (EC) or its member states (prior to the formation of the EC Commission in 1962) 1/ have been the leading participants in the process--the United States most often as the complainant and the European Community as the subject of complaints. One or the other was a party to a dispute in 77 of the 84 cases examined. In 26 of these cases they were engaged in disputes with each other. Other countries have participated in the process much less frequently.

The United States has participated in the GATT dispute settlement process more than any other single GATT country member. A party to more than one-half of all cases since 1948, the United States filed complaints in 33 cases and was named in 13 complaints. In 14 cases, the U.S. complaints concerned agricultural products. The most frequent targets of U.S. complaints were EC countries, against whom about two-thirds of the U.S. complaints were filed. Ten of these fourteen complaints were against EC measures affecting agricultural trade. The second ranking target of U.S. complaints was Japan, which was the subject of five U.S. complaints-(four concerning Japan's restrictions on imports of manufactured leather).

Since passage of the Trade Act of 1974, 11 of the cases filed by the United States originated in petitions filed by private parties under section 301 of the Trade Act of 1974; nine of these were referred to panels under the General Agreement and two were referred to panels under the Subsidies code. Complaints against the United States have also become more common. Over the last decade eight panel cases were filed against U.S. measures. Since 1975, the EC and Canada have each filed three complaints against the United States.

1/ Unless otherwise indicated, reference to the EC also includes activity of its member states prior to 1962 or the date of accession. The EC Commission took responsibility for representing EC member countries in GATT dispute settlement after 1962 in accordance with the common commercial policy mandated by art. 113 of the Treaty of Rome.

As a group, the EC countries have engaged heavily in formal dispute settlement. They were involved in 62 cases--accounting for about 74 percent of all GATT and code panels, most often as the target of complaints. Complaints against EC countries concerned subsidies more frequently than any other type of trade measure. More than one-half of the complaints against EC countries (23 out of 42 complaints) have concerned its measures affecting trade in agricultural goods. In the last decade, 14 of the 17 complaints against the EC concerned its measures affecting agricultural trade.

Other countries have also requested panels more often in recent years. Canada has increasingly used the panel process to resolve its trade disputes, filing six of its eight panel requests within the last decade. Three-fourths of the reviewed complaints by developing countries have been filed within the last decade.

Almost 60 percent of the 56 cases involving specific products concerned complaints about measures affecting agricultural trade. Since 1948, a total of 33 cases have addressed measures affecting agricultural trade. Subsidies and quotas were at issue in most of these cases. In 23 of these cases, or almost 70 percent, measures taken by EC countries have been the subject of complaints. Cases regarding restrictions on manufactured goods trade accounted for another 39 percent of the complaints involving specific products. Several cases were filed concerning products considered to be import sensitive in industrialized countries, including textiles, leather, and footwear.

Between 1948 and 1974, tariffs were the most frequent subject of disputes. In the following 10 years, as tariff levels were negotiated downward and the use of other barriers increased, tariff-related disputes were equaled or exceeded by complaints against quotas, subsidies, and nontariff measures. Since 1975, tariffs have accounted for only about 19 percent of the cases filed, while quotas were the most prominent type of trade measure disputed, and accounted for nearly 29 percent of the cases. Although tariffs and quotas have been the most frequent subject of complaints, these cases have generally been resolved satisfactorily under the existing dispute settlement procedures.

Subsidies have been complained about less often, but satisfactory resolution of these cases has proven difficult. Part of this difficulty may be due to a lack of consensus on interpretation of GATT subsidy provisions, particularly differences in interpretation by the United States and the European Community. A total of 14 cases concerning subsidies have been filed since 1948, and 8 of these since 1975. The most notable characteristic of the subsidies-related disputes is their link to trade in agricultural goods. All of the subsidies cases initiated since 1975 have concerned agricultural products.

Nontariff measures have been involved in 10 complaints of the 42 complaints filed in the last 10 years. All but 1 of the 10 nontariff measure cases filed since 1975 were handled under the auspicies of the General Agreement rather than the NTM codes negotiated during the Tokyo round of multilateral trade negotiations.

The record indicates that existing GATT dispute settlement mechanisms have been adequate for managing all but the most contentious GATT disputes. In many of the more contentious disputes, each stage of the process has been subject to controversy and delays. Establishment and formation of panels has, as a rule, proceeded smoothly, while report adoption and implementation have proven troublesome in recent years.

Obtaining formal agreement to establish a panel has generally been achieved within a reasonable time. A request for a panel is usually considered at the next monthly meeting of the GATT Council. In the 50 cases for which dates were available, most panels were set up within 2 months. The most notable exceptions were the 1973 set of cases between the United States and the EC on the U.S. Domestic International Sales Corporation (DISC) program and tax practices for exporting companies in three EC countries. These panels took nearly 3 years to compose.

Once a panel is formed and terms of reference agreed upon, lengthy delay in the deliberations of panels is the exception rather than the rule. Many panels meet between three and five times before issuing a report. Two cases were outstanding exceptions in this regard. Numerous panel meetings were required to resolve the 1973 DISC and related tax cases as well as the 1982 U.S. complaint concerning the EC's tariff preferences on imports of citrus products from Mediterranean countries. Since 1975, the average number of meetings held by panels is eight, when complicated cases, such as the one on citrus, are included.

In about one in five panel cases, continuing consultations between the parties resulted in bilateral settlements before the panel completed its work. The tendency to arrive at bilateral settlements after the panel process has been initiated is diminishing, however. Since 1980, a bilateral settlement followed panel establishment in only three of the panel cases completed.

The use of consensus to adopt panel reports has often been cited as a weakness of the panel process, but, in practice, report adoption rarely has been delayed for long periods. For reports adopted since 1948, the average period of time from the date of the article XXIII:2 complaint to date of report adoption was 10 months. Again, the 1973 DISC and related tax cases were exceptions. Reports on these cases were finally adopted, subject to an "understanding," 8 years after the panel requests were filed. For cases after 1975, the average period of time between the complaint and report adoption increased to about 16 months.

Prior to 1979, all panel reports were adopted, but since that time consensus on adoption of five panel reports has not proved possible. In two of these cases, the Contracting Parties could not agree to adopt reports whose interpretations and conclusions were regarded by many members as faulty or inadequate. In all of the five cases in which reports were not adopted, the United States was the complaining party. All five concerned trade in agricultural products, and all originated out of section 301 petitions filed by private parties under U.S. law.

Implementation action was taken to resolve the dispute in more than 70 percent of all the completed cases reviewed. GATT resolution has resulted in the termination of the disputed practice in over 33 percent of the cases reviewed. Some partial elimination, change of measure, or other settlement was obtained in another 38 percent of the cases. No action on implementation of recommendations adopted by the Contracting Parties was the result in only 6 of the 75 completed cases.

The record on timeliness of implementation in cases that have been resolved again shows that implementation has been fairly prompt in the majority of cases. The average time that has elapsed between the date of the article XXIII:2 complaint and the date of implementation action was about 2 years. Action on implementation took more than 2 years in 10 of the cases for which dates were available.

However, an examination of cases completed since 1975 shows that the number of satisfactory outcomes has diminished. Total elimination of a disputed measure has resulted less frequently from the process, largely due to the increase since 1975 in the number of cases in which reports were not adopted or where the party complained against has taken no action to comply with rulings and recommendations of the panel.

Views on the Purpose and Function of the Dispute Settlement Process and Proposals for Changes

The Senate Finance Committee also requested that the Commission obtain from participants in the process their opinions on the major strengths and weaknesses in the GATT's dispute resolution mechanisms and on possible improvements in the procedures. Accordingly, Commission staff solicited the views of more than 30 officials and experts on GATT affairs on the purpose and operation of these mechanisms and on various proposals for improvement. Those interviewed included staff of the GATT Secretariat, representatives to the GATT of both major trading partners and smaller countries, staff of the Office of the United States Trade Representative, former panelists, and other government officials with experience with GATT dispute settlement. In addition, the Commission received written submissions from seven interested U.S. parties.

All of the officials interviewed by Commission staff seemed to view the GATT as the only viable means of ordering world trade. Perceived as being both pragmatic and flexible, the GATT was frequently compared favorably with other international organizations, which were described as politicized, inefficient, and burdened by overly large bureaucracies. The dispute resolution process in particular was observed to work well where the issues were narrowly focused or technical.

Nevertheless, participants cited a number of problems with the process. One aspect of the GATT in general that was sometimes cited as a benefit, and sometimes as a detriment, is its strong reliance on consensus decisionmaking. Some observers said that the avoidance of voting strengthens GATT and

discourages politicization, while at the same time preserving national sovereignty. Others criticized the insistence on consensus, particularly in dispute settlement, noting that it can impede the completion of panel work and result in blockage of panel findings.

Numerous other problems with the process were cited, including the length of time it takes to set up panels, the problem of obtaining qualified and independent panelists to consider disputes, and the difficulty panels sometimes face in interpreting vague or overlapping provisions in the General Agreement. GATT procedures are cumbersome and difficult to amend, some felt, fostering informal approaches to resolution and the increasing preference for use of non-GATT measures. Many others complained that the mechanisms for enforcement of decisions, once made, are weak.

Composition of panels was viewed by many of those interviewed as the stage of the settlement process that was most vulnerable to delaying tactics. At present, the two disputants must agree on the composition of the panel. Since disputes often involve the United States or the European Community, many potential panelists are excluded on the basis of nationality, predisposition, interest in the outcome, experience, or other factors, leaving a relatively small pool of possible choices.

One step that was viewed as positive in this regard was the decision in 1984 to empower the Director-General to seek nominations for a roster of experts to serve on panels. Though no formal procedures or guidelines have been adopted for the roster, it is possible that one or more persons from the roster could be used to complete a panel where the disputants fail to agree on the persons initially suggested within a set time period.

The establishment of terms of reference for the panels also was viewed as problematical. The terms of reference effectively set the questions which the panel is to address and the substantive provisions of the General Agreement to be considered, in addition to the procedures or time frame to be used. The terms of reference must be accepted by the disputants before the panel can begin its work and their drafting has sometimes been used to delay panel proceedings. In view of this problem, some country officials advocated the setting of standard terms of reference for all panels or giving the Chairman of the Council or the code committees the authority to set terms of reference in difficult cases. Other officials opposed these proposals, suggesting that stalling at this stage affords the parties maximum opportunity to reach a bilateral solution. In addition, a few respondents noted that set terms of reference, or timetables for their adoption, could force the panel to ignore crucial issues in a case.

Many persons involved with panels shared the view that fixed periods for actual panel work should be enunciated, with extensions possible only in truly complex cases. The time limit for panel work in the Subsidies code, though not a binding rule and not consistently observed, was viewed as having contributed to shortening that code's entire dispute process.

Assuming a report is adopted, obtaining its implementation can be troublesome for the "winner," many observers complained. The burden of obtaining oversight or followup generally rests on the winner, they explained, and there is no requirement for the loser to notify the Contracting Parties of what actions it has taken to implement findings. The winner bears responsiblity for raising the matter regularly at the GATT Council or otherwise organizing pressure for compliance. The majority of those questioned viewed this aspect of dispute settlement as the most troublesome. Both delegates and those involved in panel work favored regular review of the progress made in implementing panel reports as a matter of course. A more structured way to accomplish this followup was also proposed by one developed country official.

In response to the Commission's request for public comments, seven submissions from interested parties were received. Most of the submissions criticized three main aspects of the process: the length of time it takes to complete each stage of the procedure; defects of the panel process itself; and lack of adequate assurance of compliance with panel findings.

With regard to the first aspect, all the submissions stated in strong terms that the process takes too long, threatening not only the credibility of the GATT as an institution but also domestic U.S. industries, markets, and exports. This problem is especially critical when the individual case is begun as a petition by private parties under section 301 of the Trade Act of 1974, since the process of getting the petition accepted by the U.S. Government and initiating negotiations with the country concerned is frequently time consuming.

Support was widely expressed in the submissions for the creation of a permanent panel to hear all disputes, or at least for a pool of permanent panelists, including experts to help in complex cases. In addition, the submissions were critical of the fact that panel reports often lack clear statements of the pertinent GATT violations in a case or of the actions needed for their elimination. Finally, the submissions found fault with the GATT's settlement process because it provides no formal means of achieving implementation of panel findings, once adopted.

In general, the opinion of those interviewed was that small procedural changes in the dispute settlement process--as opposed to changes in the GATT itself--are not likely to improve the present situation significantly. Others said that while specific and narrow modifications would be desirable, there were on paper few real institutional deficiencies in the process, and the mechanisms are operating as well as can be expected. It was recognized that certain problems have developed, particularly in regard to United States-EC agricultural disputes. However, the prevailing view among the persons interviewed was that thorough, tough negotiations on improving the substantive provisions of the GATT were what was really needed--something many GATT members have thus far been unwilling to do. In the agricultural sector in particular, consensus has proven extremely difficult to achieve on substantive

language interpreting existing obligations. In addition, the application of export subsidies and waivers under article XXV by contracting parties to their agricultural trade has posed particular problems. Where the language has not been sufficiently developed to deal with past and current practices, it is likely to be abused.

According to all persons interviewed in Geneva and to many academic sources, the most obvious and difficult issue facing the GATT is that its members lack the political will to cooperate in trade matters. As a consequence of this problem and its relationship to national interests, the language of the GATT and the codes was devised as a carefully structured compromise. While many officials were not confident that the situation could be improved, and a few were overtly pessimistic on the GATT as a whole as it presently functions, all of those questioned cited the need to continue both efforts for improvement and support of the GATT. Avoiding a reversion to bilateral, ad hoc solutions to trade problems was seen as the long range policy each contracting party should advocate.

INTRODUCTION

The General Agreement on Tariffs and Trade (the GATT or General Agreement 1/) is the principal body of internationally accepted rules governing the world trade system in the post-World War II period. The objective of the United States and other founders of the GATT was to create a liberal international trade order that would foster trade and economic growth. The GATT is generally considered to have been successful in achieving this goal.

The GATT is a contractural agreement between member governments (contracting parties) 2/ to adhere to specified rules in the regulations and restrictions that they impose on their trade with other GATT members. An important part of the GATT is a commitment by each contracting party on the maximum tariff it will levy on its imports of particular products from the other contracting parties. Such commitments, together with adherence to the articles of the GATT itself, are commonly referred to as concessions. As each member country has adhered to the GATT, it has established, in negotiations with the other members, a balance of concessions between itself and the other contracting parties. The purpose of successive rounds of GATT negotiations since its formation in 1948 has been to increase the magnitude, in both product coverage and depth of tariff reductions, of the pool of tariff concessions. An effort has been made in recent rounds to also include nontariff measures (NTM's) in the pool. As a result of these various negotiations, a balance of concessions among the contracting parties is presumed to exist. Ninety-one countries are now contracting parties to the GATT, 1 country has acceded provisionally, and 31 additional developing countries apply the agreement on a de facto basis.

A principal aim of the dispute settlement procedures of the GATT and its related Tokyo round agreements on nontariff measures (NTM codes) is to provide an orderly process for maintaining or restoring the balance of concessions when a contracting party violates a tariff concession or contravenes one of the rules of the agreement.

The articles of the GATT contain over 30 provisions relating to dispute settlement procedures. In particular, two of these provisions, articles XXII and XXIII, are central to the dispute settlement process of the GATT. Article

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1/ Hereinafter, the common convention is observed that the term "GATT" is used to refer to the organization or collectively to the organization and the legal instruments, while the term "General Agreement" is used to refer specifically to the agreement.

2/ In this report, the conventional practice is followed of using the term "Contracting Parties" (with capitalization) to refer to the parties to the General Agreement acting as a body. References to individual contracting parties or to several contracting parties are uncapitalized.

XXII provides for consultation between parties "with respect to any matter affecting the operation of this Agreement," and article XXIII provides for mediation by the Contracting Parties and authorizes retaliation as the ultimate measure to restore the "balance of concessions" in the event of unredressed nullification or impairment of benefits under the General Agreement. This report deals principally with the operations of the procedures set forth in articles XXII and XXIII and in the dispute settlement provisions of the GATT-related NTM codes.

The GATT was drafted in 1947 to insure the integrity of tariff concessions negotiated in 1947, pending the establishment of the International Trade Organization (ITO). The GATT was to be an interim agreement incorporating the principal commercial provisions of a 1947 draft ITO charter; the ITO was to be the standing world trade organization equivalent, in the area of trade, to the United Nations. The ITO charter, completed in Havana in 1948, never came into force. Consequently, the GATT became a permanent agreement and an institution has grown up around it. Today the term GATT refers to both a multilateral agreement and to an international institution. Because the provisions of the General Agreement dealing with dispute settlement are much less explicit than those in the ITO, the procedures employed in resolving disputes and in handling other matters among contracting parties under the General Agreement have generally developed on an ad hoc basis.

Thousands of disputes arise annually in world trade. Most of these are of a private or semiprivate commercial nature, do not involve strong government interests, and are resolved through judicial proceedings in the courts of one of the parties, through arbitration, or other means agreed by the parties. The GATT dispute settlement procedures are available only to governments that are contracting parties to the General Agreement and only with respect to matters affecting the operation of the General Agreement.

The U.S. Congress has expressed concern about the GATT dispute settlement procedure on a number of occasions. In section 121 of the Trade Act of 1974 Congress directed the President to take certain steps toward GATT revisions, including "any revisions necessary to establish procedures for regular consultation among countries and instrumentalities with regard to international trade and procedures to adjudicate commercial disputes among such countries or instrumentalities." 1/ In its report on the bill that became the Trade Act of 1974, the Senate Committee on Finance expressed the view that "There is a lack of adequate provision for regular and timely consultations among trading nations on issues regarding trade matters of mutual interest." The Committee stated that there "is the need for effective procedures to adjudicate international commercial disputes." 2/

Some of these concerns were addressed in the subsequent Tokyo round negotiations in 1979, both in the "Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance" and in the various nontariff barrier codes that resulted from these negotiations. In approving

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1/ Section 121(a)(9) of the Trade Act of 1974, 19 U.S.C. 2131(a)(9).

2/ Trade Reform Act of 1974: Report of the Committee on Finance . . ., S. Rep. No. 1298, 93d Cong., 2d Sess., at 85 (1974).

the Tokyo round NTM codes in the Trade Agreements Act of 1979, Congress noted that some progress has been made in improving these procedures, but that much remained to be done and that this matter demanded more attention. 1/

The U.S. administration has consistently listed reform of the dispute settlement mechanism as one of the improvements to the GATT system it hopes to negotiate in the upcoming round of multilateral trade negotiations:

> "An expeditious and effective dispute settlement mechanism is essential to maintain confidence in the GATT system among the international business community and contracting parties. The current GATT mechanism requires vast improvement. Many believe there is little point in improving the old rules and developing new ones if disputes about their application cannot be effectively resolved." 2/

The information contained in this report is based on information obtained from published sources, including GATT publications; interviews with delegates representing GATT member countries, staff in the GATT Secretariat, and other persons; and information contained in the Commission's files submitted by interested parties or obtained from other sources. Most of the interviews were conducted with the understanding that opinions would not be attributed by name. Members of the GATT Secretariat staff talked with Commission staff on a personal basis rather than in an official capacity. The Commission has had access to certain GATT documents, some of which were classified by GATT as confidential. Where reference to the information in confidential documents was necessary, the Commission has generally referred to secondary sources.

The information contained in this report is set forth in three chapters. Chapter I traces the development of the GATT dispute settlement procedure from the drafting of articles XXII and XXIII to the recent dispute settlement cases under those articles and the 1979 GATT codes. Section 301 of the Trade Act of 1974, which authorizes the President to take certain actions, including retaliatory actions against countries which violate their international trade obligations, is also discussed in chapter I. Chapter II presents a summary of selected GATT dispute settlement cases by country, product, and issue. It also describes the stages of the present panel process for resolving complaints brought under article XXIII. Chapter III summarizes the views of major GATT participants on the purpose and functions of the dispute settlement process and on proposals for improvement. The information presented in chapter III is based primarily on interviews conducted by Commission staff in Geneva and Washington.

1/ S. Rep. 249, 96th Cong., 1st Sess. at 234 (1979); see H. Rep. 317, 96th Cong. 1st Sess. at 172-73 (1979); S. Rep. 249, 96th Cong., 1st Sess. at 283-84 (1979).

2/ Holmer & Bello, Recent Trade Policy Initiatives, United States Import Relief Laws, Practicing Law Institute, at 289 (1985). Holmer and Bello are General Counsel and Deputy General Counsel, respectively, of the Office of the U.S. Trade Representative. The authors state that their paper, dated Oct. 21, 1985, "describes the Administration's international trade policy, as recently reitereated in a white paper approved by the Economic Policy Council." Id. at 283. This white paper is reprinted as an appendix to the PLI publication at 339.

The text of the letter from the Chairman of the Senate Finance Committee requesting the investigation, the Commission's notice of investigation, certain GATT articles, the 1979 "Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance," and a summary of selected dispute settlement cases are set forth in appendixes to the report.

CHAPTER I

DEVELOPMENT OF THE DISPUTE SETTLEMENT PROCEDURES IN THE GATT AND TOKYO ROUND NONTARIFF MEASURE AGREEMENTS, AND PROVISIONS OF U.S. LAW RELATING TO TRADE AGREEMENT RIGHTS

The Period Prior to the Tokyo Round

Formulation of GATT articles XXII and XXIII

To a large extent, the seeds of GATT lie in the worldwide economic difficulties of the 1930's when major world economies and international trade were in a state of collapse. To protect their depressed industries, many of the major world trading nations, including the United States and the United Kingdom, imposed higher tariffs and other barriers on imports in the early 1930's, furthering the decline in world trade that was already underway. The value of U.S. foreign trade, for example, declined from $9.6 billion in 1929 to $2.9 billion in 1932, a drop of more than two-thirds. 1/ The percentage of U.S. production exported declined from 9.8 percent in 1929 to 6.7 percent in 1933. 2/

The United States took an early lead in efforts to revitalize world trade. In 1933, the new Roosevelt administration and Congress concluded that expansion of exports would be an important factor in efforts to revive the U.S. economy. 3/ They also recognized that the promotion of exports could not be divorced from the treatment of imports. 4/ This reasoning led to the passage of the Trade Agreements Act of 1934, which authorized the President to negotiate reductions in tariffs and other trade barriers with foreign countries. 5/ By 1940 and the onset of World War II, the President had concluded 22 reciprocal trade agreements, and the countries party to the agreements accounted for about 60 percent of U.S. trade. 6/

1/ The United States Reciprocal Trade-Agreements Program and the Proposed International Trade Organization, Dep't of State Pub. 3112, Commercial Policy Series 112, at 1 (1948).

2/ Summary of Foreign Trade of the United States, 1941, U.S. Department of Commerce, as quoted in the statement of Assistant Secretary of State William L. Clayton before the Senate Committee on Finance at hearings on the 1945 Extension of the Reciprocal Trade Agreements Act, May 30, 1945, at 12.

3/ Testimony of Secretary of State Cordell Hull in Hearings Before the House Committee on Ways and Means on H.J. Res. 407, 76th Cong. 2d Sess. vol. I, at 6 (1940).

4/ Id.

5/ 48 Stat. 943 (1934). Testimony of Secretary of State Cordell Hull in Hearings Before the House Committee on Ways and Means on H.J. Res. 407, 76th Cong. 2d Sess. vol. I, at 6 (1940).

6/ Id. at 7.

During the war years, officials in the United States, Great Britain, and other allied countries expressed the view that it would be necessary to establish new world political and economic institutions after the war to promote and maintain peace and avoid a return to the intense political and economic nationalism of the prewar years. 1/ At the Bretton Woods Conference in 1944, at which the charters for the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD) were drafted, it was concluded that an international economic institution would be necessary if the goals underlying establishment of the two organizations were to be achieved. 2/

Following bilateral negotiations with the British, U.S. plans for establishment of an International Trade Organization (ITO) were published in 1945 in a State Department publication entitled Proposals for Expansion of World Trade and Employment. 3/ Thereafter, the United States elaborated on the Proposals and prepared a "Suggested Charter" for the organization. 4/ The ITO was to be a United Nations organ, open to United Nations members and other countries accepting the charter. 5/ Its organization was to be similar to that of the United Nations, and it was to have a permanent secretariat consisting of a director-general, several deputies, and an expert staff. 6/

The General Agreement and the ITO charter were drafted together at four conferences held during 1946-48 in London, New York, Geneva, and Havana. 7/

1/ See, for example, the Declaration of Principles of Aug. 14, 1941 (Atlantic Charter), H. Doc. 358/77C1/1941; and the Moscow Declaration of Oct. 30, 1943, State Dep't Bull., IX, at 308 (1943).

2/ United Nations Monetary and Financial Conference, July 1-22, 1944, 2 UNTS, 40-133. J. Jackson, World Trade and the Law of GATT, at 40 (1969). The IMF was to maintain reasonable exchange stability and facilitate adjustments in the balance of payments of member countries. Because of the war, most countries had serious balance of payments problems. The IBRD was to provide loans for post-war reconstruction and development.

3/ Dep't of State Pub. 2411, Commercial Policy Series 79 (1945).

4/ Suggested Charter for an International Trade Organization of the United Nations, Dep't of State Pub. 2598, Commercial Policy Series 93 (1946).

5/ Id. at 1-2.

6/ Id. at 42-43.

7/ The process for the conferences was set in motion in February 1946 when the Economic and Social Council of the United Nations resolved to call the United Nations Conference on Trade and Employment to consider the establishment of the organization suggested by the United States. The Council set up a Preparatory Committee composed of 19 countries (Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Czecholovakia, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, the USSR, the United Kingdom, and the United States) to arrange for such a conference, prepare an agenda for it, and draft a charter for the proposed organization to be considered at the international conference. The Preparatory Committee began its work at a meeting in London in October 1946 using the U.S. "Proposals" and "Suggested Charter" as its basic documents. A drafting committee of the Preparatory Committee met in Lake Success, New York, during January-February 1947 and made further modifications to the proposed charter. The Preparatory Committee met in Geneva during April-August 1947 and produced a final draft. The draft charter for the ITO was submitted to the United Nations Conference on Trade and Employment when it convened in Havana on Nov. 21, 1947. See The United States Reciprocal Trade-Agreements Program and the Proposed International Trade Organization, Dep't of State Pub. 3112, Commercial Policy Series 112, at 6 (1948).

The ITO charter was to be a broad agreement that would not only establish a standing organization to facilitate resolution of trade problems and sponsor multilateral negotiating sessions to reduce trade barriers, but also establish rules concerning international commercial and economic activity, restrictive business practices, and intergovernmental commodity agreements. 1/ The GATT was intended, to a large extent, to be an interim agreement that would insure the value of the tariff concessions to be negotiated in Geneva during 1947 pending the completion and adoption of the ITO charter. 2/ Article XXIX:2(a) of the General Agreement provided that articles I and III-XXIII of the General Agreement would be suspended and superseded by the corresponding provisions of the charter on the day on which the charter was adopted. To the extent that there were any inconsistencies between the General Agreement and the charter (once adopted), the charter was to prevail. 3/

The consultation and dispute settlement clauses in articles XXII and XXIII of the General Agreement are derived from 1945 U.S. proposals regarding a U.S. desire to include a dispute resolution provision in the ITO charter. Such a provision would permit the ITO "to interpret the provisions, . . . to consult with members regarding disputes . . . and to provide a mechanism for the settlement of such disputes." 4/ The 1946 U.S. draft charter also called for such a provision. 5/ The provision was placed in the same section as the escape clause provision (emergency relief for serious injury caused by increased imports), and discussions at the 1946 London drafting session indicated that there was to be a strong resemblance between the escape clause and the "nullification and impairment" clause. 6/ ITO drafters elaborated on the provision further at the session in Geneva during April-August 1947. 7/ They created a separate chapter for the provision at the end of the charter and subdivided it into four articles. The revised provision called for a dispute settlement procedure involving three broad stages--(1) consultation between the parties, (2) referral of the matter to the ITO, which might arrange for arbitration, and (3) referral to the International Court of Justice. 8/

1/ Suggested Charter for an International Trade Organization of the United Nations, Dep't of State Pub. 2598, Commercial Policy Series 93 (1946).

2/ Analysis of General Agreement on Tariffs and Trade, Dep't of State Pub. 3983, Commercial Policy Series 109, at 205 (1947).

3/ Id.

4/ Proposals for Expansion of World Trade and Employment, Dep't of State Pub. 2411, Commercial Policy Series 79, at 24 (1945).

5/ Suggested Charter for an International Trade Organization of the United Nations, Dep't of State Pub. 2598, Commercial Policy Series 93, at 23 (1946).

6/ Jackson, World Trade and the Law of GATT, supra, at 167.

7/ Further revisions were made to the London draft by a drafting committee of representatives of the members of the Preparatory Committee which met in Lake Success, New York, during January-February 1947. This "New York Draft" was the working document of the Preparatory Committee at its Second Session which opened in Geneva in April 1947.

8/ Draft Charter for the International Trade Organization of the United Nations, Dep't of State Pub. 2927, Commercial Policy Series 106, at 53-54 (1947). This draft is generally referred to as the "Geneva Draft". See also The Geneva Charter for an International Trade Organization: A Commentary, Dep't of State Pub. 2950, Commercial Policy Series 107, at 26-27 (1947). The three stages corresponded with the first three articles. The fourth article limited members to these procedures and authorized the formulation of appropriate rules and regulations.

The first full draft of the General Agreement was developed at the drafting committee meeting held in New York during January-February 1947, and it was further edited at the meeting of the Preparatory Committee in Geneva that began in April 1947. The first paragraph of the London/New York draft charter provision, which provided for consultation, was carried into GATT in edited form and became article XXII of the General Agreement. 1/ The first two articles of the Geneva charter draft, which provided for consultation and for referral of disputes to the ITO when consultation proved unsuccessful, were carried into the General Agreement in edited form as article XXIII, but with the reference to the Contracting Parties substituted for the ITO and without reference to referral to arbitration. 2/ The third and fourth articles of the Geneva Draft, providing for referral to the International Court of Justice and for certain miscellaneous matters, were not carried into the General Agreement.

At the 1946 London session, it was made clear that the nullification and impairment clause was to be something more than a complaint and dispute settlement procedure. 3/ The original London draft allowed not only complaints against a measure taken by another government "whether or not it conflicts with the terms of this Charter," but also redress in "any situation . . . which has the effect of nullifying or impairing any object of this Charter." 4/ It was explained that the clause could permit use of the procedure where world deflationary pressures were adversely affecting benefits of the agreement or where exports of one country were underselling those of another because of substandard labor conditions. 5/ This concept was included in the initial GATT draft, 6/ but it was removed at the Geneva conference in April 1947 along with certain other provisions that had been criticized in hearings before the U.S. Congress. The provision in both the ITO charter and the General Agreement was changed at the Geneva conference to allow a member to bring a complaint whenever "any benefit accruing to it directly or indirectly . . . is being nullified or impaired or that the attainment of any of the objectives . . . is being impeded . . . ." 7/

1/ See article 35 of the London draft of the ITO charter, supra, at 29-30. See also article XIX of the New York draft of the General Agreement, U.N. Economic and Social Council, Report of the Drafting Committee of the Preparatory Committee of the United Nations on Trade and Employment, E/PC/T/34, article XIX, at 77 (Mar. 5, 1947).

2/ See articles 89 and 90 of the Geneva Draft of the ITO charter, supra, at 53.

3/ Jackson, World Trade and the Law of GATT, supra, at 167-68.

4/ Preliminary Draft: Charter for the International Trade Organization of the United Nations, Dep't of State Pub. 2728, Commercial Policy Series 98, at 30 (1946). This "Preliminary Draft" is also known as the "London Draft". It was recognized that actions by a nonmember that were not contrary to the letter of the charter might injure the trade of another member or nullify or impair objectives of the charter. Preliminary Proposals for an International Trade Organization, Dep't of State Pub. 2756, Commercial Policy Series 99, at 10 (1947).

5/ Jackson, World Trade and the Law of GATT, supra, at 168.

6/ U.N. Economic and Social Council, Report of the Drafting Committee of the Preparatory Committee of the United Nations on Trade and Employment, E/PC/T/34, article XIX, at 77 (Mar. 5, 1947).

7/ Article XXIII reads "of any objective".

Articles XXII and XXIII reached their final form at the Geneva conference. While minor changes were made in the nullification-consultation provisions in the ITO charter at the November 1947-March 1948 Havana conference, none were carried into the General Agreement. 1/ The only amendments to articles XXII and XXIII of GATT since 1947 were adopted by the Contracting Parties at the Ninth Session in 1955 and entered into force in October 1957. Article XXII was amended by adding a new paragraph providing for joint consultation with the Contracting Parties if bilateral consultations do not yield a satisfactory result. The last two sentences of article XXIII were also slightly modified, but the amendments were minor in nature. 2/

Both articles allowed for a broad cause of action. Article XXII provided for consultation "with respect to any matter affecting the operation of this Agreement." Article XXIII provided for consultation and, upon request, an investigation by the Contracting Parties and appropriate recommendations or a ruling whenever any contracting party considered "that any benefit accruing to it directly or indirectly . . . is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of," among other things, "any measure, whether or not it conflicts with the provisions of this Agreement, or . . . the existence of any other situation." Thus, under article XXIII, a cause of action could be had with respect to allegations of both a "violation" and a "nonviolation" 3/ of the General Agreement.

In its present form, article XXII reads as follows:

> 1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of the Agreement.
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> 2. The Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect to any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII provides as follows:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this

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1/ Havana Charter for an International Trade Organization and Final Act and Related Documents, Dep't of State Pub. 3117, Commercial Policy Series 113 (1947).

2/ GATT, Analytical Index (Second Revision): Notes on the drafting, interpretation and application of the Articles of the General Agreement, at 115-17 (1966).

3/ That is, nullification or impairment in the absence of infringement of the General Agreement.

Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out his obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations for proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic considerations to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The Contracting Parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary.

If the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

Development of dispute settlement procedures, 1948-59

The ITO never came into existence, largely because the U.S. Congress never ratified the ITO charter. 1/ The drafters of the General Agreement had

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1/ The Truman Administration had agreed that it would submit the ITO Charter to Congress for ratification. However, in 1950 after it became clear that there was insufficient public or Congressional support for ratification, the Administration announced that it would not press for ratification. The Administration's decision reflected growing public concern about the compromises that had been made to reach an agreement as well as disappointment with the operation of the United Nations. See K. Dam, The GATT: Law and International Economic Organization, at 14 (1970).

Congressional opposition to the ITO is reflected in the colloquy between Senator Eugene Millikin, ranking Republican on the Senate Committee on Finance, Secretary of State Dean Acheson, and Winthrop Brown, Director, Office of International Trade Policy, Department of State, during hearings on the Trade Agreements Extension Act of 1951--

> Senator MILLIKIN. So that ITO is out so far as GATT is concerned; is that correct?
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> Mr. BROWN. The decision not to submit the ITO has removed it. It does not mean that we do not still think that some of the ideas there were good and sound ideas to follow, but we do not consider it as any legal or moral obligation.
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> Senator MILLIKIN. Mr. Secretary, let me say, first, that I am delighted that you have decided not to press ITO. But may I ask why you have decided not to press it? It was represented as such an earth-shaking affair essential to the free world and the world of free trade, and we were deluged with propaganda of that kind; and now suddenly it has lost stature to the point of where it is in the waste basket. May I have the Secretary's views on why it was abandoned?
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> Secretary ACHESON. It was abandoned, Senator, because the support which we hoped would develop for the ITO did not develop; and on the contrary, a great deal of opposition developed for it, and it seemed a fruitless effort to go forward with it.
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> Senator MILLIKIN. What you said delights my soul. . . .

Trade Agreements Extension Act of 1951: Hearings Before the Committee on Finance . . ., pt. 1, 82d Cong., 1st Sess., at 13 (1951).

The General Agreement was submitted to Congress for ratification and has never been ratified by Congress. The Truman Administration took the position that the Reciprocal Trade Agreements Act of 1934, as amended in 1945 (59 Stat. 410 (1945)), authorized it to accept the General Agreement. The United States never signed the Agreement per se, but only signed the General Agreement Protocol of Provisional Application. In so doing, it agreed (along with the other signatories) to apply Part I and III of the General Agreement (arts. I and II and arts. XXIV et seq.), and to apply Part II (arts. III through XXIII) "to the fullest extent not inconsistent with existing legislation. For a discussion of the GATT in the context of U.S. law, see Jackson, The General Agreement on Tariffs and Trade in United States Domestic Law, 66 Mich. L. Rev. 252-55 (1967).

expected the ITO to provide the organization and staffing necessary to administer the General Agreement, and therefore no provision for such was contained in the General Agreement. In the absence of the ITO organizational structure, it was necessary to create one for the General Agreement. This absence of formal structure was later viewed by some of the Contracting Parties as having "in one sense been fortunate" in that it allowed them to develop practical solutions to problems and left them unhampered by detailed organizational rules. 1/

Pending resolution of the question of whether the ITO would come into being, GATT affairs were conducted on a day-to-day, "pay-as-you-go" basis. 2/ The organizational format initially followed that of the old ITO Preparatory Committee. The Contracting Parties used the Secretariat of the Interim Commission for the ITO, consisting of an executive secretary and his small staff, to oversee GATT affairs and perform the usual duties of a secretariat. 3/ Beginning in March 1948 in Havana, following the ITO conference, the member countries adopted a practice of administering the General Agreement in the form of periodic meetings called "sessions". 4/

The initial GATT sessions were primarily concerned with post-Havana revisions of the General Agreement, housekeeping functions, and preparations for the rounds of multilateral tariff negotiations held in Annecy, France, in 1949 and Torquay, England, in 1950. 5/ Geneva became the de facto site of the organization, but most decisions, including this decision, were not given any formal recognition. 6/

The first complaints under the dispute settlement mechanism were brought in the course of the Second Session, held in Geneva in August-September 1948. In the absence of the ITO or established procedure, these first complaints were referred to the chairman of the session for a ruling. The first such complaint involved an allegation by the Netherlands that Cuba's consular taxes were violating the article I most-favored-nation (MFN)obligation. The matter was referred to the chairman, he ruled that they were, and several months

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1/ GATT, International Trade 1954, at 128 (1955).

2/ Summary Report of the Twenty-Second Meeting (Second Session), Sept. 9, 1948, GATT/CP.2/SR.22, at 1. See also R. Hudec, The GATT Legal System and World Trade Diplomacy, at 61 (1975).

3/ Summary Report of the Twenty-Second Meeting, Sept. 9, 1948, GATT/CP.2/SR.22, at 4; GATT/CP.2/3Rev.2 (1948); and United Nations Interim Commission for the International Trade Organization, The Attack on Trade Barriers: A Progress Report on the Operation of the General Agreement on Tariffs and Trade from January 1948 to August 1949, at 28 (1949). The "Executive Secretary" was redesignated as the "Director-General" in 1965. GATT, Analytical Index (Second Revision): Notes on the drafting, interpretation and application of the Articles of the General Agreement, at v (1966).

4/ United Nations Interim Commission for the International Trade Organization, The Attack on Trade Barriers: A Progress Report on the Operation of the General Agreement on Tariffs and Trade from January 1948 to August 1949, at 8-9 (1949).

5/ Id. at 7-9.

6/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 63.

later Cuba reported that it had removed the discrimination. 1/ A similar complaint was also filed by Pakistan against India. The chairman issued a similar ruling, but India reserved its position and the matter was not resolved until the Third Session. 2/

A third complaint brought at the Second Session, this one by the United States against Cuba, ultimately resulted in a change in procedures for treating with complaints by referring them to "working parties." The United States brought a formal article XXIII complaint alleging that a new Cuban regulation imposing quantitative restrictions on textiles violated article XI of the General Agreement. The Cuban regulation established a register of textile manufacturers and importers, allowed only those firms regularly engaged in textiles to be on the list, and permitted only those firms to import textiles. In addition, the regulation imposed "elaborate formalities" on the trade that was allowed. The United States argued that, whether or not the new regulation violated the General Agreement, the regulation had stopped trade and had therefore nullified the benefits of the concessions. The United States refused to engage in bilateral consultations and instead demanded immediate revocation of the regulation and immediate authority to retaliate in the form of withholding compensatory concessions. 3/

The Contracting Parties did not take the immediate action requested but instead disposed of the complaint by referring it to a working party charged to consider the matter "in the light of the factual evidence submitted to it" and "to recommend to the Contracting Parties a practical solution consistent with the principles and provisions of the General Agreement." The working party consisted of the chairman of the session, a Canadian, and representatives from Cuba and the United States, the two principals in the dispute, and India and the Netherlands. 4/ After 3 days of meetings, the working party reported that a settlement had been reached. Cuba agreed to withdraw the regulation and the United States agreed to renegotiate certain textile tariffs. 5/

1/ GATT/CP/4; see also Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 66.

2/ Pakistan alleged that India's failure to provide the same excise tax rebates to Pakistan as were afforded to other countries was discriminatory. At the Second Session the two parties agreed to consult. GATT/CP.2/SR11, at 3-5 (1948). They reported to the Third Session that they had reached an agreement whereby each would provide a full rebate on excisable commodities exported to each other when such a rebate was given on exports to other countries. United Nations Interim Commission for the International Trade Organization, The Attack on Trade Barriers: A Progress Report on the Operation of the General Agreement on Tariffs and Trade from January 1948 to August 1949, at 19-20 (1949).

3/ GATT/CP.2/SR.22, at 6-7 (1948); GATT/CP.2/SR.23, at 1-11 (1948).

4/ GATT/CP.2/WP.7/1 (1948); GATT/CP.2/SR.23, at 8-9 (1948). Cuba opposed the taking of the immediate action on the ground that it had lacked sufficient time to review the complaint, in part because of a delay of translating it from English into Spanish.

5/ GATT/CP.2/SR.25, at 6-7 (1948). Working parties were first appointed at the Second Session and are generally given specific charges. The first working party was created for the purpose of considering GATT finances.

The working party approach to dispute resolution was well established by the close of the Third Session held in Annecy during April-August 1949. Three of five complaints considered at the session, including the Pakistan-India consular tax dispute carried over from the Second Session, were referred to working parties. The remaining two complaints, one involving a Cuban complaint about United States tariff reductions on products on which Cuba received a preferential rate and the other involving a Czechoslavak complaint about U.S. licensing requirements and formalities on exports to East European countries, were dismissed by the Contracting Parties. 1/

While the working party handling the Pakistan-India dispute was unable to resolve the difficult factual issues present in that case, working party groups partially resolved cases involving Brazilian taxes and an Australian subsidy. The working party in the Brazilian taxes case consisted of representatives from France and Brazil, the two principals, two countries that had supported France's complaint (the United States and the United Kingdom), and three "neutral" developing countries (China, Cuba, and India). The working party was able to resolve a number of the issues, and issues that could not be resolved were catalogued. However, the working party did not render "decisions" on the unresolved issues, but only reported the reasons for disagreement. 2/

The working party in the Australian subsidy case went further and involved what was for the first time tantamount to a third-party adjudication. 3/ The working party consisted of the two principals, Australia and Chile, and three neutral members, the United States, the United Kingdom, and Norway. The neutrals considered the arguments of the two principals and concluded that Chile had a valid claim of nullification. 4/ However, Australia disagreed and filed a separate statement outlining its position. 5/ As a result of a lobbying effort on both sides, the decision was in effect appealed to the Contracting Parties for a final ruling. However, the

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1/ In the Cuban case the Contracting Parties concluded, among other things, that Cuba could have recourse to the "nullification or impairment" procedures notwithstanding the fact that the margin of preference was not bound against decrease. In the Czech case the United States argued that the licenses were only a formality and that the controls were for security purposes--that is, to prevent war materials from reaching certain countries. United Nations Interim Commission for the International Trade Organization, The Attack on Trade Barriers: A Progress Report on the Operation of the General Agreement on Tariffs and Trade from January 1948 to August 1949, at 17, 19 (1949).

2/ GATT/CP.4/SR.21; see also Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 69. The complaint alleged that Brazil imposed higher internal taxes on certain imported products, such as liqueurs, than domestic products. Brazil argued that the practice was required by domestic law, was consistent with legislation existing at the time it signed the Protocol of Provisional Application, and therefore was not contrary to the provisions of the Protocol. However, Brazil agreed to amend its laws. GATT/CP/72; see also United Nations Interim Commission for the International Trade Organization, The Attack on Trade Barriers: A Progress Report on the Operation of the General Agreement on Tariffs and Trade from January 1948 to August 1949, at 22-23 (1949).

3/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 70.

4/ GATT/CP.4/39, at 1-7 (1950).

5/ Id. at 8-9.

Contracting Parties declined to be drawn into the case and approved the working party report virtually without discussion. 1/

Procedures established in the Third Session were carried over into the dispute settlement matters of the Fifth and Sixth Sessions held in 1950. One case of significance involved a complaint filed by Czechoslovakia against a United States action invoking the article XIX escape clause with respect to imports of hatters fur. This was the first complaint to challenge an article XIX action. Czechoslovakia alleged that the United States had failed to prove that there had been an unforeseen development since signing the General Agreement and that products were being imported under such conditions as to cause or threaten serious injury to domestic producers. 2/ The working party, in concluding that Czechoslovakia had not proved a violation, issued a particularly detailed and legalistic decision. The working party was aided by the fact that the United States was able to offer a detailed report produced by the U.S. Tariff Commission in support of its escape action. 3/

Procedures evolved further at the Seventh Session, held in late 1952, when for the first time a dispute was referred to a "panel" of experts rather than to a working party. A relatively large number of complaints had been placed on the agenda for the session. The first complaint on the agenda involved a complaint by Norway against West Germany alleging German discrimination against Norwegian sardines. Norway asked for a "working party" and West Germany expressed a willingness to have the matter referred to one. 4/ However, rather than appoint separate working parties for each of the disputes, the Chairman of the Contracting Parties (who was Norwegian) proposed that "a single working party" be established for all of them. 5/ Five days later the Chairman "recalled" that "it had been agreed . . . to establish a panel to hear the various complaints that might be referred to it by the Contracting Parties during the present Session." 6/ He then named six countries, Australia, Canada, Ceylon, Cuba, Finland, and the Netherlands, to the panel, and named an individual, the permanent representative of Canada, as chairman of the panel. They were "To consider, in consultation with the representatives of the countries directly concerned and of other interested countries, complaints referred . . . to the Panel, and to submit findings and recommendations to the Contracting Parties." 7/

1/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 70.

2/ GATT/CP.5/22, at 3 (1950).

3/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 71. This was the first of only three complaints involving actions under Article XIX and the only one of the three to result in a formal ruling or report. The other two, both filed against the United States, involved a complaint by Greece and Turkey in 1952 concerning a U.S. tariff increase on dried figs and a complaint by Denmark and Sweden in 1957 concerning a U.S. action on clothespins. The figs case was resolved when Turkey withdrew concessions under Article XIX:3 in 1952 and the U.S. tariff increase was made permanent under Article XXVIII in 1954. The clothespins case was not pursued.

4/ GATT/SR.7/5, at 4-5 (Oct. 9, 1952).

5/ Id. at 6.

6/ GATT/SR.7/7, at 7 (Oct. 14, 1952). Even the subject headings in the minutes of the meeting reflected the new terminology. Item 5 on the agenda of the meeting was "Appointment of a Panel of Complaints." Id. at 1.

7/ GATT/SR.7/7, at 7.

The change of procedure was considered to represent a relatively minor modification of existing practice. However, in practice the panel approach represented a major departure from the previous working party approach in several important respects. 1/ First, the panel did not include representatives from the countries filing the complaints. Second, the panel did not include representatives from the major trading nations, such as the United States or the United Kingdom. Third, the panel and the Secretariat worked out new procedures that were more formal and courtlike. For example, the panel told the parties in the Norwegian sardines case that they would be afforded an opportunity to present their cases and that the panel would also hear from other interested parties. The parties would then have an opportunity to discuss with the panel the various points arising from those presentations. Subsequently, the panel would retire by itself, without the parties present, to consider the issues and draft a report containing its findings. The panel would then discuss its draft report with each of the parties and prepare a final report for submission to the Contracting Parties. 2/ Because the parties were not present at the decisionmaking stage under this new approach, they were forced, as a practical matter, to organize their cases and put their arguments in writing to ensure that the relevant facts and arguments would be before the panel at the time of decision. In addition, the new approach allowed the panel the freedom to deliberate in private, but it also forced the panel to formalize its findings in writing. Thus, the panel approach further formalized the proceedings and tended toward a more independent consideration of the relevant facts, on the basis of which a decision could ultimately be made.

However, when a complaint involved one of the panel members, such as the U.S. dairy quotas case brought by the Netherlands during the Seventh Session, other procedures were followed. 3/ In that case the Chairman of the Contracting Parties named a special working party to consider the matter. However, the working party functioned much as a panel in that case and did not include either of the two principals. 4/

The dairy quotas case also marked the first and only time that a panel or other GATT body acting under the article XXIII dispute settlement procedures has authorized a country to take retaliatory action against another. During the Sixth Session, the Netherlands filed a complaint alleging that U.S. quotas on dairy products imposed under section 104 of the Defense Production Act violated article XI of the General Agreement. The United States did not contest the issue. 5/ The United States indicated it was seeking to have the legislation repealed. The Contracting Parties passed a resolution noting U.S. efforts to have the legislation repealed and requested that the United States report back to the Contracting Parties no later than the opening of the Seventh Session. 6/ However, Congress renewed the act and its restrictions,

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1/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 75-76. See also GATT, International Trade 1952, at 96 (1953).

2/ See the report of the working party published in GATT, Basic Instruments and Selected Documents, 1st Supp., at 53-54 (1953) (hereinafter BISD). See also Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 77-78.

3/ The original complaint was filed during the Sixth Session in 1951.

4/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 76, 78. See also BISD, 1st Supp., at 62-64 (1953).

5/ GATT, International Trade 1952, at 95 (1953).

6/ GATT/CP/130, at 14-15 (1951).

although many of the restrictions were substantially relaxed. At the Seventh Session the Netherlands sought permission to retaliate by setting a quota on imports of wheat flour from the United States of 57,000 metric tons in calendar year 1953. This would have represented a reduction of 15,000 metric tons from then-current levels. 1/ The Contracting Parties authorized a level of 60,000 metric tons. 2/ The quota was reauthorized at this level on an annual basis through 1959. 3/ The Netherlands, however, did not enforce the quotas. Their U.S. imports exceeded the quota level by 10 to almost 30 percent in each of the quota years, probably because U.S. wheat flour was priced competitively and they would have hurt themselves as much as the United States by buying from alternative sources. 4/ The Netherlands did not seek authorization to extend the quotas after 1959.

The panel procedure implemented at the Seventh Session was continued in subsequent sessions. None of the complaint items listed for the Eighth Session during September-October 1953 resulted in the appointment of a panel. The Contracting Parties nevertheless considered two new complaints, one involving a U.S. challenge of a French 0.4 percent revenue-raising tax on imports and exports, and the other involving a challenge by Turkey of U.S. quotas on filberts under section 22 of the Agricultural Adjustment Act. However, both complaints were quickly resolved. The French Government indicated it would abolish the tax, and the United States was able to announce, by the time the filbert complaint was considered, that the restriction had been removed. 5/

The panel appointed for the Ninth Session held during October 1954-March 1955 was given the same basic charge as the panel for the Seventh Session. However, beginning with the Ninth Session panel, individuals rather than countries were named to the panels. No apparent significance was placed on this change. 6/

During the Ninth Session, 17 complaints were filed by 15 different countries. Of these, 10 were removed from the agenda before the end of the session as settled or sufficiently near settlement. Two were referred to a

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1/ BISD, 1st Supp., at 63 (1953).

2/ BISD, 1st Supp., at 32-33.

3/ BISD, 7th Supp., at 23-24 (1959). Section 104 of the Defense Production Act was repealed in 1953 and the quotas were reimposed under section 22 of the Agricultural Adjustment Act (7 U.S.C. 624). The United States sought and obtained an Article XXV waiver for section 22 actions in 1955. BISD, 3d Supp., at 32-38 (1955). The Netherlands' quotas on wheat flour were reauthorized nonwithstanding the waiver. The waiver provided that "this Decision shall not preclude the right of affected contracting parties to have recourse to the appropriate provision of Article XXIII". BISD, 3d Supp., at 35.

4/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 181-82.

5/ GATT, International Trade 1953, at 125-26 (1954). The President took his action on filberts following receipt of a recommendation from the Tariff Commission recommending such action.

6/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 79.

panel. One of the two, a complaint by Italy against Sweden, was the first to involve antidumping or countervailing duties. 1/

In response to a Ninth Session request that the Secretariat explore the possibility of expanding the panel procedure to cover other matters, the Secretariat produced a detailed document describing the purposes and practices of the panels for the Tenth Session held during October-December 1955. The document explained the differences between the working party and panel approaches, and indicated that the working parties tended to serve as vehicles for political compromise while the panels allowed for greater "objectivity." As a result of this document, the panel procedure became a part of formal GATT policy. However, the proposal to extend the panel practice to other matters was defeated. 2/

Eleven complaint items were listed on the agenda for the Tenth Session. Five of these, including the Italian antidumping complaint against Sweden, were settled and withdrawn from the agenda. Two of the complaints were the subject of discussions between the parties at the end of the session, including one brought by Australia against the United States alleging that a Hawaiian law requiring the posting of a "We sell foreign eggs" sign on imported eggs violated article III of the General Agreement. 3/ In three of the complaints the respondent countries were in the process of abrogating or amending the relevant laws or regulations. The eleventh involved the continuing complaint by the Netherlands about U.S. quotas on dairy products. The Netherlands requested (and was granted) authority to continue quotas on U.S. imports of wheat flour for another year. 4/ None of the complaints was referred to a panel.

Five new complaints were filed during the Eleventh Session, held during November-December 1956, but only one, a complaint by West Germany against Greece involving a tariff binding on longplaying phonographic records, was referred to a panel. The West German Government argued that the rate of duty on records had been bound and that the Greek rate on longplaying records exceeded the permissible level. The Greek Government argued that such records constituted a new article not in existence at the time of the binding. The panel recommended that the rate be renegotiated, 5/ and it subsequently was.

1/ Italy alleged that the Swedish practice of imposing antidumping duties based on the difference between the minimum fixed price set by the Swedish Government and the invoice price of the imports, rather than the margin of dumping, violated Article VI of the General Agreement. The panel found that the Swedish practices were inconsistent with the General Agreement. On the advice of the panel, the Contracting Parties recommended that the two parties explore whether the Italian imports entered Sweden at less than their normal value and that they report back to the Tenth Session. GATT, International Trade 1954, at 135-36 (1955). Sweden reported to the Tenth Session that it had abrogated its antidumping decree in July 1955. GATT, International Trade 1955, at 196 (1956).

2/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 80.

3/ The Hawaiian law was the subject of litigation at the time and was subsequently invalidated. See Territory v. Ho, 41 Hawaii 565 (1957).

4/ GATT, International Trade 1955, at 196-99 (1956).

5/ GATT, L/580, at 1-2 (1956).

An additional nine complaints were filed during the Twelfth through Fifteenth Sessions held in October-November 1957, October-November 1958, May 1959, and October-November 1959, respectively. Three of the complaints, one involving an Italian subsidy on agricultural machinery, a second involving a French export subsidy on wheat flour, and a third involving a United Kingdom preference on ornamental pottery, resulted in panel determinations. The complaint against Italy was resolved when the Italian subsidy law was allowed to expire; the complaint against France was settled on the basis of an agreement between France and the complainant, Australia; and the complaint against the United Kingdom was resolved when the panel found that the preference was not likely to result in substantial diversion. 1/

In summary, between July 1948 and March 1959, 54 complaints were filed with the GATT Council under article XXIII. Formal rulings or reports were issued in 20 of the cases. Most of the remaining cases were either quickly settled following consultation or were not pursued by the complaining party. 2/ Retaliation was authorized only once, in 1952 in the dairy products case brought by the Netherlands against the United States.

One additional development in the GATT dispute settlement process during this period was the effort of the Contracting Parties to introduce greater "transparency" 3/ in the process of bilateral consultations under article XXII in order to protect third countries whose interests also could be affected by the outcome of the consultations. At the Thirteenth Session, in the fall of 1958, the Contracting Parties adopted the following decision on consultation procedures under article XXII on questions affecting a number of contracting parties:

1. Any contracting party seeking a consultation under Article XXII shall, at the same time, so inform the Executive Secretary for the information of all contracting parties.

2. Any other contracting party asserting a substantial trade interest in the matter shall, within forty-five days of the notification by the Executive Secretary of the the request for consultation, advise the consulting countries and the Executive Secretary of its desire to be joined in the consultation.

3. Such contracting party shall be joined in the consultation provided that the contracting party or parties to which the request for consultation is addressed agree that the claim of substantial interest is well founded; in that event they shall so infrom the contracting parties concerned and the Executive Secretary.

1/ BISD, 7th Supp., at 22-23, 46-68 (1959); and Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 288-90.

2/ Based on list of cases and their disposition compiled by Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 278-90.

3/ "Transparency" is a term which, in GATT usage, refers to the exchange of information through the notification to the GATT by contracting parties of all actions affecting trade.

4. If the claim to be joined in the consultation is not accepted, the applicant contracting party shall be free to refer its claim to the Contracting Parties.

5. At the close of the consultation, the consulting countries shall advise the Executive Secretary for the information of all contracting parties of the outcome.

6. The Executive Secretary shall provide such assistance in these consultations as the parties may request. 1/

The decline in use of formal GATT dispute settlement procedures during the 1960's

Use of the formal GATT dispute settlement procedure slowed significantly after the Thirteenth Session, held during October-November 1958. Only six disputes were referred to panels over the next 11 years, whereas seven had been referred to panels during the 2-year period from the fall of 1952 to the fall of 1954 alone (the Seventh through Ninth Sessions). No panels were appointed between 1963 and 1970. Only 10 complaints were brought between 1960 and the end of 1969, an average of 1 per year, as compared with 54 complaints during 1948-1959, an average of about 5 per year. Only 6 formal rulings or reports were issued during 1960-1969, as compared with 20 during the previous period. The United States was the major complainant during the period, having filed 6 of the 10 complaints. Western European countries were the subject of 7 of the 10. Only two complaints were filed in whole or in part against the United States. 2/

Commentators attribute this slowdown to increasing reluctance on the part of Contracting Parties to submit disputes to the "legalistic" process embodied in the panel approach and to their tendency to favor a more "antilegalistic" consultation approach to conflicts. They attribute this shift to three factors. First, there was a growing perception that many of the GATT rules were becoming outdated and therefore should no longer be strictly adhered to. Second, an important shift in political power occurred within the GATT beginning in the late 1950's. Prior to that time, the GATT had been dominated by the United States, which designed the legalistic system, and a splintered group of small European countries and British Commonwealth countries, which found the legalistic approach to be in their best interest. 3/ However, in the late 1950's six of the European countries joined to form the European Common Market, which in its aggregate approached the United States in economic size. In addition, Japan and the developing countries began to assert a greater role. Thus, the United States, which had designed the system and which was still the largest player, was no longer the only large player. Third, declining compliance with GATT rules, a general frustration with the inability of GATT to deal with nontariff barriers, rising protectionist sentiment in many of the industrialized countries, and a distrust of a legal

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1/ BISD, 7th Supp., at 24 (1959).

2/ Based on a listing of complaints in Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 278-94.

3/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 152.

approach in developing countries all acted to erode support for a legalistic solution to disputes. 1/

Special sectoral agreements authorizing actions contrary to the spirit of the General Agreement were negotiated during this period. For example, in February 1962 the developed and developing countries concluded, under GATT auspices, the first of several multilateral agreements involving restrictions on textiles. 2/ In 1968, the United States negotiated voluntary arrangements with Japanese and European Community producers to limit exports of certain steel products to the United States. 3/

The first and perhaps most controversial complaint filed during the period was that by Uruguay during the Nineteenth Session in November 1961. The panel ruling also in this case was also particularly notable because it included reference for the first time to prima facie findings of nullification or impairment when certain conditions were present. Uruguay claimed nullification or impairment of benefits as a result of 562 alleged restrictions maintained by 15 major developed countries. 4/ A panel, chaired by a Canadian and including members from the Netherlands, Israel, Brazil, and Switzerland, was formed by the Council in February 1962. The panel held consultations with the 15 countries in July 1962 and late October--early November 1962.

In mid-November 1962, the panel concluded that a prima facie case existed with respect to the practices of 7 of the 15 countries (Austria, Belgium, France, West Germany, Italy, Norway, and Sweden) and recommended that the seven take corrective actions and report to the Council in March 1963 on such actions. 5/ The term "prima facie" appears in several articles of the General Agreement, but not in article XXIII. The panel found that a prima facie case of nullification or impairment would exist where there is "clear infringement" of the provisions of the General Agreement, that is, "where measures are applied in conflict with the provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party . . . ." In such cases, the panel would have to consider "whether the circumstances were serious enough to justify the authorization of suspension of concessions or obligations." The panel stated that a prima facie case of nullification or impairment could also arise even if there were

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1/ Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 Cornell Int'l L.J. 145, 152-53 (1980); see also Jackson, The Jurisprudence of International Trade: The DISC Case in GATT, 72 Am. J. Int'l L. 747, 748 (1978).

2/ BISD, 11th Supp., at 25 (1963).

3/ The text of the letters of intent regarding the arrangements can be found in Consumers Union of United States v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974). The United Kingdom was not a member of the European Community in 1968 and did not participate in the first set of arrangements.

4/ The complaint in essence listed all the nontariff trade barriers, without regard to legality, including various import permit requirements, health regulations, preferential tariffs, and turnover taxes, of the 15 major developed countries, including Canada, Japan, the United States, and 12 European countries, which affected Uruguayan exports. Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 220-21.

5/ BISD, 11th Supp., at 56, 95-148 (1963).

no infringement of provisions of the General Agreement, but in such cases it would be "incumbent on the country invoking article XXIII to demonstrate the grounds and reasons for its invocation." 1/ Thus, the complainant would have a higher burden in "nonviolation" cases than in "violation" cases.

Following the panel's report and its adoption by the Contracting Parties, several but not all restrictions were terminated. 2/ Uruguay then asked the panel to decide whether and how much retaliation should be authorized, but the panel stated that it was up to Uruguay to propose specific retaliation. Uruguay declined. Uruguay returned in July 1964 and asked the panel to press for compliance. Uruguay also presented a new list of restrictions. However, the panel declined to act on the old claims without Uruguayan participation and declined to consider the new ones in the absence of Uruguay's conducting the bilateral discussions required by article XXIII. 3/ Thus, in the view of one commentator, Uruguay's effort to have GATT assume the role of prosecutor was rebuffed. 4/

In 1965, Uruguay and Brazil presented a proposal to reform article XXIII procedures for the benefit of developing countries. The reforms would aid developing countries by providing (1) greater technical assistance to developing countries in dispute actions, (2) third-party prosecution of developing country complaints, and (3) stronger remedies, including financial compensation, in the case of wrongful actions by developed countries against developing countries. 5/ The second and third proposals were rejected, but in 1966 the Contracting Parties adopted new article XXIII procedures that provided for expedited treatment of complaints brought by developing countries. 6/

In the fall of 1962, at the time Congress was engaged in final passage of the Trade Expansion Act of 1962, 7/ the United States filed three new

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1/ BISD, 11th Supp., at 100 (1963).

2/ BISD, 13th Supp., at 46 (1965). Only Sweden reported full compliance. BISD, 13th Supp., at 44.

3/ BISD, 13th Supp., at 45-55. Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 220-22.

4/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 222.

5/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 222.

6/ BISD, 14th Supp., at 18-20 (1966). Only one case has been brought pursuant to these revised procedures. In a case brought by Chile complaining of EC export practices for malted barley, Chile was pursuaded to defer the case to allow greater bilateral consultations, effectively vitiating the strict deadlines contained in the 1966 procedures. The case disappeared from view after it was referred to the Director-General for conciliation. These reforms of the dispute resolution process for developing countries may have provided some impetus for efforts to refine the GATT dispute resolution machinery generally in the 1979 Tokyo Round. See Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, supra, at 157-158, 179-180; Report of the Director-General of GATT: The Tokyo Round of Multilateral Trade Negotiations, at 96-97 (GATT 1979).

7/ 76 Stat. 872 (1962). The 1962 act authorized the President to engage in a new round of trade negotiations (the Kennedy Round) and provided the President with additional authority to retaliate against illegal foreign practices (section 252, the predecessor of section 301 of the Trade Act of 1974, discussed later in this chapter).

complaints against France, Italy, and Canada. The complaints against France and Italy involved continued restrictions by those countries on products on which the European Community (EC) had given concessions at recently concluded negotiations. The complaint against Italy was settled and withdrawn without a panel. 1/ The complaint against France was referred to a panel (app. I, case 28). The panel report adopted in November 1962 called upon France to withdraw the restrictions. 2/ France subsequently did.

The U.S. complaint against Canada alleged that a Canadian "dumping duty" imposed on Western U.S. potatoes violated articles II and VI of the General Agreement (app. I, case 29). The duty imposed was to be in an amount equal to the difference between the U.S. export price and what Canada considered to be the "normal" price of such potatoes. The "normal" price was defined as being the average price for the preceding 3-year period. The panel report adopted in November 1962 concluded that the Canadian dumping duty was an additional duty and suggested that Canada withdraw it. 3/ Canada did.

Resort to the GATT dispute settlement procedures continued to decline; no complaints were filed between 1963 and 1966, and the two complaints considered in 1967 were brought under article XXII, which provides only for consultation, rather than under article XXIII. The first of these, brought by Malawi against the United States, concerned a U.S. export subsidy on leaf tobacco. The working party overseeing the consultations requested that the United States consult further in the event it considered extending the subsidy. The United States agreed to convey the request to the appropriate U.S. authorities. 4/ The second complaint, brought by the United States against the United Kingdom, challenged certain rebates given by State-owned British Steel to purchasers who certified that they purchased no imports. The rebate program was canceled within a few years. 5/

The dispute settlement procedures, 1970-79

The dispute settlement procedure was reactivated in the early 1970's and has continued to be active since then, in large part as a result of complaints filed by the United States. A wave of U.S. complaints (eight of the nine complaints filed during 1970-1972) was similar to a surge of complaints filed by the United States during the early 1960's. This sudden increase is attributed to two related factors. First, the new Nixon administration, concerned about loss of control in GATT affairs, was taking a more confrontational approach in responding to violations; 6/ and second, the

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1/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 291.

2/ BISD, 11th Supp., at 94-95 (1963).

3/ BISD, 11th Supp., at 88-94 (1963).

4/ BISD, 15th Supp., at 116-25 (1968).

5/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 224. Hudec describes the two cases as representing an effort to escape the "sharper pressures" of article XXIII procedures. He calls them "a significant step backward." Hudec claims that this "new sensitivity to confrontation" reached its greatest heights a few days after the U.S.-U.K. discussion when the United States refused to go along with a request of other governments for an article XXII consultation proceeding on the ground that article XXII proceedings were too much like a "consultation." Id.

6/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 230.

administration was responding to Congressional concern about trade policy and GATT affairs. 1/ The administration was seeking new authority to engage in trade negotiations and Congress was considering a number of measures that would have imposed stringent import quotas and other restrictions on trade.

Of the eight cases filed by the United States during this period, perhaps the most significant is the one that marked the beginning of a long dispute over EC tariff preference agreements with Tunisia, Morocco, Spain, and Israel on certain citrus products. The United States threatened to bring a formal article XXIII complaint, but engaged in consultations under article XXII instead. A compromise settlement, which proved to be only temporary, was reached in late 1971 when the EC agreed to reduce the margin of preference on citrus during the peak U.S. export season. 2/

The other three U.S. complaints filed in 1970 involved smaller issues. The United States successfully opposed a Greek request for a waiver to permit Greece to establish a preferential tariff; 3/ a complaint concerning Danish import restrictions on grains was settled through consultations; 4/ and although a panel agreed with the U.S. position on Jamaican margins of preference accorded to other Commonwealth countries, the United States agreed, with some reservation, to the panel suggestion that, in view of "exceptional circumstances" relating to events that occurred prior to Jamaica's receiving independence in 1962, Jamaica be granted a waiver for margins of preference in effect at that time. 5/ The four complaints filed by the United States in 1972 involved the EC's compensatory tax system, Netherlands Antilles tariff preferences, French residual restrictions, and U.K. dollar-area quotas. The Antilles complaint was not pursued; the other three complaints resulted either in substantial withdrawal of the offending measure (EC compensatory taxes) or settlement. 6/ The U.K. dollar-area quota complaint was the only one to be referred to a panel (app. I, case 38).

1/ For example, the Senate Committee on Finance in its report on the bill which became the Trade Act of 1974, stated that U.S. trade policy lacked "coherence or consistency", and that the U.S. Executive, by pursuing a "soft trade policy . . . has actually fostered the proliferation of barriers to international commerce." The Committee further stated that it "feels that in many essential respects the GATT is discriminatory, inadequate, and outmoded." The Committee stated that "many GATT principles are observed more in the breach." The Committee noted that, among the contracting parties of GATT, the proportion of imports entering at preferential rates increased from 10 percent in 1955 to 25 percent in 1970, and it estimated that the percentage would grow with the enlargement of the European Community. Trade Reform Act of 1974: Report of the Committee on Finance . . . , S. Rep. 1298, 93d Cong., 2d Sess., at 5, 11, 83 (1974).

2/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 232-33. Hudec reports that prior to the settlement the issue was debated extensively in the GATT Council and that there was a lack of support for the taking of any definitive legal action. The EEC, he says, made it clear that the it would not accept invalidation of the Association network, and the other contracting parties, even though in agreement with the U.S. position, were reluctant to precipitate a crisis. Ibid., p. 232.

3/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 233-34.

4/ Id. at 294.

5/ BISD, 18th Supp., at 33, 183-88 (1972).

6/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 294-95.

Following submission of an interim report to the Council outlining the issues, a settlement was reached whereby the United Kingdom would liberalize its restrictions. 1/

Two highly contentious cases that were to continue for several years arose in 1973. The European Community challenged U.S. tax legislation that permitted qualifying U.S. firms to defer paying taxes on certain export earnings (Domestic International Sales Corporations (DISC's))(app. I, case 38). The United States countered with an allegation that certain tax treatment of export businesses by France, Belgium, and the Netherlands also constituted an export subsidy (app. I, cases 39, 40, and 41). Four panels, all consisting of the same five individuals, were appointed in 1973 to consider the complaints. The panel included two tax experts. The panels reported to the Council in late 1976 that they had found that all four tax practices constituted an export subsidy and that there was a prima facie case of nullification or impairment in all four instances. 2/ The panel in the DISC case specifically noted and rejected a U.S. argument that the DISC legislation was justified on the basis that it corrected existing distortions created by tax practices of certain other contracting parties. 3/ The four panel reports were adopted by the GATT Council in December 1981 after considerable debate and in conjunction with an understanding concerning extraterritorial taxation and article XVI:4 of the General Agreement. 4/

Over the next 3 years, the United States filed three complaints. The first, in September 1975, challenged Canadian import restrictions on eggs as being inconsistent with article XI of the GATT (app. I, case 43). A working party reported that the Canadian program appeared to be consistent with article XI but did not reach any conclusion as to other related issues. Nonetheless, the working party suggested that the United States and Canada engage in consultations in an effort to come to a pragmatic solution, following which Canada adjusted its quota to allow greater quantities of eggs to be imported. 5/

In April 1976, the United States claimed that EC measures imposing minimum import prices for tomato concentrates, and its system of licences and deposits on processed fruits and vegetables, was not consistent with the GATT (app. I, case 44). A panel reported that the EC import licensing and deposit system was not inconsistent with GATT rules, although the EC minimum import price and deposit requirement for tomato concentrates was inconsistent with the provisions of articles II and XI. The EC subsequently abolished the minimum import price system for tomato concentrates, but for internal reasons. 6/ Also in April 1976, the United States asserted that the EC

1/ BISD, 20th Supp., at 230-37 (1974).

2/ BISD, 23d Supp., at 98-147 (1977).

3/ Id. at 114.

4/ BISD, 28th Supp., at 114 (1982). The DISC was not repealed by the United States until 1984 with the passage of the Foreign Sales Corporation Act. The EEC has engaged in consultations under article XXII with the United States regarding the consistency of the FSCA with the GATT. See GATT Activities 1984, at 42 (1985).

5/ BISD, 23d Supp., at 91-93 (1977); GATT Activities in 1975, at 57-58 (1976); GATT Activities in 1976, at 66 (1977).

6/ BISD, 25th Supp., at 68 (1979); GATT Activities in 1978, at 92-93 (1979).

compulsory purchase program and import licensing requirements for skimmed milk powder and animal feed proteins was inconsistent with the GATT, particularly articles I, II, and III, (app. I, case 45). When the Council adopted the panel report that certain measures of this program were inconsistent with article III, it noted that the program has already been terminated. 1/

The United States filed four complaints in the remaining years before the agreements negotiated in the Tokyo round were to come into effect. Three of these involved Japan and the fourth involved Spain. One of the Japanese cases was settled promptly, 2/ but the other two (Japanese restrictions on imports of leather and manufactured tobacco) continued in one form or another into the mid-1980's. These cases and the case on Spanish restrictions on soybean oil are discussed later in this chapter with the cases initiated after the Tokyo round.

The Impact of the Tokyo Round Negotiations on Dispute Settlement Procedures

The Framework Agreement on dispute settlement

Dispute settlement procedures were an important item on the negotiating agenda of the United States and other nations when the Tokyo round was launched in 1973, 3/ but they did not become a part of the formal negotiating agenda until November 1976. The call for negotiations was made by Brazil, which was one of a number of developing countries interested in strengthening the procedures to provide for stronger actions against developed countries, including allowance for money damages in the case of wrongful actions against developing countries. 4/

1/ BISD, 25th Supp., at 49; GATT Activities in 1978, at 91-92.

2/ In July 1977, the Japanese "prior permission system" on imports of thrown silk yarn was challenged as inconsistent with the GATT. By February 15, 1978, a solution of the dispute was negotiated before the panel finished examination of the case. See app. I, case 47; BISD, 25th Supp. at 107 (1979); Gatt Activities in 1977, at 79.

3/ The Congress explicitly instructed the President to seek improvements in dispute settlement procedures in the Tokyo Round. See section 121 (a)(1), (7)-(9), (12) of the Trade Act of 1974, 19 U.S.C. 2131(a)(1), (7)-(9), (12); S Rep. 1298, 93d Cong. 2d Sess. at 85 (1974) (There is a "need for effective procedures to adjudicate international commercial disputes. The Committee believes a major effort should be made in the forthcoming negotiations to remedy these problems.") and 16; Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, supra, at 156. See also Wolff, The U.S. Mandate for Trade Negotiations, 16 Va. J. Int'l L. 505, 545-46 (1976); Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, supra, at 147-48 ("In the late 1960's, governments began to express concern that the GATT's dispute-settlement machinery was not functioning properly and the compliance with GATT rules was suffering as a result. This problem occupied a prominent place on the agenda of the Tokyo Round negotiations.").

4/ Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, supra, at 157-58.

The aim of the negotiators with respect to dispute settlement was "to secure reaffirmation of the current GATT practice, while giving the existing procedures greater precision." 1/ They produced a documents pertaining to article XXIII dispute settlement procedures that was adopted by the contracting parties on November 28, 1979: an "Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance" along with its annex entitled "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)," (hereinafter referred to as the "Understanding" and the "Agreed Description," respectively). 2/ The document, which was part of the so-called "Framework Agreements," failed to address to a significant degree some alleged problems with the current procedure, such as the time consuming processing of complaints as a result of delaying tactics used by countries that are the subjects of the complaints. 3/ For the most part, the document restated or refined current practice. While the document did not revolutionize GATT dispute resolution procedures, it was significant in that it represented a willingness of the Contracting Parties to reaffirm their commitment to the existing dispute settlement process and to make explicit what had previously been only informal practice.

The Understanding described certain obligations that the parties had regarding notification of other parties, consultation, and dispute settlement procedures. For example, in paragraph 3, the Contracting Parties reaffirmed their obligation to notify the Contracting Parties of their adoption of trade measures affecting the operation of the General Agreement, and in paragraph 4 they reaffirmed their resolve to use the consultative procedures.

Most of the Understanding was devoted to a discussion of the dispute settlement process itself. The Contracting Parties agreed that the customary practice of settlement, as described in the annex, would be continued in the future. 4/ They reaffirmed their commitment to special procedures agreed to in 1966 concerning settlement of disputes between developed and less-developed countries. 5/ They agreed that if they could not resolve a dispute through consultations, the contracting parties concerned might request an appropriate body or individual to use their good offices with a view to conciliation. 6/ Requests for a panel or working party were to be granted in accord with current practice and only after the contracting party that was the subject of

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1/ Report of the Director-General of GATT: The Tokyo Round of Multilateral Trade Negotiations, at 105 (1979).

2/ BISD, 26th Supp., at 210 (1980). See also Jackson, Journal of World Trade Law, supra, at 5. The Tokyo Round also produced the 9 NTM codes, most of which contain their own generally similar dispute settlement procedures. The code procedures and those of the code disputes that are illustrative of the operation of the dispute settlement procedures are discussed later in this chapter.

3/ See generally Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, supra, at 158-159 (the 1979 reforms were generally conservative reforms); Report of the Director-General of GATT: The Tokyo Round of Multilateral Trade Negotiations, at 151 (1979) (the Understanding represents an improvement and tightening up of procedures).

4/ Understanding, at para. 7.

5/ Id.

6/ Id. at para. 8.

the complaint had had an opportunity to study the complaint and respond to it before the Contracting Parties. 1/

The Understanding specified the procedures to be followed in the establishment and operation of a panel. The Director-General, "after securing the agreement of contracting parties concerned," would propose the composition of a panel of three or five members, depending on the case. 2/ Citizens of countries party to the dispute would not be members. 3/ The panel was to be constituted as promptly as possible and "normally not later than thirty days from the decision of the Contracting Parties." 4/ Panel members were to serve in their individual capacities and not as government representatives. 5/ Panels were to make an "objective assessment" of the matter before them and to consult regularly with the parties to the dispute. 6/ Where the parties failed to develop a mutually satisfactory solution, the panel was to submit its findings in written form, together with the rationale behind any findings and recommendations. 7/ Parties were to have an opportunity to see the descriptive part of the report and its conclusions before submission to the Contracting Parties. 8/ Panels were to deliver their findings "without undue delay," which in cases of urgency would "normally" be within 3 months from the time the panel was established. 9/ Reports of panels and working parties were to be given "prompt consideration" by the Contracting Parties. 10/

The Agreed Description repeated much of what appeared in the Understanding. In addition, it restated several objectives, indicated the differences between working parties and panels, and further explained the role of the panels. For example, it restated that the objective of the procedure was to "secure a positive solution to a dispute," preferably one "mutually acceptable" to the parties. 11/ In the absence of such a solution, it listed in order of preference the three actions that could be taken to resolve the dispute--(1) withdrawal of measures found to be inconsistent with the General Agreement, (2) compensation, if withdrawal was impractical, and (3) the retaliation as a last resort. 12/ It noted that working parties would include the parties to the dispute, but that panels would be composed of individuals agreed upon by the parties to the dispute and approved by the GATT Council, who would act "impartially without instructions from their governments." 13/ Working parties would include representatives from 5 to 20 delegations, depending on the importance of the question, but panels would include only 3 or 5 individuals. 14/ As is noted in the following section of the report on the various codes approved in 1979, several of the codes provide more detailed procedural safeguards than the Understanding and Agreed Description. For

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1/ Id. at para. 10.
2/ Id. at para. 11.
3/ Id.
4/ Id.
5/ Id. at para. 14.
6/ Id. at para. 16.
7/ Id. at para. 17.
8/ Id. at para. 18.
9/ Id. at para. 20.
10/ Id. at para. 21.
11/ Agreed Description.
12/ Id. at para. 4.
13/ Id. at para. 6(i), (iii).
14/ Id.

example, the Subsidies code provides that a party could request a panel 30 days after beginning consultations, but the former two documents are silent on this point. 1/

Many of the issues considered in the 1979 Understanding were reconsidered and reaffirmed in a 1982 GATT ministerial declaration. In the section of the declaration addressing dispute settlement procedures, the Contracting Parties agreed, when the parties to a dispute were unable to resolve the dispute through consultations, they could seek the good offices of the Director-General before requesting a panel. Further, they agreed that panels should make clear findings and suggest a solution when finding nullification and impairment. They also agreed that panels should seek to complete their work within the suggested time periods and that the Contracting Parties should promptly consider such reports. 2/

In the Fortieth Session of the Contracting Parties in 1984, further improvements were made to the procedures, primarily in facilitating the work of panels. In particular, the Director-General of the GATT was empowered to draw up a short list of independent, nongovernmental panelists from names submitted by the contracting parties. When the parties to a dispute cannot agree on the members of a panel within 30 days after a matter is referred by the Contracting Parties, the Director-General must, upon the request of either party and after consulting with the parties and the Chairman of the Council, appoint persons from the roster of nongovernmental panelists to resolve the deadlock. The decision at the Fortieth Session also indicated that panels should establish a proposed calendar for the panel's work and should set precise deadlines for any written submissions by the parties to a dispute. 3/

Dispute settlement procedures adopted in the Tokyo round nontariff measure agreements

Dispute settlement provisions were included in a number of separate agreements dealing with the problem of nontariff measures (commonly referred to as the NTM codes) negotiated in the Tokyo round. These codes are (1) the Agreement on Technical Barriers to Trade (Standards code, dealing with product standards), (2) the Agreement on Government Procurement, (3) the Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the GATT (Subsidies code, dealing with countervailing duties and subsidies), (4) the Arrangement Regarding Bovine Meat, (5) the International Dairy Arrangement, (6) the Agreement on Implementation of Article VII of the GATT (Customs Valuation agreement), (7) the Agreement on Import Licensing Procedures, (8) the Agreement on Trade in Civil Aircraft, and (9) the Agreement on Implementation of Article VI (Antidumping code). 4/ A country may be a party

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1/ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, art. 17, para. 3.

2/ BISD, 29th Supp. at 9 (1983).

3/ See app. H.

4/ The United States was initially a signatory to all of these codes, but withdrew from the International Dairy Arrangement effective Feb. 12, 1985. 24 ILM at 531 (March 1985). In the U.S. view, the decision of the International Dairy Council in December 1984 to allow the EC to sell a large quantity of butter and butter oil to the U.S.S.R at prices below the established minimum effectively invalidated key provisions of the International Dairy Arrangement. See GATT Activities 1984, at 29 (1985).

to none, any, or all of these agreements, whether or not it is a signatory to the GATT. Each code establishes an administering committee or council, generally composed of all parties to the code, which is to report to the Contracting Parties of the GATT. 1/

As was the case with the Understanding on dispute settlement, the inclusion of these specific provisions on dispute settlement in the NTM codes was part of the general effort in the 1979 Tokyo round to deal with shortcomings perceived with GATT dispute settlement procedures. The NTM code provisions on dispute settlement, together with the Understanding, were designed to achieve some improvement in these procedures. As the House Ways and Means Committee reported in approving these codes:

> A major U.S. objective in the MTN was to improve the dispute settlement procedure of the GATT to ensure timely resolution of the disputes on the basis of the GATT Articles and the nontariff measure agreements. This objective was addressed in the specific dispute settlement procedures in each agreement. In addition, one of the Texts Concerning a Framework for the Conduct of World Trade approved by the Congress. . . contains the general procedure available under the GATT when the specific provisions of an agreement do not apply.
>
> Common to the specific agreements are the following principles designed to ensure prompt and fair dispute settlement:
>
> Timing guidelines for the dispute settlement process to prevent parties to a dispute from delaying decisions by a panel or a Committee of Signatories;
>
> Consultation provisions which outline principles for bilateral and multilateral consultation prior to establishment of an impartial dispute panel;
>
> Right to a panel is provided in each of the agreements. Panels are to be composed of experts who act in their individual capacities;
>
> Panels are to review the dispute and make findings of fact and law; and
>
> Panel findings are sent to the Committee of Signatories for final decision which may include authority to retaliate if a party refuses to change the practice found to be in violation of the agreement. 2/

1/ The Arrangement Regarding Bovine Meat and the International Dairy Arrangement do not explicitly require reports to be made to the Contracting Parties but such reports are nonetheless still made annually. See BISD, 27th Supp., at 36 and 39 (1981).

2/ H. Rep. 317, 96th Cong. 1st Sess., at 172-73 (1979). Virtually identical language is contained in the report of the Senate Committee on Finance. See S. Rep. 249, 96th Cong., 1st Sess., at 283-84 (1979).

While the 1979 reforms 1/ could be characterized as only a commitment to writing of what was already largely GATT practice, although "somewhat undependable GATT practice," the codes did create rights to certain specified procedures that either did not exist or were not clearly set forth prior to 1979. The codes were viewed as limiting procedural obstacles to dispute settlement. 2/

Close examination of the dispute settlement procedures of the codes reveals that no two of the dispute settlement procedures in the codes are exactly alike, but they can be deemed to fall into two categories according to the degree of detail of the dispute settlement procedures specified in each. The first category consists of those codes, namely, the Arrangement Regarding Bovine Meat, the International Dairy Arrangment, the Agreement on Trade in Civil Aircraft, and the Agreement on Import Licensing Procedures, that do not specify detailed procedures for resolution of disputes. 3/ The second category consists of those codes (namely, the Standards code, the

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1/ Two differences between most of the code dispute settlement procedures and the GATT procedures in the Understanding are (1) that a party has an explicit right to a panel under most of the code provisions while the Understanding merely indicates that the normal GATT practice is to grant a request for a panel and (2) some code procedures, such as the Subsidies code, contain deadlines for completing some stages in the dispute settlement process that are not subject to suggested deadlines in the Underatanding.

2/ See 6 MTN Studies, pt. 1, at 23 (1979). See also H.R. Doc. No. 153, 96th Cong., 1st Sess., 4 (1979) (statement of President Carter); S. Rep. 249, 96th Cong., 1st Sess., 234 (1979) ("The changes made in the MTN with respect to dispute settlement procedures offer possibilities of significantly improving the process and the results of international dispute settlement. . ."."); and 4 MTN Studies 20 (1979).

3/ The Arrangement Regarding Bovine Meat, BISD, 26th Supp., at 84 (1980), merely provides that any participant may raise before the Bovine Meat Council any matter affecting the arrangement, which must meet within a period of not more than 15 days to consider any such matter. Art. IV: 2, 6.

The International Dairy Arrangement establishes both a Council to administer the arrangement and three Committees to implement the provisions of the three subsidiary Protocols created concerning Certain Milk Powders, Milk Fat, and Certain Cheeses, respectively. If a dispute arises that affects the application of the specific provisions of these Protocols, any participant that considers that its trade interests are being seriously threatened and that is unable to reach a mutually satisfactory solution with the other parties to the dispute may request the Chairman of the Committee for the relevant Protocol to convene a meeting of the Committee as soon as possible, and within 4 working days if requested. The Protocol Committee is to determine appropriate measures to be taken. If a satisfactory solution is not reached, the Council, if requested by the Chairman of the Protocol Committee involved, must meet within a period of 15 days to consider the matter. BISD, 26th Supp., at 91 (1980), arts. VII, and art. IV: 6.

Any participant to a dispute concerning matters affecting the Dairy Arrangement may raise the matter before the Council. Each party to the dispute must promptly afford adequate opportunities for consultations regarding such matters.

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Customs Valuation Code, the Government Procurement Code, the Subsidies code, and the Antidumping code) that contain much more detailed procedures for resolving disputes between parties to the agreements. Although there is some variation among the dispute settlement provisions in the second group, several similarities are apparent.

All of the codes in the second group generally provide for a four-step process for resolving disputes: (1) mandatory consultations between the parties to the dispute, followed, if necessary, by (2) conciliation mediated by the administering council or committee, followed, if necessary and if requested, by (3) proceedings before a panel or working or technical group, or a combination of the above, which issue(s) a report to the council or committee if the dispute has not been resolved, followed by (4) issuance by the administering council or committee of appropriate findings, rulings, or recommendations. 1/ Every stage of the dispute settlement process encourages the parties to reach a mutually satisfactory solution that would obviate the need for proceedings before panels or the administering council or committee.

Each of the more detailed dispute provisions also generally indicates that the dispute settlement process may be begun once a party to the code involved considers that any benefit accruing to it, directly or indirectly, is being nullified or impaired, or that the attainment of any objective of the

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The Agreement on Trade in Civil Aircraft similarly establishes a Committee on Trade in Civil Aircraft composed of representatives of all signatories to the Agreement. BISD, 26th Supp., at 162; art. 8:1. The Committee's functions with respect to disputes between the signatories are to consider requests for review of a dispute whenever a signatory considers that its "trade interests in civil aircraft manufacture, repair, maintenance, rebuilding, modification or conversions have been or are likely to be adversely affected by any action of any other Signatory". Arts. 8:1 and 8:7. The Committee, upon receiving a request for the review of a dispute, must convene within 30 days and review the matter as quickly as possible. The applicable dispute settlement provisions of arts. XXII and XXIII of the General Agreement otherwise apply to dispute settlements under the agreement. Art. 8:8.

The Agreement on Import Licensing Procedures, BISD, 26th Supp., at 154, establishes a coordinating Committee composed of representatives from each of the parties to the agreement, but merely provides that that Committee is to meet as necessary for consultations on any matter relating to the operation or objectives of the agreement. Otherwise, the Agreement expressly adopts the procedures of arts. XXII and XXIII of the General Agreement for the purposes of consultations and the settlement of disputes. Art. 4.

1/ The Antidumping code provides specific provisions on dispute settlement through the stage at which a panel is to be established, and otherwise notes merely that the settlement of disputes is to be governed by the applicable provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Art. 15:7.

relevant code is being impeded, by another party or parties. 1/ As noted above, the codes generally require that an aggrieved party consult with any offending party or parties before exercising the dispute settlement procedure specified in the code. The codes require parties to give sympathetic consideration to the representations or proposals of an aggrieved party and to settle all disputes promptly and expeditiously.

In the event that the parties are unable to reach a solution through consultations, a request may be made by any party to the dispute that the supervisory committee or council investigate the matter. 2/ An investigation must be commenced by the committee within 30 days of receiving such a request. 3/ At any time during the dispute settlement process, the committee or council may consult and seek the assistance of any competent bodies and experts. 4/ If no mutually satisfactory solution is reached within 3 months, 5/ one of the disputing parties can request that the dispute be

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1/ The wording of this jurisidictional phrase differs in some of the codes. For example, in the Standards Code, a country's trade interests must also be significantly affected. Art. 14:2. Further, the dispute settlement process under that agreement may be invoked in some circumstances even where the actions of non-governmental bodies are involved. See Agreement on Technical Barriers to Trade, art. 14:24. The Subsidies code provides a broader basis for invoking the dispute resolution mechanism: "Whenever a signatory has reason to believe that an export subsidy is being granted or maintained by another signatory in a manner inconsistent with . . . this Agreement" or "any subsidy is being granted or maintained by another signatory in a manner inconsistent with . . . this Agreement" and "such subsidy either causes injury to its domestic industry, nullification or impairment of benefits accruing to it under the General Agreement, or serious prejudice to its interests" consultations may be requested. Arts. 12:1 and 12:3.

In some of the codes, the parties to the dispute are required to complete the specified dispute settlement procedures before availing themselves of any rights they have under the GATT. See Standards code, Customs Valuation code, Antidumping code.

2/ The Subsidies code provides for specified periods of consultations before the dispute may be referred to the Committee. When the dispute centers around the alleged existence of an export subsidy that is inconsistent with the agreement any signatory party to the dispute may refer the matter to the Committee if no mutually acceptable solution has been reached within thirty days of the request for consulations. Art. 13:1. When the complaint is the more general one that an alleged subsidy either causes injury to the complainant's domestic industry or nullifies or impairs benefits accruing to it under the GATT, the request for conciliation by the Committee may be made if no mutually satisfactory solution is reached within sixty days of the request for consultations. Art. 13:2. Either of these deadlines may be extended by mutual agreement. Art. 13, n. 1.

3/ The Subsidies code provides that the Committee shall "immediately" review the facts involved. Art. 17:1.

4/ The Customs Valuation and Standards codes provide for technical working groups as an adjunct to, or instead of, panels to give guidance on technical matters. If a technical group is utilized in addition to a panel, it could extend the settlement process by at least 3 to 6 months.

5/ The Subsidies code provides that a party may request that a panel be established 30 days after the request for conciliation by the Committee was made. Art. 17:3.

referred to a panel. One important change from previous GATT practice is that a party to a dispute has a right to refer the dispute to a panel if consultations or conciliation efforts are not effective. If no party requests a panel, it appears that the committee or council will, after completing its investigation, issue any findings, recommendations, or rulings that it deems appropriate, but there is no suggested deadline for this to occur and it appears that conciliation efforts can go on indefinitely. In the dispute involving the U.S. complaint under the Subsidies code regarding EC export subsidies on poultry, consultations under article 12(3) of the code were begun in February 1982 after the filing of a section 301 petition by the National Broiler Council. A complaint of Brazilian practices was subsequently added. Conciliation by the Subsidies Committee was begun in November 1983 and is still in progress. 1/

Members of panels are selected from an informal list of persons maintained by the chairman of the committee or council. Citizens of countries that are central participants in the dispute are not eligible to serve on a panel dealing with the dispute, 2/ although individuals serving on the panel are to serve in their individual capacities and not as representatives of a government or organization. Within 7 days after a panel has been established, the chairman of the council or committee is to propose the composition of the panel, which consists of three or five members who have experience in this field, 3/ preferably government officials. The parties have 7 working days to "react" to the proposed composition of the panel, but are not to oppose nominations except for compelling reasons. 4/

One interesting development under the Antidumping code is the referral of one dispute, concerning a complaint by the EC regarding an antidumping investigation conducted by Canada with respect to electrical generators from

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1/ BISD, 30th Supp. at 43; Section 301 Table of Cases, Office of the U.S. Trade Representative reprinted in 2 Int'l Trade Rep. (Nov. 6, 1985); GATT Activities in 1983, at 16 (1984).

2/ The Antidumping code provides no further details on the settlement procedure to be followed after this point other than specifying that the settlement of disputes is to be governed by the provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, to the extent they are applicable. The code further specifies that parties must complete the dispute settlement procedures of the code before availing themselves of any rights under the GATT. Art. 15:7 and art. 15, n. 1.

3/ The qualifications for serving as a panel member differ somewhat from code to code, though it is difficult to determine whether the differences are intended to be significant. For example, the panel members selected pursuant to the Subsidies code may serve if they are qualified in the fields of economic development and "other matters covered by the General Agreement and this Agreement" as well as in trade relations. Art. 18:4. However, annex 3 to the Standards code provides that panelists be experienced in trade relations or economic development while article VII:8 of the Government Procurement code provides merely that panelists be experienced in trade relations.

4/ The Subsidies code states that a panel should be established within 30 days after 1 is requested. Art. 18:2.

Italy, to a standing ad hoc group. 1/ It is not clear whether this may constitute a precedent for referring disputes to a standing working group or party rather than establishing special panels for each investigation under that code or under any of the other codes.

Each panel may establish its own procedures, but the panel will generally examine the issues, consult with the parties, and make factual and other appropriate findings that will assist the committee. A draft of the panel's written report, which includes a statement of the issues, findings and recommendations, must be circulated to the parties for comments before being issued, with the part of the panel's report that describes the issues in the case being submitted first, followed by the draft of the panel's conclusions. No firm deadline for the panel's action is specified, but the codes generally contemplate that a panel should strive to deliver its findings and recommendations within at most 4 months of the establishment of the panel. 2/

In practice there has been considerable disagreement over the issues to be addressed by the panel and the scope of the panel's investigation (the so-called "terms of reference" problem). This can cause considerable delay in the panel's consideration of the dispute, notwithstanding the suggested deadlines contained in the codes. In a recent dispute between the United States and the EC under the Subsidies code (involving the definition of the wine industry in the U.S. Trade and Tariff Act of 1984), the panel's work was delayed for several months while the terms of reference were decided. 3/

After the panel issues its report, the committee is to promptly consider it and to issue such findings, recommendations and rulings as it deems appropriate. This action is generally directed to take place within 30 days of the submission of the panel report. In practice, however, this timetable is sometimes delayed. In two cases under the Subsidies code, panel reports have not yet been adopted, notwithstanding the expiration of this suggested deadline: the panel report involving the U.S. complaint of EC subsidies on exports on wheat flour was submitted to the Subsidies Committee on March 21, 1983, and the panel report on the U.S. complaint of EC subsidies on exports of pasta was submitted on May 19, 1983. 4/

1/ See GATT Activities in 1984, at 20-21 (1985). The standing Ad-Hoc Group also known as a working party was established to generally examine problems related to the implementation of the Antidumping Code. See BISD, 30th Supp., at 69, (1984).

2/ The deadline suggested for panel reports is 60 days under the Subsidies code; 3 months under the Customs Valuation code.

3/ The EC complaint was initiated in February 1984. GATT Activities in 1984 at 22-23 (1985). The terms of reference were not established until October 1985.

4/ BISD, 30th Supp., at 42. The United States first complained of the EC subsidies on the export of wheat flour in 1981, and the matter was referred to the panel in January 1982. The EC also complained in the Subsidies Committee about U.S. subsidies on the export of wheat flour to Egypt, and a panel was established in that dispute in May 1983. BISD, 28th Supp., at 30; BISD, 29th Supp., at 46; BISD, 30th Supp., at 42; GATT Activities in 1983, at 15-16 (1984); GATT Activities in 1984, at 22 (1985).

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After the panel report is adopted, and the committee or council issues its findings, recommendations, or rulings, a party that considers itself to be unable to implement recommendations of the committee that are addressed to it must give its reasons for the inability in writing, at which time the committee may take such action as it deems appropriate. As a mechanism of enforcement, the committee may authorize one or more parties to suspend its obligations under the agreement in question with respect to any other party. However, this enforcement mechanism has also been subject to delays. In one dispute under the Government Procurement code regarding a U.S. complaint about EC practices in deducting value added tax (VAT) payments from the value of government contracts, the United States formally invoked the dispute process in July 1982. A panel was formed in 1983, and it issued its report in February 1984; the report was adopted by the Committee on Government Procurement in May 1984. The Committee issued a recommendation that the EC take action to change this practice. While the EC indicated that it was beginning to take steps to implement the recommendation of the Committee late in 1984, 1/ it appears that the practice has not yet been changed and that the United States and the EC are still consulting on this matter.

Developments in Dispute Settlement Procedures under the General Agreement since the Tokyo Round

While some cases have been brought pursuant to the code settlement mechanisms, a significant number of complaints have been filed or pursued under article XXIII procedures since 1979. The United States has been heavily involved in several of these, both as a complainant and respondant. 2/ In general, the dispute settlement process is considered by most GATT observers to have operated well during the post-MTN period, except in cases in which a resolution has been delayed, sometimes for several years. Two illustrations of this are found in cases that had been initiated by the United States against Japan but not yet resolved when the Tokyo round ended. A second development of interest during this period is the publication, for the first time, of a full panel report dealing with the merits of a case after a bilateral settlement had been reached between the disputants.

In July 1978, the United States filed a complaint against Japan's restrictions on imports of leather in pursuance of the case brought by the Tanners Council of America in August 1977 under section 301 of the Trade Act of 1984 (app. I, case 49). A panel reported in March 1979 that the United States and Japan had negotiated a settlement and the United States was

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The pasta dispute was the subject of a section 301 petition by the National Pasta Association filed in October 1981. The United States requested that a panel be established under the Subsidies code in April 1982, and one was established in June 1982. BISD, 29th Supp., at 47; BISD, 30th Supp., at 42. While the pasta dispute is still unresolved, the United States has raised the duties on imports of pasta as a retaliatory measure in the citrus dispute described in the preceding section. Section 301 Table of Cases, Office of the U.S. Trade Representative, reprinted in 2 Int'l Trade Rep. (Nov. 6, 1985).

1/ GATT Activities in 1983, at 16 (1984); GATT Activities in 1984, at 25 (1985).

2/ Article XXIII cases, including the post-1979 disputes are summarized in app. I (cases 52 through 84). A number of recent and controversial cases are also described in connection with the section of "Operation of the Process" at the end of chapter II.

withdrawing the complaint. The two parties reserved their rights under the GATT if the bilateral agreement was not put into practice to the mutual satisfaction of both governments. In March 1983, the United States informed the GATT Council that the bilateral arrangement had been ineffective, and while the Council requested that the United States and Japan continue bilateral consultations, it agreed to establish a panel to review the matter in April 1984. A panel report adopted by the Council in May 1984 found that the Japanese restrictions did nullify or impair U.S. benefits under article XI of the GATT (app. I, case 75). The measures taken by Japan to liberalize its restrictions were unsatisfactory to the United States. In September 1985, the United States Trade Representative (USTR) began the domestic procedures to take retaliatory action against U.S. imports of several Japanese products. 1/

The case filed by the United States in November 1979, just as the Tokyo round ended, against Japanese import restrictions on manufactured tobacco has followed a somewhat similar course (app. I, case 56). After a panel was established in February 1980, the United States and Japan reached an agreement on the problem and the United States withdrew its complaint. 2/

For the first time in the history of the GATT, just 2 years after the Tokyo round ended, the Contracting Parties could not agree on the adoption of the report of the panel in a dispute. The United States complained in November 1979 that Spain's restrictions on soybean oil imports were inconsistent with articles III and XVII of the General Agreement. The panel report, discussed by the Council in November 1981, was contested by the United States, which indicated reservations about some of the panel's findings or interpretations of several GATT provisions. Although Spain urged that the report be adopted, the reservations of the United States and other countries about certain findings of the panel blocked a consensus and the Council merely took note of the report. 3/ Since this initial failure of the Contracting Parties to agree on a panel report, additional cases have arisen in which a report has not been adopted (see ch. II).

Another development of interest came in early 1982. When parties to a dispute reached a bilateral settlement before the deliberations of the panel were completed, the panel customarily did not examine or rule on the merits of the case but only noted that a bilateral settlement had been reached. In January 1980, Canada complained that a U.S. embargo of tuna from Canada, imposed as a result of a fisheries dispute with Canada, was contrary to GATT

1/ BISD, 26th Supp., at 320 (1980); GATT Activities in 1978, at 94-95 (1979); GATT Activities in 1983. at 43-44 (1984); GATT Activities in 1984, at 40-41 (1985); 35 GATT Focus, at 1, 4 (August-September 1985). Note that other countries had indicated their interest in the U.S. complaint. Id. Canada filed its own complaint regarding Japanese leather imports restrictions in November 1979, and after a panel was established, it was reported that Japan and Canada had reached a mutually satisfactory solution of the dispute and that Canada was withdrawing its complaint. GATT Activities in 1979, at 78-79 (1980); GATT Activities in 1980, at 53 (1981). The United States has sought to apply the conclusion of the leather panel decision to a related dispute involving the Japanese leather footwear quota. Sec. 301 Table of Cases, supra.

2/ GATT Activities in 1979, at 79; GATT Activities in 1980, at 52; and GATT Activities in 1981, at 46.

3/ GATT Activities in 1979, at 58; GATT Activities in 1981, at 48-49 (1982); Sec. 301 Table of Cases, supra.

obligations. A panel was established in March 1980. The United States ended the embargo in August 1980, but the panel continued to investigate the matter at the request of Canada and with the acquiesence of the United States. The panel issued a report, subsequently approved by the Council, which found that the U.S. embargo had been in violation of article XI and that article XX of the General Agreement did not apply. 1/

The number of cases dealing with nontariff issues has increased since the Tokyo round. Illustrative of such cases is the United States complaint in March 1982 that practices associated with Canada's Foreign Investment Review Act were inconsistent with articles III, XI and XVII of the General Agreement. A panel report, issued in July 1983 and adopted by the Council in February 1984, found that certain of the Canadian practices were inconsistent with article III:4. Canada indicated that it would take steps to meet its GATT obligations, and the United States indicated it considered the panel's work "'to be exemplary of how the GATT dispute settlement process should function.'" 2/

Dispute Settlement Procedures in the Multifiber Arrangement

The Arrangement Regarding International Trade in Textiles, otherwise known as the Multifiber Arrangement (MFA), is a multilateral arrangement sanctioned under the GATT for the regulation of international trade in textiles and apparel of cotton, wool, and manmade fiber through a network of supervised bilateral arrangements, or, in some cases, through unilateral action. 3/ The 49 signatories to the MFA account for over 80 percent of U.S. imports in textiles and related products. The MFA contains provisions for the resolution of disputes among the signatories on trade in the textile and related articles it covers.

In general, the MFA dispute settlement procedures consist of consultations between or among the countries involved in a dispute, followed by referral of the dispute to the Textile Surveillance Body (TSB), 4/ composed

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1/ BISD, 29th Supp., at 91 (1983); GATT Activities in 1982, at 62-63 (1983).

2/ GATT Activities in 1983, at 39-41.

3/ The MFA dispute settlement mechanisms have been suggested as a model that might be worth emulating, although the procedures are regarded by some as being essentially the same as in the NTM codes. One official interviewed in Geneva indicated that the effectiveness of the MFA in dispute settlement depended on having a strong chairman of the supervisory Textile Surveillance Body who could make the deadlines work, and noted that as the MFA is concerned with only one area of trade (textiles and related products), it may be easier to generate compromise or consensus in disputes than would be the case under the GATT, where decisions could have a wider application.

4/ In Hudec's view the success of the MFA in dispute settlement is due to the TSB's character as a "small permanent corps of tough-minded experts" in the "'world-into-itself' quality of the textile trade" that imparts a closely knit authority structure to the TSB. Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, supra, at 168-70.

of eight members, if the dispute is not resolved by mutual agreement. 1/ In certain specified circumstances involving market disruption caused by textile products not already subject to restraint, the complaining party may take unilateral action to refuse to accept imports above a certain level from the exporting countries involved pending action by the TSB. 2/ As a general rule, the TSB is to make recommendations or findings with respect to a dispute within 30 days after the dispute is referred to it. If problems persist despite the findings and recommendations of the TSB, those matters may be brought before the Textiles Committee or the GATT Council through the normal GATT procedures.

Provisions of U.S. Law Relating to Enforcement of Trade Agreement Rights

The GATT and NTM codes' dispute settlement procedures are by their terms open only to the governments of signatory countries. There are no provisions for access by private individuals or organizations. However, under U.S. law indirect access is available. Sections 301-306 3/ of the Trade Act of 1974, as amended, provide that a private party may petition the USTR to enforce U.S. rights under any of the agreements. 4/ Amendments to sections 301-306 by the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984 have generally made the parameters of indirect access more certain and defined. While this statutory mechanism provides private parties an indirect means of starting the international dispute resolution process within the GATT and NTM codes, there are limitations on the role a private party can play after initiation. Most importantly, the decisions as to whether and how to proceed are still subject to political considerations beyond the scope of the immediate trade practice in question and out of the hands of the

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1/ BISD, 21st Supp. (1975), art. 3 (disputes regarding textile products whose trade is not already restrained by agreement); art. 8 (disputes about alleged circumvention of the arrangement); and art. 11 (disputes generally). One important feature of the MFA is that the TSB is to be kept informed of all information underlying any disputes, as well as any bilateral agreements designed to solve the dispute. See art. 3:3, 3:4, and 8:4.

2/ See MFA, art. 3:5. There is also provision for an emergency bilateral arrangement to limit imports under the circumstances specified in art. 3:6.

3/ 19 U.S.C. 2411-2416.

4/ The scope of sec. 301 is quite broad and the President is directed to take appropriate and feasible actions:

> (A) to enforce the rights of the United States under any trade agreement;
> (B) to respond to any act, policy, or practice of a foreign country or instrumentality that--
> (i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
> (ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce . . . .

19 U.S.C. § 2411(a).

In addition to taking action pursuant to a petition from a private party, the USTR may also self-initiate an investigation.

petitioners. 1/ Furthermore, if the consultation and dispute resolution procedures do not result in a satisfactory result (and it is the Government not the petitioning party that makes this evaluation), the sanction is retaliation that might provide no direct relief whatever to the petitioner. Thus, even though the primary expense and effort in these cases are the responsibility of the Government, the uncertainty of the result has limited the number of petitions filed. 2/ This uncertainty of result may be a reason why significantly fewer petitions are filed under section 301 than under other U.S. laws providing relief for domestic industries in international trade matters. 3/

Procedurally, an interested party 4/ may file a petition with USTR under section 302(a) requesting action and setting forth allegations in support of the request. The USTR then makes a decision within 45 days as to whether to commence an investigation. If the determination is negative the petitioner must be presented with the reasons for the decision. Notice of the determination and a summary of the reasons for it are published in the Federal Register. 5/

1/ A hearing held by USTR on Nov. 18, 1985, concerning possible retaliation against Japan for its quotas on imports of leather goods including footwear, illustrates the the broader domestic concerns that must be considered before instituting countermeasures. The Leather Industries of America, Inc., recommended restrictions on exports of U.S. hides to Japan. This was strongly opposed by the U.S. Hide, Skin and Leather Association. Proposed restrictions against various nonleather imports from Japan were also vigorously opposed by such groups as the North American Telecommunications Association, a trade group representing manufacturers, suppliers and distributors of telecommunications equipment.

2/ Between 1974 and November 1985, there were 51 sec. 301 petitions filed.

3/ For instance, under title VII of the Tariff Act of 1930 there have been over 550 petitions filed since 1979 alleging dumping or subsidization.

4/ The regulations define "interested party" as follows:

> (b) Petitions may be submitted by an interested party. An interested party is deemed to be a party who has a significant interest; for example, a producer or a commercial importer or exporter of a product which is affected either by the failure to grant rights to the United States under a trade agreement or by the act, policy or practice complained of; a trade association, a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production or wholesale distribution in the United States of a product so affected; or any person representing a significant economic interest affected either by the failure of a foreign government to grant United States rights under a trade agreement or by the act, policy or practice complained of in the petition.

15 C.F.R. 2006.0(b).

5/ 19 U.S.C. 2412(b)(1). The review of a complaint received under sec. 301 may be terminated or suspended by USTR upon publication of a notice and statement of reasons in the Federal Register.

Following an affirmative determination to initiate an investigation, USTR publishes the text of the petition and commences an investigation including a period for a public hearing and the filing of comments. 1/ The USTR is also to commence consultations with the foreign government or instrumentality. The Trade and Tariff Act of 1984 amended section 303 to provide that the beginning of these consultations may be delayed for up to 90 days after the date of the affirmative determination if extra time is needed for gathering or verifying information.

If, at the end of any consultation period specified in the relevant trade agreement, no adequate resolution is reached, the USTR must then request proceedings under the formal dispute resolution procedures of such trade agreement. The USTR is required by section 303 to obtain information from the petitioner and other appropriate private sector representatives 2/ in preparing for consultations and dispute resolution proceedings.

Following investigation and consultation, the USTR must then recommend action to the President, which may include retaliatory measures. 3/ Within 21 days of receiving the USTR's recommendation, the President must decide what action, if any, to take, 4/ and publish the decision in the Federal Register. 5/ The President's retaliatory powers were expanded by the Trade and Tariff Act of 1984 to include additional actions against services of foreign countries and instrumentalities. 6/

Section 301 was enacted to authorize the President to retaliate against other countries' "unreasonable" and "unjustifiable" import restrictions. 7/ The House bill originally included a requirement that the President consider the relationship of any retaliatory action to the United States' international obligations. This provision was deleted by the Senate so that the President could retaliate or threaten to retaliate "whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade." 8/ Congress wanted to give the President authority for "swift and certain retaliation" against the commerce of foreign countries or instrumentalities that discriminate against U.S. commerce. 9/

1/ 19 U.S.C. 2412(b)(2).

2/ Sec. 135 of the Trade Act of 1974, 19 U.S.C. 2155(i), requires USTR to consult with the appropriate general policy advisory committees established by the President for industry, labor, agriculture, and services as well as private organizations representing labor, industry, agriculture, small business, service industries, consumer interests, etc.

3/ 19 U.S.C. 2414.

4/ 19 U.S.C. 2411(d)(2).

5/ Id.

6/ 19 U.S.C. 2411.

7/ S. Rep. 1298, 93d Cong. 2d Sess., at 163 (1974).

8/ Id. at 166.

9/ Id. at 164

The Senate Finance Committee cited as a "classic example" of discriminatory standards (i.e., laws, regulations, specifications, and other requirements with respect to the properties or the manner, conditions, or circumstances under which products are produced or marketed) a European organization called the European Committee for Coordination of Electrical Standardization, which the Finance Committee said virtually excluded U.S. products from the European market. 1/ However, retaliation was not expected to be used "frivolously or without justification" and it was hoped that the threat of retaliation under section 301 would "serve as negotiating leverage to eliminate those barriers to, and other distortions of trade" that the act gave the President broad authority to harmonize, reduce, or eliminate on a reciprocal basis. 2/

The retaliation provisions in the 1974 act are successors to the retaliation provisions against foreign import restrictions contained in section 252 of the Trade Expansion Act of 1962, though the policy of providing trade concessions by lowering tariffs and then providing for retaliatory power to remove the concessions in the event of discriminatory treatment by another country goes back further than section 252. Under section 252(a), the President was to take all appropriate and feasible steps to eliminate any restrictions that "oppress U.S. commerce." However, retaliation under section 252(b) was only in the form of removal of negotiated trade agreement concessions. Thus, section 252 represented a continuation in somewhat different form of the provisions enacted in the Reciprocal Trade Agreements Act of 1934, which amended the Tariff Act of 1930 by adding section 350 to provide authority for the President to negotiate bilateral trade agreements and to withdraw any such concessions granted if the other country discriminated against American commerce. These provisions, in turn, were based on withdrawal of concession provisions contained in the McKinley Act of 1890 (26 Stat. 567) and the Dingley Act of 1897 (30 Stat. 151). 3/ The innovation of section 350 was to prospectively authorize the President to enter into reciprocal trade agreements and avoid the filibustering that occurred with respect to treaties negotiated under the Dingley Act. 4/ Section 301 of the Trade Act of 1974 is different from these predecessors in that retaliation under its provisions is available against the goods and services of any countries that discriminate against U.S. commerce and is not limited to the withdrawal of trade concessions previously negotiated.

The retaliation authority of section 252 was used in 1964 by President Johnson in the "chicken war." In that instance, German tariffs on poultry imports were replaced in 1962 by the much higher variable levies of the EC. The United States threatened retaliation. After much public attention and the consequent hardening of the parties' positions, both the United States and the EC were willing to submit the dispute to a neutral GATT panel to prevent a further escalation. The panel arrived at a retaliation figure between those proposed by the parties and this resolution was accepted by both sides.

1/ Id.

2/ Id.

3/ See testimony of Secretary of State Cordell Hull in hearings before the Senate Committee on Finance on H.R. 8687, 73d Cong. 2d Sess., at 9 (1934).

4/ Testimony of Secretary of State Cordell Hull in hearings before the House Committee on Ways and Means on H.R. 8430, 73d Cong. 2d Sess., at 5 (1934).

President Johnson then issued Presidential Proclamation No. 3564 1/ withdrawing previously proclaimed tariff concessions. 2/ The resolution did not include any change in the EC tariffs to help the American poultry exporters. 3/

A case that shows both the potential for providing relief as well as the limitations of section 301 was one that was threatened by a U.S. industry but never formally filed, the metal baseball bat case. 4/ During the 1970's, the U.S. aluminum bat industry held a leading position in the Japanese market. 5/ In the mid-1970's, safety-related problems arose, primarily with respect to Japanese-made bats. The Japanese Government then set safety standards for the bats. However, the standards did not apply evenly to Japanese-and-American-made bats. Entry into the largest segment of the market required an approval mark on the bats from the Japanese Rubberized Baseball League, and the league refused to provide approval for any foreign-made bats. Also, the Japanese Government "S" (safety) certification mark was available to U.S. manufacturers but not on an equal basis with their Japanese competitors. 6/

The United States contended that these procedures violated the Standards code. Fairly lengthy bilateral discussions ensued. On September 17, 1982, the United States formally requested the Standards code committee to investigate Japanese certification procedures pursuant to article 14.4. of the Standards code. At this point a U.S. trade association threatened to file a section 301 complaint against Japan. Faced with these two possibilities, the Japanese proposed a new solution in March 1983, and the case was essentially settled on the basis of the Japanese proposal.

Thus, on the one hand, the case apparently was successfully resolved, and the problems of Japanese technical barriers highlighted, due in part to the threat of a section 301 petition with the adverse publicity and threat of retaliation it entailed. For this reason, the case has been cited

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1/ 28 Fed. Reg. 13,247 (Dec. 4, 1963)

2/ Since the case was brought pursuant to arts. XXIV and XXVIII of the General Agreement, the withdrawal of trade concessions was done on a most-favored-nation basis rather than specifically against EC products. Though the products chosen were meant to be ones imported almost exclusively from the EEC, there was a broader impact. Nevertheless, the President's authority in issuing Proclamation No. 3564 to retaliate in this manner was eventually upheld. United States v. Star Industries, 462 F.2d 557 (C.C.P.A. 1972).

3/ Hudec, The GATT Legal System and World Trade Diplomacy, supra, at 219-220.

4/ For a description of the case, see Note, Dispute Settlement Pursuant to the Agreement on Technical Barriers to Trade: The United States-Japan Metal Bat Dispute, 7 Fordham Int'l L.J. 137 (1984).

5/ See Lohr, How the U.S. Struck Out in Japan, N.Y. Times, Oct. 25, 1981, § 3, at 17.

6/ Product inspection could be carried out in either of two ways, by factory inspection or "lot inspection", the latter being a selective sampling done at the dock. The lot inspection system was the only one available for U.S. bats, which required an unpacking of all of the bats after a successful test sampling and marking each individually with the "S" mark. U.S. producers claimed that this put them at a competitive disadvantage. Both the league officials and the Japanse Ministry of International Trade and Industries acknowledged that there was a discriminatory effect to these certification rules. See Note, Dispute Settlement Pursuant to the Agreement on Technical Barriers to Trade: The United States-Japan Metal Bat Dispute, supra., at 157.

as an example of how well section 301 potentially can work for U.S. industry. 1/ However, by the time the "resolution" was achieved, conditions in the industry had changed, some of the technical problems with the Japanese bats were solved, and few American bats are now sold in Japan. 2/ While the resolution may have a beneficial effect on the conditions of future United States-Japan trade, it was of little practical value to the U.S. industry. Thus, even when the system can be viewed as functioning well, the lack of actual relief to the industry bringing the case due to political or other factors outside of the legal process may lead to frustration.

A second illustration of the resolution of a section 301 case without benefit (and possibly some harm) to the U.S. industry concerned is found in the U.S. complaint against EC tariff preferences on citrus imports from certain Mediterranean countries. 3/ The dispute was first formally initiated in 1980. 4/ By 1985 there was still no resolution of the dispute, and even after the full panel report was submitted in December 1984 supporting the U.S. position, the EC blocked any action. On April 30, 1985, the United States stated that it considered the dispute settlement process completed. In retaliation for the EC's discriminatory actions, President Reagan announced retaliation in the form of substantially increased U.S. duties on imports of pasta from the EC. 5/ The EC then instituted its own counter-retaliation in the form of increased duties on imports of American lemons and walnuts. Thus, in this instance the retaliation provisions of section 301 were utilized, without regard for GATT authorization, yet the citrus dispute still has not been settled with respect to the original issue of discrimination against exports of American citrus products to Europe. While the delays and panel procedures are cited as the most vexing aspects of the proceedings, 6/ this

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1/ Fisher & Steinhardt, Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital, 14 Law & Pol'y in Int'l Bus. 569, 610-612 (1982). See also Note, Dispute Settlement Pursuant to the Agreement on Technical Barriers to Trade: The United States-Japan Metal Bat Dispute, supra., at 161-65.

2/ C. Rapoport, U.S. Exporters May Pitch in as Japan's Bats Fall to Bits, Financial Times, Aug. 6, 1985, sec. I, at 4.

3/ Petition filed by Florida Citrus Commission, et al., Nov. 12, 1976.

4/ Section 301 Table of Cases, supra, at 1415-16 (Nov. 6, 1985).

5/ Pres. Proc. 5354, 50 Fed. Reg. 26,143 (June 25, 1985). The increased duties on pasta eventually became effective on Nov. 1, 1985. In effect, this retaliation can also be considered a "resolution" of the section 301 pasta case. That case was filed Oct. 16, 1981, by the National Pasta Association alleging violation of the Subsidies code and art. XVI of the GATT by EC export susidies on pasta. This case was referred to a Subsidies code panel in July 1984. The EC requested an additional panel meeting which was held in March 1985, and the panel report was submitted to the Subsidies code Committee on May 19, where it is still pending. Pres. Proc. 5363, 50 Fed. Reg. 33,711 (Aug. 21, 1985).

6/ See Statement of Florida Citrus Mutual, filed Sept. 23, 1985, in connection with U.S. International Trade Commission investigation No. 332-212. See also Statement of California Cling Peach Advisory Board, filed Sept. 23, 1985, in connection with U.S. International Trade Commission investigation No. 332-212 discussing the section 301 petition filed Oct. 29, 1981, concerning European Community production subsidies on member states' canned peaches, canned pears and raisins.

case is a good illustration of the problem of expecting definitive, legally enforceable results when there is a fundamental disagreement between the contracting parties involved as to the purpose and nature of the dispute settlement procedures of the GATT and the NTM codes. Section 301 provides an apparently legally definitive structure for pursuing trade complaints, but this can be misleading as to the eventual result when there are such fundamental disagreements among countries about the dispute settlement processes to which it provides indirect access.

CHAPTER II

SUMMARY OF DISPUTE SETTLEMENT ACTIVITY

To assist in assessing the effectiveness of the GATT dispute settlement process, this chapter examines the record of selected cases, the circumstances in which the process has worked to resolve disputes, and those in which it has failed. Information on disputes referred to the signatories of the General Agreement and the NTM codes negotiated in the Tokyo round is summarized in terms of the pattern of country participation and the kinds of products and trade measures addressed, and then according to the various stages of the process to illustrate the record on operation of the process. For each stage of the process, the information illustrates the strengths or shortcomings so that obstacles to effectiveness may be identified.

The statistics summarized in this chapter are based on a set of 84 cases that were referred for resolution under article XXIII:2 to the Contracting Parties as a whole or to panels established by the Contracting Parties, or to panels established by the committees of the Tokyo round nontariff measure codes. 1/ These disputes, therefore, concern issues that could not be resolved through the mechanisms for bilateral consultations available to signatories. While article XXIII:2 does not name any specific methods for handling disputes, as indicated in chapter I, customary practice has developed for the Contracting Parties to establish a panel to examine a dispute brought before them. Since 1975, panels have been used to examine over 85 percent of the cases brought under article XXIII:2. The remaining 15 percent were referred to working parties or further consultations. The 1979 Understanding on dispute settlement has had the effect of standardizing the use of panels in this process. Of the 28 such cases initiated since 1980, all but 2 cases have been referred to panels.

Thus, this summary examines predominantly the use of panels to resolve disputes. It also includes, however, article XXIII:2 disputes that the Contracting Parties examined by other methods employed more frequently in the early years of the GATT than at present. 2/ A list of the cases included in

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1/ The review was limited to this class of disputes for two reasons: (1) information on these cases is formally documented and publicly available (in the form of panel reports or published decisions) whereas that on consultations notified under arts. XXII and XXIII:1 and similar code provisions are not, and (2) although consultations under art. XXII and XXIII:1 are a very important part of the dispute settlement mechanism, those cases that could not be solved in consultations provide a view of the functioning of the dispute settlement throughout the entire process.

2/ Such methods include working parties, groups of experts, and handling of complaints directly in sessions of the contracting parties or meetings of the Council of Representatives (acting on behalf of the Contracting Parties).

the profile is provided in appendix I. In the review of these cases, it is important to keep in mind that a much larger number of complaints in which bilateral consultations were requested under articles XXII and XXIII:1 of the General Agreement and under provisions of the codes have been resolved without requiring further examination under article XXIII:2 or by panels under the code committees. Generally, it can be assumed that some form of mutually satisfactory bilateral settlement was obtained or the complaint was dropped for some other reason if the complaining country did not request examination by the Contracting Parties under article XXIII:2 or by the appropriate code committee. 1/

Profile

Resort to that part of the dispute settlement process beyond the consultation stage has increased dramatically in the last decade. One-half of the 84 cases reviewed were filed after 1975 and one-third were filed after the conclusion of the Tokyo round in 1979. Together with this escalation in the level of disputes, the perception has grown that the dispute settlement process is not wholly effective.

Country participation

One of the most salient features of country participation in the 84 cases examined is the degree to which it has involved relatively few of the GATT members. Participation has been dominated by the United States and the EC (or countries that became members of the EC, represented since 1962 or since accession by the Commission of the European Communities (the EC Commission) in disputes 2/). One or the other was a party in 77 of the 84 cases. In 26 of these cases they engaged in disputes with each other. Other countries were involved much less frequently. Of the 90 countries that are currently members of the GATT, 3/ only 21 countries, other than the United States and the EC countries, were parties to the formal disputes reviewed. Jackson states that "Many countries have hesitated or refused to invoke the procedures of article XXIII," and he notes that a small country, even if allowed to retaliate, doubts that its retaliation would have any significant effect on the large

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1/ Under provisions for consultation under art. XXII and XXIII:1, contracting parties often provide written notification to the Contracting Parties of a request for consultations. No further notification or information is presented or required unless a panel is requested. Although contracting parties sometimes notify the Contracting Parties that consultations have been successfully concluded, such optional notification normally does not include any details on the nature of the settlement.

2/ The EC Commission is the administrative body of the European Communities that initiates policies for the approval of the Council of Ministers, implements decisions made by the Council, and represents the EC members in official international trade matters. The EC Commission took responsibility for representing EC member countries in GATT dispute settlement after 1962 in accordance with the common commercial policy mandated by art. 113 of the Treaty of Rome.

3/ App. D contains a list of all GATT signatories.

country. 1/ This observation was confirmed in interviews with officials from country delegations to the GATT. Small countries, regardless of their level of economic development, perceive a common set of problems with respect to their use of dispute settlement. 2/ As a result, these countries have limited their resort to panels.

The United States.--As illustrated in tables 1 and 2, the United States has participated in the cases reviewed more than any other single GATT country member, most often as a complainant. A party to more than one-half of all the cases, the United States filed complaints in 33 cases and was named in 13 complaints. The most frequent targets of U.S. complaints were the EC or EC member countries, against whom about two-thirds of the U.S. complaints were filed. In 14 cases, the U.S. complaints concerned agricultural products (table 1), and 10 of these were against EC measures. The second-ranking target of U.S. complaints was Japan, which was the subject of five U.S. complaints.

The United States has stepped up its activity in disputes in the last decade. Nearly one-half of all U.S. complaints in the cases reviewed have been filed since 1975. Of these complaints, eight were against EC measures and five were against Japanese measures. Since passage of the Trade Act of 1974, 11 of the cases reviewed originated in petitions filed by private parties with the U.S. Government under section 301; nine of these were referred to panels under the General Agreement and two were referred to panels under the Subsidies code. 3/

Complaints against U.S. measures have also become more common. Over the last decade, eight panel cases were filed against U.S. trade measures. In the 27 years prior to 1975, only five of the cases reviewed named U.S. measures. The EC or its member countries (hereafter generally referred to as the EC) filed five of these cases on U.S. measures; three of them since 1975. Since 1975, Canada complained of U.S. actions in three of the reviewed cases, and India and Nicaragua each filed one of the cases.

The European Community.--As a group, EC countries have heavily engaged in formal dispute settlement. As table 1 shows, they were involved in 62 of the examined cases--accounting for about 74 percent of all GATT and code panels--most often as the target of complaints. 4/ While EC countries filed

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1/ Jackson, Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT, 13 J. World Trade Law 5 (1979).

2/ See ch. III for further discussion.

3/ The United States has also frequently employed consultations under the provisions of art. XXII and of the NTM codes to address sec. 301 petitions but only 11 cases have proceeded to the panel phase.

4/ For statistical purposes, the EC country group consists of Belgium, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Netherlands, and the United Kingdom. Greece is categorized under "other developed countries" for statistical purposes because its accession to the EC, in 1982, is so recent that all of the cases in which it was directly involved occurred prior to its accession. Cases involving EC members prior to 1962 when the EC Commission assumed responsibility for representing EC countries are included in this figure. In 12 of the examined cases occurring prior to 1973, EC member countries filed as individual countries. Five of these cases were disputes between EC countries.

Table 1.—Summary of cases by country or country grouping, 1/ type of product, and type of trade measure, 1948 to Sept. 1, 1985

Country	1948 to Sept. 1, 1985											
	Total	Percent of total 2/	Type of Product			Type of Measures						
			Manufactured 3/	Agricultural 4/	Other	Tariff 6/	Subsidy	Quota 7/	Tax	Other NTM 8/	Other
Total cases	84	100	23	33	28	19	14	18	16	13	4
United States:											
Filed by	33	39	5	14	14	5	3	8	9	8	0
Filed against	13	15	5	5	3	3	0	4	1	3	2
Total	46	55									
European Community countries: 9/											
Filed by	20	24	7	3	10	7	3	1	5	3	1
Filed against	42	50	5	23	14	7	13	8	10	4	0
Total	62	74									
Canada:											
Filed by	7	8	3	3	1	2	0	4	0	1	0
Filed against	6	7	2	2	2	2	0	1	1	2	0
Total	13	15									
Japan:											
Filed by	0	0	0	0	0	0	0	0	0	0	0
Filed against	7	8	5	1	1	0	0	4	1	1	1
Total	7	8									
Australia:											
Filed by	5	6	0	5	0	0	4	0	0	1	0
Filed against	1	1	1	0	0	0	1	0	0	0	0
Total	6	7									
Other developed countries: 10/											
Filed by	6	7	3	1	2	2	0	0	2	0	2
Filed against	12	14	4	2	6	6	0	1	2	2	1
Total	18	21									
Developing countries: 11/											
Filed by	13	15	5	7	1	3	4	5	0	0	1
Filed against	3	4	1	0	2	1	0	0	1	1	0
Total	16	19									

1/ See app. I for listing of cases included in each country grouping. Country groupings were based on the definitions found in the World Bank's 1984 edition of the World Development Report. Gross National Product (GNP) per capita is the criteria used by the Bank to classify countries by stage of development.

2/ Percentages do not always total due to rounding.

3/ The manufactured product category does not include processed agricultural products.

4/ The agricultural product category includes raw and processed agricultural and fisheries products.

5/ The other category consists mostly of cases involving a general practice, rather than a specific product.

6/ The tariffs category also includes tariff-quotas.

7/ Embargoes are included under quotas.

8/ The "other NTM" (nontariff measures) category includes, for example, import licensing, standards, and other domestic regulatory actions.

9/ The European Community country grouping includes Belgium, Denmark, Federal Republic of Germany, France, Iceland, Italy, Luxembourg, Netherlands and the United Kingdom. Greece is not included here because all cases directly involving Greece took place prior to its accession to the EC in 1982.

10/ Czechoslovakia, Finland, Greece (prior to entry into the EC), New Zealand, Norway, South Africa, Spain, and Sweden.

11/ Argentina, Brazil, Chile, Cuba, Hong Kong, India, Israel, Jamaica, Nicaragua, Uruguay.

Table 2.--Summary of cases by country or country grouping, 1/ type of product, and type of trade measure, 1975 to Sept. 1, 1985

Country	1975 to Sept. 1, 1985											
	Total	Percent of total 2/	Type of Product			Type of Measures						
			Manufactured 3/	Agricultural 4/	Other 5/	Tariff 6/	Subsidy	Quota 7/	Tax	Other NTM 8/	Other
Total cases	42	100	16	21	5	8	8	12	3	10	1
United States:											
Filed by	16	38	4	10	2	1	3	4	2	6	0
Filed against	8	19	4	3	1	3	0	3	0	2	0
Total	24	57									
European Community countries: 9/											
Filed by	7	17	4	0	3	3	0	0	0	3	1
Filed against	17	40	2	14	1	2	8	3	1	3	0
Total	24	57									
Canada:											
Filed by	6	14	3	3	0	1	0	4	0	1	0
Filed against	5	12	2	1	2	1	0	1	1	2	0
Total	11	26									
Japan:											
Filed by	0	0	0	0	0	0	0	0	0	0	0
Filed against	7	17	5	1	1	0	0	4	1	1	1
Total	7	17									
Australia:											
Filed by	2	5	0	2	0	0	2	0	0	0	0
Filed against	0	0	0	0	0	0	0	0	0	0	0
Total	2	5									
Other developed countries: 10/											
Filed by	2	4	2	0	0	1	0	0	1	0	0
Filed against	5	12	3	2	0	2	0	1	0	2	0
Total	7	17									
Developing countries: 11/											
Filed by	9	21	3	6	0	2	3	4	0	0	0
Filed against	0	0	0	0	0	0	0	0	0	0	0
Total	9	21									

1/ See app. I for listing of cases included in each country grouping. Country groupings were based on the definitions found in the World Bank's 1984 edition of the World Development Report. Gross National Product per capita is the criteria used by the Bank to classify countries by stage of development.

2/ Percentages do not always total due to rounding.

3/ The manufactured product category does not include processed agricultural products.

4/ The agricultural product category includes raw and processed agricultural and fisheries products.

5/ The other category consists mostly of cases involving a general practice, rather than a specific product.

6/ The tariff category also encompasses tariff-quotas.

7/ Embargoes are included under quotas.

8/ The "Other NTM" (nontariff measures) category includes, for example, import licensing, standards, and other domestic regulatory actions.

9/ The European Community country grouping includes Belgium, Denmark, Federal Republic of Germany, France, Iceland, Italy, Luxembourg, Netherlands and the United Kingdom. Greece is not included here because all cases directly involving Greece took place prior to its accession to the EC in 1982.

10/ Finland, New Zealand, South Africa, Spain, and Norway.

11/ Argentina, Brazil, Chile, Hong Kong, India, and Nicaragua.

20 panel requests, they were the subject of complaints in 42 of the panel cases. Since 1975, the EC has been a party to 24 of the 42 panel cases filed. Over 40 percent of all the panel complaints against the EC have been filed since 1975.

Complaints against the EC concerned subsidies more frequently than any other type of measure. Subsidies were the topic of one-third, or 13, of the examined complaints against the EC. More than one-half of the examined complaints against the EC (23 out of 42 complaints) have concerned measures affecting trade in agricultural goods. The proportion of the cases against the EC involving trade in agricultural goods increased substantially after 1975. In the last decade, 14 (or 82 percent) of the 17 examined complaints against the EC concerned its measures affecting agricultural trade.

Other participants.--Other developed countries participated in the cases examined much less frequently than the United States and the EC and have tended to be major trading nations such as Canada, Japan, and Australia. Canada has become increasingly involved in the panel process to resolve its trade disputes. Prior to 1975, Canada was a party to only two cases. Since 1975, Canada has filed six panel requests (five of these since 1980) and has been named in five panel requests by other countries.

All seven cases involving Japan occurred in the last decade and all consisted of complaints by other countries about Japanese measures. Five of these were U.S. complaints. Because Japan has preferred resolving disputes through bilateral negotiations, it did not file a panel request in any of the cases reviewed. 1/ Most of the cases against Japanese measures concerned Japanese barriers to imports of manufactured products; four addressed restrictions on leather imports. 2/ Australia filed five of the complaints examined; four of them concerned EC trade measures.

Developing countries have used the process intermittently but have requested panels more often in recent years. 3/ Three-fourths of their examined complaints were filed in the last 10 years. Only eight developing country GATT members were complainants in the cases examined: three cases were brought by Brazil, three by Chile, two by Hong Kong (represented by the United Kingdom), and one each by Argentina, Israel, Nicaragua, Uruguay and India. At the same time, however, industrialized GATT members have rarely filed complaints against developing countries.

1/ In 1981, Japan filed one significant art. XXIII:1 complaint involving EC import barriers to video tape recorders (VTR's). This case is not included in the analysis since it was not handled under art. XXIII:2. However, the case raised technical issues about trade in high-technology products and was referred to the Committee on Tariff Concessions. See Operation of the Trade Agreements Program, 36th Report, 1984, USITC Publication 1725, at 44 (1985). The matter was finally addressed through conclusion of a voluntary export restraint.

2/ One complaint by Canada in 1979 and three complaints by the United States; one in 1979, the sequel to this case filed in 1983, and the addition of the leather footwear case filed in 1985.

3/ The General Agreement and other GATT instruments do not provide a definition of what constitutes a developing country or provide any illustrative list. World Bank classification standards are used as a basis for categorization. See n. 1, table 1.

Types of products involved in disputes

Agricultural practices have proven controversial for the application of rules of the General Agreement and the Subsidies code. This is reflected in the pattern of the types of products subject to complaints. Of the 84 cases reviewed, 56 cases involved agricultural or manufactured products (see table 1). 1/ The majority, or almost 60 percent, of the cases in which products are identified involved agriculture (raw or processed agricultural or fisheries products). Another 39 percent involved nonagricultural manufactured products. Among other products, two cases involved raw materials and one involved intellectual property. 2/ The remainder of the cases usually involved tax or general tariff measures in which a particular product was not involved.

Agricultural products.--A total of 33 of the examined cases addressed trade in raw or processed agricultural or fisheries products (see table 1). In 23 of these cases, or almost 70 percent, measures taken by EC countries were the subject of complaints. The largest single product group among the agricultural cases is that of fruit and fruit products, which were involved in eight cases. In other product groups, five cases involved sugar or sugar products and three cases involved subsidies on wheat flour.

Application of subsidies and quotas was an issue in most of the agricultural cases. Subsidies on agricultural goods were the subject of dispute in 11 cases, and all of these complaints concerned subsidy practices by EC countries. Eight of the subsidy cases were filed after 1975. The number of complaints about quotas on agricultural imports has increased in recent years. Quotas on agricultural products were the subject of nine disputes; seven of these occurred in the last decade.

Nonagricultural manufactures.--Nonagricultural manufactured products were involved in 23 of the cases (see table 1). No one type of manufactured good stands out as a subject of complaints. However, several of the cases concerned products produced by industries currently considered to be import sensitive in industrialized countries such as textiles, leather, and

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1/ Of the 28 cases in the other product category (table 1), 25 of the cases did not involve particular products and usually focused on internal tax measures or on generally applied tariffs; three cases involved products that did not fall under the agriculture or nonagricultural manufactures categories.

2/ Three cases included in the other product category on tables 1 and 2 concern products that are neither agricultural nor manufactured. Two are cases on raw materials: One brought in 1954 by the United States against Belgian quotas on coal imports; and another in which the EC protested in 1976 that Canadian withdrawal of concessions as a response to EC tariff revisions on lead and zinc were unreasonable. The third case was on intellectual property, the topic of an EC case filed in 1982 against the U.S. Manufacturing Clause, which prohibited imports of certain literary materials by American authors into the United States. See Operation of the Trade Agreements Program (OTAP), 36th Report, 1984, supra, at 53).

footwear. In four cases, measures relating to textiles trade were debated. 1/ Three disputes were filed concerning Japan's leather import restrictions. Footwear was involved in two complaints.

Types of trade measures disputed

The articles of the General Agreement govern the use of various types of trade measures by contracting parties (see app. E). Table 3 below summarizes the frequency with which certain categories of trade measures have been the subject of disputes.

Table 3.--Summary of panel cases by time period and type of trade measure, 1948 to Sept. 1, 1985 1/

Type of measure	Overall, 1948 to Sept. 1,1985		1948 to 1974		1975 to Sept. 1, 1985	
	Number	Percent of total	Number	Percent of total	Number	Percent of total
Tariffs 2/	19	22.6	11	26.2	8	19.0
Quotas 3/	18	21.4	6	14.3	12	28.6
Subsidies	14	16.7	6	14.3	8	19.0
Taxes 4/	16	19.0	13	30.9	3	7.1
Other NTM's 5/	13	15.5	3	7.1	10	23.8
Other	4	4.8	3	7.1	1	2.4
Total	84	100.0	42	100.0	42	100.0

1/ See app. I for a list of the cases included in these categories.
2/ Tariff-quotas are classified under tariffs.
3/ Embargoes are classified as quotas.
4/ Includes both internal tax measures as well as taxes on imports.
5/ Other nontariff measures include import licensing, standards, other domestic regulatory measures, and application of national laws in a way that discriminates against imported products.

Application of tariffs, the principal trade measure addressed in the several multilateral negotiating rounds sponsored by the GATT, has been a leading concern in the disputes examined. Disputes over tariffs have remained prominent, but their importance relative to that of disputes over other types of measures has receded. Between 1948 and 1974, tariffs and tax measures, involved in 11 and 13 of the cases respectively, were the most frequent subjects of disputes. In the 10 years since 1975, and as tariff levels were progressively reduced, tariffs were the subject of another eight cases, but accounted for only about 19 percent of the total panel cases filed.

1/ The United States complained about Cuban textile import restrictions in 1948. In 1972, Israel filed a complaint about U.K. import restrictions on cotton textiles. In 1977, the United States complained about Japanese import restrictions on silk yarn and fabric. Finally, in 1978, the United Kingdom represented Hong Kong in a complaint about Norway's quotas on textile imports.

Since 1975, tariff-related disputes have been equaled or exceeded by cases against quotas, subsidies, and nontariff measures. Over the last decade, quotas became a prominent type of trade measure disputed, accounting for nearly 29 percent of the cases examined. Moreover, nine of the cases on quotas have been filed since 1980. Of a total of 14 cases concerning subsidies, 8 of these were filed after 1975. In spite of the availability of dispute settlement mechanisms under the Subsidies code, only two of five panels examining subsidies since the code was concluded in 1979 were set up under code provisions rather than under the General Agreement. 1/ For example, in a subsidy panel case filed by the United States on EC restrictions on canned fruit, the United States filed the complaint under article XXIII of the General Agreement because it alleged that the subsidy nullified and impaired a tariff concession bound under the General Agreement. The most notable characteristic of the subsidies-related disputes is their link to trade in agricultural goods. All of the panel cases initiated since 1975 to examine subsidy practices have concerned agricultural products.

Nontariff measures were involved in 13 of the cases examined, 10 filed in the last 10 years. This pattern reflects a trend towards the increasing use of nontariff measures to restrict trade. 2/ In spite of the conclusion of the Tokyo round codes on nontariff measures, dispute settlement provisions of the General Agreement are still sometimes used to resolve such complaints. Only a few panels have been established under the NTM codes-- those on subsidies discussed above, another panel requested in the in the Subsidies code by the EC on provisions of the U.S. Wine Equity Act affecting U.S. countervailing duty law, and one requested by the United States regarding EC value-added taxes filed under the Government Procurement code.

Although tax measures ranked third, along with subsidy practices, as a topic of all the disputes examined, the frequency of disputes involving tax measures has diminished significantly in recent years. Some officials interviewed credited this decline to the dispute settlement process, saying that a clear understanding of the rules on tax practices had evolved out of the early cases. Accordingly, most of the tax-related cases (14 out of 16) were filed prior to 1975. Although issues on taxation, related to the 1973 EC case regarding the U.S. DISC program, remain controversial, only three new cases have been filed since 1975 concerning discriminatory application of internal taxes. 3/

1/ A third panel case, currently pending under the Subsidies code, concerned provisions of the U.S. Wine Equity Act. The issue in this Subsidies code panel case is not the application of a subsidy but the substance of certain temporary changes made to U.S. countervailing duty law.

2/ See Nogues, et. al., The Extent of Nontariff Barriers to Industrial Countries' Imports, Development Research Department Discussion Paper, No. 115, The World Bank, at 15 (1985).

3/ One panel involved a U.S. complaint in 1979 against Japan's taxes and other measures affecting imports of manufactured tobacco. A U.S. panel request in 1982 under the Government Procurement code addressed EC value-added taxes. A panel established in 1985, at the request of South Africa, examined a Canadian (Ontario) retail sales tax on gold coins.

Operation of the Process

The five main states of the present dispute settlement process are (1) consultation and conciliation, (2) establishment and formation of a panel, (3) deliberation of the panel, (4) consideration of findings and recommendations, and (5) followup and implementation. 1/ The stages involved in dispute settlement under GATT and the codes are basically similar. Information on the cases examined is summarized below to illustrate perceived strengths and weaknesses of the process at each of these stages, except the consultation and conciliation stage.

Consultation and conciliation

An important concept of GATT dispute settlement is its emphasis on achieving a solution satisfactory to the parties concerned through voluntary bilateral settlement. GATT dispute settlement practice and procedures were designed to reflect this concept and create pressures in this direction. Both the NTM codes, generally, and practices under article XXIII of the General Agreement urge complaining parties to attempt to obtain voluntary settlement prior to requesting a panel. Indeed, many disputes handled under the bilateral consultation phases provided for in article XXII and XXIII:1 of the General Agreement and under the similar provisions of the codes are not subsequently referred to panels.

At the consultation stage, discussions are solely among the parties concerned. The Contracting Parties are notified of a request for consultations, but neither the substance of such discussions nor any resulting settlement needs to be reported to any other parties or official body. At the same time, however, the confidentiality of consultations may contribute to expedient resolution of disputes. Bilateral consultations generally have worked well, but because there is no formal requirement to disclose the results of consultation, a third party may not be able to discern until much later if a settlement reached between the consulting parties could harm its trading interests.

Data are not available from which a tabulation could be made of the outcome of the numerous consultations that contracting parties have held under articles XXII and XXIII:1 that would give some measure of the success or failure of the consultation process. However, it is generally perceived to have worked well. Since the 84 cases examined in this chapter were those referred to the Contracting Parties or a code committee panel, it can only be said that initially, at least, the consultation process had not resolved the issues in these cases. In some of these cases, however, consultation continued after the request for a panel and led to a resolution of the issue before the panel finished its deliberations.

1/ The categorization of the process into these five steps is for the purpose of organizing and presenting relevant information. It is not intended to portray specific or required procedures in any definitive legal sense.

Establishment and formation of panels 1/

If consultations do not yield a solution, a complaining party can request the establishment of a panel. A request for a panel is usually considered at the next monthly meeting of the GATT Council. Although further consultations and efforts at conciliation at times have been recommended as a precursor to panel establishment, the decision is often taken after consideration of the request at one or two of the monthly meetings. When delay at this stage does occur it more commonly is due to the parties' difficulty in agreeing on the members (three or five persons) and terms of reference of the panels.

For the 50 cases in which dates were available, the membership and terms of reference for most panels were set up in less than 2 months. 2/ The most notable exceptions were the 1973 set of cases between the United States and the EC on the U.S. Domestic International Sales Corporation (DISC) program and tax practices of three EC countries (see app. I, cases 38-41). These panels took nearly 3 years to compose. Other notable examples of delay at this stage include the United States case on EC value-added taxes (VAT) under the Government Procurement code and the recent Wine Equity Act case under the Subsidies code: each of these panels took 7 to 8 months to compose before their substantive work could commence. (app. I, cases 72 and 81).

Agreement on panelists is becoming more difficult. Recognition of this problem resulted in a decision by the Contracting Parties in 1984 to develop a roster of independent experts (see app. H). Since that time, two independent experts, both retired GATT Secretariat officials, have served on some panels.

Deliberations of panels

The Understanding on dispute settlement (app. F) indicates that panels should act "without undue delay." The Understanding also says that panels should aim to deliver their findings within a "period normally of three months from the time the panel was established." Again, lengthy delay in the deliberations of panels is the exception rather than the rule. Many panels meet between three and five times before issuing a report. Two cases were outstanding exceptions in this regard. Numerous panel meetings were required to resolve the 1973 DISC and related tax cases as well as the 1982 case on EC tariff preferences on citrus products from Mediterranean countries (app. I, case 69). Since 1975, panels have met an average of eight times, when complicated cases, such as the one on citrus, are included.

The time required for panel deliberation depends partly upon the availability of the panelists (who are at the same time usually attending to the regular demands of their positions on GATT delegations), but also on the

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1/ The term establishment is used to refer to the formal approval of the panel request. Formation is used to refer to setting up the panel with regard to its membership and terms of reference. The panel cannot commence with its substantive work until these issues are resolved.

2/ Dates of request were obtained from GATT documents, for each case, in which a complaining country formally requests a panel. Dates of the completion of the formation of the panel, and any other dates relevant to assessing the promptness of the process discussed in this chapter, were obtained from panel reports, minutes of meetings, or other GATT documents that provided such information.

promptness with which disputing parties prepare and submit information to the panel. In rare instances, disputing parties have delayed panel deliberations by submitting new information in the final stages, sometimes after viewing the draft report. The problem of delay at this stage was addressed in the 1984 decision on dispute settlement (app. H), which states that panelists should establish schedules and that disputing parties should respect the scheduled deadlines for submission of information. In an informal measure to expedite deliberations, the Secretariat recently has increased its technical support and other assistance to panels.

In about one in five panel cases, continuing consultations concurrent with panel deliberations resulted in bilateral settlements of disputes before the panel completed its work. The tendency to arrive at bilateral settlements after the panel process has been initiated is diminishing, but this may reflect the results of some of the recent reforms. Prior to the adoption of the 1979 Understanding on dispute settlement, parties requesting a panel were at times asked to engage first in bilateral discussions. The Understanding clarified and standardized the procedures to be followed so now a panel request is usually filed only after extensive bilateral talks have yielded no results. Accordingly, since 1980, a bilateral settlement followed panel establishment in only three of the panel cases completed; a U.S. case on Japanese restrictions on imports of manufactured tobacco (app. I, case 56), a Canadian case on the U.S. tuna embargo (app. I, case 57), and an Indian case on U.S. imposition of countervailing duties (app. I, case 61).

Although interviews with GATT officials indicated that many contracting parties support the flexibility of the process to allow continuing bilateral negotiations even after the panel process is initiated, as noted in chapter I, settlements achieved in this practical manner are frequently effective but do not always ensure the desired results.

Consideration of findings and recommendations

Panels do not make the final decisions in settling disputes. Only the GATT Contracting Parties or NTM code signatories may interpret the rules of the GATT and the NTM agreements and this authority has not been delegated to panels. The panel report serves only as an aid in examining cases. Thus, before becoming the final decision, the panel reports and recommendations must be adopted by the Council or the code committee.

Report adoption rarely has been delayed for long periods. For most panel or working party reports, adopted since 1948, the average period of time from the date the article XXIII:2 complaint is filed to the date of report adoption is 10 months. Again, the 1973 DISC and related tax cases were exceptions. Reports on these cases were finally adopted, subject to an "understanding," 8 years after the panel requests were filed. For cases after 1975, the average period of time between the complaint and report adoption increased to about 16 months.

Also, it has been rare for reports to be rejected outright. In 60 of the cases reviewed, formal reports of panels or working parties were issued. In only five cases the reports failed to be adopted. Prior to 1979, adoption of panel reports was customary. In recent years, this customary practice has not been as frequently observed. All of the cases in which the reports were not adopted have been filed since 1979. These cases concerned Spanish

restrictions on soybean oil imports, EC export subsidies on wheat flour, EC subsidies on canned fruit, EC subsidies on pasta, and EC tariff preferences on citrus imports from Mediterranean countries.

In spite of certain similarities, the reasons for lack of adoption vary with each case. In all five cases, the United States was the complaining party and all concerned trade in agricultural products. Four of the cases were filed against EC measures and in all of these the U.S. complaint originated out of a section 301 petition filed by private parties. Three of the cases concerned subsidy practices; two of these were handled under dispute settlement provisions of the Subsidies code. These four cases are described below. 1/

The first panel report not to be adopted concerned the 1979 U.S. case against Spanish restrictions on soybean oil imports (app. I, case 55). The U.S. complained of the Spanish restrictions in November 1979, claiming that Spain's practices were inconsistent with articles III and XVII of the General Agreement. Spain and the United States jointly requested that a panel be established in January 1980. The panel's report was discussed by the Council in November 1981, and was the subject of some controversy, as both the United States and a number of other countries indicated that they had reservations about some of the panel's findings or interpretations of several General Agreement provisions. In its report, the panel found that the U.S. claims were valid only in part. 2/ Although Spain urged that the panel's report be adopted, the Council, at the suggestion of the U.S. and other delegations, merely took note of the report. 3/

Similarly, signatories to the Subsidies code were dissatisfied with panel conclusions in the wheat flour case (app. I, case 65). In commenting on the failure of report adoption in this case, the General Counsel of the Office of the United States Trade Representative noted that the wheat flour panel report "left no country happy, since it found as a factual matter that the EC had used export subsidies to become overwhelmingly the world's largest exporter, but as a legal matter the panel reached no conclusion on the central issue. There was no significant support for adoption of that report." 4/ In this case, the panel stated it was unable to determine whether the evidence indicated that the EC had obtained a "more than equitable share" of world markets or engaged in "price undercutting" in wheat flour through the use of the subsidies. 5/

1/ Although reports that are not adopted do not become public documents, many details of the reports and their main conclusions could be determined from other official statements and press accounts on the disputes.

2/ The Council "took note of" the panel report on Nov. 3, 1981. The panel concluded that the restrictions were not inconsistent with the two articles of the General Agreement in question. The panel did decide, however, that nullification or impairment of U.S. benefits could have occurred.

3/ GATT Activities in 1979, at 58 (1980); GATT Activities in 1981, at 48-49 (1982).

4/ Letter of comments from the Office of the United States Trade Representative in Current Issues in U.S. Participation in the Multilateral Trading System, U.S. General Accounting Office, Pub. No. GAO/NSAID-85-118, at 101 (1985).

5/ "More than equitable share" is a concept contained in the General Agreement (art. XVI:3) and the Subsidies code (art. 10:2b) and "price undercutting" is a term used in the code (art. 10:3) to distinquish the harmful effects of an otherwise allowable subsidy.

In the cases on soybean oil imports and wheat flour, a number of the contracting parties, including the complaining party, were dissatisfied with the conclusions of the panel. In these two cases, the Contracting Parties rejected reports whose interpretations and conclusions were viewed by several members to be faulty or inadequate.

In April 1982, the United States requested a panel, under Subsidies code provisions, to examine EC pasta subsidies (app. I, case 68). 1/ A majority of the panel ruled in favor of the U. S. position. The report, however, has not been adopted by the Subsidies code committee due to continuing EC opposition. The USTR General Counsel said the pasta report "was blocked by the EC and certain other countries because they could not accept the panel report's clear legal conclusions regarding practices they had maintained for an extended period." 2/ In this case, however, adoption was also complicated by the fact that the findings of the panel were not unanimous. This is the only instance of a panel case in which the report included the dissenting view of a panelist.

In the cases on canned fruit and citrus preferences (app. I, cases 66 and 69), the EC has blocked report adoption due to fundamental disagreement with the interpretations offered by the panel. In March 1982, pursuant to a section 301 petition, the United States filed an article XXIII:2 complaint that subsidies granted by the EC for the production of canned peaches, canned pears and raisins nullified and impaired U.S. GATT benefits. 3/ The United States requested that a panel be established in March 1982; one was established in June 1982, after further consultations between the United States and EC. The panel report, first submitted to the Council in March 1985, found that U.S. benefits with respect to canned peaches, canned pears, and canned fruit mixtures had been nullified or impaired, but was unable to find that the EC system would cause additional market disruption with respect to raisins. Due to EC reluctance, the Council has not yet adopted the report. The EC disagreed with the panel findings, arguing that they set an unacceptable precedent by implying that any subsidy could be considered to impair the value of a tariff concession. 4/

1/ A sec. 301 petition filed in 1981 by the National Pasta Association argued that the subsidies violated provisions of the General Agreement and of the Subsidies code by use of export subsidies on a nonprimary product that displaced American produced pasta in its home market (46 Fed. Reg. 59675).

2/ Letter of comments from the Office of the United States Trade Representative in Current Issues in U.S. Participation in the Multilateral Trading System, supra, at 101.

3/ In October 1981, the California Cling Peach Advisory Board filed a section 301 petition on EC production subsidies on canned peaches, canned pears, and raisin alleging that the production subsidies violated art. XVI, and displaced such non-EC produced products from the EC market (46 Fed. Reg. 61358).

4/ GATT Activities in 1982, at 54 (1983); GATT Activities in 1984, at 39-40 (1985); 3 Inside U.S. Trade, No. 46 (Nov. 15, 1985).

In June 1982, the United States complained that certain EC tariff preferences granted on imports of citrus products from certain Mediterranean countries were inconsistent with EC most-favored-nation obligations under article I of the General Agreement. The Council agreed to establish a panel in November 1982, and one was established in May 1983. The panel report, first considered by the Council in March 1985, found that the EC practices impaired U.S. benefits under article I of the General Agreement and suggested, as a solution, that the EC consider reducing its tariffs on fresh oranges and otherwise consider limiting the adverse effect on U.S. exports of fresh oranges and lemons. The United States supported the adoption of the report, even though the recommendations of the panel were limited to fresh oranges and lemons. The EC took issue with the panel's findings on several legal grounds and the report has not yet been adopted. As noted in chapter I, the United States unilaterally retaliated by raising its tariffs on pasta imports and the EC has taken a counter action on imports of U.S. lemons and walnuts. 1/

Followup and implementation

Once the Contracting Parties or a code committee approve a panel report containing a finding of violation, or nullification or impairment, the final step is to induce the offending party to change or amend its practices to conform to the rules. The offending contracting party can respond in a variety of ways and over varying lengths of time. For example, the disputed practice may be terminated or adjusted, certain of the disputed measures may be eliminated, or some other settlement or remedy may be agreed upon by the disputing parties.

Table 4 presents the information compiled on the outcome of the cases examined. Overall, implementation action was taken to resolve the dispute in 72 percent of completed cases. This figure was about 83 percent for the period from 1948 to 1974, but dropped to about 57 percent in the 1975 to 1985 period. Dispute settlement has resulted in the termination of a disputed practice in over 33 percent of the 75 cases shown in table 4 (a figure which excludes the nine cases noted as pending in table 4). 2/ Some partial elimination, change of measure, or other settlement was obtained in another 38 percent of the cases. No action was taken to implement recommendations adopted by the Contracting Parties in only 7 of the 75 completed cases.

1/ GATT Activities in 1982, at 54-55 (1983); GATT Activities in 1983, at 42-43 (1984); GATT Activities in 1984, at 36-38 (1985); USTR Section 301 Table of Cases; 3 Inside U.S. Trade, No. 46 (Nov. 15, 1985). On June 20, the United States anounced that as retaliation it would double tariffs on imports of pasta from the EC. The EC then proposed counter-retaliation--a doubling of tariffs on imports of walnuts and lemons from the United States. Both actions were suspended pending further bilateral negotiations. On Nov. 1, 1985, the United States and the EC increased the duties since no settlement had been obtained.

2/ In some of the cases, disputed measures have been eliminated even before the dispute settlement process was complete. In others, action was not taken for many years. The elimination or alteration of a country's practices was not always a direct result of dispute settlement; at times, measures were changed or eliminated for domestic reasons.

Table 4.--Summary of outcome of dispute settlement cases, 1948 to Sept. 1, 1985 1/

Outcome	Overall, 1948-Sept. 1, 1985		1948 to 1974		1975 to Sept. 1, 1985	
	Number	Percent of total	Number	Percent of total	Number	Percent of total
Complaint not supported 2/	4	5.3	2	4.8	2	6.1
Implementation action taken: 4/						
Disputed practice terminated	25	33.3	19	45.2	6	18.2
Other action:						
Some practices terminated	6	8.0	3	7.1	3	9.1
Disputed practice adjusted	9	12.0	6	14.3	3	9.1
Other settlement	14	18.7	7	16.7	7	21.2
Subtotal	54	72.0	35	83.3	19	57.6
No implementation action taken:						
Decision not to adopt report 3/	1	1.3	0	-	1	3.0
Report adopted: 3/						
No action taken 4/	5	6.7	0	-	5	15.2
Retaliation authorized 3/	1	1.3	1	2.4	0	-
Subtotal	7	9.3	1	2.4	6	18.2
Complaint not pursued 5/	8	10.7	3	7.1	5	15.2
Outcome unknown	2	2.7	1	2.4	1	3.0
Total cases	75	100.0	42	100.0	33	100.0
Pending cases: 6/						
Report submitted, adoption pending	4	-	0	-	4	-
Report not yet submitted	5	-	0	-	5	-

1/ For listing of cases included in each category, see app. I.

2/ Contracting Parties determined that the allegations of the complainant were not supported by the evidence submitted.

3/ By the Contracting Parties or NTM code signatories.

4/ By the offending party following either adoption of a report and recommendations or resolution through bilateral settlement.

5/ By the complaining party after having requested a panel.

6/ Cases for which stages of the GATT process is still active, including the two subcategories, (1) adoption of the report submitted by the panel has not been formally rejected but is still outstanding, and (2) the panel has not yet submitted its report to the Contracting parties or NTM code signatories.

When cases filed since 1975 are examined separately, several trends are evident. As shown in table 4, a decrease in the frequency of termination of the disputed practice contributed to an overall decrease in implementation action taken after 1975. Taken together, other forms of implementation (some practices terminated, practices adjusted, and other settlement) remained at comparable levels. Thus, the overall decline in implementation action since 1975 reflected an increase in the cases in which no action was taken on adopted reports as well as an increase in cases in which the party did not pursue its complaint.

Complaint not supported.--As noted in table 4, findings of no violation or impairment have been made four times in the cases reviewed. 1/ The two most recent cases of this kind are an EC complaint about U.S. duties on vitamin B-12 and a Canadian complaint about a U.S. exclusion order on spring assemblies (app. I, cases 62 and 64). 2/ The EC complained in June 1981 that the practice of the United States in imposing a higher duty on imports of vitamin B-12 of feedgrade quality than on imports of vitamin B-12 of pharmaceutical grade violated a concession negotiated in the Tokyo round. The panel found that the United States had not infringed its GATT committments but suggested that the United States accelerate the Tokyo round concessions on feedgrade Vitamin B-12 so that the EC could regain its normal competitive position in the U.S. market. Because the panel found no violation or impairment, the United States declined to accelerate concessions unilaterally. The United States did, however, express a willingness to enter into consultations with the EC on the subject. The EC indicated in March 1983 that it wished to exercise its rights under article XXVIII:3(a) and increase duties on imports of acetic acid to compensate for its injury by the U.S. practice. The United States denied that the EC had any rights in this matter under article XXVIII and urged the EC to reflect further before proceeding in this manner. 3/

The Canadian complaint against the United States concerned the exclusion by the United States of imports of certain Canadian automotive spring assemblies pursuant to an order by the U.S. International Trade Commission under section 337 of the Tariff Act of 1930. The exclusion order was alleged to be inconsistent with articles II, III, XI and XX of the General Agreement. The panel found that the exclusion fell under the exemption from GATT obligations provided by article XX(d) for measures designed to protect patents. The panel thus did not reach conclusions on the allegations of inconsistency with articles II, III or XI. The report of the panel was adopted on May 26, 1983, but the Council noted that its adoption of the report

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1/ Cases in which the panel found no formal rule violation but nevertheless did find nullification or impairment of benefits is another matter. In such cases, the Contracting Parties usually recommend that some action be taken to restore the benefits impaired.

2/ The two early cases both consisted of complaints filed by Czechoslovakia against U.S. actions: one in 1949 on U.S. national security export restrictions (app. I, case 3) and one in 1950 on U.S. application of art. XIX (app. I, case 5).

3/ BISD, 29th Supp., at 110 (1983); GATT Activities in 1982, at 59 (1983); GATT Activities in 1983, at 48-49 (1984).

did not foreclose future examination of the use of section 337 to deal with patent infringement cases and the consistency of that use with articles III and XX of the General Agreement. 1/

Implementation action taken.--If a ruling of violation of a GATT provision, or nullification or impairment of benefits is adopted by the Contracting parties, or a bilateral settlement is reached, the disputed practice may be terminated or adjusted, certain of the disputed measures may be eliminated, or some other form of implementation action may be agreed upon to the mutual satisfaction of the disputing parties (see table 4, footnote 4). As shown in table 4, the record on compliance with findings and recommendations as a result of dispute settlement is varied. GATT resolution has resulted in the termination of a disputed practice in over 30 percent of the 79 completed cases reviewed. Some partial elimination, change of measure, or other settlement was obtained in another 29 percent of the cases. In some of the cases, disputed measures have been eliminated even before the dispute settlement process was complete. In others, action was not taken for many years. The elimination or alteration of a country's practices, however, were not always a direct result of dispute settlement; at times, measures were changed or eliminated for domestic reasons. No action on implementation of recommendations of Contracting Parties occurred in only 6 of the 75 cases not listed as pending on table 4. 2/

The record on timeliness of implementation in cases that have been resolved, either through adoption of recommendations or bilateral settlement, shows a pattern where implementation has been fairly prompt in the majority of cases. The average time that has elapsed between the date of the article XXIII(2) complaint and the date of implementation of panel recommendations was about 2 years. Implementation action took more than 2 years in 10 of the cases for which dates were available. Among the most notable examples of cases requiring lengthy implementation periods are the 1973 tax cases discussed in chapter I.

No implementation action.--In six cases, panel recommendations have been adopted but no action has been taken to adjust or eliminate the disputed practice (see table 4). The circumstances of and reasons for nonimplementation vary with each case. In three of these cases (two cases on the European sugar regime filed by Australia and Brazil and a case on the U.S. reduction in Nicaragua's sugar quota), the contracting party concerned has informed the GATT of the reasons for its inaction. In two of these cases (one on the U.S. Manufacturing Clause and one concerning the EC value-added tax system), implementation action is pending.

In only one case, the Netherlands complaint on U.S. dairy quotas discussed in chapter I, was retaliation requested and authorized by the Contracting Parties. GATT officials interviewed noted that the infrequency of such action is not due to any rejection by the Contracting Parties of requests for retaliation but to the fact that the complaining parties have not opted to request authorization to retaliate.

1/ BISD, 30th Supp., at 107 (1984); GATT Activities in 1983, at 44-45 (1984).

2/ Either the United States or the EC are a party to all of the disputes that remain unresolved due to lack of report adoption or lack of implementation action.

The two disputes brought by Australia and Brazil concerning the EC sugar regime demonstrate the type of impasse that can develop in attempting to implement a panel's finding that addresses an entrenched domestic policy. Australia filed a complaint in September 1978 and Brazil filed a complaint in November 1978 alleging that the EC sugar export subsidies contravened article XVI of the General Agreement (app. I, cases 50 and 51). Separate panels were established in November 1978. The panel in the Australian case reported that the EC practice constituted a threat of prejudice in terms of article XVI:1 of the General Agreement. The report was adopted by the Council in November 1979. Australia raised the question of EC compliance with the panel report at several meetings of the Council in 1980, and the Council decided in its November 1980 meeting to create a working party to discuss the possibility of the EC limiting its sugar export subsidies. 1/

The panel in the Brazilian dispute reported that serious prejudice and threat of serious prejudice existed to Brazilian interests in terms of article XVI:1 of the General Agreement as a result of the EC sugar export subsidy practices. This report was adopted by the Council in November 1980, at which time the working party mentioned above was created to discuss with the EC the possibility of limiting its sugar export subsidies. 2/

In a report to the Council adopted in March 1981, the working party reported that the EC had adopted a new system for sugar export refunds that the EC claimed was a sufficient response to the complaints and that fulfilled its obligations under the GATT. Australia and Brazil disagreed and maintained their complaints. A new working party was established to review the situation and to report to the Council by March 1982. The working party reported to the Council that the EC believed that the discussions of the working group should not be limited to a discussion of the sugar export policy of the EC, but should also include discussions of the sugar export policies of other countries. Despite the opinion of the chairman of the working party that the proper focus of the review to be conducted by the working party was the situation that had arisen as a consequence of the complaints by Australia and Brazil, the EC refused to agree to this interpretation. Australia and Brazil stated that the proper work of the working party was the analysis of the EC program and a more general discussion of other countries' sugar export policies should be made in other fora. In light of the impasse, the Council decided to terminate these matters. The European sugar regime has continued to be the subject of complaints by GATT members. No resolution has been obtained in these cases as of this writing. 3/

1/ BISD, 26th Supp., at 290 (1980); GATT Activities in 1978, at 93-94 (1979); GATT Activities in 1979, at 71-75 (1980); GATT Activities in 1980, at 45-47 (1981).

2/ GATT Activities in 1980, at 47-49 (1981).

3/ BISD, 28th Supp., at 80 (1982); BISD, 29th Supp., at 82 (1983); GATT Activities in 1981, at 45-46 (1982); GATT Activities in 1982, at 56, 67 (1983). A new complaint was filed by Australia, Brazil and other countries in April 1982 claiming that the EC sugar regime caused and threatened to cause serious prejudice to the complainants' interests under art. XVI and nullified and impaired the complaining parties' rights under art. XXIII. The complaint has not been pursued. The United States has also filed a complaint under the Subsidies code with respect to EC subsidies on exports of sugar and the Subsidies code committee attempted to conciliate the matter in 1982 and 1983. See BISD, 30th Supp., at 42 (1984); BISD, 29th Supp., at 46 (1983); GATT Activities in 1982, at 30 (1983).

A case reflecting the role that political considerations play in a decision on whether to implement the recommendations of an adopted panel report is the complaint brought by Nicaragua concerning changes in its share of the U.S. import sugar quota (app. I, case 77). After the United States notified the Council in May 1983 that Nicaragua's share of the U.S. sugar import quota would be reduced, Nicaragua complained that these U.S. measures were inconsistent with the provisions of articles II, XI, and XIII of the General Agreement, as well as with part IV of the General Agreement, which provides for more favorable treatment of developing countries. At Nicaragua's request, a panel was established in October 1983. Its report, adopted by the Council in March 1984, found the U.S. measures to be inconsistent with articles XI and XIII and recommended withdrawal of the U.S. measures. Nicaragua informed the Council in May and November 1984 that the United States had extended its measures with respect to Nicaragua's share of the U.S. import sugar quota for 1984-85, notwithstanding the panel's finding that these measures were not consistent with the General Agreement. The United States maintained that the matter was related to the broader political dispute between the United States and Nicaragua, and resolution of the sugar quota issues would have to await a settlement of that broader dispute. The United States recognized that Nicaragua had certain rights under article XXIII of the General Agreement to retaliate against the U.S. measures, but Nicaragua responded that such retaliation would be contrary to the spirit of the GATT and to its own interests. 1/

In the Manufacturing Clause case, implementation of the recommendations of the Contracting Parties is outstanding due to domestic legislative concerns and awaits the upcoming expiration of the law. In September 1982, the EC complained that the U.S. Manufacturing Clause, which generally prohibits the importation or distribution of a nondramatic English language literary work that has not been manufactured in the United States or Canada, was inconsistent with articles XI and XIII of the General Agreement. 2/ A panel found that the Manufacturing Clause was inconsistent with article XI. When the report was adopted by the Council in May 1984, the United States indicated it would make every effort to bring its practice into compliance. 3/ The legislation is due to expire on July 1, 1986.

Internal political processes are also a factor in implementation problems on the value added tax case of the Government Procurement code. Due to continuing negotiations within the EC Commission, the EC has yet to take action to implement the recommendations of the code committee. When the panel report was adopted by the Committee in May 1984, the EC Commission informed the Committee that it was seeking a negotiating mandate from the EC Council of Ministers that would allow it to find a means of implementing the panel recommendations. 4/

1/ GATT Activities in 1983, at 46-47 (1984); GATT Activities in 1984, at 39 (1985).

2/ The regulation was due to expire on July 1, 1982. A day before expiration, both Houses of Congress passed legislation extending the measure for 4 years. Two weeks later, after being vetoed by the President, the extenstion went into effect due to a Congressional override of the veto.

3/ GATT Activities in 1983, at 45-46 (1984).

4/ GATT Activities in 1984, at 24 (1985).

CHAPTER III

VIEWS ON THE PURPOSE AND FUNCTION OF THE DISPUTE SETTLEMENT PROCESS AND PROPOSALS FOR CHANGES

Purpose and Function

Background

Each country's positions and philosophies on the GATT and on its dispute settlement processes are of critical importance in evaluating the success of the agreement. Thus, the extent to which the GATT is perceived as creating a normative or legal structure, operating in a manner similar to national legal systems, versus a diplomatic framework, setting basic yet flexible guidelines for negotiations, is key to an examination and evolution of the dispute settlement mechanisms. A vast range of positions exist on this fundamental issue; and suggestions for changes in current dispute settlement procedures, or reactions to such suggestions, are often dictated by a country's broader view of the nature of the GATT.

The fact that procedures for the resolution of disputes under the General Agreement have evolved to a large extent without prior formal structuring by the members has been described by many GATT participants as furthering the parties' desire for flexibility and pragmatism in regulating international trade. However, it has resulted in problems in handling the unique and complex issues presented by the members, and in an increase in non-GATT measures intended to address some of them. Efforts to resolve individual disputes may be affected or rendered futile by broader issues of negotiating, bargaining, and policymaking, or by domestic or international economic and political circumstances.

Views on problems in the process

To respond to the Senate Finance Committee request that the Commission examine the strengths and weaknesses in settlement mechanisms perceived by major participants, report their views on the purpose and operation of these mechanisms, and ascertain the views of interested parties on various proposals for improving the mechanisms, Commission staff conducted interviews with more than 30 officials and experts on GATT affairs on the purpose and operation of these mechanisms and on various proposals for improvement. Those interviewed included staff of the GATT Secretariat, representatives to the GATT of both major trading partners and smaller countries, 1/ staff of the Office of the United States Trade Representative, former panelists, and other government officials with experience with GATT dispute settlement. Most of these

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1/ Throughout this chapter, the terms "small" and "large" are used to describe countries in terms of their amount of overall trade volume in 1984.

interviews were conducted with the understanding that opinions would not be attributed by name; also, members of the Secretariat talked with Commission staff on a personal basis rather than in an official capacity.

These interviews focused on general issues concerning the dispute settlement mechanisms and, to some extent, the overall functioning of the GATT. The progress or outcome of pending and prior cases at the GATT was not the subject of these discussions except insofar as they exemplified procedural advantages or problems. Also, the facts and issues of such complaints were not reexamined, including the specific policies and actions of the governments involved in the disputes. Instead, those interviewed were asked to express opinions on the need for and type of changes in the dispute settlement process and to comment on the problems cited by academic observers (especially Robert Hudec and John Jackson), and GATT participants.

Views on the GATT in general.--Those interviewed expressed both general opinions on GATT issues and specific views on changes in the dispute settlement process. None of those interviewed expressed a desire to abolish the GATT; while a few spoke of prospects for a fundamental rewriting of all or part of the GATT to modernize and improve it, all seemed to view the GATT as the only available means of ordering world trade. This attitude was demonstrated even by representatives of small and/or developing countries, which often see themselves as lacking the power to bring about their own goals. Viewed as being pragmatic and flexible, GATT was frequently compared favorably with other international organizations, which were described as politicized and often inefficient, and as burdened by overly large bureaucracies.

Almost all the persons interviewed agreed with academic commentators that a basic divergence of philosophy exists among the contracting parties in regard to the GATT and thus to dispute settlement under it. Two basic approaches predominate, though countries on both "sides" are seen as departing from usual philosophical positions as circumstances dictate. The first perspective is essentially legalistic. The United States, along with Canada, New Zealand, Hong Kong, Australia, and a number of other members, is seen to view the General Agreement and other rules and agreements concluded under its auspices as creating binding obligations; equally binding adjudicative findings should be expected of the panels and other bodies which in the course of their work apply and interpret the substantive language of the instruments.

Under the second approach, by contrast, the EC and many others (including Japan) appear to shun such a legalistic view, seeing it as impinging on national sovereignty; they favor a more flexible approach dependent upon negotiations and consensus. This approach seems to rest on the view that the members retain both their legal sovereignty and policymaking authority undiminished in spite of the obligations of the GATT, which provides broad guidelines within which negotiations set the course of trade relations. Thus, to the EC, diplomacy rather than adjudication is argued to have been the intended GATT philosophy, and third-party adjudication was not conceived of as requiring policy changes. This outlook deemphasizes the General Agreement as a legal binding instrument.

In addition to this basic conflict of views on the nature of the GATT, almost all the interviewees cited GATT's principal problem as the growing lack of cooperation among the members to set common goals and to comply with the rules. This general unwillingness to cooperate is said to be evidenced by the

number of difficulties during the rounds of multilateral negotiations (particularly demonstrated by failures to achieve rules on agriculture and subsidies) and in the frequent abuse of the rules of the General Agreement and the blocking or nonimplementation of findings in disputes. According to these interviewees, the "problem of political will" has become more apparent as economic circumstances have changed and the positions of many countries have deteriorated. It has also been exacerbated, in the view of several participants in GATT activities, by unduly high expectations, on the part of some countries of the GATT and the Tokyo round agreements, in terms of resolving conflicts. Most of the persons interviewed believed that the EC and, to a lesser extent, the United States are chiefly responsible for the present situation.

Another aspect of the GATT that was sometimes cited as a benefit, and sometimes as a detriment, is its strong reliance on consensus in decisionmaking; in the view of many of those questioned, the consensus approach is not always in accord with U.S. interests. Some observers, both country representatives and private parties, said that the avoidance of voting strengthens GATT and prevents much politicization while at the same time preserving national sovereignty. Others criticized the insistence on consensus specifically in dispute settlement, noting that it impedes the completion of panel work, often results in blockage of panel findings at the Council, and permits the disputants (especially the "loser") to be judges in their own cause.

Many of those interviewed, particularly officials of smaller member countries, specified that problems with the dispute settlement mechanisms were less significant than problems with substantive provisions of the GATT. One such provision often cited in this regard was article XXIV, "Territorial Application--Frontier Traffic--Customs Unions and Free-Trade Areas." Under this article, actions or practices that operate only among a limited group of countries (that is, on a basis of less than GATT's full membership), and that as a result are not conducted on an unconditional MFN basis, are permitted. Based on this article, customs unions such as the EC free-trade areas (including the European Free Trade Association) are permitted to operate "separate tariffs or other regulations of commerce" (art. XXIV:2) than are applicable to other GATT contracting parties or third countries--in essence constituting advantages not conferred on an MFN basis. Thus, for example, the EC maintains its Common External Tariff applicable to products of nonmembers of the customs union, while products of members are traded free of duties within the union. Some country officials argue that only those measures that do not cause disadvantage to or dislocations in outside countries are permissible. 1/ A major problem cited has been that at the time a customs union or free-trade area is approved, it is impossible to predict future circumstances and shifting trade patterns. As a result, for example, the Common Agricultural Policy (CAP) 2/ of the European Community was not

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1/ U.N. Doc. EPCT/C.II/38, at 8 (1946).

2/ The EC's CAP is a system of support of farmers' income through common floor prices, financial aid, and a system of community preference using variable import levies to protect the EC farm market from low-priced agricultural imports from nonmembers. The goals of the CAP are to manage free internal trade in agriculture, stabilize internal markets, and increase farm production. All EC members are bound to the CAP and its rules and regulations, and all must share in its costs.

predicted at the time of its institution by the EC to have such a far-reaching scope and impact. Once in place, these measures are hard to deal with, given the vagueness of article XXIV.

Problems for smaller member countries.--Even optimistic observers of the GATT felt that smaller and developing countries have significant problems with the General Agreement and the dispute resolution process. Such countries may lack the experienced personnel needed to handle GATT affairs or conduct disputes, and the cost of bringing a case is high. Smaller and developing countries, more so than large members, may suffer from the long time period often needed to obtain resolution of disputes, since a harmful practice can be continued during consultations or panel work and the more fragile trade interests of the smaller member can be damaged or destroyed. Even a favorable panel report is then generally viewed as affording little benefit. The smaller countries may fear that a claim against a larger member could result in reduction of their benefits under the Generalized System of Preferences (GSP) 1/ or in other retaliatory measures; they also fear that the larger country could more effectively obstruct panel proceedings or block eventual findings relative to a small country.

More important, however, was the frequently expressed view that such small countries avoid the dispute settlement process because they cannot effectively retaliate if the larger "loser" refuses to comply with the outcome. In addition to their lack of "political clout," the diversity of the major countries' economies and large number of trading partners, contrasted with the narrower (in terms of types of products), less stable economies of smaller countries, was asserted as the basis for this lack of power to retaliate. One interviewee stated that the only action of consequence a smaller "winner" could take is to stop debt repayment. Instead, smaller countries may be forced to agree to voluntary export restraints or other non-GATT measures sought by larger members. Small countries are also impeded, according to some respondents, by philosophical divisions among themselves; "hard-line" countries may not share all the interests of more moderate ones and may be more willing to take on larger members. Finally, small and developing countries are often vulnerable because of their own protectionist measures, which may also forestall their initiation of complaints against others.

Nevertheless, these countries seem to view the GATT as the only available and more or less neutral forum for regulating the conduct of the large developed members. Such countries are aware of their own limited ability to affect the large countries' actions absent a structure that acknowledges small countries' rights on an equal footing with those of large countries. Because of the modest number of GATT obligations undertaken by many developing countries, and because their economies and trade patterns may be unstable,

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1/ The GSP is a program of nonreciprocal tariff preferences to developing countries. The United States and 19 other developed countries established GSP programs in the 1970's under a waiver of GATT MFN obligations granted in 1971 and made permanent by one of the Framework Agreements in 1979. The U.S. GSP, enacted in title V of the Trade Act of 1974 and renewed in the Trade and Tariff Act of 1984, applies to merchandise imported before July 4, 1993. It provides duty-free entry to eligible articles imported directly from designated beneficiary developing countries.

they often seem to view the GATT from a philosophical position lying between those of the United States and EC, depending on the circumstances of a particular issue. Their expectations of the GATT and the dispute settlement process are equally modest, in light of their perceived inability to retaliate against larger or more developed countries.

Perceived problems.--To permit consideration of the many proposals for altering the dispute settlement process, it is useful to enumerate some of the often-cited deficiencies in the system. They are not listed here in a particular order of priority.

(1) General complaints:

(a) There are many vague, possibly inconsistent or overlapping provisions in the GATT, and many crucial terms are not defined.

(b) There is no single dispute settlement procedure in the GATT, and different phases, such as consultation and panel proceedings, may go on simultaneously. Cases may end at any point based on withdrawal of the complaint or a negotiated solution, and the outcome of consultations between the disputants generally is not made available to the other contracting parties.

(c) Many disputes present issues resolved by the grant of waivers from the Contracting Parties for specific actions (with no change in practice) or by outside actions creating new "norms." This practice means that deviations from GATT rules are in essence "legalized."

(d) Governments have generally declined to invoke some procedures, such as those of article XXIII(2), the process resulting in a vote by the Contracting Parties to authorize retaliation by the "winner."

(e) Small countries, even if authorized by the Contracting Parties to retaliate against large countries, may achieve minimal effective results; smaller countries also face technical difficulties in comprehending and using the settlement mechanisms and fear retraction of trade preferences by larger countries.

(2) Procedural problems:

(a) The use of GATT panels, while seen by many as a useful though not formally authorized device, has not been sufficiently developed. The resolution process is often lengthy, and governments may use delaying tactics to postpone or even avoid any opinion on the issues. On the other hand, in a different sort of "abuse of process," a country may even seek out an adverse finding, using the process to lessen domestic pressures.

(b) Bringing a case and reopening a complaint are inadequately provided for in a legal sense. The General Agreement does not provide for the automatic establishment of a panel.

(c) Obtaining qualified and independent panelists and developing terms of reference for their work can be difficult and time consuming, and they are often asked to deal with issues that cannot be satisfactorily resolved because of the lack of underlying GATT "law" or the political positions of the disputants.

(d) Inadequate staff (supporting panel research) and funding impede the operation of the mechanisms and the ascertainment of facts in relation to trade policies and disputes.

(e) Because of the continued insistence of the members on consensus, the "loser" is among the judges in a case.

(f) GATT procedures are difficult to amend, potentially endangering its ability to function in light of changed circumstances; this has been said to detract from its efficacy as a body of legal rules and to foster informal approaches to resolution and growing use of non-GATT measures.

(3) Substantive problems:

(a) The concepts of "prima facie nullification and impairment" and "nonviolation nullification and impairment" may have complicated the work of panels; where the prospective harm is future or potential in nature or the "breach" is a minor or technical one, it may be difficult to obtain a change in the offending practice. The idea of "damage" to a member country's "expectations" is difficult to assess, and equity or policy and political concerns may prevail over legal rules.

(b) The legal or precedent-setting effect of findings is hard to identify, so that panels and members may be compelled to deal repeatedly with issues arguably resolved in prior cases. Detailed reports on all aspects of disputes have not always been published, with general "understandings" lacking useful interpretive language often the only documents issued.

(c) Enforcement and sanctions are almost nonexistent (with the exception of bilateral retaliation). Actions by members may be hard to undo, and governments may choose to ignore or obstruct panel or Contracting Parties decisions; implementation cannot adequately be overseen. No back damages are available, and the burden of obtaining oversight or followup generally rests on the "winner."

(d) There is no notification requirement in regard to implementation of finding.

(e) The separate dispute settlement mechanisms of the NTM codes are viewed as increasingly ineffective; the codes are said to complicate the legal structure for dispute resolution. Export subsidies have become a particularly difficult area; control over them by GATT and the Subsidies code has been limited and may threaten other aspects of the GATT system.

(f) Political conflicts have resulted in economic actions that can not easily be dealt with at the GATT, especially where domestic political forces and policies have become entrenched.

(g) The escape clause (art. XIX) has frequently been used--and in some instances is said to have been abused--to justify restrictive actions, such as quotas (despite the general disapproval of quantitative restrictions in art. XI). It is often asserted that compliance with the terms of the article is difficult if not impossible, reducing the effectiveness of and confidence in the system.

(h) Problems in the agricultural sector have increased, and agricultural disputes have tended not to be resolved efficiently. In part, this is argued to have resulted from disagreement on the application of article XVI of the GATT and article 10 of the Subsidies code concerning export subsidies on agricultural products.

Views of Participants on Proposed Changes

Proposals for change

Due to the long list of perceived problems, changes in the dispute settlement procedures have often been suggested. However, a number of persons interviewed did not believe that such "tinkering" would help deal with serious underlying difficulties, especially the attitudes of the members and the desire recently to use GATT to justify protectionist measures rather than to expand free trade. In spite of these concerns, views on procedural changes suggested before, during, and since the Tokyo round by many Geneva-based and U.S. legal experts were solicited by the Commission staff. Among the proposals are the following:

(1) Panels should be strengthened, in terms of formalizing their procedures and authority, and deadlines imposed for their establishment and operation; panels should generally be automatically used under the GATT.

(2) Panels should be composed of third-party experts chosen from a permanent roster. As an alternative, a standing panel could be constituted.

(3) Panels should always write detailed decisions and provide rationales for their findings, with an effort made to interpret narrowly and precisely to develop a body of law relying on precedent. Violations of GATT rules should be clearly specified.

(4) An opportunity for early intervention by the GATT Director-General in disputes should be provided. The Director-General should be able to make procedural decisions (such as on panel composition and terms of reference) where parties disagree.

(5) Panel reports should be more effectively implemented, with regular review, by the Council, of progress toward implementation; the Contracting Parties should act firmly and clearly by formally supporting, rejecting, or altering the panel opinions. Reports and findings should be published, and the "loser" should report regularly on its progress toward compliance.

(6) Procedures for omitting the consultation-conciliation phase under article XXIII:1 and under the Subsidies code procedure (the course of which is often dictated by the relative power positions of the disputants), at one or more disputant's option, should be adopted, enabling a speedy legal adjudication of issues.

(7) The Secretariat's size, and its role in dispute resolution and subsequent monitoring, should be expanded; it should be able to assist panels in factfinding activities and to help on procedural problems. Some interested commentators have recommended that the Secretariat be asked to issue advisory opinions on legal matters, especially the interpretation of specific GATT language.

(8) Political pressures should be minimized to the extent possible, along with factors relating to the relative economic power of the disputants. Sanctions should as a rule be avoided in the effort to obtain compliance. Special attention to the role and involvement of developing countries is needed.

(9) One commentator has suggested that a separate international instrument on dispute settlement be adopted. 1/ A list of rules to be within the purview of the revised settlement mechanisms should be compiled; members not accepting the changes, and rules not suitable for adjudication, would continue under existing procedures.

(10) Mechanisms of the GATT and the NTM codes should be unified; specialized surveillance bodies could undertake monitoring for purposes of obligations under the GATT and the codes. In particular, it has been suggested that a surveillance body be created to oversee the agricultural sector.

(11) A new round of multilateral trade negotiations should address issues relating to dispute settlement, but also address issues such as agriculture and export subsidies that have presented serious problems in dispute resolution.

(12) A new world trade organization with arbitral and/or adjudicatory bodies having authority to decide matters arising under specified rules should be established.

1/ Jackson, Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT, 13 J. World Trade L. 13-21 (1979).

Views of participants on specific stages of the process

The Commission staff's discussions of these issues and proposals with country representatives and interested experts produced a variety of information and opinions. Some of these were predictable based on previous public statements; many others reflected considerable personal thought on GATT problems. With one exception, the persons interviewed were presented with a list of questions regarding dispute settlement prior to meeting with Commission staff, but they were not asked to address all of the questions.

Views on the various problems cannot easily be addressed except insofar as they relate to the stages and procedures of dispute resolution. The following consolidated opinions of the persons interviewed relate only to the procedures under the GATT, unless the NTM codes are mentioned specifically.

Early stages of the process.--In the first stage of each dispute, a claim or complaint is filed with the GATT Director-General and is assigned, based on its subject matter, to a division of the Secretariat, which is functionally organized into the following major components (apart from the Director-General and the Office of Legal Affairs):

Department A	Department B
Nontariff Measures Division	Economic Research and Analysis Unit
Development Division	Agricultural Division
Trade Policies Division	Tariff Division
Technical Co-operation Division	External Relations Division
Special Projects	Technical and Other Barriers to Trade Division

The assignment process involves a decision to determine the type of claim made by the complainant, requiring a focusing of issues; in addition, to some extent the assignment structures the type of support work to be given the panelists, based on the background and expertise of the Secretariat personnel. Many of the country delegates interviewed were critical of this system and said it contributed to "turf squabbles" among the Secretariat staff as well as problems in handling disputes, including philosophical and legal inconsistencies. They suggested that all disputes be assigned to the Office of Legal Affairs, which could call on personnel of other offices as needed. While this idea would arguably lead to greater uniformity in interpretation, others expressed the fear that such an approach would permit or encourage the Secretariat rather than the Contracting Parties to determine the merits of a case. As a practical matter, this issue is no longer especially important, since the legal staff and technical personnel currently assist the panelists by drafting portions of the reports and the panelists add policy-oriented or other paragraphs.

Panel establishment.--More detailed ideas were elicited from the persons interviewed in relation to the panels, the basic unit working on most disputes. First, many country officials and other participants interviewed were of the opinion that panels should not automatically be established, often adding that even if such a rule were proposed the member governments would

oppose it. Several reasons were offered in support of this contention: that such a rule would reduce national sovereignty; that it would damage the GATT's consensus approach; that it would be too costly compared to potential benefits; and that many disputes can be resolved more quickly and effectively by consultation. It was also stated by some delegates from smaller countries that panels are requested in some cases only to apply pressure for bilateral solution, not because the issues required panel review. In addition, it is argued that if a panel finds "nonviolation nullification and impairment," 1/ the panel's ultimate recommendation is limited to seeking a new balancing of concessions and an automatic panel may not be needed. By contrast, however, other interviewees, both government officials of large and small countries and other experts, said that by the time a case is brought to the GATT, bilateral talks have failed and positions have hardened, so an expeditious creation of a panel should be assured. In spite of this factor, these respondents tended to feel that the Contracting Parties would not adopt an automatic panel establishment rule under the General Agreement.

Related to the establishment question, the choice of the three or five individuals who will hear the case is a stage of the settlement process that seems to engender hostility and invite delaying tactics. At present, the two disputants must agree on the composition of the panel. Since many disputes involve the United States or the EC (or both), many potential panelists are excluded on the basis of nationality, predisposition, interest in the outcome, ability, or other factors, leaving a relatively small pool of possible choices. Thus, panelists are often drawn from smaller, more neutral members such as the Nordic countries or New Zealand, imposing a burden on these small Geneva delegations. In some cases, selection of the panel members can drag on for months as parties disagree or possible panelists withdraw.

Panel members.--Another major point of criticism is the ability of the panelists and their independence from governmental pressure. All those commenting on the question felt that independent panelists are essential to the process; many advocated an increased or complete reliance on non-Geneva-based experts, such as experienced trade and legal experts and retired Secretariat or government officials. A few respondents specified that the chairman of each panel might be an "outsider" while the remaining two to four should be Geneva delegates involved in GATT. Adequate provision for the costs of non-Geneva personnel would be necessary. This use of expert panelists was asserted to be an effective way to assure their competence as well, since many Geneva-based diplomats are reassigned to their capitals before they can develop much GATT expertise. Both of these questions--the competence and independence of panelists--are involved in the larger issue of the composition of panels and the possible use of a "roster of experts" or even a "standing panel."

In response to membership difficulties, and to the 1979 and 1982 documents on dispute settlement, the Director-General sought nominations for a roster of experts and obtained nominations from about one-fifth of the members. Though no formal procedures or guidelines have been adopted for the roster, it is possible that one or more persons from the roster--who are for the most part retired GATT Secretariat staff or attorneys--could be used to complete a panel where the disputants fail to agree to the persons initially

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1/ No specific provision of the General Agreement is violated, but the receipt of benefits of a trade agreement concession is impeded.

suggested (who apparently would continue to be Geneva diplomats) after a set time period. The use of such a roster was submitted by many respondents as contributing to continuity of experience and interpretation. Some interviewees, particularly those with experience in the work of panels, even suggested that the roster be the sole source of panelists and that, from the eventual list created, the Director-General be authorized to suggest five or seven potential panelists from which each disputant would strike one or two.

However, some country delegates said that such a roster may not be very helpful in alleviating problems in the formation of panels, and a few interviewees said that the roster should not consist entirely of non-Geneva experts. Some stated that consensus should be the preferred approach in the composition stage; it is asserted that other ways of reducing the tendency to delay (such as set time limits for completing work on terms of reference or the report by the panel) would be as helpful. Other persons who had been involved in the panel process said that the expertise of panelists is not a crucial problem--and thus does or should not impede composition--due to the extensive Secretariat support, thereby largely eliminating that factor in any consideration of the roster. Even with the roster, the impact on assuring the independence of the panelists remains questionable, according to some of those interviewed.

Terms of reference.--The issue of the establishment of terms of reference (abbreviated herein as "TOR") for the panels likewise promoted strong and varied opinions; the TOR effectively set the question(s) that the panel is to address and the substantive provisions to be considered, in addition to any other necessary points concerning the procedures or timeframe to be used. The TOR must be accepted by the disputants before the panel can begin its work, so their drafting can provide opportunities for delay. In some cases, "standard" TOR quoting applicable GATT articles and directing the panels to address them are sufficient, while others include more specific questions and provisions.

In addition to objecting to the delay often arising from disagreements over TOR, some small country officials and persons involved in the work of panels stated that the TOR were not very useful or necessary and that standard TOR in each case (or no TOR) would be preferable. These TOR could be given by the Chairman of the Council or the code committees. 1/ Other delegates and officials stated that no changes in TOR would be needed if expert panelists rather than government representatives were used. Many small country officials noted that most countries, especially the larger ones, oppose an extension of authority to set TOR.

In relation to TOR and the delays in establishing other aspects of dispute settlement, it was frequently observed that countries often want the process to move slowly, sometimes to delay an adverse result but often to afford the maximum opportunity for bilateral solutions. Some delegates and officials pointed out that dispute settlement under the General Agreement can occur more rapidly than domestic judicial proceedings and rarely exceeds the time required for long court cases. In addition, a few large country respondents noted that mandatory TOR, to be imposed after a specified time period for establishing agreed TOR, could force "acceptance" of TOR too early, ignoring crucial issues in a case.

1/ In the complaint filed by the EC before the Subsidies Committee in February 1985, concerning the U.S. Wine Equity Act, standard TOR were dictated for the Committee when the disputants could not agree on TOR.

Finally, it was observed by several delegates that using the TOR to attempt to compel a panel to address difficult interpretive points is not a useful strategy, since the country complained against may not want the language construed by the panel and is likely to refuse to agree to the TOR to obstruct the panel's work in other ways.

Panel consideration and reporting.--Once the panel begins its consideration of the case, according to a few country delegates, some member countries attempt to delay or to alter the course of the dispute by trying to introduce new claims or evidence--sometimes doing so after the panel has completed its report. This practice should be clearly discouraged, in the view of these respondents. They shared the viewpoint of many officials and persons involved with panels that fixed periods for actual panel work should be enunciated, with extensions (subject to approval by the Council Chairman or the chairman of the applicable code committee) permitted only in truly complex cases. The time limit for panel work in the Subsidies code, though not a binding rule and not consistently observed, is thought to be helpful in shortening the entire dispute process. 1/

Still another problem frequently cited in relation to the work of panels is the format and content of panel reports. Where the disputants reach agreement prior to the distribution of a report by the panel, the panel then submits a report saying only that an accord has been devised. There is no statement regarding the type of solution agreed to, or the violation of any GATT provisions; thus, third countries that could have a legal or trade interest in the arrangement cannot learn of its terms by way of an open report. Where no such agreement occurs, the panel may issue a report making no direct statement that rules of the General Agreement have been breached and, if any recommendation is included, make it in indirect and--in the apparent view of most country delegates interviewed--irresolute language that may not result in the termination of the practice. Thus, according to most respondents, there is frequently no finding of value as precedent, no sanction for the practice complained of, and no clear mandate for change.

All categories of interviewees often cited the potential advantages in a "consensus minus one" (the "loser") or "minus two" (both disputants), pointing to the reduced opportunity for blocking panel reports. However, it was noted by some country delegates that the change to a limited consensus would not eliminate the possibility that the excluded country could express its views through a surrogate. Also, most proponents of the change admitted it would probably never be accepted. It may be said, however, that advocates of limited consensus still see the basic principle of operating based on agreement of all the members as preserving the flexible and pragmatic philosophy of the GATT and as taking into account the realities of trade and the varieties of measures and circumstances.

1/ This opinion is not widely held by country delegates in relation to the Subsidies code's conciliation procedure, where all members of the Committee can express views on the dispute and possible outcomes. Most of the persons discussing this process favor its omission or replacement, probably in the form of private mediation by the Committee Chairman.

While a number of delegates expressed the view that consensus before the panel is in keeping with the GATT's emphasis on negotiation and consensus, in light of national sovereignty, many others, along with persons involved in the panel process, stated that the reports have been a significant weakness in the process. These respondents generally favored requiring panels to make precise findings of any provisions breached, in part for their effects as precedents and, presumably, deterrents and in part to facilitate the modification of the measure that gave rise to the dispute. Many of the same respondents also felt that, where possible, panels should not be prevented from interpreting the language of the General Agreement or the code provisions; some complex or politically sensitive matters might still need to be negotiated. They noted, however, that such reports (assuming they are not or could not be blocked at the Council) still would not now be viewed by some GATT Contracting Parties as binding. Other delegates, particularly from smaller countries, expressed concern about panelists' ability to render such detailed reports, especially under complex circumstances. Finally, only a minority of delegates saw a "transparency" problem with respect to the content of panel reports, even those stating only that agreement had been reached, given the GATT's emphasis on consensus and focus on nonadjudicative decisionmaking.

Implementation of findings.--A still more serious weakness in the dispute settlement process, according to nearly all of those interviewed, is in the area of implementation of findings and recommendations in panel reports. This issue may be examined in two parts--namely, the adoption of reports by the Council and the compliance by members with the reports. When a panel completes its report, the matter is placed on the agenda for a subsequent Council meeting to permit its consideration. If the "loser" is not satisfied with the findings, it may be able to weaken the language or block Council approval of the report--a quite recent phenomenon in GATT history. During the period of such a delay--and debate over a report can go on for months or years, with consideration during each Council meeting--the challenged practice and any resulting harm can continue, perhaps ending the "winner's" efforts to market its affected products.

Many of the delegates and persons involved with panel work said such blockage should not be permitted; however, they deemed it unlikely that the larger countries would ever accept such a rule. In addition, they did not speculate as to how such a requirement could be reconciled with the consensus approach to collective actions, and some said that panel reports should not be automatically adopted because there may be instances when nonadoption is warranted for "other" reasons. A few respondents, former panelists or other experts, suggested that disputing countries should have an option to agree to binding arbitration comparable to the process used in private commercial disputes in lieu of the usual dispute settlement procedures.

Some delegates, especially those from smaller countries, supported the use of surveillance bodies like the Textile Surveillance Body, which oversees

the Multifiber Arrangement, 1/ at least for the purpose of overseeing trade in agricultural products. The TSB is viewed by some participants as a relatively effective means of "brokering" trade in a sensitive product sector and of giving small countries greater ability to influence decisions, despite the general view that the MFA is an undesirable derogation from GATT principles. These interviewees point to the fact that, while the eight-member TSB operates by consensus, it still manages to issue short reports informing the members of the issues and violations and making pragmatic recommendations that the disputants can accept, in part due to the emphasis on narrow or technical issues. The only other procedural alternative mentioned was the "consensus minus one" approach discussed above. Other interviewees rejected any change in the present practices and said that the TSB should be abolished.

Assuming a report is adopted, obtaining its implementation can be troublesome for the "winner," who now bears a responsibility for raising the matter regularly at the Council or otherwise organizing pressure for compliance. Most of those questioned saw this aspect of dispute settlement as the most troublesome, threatening the GATT's credibility as an institution. The fact that some "losers" attempt even at that late stage to negotiate around the findings was also described by some small country delegates as a complication. Various ways of improving the record on compliance were suggested during the interviews.

First, some delegates, especially those adhering to the "legalistic" philosophy, favored adoption of a right to automatic retaliation after the panel's report is accepted when the practice complained of is not changed. Thus, the "loser" would have an incentive to comply, and the "winner" could more expeditiously act if necessary, without returning to the Council for authority to retaliate. Opponents of this change saw it as harming the consensus approach, impairing sovereignty, and creating disputes about the level of retaliation (which would still need to be notified to the GATT), and as possibly giving rise to counter-retaliation and "trade wars." In addition, it was observed that a change such as automatic retaliation should apply only in cases of violation of GATT provisions with nullification and impairment, since in nonviolation cases the panel makes only a nonbinding recommendation that a rebalancing of concessions occur through the payment of compensation.

1/ Officially known as the Arrangement Regarding International Trade in Textiles, and sanctioned under the General Agreement on Tariffs and Trade (GATT), the MFA provides a framework for the regulation of international trade in textiles and apparel of cotton, wool, and manmade fibers through bilateral agreements or unilateral action in the absence of a bilateral agreement. As of September 1985, the United States had bilateral agreements with the following MFA signatories: Bangladesh, Brazil, China, Colombia, Dominican Republic, Egypt, Haiti, Hong Kong, Hungary, India, Indonesia, Japan, the Republic of Korea, Macau, Malaysia, the Maldives, Mexico, Pakistan, Peru, the Philippines, Poland, Romania, Singapore, Sri Lanka, Thailand, Uruguay, and Yugoslavia. The United States also had bilateral restraint agreements with the following nonsignatories: Costa Rica, Mauritius, Panama, and Taiwan. The United States had unilateral restraints on imports from Barbados, Guatemala, Portugal, Spain, and Turkey. The TSB is composed of an eight-member board, with four permanent members (importers) and four rotating members (exporters).

Moreover, some delegates and officials noted that it can easily take a "loser" a considerable period of time under domestic law to enact a change in practice, even when the best intentions exist to do so. Finally, others observed that developing countries may have difficulty retaliating and that any retaliation has a trade-contracting effect.

A second option is for the Contracting Parties to take concerted action after some period of time, perhaps to permit the withdrawal by the "winner" of a concession affording to the "loser" a benefit comparable to the "cost" of the offending practice. Support for this option was in general tentative. However, no support was expressed for the idea that collective retaliation by a bloc of countries (such as major suppliers or developing nations) be permitted.

Most interviewees, both delegates and those involved in panel work, favored regular review of progress on implementing panel reports as a matter of course rather than based on the "winner's" request. A more structured way to accomplish this followup was proposed by one developed country official. First, a standard period of 1 to 2 years, perhaps with an optional grace period, would be adopted, during which the "loser" would report on its progress at least annually. By the end of the period, the "loser" would be required to have implemented the decision or to state that it could or would not do so. In the case of a statement of noncompliance, the "loser" would be required to seek a waiver for the measure and to pay compensation under normal GATT rules. The "winner" would still be empowered to choose to retaliate. After the grant of a waiver, subsequent cases on the measure would be nonviolation claims, with the end result a new balancing of concessions. In all cases, the goal of the process would be to bring cases to a close and to expand trade. This idea has not been presented at the Council as a formal proposal, and it may not be acceptable to all contracting parties.

Again, interviewees in all categories were pessimistic about the members' political will to comply; others worried that compensation might be impossible where large trade volumes exist or that it might need to continue indefinitely. Finally, most respondents called attention to a basic GATT problem--namely, that compensation need not be channeled to the same product, industry, or sector as is affected by the "loser's" measure, which may result in continued damage to the "winner's" exports. Thus, in many respects the "loser" on paper in a GATT dispute is at the same time a "winner"--especially if it chooses to continue the offending practice indefinitely.

Some U.S. Perspectives

Seven submissions from interested parties were received in response to the invitation in the Commission's public notice of this investigations for written submissions by interested parties. The submissions enumerated many of the same problems with the dispute settlement process that were cited by Geneva-based officials and in some cases presented recommendations for change. Many of the submissions came from parties with experience in dispute settlement, either as an affected industry or as an advocate for an industry. They dealt mainly with three aspects of the process: the amount of time employed in each stage and in the whole procedure; the defects in the panel process; and the implementation of results.

With regard to the first aspect, all the submissions stated in strong terms that the process takes too long, threatening not only the credibility of the GATT as an institution but also domestic industries, markets, and exports. This problem is especially critical when the individual case begins as a domestic petition under section 301 of the Trade Act of 1974, since the process of getting the 301 petition accepted and negotiating with the country concerned can be time-consuming.

The panel process -including the lack of automatic panels; difficulties in finding members and other composition problems; restrictions imposed by terms of reference; the time needed for panel work; the absence of concrete findings and proposals; problems in obtaining parties' agreement to draft reports; and procedural redundancies and gaps--was the second aspect discussed in the submissions. Support was widely expressed for a permanent panel to hear all disputes, or at least for a pool of permanent panelists, including experts to help in complex cases. In addition, the submissions were critical of the fact that panel reports often lack clear statements of the pertinent GATT violations in a case or the actions needed for their elimination.

Finally, the submissions found fault with the settlement process as having no means of achieving implementation of adopted panel findings (where the "loser" does not block the report). None supported the current practice permitting blockage of reports, but, in acknowledging it as a fact, the submissions advocated requiring a statement by the "loser" as soon as the report reaches the Council or relevant code committee that compliance would not occur. While the submissions generally urged firm U.S. actions on trade problems--including retaliation--it was recognized again that these actions would not usually help the affected industry or sector and might even be counterproductive if U.S. exports consequently are curtailed. Thus, those commenting to the Commission mirrored the view commonly expressed abroad that there are no simple solutions to the complex and interrelated difficulties facing the GATT today.

Overall Observations

In general, the opinion of those interviewed was that small procedural changes in the dispute settlement process--as opposed to changes in the GATT itself--are not likely to improve the present situation significantly. Some stated that the settlement process was working and need not be altered. Others said that while specific and narrow modifications would be desirable, there were, on paper, few real institutional deficiencies, and the mechanisms were operating "as well as can be expected." One official involved in panel work indicated that the increase in the number of disputes indicates a growing reliance on and knowledge of the GATT. Few viewed the system as unreasonably overloaded. It was recognized that certain problems have developed, especially in regard to United States-EC issues, as is obvious in the recent agricultural disputes. However, the prevailing view among the persons interviewed in Geneva was that thorough, tough multilateral negotiations are needed and that frustrations with the GATT should not be blamed on failures of the dispute settlement mechanisms.

According to all persons interviewed in Geneva and to many academic commentators, the most obvious and difficult issue facing the GATT is its members' lack of political will to cooperate on GATT matters. As a consequence of this problem and its relationship to national interests, according to many of those interviewed, the language of the GATT and the codes was devised as a carefully structured compromise. In many areas, consensus on new substantive language or on interpretations of existing language has proven impossible; for example, it has not been possible to define "nullification and impairment" or the term "more than equitable share." Where the language has not been sufficiently developed to deal with past and current practices, it may be abused; and policies can result that do not comply with the rules but are seen by governments as essential. When governments perceive that their national interests are impaired, disputes arise--often involving complex, uncharted matters of interpretation that were not addressed or could not be resolved during negotiations. If those complained against consider their measures of crucial importance, they are unlikely to change them. Also, the agricultural sector presents particular problems in view of the number of special waivers granted to some contracting parties and the prevalence of export subsidies maintained on agricultural products.

Thus, in the view of many GATT participants, a party bringing a dispute on such significant internal measures as the EC's CAP or the U.S. Domestic International Sales Corporation program should not expect the dispute settlement process to operate smoothly. Many delegates from other countries described such cases as being "wrong," viewed in light of their potential for harming the GATT as an institution. These complaints are perhaps more accurately described as difficult cases, where the legal advantage does not always determine the outcome. It appeared to be recognized that domestic reasons often induce the initiation of such cases, in particular after unsatisfactory discussions with offending countries (as in the case of formal GATT disputes brought following action under the U.S. sec. 301). Nonetheless, a common reaction of many interviewees was that these matters could be resolved only through negotiations rather than under the GATT's dispute mechanisms.

Despite the frequently expressed view that the process works fairly well, most participants do specify problems they perceive to exist, and some cases (mainly United States-EC agricultural disputes) have yet to be resolved. Many observers noted that the system appears to work best where the issues are narrowly focused or technical and the economic and political strength of the disputants is roughly equal.

It was often stated, mainly by small country officials, that the United States and other countries have been too lenient for too long with regard to objectionable practices of some countries. As a result, challenges to these objectionable policies now cannot be expected to have simple or speedy solutions. One suggested strategy was a coordinated multilateral isolation of any countries seen as consistent troublemakers, especially during negotiations or technical work; however, the threat of trade restriction and its effect on the world economy must constantly be kept in mind. While many officials were not confident the situation could soon be improved, and a few were even overtly pessimistic on GATT as a whole as it presently functions, all of those questioned cited the need to continue both efforts for improvement and support for the GATT. Avoiding a reversion to bilateralism was seen as the long-range policy each contracting party should advocate.

An important conclusion that may be drawn from the academic literature and from the interviews with Geneva-based officials is that most of the proposals for changes in the dispute settlement process are not new. In fact, conversations with those officials and with persons involved in the Tokyo round negotiations indicate many of the "current" proposals were suggested during the preparatory work on the 1979 Understanding but could not be accepted by the Contracting Parties involved. It would thus appear that there is some reason to question either the necessity for the changes or their acceptability to some GATT members, or both.

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APPENDIX A

REQUEST FROM THE SENATE FINANCE COMMITTEE

United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510

April 30, 1985

Honorable Paula Stern
Chairwoman
U.S. International Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

Dear Madam Chairman:

The Committee on Finance requests that the United States International Trade Commission conduct an investigation under section 332 of the Tariff Act of 1930 to examine the effectiveness of the dispute-settlement mechanisms provided in the General Agreement on Tariffs and Trade (GATT) and any agreements ("codes") negotiated under the auspices of the GATT.

The Commission's report on this investigation should--

(1) review the development of the GATT dispute-settlement mechanisms and their relationships to U.S. trade laws;

(2) summarize disputes that have been addressed by the GATT and the code committees, including the outcomes of the disputes; and

(3) outline strengths or weaknesses in the process as perceived by major participants.

The assessment of the effectiveness of these dispute-settlement mechanisms should be based on, among other things, consideration of the types of products and trade barriers concerned, the pattern of individual countries' involvement, the conditions leading to success or failure of the process, and the record on implementation of the GATT and code committee findings. The report should also examine the differences in views of the major participants on the purpose of these mechanisms and on the manner in which the process should operate to achieve the desired goals.

During the course of the investigation, the Commission should seek the views of interested parties concerning the operation of the GATT mechanisms and proposals for their improvement.

Please transmit the final report to the Committee on Finance not later than December 31, 1985.

Sincerely,

Bob Packwood

Bob Packwood
Chairman

BP:tkk

APPENDIX B

U.S. INTERNATIONAL TRADE COMMISSION NOTICE CONCERNING INVESTIGATION NO. 332-212

WRITTEN SUBMISSIONS: While there is no public hearing scheduled for this investigation, written submissions from interested parties are invited. Commercial or financial information which a party desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submissions requesting confidential treatment must conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). All written submissions, except for confidential business information, will be made available for inspection by interested persons. To be assured of consideration by the Commission, written statements should be received no later than September 23, 1985. All submissions should be addressed to the Secretary at the Commission's office in Washington, D.C.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: June 7, 1985

APPENDIX C

PERSONS SUBMITTING WRITTEN STATEMENTS

PERSONS SUBMITTING WRITTEN STATEMENTS

Carolyn B. Gleason
Heron, Burchette, Ruckert & Rothwell
Washington, D.C.

on behalf of

Heron, Burchette, Ruckert & Rothwell

Carolyn B. Gleason
Heron, Burchette, Ruckert & Rothwell
Washington, D.C.

on behalf of

The Sun-Diamond Growers of California and the California Raisin Advisory Board

Carolyn B. Gleason
Heron, Burchette, Ruckert & Rothwell
Washington, D.C.

on behalf of

The California Cling Peach Advisory Board

James H. Lundquist
Matthew T. McGrath
Barnes, Richardson & Colburn
Washington, D.C.

on behalf of

The Florida Citrus Mutual

Jean-Mari Peltier
California State World Trade Commission
Sacramento, CA

on behalf of

The California State World Trade Commission

Henry J. Voss, President
California Farm Bureau Federation
Sacramento, CA

on behalf of

The California Farm Bureau Federation

The Honorable Pete Wilson, Senator from California
Committee on Agriculture, Nutrition, and Forestry
U.S. Senate
Washington, D.C.

on behalf of

The Honorable Pete Wilson, Senator from California

APPENDIX D

GATT MEMBERSHIP

GATT Membership as of September 1, 1985

Contracting Parties to the GATT (90)

Argentina
Australia
Austria
Bangladesh
Barbados
Belgium
Belize
Benin
Brazil
Burma
Burundi
Cameroon
Canada
Central African Republic
Chad
Chile
Colombia
Congo
Cuba
Cyprus
Czechoslovakia
Denmark
Dominican Republic
Egypt
Finland
France
Gabon
Gambia
Germany, Federal Republic of
Ghana
Greece
Guyana
Haiti
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Kenya
Korea, Republic of
Kuwait
Luxembourg
Madagascar
Malawi
Malaysia
Maldives
Malta
Mauritania
Mauritius
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Pakistan
Peru
Philippines
Poland
Portugal
Romania
Rwanda
Senegal
Sierra Leone
Singapore
South Africa
Spain
Sri Lanka
Suriname
Sweden
Switzerland
Tanzania
Thailand
Togo
Trinidad and Tobago
Turkey
Uganda
United Kingdom
United States of America
Upper Volta
Uruguay
Yugoslavia
Zaire
Zambia
Zimbabwe

Acceded provisionally (2)

Tunisia
Costa Rica

Countries to whose territories the GATT has been applied and that now, as independent states, maintain a de facto application of the GATT pending final decisions as to their future commercial policy (30)

Algeria
Angola
Antigua and Barbuda
Bahamas
Bahrain
Botswana
Cape Verde
Dominica
Equatorial Guinea
Fiji
Grenada
Guinea-Bissau
Kampuchea
Kiribati
Lesotho
Mali
Mozambique
Papua New Guinea
Qatar
St. Christopher and Nevis
St. Lucia
St. Vincent
Sao Tome and Principe
Seychelles
Solomon Islands
Swaziland
Tonga
Tuvalu
United Arab Emirates
Yemen, People's Democratic Republic of

APPENDIX E

LIST OF THE ARTICLES OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

List of the Articles of the General Agreement on Tariffs and Trade

APPENDIX F

UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT, AND SURVEILLANCE

UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT, AND SURVEILLANCE

Adopted on 28 November 1979

1. The CONTRACTING PARTIES reaffirm their adherence to the basic GATT mechanism for the management of disputes based on Articles XXII and XXIII.[1] With a view to to improving and refining the GATT mechanism, the CONTRACTING PARTIES agree as follows:

Notification

2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.[2]

3. Contracting parties moreover undertake, to the maximum extent possible, to notify the Contracting Parties of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly ex post facto. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

Consultations

4. Contracting parties reaffirm their resolve to strengthen and improve the effectiveness of consultative procedures employed by contracting parties. In that connexion, they undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions. Any requests for consultations should include the reasons therefor.

5. During consultations, contracting parties should give special attention to the particular problems and interests of less-developed contracting parties.

6. Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2.

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[1] It is noted that Article XXV may, as recognized by the CONTRACTING PARTIES, inter alia, when they adopted the report of the Working Party on particular difficulties connected with trade in primary products (L/930), also afford an appropriate avenue for consultation and dispute settlement in certain circumstances.

[2] See secretariat note, Notifications required from contracting parties (MTN/FR/W/17, dated 1 August 1978).

Dispute settlement

7. The CONTRACTING PARTIES agree that the customary practice of the GATT in the field of dispute settlement, described in the Annex, should be continued in the future, with the improvements set out below. They recognize that the efficient functioning of the system depends on their will to abide by the present understanding. The CONTRACTING PARTIES reaffirm that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966 (BISD, fourteenth supplement, page 18) and that these remain available to less-developed contracting parties wishing to use them.

8. If a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council.

9. It is understood that requests for conciliation and the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts and that, if disputes arise, all contracting parties will engage in these procedures in good faith in an effort to resolve the disputes. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

10. It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice. It is also agreed that the CONTRACTING PARTIES would similarly decide to establish a working party if this were requested by a contracting party invoking the Article. It is further agreed that such requests would be granted only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES.

11. When a panel is set up, the Director-General, after securing the agreement of the contracting parties concerned, should propose the composition of the panel, of three or five members depending on the case, to the CONTRACTING PARTIES for approval. The members of a panel would preferably be governmental. If is understood that citizens of countries whose governments[1] are parties to the dispute would not be members of the panel concerned with that dispute. The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES.

12. The parties to the dispute would respond within a short period of time, i.e., seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons.

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[1] In the case customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

13. In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and nongovernmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party would be invited to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available for such work.[1]

14. Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.[2]

15. Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel. Each panel should have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a State it shall inform the government of that State. Any contracting party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided should not be revealed without formal authorization from the contracting party providing the information.

16. The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2. In this connexion, panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

17. Where the parties have failed to develop a mutually satisfactory solution, the panel should submit its findings in a written form. The report of a panel should normally set out the rationale behind any findings and recommendations that it makes. Where a bilateral settlement of the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached.

18. To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel should first

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[1] The coverage of travel expenses should be considered within the limits of budgetary possibilities.

[2] A statement is included in the Annex describing the current practice with respect to inclusion on panels of persons from developing countries.

submit the descriptive part of its report to the parties concerned, and should subsequently submit to the parties to the dispute its conclusions, or an outline thereof, a reasonable period of time before they are circulated to the CONTRACTING PARTIES.

19. If a mutually satisfactory solution is developed by the parties to a dispute before a panel, any contracting party with an interest in the matter has a right to enquire about and be given appropriate information about that solution in so far as it relates to trade matters.

20. The time required by panels will vary with the particular case.[1] However, panels should aim to deliver their findings without undue delay, taking into account the obligation of the CONTRACTING PARTIES to ensure prompt settlement. In cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established.

21. Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of less-developed contracting parties concerned.

22. The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution.

23. If the matter is one which has been raised by a less-developed contracting party, the CONTRACTING PARTIES shall consider what further action they might take which would be appropriate to the circumstances.

Surveillance

24. The CONTRACTING PARTIES agree to conduct a regular and systematic review of developments in the trading system. Particular attention would be paid to developments which affect rights and obligations under the GATT, to matters affecting the interests of less-developed contracting parties, to trade measures notified in accordance with this understanding and to measures which have been subject to consultation, conciliation or dispute settlement procedures laid down in this understanding.

Technical assistance

25. The technical assistance services of the GATT secretariat shall, at the request of a less-developed contracting party, assist it in connexion with matters dealt with in this understanding.

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[1] An explanation is included in the Annex that "in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months".

ANNEX

Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)

1. Any dispute which has not been settled bilaterally under the relevant provisions of the General Agreement may be referred to the CONTRACTING PARTIES[1] which are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel.[2]

2. The CONTRACTING PARTIES adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties (BISD, 14th Supplement, page 18). This procedure provides, inter alia, for the Director-General to employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure.

3. The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters. In this connexion, panels have consulted regularly with the parties to the dispute and have given them adequate opportunity to develop a mutually satisfactory solution. Panels have taken appropriate account of the particular interests of developing countries. In cases of failure of the parties to reach a mutually satisfactory settlement, panels have normally given assistance to the CONTRACTING PARTIES in making recommendations or in giving rulings as envisaged in Article XXIII:2.

4. Before bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision on compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending

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[1] The Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice.

[2] At the Review Session (1955) the proposal to institutionalize the procedures of panels was not adopted by CONTRACTING PARTIES mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT.

the application of concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case.

5. In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment. A prima facie case of nullification or impairment would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the change. Paragraph 1 (b) permits recourse to Article XXIII if nullification or impairment results from measures taken by other contracting parties whether or not these conflict with the provisions of the General Agreement, and paragraph 1 (c) if any other situation exists. If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification.

6. Concerning the customary elements of the procedures regarding working parties and panels, the following elements have to be noted:

(i) working parties are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally "to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council". Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally working parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the Working Party and have the same status as other delegations. The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the Working Party's report. The Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision.

(ii) In the case of disputes, the CONTRACTING PARTIES have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2. Since 1952, panels have become the usual procedure. However, the Council has taken such decisions only after the party concerned has had an occasion to study the complaint and prepare its response before the Council. The terms of reference are discussed and approved by the Council. Normally, these terms of reference are "to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII". When a contracting party having recourse to Article XXIII:2 raised questions relating to the suspension of concessions or other obligations, the terms of reference were to examine the matter in accordance with the provisions of Article XXIII:2. Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. The practice has been to appoint a member or members from developing countries when a dispute is between a developing and a developed country.

(iii) Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council. It is recognized that a broad spectrum of opinion has been beneficial in difficult cases, but that the number of panel members has sometimes delayed the composition of panels, and therefore the process of dispute settlement.

(iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical

opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels.

(v) Where the parties have failed to develop a mutually satisfactory solution, the panel has submitted its findings in a written form. Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made. Where a bilateral settlement of the matter has been found, the report of the panel has been confined to a brief description of the case and to reporting that a solution has been reached.

(vi) The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made.

(vii) To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel has normally first submitted the descriptive part of its report to the parties concerned, and also their conclusions, or an outline thereof, a reasonable period of time before they have been circulated to the CONTRACTING PARTIES.

(viii) In accordance with their terms of reference established by the CONTRACTING PARTIES panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. Panels have also, if so requested by the CONTRACTING PARTIES, formulated draft recommendations addressed to the parties. In yet other cases panels were invited to give a technical opinion on some precise aspect of the matter (e.g. on the modalities of a withdrawal or suspension in regard to the volume of trade involved). The opinions expressed by the panel members on the matters are anonymous and the panel deliberations are secret.

(ix) Although the CONTRACTING PARTIES have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months.

The 1966 decision by the CONTRACTING PARTIES referred to in paragraph 2 above lays down in its paragraph 7 that the Panel shall report within a period of sixty days from the date the matter was referred to it.

APPENDIX G

1982 GATT MINISTERIAL DECLARATION: DISPUTE SETTLEMENT PROCEDURES

1982 GATT MINISTERIAL DECLARATION

DISPUTE SETTLEMENT PROCEDURES (Excerpted)

The CONTRACTING PARTIES:

Agree that the Understanding on Notification, Consultation, Surveillance and Dispute Settlement negotiated during the Tokyo Round (hereinafter referred to as the "Understanding") provides the essential framework of procedures for the settlement of disputes among contracting parties and that no major change is required in this framework, but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures to this end;

And agree further that:

(i) With reference to paragraph 8 of the Understanding, if a dispute is not resolved through consultations, any party to a dispute may, with the agreement of the other party, seek the good offices of the Director-General or of an individual or group of persons nominated by the Director-General. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. Conciliation proceedings, and in particular positions taken by the parties to the dispute during conciliation, shall be confidential, and without prejudice to the rights of either party in any further proceedings under Article XXIII:2. It would remain open at any time during any conciliatory process for either party to the dispute to refer the matter to the CONTRACTING PARTIES.

(ii) In order to ensure more effective compliance with the provisions of paragraphs 11 and 12 of the Understanding, the Director-General shall inform the Council of any case in which it has not been found possible to meet the time limits for the establishment of a panel.

(iii) With reference to paragraph 13 of the Understanding, contracting parties will co-operate effectively with the Director-General in making suitably qualified experts available to serve on panels. Where experts are not drawn from Geneva, any expenses, including travel and subsistence allowance, shall be met from the GATT budget.

(iv) The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters dealt with.

(v) The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the

facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding. Where a finding establishing a contravention of GATT provisions or nullification and impairment is made, the panel should make such suggestions as appropriate for dealing with the matter as would assist the CONTRACTING PARTIES in making recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

(vi) Panels would aim to deliver their findings without undue delay, as provided in paragraph 20 of the Understanding. If a complete report cannot be made within the period foreseen in that paragraph, panels would be expected to so advise the Council and the report should be submitted as soon as possible thereafter.

(vii) Reports of panels should be given prompt consideration by the CONTRACTING PARTIES. Where a decision on the findings contained in a report calls for a ruling or recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to a satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report.

(viii) The recommendation or ruling made by the CONTRACTING PARTIES shall be aimed at achieving a satisfactory settlement of the matter in accordance with GATT obligations. In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendations. The Contracting party to which such a recommendation has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES. The contracting party bringing the case may also ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution as provided in paragraph 22 of the Understanding.

(ix) The further action taken by the CONTRACTING PARTIES in the above circumstances might include a recommendation for compensatory adjustment with respect to other products or authorization for the suspension of such concessions or other obligations as foreseen in Article XXIII:2, as the CONTRACTING PARTIES may determine to be appropriate in the circumstances.

(x) The parties to a dispute would fully participate in the consideration of the matter by the CONTRACTING PARTIES under paragraph (vii) above, including the consideration of any rulings or recommendations the CONTRACTING PARTIES might make pursuant to Article XXIII:2 of the General Agreement, and their views would be fully recorded. They

would likewise participate and have their views recorded in the considerations of the further actions provided for under paragraphs (viii) and (ix) above. The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided. 1/ It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement.

1/ This does not prejudice the provisions on decision making in the General Agreement.

APPENDIX H

DISPUTE SETTLEMENT PROCEDURES: ACTION TAKEN ON 30 NOVEMBER 1984 AT THE FORTIETH SESSION OF THE CONTRACTING PARTIES

DISPUTE SETTLEMENT PROCEDURES:

ACTION TAKEN ON 30 NOVEMBER 1984 AT THE FORTIETH SESSION OF THE CONTRACTING PARTIES

At the 1982 Ministerial it was agreed that the Dispute Settlement "Understanding" provides the essential framework of procedures for the settlement of disputes among contracting parties and that no major change is required in this framework, but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures to this end.

However, if improvement in the whole system is to be achieved, it is necessary not only to make specific procedural improvements, but also to obtain a clear cut understanding by and commitment from the CONTRACTING PARTIES (or Signatories to the Codes) with respect to the nature and time-frame of (a) the panel process; (b) the decision on the dispute matter to be taken by the CONTRACTING PARTIES (or the Code Committee) on the basis of the panel's report; and (c) the follow-up to be given to that decision by the parties to the dispute.

A number of procedural problems related to the panel process have been encountered which can be addressed within the existing framework. Such problems include the formation of panels in a timely manner, and the timely completion of panel work. Although the "Understanding" provides guidelines for these procedures (thirty days for the formation of a panel and three to nine months to complete the panel's work), experience has shown these time targets are seldom met. These are only a couple of difficulties related to the dispute settlement mechanism, so addressing them alone will not cure all its deficiencies. However, procedural improvements can lead to improvements in the quality of panel reports. Therefore, the CONTRACTING PARTIES agree that, as a first step, the following approach should be adopted, on a trial basis, for a period of one year in order to continue the process of improving the operation of the system.

Formation of panels

1. Contracting parties should indicate to the Director-General the names of persons they think qualified to serve as panelists, who are not presently affiliated with national administrations but who have a high degree of knowledge of international trade and experience of the GATT. These names should be used to develop a short roster of non-governmental panelists to be agreed upon by the CONTRACTING PARTIES in consultation with the Director-General. The roster should be as representative as possible of contracting parties.

2. The Director-General should continue the practice of proposing panels composed preferably of governmental representatives but may also draw as necessary on persons on the approved roster. The parties should retain the ability to respond to the Director-General's proposal, but shall not oppose nominations except for compelling reasons.

3. In the event that panel composition cannot be agreed within thirty days after a matter is referred by the CONTRACTING PARTIES, the Director-General shall, at the request of either party and in consultation with the Chairman of the Council, complete the panel by appointing persons from the roster of non-governmental panelists to resolve the deadlock, after consulting both parties.

Completion of panel work

1. Panels should continue to set their own working procedures and, where possible, panels should provide the parties to the dispute at the outset with a proposed calendar for the panel's work.

2. Where written submissions are requested from the parties, panels should set precise deadlines, and the parties to a dispute should respect those deadlines.

APPENDIX I

GATT DISPUTE SETTLEMENT CASES USED IN CHAPTER II ANALYSIS

Section One
GATT Dispute Settlement Cases used in Chapter II Analysis

List of Cases (case no. and title)

1. Import Restrictions
2. Internal Taxes
3. Export Restrictions
4. Subsidy on Ammonium Sulphate
5. "Serious Injury" in Case of Article XIX Action
6. Family Allowances
7. Import Restrictions on Dairy Products
8. Increase of Imports Duties (Coefficient for Currency Conversion)
9. Treatment of Sardine Imports
10. Special Imports Taxes ("contribution" levied on certain imports)
11. Statistical Tax on Imports and Exports
12. Special Temporary Compensation Tax on Imports
13. Anti-Dumping Duties
14. Stamp Tax, Increase to 2 Percent
15. Luxury Import Tax
16. Import Duties on Starch and Potato Flour
17. Import Restrictions on Coal
18. Stamp Tax, Further Increase to 3 Percent
19. U.S. (Hawaiian) Regulations Affecting Imported Eggs
20. Increase in Bound Duties (Long-Playing Records)
21. Exports of Subsidized Eggs
22. Discrimination Versus Imported Agricultural Machinery
23. Discrimination Versus Imported Agricultural Machinery
24. Assistance to Exports of Wheat
25. Assistance to Exports of Flour
26. Increase in Margin of Preferences on Bananas
27. Recourse to Article XXIII (Primary Products)
28. Import Restrictions
29. Imports of Potatoes (Value for Antidumping Duties)
30. U.S. Action Under Article XXVIII (Negotiations on Poultry)
31. Administrative and Statistical Fees
32. Preferential Tariff Quotas
33. Import Restrictions on Grains
34. Margins of Preference
35. Compensatory Taxes on Imports
36. Restrictions on Cotton Textiles
37. Dollar Area Quotas
38. Tax Legislation (DISC)
39. Income Tax Practices
40. Income Tax Practices
41. Income Tax Practices
42. Article XXIV:6 Negotiations with the EC
43. Import Quotas on Eggs
44. Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables 1/
45. Import Deposits for Animal Feed Proteins 1/

See footnotes at the bottom of next page.

46. Withdrawal of Tariff Concessions Under Article XXVIII:3
47. Import Restrictions on Thrown Silk Yarn 1/
48. Exports Refunds on Malted Barley
49. Restrictions on Imports of Leather 1/
50. Refunds on Exports of Sugar
51. Refunds on Exports of Sugar
52. Restrictions on Imports of Textiles from Hong Kong
53. Imports Restrictions on Apples from Chile
54. Restrictions on Imports of Leather
55. Restrictions on Domestic Sale of Soybean Oil
56. Restrictions on Imports of Manufactured Tobacco 1/
57. Prohibitions of Imports of Tuna and Tuna Products
58. Imports of Beef from Canada
59. Tariff Treatment of Unroasted Coffee
60. Imports of Poultry from the United States
61. Imposition of Countervailing Duties without Injury Criterion
62. Import Duty on Vitamin B12, Feed-Grade Quality
63. Production Subsidies on Canned Fruit
64. Imports of Automotive Spring Assemblies
65. Export Subsidies on Wheat Flour 1/ 2/
66. Production Aids on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes 1/
67. Administration of the Foreign Investment Review Act (FIRA)
68. Pasta Subsidies 1/ 2/
69. Tariff Treatment on Imports of Citrus Products from Certain Mediterranean Countries 1/
70. "Manufacturing Clause" in U.S. Copyright Legislation
71. Sugar Regime
72. Value Added Tax (VAT) Payments 2/
73. Quantitative Restrictions Against Imports from Hong Kong
74. Internal Regulations Having an Effect on Imports of Certain Parts of Footwear
75. Measures on Imports of Leather 1/
76. Nullification or Impairment of Benefits and Impediment to the Attainment of GATT Objectives
77. Imports of Sugar
78. Imports of Newsprint From Canada
79. Imports of Electrical Transformers
80. Discriminatory Application of Retail Sales Tax on Goal Coins
81. Provisions of the U.S. Wine Equity Act 2/
82. Import Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies
83. U.S. Restrictions on Imports of Certain Sugar-containing Products
84. Quota on Imports of Leather Footwear 1/

1/ Throughout this listing, this footnote notation indicates that the case was filed following a section 301 petition filed by private parties in the United States in accordance with U.S. law.

2/ Throughout this listing, this footnote notation indicates that the case was filed under one of the Tokyo round NTM codes.

Description of Cases: 1948 to September 1985 1/

1. Import Restrictions

Date: 2/	September 1948
Complaint by:	United States
Versus:	Cuba
Issue:	Whether several import regulations requiring documentation and prohibiting unapproved importers from entering shipments constituted nullification or impairment of benefits of concessions or violation of article XI (quantitative restrictions)
GATT action:	Working party report (adopted September 1948) announced bilateral settlement without ruling on the legal issues
Result:	Regulations rescinded immediately as part of a broader settlement on September 14, 1948

2. Internal Taxes

Date:	April 1949
Complaint by:	France
Versus:	Brazil
Issue:	Validity of increased margins of discrimination in internal taxes under Protocol reservation (grandfather clause); rights of France under article XXIII to pursue the issue
GATT action:	Working party report (adopted June 1949) found margins of discrimination went beyond grant allowed by Protocol and asked Brazil to liberalize them
Result:	Discrimination ended with major tariff revision in August 1958

3. Export Restrictions

Date:	May 1949
Complaint by:	Czechoslovakia
Versus:	United States
Issue:	Validity of U.S. restrictions under article XXI (security exceptions)
GATT action:	Contracting Parties rejected complaint in plenary ruling because they found no violation of that provision (June 8, 1949)
Result:	Issue ultimately became moot with GATT-authorized suspension of obligations between Czechoslovakia and the United States

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1/ These case were used as a basis for presentation of data in chap. II. Information on these cases was compiled from a variety of sources, most notably: Basic Instruments and Selected Documents (BISD), The Contracting Parties to the General Agreement on Tariffs and Trade, Supplements 1-31; Hudec, Robert E. The GATT Legal System and World Trade Diplomacy, Praeger Publishers, 1975; various annual editions of GATT Activities, the General Agreement on Tariffs and Trade; and other GATT information and documents.

2/ Date used is generally the date of the request for panel, filed under article XXIII:2.

4. Subsidy on Ammonium Sulphate

Date:	July 1949
Complaint by:	Chile
Versus:	Australia
Issue:	Asserted violation of article I (MFN), and/or nullification and impairment of concession, due to Australia's removal of a subsidy on an article having a bound rate of "free," resulting in shift to competing product
GATT action:	Referred to working party. In April 1950, contracting parties found that the value of a concession granted to Chile had prima facie been impaired as a result of the subsidy, although it was not in conflict with GATT. Australia dissented
Result:	Australian subsidy practice adjusted in November 1950

5. "Serious Injury" in Case of Article XIX Action

Date:	November 1950
Complaint by:	Czechoslovakia
Versus:	Unites States
Issue:	Validity of escape clause action under article XIX criteria: standards for "serious injury"
GATT action:	Working party report (adopted October 1951) found the U.S. withdrawal of a tariff concession did not violate article XIX
Result:	No U.S. action necessary

6. Family Allowances

Date:	September 19, 1951 (Norway); September 20, 1951 (Denmark); resubmitted October 29, 1952
Complaint by:	Norway and Denmark
Versus:	Belgium
Issues:	Validity of discriminatory tax under protocol reservation (grandfather clause)
GATT action:	Panel report (adopted November 1952) found Belgian legislation inconsistent with article I (and perhaps III:2) and ruling on a concept inconsistent with the spirit of the Agreement. The contracting parties recommended that changes in the legislation be expedited.
Result:	Tax abolished as of March 1954

7. Import Restrictions on Dairy Products

Date:	September 19, 1951 (The Netherlands), September 21, 1951 (Denmark)
Complaint by:	The Netherlands and Denmark
Versus:	United States
Issue:	Whether dairy quotas violated article XI (quantitative restrictions): not contested

GATT action: Referred to contracting parties and working party on appropriateness of Netherlands' retaliation under article XXIII:2. The United States was asked to remove restrictions within a reasonable time. No progress occurred, and contracting parties (decision adopting working party report on August 1952) authorized Netherlands to take action under article XXIII:2 in retaliation

Result: Quotas unchanged; covered by waiver in 1955 for U.S. section 22 (7 U.S.C. § 624), as amended. The Netherlands suspended concessions on wheat flour in retaliation

8. Increase of Import Duties (Coefficient for Currency Conversion)

Date: September 1952
Complaint by: United Kingdom
Versus: Greece
Issue: Argued violation of bound tariff rate, due to increase in coefficients used for currency conversion, pursuant to article II (schedule of concessions): not contested
GATT action: Panel report (adopted November 1952) found measure inconsistent with article II:1, requiring adherence to schedules of concessions
Result: Bound tariff restored in July 1953

9. Treatment of Sardine Imports

Date: September 1952
Complaint by: Norway
Versus: West Germany
Issue: Whether differing tariff rates (and various other restrictions) on competing sardine products violated article I (MFN) and/or caused nullification or impairment of benefits of a concession
GATT action: Contracting parties (adopting panel report, October 1952) ruled that the duty rates were not in violation of article I but did constitute nullification of a tariff concession. Recommended that Germany consider ways of removing the competitive inequality among different types of sardine imports in the levels of duties and taxes
Result: Settled. Duties reduced to virtual equivalence in 1953

10. Special Imports Taxes ("contribution" levied on certain imports)

Date: September 1952
Complaint by: France
Versus: Greece
Issue: Validity of new import taxes under article III (national treatment); defended as "monetary" restrictions pursuant to IMF
GATT action: Panel decision was deferred and case referred to contracting parties for decision on merits
Result: Tax eliminated in April 1953

11. Statistical Tax on Imports and Exports

Date:	November 7, 1952
Complaint by:	United States
Versus:	France
Issue:	Whether tax violated bound tariffs: not contested
GATT action:	Referred to the Contracting Parties. Discussed; correction promised
Result:	Tax abolished as of January 1, 1955

12. Special Temporary Compensation Tax on Imports

Date:	July 1954
Complaint by:	Italy
Versus:	France
Issue:	Whether tax on imports intended to reduce effects of quota liberalization violated tariff bindings under article II (schedule of concessions): legal claim not contested
GATT action:	Referred to Contracting Parties and working party. Decision formally found legal violation and urged removal.
Result:	Taxes removed in August 1957, after general devaluation and adoption of replacement measures

13. Anti-dumping Duties

Date:	July 1954
Complaint by:	Italy
Versus:	Sweden
Issue:	Validity of administrative procedures used in antidumping cases under article VI; validity of specific dumping determinations
GATT action:	Panel report (adopted February 1955) suggested procedures were defective and raised questions requiring further investigation on the validity of the challenged determinations; parties were asked to consult
Result:	Dumping regulations in question repealed on July 10, 1955

14. Stamp Tax, Increase to 2 Percent

Date:	September 1954
Complaint by:	United States
Versus:	France
Issue:	Whether tax violated tariff bindings under article II (schedule of concessions) and provisions regarding import fees under article VIII (fees and formalities): not contested
GATT action:	Referred to Contracting Parties; correction was promised
Result:	Complaint withdrawn on January 1, 1955. Tax abolished in 1961

15. Luxury Import Tax

Date:	October 1954
Complaint by:	Italy
Versus:	Greece
Issue:	Whether taxes on imports violated article III (national treatment); other technical questions on tariff revisions
GATT action:	Discussed. Deferred for bilateral consultations
Result:	Settled during consultations. Some measures were eliminated, and best efforts to do so were promised on others

16. Import Duties on Starch and Potato Flour

Date:	October 1954
Complaint by:	Benelux
Versus:	West Germany
Issue:	Legal effect of commitment made in tariff negotiations to use best efforts to maintain balance of concessions
GATT action:	Panel report (noted February 1955); partial legal analysis suggested nullification or impairment
Result:	Germany proposed tariff concessions that were viewed as acceptable

17. Import Restrictions on Coal

Date:	October 1954
Complaint by:	United States
Versus:	Belgium
Issue:	Whether intensification of quota restrictions was justified under article XII (balance of payments measures)
GATT action:	Withdrawn before discussion by Contracting Parties
Result:	Settled. Increased quota given

18. Stamp Tax, Further Increase to 3 Percent

Date:	September 1955
Complaint by:	United States
Versus:	France
Issue:	Whether tax violated tariff bindings under article II (schedule of concessions) and provisions regarding import fees in article VIII (fees and formalities): not contested
GATT action:	Referred to Contracting Parties, who recommended (November 1955) cancellation of measures as soon as practicable. France undertook to do so
Result:	Tax reduced from 3 to 2 percent as of January 1, 1961. Tax finally abolished later in 1961

19. U.S. (Hawaiian) Regulations Affecting Imported Eggs

Date:	September 1955
Complaint by:	Australia
Versus:	United States

Issue:	Whether State government regulation requiring notice "we sell foreign eggs" violates article III (national treatment)
GATT action:	Referred to Contracting Parties. Discussion deferred pending State court legal action (November 1955)
Result:	Regulation invalidated by state court in Territory v. Ho., 41 Hawaii 565 (1957)

20. Increase in Bound Duties (Long-Playing Records)

Date:	October 1956
Complaint by:	West Germany
Versus:	Greece
Issue:	Whether generic tariff binding under art. II (schedule of concessions) applied to newly developed product
GATT action:	(a) Referred to group of experts on customs matters, who ruled that binding was applicable (b) Ruling protested. Deferred for additional study
Result:	Compromise duty rate negotiated bilaterally in November 1957

21. Exports of Subsidized Eggs

Date:	May 1957
Complaint by:	Denmark
Versus:	United Kingdom
Issue:	Whether subsidy violated terms of new article XVI (subsidies); ruling was requested, even though article not yet officially in force at the time
GATT action:	Panel was appointed but never met because dispute was resolved in bilateral consultations
Result:	Export of subsidized eggs to Europe prohibited

22. Discrimination Versus Imported Agricultural Machinery

Date:	October 1957
Complaint by:	United Kingdom
Versus:	France
Issue:	Whether purchase subsidy limited to domestically made machinery violated article III (national treatment)
GATT action:	Referred to the Contracting Parties. Discussed. Action deferred pending outcome of efforts to correct the situation
Result:	Discrimination removed with retroactive effect. Subsidy restored for imported articles

23. Discrimination Versus Imported Agricultural Machinery

Date:	May 1958
Complaint by:	United Kingdom
Versus:	Italy
Issue:	Whether farmers' credit program (granting loans on especially favorable terms for purchase of domestic products) violated article III (national treatment)
GATT action:	Panel report (adopted October 1958) ruled the provision was contrary to article III

Result: Agreement reached between parties in November 1958 (law allowed to expire)

24. Assistance to Exports of Wheat

Date: May 1958
Complaint by: Australia
Versus: France
Issue: Whether export subsidies resulted in the gain of more than an equitable share of market in violation of article XVI (subsidies)
GATT action: Panel report (adopted November 1958) ruled that subsidies were in violation of article XVI
Result: Agreement reached between parties in April 1960 to consult on prices

25. Assistance to Exports of Flour

Date: September 1958
Complaint by: Australia
Versus: Italy
Issue: Whether subsidy caused Italy to have more than an equitable share of market in violation of article XVI (subsidies)
GATT action: Referred to panel considering French subsidy. Panel report (adopted November 1958) ruled subsidies were in violation of article XVI
Result: Settled. Subsidy program revised

26. Increase in Margin of Preferences on Bananas

Date: December 1961
Complaint by: Brazil
Versus: United Kingdom
Issue: Whether intent of proposed increase in margin of preference on bananas was appropriate under conditions of article XXV authorizing waiver
GATT action: Panel report (adopted April 1962) ruled the purpose of the increase did not qualify
Result: Proposed increased tariff dropped in October 1962

27. Recourse to Article XXIII (Primary Products)

Date: February 1962
Complaint by: Uruguay
Versus: Fifteen contracting parties
Issue: Whether broad nullification and impairment of concessions existed, based on legality of 562 alleged restrictions imposed by the fifteen developed countries on primary products
GATT action: Panel report (adopted November 1962) enumerated various self-confessed violations, recommended their removal, and suggested consultations on other restrictions

Result: Several restrictions were eliminated, but Uruguay stated the overall situation not improved. Panel was reconvened in July 1964 and made recommendations similar to those of 1962. Further action not reported

28. Import Restrictions

Date: November 1962
Complaint by: United States
Versus: France
Issue: Propriety of certain residual measures: quotas alleged to be in violation of article XI (quantitative restrictions): not contested; separate issue of claimed nullification and impairment of benefits the United States expected from Dillon Round concessions
GATT action: Panel report (adopted November 1962) affirmed that under GATT (no articles specified,) nullification and impairment existed, and recommended that France withdraw the quotas
Result: The United States complied with request to refrain from suspending concessions for a "reasonable period," based on a partial settlement. The United States again raised the case in September 1972 and subsequently reached a full settlement based on substantial liberalization of quotas of benefit to the U.S.

29. Imports of Potatoes (Value for Antidumping Duties)

Date: November 1962
Complaint by: United States
Versus: Canada
Issue: Whether antidumping duties violated tariff bindings under article II (schedule of concessions) or were justified under article VI (antidumping and countervailing duties)
GATT action: Panel report (adopted November 1962) ruled that the additional duties were not justified under article VI and violated tariff bindings under article II. Recommended that Canada withdraw the antidumping duties or make "satisfactory adjustment" of the benefit impaired by the duties
Result: Duties terminated on January 2, 1963

30. U.S. Action Under Article XXVIII (Negotiations on Poultry)

Date: October 1963
Complaint by: Joint submission by United States and EC
Versus: United States
Issue: Value of trade as to which concessions should be withdrawn, based on U.S. article XXVIII rights
GATT action: Referred to panel for advisory opinion. Panel report (adopted November 1963) fixed value at a point between U.S. and EC claims
Result: Parties complied with panel ruling

31. Administrative and Statistical Fees

Date:	October 1969
Complaint by:	United States
Versus:	Italy
Issue:	Whether service fee was limited to cost of service rendered (article VIII: fees and formalities) and were discriminatory (art. I: MFN principle)
GATT action:	Referred to Contracting Parties. Deferred for legislation
Result:	Not reported

32. Preferential Tariff Quotas

Date:	April 1970
Complaint by:	United States
Versus:	Greece
Issue:	Violation of article 1 (MFN): not contested
GATT action:	Referred to working party. Waiver considered under article XXV and denied
Result:	Not reported

33. Import Restrictions on Grains

Date:	September 1970
Complaint by:	United States
Versus:	Denmark
Issue:	Whether quota/embargo violated article XI (quantitative restrictions)
GATT action:	Referred to Council
Result:	Bilaterally settled (in October 1970). Access for certain products provided

34. Margins of Preference

Date:	September 1970
Complaint by:	United States
Versus:	Jamaica
Issue:	Interpretation of provisions governing base date for calculating maximum margin of preferences under article I (MFN principle)
GATT action:	Panel report (adopted February 1971) affirmed U.S. legal position (1947 base date), but recommended waiver under article XXV permitting 1962 date
Result:	Waiver granted. Margins in excess of 1962 margins rescinded

35. Compensatory Taxes on Imports

Date:	June 1972
Complaint by:	United States
Versus:	European Community
Issue:	Violation of tariff bindings under article II (schedule of concessions): not contested
GATT action:	Complaint referred to Council
Result:	Compensatory taxes on large number of articles abolished. United States agreed to defer further action

36. Restrictions on Cotton Textiles

Date:	September 1972
Complaint by:	Israel
Versus:	United Kingdom
Issue:	Legality (under GATT and MFA) of quotas based on allegedly inaccurate classification of Israel as a low-cost, disruptive supplier of cotton textiles in the U.K. market
GATT action:	Panel report (adopted February 1973) noted bilateral settlement in January 1973
Result:	Quotas suspended for trial period

37. Dollar Area Quotas

Date:	October 1972
Complaint by:	United States
Versus:	United Kingdom
Issue:	Whether quotas violated articles XI (quantitative restrictions) and XIII (nondiscriminatory administration): not contested
GATT action:	Complaint referred to panel. Interim panel report (adopted July 1973) made no formal legal finding. Recommended further consultations
Result:	Bilateral settlement of the dispute in July 1973 based on phasing out of quotas

38. Tax Legislation (DISC)

Date:	April 1973
Complaint by:	European Community
Versus:	United States
Issue:	Whether certain tax deferrals, arguably exemptions of income from taxation, constituted an export subsidy in violation of article XVI (subsidies)
GATT action:	Panel in November 1976 found nullification and impairment of benefits under the Agreement. Council in December 1981 adopts panel report submitted in conjunction with bilateral understanding
Result:	The DISC legislation was amended in 1984

39. Income Tax Practices

Date:	May 1973
Complaint by:	United States
Versus:	European Community (the Netherlands)
Issue:	Whether tax treatment of foreign income of export businesses (based on territoriality principle) constituted an export subsidy, contrary to article XVI (subsidies)
GATT action:	Panel, with membership identical to DISC panel, found nullification and impairment of benefits in November 1976. Council, in December 1981, adopted panel report in conjunction with bilateral understanding
Result:	Report concluded tax practices acted as export subsidy

40. Income Tax Practices

Date:	May 1973
Complaint by:	United States
Versus:	European Community (France)
Issue:	Whether tax treatment of foreign income of export businesses constituted an export subsidy in violation of article XVI (subsidies)
GATT action:	Panel, with membership identical to DISC panel, found nullification and impairment of benefits in November 1976. Council, in December 1981, adopted panel report in conjunction with bilateral understanding
Result:	Report concluded tax practices acted as export subsidy

41. Income Tax Practices

Date:	May 1973
Complaint by:	United States
Versus:	European Community (Belgium)
Issue:	Whether tax treatment of foreign income of export businesses constituted an export subsidy in violation of article XVI (subsidies)
GATT action:	Panel, with membership identical to DISC panel, found nullification and impairment of benefits in November 1976. Council, in December 1981, adopted panel report in conjunction with bilateral understanding
Result:	Report concluded that tax practices acted as export subsidy

42. Article XXIV:6 Negotiations with the EC

Date:	November 1974
Complaint by:	Canada
Versus:	European Community
Issue:	Ruling sought under article XXIII on whether compensation maintained prior level of concessions and whether Canada's possible compensatory withdrawal would restore balance
GATT action:	Dispute referred to a panel
Result:	Panel never met because bilateral settlement was reached in March 1975

43. Import Quotas on Eggs 1/

Date:	September 1975
Complaint by:	United States
Versus:	Canada
Issue:	Whether Canada's import quotas on eggs were consistent with article XI (quantitative restrictions)
GATT action:	Working party established in 1975 issued a report (adopted February 1976) that agreed with Canadian view that program was consistent with article XI:2(c)(i) (United States dissenting) but was unable to decide whether the period chosen by Canada for determining

See footnotes at end of list.

	the import quota was consistent with the last paragraph of article XI, and did not reach a conclusion whether the Canadian scheme constituted a nullification or impairment of a binding. The working party urged intensive bilateral discussions
Result:	Canada increased (roughly doubled) supplementary quotas for U.S. eggs

44. Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables 1/

Date:	June 1976
Complaint by:	United States
Versus:	European Community
Issue:	Whether EC systems for licensing and surety deposits for imports of certain processed fruits and vegetables and for minimum import prices for tomato concentrates were consistent with articles II (schedule of concessions), VIII (fees and formalities), and XI (quantitative restrictions); if minimum import price system was consistent with article I (MFN)
GATT action:	Panel report (October 1978) found that the minimum import price and costs associated with the security system for tomato concentrates violated articles XI and II, and further found that minimum import prices constituted a prima facie case of nullification or impairment of benefits under article XXIII. No other inconsistencies found
Result:	EC, for internal reasons, in June 1978 abolished minimum import prices for tomato concentrates

45. Import Deposits for Animal Feed Proteins 1/

Date:	July 1976
Complaint by:	United States
Versus:	European Community
Issue:	Whether EC import deposits and purchasing requirements affecting nonfat dry milk held by various intervention agencies and certain animal feed proteins was consistent with EC obligations under articles I (MFN), II (schedule of concessions), and III (national treatment)
GATT action:	Panel report (adopted March 1978) found the program to be inconsistent with various provisions of article III, but not articles I or II
Result:	EC program had already been discontinued in October 1976

46. Withdrawal of Tariff Concessions under Article XXVIII:3

Date:	October 1976
Complaint by:	European Community
Versus:	Canada

See footnotes at end of list.

Issue:	Whether Canada's retaliation against the EC conversion of duties on wrought lead and zinc from a weight basis to an ad valorem basis was justified under article XXVIII (modification of schedules)
GATT action:	Panel report (adopted May 1978) found that Canada was entitled to withdraw concessions (which it had previously done on canned meats, liqueurs, aperitifs, cordial wines, and iron and steel wires), since EC method of conversion had increased duties without compensation under article XXVIII, but that Canada's retaliatory action was excessive in relation to the actual damage suffered by Canada and that the retaliation should be withdrawn as soon as the EC decreased its zinc tariff or made other compensatory concessions
Result:	Resolution of issues unknown

47. Import Restrictions on Thrown Silk Yarn 1/

Date:	July 1977
Complaint by:	United States
Versus:	Japan
Issue:	Whether a "prior permission system" introduced by Japan on imports of thrown silk yarn was inconsistent with the GATT
GATT action:	Complaint referred to a panel; panel report (adopted May 1978) stated parties had reached an understanding on the implementation of the system
Result:	Consultations between the United States and Japan had resulted in an understanding that was acceptable to the United States

48. Exports Refunds on Malted Barley

Date:	October 1977
Complaint by:	Chile
Versus:	European Community
Issue:	Alleged EC export subsidy on malted barley
GATT action:	Referred to GATT Director-General for conciliation under 1966 procedures concerning disputes initiated by developing countries
Result:	Matter not pursued by Chile

49. Restrictions on Imports of Leather 1/

Date:	July 1978
Complaint by:	United States
Versus:	Japan
Issue:	Whether quota restrictions constitute a nullification or impairment of U.S. benefits under the General Agreement
GATT action:	Panel report (adopted November 1979) noted that a bilateral settlement had been reached in February

See footnotes at end of list.

	1979 and that the U.S. was withdrawing its complaint; each party reserved its rights under the GATT as to the matter if the agreement failed
Result:	The bilateral understanding reached in February 1979 terminated on March 31, 1982. United States filed a new complaint in December 1982 (see case 75)

50. Refunds on Exports of Sugar

Date:	September 1978
Complaint by:	Australia
Versus:	European Community
Issue:	Whether EC export subsidies contravened its obligations under article XVI (subsidies) or caused or threatened serious prejudice to Australia or nullified or impaired Australian benefits under the GATT or impeded the objectives of the General Agreement
GATT action:	Panel report (adopted November 1979) concluded EC export subsidies had indirectly caused "serious prejudice" to Australia and constituted a threat of serious prejudice in terms of article XVI(1), but did not find that the EC had more than an equitable share of world export trade. No other findings made
Result:	In response to Australian efforts to obtain implementation of the finding, EC argued that it was not under any obligation to alter its system of restrictive payments. In 1980, a working party began review, and in a report (adopted March 1981) indicated that the EC maintained that its new EC sugar export refund system was a sufficient response. Australia and Brazil disagreed. In September 1981, a second working party was asked to report on the implementation of the panel's report. In a report (adopted March 1982), that working party stated it could not conclude its work since the EC attempted to broaden the scope of review to include other countries' sugar policies

51. Refunds on Exports of Sugar

Date:	November 1978
Complaint by:	Brazil
Versus:	European Community
Issue:	Whether EC sugar export subsidies were consistent with its obligations under article XVI (subsidies); whether they caused or threatened serious prejudice or nullified or impaired Brazilian benefits under Part 4 of the General Agreement
GATT action:	Panel report (adopted November 1980) found that EC practices caused serious prejudice and threatened serious prejudice to Brazilian interests in terms of XVI(1) and did not further the principles and objectives of article XXXVI in conformity with the commitments of article XXXVIII of the GATT
Result:	Bilateral discussion reached impasse (see case 50)

52. Restrictions on Imports of Textiles from Hong Kong

Date:	July 1979
Complaint by:	United Kingdom on behalf of Hong Kong
Versus:	Norway
Issue:	Whether Norway's quotas were consistent with article XIX (emergency action on particular imports) and article XIII (nondiscriminatory administration)
GATT action:	Council adopted in principle (June 1980) panel report that Norway's article XIX action was not consistent with article XIII; termination or modification was recommended based on mutual agreement
Result:	Norway extended its article XIX restrictions until the end of 1981; Hong Kong reserved its rights; restrictions ultimately modified

53. Imports Restrictions on Apples from Chile

Date:	July 1979
Complaint by:	Chile
Versus:	European Community
Issue:	Whether EC's 4-month suspension of apple imports from Chile was consistent with various provisions of the GATT (articles I, II, XI, XIII, and part IV)
GATT action:	Panel report (adopted November 1980) found EC measures not in conformity with article XIII and constituted prima facie nullification or impairment of benefits under article XXIII. No other findings
Result:	Issues apparently resolved in bilateral consultations

54. Restrictions on Imports of Leather

Date:	October 1979
Complaint by:	Canada
Versus:	Japan
Issue:	Whether quota restrictions constituted a nullification or impairment of Canada's benefits under GATT
GATT action:	Panel report (adopted November 1980) stated that a bilateral settlement had been reached
Result:	Bilateral consultations had led to a solution of the dispute in September 1980

55. Restrictions on Domestic Sales of Soybean Oil

Date:	October 1979
Complaint by:	United States
Versus:	Spain
Issue:	Whether internal consumption quotas were inconsistent with article III (national treatment) and article XVII (State trading enterprises)
GATT action:	Panel report (not adopted but noted in November 1981) found Spanish restrictions not inconsistent with articles III and XVII, but that nullification or impairment of U.S. benefits could have occurred in the sense of article XXIII:1(b) and 1(c)
Result:	No change in restrictions

56. Restrictions on Imports of Manufactured Tobacco 1/

Date:	November 1979
Complaint by:	United States
Versus:	Japan
Issue:	Whether Japanese measures affecting imports of manufactured tobacco products were inconsistent with provisions of articles III (national treatment of imports) and XVII (operation of State trading enterprises)
GATT action:	Panel established in March 1980; panel report (adopted June 1981) indicated the U.S. had withdrawn its complaint
Result:	Following bilateral consultations, Japan repealed internal tax on imported cigars in March 1980 and reduced import duties on cigars and pipe tobacco. Japan agreed to liberalize market restrictions

57. Prohibitions of Imports of Tuna and Tuna Products

Date:	January 1980
Complaint by:	Canada
Versus:	United States
Issue:	Whether U.S. embargo on imports of tuna from Canada was contrary to U.S. GATT obligations (articles I (MFN), XI (quantitative restrictions), and XIII (nondiscriminatory administration)) or was within the scope of exception in article XX(g) (measures to protect exhaustible natural resources)
GATT action:	Panel report (adopted February 1982) found that the tuna embargo was not in conformity with article XI and that the exception provided in article XX did not apply
Result:	In the interim, the United States had eliminated the challenged embargo

58. Imports of Beef from Canada

Date:	March 1980
Complaint by:	Canada
Versus:	European Community
Issue:	Whether the EC requirement that beef be graded according to USDA standards to meet requirements for tariff quota was consistent with articles I and II (MFN and schedule of concessions, respectively); whether nullification or impairment existed
GATT action:	Panel report (adopted March 1981) found EC measures inconsistent with articles I and II
Result:	EC granted a quota share to Canadian beef meeting high quality standard

59. Tariff Treatment of Unroasted Coffee

Date:	April 1980
Complaint by:	Brazil
Versus:	Spain

See footnotes at end of list.

Issue:	Whether Spain's discriminatory tariff treatment of imports of Brazilian coffee by Spain violated article I (MFN)
GATT action:	Panel report (adopted June 1981) found Spanish actions prima facie impairment of Brazilian GATT benefits; actions not in conformity with article I:1
Result:	Spain agreed to give equal tariff treatment by December 31, 1981

60. Imports of Poultry from the United States

Date:	September 1980
Complaint by:	United States
Versus:	European Community
Issue:	Whether U.S. benefits accruing under article III (national treatment) were impaired by discriminatory U.K. restrictions on U.S. poultry imports and whether United Kingdom measures met the terms of article XX (general exceptions)
GATT action:	Panel established in October 1980
Result:	Complaint withdrawn in May 1981

61. Imposition of Countervailing Duties without Injury Criterion

Date:	October 1980
Complaint by:	India
Versus:	United States
Issue:	Whether application of countervailing duties without the application of material injury test under article VI:6 was inconsistent with MFN obligation of article I
GATT action:	Panel established in November 1980; panel report (adopted November 1981) stated that bilateral consultations had resolved dispute
Result:	Complaint withdrawn after bilateral consultations resolved dispute in September 1981. The United States agreed to apply provisions of the Subsidies Code to India

62. Import Duty on Vitamin B12, Feed-Grade Quality

Date:	June 1981
Complaint by:	European Community
Versus:	United States
Issue:	If U.S. imposition of higher duty on vitamin B12 feed-grade quality as a result of elimination of American Selling Price method of valuation nullified or impaired EC benefits under the Agreement
GATT action:	Panel report (adopted in Oct. 1982) found that the United States had not infringed any GATT provision but indicated that the Council could invite the United States to advance the implementation of Tokyo Round concession duty rate on feed-grade vitamin B12
Result:	Council did not adopt panel's recommendation; therefore, the United States did not accelerate staging on this product

63. Production Subsidies on Canned Fruit

Date:	June 1981
Complaint by:	Australia
Versus:	European Community
Issue:	Whether subsidies were consistent with EC obligations under article XVI (subsidies)
GATT action:	Referred to panel
Result:	Australia did not pursue this case. Instead, Australia supported the United States in the United States-EC canned fruit case (see Case 66)

64. Imports of Automotive Spring Assemblies

Date:	November 1981
Complaint by:	Canada
Versus:	United States
Issue:	Whether the U.S. International Trade Commission exclusion order pursuant to section 337 of Tariff Act of 1930 as to such imports was consistent with articles II (schedule of concessions), III (national treatment), XI (quantitative restrictions), and XX (general exceptions); whether prima facie nullification or impairment existed
GATT action:	Panel report (adopted May 1983) found U.S. actions fell under the exception from GATT obligations provided under article XX(d)
Result:	No U.S. action required or taken

65. Export Subsidies on Wheat Flour 1/ 2/ 3/

Date:	December 1981
Complaint by:	United States
Versus:	European Community
Issue:	Alleged violation of articles 8 and 10 of the Subsidies code (EC subsidies on wheat flour had resulted in EC having more than an equitable share of the world export trade in wheat flour)
GATT action:	Subsidies code panel report (issued March 1983) has been considered but not yet adopted by the Subsidies code committee
Result:	Subsidies code committee continues its examination of panel's report

66. Production Aids on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes 1/

Date:	March 1982
Complaint by:	United States
Versus:	European Community
Issue:	Whether production subsidies nullified or impaired tariff concessions previously granted by EC, in violation of article XVI (subsidies)
GATT action:	Panel report found that production subsidies on peaches and pears nullified and impaired benefits

See footnotes at end of list.

	accruing to the United States from EC tariff concessions on canned peaches, canned pears, and canned fruit mixtures
Result:	Additional information was supplied after the panel report was originally issued in November 1983. Revised panel report released in June 1985. The Council has not yet adopted the panel's report. The United States and EC reached a bilateral solution

67. Administration of the Foreign Investment Review Act (FIRA)

Date:	March 1982
Complaint by:	United States
Versus:	Canada
Issue:	Whether conditions on foreign investors relating to purchases of Canadian goods and exports were consistent with articles III (national treatment), XI (quantitative restrictions), and XVII (State trading enterprises); whether the measures fell under the exceptions of article XX(d)
GATT action:	Panel report (adopted February 1984) found that certain enforceable purchase undertakings but not export undertakings were inconsistent with GATT and were not necessary within the meaning of article XX(d)
Result:	Canada agreed to implement legislation in a manner consistent with GATT

68. Pasta Subsidies 1/ 2/

Date:	April 1982
Complaint by:	United States
Versus:	European Community
Issue:	Whether export subsidies on pasta violated article 9 of the Subsidies code, which prohibits export subsidies on products other than certain primary products
GATT action:	In May 1983 Subsidies code panel ruled in favor of the US complaint
Result:	Subsidies code committee continues its examination of the panel's report

69. Tariff Treatment on Imports of Citrus Products from Certain Mediterranean Countries 1/

Date:	June 1982
Complaint by:	United States
Versus:	European Community
Issue:	Whether preferences were inconsistent with article I (MFN) or were consistent with article XXIV (free-trade areas, etc.) or otherwise impaired benefits under the GATT
GATT action:	Panel report did not pass judgment on the conformity of the EC agreements with article XXIV. Panel found that the EC preferences on fresh oranges and fresh lemons had impaired benefits accruing to the United States under article I:1 in the sense of article XXIII:1(b).

See footnotes at end of list.

	Report suggested EC "should consider limiting the adverse effect on U.S. exports of fresh oranges and lemons" which could be accomplished by the EC reducing the MFN rate of duty by October 1985
Result:	The EC has opposed final action by the Council on the report. The United States implemented additional duties on EC pasta by way of retaliation

70. "Manufacturing Clause" in U.S. Copyright Legislation

Date:	March 1983
Complaint by:	European Community
Versus:	United States
Issue:	Whether prohibition on the importation or distribution of foreign (except Canadian) printed works was contrary to articles XI and XIII (quantitative restrictions and non-discriminatory administration, respectively) of the GATT and nullified or impaired benefits to the EC under article XXIII; whether it was justified under the Protocol reservation (grandfather clause)
GATT action:	Panel report (adopted May 1984) concluded that Manufacturing Clause was inconsistent with article XI and found prima facie nullification or impairment of EC benefits under the Agreement
Result:	The United States announced it would make every effort to bring its practices into conformity with GATT provisions. The law is still in effect, subject to statutory expiration date in 1986

71. Sugar Regime

Date:	June 1982
Complaint by:	Argentina, Australia, Brazil, Colombia, Cuba, Dominican Republic, India, Nicaragua, Peru, and the Philippines
Versus:	European Community
Issue:	Whether subsidies violated article XVI (caused serious prejudice to national interest and resulted in more than an equitable share of the market)
GATT action:	Consultations under article XXIII:1 were recommended
Result:	Rights under the GATT reserved upon parties' report that consultations had not resulted in resolution

72. Value Added Tax (VAT) Payments 2/

Date:	July 1982
Complaint by:	United States
Versus:	European Community
Issue:	Whether EC practices of deducting VAT payments from the value of government contracts were inconsistent with article 1 of the Government Procurement code
GATT action:	Panel report (adopted May 1984) found that the EC practices were inconsistent with article 1:b of the Government Procurement code

See footnotes at end of list.

Result:	The United States-EC consultations on ways to resolve issue continue

73. Quantitative Restrictions Against Imports from Hong Kong

Date:	August 1982
Complaint by:	United Kingdom (for Hong Kong)
Versus:	European Community
Issue:	Whether restrictions were consistent with articles XI and XIII (quantitative restrictions and nondiscriminatory administration, respectively)
GATT action:	Panel report (adopted July 1983) found EC measures did not comply with article XI and had to be considered prima facie nullification or impairment. Report recommended that EC terminate the quantitative restrictions
Result:	France took actions to terminate restrictions covering a small portion of the disputed products during November 1983. EC took article XIX action on quartz watches, legalizing restrictions on this product in May 1984. Hong Kong continues to press France to conform to the panel recommendations on other products

74. Internal Regulations Having an Effect on Imports of Certain Parts of Footwear

Date:	November 1982
Complaint by:	European Community
Versus:	Finland
Issue:	If Finland's "local content" restrictions on footwear sole exports to the Soviet Union disrupted EC exports of this product to Finland, constituting an infringement of article III (national treatment)
GATT action:	Referred to panel
Result:	Not reported

75. Measures on Imports of Leather 1/

Date:	February 1983
Complaint by:	United States
Versus:	Japan
Issue:	Whether import quota on leather was consistent with prohibition on quantitative restrictions in articles II, X, XI, and XIII (schedule of concessions, publication and administration of trade regulations, quantitative restrictions, and non-discriminatory administration, respectively). Similar complaint by United States was withdrawn in February 1979 (see case 49)
GATT action:	Panel report (adopted by Council in May 1984) found the quotas were inconsistent with article XI
Result:	Japan announced some preliminary measures to progressively liberalize its restrictions. The U.S. continues to request that Japan conform to panel recommendations. Japan has announced that it will replace quantitative restrictions with a tariff-rate quota

See footnotes at end of list.

76. Nullification or Impairment of Benefits and Impediment to the Attainment of GATT Objectives

Date:	April 1983
Complaint by:	European Community
Versus:	Japan
Issue:	Benefits of GATT not realized due to particulars of Japanese economy resulting in low level of imports
GATT action:	Discussed in Council meetings. No panel established
Result:	No further action reported

77. Imports of Sugar

Date:	June 1983
Complaint by:	Nicaragua
Versus:	United States
Issue:	Whether reduction of quota on Nicaraguan sugar was inconsistent with articles II, XI, XIII:2, and Part 4 (schedule of concessions, quantitative restrictions, non-discriminatory administration of quantitative restrictions, and trade and development)
GATT action:	Panel report (adopted March 1984) found the sugar quota allocated to Nicaragua inconsistent with articles XI and XIII
Result:	The United States informed the GATT and Nicaragua that it will terminate action only if a solution is found for the broader United States-Nicaraguan political dispute.

78. Imports of Newsprint from Canada

Date:	March 1984
Complaint by:	Canada
Versus:	European Community
Issue:	Whether EC reduction of its duty-free quota on imports of newsprint was inconsistent with EC obligations under articles II (schedule of concessions) and XIII (non-discriminatory administration of quantitative restrictions)
GATT action:	Panel report (adopted November 1984) found that EC action was inconsistent with articles II and XIII
Result:	In December 1984, EC agreed to restructure the quota for newsprint

79. Imports of Electrical Transformers

Date:	September 1984
Complaint by:	Finland
Versus:	New Zealand
Issue:	Whether imposition of antidumping duties by New Zealand on Finnish electrical transformers was consistent with article VI (antidumping and countervailing duties)
GATT action:	Panel report (adopted June 1985) did not find that material injury of New Zealand's transformer industry had been established and found that New Zealand's action was inconsistent with article VI. Report proposed reimbursement of duties paid
Result:	Duties repaid promptly

80. Discriminatory Application of Retail Sales Tax on Gold Coins

Date:	October 1984
Complaint by:	South Africa
Versus:	Canada (Ontario)
Issue:	If discriminatory elimination of Ontario's sales tax on Canadian maple leaf gold coins violated article II (schedule of concessions) through the non-observance of a tariff binding, article III (equal treatment of national and imported products in respect of internal taxes) and article XXIV:12
GATT action:	Panel report ruled in favor of South Africa
Result:	Panel report awaiting adoption

81. Provisions of the U.S. Wine Equity Act 2/

Date:	February 1985
Complaint by:	European Community
Versus:	United States
Issue:	Whether U.S. legislation amending the definition of industry for purposes of wine and grape products was consistent with the terms of the Subsidies code
GATT action:	Subsidies code panel formed
Result:	Pending

82. Import Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies

Date:	March 1985
Complaint by:	European Community
Versus:	Canada (Quebec)
Issue:	Possible violation of article XXIV:12 by Quebec Liquor Board for increasing markup differentials between domestic and imported wines
GATT action:	Panel requested but composition and terms of reference undecided (as of June 1985)
Result:	Pending

83. U.S. Restrictions on Imports of Certain Sugar-containing Products

Date:	March 1985
Complaint by:	Canada
Versus:	United States
Issue:	Nullification or impairment of Canadian benefits under article XXIII:1(b)
GATT action:	Panel requested
Result:	Pending

84. Quotas on Imports of Leather Footwear 1/

Date:	July 1985
Complaint by:	United States
Versus:	Japan
Issue:	If quantitative restrictions create prima facie case of nullification or impairment of benefits accruing to the United States

See footnotes at end of list.

GATT action:	Panel requested, but terms of reference undecided. The United States requests that conclusions reached in the leather panel decision (case 68) be applied to this case since the quota schemes are identical
Result:	Pending

1/ Throughout this listing, this footnote notation indicates that the case was initiated following a section 301 petition filed by private parties in the United States, in accordance with U.S. law (the Trade Act of 1974). Other actions taken by the United States pursuant to section 301, such as pending consultations or U.S. responses to foreign government actions, are not included in this listing since they have not resulted or may not result in formal dispute settlement procedures being invoked under the GATT.

2/ Throughout this listing, this footnote notation indicates that the case was filed under one of the NTM codes adopted in the Tokyo round .

3/ In May 1983 the EC filed a complaint challenging the consistency of U.S. subsidies on exports of wheat flour to Egypt with the provisions of the Subsidies code. A panel was established in May 1983, but no further action has been reported.

Section Two
Cases Included in Data in Tables 1-4

Table 1.--Summary of cases by country or country grouping, type of product, and type of trade measure, 1948 to Sept. 1, 1985

Country	Action	Case Number(s)
United States	Filed by	1, 11, 14, 17, 18, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41, 43, 44, 45, 47, 49, 55, 56, 60, 65, 66, 67, 68, 69, 72, 75, 84
	Filed against	3, 5, 7, 19, 38, 57, 61, 62, 64, 70, 77, 81, 83
European Community	Filed by	2, 7, 8, 10, 12, 13, 15, 16, 20, 21, 22, 23, 38, 46, 62, 70, 74, 76, 81, 82
	Filed against	6, 9, 11, 12, 14, 16, 17, 18, 21, 22, 23, 24, 25, 26, 28, 30, 31, 33, 35, 36, 37, 39, 40, 41, 42, 44, 45, 48, 50, 51, 53, 58, 60, 63, 65, 66, 68, 69, 71, 72, 73, 78
Canada	Filed by	42, 54, 57, 58, 64, 78, 83
	Filed against	29, 43, 46, 67, 80, 82
Japan	Filed by	Not Applicable
	Filed against	47, 49, 54, 56, 75, 76, 84
Australia	Filed by	19, 24, 25, 50, 63
	Filed against	4
Other developed countries	Filed by	3, 5, 6, 9, 79, 80
	Filed against	8, 10, 13, 15, 20, 27, 32, 52, 55, 59, 74, 79
Developing countries	Filed by	4, 26, 27, 36, 48, 51, 52, 53, 59, 61, 71, 73, 77
	Filed against	1, 2, 34

Table 2.--Summary of cases by country or country grouping, type of product, and type of trade measure, 1975 to Sept. 1, 1985

Country	Action	Case Number(s)
United States	Filed by	43, 44, 45, 47, 49, 55, 56, 60, 65, 66, 67, 68, 69, 72, 75, 84
	Filed against	57, 61, 62, 64, 70, 77, 81, 83
European Community	Filed by	46, 62, 70, 74, 76, 81, 82
	Filed against	44, 45, 48, 50, 51, 53, 58, 60, 63, 65, 66, 68, 69, 71, 72, 73, 78
Canada	Filed by	54, 57, 58, 64, 78, 83
	Filed against	43, 46, 67, 80, 82
Japan	Filed by	Not Applicable
	Filed against	47, 49, 54, 56, 75, 76, 84
Australia	Filed by	63
	Filed against	Not Applicable
Other developed countries	Filed by	79, 80
	Filed against	52, 55, 59, 74, 79
Developing countries	Filed by	48, 51, 52, 53, 59, 61, 71, 73, 77
	Filed against	Not Applicable

Table 3.--Summary of panel cases by time period and type of trade measure, 1948 to Sept. 1, 1985

Type of measure	Case number(s) 1948-74	1974-85
Tariffs	8, 9, 13, 16, 20, 26, 29, 30, 32, 34, 42	46, 58, 59, 61, 62, 69, 79, 81
Quotas	7, 17, 28, 33, 36, 37	43, 49, 52, 53, 54, 57, 73, 75
Subsidies	4, 21, 22, 23, 24, 25	77, 78, 83, 84, 48, 50, 51, 63, 65, 66, 68, 71
Taxes	2, 6, 10, 12, 14, 15, 18, 35, 38, 39, 40, 41	56, 72, 80
Other NTM's	1, 19, 31	44, 45, 47, 55, 60, 64, 67, 70, 74, 82
Other	3, 5, 27	76

Table 4.--Summary of outcome of dispute settlement cases, 1948 to Sept. 1, 1985

Outcome	Case number(s) 1948 to 1974	1975 to Sept. 1, 1985
Complaint not supported	3, 5	62, 64
Implementation action taken:		
Disputed practice terminated	1, 2, 6, 8, 9, 10, 11, 12, 13, 18, 20, 22, 23, 26, 28, 29, 30, 35, 37	44, 45, 57, 59, 61, 79
Other action:		
Some practices terminated	15, 27, 36	49, 73, 75
Disputed practice adjusted	4, 25, 38, 39, 40, 41	43, 67, 78
Other settlement	16, 17, 21, 24, 33, 34, 42	46, 47, 52, 53, 54, 56, 58
No implementation action taken:		
Decision not to adopt report	Not Applicable	55
Report adopted:		
No action taken	Not Applicable	50, 51, 70, 72, 77
Retaliation authorized	7	
Complaint not pursued	14, 19, 31	60, 63, 71, 74 76
Outcome unknown	32	48
Pending cases:		
Report submitted, adoption pending	Not Applicable	65, 66, 68, 69
Report not yet submitted	Not Applicable	80, 81, 82, 83, 84

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