GATT Dispute Settlement after the Tokyo Round: An Unfinished Business

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GATT DISPUTE SETTLEMENT AFTER THE TOKYO ROUND: AN UNFINISHED BUSINESS

Robert E. Hudect†

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INTRODUCTION

Government conduct in the area of foreign trade policy is subject to a network of rather specific international rules. For an area as politically sensitive as trade policy, the scope and detail of this rule network is quite extraordinary. The centerpiece is a comprehensive code of basic rules contained in the 1947 General Agreement on Tariffs and Trade (GATT, or the General Agreement).\(^1\) Over the years, the GATT governments have supplemented and refined the rules of the General Agreement extensively by means of amendments, collateral instruments and interpretative decisions. Most recently, the Tokyo Round of trade negotiations,\(^2\) conducted

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2. The formal title of the negotiations was the Multilateral Trade Negotiations. This bland title, which became "MTN" to the participants, signified that the negotiations were an
from 1973 to 1979, added a number of important new "codes" that establish detailed rules and procedures concerning particular nontariff trade barriers.

An international organization, known also as "the GATT," administers the rules of the General Agreement. GATT procedures provide for extensive exchanges of information, regular review of key subject areas, and ad hoc consultations on particular concerns. In the event that a dispute between governments cannot be resolved by these consultative procedures, the GATT has a process, known as "the panel procedure," for third-party adjudication of legal claims. The generic term for this final stage of conflict-resolution activity is "dispute settlement."

All of the GATT mechanisms for exchange of views and information play a role in focusing the regulatory impact of GATT rules. The procedures for dispute settlement have a special importance, however, for they are the ultimate test of rule enforcement and thus set the tone for treatment of the rules in the rest of GATT affairs, and in national capitals where critical compliance decisions are actually made.

In the late 1960's, governments began to express concern that the GATT's dispute-settlement machinery was not functioning properly and autonomous international conference independent of the General Agreement. Such autonomy permitted the participation of several non-GATT countries. In reality, the GATT controlled the negotiations completely.

A meeting of government ministers in September, 1973, in Tokyo, formally opened the negotiations. See Declaration of Ministers Approved at Tokyo on 14 September 1973, BISD (20th Supp) 19 (1974). After remaining dormant for over a year until the U.S. Congress passed authorizing legislation, the negotiations moved in lethargic circles for about three years until the customary final "crunch" began in 1978. The signing of a Final Act in April, 1979 formally concluded the negotiations; most of the agreements came into effect on January 1, 1980.

For the United States, the results of the negotiations were effectuated by the Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.A. (West 1980)).

Currently, the GATT has not yet published the texts of the various Tokyo Round agreements in its BISD series. The GATT has published official texts of each agreement in separate GATT pamphlets bearing the formal title of the individual agreement, without further documentary designation. A complete set of texts, in somewhat rudimentary form, can be found in AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. Doc. No. 153, 96 Cong., 1st Sess. (1979) [hereinafter cited without cross reference as H.R. Doc. No. 153].

For a detailed two-part report by the GATT Secretariat on the issues and results of all the Tokyo Round agreements, see GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1979) [hereinafter cited as THE TOKYO ROUND]; id., pt. II, SUPPLEMENTARY REPORT (1980).

3. The GATT does not have the formal status of an international organization. Article XXV of the General Agreement vests all powers of administration in the Contracting Parties to the agreement acting as a collective entity. GATT Art. XXV. By decision, practice, and tradition, the Contracting Parties have constructed a large organization with many branches, headed by an executive GATT Council. The organizational aspects of the GATT are discussed extensively in J. JACKSON, WORLD TRADE AND THE LAW OF GATT 119-62 (1969).
that compliance with GATT rules was suffering as a result. This problem occupied a prominent place on the agenda of the Tokyo Round trade negotiations. For the United States in particular, the substantive results of the negotiations, especially in the new codes, were closely tied to the achievement of more effective dispute-settlement procedures.

The Tokyo Round produced a complex and subtle package of reforms dealing with GATT dispute settlement. Governments are certain to test this reform package rather promptly. The momentum of the reform negotiations has already stimulated a general increase in GATT litigation. Moreover, the United States in particular is committed to an intensive use of the new dispute-settlement procedures by virtue of provisions in the Trade Act of 1979 requiring the Administration to pursue these procedures in response to significant violations of GATT rules.


Each of the major NTB codes, which are juridically separate from the General Agreement, contains its own dispute-settlement procedure. The major NTB codes are:


Each code disputes procedure is modeled after the traditional panel procedure, but with certain important differences; smaller differences distinguish some code procedures from others. See note 82 infra.

This article examines the Tokyo Round reforms on dispute settlement and attempts to assess the likely impact of these reforms on future GATT dispute-settlement practice.

I

GATT REGULATORY POLICY BEFORE THE TOKYO ROUND

The main reason for establishing an international regulatory structure is to create pressures that will influence governments to act in conformity with certain agreed objectives. The fact that governments are prepared to accept regulation indicates a shared perception of the need for mutual restraint and discipline. This shared perception exists prior to, and independent of, the regulatory structure itself. The prime objective of regulatory policy is to make this shared value a more effective influence on conduct by creating institutions that will somehow augment its force.

Sovereign governments are free to decide how much force an international regulatory structure will have. At a minimum, governments will presumably want the regulatory structure to have more force than the sum of the persuasive and coercive pressures already available through ad hoc diplomacy. The upper limit involves a calculation of the extent to which gov-

5. Section 901 of the Trade Agreements Act of 1979, 19 U.S.C.A. §§ 2411-2416 (West 1980), amends and expands Chapter I of Title III of the Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 2041 (1975). Congress rewrote the substantive bases for retaliatory action by the President to include specific references to the enforcement of trade agreement rights, see 19 U.S.C.A. § 2411(a)(1), (a)(2)(A)(West 1980), a change which may have been necessary to cover some of the rights granted by the Tokyo Round Subsidies Code. Congress also tightened the private complaints procedure established in the 1974 Act by adding rather strict time limits. See 19 U.S.C.A. §§ 2412, 2414 (West 1980). In addition, once the Administration makes the threshold determination to investigate a private complaint, the statute requires consultation with the foreign government involved. If the consultants do not resolve the issue and a trade agreement covers the matter, the law requires that the Administration “shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement.” 19 U.S.C.A. § 2413 (West 1980).

Congress considered section 901 an important prerequisite to the passage of the various trade-liberalization amendments required to implement the substantive agreements concluded in the Tokyo Round. Section 901 was particularly important in connection with the liberalization of the U.S. countervailing duties law, 19 U.S.C.A. §§ 1671-1671f (West 1980), as required by the Tokyo Round Subsidies Code. The exceptionally rigorous dispute-settlement procedure in the Subsidies Code, see text accompanying notes 82-98 infra, is a product of this linkage.

ernments are willing to restrict their own freedom of action for the sake of similarly influencing the behavior of others. This calculation is more complicated than it appears. The people who make these decisions often regard the restraining discipline imposed on their own governments as a desirable influence on domestic policymaking. At the same time, these decision makers are aware that they represent nation-states with complex and dynamic political systems whose future behavior cannot be predicted with absolute certainty.

The GATT regulatory structure has never been very coercive. Technically, the General Agreement authorizes the use of economic countermeasures that could serve as coercive sanctions, but the GATT has chosen not to make use of this opportunity. The GATT has also chosen not to employ the full regulatory impact of formal international obligations. None of GATT's major participants have accepted the General Agreement as a "definitive" obligation, and GATT adjudicatory bodies have usually avoided placing emphasis on the obligatory quality of GATT rules generally.

The regulatory impact of GATT rules has rested on the normative force of organized community condemnation. The key to the force of such normative pressures is an underlying consensus among GATT member governments about what constitutes correct governmental behavior. Without any rules at all, the member governments could probably arrive at a rough consensus on the propriety of most government actions. The written rules of the General Agreement serve to sharpen and focus the normative force of the underlying consensus — by clarifying its substantive content, having governments freely subscribe to that substantive content, and adding a further normative obligation in the form of reciprocity owed to other governments who observe the rules.

6. GATT Art. XXIII(2) permits the Contracting Parties to authorize governments to suspend obligations (i.e., to impose prohibited trade restrictions) against other governments that violate the General Agreement. The drafting history of this provision makes clear that the purpose of the remedy is purely compensatory. See R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 26-28 (1975). The Article XXIII retaliation authority has been requested only once, and even then it was not actually used. See Hudec, supra note 5, at 505-07. Governments, however, sometimes employ compensatory measures authorized by other GATT provisions to demonstrate displeasure. See id. at 507-10.


GATT regulatory policy has always contained a certain tension between two schools of thought regarding the utility and efficacy of written rules. A "legalist" viewpoint has supported the effort to write clearly defined rules and has urged the importance of a third-party adjudication procedure that can objectively apply such rules in disputed cases. An "antilegalist" viewpoint has emphasized the complexity of the political, social, and economic forces involved in any government's trade policy, as well as the limited power of international legal obligations in the face of such forces. This latter view has admitted that rules may have some value as guidelines, but has sought to discourage resort to adjudication, favoring more loosely structured consultation procedures in which governments seek to resolve conflicts through negotiation.9

In the twenty-five years that preceded the Tokyo Round, GATT regulatory policy moved from a somewhat legalist position to a rather pronounced antilegalist position. The drafting of the General Agreement in the form of detailed rules represented an initial commitment in the legalist direction. In the GATT's early years, the development of a procedure for third-party adjudication of legal complaints, called the "panel procedure," reinforced that commitment. During the 1950's, governments called upon the panel procedure frequently, and the procedure achieved a reputation for some effectiveness.10

The 1960's brought dramatic changes. Resort to adjudication became increasingly less frequent, and attempts to invoke rules in other areas of GATT business likewise became less common. The prevailing GATT ideology of the time, as espoused by the major participants, seemed preoccupied with not being "too legalistic." Accordingly, consultation-style diplomacy became glorified as the ideal of regulatory policy. When individual governments took issue with this ideology by invoking GATT legal

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9. There is a widely-held suspicion that governments often espouse the antilegalist position not because they believe that such position will lead to more effective regulation, but rather because they want to weaken GATT's regulatory impact. Although the author shares this suspicion, it would be unproductive to interrupt the analysis at each mention of the antilegalist viewpoint in order to probe its proponents' good faith. The actual shape of GATT regulatory policy, legalist or antilegalist, is a fact, regardless of the motives that have prompted such policy. Changes in regulatory policy, including those of the Tokyo Round reforms, are also facts that can be analyzed without regard to motive. Finally, the possibility of questionable motivation should not be allowed to obscure the fact that the antilegalist arguments raise serious issues of regulatory policy. These issues should be treated on the merits.

10. R. HUDEC, supra note 6, at 66-190, gives a detailed history of the panel procedure during this period. In the peak years 1952-1958, 40 complaints were filed, 11 of which the parties carried to a third-party ruling. Of these 40 cases, 36 had an identifiable result; in 30 of these 36, the complainant reported satisfaction. Id. at 84, 95-96.
rights, they found that their legalistic efforts caused considerable resentment, and even open resistance.\textsuperscript{11}

The decline of the legalist model during the 1960's can be traced to two important developments.\textsuperscript{12} The major development was that several of the original GATT rules, written in 1947, were becoming outdated. Governments were finding that they could not comply, and in some cases came to believe they should not comply, with some of the 1947 rules.\textsuperscript{13} Moreover, nations found that the 1947 rules had failed to regulate certain nontariff trade barriers (NTBs) that were as pernicious as the more conventional trade barriers that were regulated in the General Agreement.\textsuperscript{14} As a result, even the 1947 rules that continued to make sense seemed less compelling. Although the GATT might have renegotiated the rules to meet this problem, it developed the practice of putting outmoded or circumvented rules aside and persuading everyone to concentrate on "practical solutions" instead. The need to justify this practice was one of the factors that led governments to espouse the antilegalist viewpoint. At a more fundamental level, the breakdown of the 1947 rules led many governments to question the utility of rule-oriented regulation in general.

The second development that contributed to the antilegalist surge was a change in the structure of political power within the GATT. Originally, the centers of power were the United States, which had designed the legalist model, and a fragmented collection of relatively small European and British Commonwealth states, for which a rule-oriented, legalist model of regulation made sense. The formation of the EEC and the economic resurgence of Japan transformed the GATT power structure into a triad of economic superpowers, each of which felt more comfortable with, and entitled to, a less restrictive form of regulation.

The emergence of a strong bloc of developing-country members accentuated the superpower preference for a less legal approach. The developing countries, having been excused from most meaningful GATT obligations, began to press for strict enforcement of developed-country obligations as a

\textsuperscript{11} For a discussion of the history and tone of GATT legal disputes during the 1960's, see \textit{id.} at 216-29, 241-60.

\textsuperscript{12} For a more thorough analysis of the decline of the legalist model, see Hudec, \textit{GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade}, 80 \textit{YALE L.J.} 1299, 1343-68 (1971); Hudec, Adjudication of International Trade Disputes 14-24 (Trade Policy Research Centre, Thames Essay No. 16, 1978) [hereinafter cited as Hudec, Thames Essay].

\textsuperscript{13} For a discussion of the key GATT rules involved in this breakdown, see section III(A)(2) \textit{infra}.

\textsuperscript{14} The most prominent unregulated NTBs were voluntary export restraints, see note 45 \textit{infra} and accompanying text, variable levies, see note 40 \textit{infra}, various subsidies (now treated in the Tokyo Round Subsidies Code), and various product standards (now treated in the Tokyo Round Standards Code). For a detailed description of unregulated NTBs, see the sources cited in note 12 \textit{supra}. 
duty owed to the poor countries of the world. Finding these demands excessive and unrealistic, as well as irksome in their one-sidedness, the developed countries grew more attached to an ideology that emphasized the shortcomings of a legalistic approach toward trade policy.

Behind the antilegalist ideology of the 1960's was the declining level of compliance with GATT rules. In the beginning, some of the noncompliance did not appear too alarming since it involved rules that governments had come to view as unrealistic. As to these rules, noncompliance amounted to de facto renegotiation. As time went on, however, the legal breakdown started spreading to other areas. Governments began invoking antilegalist responses to every GATT rule, and these responses gained increasing legitimacy as the growing number of obviously nonfunctioning rules called into question the overall balance and equilibrium of the GATT rule structure.15 Toward the end of the 1960's, an increasing number of observers began to express the feeling that governments were simply not observing GATT rules.16

II

THE COMMITMENT TO LEGAL REFORM

The 1970's produced an intensive reexamination of GATT regulatory policy. Although diplomats usually do not reopen an issue without a fairly precise idea of the eventual outcome, this particular decision seems to have been stimulated more by the pressure of events than by controlled choice.

The dominant influence on GATT affairs during this period was a mounting wave of protectionist sentiment in the national governments of most major GATT participants. Something more than the progressive legal breakdown of the 1960's, this "new protectionism" indicated a fundamental shift of trade policy attitudes at the political level. The new attitude posed a genuine threat to the relatively liberal trading system that the GATT had

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15. One example of this movement was the sound defeat of a proposal requiring governments either to submit a firm plan for the elimination of illegal "residual restrictions" or to apply for formal waivers. Even though the GATT was sure to grant the waivers, governments refused to acknowledge the obligations in question. Several countries argued that it would be wrong to single out certain illegal practices when many other "legal" practices produced identical results. GATT Doc. SR.25/6-7 (1968). A similar deadlock occurred in a working group charged with formulating a plan for the negotiation of NTBs. The dispute centered on the issue of whether a removal of an illegal restriction, as a concession, should count any less than a removal of a legal restriction. See GATT Docs. C/M/59-60 (1970).

constructed since 1948. The danger appeared great enough to require some type of significant new initiative.

Paradoxical as it may seem, the GATT’s response to this danger was a new round of trade negotiations. There was a feeling that the lull in GATT activities following the conclusion of the Kennedy Round had allowed protectionist forces to capture the initiative in trade policy matters. Officials hoped that a new and ambitious round of trade negotiations would recapture the lost leadership and momentum. Furthermore, ongoing trade negotiations might also slow the rush to enact protectionist measures, for governments tend to shy away from actions that may provoke the collapse of significant international negotiations.

Once government officials had recognized the need for negotiations, the agenda of the negotiations was largely dictated by the agenda of unsettled trade policy questions existing in the early 1970’s. The foremost concern was the number of unregulated or under-regulated nontariff trade barriers. Due to the difficulty of negotiating reciprocal reductions of NTBs, there was little choice but to attack the problem with new and better general rules in the form of codes. Naturally, once GATT members started thinking about writing new rules, the GATT’s recent failures in enforcing its old rules required the participants to consider methods of improving enforcement procedures.

The creation of a stronger enforcement machinery was also an appealing answer to the broader problem of the “new protectionism.” The GATT seemed to need more clout to counter strong protectionist forces within national governments. Stricter obligations and more effective enforcement mechanisms are the usual methods of increasing an institution’s clout. The fact that the rise of the “new protectionism” had coincided with the breakdown of the GATT’s legal machinery undoubtedly made legal reform seem all the more appropriate an answer.

17. See S. REP. No. 1298, 93d Cong., 2d Sess. 5(1974) (trade negotiations needed “to prevent a serious deterioration in the spirit of economic cooperation.”); The Tokyo Round, supra note 2, at 2-3, 10. The forecasts of a genuine crisis usually noted the breakdown of the international monetary system, the energy crisis, and fears of recessionary pressures.

18. The text of the General Agreement is essentially a comprehensive code of general rules limiting or prohibiting conventional NTBs such as quotas, internal taxes and restrictions, state trading, subsidies, and administrative formalities. Over the years, collateral decisions and reports have amplified these rules and have added clarifying detail. See, e.g., Subsidies, BISD (9th Supp.) 185(1961) (working party report on the definition of “subsidy”). The most ambitious codification effort prior to the Tokyo Round was the 1967 Antidumping Code, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, done June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431, reprinted in BISD (15th Supp.) 24 (1967), which became the model for the Tokyo Round codes.
The United States played an important role in establishing the legalist direction of the new negotiations. In the early 1970's, the executive branch of the U.S. Government concluded that passage of legislation authorizing a new round of trade negotiations would require a demonstration that GATT rules still worked and that the executive would actively protect U.S. rights under those rules. The executive branch began to search out violations of GATT rules and launched a wave of GATT lawsuits under the Article XXIII adjudication procedure. Given the moribund state of those adjudication procedures at the time, this action amounted to a "shake-it-by-the-throat" reform strategy.

Overall, the U.S. campaign was moderately successful. The United States had experienced some difficulty, however, in making the GATT adjudication machinery move forward against strong opposition, and this difficulty continued to concern congressional leaders and some members of

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Underlying this strategy on both occasions was a serious concern in the U.S. Congress that the executive branch was not sufficiently protecting and litigating U.S. trade agreements rights. This sentiment led to increasingly stringent statutory directives. See Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 872 (repealed 1975); Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975) (current version at 19 U.S.C.A. §§ 2411-2416 (West 1980)). See also note 5 supra.

the executive branch.\textsuperscript{21} The main problem was the apparent ability of the EEC to mount opposition to GATT adjudicatory procedures due to its wide network of preferential trade agreements with a substantial part of GATT's membership.\textsuperscript{22} Strong resistance from developing countries, supported by their voting majority in the GATT, gave rise to similar concerns.\textsuperscript{23}

The U.S. Congress responded by listing GATT institutional reform as a negotiating objective in the Trade Act of 1974, the authorizing legislation for the Tokyo Round negotiations.\textsuperscript{24} GATT voting procedures were the foremost target at the time, but the Trade Act of 1974 also listed dispute-settlement procedures as an object of reform. The presence of dispute settlement on the statutory list of U.S. objectives ensured that the participants would deal with the subject.

In the meanwhile, section 301 of the Trade Act of 1974 guaranteed that the United States would continue invoking the existing dispute-settlement procedures during the Tokyo Round. The statute required the President to "take all appropriate and feasible steps within his power," including trade retaliation, to obtain the removal of unfair trade measures imposed by foreign governments.\textsuperscript{25} It also created a private complaints procedure that required an investigation by the Administration and a report to the Congress on the disposition of these complaints. In a number of cases, the pressures created by the section 301 procedure forced the Administration to bring GATT legal actions.\textsuperscript{26} The stream of U.S. complaints during the Tokyo Round negotiations served as both a reminder of the various inadequacies

\begin{itemize}
\item \textsuperscript{21} See, e.g., H.R. REP. No. 571, 93d Cong., 1st Sess. 66-67 (1973) ("Your committee is particularly concerned that the decision-making process in the GATT is such as to make it impossible in practice for the United States to obtain a determination with respect to certain practices of our trading partners which appear to be clear violations of the GATT.").
\item \textsuperscript{22} U.S. officials felt particularly frustrated by their inability to secure GATT consideration of several EEC association agreements involving the citrus trade. Although the United States eventually obtained an acceptable settlement, a series of efforts to secure formal GATT rulings on the EEC agreements resulted in impasse. See, e.g., GATT Doc. SR. 28/2, 19 (1972) ("[U.S.] delegation considered it a disservice to the GATT for the contracting parties to fail to deal adequately with so flagrant a violation of GATT rules.").
\item \textsuperscript{23} See, e.g., the painfully drawn-out proceedings in United Kingdom—Dollar Area Quotas, BISD(20th Supp.) 230 (1973) Appendix, case 73, discussed at text accompanying notes 140-41 infra.
\item \textsuperscript{24} 19 U.S.C.A. § 2131 (West 1980). The 1974 Act calls for "the revision of decision-making procedures . . . to more nearly reflect the balance of economic interests," and "any revisions necessary to establish procedures . . . to adjudicate commercial disputes among . . . countries or instrumentalities." Id. § 2121(a)(1), (9).
\item \textsuperscript{25} Id. § 2411. See also notes 5 & 19 supra and accompanying text.
\end{itemize}
of the existing system, and as a warning that the GATT dispute-settlement procedures were likely to come under increasingly heavy pressure in the future.

Negotiating objectives established at the Tokyo Ministerial Meeting of September, 1973 did not expressly mention the problem of dispute-settlement procedures.\textsuperscript{27} The Ministerial Declaration did, however, contain two general references that encompassed the subject. First, the negotiating objectives included the reduction and elimination of nontariff trade barriers and the submission of NTBs to "more effective international discipline."\textsuperscript{28} GATT participants generally understood these objectives to be a call for both new substantive rules \textit{and} new procedures to review performance under those rules. Second, the Ministers reaffirmed their support for the "principles, rules and disciplines" provided for under the General Agreement and called for the negotiators to consider "improvements in the international framework for the conduct of world trade."\textsuperscript{29} In GATT parlance, the word "framework" refers to the legal framework of GATT, substantive and procedural.

The actual negotiations began in early 1975. On the issue of nontariff trade barriers, the negotiators reached agreement fairly early on the desirability of adopting codes to deal with certain NTBs. Following the format of the Antidumping Code of 1967,\textsuperscript{30} each code was to contain detailed rules governing the nontariff trade barrier that was the subject of the particular code. The negotiators promptly realized that writing rules would be a waste of time unless a strong enforcement procedure accompanied the code. As a result, the text of each code grew to contain its own dispute-settlement procedure. Due to the diverse subject matter of the various codes and the different negotiators involved, these early efforts contained a variety of approaches to dispute settlement.\textsuperscript{31}

Article XXIII, the GATT's general dispute-settlement procedure, did not appear on the formal negotiating agenda until November 1976.\textsuperscript{32} The

\textsuperscript{27} See Declaration of Ministers Approved at Tokyo on 14 September 1973, BISD (20th Supp.) 19 (1973).
\textsuperscript{28} Id. para. 3.
\textsuperscript{29} Id. para. 9.
\textsuperscript{31} The various draft versions of the NTB codes are part of the negotiation documents that are likely to remain "restricted."
\textsuperscript{32} The context was a proposal by Brazil to establish a new negotiating sector, the Framework Group, to deal with general issues pertaining to the legal framework of GATT. \textit{See} \textit{The Tokyo Round, supra} note 2, at 96.
developing countries first raised the issue of Article XXIII reform as one of several "framework" reforms of interest to them. The dispute-settlement proposals made by the developing countries called for increasing the powers of coercion available for use against developed countries, including massive retaliation against offenders by the entire GATT membership and the award of money damages to injured developing countries. GATT participants had debated and totally rejected similar provisions in the mid-1960's. At the Tokyo Round, several developed countries endorsed the Article XXIII initiative, and eventually succeeded in directing it toward more modest objectives. Although at this point of the negotiations there was no clear consensus on the necessary scope of the reforms, most delegations seemed to agree that something had to be done.

III

THE BASIC APPROACH

In the area of dispute settlement, the Tokyo Round produced essentially conservative reforms. Governments chose to retain the panel procedure as the central adjudicatory body. The reforms consisted primarily of selective adjustments designed to enhance its efficiency and impact.

Viewed from outside the GATT's historical and institutional context, the Tokyo Round results will appear to be a rather timid response to the threat of deteriorating international discipline. To the GATT insider, however, radical reform was never a realistic possibility. The fundamental political constraints that limit GATT regulatory policy had not changed. The Tokyo Round debate over dispute settlement never seriously questioned the assumption that the GATT would continue to rely on the essentially normative force of declaratory rulings such as those produced by the existing panel procedure. The issues for the negotiators centered on the advan-

33. A reference to a subsequent version of this proposal appears at id. at 106.
34. See BISD (14th Supp.) 139-40 (1966). The author participated in these reform negotiations as a U.S. delegate and later as an observer.
35. The United States was the first developed country to support the inclusion of dispute settlement as a Framework topic, hardly a surprising move in view of its specific negotiating mandate. See note 24 supra.
36. A minority of some importance did not share this view for a long time. See THE TOKYO ROUND, supra note 2, at 106.
37. There were, of course, developing country proposals for more radical reform, see text accompanying note 33 supra, but these proposals had no support from any of the major developed country participants. The idea of adopting a more formal juridical structure was also raised and discussed seriously in some quarters, but it never received enough support to be advanced formally. For a contemporaneous public proposal advocating the latter type of reform, see UNCTAD Doc. UNCTAD/MTN/47 (1976) (Address by Professor John Jackson proposed a central dispute-settlement tribunal with competence limited to objective rulings on fact and law).
tages and disadvantages of a more vigorous application of these normative pressures, through the panel procedure or otherwise. Viewed in this context, the results, although cautious and selective, appear as a rather bold gamble to strengthen the dispute-settlement procedure in the face of serious difficulties.

A. THE “WRONG CASE” PROBLEM

Although the Tokyo Round negotiators were generally committed to better enforcement of GATT obligations, there was considerable debate as to the means of improving the enforcement machinery. A strong current of antilegalist sentiment re-emerged, arguing against strengthening the panel procedure. Negotiators who advanced this position contended that if panel rulings declaring violations became routinely available, regardless of the nature of the violation, there would be a large number of instances in which governments would not comply with panel rulings. These instances of non-compliance would become conspicuous failures for the GATT, diminishing both its own prestige and that of its rules. According to this antilegalist view, a regulatory system must be able to avoid risking its prestige in the wrong cases. Thus the GATT should treat the panel procedure as a last resort, to be used with great discretion.

The concern about “wrong cases” had always been a factor in GATT regulatory policy, but it seemed to have grown more acute in the Tokyo Round debates. Some of this new intensity may have been simply a response to increased pressure from the legalist side. But the debates also indicated that certain situations were causing more concern than before. Three types of situations seemed to be at the source of these fears.

I. “Ordinary” Noncompliance

Given political realities in most GATT countries, even the most respected GATT rules will sometimes be overcome by an industry with particularly strong political influence or some peculiar economic situation. GATT participants generally conceded that the number of such violations would increase in times of general economic instability, and especially in times of political instability, when weak governments are most susceptible to special interest pressures. During the Tokyo Round, both economic and political conditions were anything but stable, and there was a widespread belief that these conditions were not likely to change for some time. A part of the “wrong case” concern can be traced to the belief that continued economic and political instability was going to cause a significant number of politically imperative violations that would not respond to GATT legal actions.
Inoperative Rules

As noted earlier, several GATT rules had become inoperative by the end of the 1960's. Deviation from these rules had become so widespread that most GATT governments had come to regard the legal criteria in question as unrealistic, politically impossible, and, in some cases, wrong as a matter of policy. Tacit acceptance of the widespread violations had generally deterred legal complaints, but not every government had accepted this de facto revision of GATT rules. Consequently, there was a danger that a re-invigorated panel procedure might create an avalanche of legal complaints in these areas. Lawsuits invoking these obligations were seen as particularly dangerous, for they would force the GATT's legal machinery to issue rulings that few, if any, governments would feel obliged to follow.

There were three key areas in which the problem of inoperative rules appeared troublesome. Perhaps the sharpest conflict between rule and practice involved the area of agricultural trade. GATT Article XI(2)(c) allows governments to impose quantitative import controls to protect the artificial markets created by domestic price-support programs — provided that the government also controls the volume of domestic production, and provided further that imports receive a proportional share of the controlled market. By 1970, the two provisos were almost universally ignored. The United States had obtained a waiver of the rule, the EEC had found an arguably legal way to circumvent it, and most other governments simply ignored it. Although governments appeared to recognize some obligation to behave "reasonably" toward agricultural trade, the specific criteria of Article XI(2)(c) had ceased to represent whatever consensus there was on the discipline that could be expected.

The second key area in which rules had begun to break down involved

38. See text accompanying note 13 supra.
40. In 1955, the United States obtained a waiver from all GATT obligations pertaining to its price-support programs. Waiver Granted to the United States in Connection with Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), as amended, BISD (3d Supp.) 32 (1955). Other nations that produce temperate-zone agricultural commodities have long maintained prohibited quotas known as residual restrictions. See generally R. HUDIEC, supra note 6, at 241-60. The EEC now uses a variable levy, a device that, by guaranteeing import prices in excess of domestic support prices, has approximately the same effect as a quota. See Dam, The European Common Market in Agriculture, 67 COLUM. L. REV. 209, 217-18 (1967). The variable levy does not appear to violate any GATT obligation since the applicable tariffs are unbound; this is a woeful gap in the rules.
41. Except for occasional bursts of righteousness by the United States, see text accompanying notes 146-48 & 159 infra, GATT governments appear to have given up the idea of ever enforcing Article XI(2)(c). Recent agreements on basic products concentrate on fixing international prices and negotiating larger shares under existing quotas. See, e.g., International Dairy Agreement, GATT Doc. MTN/DP/8, reprinted in H.R. Doc. No. 153, at 341.
GATT Article XIX, the "escape clause" or "safeguards" provision. Article XIX authorizes governments to impose emergency barriers against imports that are causing serious injury to domestic industries. Although governments still appeared to respect the central requirement of "serious injury," many of the lesser criteria of Article XIX had virtually been forgotten. In addition, governments had begun to make frequent use of discriminatory trade restrictions, a remedy not sanctioned by the escape clause but increasingly accepted as a legitimate method of dealing with "disruptive" trade. The final part of the problem was the growth of "voluntary restraints," under which exporting countries were persuaded to limit their exports. This new type of restriction appeared to avoid the escape clause rules entirely.

These various deviations and avoidances had greatly weakened the GATT consensus on the existing escape clause. Although there continued to be a general consensus in support of meaningful discipline over such measures, it was difficult to believe that litigation under the existing rules would produce outcomes commanding respect.

The third area of rule breakdown was the most-favored-nation (MFN) obligation of GATT Article I, which prohibits trade measures that discrimin-

42. GATT Art. XIX.
43. Originally drafted to provide escape from GATT tariff concessions, the text of Article XIX requires that the increase in imports result from "unforeseen developments" and have some causal link to tariff concessions or other obligations assumed under the General Agreement. An early GATT decision essentially read the "unforeseen development" requirement out of existence, see note 158 infra, and some nations have expressly rejected both requirements. See, e.g., 19 U.S.C.A. §§ 2251-2252 (West 1980); SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, FUTURE UNITED STATES FOREIGN TRADE POLICY 41-54 (1969).
44. See THE TOKYO ROUND, supra note 2, at 94; id. pt.II, at 14-18. The quasi-legitimization of discriminatory remedies began in the early 1960's with measures taken to control the international textile trade. First, the GATT adopted a decision identifying the phenomenon of "market disruption," defined as a substantial increase in exceptionally low-priced imports from selected sources. Avoidance of Market Disruption, BISD (9th Supp.) 26 (1960). Second, the Long-Term Arrangement Regarding International Trade in Cotton Textiles, BISD (11th Supp.) 25 (1962), an agreement between importing and exporting countries, authorized discriminatory restrictions to deal with "disruption." Many current trade problems involve a surge of exports from particular countries, and governments find it very appealing to solve the problem by imposing restrictions only on the few nations causing the "disruption." (Discriminatory restrictions usually draw quiet support from the unaffected nondisruptive suppliers—a sad tale of divide-and-conquer).
45. Governments threaten to impose even smaller import quotas in order to secure voluntary restraint agreements. Article XIX does not appear to cover voluntary restraints since they involve no action by the importing country. One particular attraction of voluntary restraints is that they circumvent the right of nations affected by Article XIX actions to suspend "substantially equivalent concessions." See GATT Art. XIX 3(a).

Attempts to regulate voluntary restraints were high on the Tokyo Round agenda, but the negotiations ended in deadlock and the matter was put aside for future consideration. THE TOKYO ROUND, supra note 2, at 90-95; id. pt. II, at 14-18.
nate between countries. In addition to the selective escape clause actions just mentioned, there had been a growing amount of ad hoc discrimination in other areas of trade policy. Much of the new discrimination had been undertaken to assist the developing countries, and this type of discrimination had generally been legitimized by waivers and other authorizing decisions. The EEC and other European countries had concluded a number of other discriminatory arrangements that had not been formally legitimized, and some of these arrangements were of dubious validity. GATT nations had tacitly accepted many of the latter arrangements as the price paid for European unification, but the acceptance was far from unanimous. As a result of the many ad hoc exceptions and deviations, the GATT found itself quite divided over general policy toward discrimination, and the extent to which it should show tolerance for particular kinds of violations. Given the particular rigor of the MFN obligation, there was a very substantial risk that increased litigation would produce findings of MFN violations, findings that would be unacceptable to a large number of GATT members.

46. To prevent nations from using the customs unions exception to justify selective trade preferences, GATT Article XXIV(8) requires that customs unions liberalize "substantially all" the trade between participants, and Article XXIV(5)(c) requires that the liberalization be achieved within "a reasonable length of time." The late 1950's and early 1960's produced numerous developing country customs unions, none of which satisfied these requirements. See generally Dam, Regional Economic Arrangements and the GATT: The Legacy of a Misconception, 30 U. CHI. L. REV. 615 (1963). The GATT noted and reviewed the agreements, but made no effort to curtail them. These customs unions turned out to be merely the first component in what became a vast network of preferential measures favoring developing country trade. In 1971, the GATT adopted a ten-year waiver that authorized developed country tariff preferences for trade from developing countries. Generalized System of Preferences, BISD (18th Supp.) 24 (1971). In the same year, another GATT waiver permitted developing countries to exchange tariff preferences among themselves. Trade Negotiations Among Developing Countries, BISD (18th Supp.) 26 (1972). Finally, the Tokyo Round produced a draft decision, later ratified by the Contracting Parties, that formally authorized these various preferential measures in perpetuity. The draft decision, which also covers unachieved customs unions, amounts to a de facto amendment of the General Agreement. See Group "Framework," Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, MTN/FR/W/20/Rev. 2, reprinted in H.R. Doc. No. 153, at 622-25.

47. In its first years, the EEC's conformity with Article XXIV was contested at length before the GATT. For a detailed description of this dispute, see Dam, supra note 46, at 641-54. The more meritorious issues included whether a significant increase in the level of protection for agriculture contravened Article XXIV(5)(a), and whether collateral arrangements with applicant members and free trade areas with former colonies had any prospect of full integration "within a reasonable length of time" under Article XXIV(5)(c). Today, the EEC itself has become an established fact. It retains a network of discriminatory arrangements with its European and Mediterranean neighbors. Only some of these arrangements meet the free trade area requirements of Article XXIV. For an example of an EEC arrangement that does not conform, see R. HUDEC, supra note 6, at 232-33 (EEC tariff preferences for Mediterranean citrus producers).
The possibility of litigation over obsolete or weakened GATT rules was not entirely academic. Despite a waiver excusing its own obligations, the United States had not been ashamed to ask for a ruling under the obsolete criteria pertaining to restrictions on agricultural trade. The United States had also launched a complaint challenging discriminatory British measures that benefitted certain developing countries, and another complaint concerning certain EEC measures favoring its Mediterranean neighbors. The general drift of U.S. trade legislation pointed toward a continuation of this aggressive litigation policy.

3. Overtaxing the Procedure

The third type of "wrong case" that concerned the Tokyo Round negotiators was the complaint that presents issues arguably beyond the decision-making capacity of the panel procedure. This type of complaint does not necessarily pose the same risk of noncompliance or embarrassment, because in most circumstances panels can find ways to limit or avoid deciding such issues. Nevertheless, the negotiators treated it as an important problem.

The assertion that a particular legal issue will overtax the panel procedure is obviously a rather subjective conclusion, invoking standards that are difficult to define. Many governments, however, had experienced at least one outstanding example that appeared to concern them. For instance, in 1974, Canada requested a ruling on the adequacy of the compensation offered by the EEC for the wholesale changes in tariff bindings that occurred when the United Kingdom, Denmark, and Ireland joined the EEC and adopted the EEC common tariff in place of their national tariffs. The EEC argued that the issue of adequacy in these circumstances posed an impossible task for a GATT panel, both in terms of the work required to master the relevant data and the difficulty of formulating criteria by which to calculate and compare the commercial advantage or disadvantage of particular tariff changes.

Another case that had troubled many GATT participants was a 1961 complaint by Uruguay that listed over 600 import restrictions, imposed by

48. Canadian Import Quotas on Eggs, BISD (23d Supp.) 91 (1976), Appendix, case 78; see notes 146-48 infra and accompanying text.
49. United Kingdom—Dollar Area Quotas, BISD (20th Supp.) 230 (1973), Appendix, case 73 (interim panel report); id. at 236 (panel report); see notes 140-41 infra and accompanying text.
51. See note 5 supra and accompanying text.
53. The parties eventually settled the dispute.
fifteen developed country governments.\textsuperscript{54} The complaint asked the panel, without further participation by Uruguay, to rule on the legality and/or "nullification and impairment" consequences of the various restrictions. Although the panel did manage to sort through the restrictions and present a respectable outcome,\textsuperscript{55} many participants felt that panels were not suited for the prosecutorial role required by the Uruguayan complaint, nor the enormous time commitment required to handle such "showcase" litigation.

The dominant example was a case decided during the Tokyo Round. The "DISC case" involved a pair of 1973 complaints, one by the EEC and the other by the United States.\textsuperscript{56} The U.S. complaint asked a panel to rule that a fundamental principle of European tax law amounted to an export subsidy that violated GATT Article XVI. The United States acknowledged that the complaint made an unrealistic legal claim, conceding that no government would allow the basic structure of its tax legislation to be dictated by a provision in an international agreement on trade policy, especially when it seemed clear that governments had never even remotely anticipated the application of Article XVI to the long-standing tax principles in question. The United States had filed the complaint to dramatize its contention that the complaint by the EEC, charging that the U.S. Domestic International Sales Corporation (DISC) tax legislation\textsuperscript{57} violated Article XVI, was equally improper. The United States believed that DISC, although an overt export subsidy, did nothing more than copy the hidden subsidy effects produced by the European tax laws.\textsuperscript{58} If DISC was a prohibited subsidy, so were the European tax laws. The EEC contended that DISC was distinguishable,\textsuperscript{59} and pressed the complaint. The United States likewise stood fast.

In late 1976, the panel issued its decisions. Somewhat surprisingly, the panel found that both DISC and the European tax legislation violated

\textsuperscript{54} GATT Doc. L/1647 (1961), Appendix, case 55.
\textsuperscript{55} Uruguayan Recourse to Article XXIII, BISD (11th Supp.) 95 (1963); BISD (13th Supp.) 35 (1965); \textit{id.} at 45, Appendix, case 55.
\textsuperscript{56} United States Tax Legislation (DISC), BISD (23d Supp.) 98 (1977), Appendix, case 74; Income Tax Practices maintained by France, Belgium, and the Netherlands, \textit{id.} at 114, 127, 137, Appendix, case 75.
\textsuperscript{57} I.R.C. §§ 991-997. Basically, the DISC tax laws allow a U.S. corporation to establish a domestic subsidiary that can defer U.S. income tax on 50% of its profits from exports provided that 95% of the subsidiary's receipts come from exports.
\textsuperscript{58} The element of the European tax laws at issue was the principle of "territoriality," which excuses from taxation income earned outside the territory of the taxing government (contrary to U.S. law, which taxes a citizen's income wherever earned, subject to credit for foreign taxes paid).
\textsuperscript{59} The background and debating strategy of the DISC cases are described in Jackson, \textit{The Jurisprudence of International Trade: the DISC Case in GATT}, 72 Am. J. Int'l L. 747 (1978).
GATT obligations. The European defendants (with a fair measure of support from other GATT members) were unable to accept the ruling on their tax laws, and the entire set of panel decisions eventually had to be tabled, without having been approved or otherwise acted upon by the Contracting Parties.  

Although a careful examination might have shown that this particular type of case did not pose a serious risk of failure in the future,  

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60. After the panel reports had remained on the GATT Council agenda for six meetings from November, 1976, to March, 1978, the Council finally agreed to defer the issue to a further meeting; the subject was not revived in the following fourteen meetings.  

61. Professor Jackson argues that the legal reasoning of the panel reports is seriously flawed. See Jackson, supra note 59. The author agrees in general with the technical criticisms made in Jackson's article, but would approach a legal critique and overall evaluation of the panel's work from a somewhat different perspective.  

The panel's finding that the European tax legislation violated Article XVI is manifestly incorrect. Long before the GATT existed, the territoriality principle, see note 58 supra, was part of the tax structure of most of the nations that became the Contracting Parties. When Article XVI(4) was drafted and approved, none of the signatory governments indicated the slightest intention of disturbing these tax structures. GATT obligations are contractual, and the words of a contractual obligation should never be read to arrive at results so clearly at odds with the parties' intentions.  

The United States DISC law presented a closer case. The law was an overt export subsidy. The fact that the tax subsidy was in the form of a deferral rather than an outright exemption provided a technical defense, but a panel would have been justified in concluding that deferral with no intention of ultimate collection is equivalent to an outright exemption.  

The Article XVI(4) requirement that the subsidy create an export price lower than the home market price (bi-level pricing) provided a more tenable defense. Some U.S. exporters had testified before Congress that DISC permitted them to lower export prices; economic theory, however, argues that an income tax subsidy should not produce such price effects since businesses should sell at the profit-maximizing price regardless of the tax rate on profits. As Professor Jackson points out, the burdens of proof as to both the existence of bi-level pricing and the causal relation of the DISC tax law to such pricing were so difficult to satisfy that the party carrying them would inevitably lose. Jackson, supra note 59, at 765, 768-70. The panel's weak, poorly-argued conclusion finding probable bi-level pricing was not sufficiently persuasive to support the serious legal charge before the panel.  

In the author's view, however, the general direction of the panel's DISC report was correct. The GATT's bi-level pricing requirement did not make much economic sense. First, the price effects of a subsidy are extremely difficult to trace, and the difficulty is insuperable when the subsidy benefits all exports. Second, a subsidy distorts international competition whether it lowers export prices or increases investment in export production. At the time of the DISC case, the GATT community obviously had little respect for the bi-level pricing requirement, because the Tokyo Round Subsidies Code, negotiated at approximately the same time, did not include the two-price rule. In this setting, it would have been most unwise for the GATT to exonerate the U.S. DISC law due to a failure of proof under the bi-level pricing requirement.  

The panel's mistake was in assuming that it had to find DISC legal or illegal. The practices of the GATT panel procedures are not that rigid. See text accompanying notes 142-57 infra. The panel could have achieved its basic purpose by writing essentially the same report, perhaps with even more stress on DISC's trade-distortion effects, but reaching a conclusion that it could not give a definitive answer on the bi-level price effects without more proof. Since the entire subsidies issue was under renegotiation in the Tokyo Round at the time, this incomplete answer would not have been a disservice to either of the parties.  

The panel could have used the same technique for the complaint concerning the European tax legislation. The main thrust of the U.S. complaint was that the economic consequences of
many Tokyo Round negotiators chose to focus on the darker side of the lesson — that "wrong" complaints can lead to "wrong" decisions that lower respect for GATT law.

B. THE POLICY DILEMMA

"Wrong cases" (which is the author's term, by the way) occupied a prominent place in the Tokyo Round debates and corridor discussions. There was not much disagreement over the existence of the three basic phenomena underlying the problem — the likelihood of some politically irreversible violations, the fact of widespread existing violations under outdated rules, and the likelihood of the occasional complaint that asked panels to make decisions beyond their capacity.

The U.S. and European laws were identical. The panel apparently agreed with this view. The panel could have stated this conclusion as a preliminary step in its legal analysis, followed by a deliberately murky legal conclusion that: (a) it was difficult to characterize the territoriality taxation principle as an Article XVI subsidy in view of the negotiating history of that provision; (b) abuse of the principle by underpriced exports to foreign affiliates would be a subsidy if proved; but (c) in any event, the panel could not resolve the bi-level pricing issue without additional proof.

The preliminary finding on economic effects would have amounted to a conclusion upholding the U.S. position that a prohibition on DISC alone would result in uneven application of the antisubsidy principle. The panel could have taken this conclusion one step further and considered the U.S. position as a claim of nonviolation nullification-or-impairment under Article XXIII (1)(b). The legal reasoning would be that, because of measures not prohibited by the General Agreement (the subsidy effect of the territoriality principle), a benefit that was supposed to accrue under the Agreement (the prohibition of export subsidies) was not in fact occurring, and thus the party that has paid something for that benefit (the United States) should be allowed to withdraw the payment made (be allowed to employ a DISC subsidy despite Article XVI(4)). Given the Tokyo Round negotiations on subsidies then in progress, however, it would probably have been wiser to limit the conclusion to economic effects, and leave it to the negotiators to work out a better answer for the future.

Arguably, the panel's effort to produce a definitive decision may have actually done a disservice to the subsidy negotiations. The actual decision may have given those negotiators who opposed the DISC law a sense that their position was legally secure, thereby inducing a more rigid negotiating position.

The Subsidies Code provisions dealing with the issues presented in the DISC cases are far from clear. The Code eliminates the bi-level pricing requirement, Subsidies Code, art. 9, H.R. Doc. No. 153, at 278, and classifies interest-free deferral of taxes as a subsidy. Id. Annex, para. (e) & n.2, H.R. Doc. No. 153, at 295, 298. The Code, however, also states that nothing in the text is meant to prejudice the issues raised in the panel report on the U.S. DISC legislation, id., a rather odd statement since the GATT had tabled further consideration of the DISC case for over a year at the time the Subsidies Code was signed. The note to the Annex says that nothing in the provision is meant to limit signatories from taking measures to avoid double taxation of foreign source income—undoubtedly a reference to the territoriality principle. The signatories do agree, however, to prohibit underpricing exports sold to affiliated foreign buyers, the means by which exporters exaggerate the tax benefits of the territoriality principle. Id. As best as one can deduce from these scattered indications, the governments apparently agreed not to disturb the deadlocked status quo. In effect, the Subsidies Code affirms the nonviolation nullification-and-impairment argument made above.
The issue that divided the Tokyo Round negotiators was what to do about “wrong case” risks. Neither the legalist nor the antilegalist viewpoints offered a very good answer. It was true that strengthening the panel procedure would create the risk of inducing some kinds of litigation that might seriously damage the GATT. But it was also true that an adjudication procedure designed to deter or suppress “wrong cases” would inevitably deter a large number of “right” cases as well. It is difficult, if not impossible, to know in advance whether a particular complaint will produce a legal failure, or whether such a failure will cause genuine damage. Governments always say that their violations are politically imperative, but when faced with an imminent legal ruling, many find that compliance is possible after all. Furthermore, even when compliance is not possible, respect for a panel decision can be shown by a postdecision settlement involving limited improvements, a promise of improvement, or submission of the defendant government to the discomfort and control of a formal waiver. The GATT can even endure an occasional complete failure if the legal system is generally effective in other cases. (The DISC case did not, after all, cause the GATT’s legal system to collapse.) Indeed, one or two dramatic failures under an obsolete provision could actually help the legal system if such failures stimulated renegotiation of the rule.

The Tokyo Round negotiators thus appeared to be confronted with a choice between two undesirable risks. An adjudication procedure designed to deter “wrong cases” would probably be too restrained to provide much enforcement, especially against more powerful members. A system that provided no deterrence at all, however, would be courting some disastrous failures, especially in view of the several outdated GATT rules that had already accumulated an uncomfortable number of violations.

Wise diplomats do not like to deal with questions that have no good answers. Their first response is to try to change the question into one that can be answered. The obvious way to change the “wrong case” question was to reduce the potential for damaging collisions between GATT legal rulings and immovable national practice. One way to do this would have been to change the obsolete rules. Unfortunately, although the escape clause was on the Tokyo Round negotiating agenda, governments had shown no interest in renegotiating the other outdated rules. Moreover, rule changes would not have eliminated the risk of random violations generated by political or economic instability, or the risk of the occasional complaint beyond the capacity of the procedure. Given the continued likelihood of difficult cases, therefore, the only other feasible solution was to change the adjudication procedure so that it could avoid generating an unacceptable number of collision-producing outcomes.
C. An Alternative Approach: The Surveillance Body

Early in the negotiations, some negotiators gave serious consideration to an alternative dispute-settlement procedure that seemed less likely to generate the highly visible collisions produced by formal adjudication proceedings, while still offering a reasonable degree of enforcement pressure. The prototype for the idea was the Textile Surveillance Body (TSB), an executive council of the committee of signatories of the Textile Agreement. The TSB monitors nearly everything that happens in textile trade policy, from trade flows to claimed violations of the Arrangement. At the time of the Tokyo Round, the TSB had earned considerable respect for being able to apply the rather vague standards of the Textile Arrangement with authority. The TSB also had a reputation of coming down very hard on violators, and with some effectiveness.

The TSB represents a mixture of political and judicial elements. Its members are government officials representing a balance of key signatory countries. Although objective behavior is expected of TSB members, its decisions on compliance matters tend to merge with its general negotiating responsibilities, making it difficult to separate the legal and political aspects of its work. When presented with a dispute, the TSB can function as conciliator, honest broker, conveyor of community political sentiment, or legal authority. Its task is simply to settle the dispute in a satisfactory manner. When the TSB speaks, the authority behind its words is a mixture of all the political, legal, and personal leverage its members possess.

The TSB seemed to have many of the collision-avoidance characteristics the Tokyo Round negotiators were seeking. As the word “surveillance” indicates, its institutional character was more administrative than judicial. It had the added virtue of operating quietly, behind closed doors. On the whole, TSB proceedings had none of the spotlight effect of a lawsuit before a GATT panel, and TSB rulings thus involved a significantly less visible commitment or prestige.

Despite these gentle attributes, the TSB model did appear to offer meaningful enforcement pressure. A certain amount of enforcement pres-

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64. In 1976, for example, the membership consisted of the EEC, Egypt, Finland, Japan, Korea, Mexico, the United States, and a tripartite seat shared by Austria, Jamaica, and Singapore. BISD (23d Supp.) 30 (1975). For practical purposes, the United States, Japan, and EEC seats were permanent.
sure would arise simply from having a standing body of experts keep close watch on developments in particular areas. Some negotiators' hopes were also raised by reports that individual TSB members had made good use of their personal prestige by launching quasi-prosecutorial inquiries into matters brought before the surveillance body. The political elements of the TSB seemed to assure that TSB members would know when to press these enforcement powers and when to make concessions to political realities.

The surveillance body model appeared prima facie suitable for the new NTB codes. As was true of the Textile Arrangement, each of the codes would be a separate juridical entity dealing with just one subject area, having its own governing committee of signatories. It was already agreed that each committee would keep its subject area under steady review. All that the negotiators had to add was a small permanent corps of tough-minded experts to serve as a surveillance body.

Despite long and serious consideration, the surveillance body model was not adopted in any of the Tokyo Round codes. Several practical problems contributed to this decision. Many of the NTB code subjects did not have the "world-into-itself" quality of the textile trade that had given the TSB its closely-knit committee structure; they were instead matters of general trade policy. In addition, the subject matter of several NTB codes did not lend itself to the kind of easy reporting and surveillance that textile restrictions allow. Finally, the problems of adequately staffing a large number of full-time surveillance bodies appeared insurmountable.

In addition to the practical problems, there seems to have been considerable hesitation about the policy consequences of adopting the TSB model across the board. It appeared doubtful that dozens of decentralized, subject-by-subject regulatory bodies could achieve sufficient prestige to become a satisfactory form of dispute settlement for the GATT as a whole. A central adjudicatory procedure was bound to have far greater institutional mo-

65. During the Tokyo Round, there was some feeling that the TSB members gained a certain amount of regulatory prestige from their experience in a truly arcane field of trade that a unique agreement regulated. Matters such as subsidies and safeguards, however, involve general commercial policy issues. For those fields that do involve genuine esoterica, the NTB codes establish special procedures before a technical panel for the resolution of technical issues by a body of experts. See Customs Valuation Code, art. 20, H.R. Doc. No. 153, at 24-26 (technical committee for customs valuation); Standards Code, art. 14.9-.13, H.R. Doc. No. 153, at 236-37 (technical expert group for standards). These procedures are final as to the technical issue, but if the technical decision does not resolve the entire dispute, the underlying legal issue may be taken to an ordinary panel.

66. Since restrictions on textile trade are a finite world, a surveillance body can review most government conduct in the area. This type of review would not be possible in broad areas such as subsidy policy, customs valuation, or government procurement. Asking governments to incriminate themselves by reporting on all matters that might interest the surveillance body does not seem a very feasible alternative.
mentum and respect than a collection of low visibility committees, each acting independently. Since even a preliminary commitment to the surveillance body model would have damaged the prestige of the panel procedure, the negotiators had to confront the question of long-term regulatory policy in the Tokyo Round itself.

The negotiators chose to remain with the panel model. All the new codes use panels as the final adjudicatory body on legal issues. These code panels all conform to the basic structure of the panel procedure used in Article XXIII complaints. Although the various panel procedures differ in important details, the common format will permit the development over time of an essentially unified dispute procedure for both General Agreement and code rules.

Notwithstanding the demise of the surveillance body model itself, several of its concepts found their way into the final reform package. Each NTB code requires that complaints pass through a conciliation procedure conducted by the committee of signatories before going to a panel, presumably so that the committee can apply a TSB-type of conciliation pressure.

More importantly, the operation of the panel procedure received some collision-avoidance adjustments that appear to have been directly inspired by surveillance-body jurisprudence. This second aspect of the TSB legacy is discussed in detail below.

IV
REFORM OF THE PANEL PROCEDURE

Once the Tokyo Round negotiators had decided to retain the existing panel procedure as the basic model for dispute settlement, they confronted the ultimate question of how the panel ought to operate, and what specific changes were necessary to achieve the desired method of operation. The negotiators gave some attention to the possibility of increasing the normative authority of panel rulings, but made no important changes in this area.

Panels would continue to consist of three or five respected diplo-

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67. Furthermore, two of the codes also have parallel procedures for technical issues. See note 66 supra.
68. See note 82 infra.
69. The Tokyo Round negotiators considered staffing panels with prestigious persons not associated with the GATT but did not pursue the idea, largely because of the anticipated difficulty of finding a sufficient number of "outsiders," both expert in GATT affairs and willing and able to serve. In addition, some negotiators associated the difficulties created by the DISC cases, see notes 56-61 supra and accompanying text, with the presence of "outside" members on that panel. The Tokyo Round reforms direct the Secretariat to maintain standing lists of prospective panel members, "governmental and non-governmental," but state that panel members should "preferably be governmental." Understanding on Dispute Settlement, supra note 4, H.R. Doc. No. 153, at 637. To the author's knowledge, all panels since the
mats from the GATT delegations of countries not involved in the dispute. Panel decisions would retain the status of advisory reports to the parent plenary body — the Contracting Parties or GATT Council for Article XXIII cases, and the respective committees of signatories for cases under the various NTB codes. The authoritative quality of the rulings would still rest on the underlying tradition of treating the reports as the final ruling, subject to only pro forma review by the parent body in all but the most extraordinary cases.

The Tokyo Round work on the panel procedure focused on two major issues: (1) access — the legal and practical obstacles to initiating the panel procedure; and (2) operating procedures — the nature of the proceedings that a panel, once created, is to conduct. On both issues, the heavy hand of the “wrong case” problem created a serious tension between legalist and antilegalist solutions.

A. Access

1. The Access Problem

The most frequent complaint about the panel procedure in the 1970’s was that defendant governments were able to obstruct or delay the panel procedure at several points in the process, thereby increasing the time, effort, and unpleasantness involved in the adjudication of a legal complaint. According to GATT practice, the GATT Council had to authorize the creation of a panel in each case.70 The normal practice of the Council was to act by consensus, thus requiring the consent of the defendant government. Consent had the virtue of giving panel adjudication much the same character as a voluntary submission to arbitration, a useful advantage in securing acceptance of the eventual ruling. But the price of such consent was a series of opportunities for obstruction.

Although community pressures made it difficult for a government to refuse consent arbitrarily, a defendant government could usually find a pretext for withholding its consent at one or more of the successive phases of the panel procedure. At the outset, a defendant government could insist

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70. Agreed Description, supra note 4, para. 6(ii), H.R. Doc. No. 153, at 645.
that the parties had not sufficiently explored the disputed matter in bilateral consultations.\textsuperscript{71} Months could pass before a formal meeting or meetings to foreclose this objection were arranged. When a request for the appointment of a panel had become undeniably timely, the defendant could postpone action for at least one GATT meeting, usually a delay of six to twelve weeks, by arguing lack of notice,\textsuperscript{72} linkage to other trade problems,\textsuperscript{73} the conflicting jurisdiction of other GATT committees,\textsuperscript{74} the impropriety of an Article XXIII ruling on the dispute,\textsuperscript{75} or the need for particular terms of reference.\textsuperscript{76} After the Council had approved the creation of a panel, the defendant had an opportunity to contest the panel's composition, usually by objecting to some of the panel members proposed by the Secretariat.\textsuperscript{77}

Once the parties finally consented to the panel members, the Council had to formally approve and appoint the panel members—at the Council's next meeting.\textsuperscript{78} The panel then would be ready to hear the dispute. The time required for the panel to hear the case and reach a decision could also be fairly long, depending on the difficulty of scheduling meetings and the number of delays induced by settlement efforts. The length of the decision-making process itself would often become part of the complainant's overall burden.

\textsuperscript{71} See, e.g., EEC—Refunds on Exports of Malted Barley, GATT Doc. C/M/123 (1977), Appendix, case 84 (EEC objection to inadequate bilateral consultations with Chile).


\textsuperscript{73} In the DISC cases, see notes 56-61 supra and accompanying text, the United States insisted that the EEC complaint could not go forward without being accompanied by the U.S. counterclaim. The Understanding on Dispute Settlement expressly prohibits such "linking" tactics in the future. Understanding on Dispute Settlement, supra note 4, H.R. Doc. No. 153, at 636.

\textsuperscript{74} See, e.g., United Kingdom—Restrictions on Imports of Cotton Textiles from Israel, GATT Docs. C/M/79, C/M/80, C/M/81 (1972), Appendix, case 71 (U.K. contention at three GATT meetings that Cotton Textile Committee was the appropriate forum); Italy—Administrative and Statistical Fees, GATT Doc. C/M/59 (1969), Appendix, case 64 (issue being studied in nontariff measures committee).

\textsuperscript{75} See, e.g., Canada—Article XXIV:6 Negotiations with the European Communities, GATT Docs. C/M/101, C/M/102 (1974), Appendix, case 76 (EEC contention that adequacy of compensation is nonadjudicable).

\textsuperscript{76} See, e.g., EEC Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, GATT Doc. C/M/115 (1976), Appendix, case 79.

\textsuperscript{77} An extreme example of this tactic was the U.S. insistence in the DISC cases, see notes 56-61 supra and accompanying text, that the Council appoint non-GATT tax experts to the panel. The EEC finally accepted the U.S. position, but only after an inordinate delay.

Arguments over panel membership reached alarming proportions in a number of recent cases. In particular, U.S. representatives protested the tendency of some defendants to object to delegates from entire blocs of GATT member countries.

\textsuperscript{78} This practice has since changed. See note 93 infra.
If a defendant government strongly resisted an Article XXIII complaint, the complaining government could face a year or more of bitter confrontation and the necessity of repeatedly irritating the defendant government in order to force the procedure forward. It took a strong and determined government to see such a process through to the end. It is not surprising that, during the eleven years prior to the opening of the Tokyo Round (1962-1973), the United States was the complainant in fifteen of the nineteen complaints filed.\textsuperscript{79}

There were some obvious technical changes in the procedure that could have removed or reduced opportunities for obstruction. GATT procedures could have provided time limits for the various stages, with the dispute moving on to the next stage automatically at the expiration of the time period. In 1966, the GATT had adopted a special disputes procedure of this kind to provide expedited treatment for developing country complaints.\textsuperscript{80} The 1966 special procedure began with a conciliation effort by the Secretariat; if satisfaction was not achieved, the procedure moved in time-controlled stages to a panel decision, followed promptly by a proceeding to assess compliance and weigh the possibility of retaliation in the case of noncompliance. Although this special procedure was never invoked until 1977,\textsuperscript{81} midway through the Tokyo Round, its existence made it an obvious model for dealing with the general access problem. The question was whether, and under what circumstances, governments would be willing to extend this procedure to other areas of dispute settlement.

2. The Response to the Access Problem

The reforms that emerged from the debate over access constituted a rather complex package. To analyze the overall outcome, it is helpful to divide the package into three components: the explicit structural elements of the various procedures, the policy statement of the Article XXIII documents, and certain spontaneous consequences that the negotiations themselves produced.

a. Structural elements

The Tokyo Round produced a divided result with regard to the precise structural changes made in the panel procedure. The negotiators adopted a

\textsuperscript{79} The 19 complaints filed during the 11 years are listed in the Appendix as cases 57 to 75.

\textsuperscript{80} Procedures under Article XXIII, BISD (14th Supp.) 18 (1966).

\textsuperscript{81} To the author's knowledge, the first invocation of the special procedure came in November, 1977, in a complaint by Chile against the EEC. EEC Refunds on Exports of Malted Barley—Recourse to Article XXIII by Chile, GATT Docs. L/4588, C/M/123 (1977), Appendix, case 84.
version of the mandatory 1966 special procedures, supported by time limits, for each of the separate disputes procedures contained in the key NTB codes. A separate set of procedures was elaborated for complaints under Article XXIII (complaints concerning GATT obligations generally). Except for a reaffirmation of the 1966 special procedures for developing countries, the Article XXIII procedures contained no mandatory access guarantees.

A comparison of the dispute-settlement provisions of the NTB codes and the Article XXIII procedures best illustrates the differences in their structural treatment of access. The rigor of the access provisions in the NTB codes varies between codes. The differences between the disputes procedure of the Subsidies Code, the most rigorous of the NTB code proce-

82. The procedures of the various Tokyo Round NTB codes may be compared according to the six structural issues discussed in the text of this subsection:

1. Time limits on consultation/conciliation
   (a) Only the Subsidies Code imposes time limits on consultations. Subsidies Code, art. 13, H.R. Doc. No. 153, at 283. The other codes allow invocation of the disputes procedure when consultations fail.
   (b) All the procedures require that the dispute be treated initially in conciliation proceedings before the code committees.
   (c) The Subsidies Code allows only 30 days for conciliation, from the date of the request for conciliation. Subsidies Code, art. 17, H.R. Doc. No. 153, at 288. The other codes give three months and are unclear as to the starting date of the time period.
   (d) The Customs Valuation and Standards Codes have procedures for the use of "technical" panels, see note 66 supra, invocation of which will add approximately four months to the dispute-settlement procedure.

2. Automatic Right to a Panel
   All the codes provide an automatic right to a panel once the time limits on consultation and conciliation expire.

3. Automatic Establishment of a Panel
   (a) Only the Subsidies Code seems to dispense with the requirement of a formal committee decision to constitute a panel. The other codes clearly require a decision by the committee of signatories before the appointment of panel members.
   (b) The Subsidies Code states that the panel "should" be established 30 days after the request. Subsidies Code, art. 18(2), H.R. Doc. No. 153, at 289. The other codes are silent, but would presumably follow the exhortation of the Understanding on Dispute Settlement that panels "should be constituted" within 30 days of the formal decision to establish them. Understanding on Dispute Settlements, supra note 4, H.R. Doc. No. 153, at 637.

4. Time Limits on Panel Decisions
   (a) All of the codes state the time limit on panel decisions in the conditional ("should" or "should aim to").
   (b) None of the other codes are as strict as the Subsidies Code's requirement that the panel deliver its findings within 60 days from the appointment of its members (90 days from the request for a panel). Other codes state that the time needed to reach a decision will vary, and indicate an average period of three or four months. The 1979 Antidumping Code, however, incorporates the three-to-nine month guideline of the Understanding on Dispute Settle-
dures, and the Article XXIII procedures illustrates the maximum range of possible differences.

(i) Both the Subsidies Code and the Article XXIII procedures require complaining parties to seek voluntary settlements before invoking the panel procedure. The Subsidies Code sets thirty or sixty-day time limits on bilateral consultations, and a further thirty-day limit on a more-or-less obligatory conciliation effort by the Subsidies Committee. The Article XXIII procedure says nothing about the time to be spent on consultation or conciliation efforts.

(ii) The Subsidies Code states that the Committee “shall” establish a panel when a party makes a request after expiration of the time limits on consultations and conciliation. The Article XXIII procedure avoids the use of the mandatory “shall” language; in the event of a request for a panel, the Article XXIII procedures provide that “the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice.” An agreed description of customary Article XXIII practice implies that the Council normally grants panel requests, but it does not explicitly state that the Contracting Parties always grant such requests. Moreover, the description of practice contains a reference to the practice of allowing a defendant an opportunity to respond to the complaint before the Council, suggesting that there may be some point in debating the request for a panel at that Council meeting.

5. Time Limits on Review
All the codes except one state that the committee “should” present recommendations to the parties within 30 days of receipt of the panel report. The “prompt consideration” requirement of the Understanding on Dispute Settlement governs the 1979 Antidumping Code. The 1979 Antidumping Code, art. 15(6), H.R. Doc. No. 153, at 327; see id. at 639n.1.

6. Follow-up
(a) The Customs Valuation, Procurement, and Standards Codes have identical provisions requiring written justification for noncompliance and mention retaliation if “circumstances are serious enough.”
(b) The Subsidies Code contains only an ominous reference to retaliation if the parties do not follow recommendations. Subsidies Code, art. 18(9), H.R. Doc. No. 153, at 281.
(c) The Antidumping Code incorporates the Understanding on Dispute Settlement procedure, which is silent on this issue.

86. Understanding on Dispute Settlement, supra note 4, H.R. Doc. No. 153, at 636. The GATT Council normally acts for the Contracting Parties in these matters.
87. Agreed Description, supra note 4, para. 6(ii), H.R. Doc. No. 153, at 645.
88. Id. The ambiguity of these remarks accurately reflects the ambiguity of GATT practice. To the author’s knowledge, the Council has never formally denied a request for an Arti-
The Subsidies Code appears to authorize the Chairman of the Committee to begin selecting names of panel members, without an official meeting of the Subsidies Committee, as soon as a complainant makes a formal request. The text of the Code requires that the membership of the panel be "established" within only thirty days of the request. The Article XXIII procedure clearly retains the need for a Council decision authorizing the creation of a panel. It sets no time limit for this Council decision and provides, moreover, that the defendant be given adequate time to study the complaint and to respond before the Council. The Article XXIII procedure goes on to state that the constitution of the panel should occur "normally not later than thirty days" after the authorizing decision by the Council. It does not address the issue of the need for a second Council decision confirming the actual composition of the panel; recent Article XXIII practice appears to have avoided this extra step.

A precedent leaning the other way occurred in 1974 when the EEC appeared to object, flatly, to the appointment of a panel to consider a Canadian complaint concerning the adequacy of compensation offered in an Article XXIV:6 negotiation. After many delegations had supported a country's right to a panel, whatever the wisdom of the complaint, the chair concluded that the Council had agreed to establish a panel. The EEC delegate merely noted the Chair's statement and undertook to obtain a response from his authorities. The potential collision was avoided when the dispute was settled shortly thereafter. GATT Docs. C/M/101-102 (1974), C/M/105 (1975).

89. Subsidies Code, art. 18(2), H.R. Doc. No. 153, at 289. The other Tokyo Round codes provide that the Chairman of the Committee is to propose panel members "when a panel is established." See, e.g., Customs Valuation Code, Annex III, para. 2, H.R. Doc. No. 153, at 61 (emphasis added). The Subsidies Code, however, states that the Chairman should propose members "when a panel is to be established." Subsidies Code, art. 18(3), H.R. Doc. No. 153, at 289 (emphasis added).

91. Id.
93. Recent GATT practice has been to authorize the Chairman of the Council to appoint the panel with the consent of the parties. The Council merely "takes note" of the membership when reported.
(iv) Under the Subsidies Code, the panel “should” render a decision within sixty days.\textsuperscript{94} The Article XXIII procedure contains a variety of statements indicating that time will vary, that panels should act “without undue delay,” that panel decisions have normally required three to nine months in the past, and that in urgent cases “the panel would be called upon to deliver its finding within a period normally of three months.”\textsuperscript{95}

(v) The Subsidies Code requires the Committee to review and make recommendations within thirty days after the panel issues its report.\textsuperscript{96} The Article XXIII equivalent is merely “prompt consideration.”\textsuperscript{97}

(vi) Both procedures provide for follow-up surveillance of recommendations, without specific time limits.\textsuperscript{98}

b. The Article XXIII documents

The separate reform package pertaining to Article XXIII procedures consisted of two documents: an Agreed Description of Customary Practice, and an Understanding on Dispute Settlement that affirmed and elaborated upon the customary practice.\textsuperscript{99} Although these two documents did endeavor to remove certain specific obstacles to access, their dominant tenor was a call for restraint in the use of the panel procedure.

On the positive side, the mere existence of the Article XXIII documents adds to the legitimacy of the panel procedure. The Agreed Description of Customary Practice reinforces this effect by providing a detailed description of the adjudicatory nature of the panel procedure and affirming that this adjudicatory role has the authority of long-established practice. Although the practice was in fact reasonably well established by the time of the Tokyo Round, a written version of its history did solidify the practice in a way that would preclude most subsequent challenges.

The restraining elements in the Article XXIII documents consist of several statements scattered throughout the texts. Added together, they convey a central message that the primary objective of the dispute-settlement procedure is to resolve disputes, not to have impressive lawsuits. Moreover, the documents strongly emphasize that the most satisfactory form of dispute resolution is voluntary settlement. The more the documents emphasized these themes, the more they shifted the balance toward

\begin{footnotes}
\item[94.] Subsidies Code, art. 18(2), H.R. Doc. No. 153, at 289.
\item[95.] Understanding on Dispute Settlement, supra note 4, H.R. Doc. No. 153, at 639 & n.1.
\item[96.] Subsidies Code, art. 18(9), H.R. Doc. No. 153, at 291.
\item[97.] Understanding on Dispute Settlement, supra note 4, H.R. Doc. No. 153, at 640.
\item[98.] \textit{Id.}; Subsidies Code, art. 18(9), H.R. Doc. No. 153, at 289.
\item[99.] \textit{See} note 4 supra.
\end{footnotes}
restraint and away from the complainant's right to move an Article XXIII proceeding forward expeditiously.

Concerning the decision to file an adjudicatory complaint, the Agreed Description of Customary Practice begins with the statement that "contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful." This history is of a rather creative variety. It was true that Article XXIII: 2 had been used in only a very small number of the instances in which there had been a legal basis for a GATT complaint. The special effort to attribute the limited use of Article XXIII to governmental judgments about "fruitfulness," however, was plainly an exhortation: governments should refrain from filing too many lawsuits, and they should not ask the impossible.

The Understanding on Dispute Settlement also addresses the decision to file a complaint. Those negotiators concerned about excessively hostile reactions to complaints would have liked a statement chastising defendant governments that treated a complaint as a diplomatic insult in order to justify angry and punitive responses. The statement that emerged, however, was that "use of . . . Article XXIII:2 should not be intended or considered as contentious acts." Although it was of course logically correct to note that complainants could also be "contentious," the decision to explicitly say so clearly blunts the force of the admonition against the critical part of the problem—overreaction by defendant governments. (Apparently, the governments who were perceived to be overreacting were not ready to accept that conclusion.)

The Understanding goes on to exhort "all contracting parties [to] engage in these procedures in good faith in an effort to resolve the disputes." The reference to "all" parties and the focus on resolving the dispute again gives the message a two-pronged meaning. From the viewpoint of defendant governments, the message is that complainants should not be unreasonable in pressing a legal claim when the dispute could be resolved by accepting something less in settlement.

As already noted, the Article XXIII reforms stopped short of giving the complainant a "right" to the establishment of a panel upon request. Although the contrast with the NTB codes procedures in this area is clear, the difference should not be overstated. The existing practice at the time of the Tokyo Round did create a strong presumption in favor of granting requests

100. Agreed Description, supra note 4, para. 4, H.R. Doc. No. 153, at 642.
102. Id. (emphasis added).
103. See text accompanying notes 86-88 supra.
for panels. The omission of an express “right” to a panel is unlikely to reverse that presumption. The omission does, however, legitimate efforts by defendant governments to raise the issues of “fruitfulness,” “contentiousness,” and lack of “good faith effort”—issues that have themselves been legitimized by being incorporated into the description of Article XXIII procedure. Defendant governments had raised these issues before; the new statement of procedure provided them with a more respectable foundation. If the Tokyo Round reforms had stopped here, these provisions might have produced even more vigorous “wrong case” resistance than before, requiring even more staying power on the part of complainants.

The Article XXIII documents did attack some of the specific obstacles to access. The Understanding on Dispute Settlement rejects the practice of defendants linking the complaint to the resolution of other related issues. It also authorizes the Secretariat to maintain a standing roster of potential panel members, exhorts parties to respond to Secretariat nominations of panel members within seven working days, exhorts parties to “not oppose nominations except for compelling reasons,” and sets a “normal” time period for the establishment of panels of not more than thirty days after authorization by Council decision.

The Article XXIII documents’ reaffirmation of the 1966 special procedures for developing countries was obviously an exception to the general restraint-oriented message of the documents, for the 1966 procedures contain access guarantees as strong as those of the Subsidies Code. The explanation for the exception is political. The GATT granted these special procedures in 1966 when it was competing with the newly-formed

104. See note 88 supra.
105. See note 73 supra.
107. Id.
108. Id.
109. Id. The Article XXIII documents did less to deal with delay in the panel proceedings. Indeed, by treating periods of up to nine months as “normal” for panel proceedings, id., H.R. Doc. No. 153, at 639 & n.1, the documents probably helped to legitimize the lengthening of panel proceedings about three months more than usually is necessary. See also text accompanying note 95 supra.
110. Understanding on Dispute Settlement, supra note 4, H.R. Doc. No. 153, at 635.
111. The 1966 procedures: (1) allow complainants to invoke a conciliation procedure conducted by the Director-General; (2) provide that after two months the complainant may request the Director-General to report to the Council; (3) require the Council to appoint a panel “forthwith” on receipt of the Director-General’s report; (4) require the panel to submit its findings and recommendations to the Council within 60 days “from the date the matter was referred to it;” (5) provide for Council review without specifying the time; (6) require defendants to report on compliance within 90 days of receipt of the Council’s recommendation; and (7) in the event of noncompliance, provide for a follow-up Council meeting for consideration of retaliation. Procedures Under Article XXIII, BISD (14th Supp.) 18, 18-20 (1966).
UNCTAD for the role of principal forum for North-South trade relations. 112 During the Tokyo Round, the GATT leadership was simply in no position to retract the 1966 concession.

The exception for developing country complaints was potentially significant. Relations between developed and developing countries in the GATT have typically been quite strained and would appear to be a fertile breeding ground for "contentious" Article XXIII complaints. There may have been some comfort in the fact that no government had used the 1966 procedures until 1977, and that the one case brought under the procedures had not gone anywhere. 113 Negotiators may also have expected that the restraining tenor of the restated Article XXIII procedures would influence developing country use of the procedure. Indeed, the negotiators may have diluted the full rigor of the 1966 procedures by packaging them with the restraint-oriented provisions of the Article XXIII documents. At the end of the Tokyo Round, however, no one could really foresee how much litigation the 1966 access guarantees might produce.

c. The spontaneous consequences

Lawyers and negotiators sometimes have an unfortunate tendency to allow their focus on precise textual content to obscure the more elementary consequences of great legal events. The Tokyo Round legal reforms offer a good case in point. For government officials not familiar with the fine details, the impact of the negotiations was simple. First, the negotiations called sustained attention to the fact that the GATT did have a procedure (or procedures) for adjudicating legal claims. Second, judging by the tenor of the negotiations, this procedure was an important part of the GATT legal structure. Third, negotiators were making the procedure "better" so that countries could use it effectively. A decade ago, this might have been called "consciousness raising."

Sooner or later, most governments encounter situations in which resort to adjudication is a possible option. The greater the noise level surrounding the procedure at the time, the more seriously a government will consider it. If, in addition, community attitudes toward adjudication appear positive,

112. The GATT viewed the creation of the UNCTAD in 1964 as a threat to the continued participation of developing countries in the GATT and responded with a series of measures designed to give greater recognition to developing-country concerns. See, e.g., GATT Arts. XXXVI-XXXVIII (adopted 1966).

113. EEC—Refunds on Exports of Malted Barley, GATT Docs. L/4588, C/M/123 (1977), Appendix, case 84. Despite the time limits of the 1966 special procedures, Chile was persuaded to defer the case to permit further bilateral consultations. See GATT Doc. C/M/123 (1977). After the case was referred to the Director-General of the Secretariat for conciliation (the first step in the 1966 procedure), it disappeared.
some of the normal fears of adverse reactions will be quieted. Even if nothing else happens, there will always be one or two governments that cannot resist the temptation to test pious declarations of good intentions. Independent of the reforms themselves, therefore, one might anticipate that the mere existence of the reform negotiations would generate a trickle of complaints from governments that had previously been reluctant to use the dispute-settlement procedure.

The Tokyo Round negotiations appear to have produced just that result. Changes began to appear even before the negotiations had been concluded. To appreciate what happened, one must examine the GATT complaints agenda over the last eighteen years.\footnote{For a tabular history of the GATT complaints agenda, see Appendix.}

From 1962-1972, GATT member countries other than the United States virtually abandoned use of the GATT adjudication machinery. Only three legal complaints, two of which went no further than the original assertion of the claim, came from countries other than the United States.\footnote{Spain—Imports of Codfish, GATT Docs. L/3221, C/M/55 (1969), Appendix, case 63; United States Subsidy on Unmanufactured Tobacco, GATT Doc. SR. 24/13 (1967), Appendix, case 61. United Kingdom Import Restrictions on Cotton Textiles, BISD (20th Supp.) 237 (1974), Appendix, case 71, was the one non-U.S. complaint of this period that underwent a panel proceeding.} The fourteen U.S. complaints during this period stood in sharp contrast to the reluctance of the rest of the GATT membership, but even the United States’ activity was a bit unusual. The U.S. complaints were concentrated in sporadic bursts (four in 1962-1963, eight in 1970-1972) designed mainly as showpieces to garner congressional support for new trade legislation.\footnote{The reasons for the U.S. complaints are discussed at note 19 supra and accompanying text.}

The next five years (1973-1977) witnessed a very gradual movement toward greater use of the adjudication machinery by other members of the GATT community. In 1973, the EEC tabled a complaint concerning the U.S. DISC tax legislation,\footnote{See generally notes 56-61 supra and accompanying text.} the first complaint ever filed by the EEC. Although timidity had certainly not been the reason for the EEC’s previous reluctance to complain,\footnote{The EEC’s avoidance of the disputes procedure may have been due to a reluctance to stimulate, or recognize the competence of, proceedings that might challenge the validity of the EEC under GATT Article XXIV. Irritation with the volume of U.S. complaints against the EEC and its members probably influenced the decision to complain. In assessing EEC attitudes toward GATT adjudication procedures in general, it should be noted that the EEC or its member countries have been defendants in sixteen of the thirty-one GATT complaints filed since 1970. See Appendix, cases 65-95.} the EEC’s initial use of the procedure was nonetheless a significant event, for by using the procedure, the EEC had endorsed it and had thus become fair game (to a point) for other potential
complainants. In 1974, Canada filed a complaint against the EEC,\(^{119}\) and Australia announced a complaint against Japan that was rather quickly settled.\(^{120}\) In 1976, Australia began a short-lived proceeding against the EEC,\(^{121}\) and the EEC filed a major complaint against Canada.\(^{122}\) When added to the four U.S. complaints filed during this same period, the five actions by these other GATT members produced a level and variety of disputes activity that, though still quite modest, was greater than at any time since the early 1960’s.

Several factors may have contributed to this gradual reawakening. The burst of eight U.S. complaints filed from 1970 to 1972 undoubtedly served to revive the GATT community’s awareness of the adjudication procedure, and may also have supplied the irritant that eventually prompted the EEC to respond with a complaint of its own. Furthermore, the law reform climate of the early Tokyo Round was obviously more hospitable to adjudication than the wave of antilegalist sentiment of the 1960’s. And, no doubt, the legal actions themselves had a contagious quality, each new complaint tending to encourage others.

Once underway, the Tokyo Round negotiations became an added stimulus to the activity. In the slightly more than two years from November, 1977, to January, 1980, governments filed twelve new complaints.\(^{123}\) More significantly, the United States accounted for only three of these new complaints. The other nine came from Canada (two), Chile (two), Brazil (two), Australia, Korea, and Hong Kong. Seven of these nine complaints were directed against the three GATT superpowers—the EEC (five times), Japan, and the United States.

By the end of 1979, when the Tokyo Round reforms were just coming into force, the GATT dispute-settlement procedure had already restored itself to a vigorous and broadly based level of activity. The number of complaints was almost equal to the peak volume attained during the 1950’s.\(^{124}\) The number of panels created was much greater than ever before. Of the

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119. Canada—Article XXIV:6 Renegotiations with the European Communities, GATT Docs. L/4107, C/M/105 (1975), Appendix, case 76.
121. Australia—Article XXIII:1 Request for Consultation with the European Communities, GATT Doc. L/4322 (1976), Appendix, case 80.
123. See Appendix, cases 84-95.
124. From November, 1977 to November, 1978, twelve separate complaint proceedings (at various stages) were listed for action on the GATT Council agenda. Council of Representatives, Report on Work since the Thirty-Third Session, GATT Doc. L/4726 (1978). For the following twelve months, the number was nine. Council of Representatives, Report on Work since the Thirty-Fourth Session, GATT Doc. L/4884 (1979). Due to the multiple appearances
eighteen complaints filed since 1975, thirteen have led to the appointment of a panel, and two others are close to that stage as this is written. At present, the GATT is actually having difficulty handling the volume of panel proceedings.

Volume, just by itself, has an important influence on the access problem. There is security in numbers. The normalcy that legal complaints acquire when there are enough of them make it more difficult for defendant governments to complain about the "unfriendly" or "legalistic" character of such actions. Likewise, the example of perfectly businesslike responses to some complaints tends to control the conduct of other defendants, for obstructionist tactics stand out more sharply against the norm established by routine proceedings. Thus, to the extent that the 1977-1979 trend continues, this apparently spontaneous product of the Tokyo Round negotiations may turn out to be its most important contribution to the access problem.

3. The Overall Result on Access

If drafting decisions may be taken as a reliable indication of intention, the intentions of the Tokyo Round negotiators were fairly clear. They were willing to grant open and effective access to the panel procedure under the NTB codes, but wanted to keep a restraining hand on access under Article XXIII. The reason for the distinction seems obvious. The NTB codes were newly-drafted obligations that represented a current consensus about what could and should be done in the narrow subject areas to which they applied. The GATT obligations adjudicable under Article XXIII, on the other hand, contained a much wider and more varied set of rules, a number of which were questionable or obsolete. The potential for "wrong cases" was much greater under Article XXIII, and accordingly access had to be more carefully controlled. (This is, incidentally, a rather vivid demonstration of the proposition that the design of enforcement procedures can never be considered in isolation from the substantive rules to which the procedures apply).

It is doubtful, however, that the greater restraint intended for Article XXIII actions will in fact result in more restricted access. The Tokyo Round reforms are going to stimulate a significantly wider resort to the panel procedure, in all areas. As just noted, a significant increase in the volume of Article XXIII complaints is already under way. The volume of adjudication is certain to be augmented further when the NTB codes begin to function. Under both Article XXIII and the NTB codes, the rigor-required for each item, this volume of ongoing litigation makes dispute-settlement business a major item at most Council meetings.

125. See notes 117-24 supra and accompanying text.
ous private complaints procedure in the Trade Act of 1979 will ensure that the United States continues to make aggressive use of the disputes machinery,\(^\text{126}\) and there are signs that other governments are also referring GATT problems to their lawyers with increasing frequency.\(^\text{127}\) The special 1966 access guarantee for developing country complaints should help to encourage continued developing country participation in this movement.

A general increase in the volume and frequency of dispute-settlement proceedings will, by itself, tend to overcome efforts to restrain access to Article XXIII. In addition, it will be very difficult to isolate Article XXIII adjudication from the higher expectations generated by the access guarantees applied in NTB code adjudications. For the developing countries, of course, the 1966 procedures actually promise that Article XXIII cases will receive similar treatment. More fundamentally, the juridical separation of the NTB code procedures simply is not real enough to divorce one kind of adjudication from another. With some exceptions, the various "Committees" which administer the separate codes will be staffed by the same government officials who represent their governments on GATT affairs generally.\(^\text{128}\) The panels established under the NTB codes, again with some exceptions, will probably be staffed by the same corps of respected GATT veterans that handle Article XXIII proceedings.\(^\text{129}\) Given the parallel staffing, it is hard to imagine that a government which submits in good faith to an automatic panel procedure under one of the NTB codes will listen very patiently when someone tries to explain that the government's own Article XXIII complaint does not deserve the same treatment.

The most likely outcome, therefore, is that, while Article XXIII proceedings will be slower than the NTB code proceedings, and will no doubt

\(^{126}\) The Trade Act of 1979 contains a rigorous set of procedures designed to ensure that the U.S. Government brings unsatisfied private complaints into the GATT dispute-settlement machinery. See note 5 supra.

\(^{127}\) Recent panel decisions indicate that legal counsel is involved in the disputes. The parties seem to raise and thoroughly contest every possible legal argument. More ominously, lawyers seem to be drafting the complaints. See, e.g., Spain—Measures Concerning Domestic Sale of Soybean Oil, Recourse to Article XXIII:2 by the United States, GATT Doc. L/4859 (1979), Appendix, case 92. Lawyers vary, but tend to be more litigious than diplomats. The particular danger is that lawyers, because of their technical expertise, may come to exercise an influence over proceedings out of proportion to their knowledge of GATT affairs.

\(^{128}\) The Customs Valuation Code and the Standards Code provide for technical committees or panels in addition to the regular plenary committee and dispute-settlement panels. Thus, disputes under these two codes will involve both experts and generalists. See note 66 supra. It is possible that the committee that administers the Procurement Code, which does not provide for a collateral group of experts, may simply be staffed entirely by procurement experts. The committee for the 1979 Antidumping Code could have a similar composition. Even where experts staff the committees, it is likely that permanent members of Geneva missions will provide administrative continuity.

\(^{129}\) See notes 66 & 69 supra.
continue to provide some opportunity for arguments about the wisdom or fruitfulness of particular complaints, complainants who want a panel adjudication under Article XXIII should be able to obtain one without costly confrontation.

On the merits, the outcome on the access issue appears correct. Within reason, the slower pace of Article XXIII proceedings is not objectionable. Complainants should hear out whatever opposition a defendant may wish to interpose to the complaint, and should think twice about the likely outcome of litigation. A meaningful legal system cannot exist, however, unless the ultimate right to a panel is beyond question. That right cannot be preserved if the GATT attempts to deal with the “wrong case” problem at the point of access. The “wrong case” defense is simply not a concept that can be administered objectively in a political body like the GATT Council; it would inevitably become a one-sided shield insulating the GATT superpowers against legal claims by smaller nations.\textsuperscript{130} Rather, the “wrong case” problem, to the extent it really exists, must be handled within the adjudication process itself, by the same independent and objective decisionmakers who are responsible for GATT legal decisions.

B. Operating Procedures

Tokyo Round negotiators concerned about the “wrong case” problem were aware that restraints on access could not filter out all such cases. Some “wrong cases” were going to arrive before panels. From the beginning, therefore, the negotiators were also looking for ways in which the panel’s own operating procedures might be altered or adjusted to reduce the risk. Given the failure to restrain access, the revision of panel operating procedures was to become the major response to the “wrong case” problem.

1. Mediation Techniques

The Tokyo Round’s consideration of panel operating procedures took place against the background of several recent cases in which panels had already bent their procedures in seeking to avoid damaging or embarrassing legal rulings. The primary new technique had been a more active mediatory role during the adjudication proceedings, in an effort to create additional pressures for voluntary settlement. Panel operating procedures had always left room for settlement negotiations, and settlements during panel proceedings were not infrequent. In the recent past, however, a few

\textsuperscript{130} One hardly needs to draw attention to the fundamental unfairness of a legal system in which only the strong can sue for relief. A legal system of this kind would deserve the contemptuous description that Marxist writers apply to capitalist legal systems in general—a moralistic facade through which the powerful exercise their power.
panels had announced that they had held separate meetings with the parties to search for a settlement.131 Other reports had referred to settlement proposals made by the panel itself, or by its members.132 At times, the panel proceedings appear to have been brought to a standstill in order to induce further settlement efforts.133 The Tokyo Round negotiators noted these precedents as possible solutions to the "wrong case" problem and set out to codify some of these new techniques as "established" panel practice.

The fullest statement of the intended panel operating procedures occurs in the two Article XXIII documents.134 The draftsmen did not ask panels to set aside their adjudicatory role, but did require them to make an active effort to promote settlement by paying primary attention to the possibility of settlement at each step of the adjudicatory process.

After stating that the panel's ultimate function is to make objective findings, the Understanding on Dispute Settlement adds, "[i]n this connection, panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."135 Panels always conduct hearing-type proceedings as part of the adjudication, but consultations directed expressly to settlement possibilities had been quite rare. The Understanding then goes on to instruct the panel to submit findings "[w]here the parties have failed to develop a mutually satisfactory solution,"136 suggesting, apparently, that the panel should withhold its findings until satisfied that further settlement negotiations would not be fruitful. Finally, the text records the established practice of showing a draft report to the parties before publication to obtain comments on its accuracy. The Understanding's description of this practice adds a new dimension that makes settlement appear to be the primary purpose. It instructs the panel to give the preview "[t]o encourage the development of mutually satisfactory solutions between the parties and with a view to obtaining their comments."137 It appears that the panel is to conduct another settlement effort at this stage.

The parts of the Article XXIII documents referring to mediation responsibilities perform a rather artful revision of GATT history. The documents are not, however, meant to be historical essays. They are statements

132. See Canadian Import Quota on Eggs, BISD (23d Supp.) 91, 92-93 (1977), Appendix, case 78. For a discussion of the case, see notes 146-52 infra and accompanying text.
133. See notes 140-41 infra and accompanying text (discussion of the panel report on the U.S. complaint against U.K. dollar area quotas).
134. See generally notes 100-13 supra and accompanying text.
137. Id. (emphasis added).
of current regulatory policy, and, whether or not they accurately portray the past, they do make it clear that panels are to play this mediating role in the future.

None of the quoted texts indicate exactly how aggressively panels are to act in these various settlement meetings, or how long they should delay the procedure in seeking a settlement. The fact that panels are made responsible for initiating such efforts suggests that the draftsmen intended something more than passive inquiry. The panel's responsibility to exercise its judgment about settlement possibilities, as the procedure moves forward, also suggests a rather active effort.

Whether, and to what extent, individual panels will follow this mediation-oriented direction may depend on the nature of the case. It must be emphasized that much of the Article XXIII dispute-settlement terminology also appears in the description of NTB code panels. The shorter time limits for code procedures, plus the fact that litigation under the NTB codes will not involve obsolescent obligations, should curtail the concentration on settlement negotiations in those cases. In difficult Article XXIII cases, however, far more substantial settlement efforts are likely.

The dual role that the documents appear to impose on panels is troublesome. Active mediation efforts require a certain amount of political involvement with the parties, because mediators cannot escape making judgments about the reasonableness of the parties' negotiating positions. Even the panel's purely adjudicatory actions can acquire a political quality in this setting. The simple decision to proceed to the next step in the adjudicatory procedure, rather than delaying a bit more, could well be viewed by one of the parties as a judgment that its negotiating position is unreasonable. One might also wonder how a losing party will view legal findings written by a panel that has tried to force a settlement, particularly when the purpose of the findings is "[t]o encourage development of mutually satisfactory solutions." The net effect of this dual role could be to change the GATT community's perception of the panel procedure, leading governments to treat panels more like a surveillance body—a conciliation-mediation body whose legal judgments are not actually an authoritative determination of legal rights, but rather something more in the nature of an advisory opinion to be "taken into account" in the search for a solution.


139. See generally notes 62-68 supra and accompanying text.
Although the risks involved in the effort to modify panel operating procedures should not be minimized, they must be viewed in context. The Tokyo Round reforms create a problem. Potential “wrong cases” will (and should) gain access to the panel procedure. The procedure itself, therefore, must have sufficient flexibility to channel the genuinely dangerous cases into collision-avoiding outcomes. Intensified mediation efforts are one technique that can be used for this purpose. There are others, and, as will be seen shortly, panels have already begun to use these other techniques as well. Each of these techniques carries a risk of damage to the integrity and effectiveness of the panel procedure, but so does the alternative of allowing the procedure to produce rulings that will not be accepted. As long as GATT substantive rules remain imperfect (and they will always be so to some degree), risk-free operating procedures are simply not realizable. The task of GATT regulatory policy is to find the course of action that minimizes the competing risks.

It is impossible to prescribe a panel operating procedure that will strike the right balance in all cases. Panels themselves, and their Secretariat advisors, will simply have to exercise judgment about how to handle particular cases. Real or feigned concern about “wrong cases” will probably be raised in most proceedings. The panel procedure cannot retain its basic adjudicatory authority if panels employ collision-avoiding techniques in each such case. Nor, indeed, should such extraordinary practices really be necessary in the majority of cases, for, to repeat what was said earlier, the system can tolerate a good deal more hard confrontation than the current “wrong case” jitters would suggest. Only the panels can decide when these techniques are appropriate. The Tokyo Round revisions of panel operating procedures should be read in this light.

2. Other Panel Techniques for “Wrong Cases”

The first response to especially difficult cases will obviously be an active and intensified effort to settle the case, along the lines indicated in the Article XXIII documents. If routine mediation efforts fail, however, other techniques are available. It is important to examine these other techniques in order to obtain an accurate view of the panel procedure’s overall capacity to avoid the dangers posed by “wrong cases.” This analysis will serve, in part, as a prediction of other adjustments in panel operating procedure that may emerge under the pressure of these especially difficult cases. It is also intended to serve as a critique of such methods.

The three techniques deserve attention. (1) If ordinary mediation fails, panels have at their disposal some considerably stronger measures to generate pressures for settlement: they can redirect investigatory proceedings to-
ward an examination of settlement possibilities; they can issue reports calling for settlement on reduced terms; and they can delay the issuance of any legal ruling until the parties see the wisdom of settlement. (2) Panels can sometimes avoid making a potentially damaging ruling simply by declaring that they are unable to reach a decision on the legal question presented. (3) Panels can look again at the meaning of certain outmoded obligations, and *may* be able to find interpretations which permit them to conclude that certain commonly accepted trade measures are not in violation after all.

a. Stronger settlement pressures

In 1972, the United States charged that the United Kingdom was violating GATT Articles XI and XIII by maintaining quantitative restrictions that discriminated against U.S. exports in favor of exports from certain Caribbean developing countries. The United Kingdom conceded the legal violation, and the panel could have written a legal ruling to that effect in an afternoon. The complaint, however, aroused a storm of protest from the developing country bloc, which argued that the principles of GATT Part IV justified discriminatory assistance to developing countries. Although there was very little legal merit in the argument, there was no question about the vehemence with which developing countries viewed the U.S. claim as unjust. After investigating the complaint, the panel wrote an interim report that carefully analyzed the trade impact on each product concerned, showing that only some of the quotas were causing real damage. The report noted the legal issues, but the panel conspicuously refused to make a formal legal finding. Instead, the panel requested the parties to continue searching for a negotiated settlement that would protect the interests of the developing countries involved. Under the circumstances, the panel's action was virtually a formal ruling that elimination of all the illegal discrimination was an unreasonable demand. The parties reached a settlement the following year.

b. The “no decision” technique

If a settlement is not forthcoming, a panel can sometimes avoid making a damaging legal ruling simply by concluding that it cannot answer the

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143. *Id.* at 236.
144. *Id.*
question. There are some early GATT precedents for this practice, involving particularly difficult legal issues upon which panels said they were unable to rule.\textsuperscript{145} The desire to avoid sustaining inappropriate legal claims may tempt panels to invent such difficulties.

This technique appears to have been employed in a 1976 decision involving a United States claim that the criteria of Article XI did not justify certain Canadian agricultural restrictions.\textsuperscript{146} The complaint was a leading nominee for "wrong case" of the decade, for not only had governments widely ignored the criteria of Article XI for years, but since 1955, the United States itself had enjoyed a waiver from Article XI obligations.\textsuperscript{147} The U.S. delegation chose to blur the proceeding by asking only for an "advisory ruling" from the neutral members of a "working party,"\textsuperscript{148} but the legal claim was apparently still too demanding for the members of the working party.

The neutral members (in essence a panel) found that the Canadian restriction satisfied the production-control requirement of the Article XI(2)(c) exception.\textsuperscript{149} The working party report went on to state, without explanation, that it could not decide whether the quantity of imports per-

\textsuperscript{145} In a 1961 complaint by Uruguay against 15 developed countries, the complainant posed two questions that the panel did not answer. Uruguayan Recourse to Article XXIII, BISD (11th Supp.) 95 (1963), Appendix, case 55. Uruguay asked for a ruling on the legality of the EEC variable levy, but the panel stated that it could not make a judgment because the Contracting Parties had previously debated the issue and were unable to reach a conclusion. Id. at 100. Uruguay also questioned whether the total effect of the more than 600 restrictions facing Uruguayan exports constituted overall nullification and impairment under Article XXIII. The panel implicitly refused to consider the claim. See Hudec, supra note 5, at 497-500.

In a 1962 complaint by the United States against France, the panel likewise refused to consider a supplemental claim of nullification and impairment. French Import Restrictions, BISD (11th Supp.) 94 (1963), Appendix, case 57. The refusal, which is not apparent in the panel report, is explained in Hudec, supra note 5, at 494-97.

\textsuperscript{146} Canadian Import Quotas on Eggs, BISD (23d Supp.) 91 (1977), Appendix, case 78.

\textsuperscript{147} See note 40 supra.

\textsuperscript{148} Canadian Import Quotas on Eggs, BISD (23d Supp.) 91, 92 (1977). The U.S. delegation explained its unusual request by stating it was not seeking a formal Article XXIII(2) ruling because it still believed the parties could settle the problem by bilateral consultations once the working party answered the legal questions. The approach seemed oddly out of character with the usual hard-line complaints of the United States; the real reason for the approach may have been U.S. embarrassment at having to press such a claim. See United States—Request for the Establishment of a Working Party, GATT Doc. L/4223 (1975); Canada—Import Quotas on Eggs, GATT Doc. C/M/108 (1975).

The working party format did not alter the basic adjudicatory nature of the proceeding. Although working party members normally act and vote as representatives of their government's interests, it is inconceivable that the parties to this dispute were asking for, or that the neutral members would offer, a legal ruling based on the perceived political interest of each neutral government.

\textsuperscript{149} GATT Article XI(2)(c) provides in pertinent part:

2. The provisions of paragraph 1 of this Article shall not extend to the following: 

\ldots
mitted by the restriction was large enough to meet the requirements of the Article XI exception. The report also stated, however, that some members of the working party had suggested that the parties settle the matter on a pragmatic basis and had offered a specific formula as a possible basis of settlement. Finally, the working party announced, again without explanation, that they had come to no conclusion on whether the Canadian restriction nullified or impaired the tariff binding on the product in question. The refusal to rule on the two final issues deprived the United States of a legal ruling under the outdated Article XI criteria. The neutral members of the working party apparently felt that the Canadian restrictions were unnecessarily restrictive, but they managed to convey that opinion without committing GATT prestige to an unrespected rule.

The "no decision" technique has its limits. Respect for the text of legal rules precludes using the technique when uncontested facts present a clear legal issue. Many GATT cases, however, turn on appraisals of fact and/or market effects, and in these cases the plea of inability to decide will be plausible enough not to be considered outrageous. Repeated resort to the "no decision" technique would surely weaken the disputes procedure, but in disputes such as the U.S.-Canada case, where the community has a reasonable degree of consensus on the obsolescence of the asserted legal criteria, governments should approve the result as an appropriate response.

Panels can also use a variation of the "no decision" technique to give recognition and support to legal claims on difficult and sensitive matters, while at the same time avoiding the confrontation of a final ruling. In some early GATT cases, panel decisions would indicate that the contested measure was very likely in violation of GATT obligations, but would refrain from making a direct ruling to that effect by finding that factual uncertainties or other complexities precluded a definitive decision.

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted.

Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions.

151. Id. at 92-93.
152. Id. at 93.
153. See, e.g., Belgian Family Allowances, BISD (1st Supp.) 59 (1952), discussed in R. HUDEC, supra note 6, at 121-42.
A recent panel decision seems to have used this technique to deal with a complaint charging that EEC export subsidies on sugar violated Article XVI(3) by allowing capture of more than an "equitable share" of world trade.\textsuperscript{154} Although certainly not a "wrong case," the complaint did present a difficult test for the adjudication procedure. The complaint required the panel to apply an extremely vague standard ("equitable share") to a politically sensitive agricultural program, in a factual situation made unusually cloudy by the market effects of the 1977 International Sugar Agreement.\textsuperscript{155} The panel responded with a series of findings and conclusions that left little doubt of its view that the EEC subsidy was inconsistent with the community standards represented by the "equitable share" concept. The panel, however, stopped just short of a formal ruling to that effect, finding the causal links between the subsidy and various market effects unclear.\textsuperscript{156}

Although a decision of this kind is not a model of authoritative legal decision making, it did bring the legal rule to bear on the problem in a moderately effective manner. The decision permitted the complainant and other governments to mount a sharply focused attack on the legal uncertainties of the sugar subsidy for several subsequent GATT meetings, during a time that the future of the subsidy policy was being considered in Brussels. Given the difficult facts and the uncertain legal standard, this is about as far as the legal claim could have been pressed without producing a "wrong case" type of collision. The decision in the DISC cases would have profited from a dose of the same uncertainty.\textsuperscript{157}

c. Creative interpretations

The most interesting panel technique for handling complaints that assert obsolete rules is the interpretation or application of the outmoded rule in a manner that makes it conform to current practice. The early GATT cases provide at least one example of the use of creative interpretation to

\textsuperscript{154} European Communities—Refunds on Exports of Sugar—Complaint by Australia, GATT Doc. L/4833 (1979), Appendix, case 88. GATT Article XVI(3) provides:

[Contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.]

\textsuperscript{155} See GATT Doc. L/4833, at 6-7.

\textsuperscript{156} Id. at 21-23.

\textsuperscript{157} For a discussion of the DISC decisions, see notes 56-61 supra and accompanying text. In the author's view, the adventurism of the DISC decisions was a proper effort to apply the current policy attitudes of the GATT community. The fault lay in going too far.
DISPUTE SETTLEMENT

limit an overbroad GATT rule. Several recent cases suggest that panels continue to use the technique.

In the 1976 U.S.-Canada case described just above, the basic issue was whether the Canadian agricultural marketing system limited domestic production as required by the Article XI(2)(c) exception. Canada's argument rested on rather speculative projections about economic effects of the marketing system, not at all certain to materialize. This was something quite far from the direct production and acreage controls of the United States that had been in view when Article XI was drafted. Nonetheless, the neutral members of the working party ruled that the Canadian system satisfied the criteria of Article XI. U.S. officials found the conclusion hard to believe, but they were probably missing the point. Since most countries, including the United States, had consistently ignored the limitation-of-production requirement in their agricultural programs, it would have been extremely difficult for the working party to insist that the Canadians respect the condition. It is very tempting to conclude that the working party did not really believe that there was any effective production control, but was willing, in view of the widespread neglect of the rule, to treat the speculative effects argued by the Canadians as sufficient to satisfy Article XI.

158. In an early pre-panel decision, one issue facing the neutral members of a working party was whether a large influx of ladies' hats imported from Czechoslovakia into the United States had been the "result of unforeseen developments," as required by Article XIX(1)(a), the GATT escape clause. This particular requirement seems to have been added to Article XIX on the premise that Article XIX applied primarily to the withdrawal of recently negotiated tariff concessions, and thus should be limited to cases of "mistake." Presented with a specific case, the working party no doubt realized that the political consensus in most GATT countries would not accept the proposition that relief from injurious imports should be limited to genuinely unforeseen trade developments. Its decision virtually erased the requirement. Although the working party had to agree with the Czech government that a change in fashion did not constitute an unforeseen development, it found that the United States "could not reasonably be expected to foresee that this style change...would in fact take place and would do so on as large a scale and last for as long." GATT, Report of the Withdrawal by the United States of a 'Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, para. 11 (1951) (GATT pamphlet, sales No. 1951-3) (emphasis added). The conclusion that the volume and duration of increased imports is part of the foreseeability issue makes virtually every instance of injurious imports the result of "unforeseen developments."

For case studies of the use of interpretative creativity to expand the reach of GATT obligations, see R. Hudec, supra note 6, at 100-43.

159. See note 149 supra and accompanying text.

160. See note 149 supra.


162. A 1978 decision sustaining a U.S. claim that an EEC import restriction failed to qualify under the production-control requirement of Article XI(2)(c) seems to contradict the suggestion that panels are willing to dilute the Article's requirements. EEC—Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, BISD (25th Supp.) 68, 101-03 (1979), Appendix, case 79. The import restriction, however, affected processed tomato products, which were at the very margin of the product area
A panel decision on a recent U.S. complaint against EEC import restrictions on tomato products offers another example of the interpretative techniques being discussed. The primary trade restriction in question was a minimum import price. The EEC enforced the minimum price requirement by means of security deposits that importers would forfeit if their import prices were too low. The deposits were a nuisance for importers, as well as a minor cost due to the lost interest on the money. The EEC waived the deposit, however, for imports originating in any country that guaranteed that all its exports to the EEC would respect the minimum price. The United States complained that the deposit waiver was a clear case of conditional MFN treatment, contrary to the express requirement of GATT Article I that MFN treatment be granted "unconditionally." The U.S. argument appears to have been quite correct. Waiver of the deposit requirement would be an "advantage" given to exports of the guaranteeing countries. Under the traditional understanding of "unconditional" MFN, such advantages must be accorded to the products of all Contracting Parties, whether or not the particular Contracting Party meets the imposed condition.

that restrictive price support programs had customarily protected. As recently as 1962, the EEC itself had granted an ordinary tariff binding on these products, a trade concession for which the United States claimed to have paid. Id. at 92. For the United States (and for the GATT as well), this dispute was a test case raising the question of the extent of the de facto repeal of Article XI(2)(c). The panel decision to apply Article XI(2)(c) as written answered this question, but was not necessarily indicative of the rule's general vitality. Perhaps a better indication of the future interpretation awaiting Article XI(2)(c) was the EEC's refusal to abandon its argument that various policies that could have had only the most tenuous influence on the volume of domestic production satisfied the production-limitation requirement. The EEC seems to have believed that this almost facetious assertion of production control was a legitimate legal argument. If the import restriction had been on a different product, that belief would probably have been justified.


164. 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and changes, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraph 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.


165. The offer of the same opportunity to all countries is known as "conditional MFN" treatment. It was exactly to prevent this practice that MFN clauses such as Article I require nations to extend benefits "unconditionally" to all other countries. See H. Hawkins, Commercial Treaties & Agreements 67-68 (1951); R. Snyder, The Most-Favored-Nation
Unfortunately, the U.S. claim also raised a serious issue about the validity of certain practices associated with "voluntary restraints," a relatively recent form of trade restriction that had become quite common. The voluntary restraint is an arrangement whereby, instead of applying import controls at its own border, the importing country secures the agreement of the exporting country to limit the quantity of goods exported. Exporters often find this self-imposed form of restraint less of a burden since it eliminates cumbersome controls in the importing country. In order to use voluntary restraints, however, the importing country must retain the power to impose equivalent import restrictions at its borders on goods from those countries who cannot (or will not) limit their exports. Selective restrictions on goods from nonparticipating countries present the same MFN problem raised by the selective deposit requirement challenged by the United States. A decision affirming the U.S. complaint against the EEC practice would have cast serious doubt on the validity of this essential component of voluntary restraints.\textsuperscript{166}

The panel rejected the U.S. claim with a one sentence explanation: "The Panel considered that, regardless of whether a guarantee had to be provided by the importer or the government of the exporting country, so long as a guarantee was necessary for all imports from all potential third country suppliers, there would be no discrimination within the meaning of Article I.\textsuperscript{167}

If this statement were meant to say that merely offering the same condition to every country was nondiscriminatory, it would be a radical redefinition of the "unconditional" requirement of Article I. It seems more probable, however, that the panel meant that the difference between the burdens imposed by the two methods of guarantee—by the exporting gov-

\textsuperscript{166} Less than a year after this decision, Chile filed a complaint charging that discriminatory quotas applied by the EEC, after Chile refused to accept a voluntary restriction on apple exports, violated Article I. European Economic Community—Restrictions on Imports of Apples from Chile, GATT Doc. L/4816 (1979), Appendix, case 90. As of this writing, the case is before a panel.

\textsuperscript{167} BISD (25th Supp.) 106 (1979).
ernment or by the importer himself—was not significant enough to constitute an "advantage" to the former. Given that the burdens were not in fact commercially equal (restraints imposed by the importing government always create more work for the buyer-importer), this view of the panel decision implies an underlying conclusion that Article I does not require exact equality in all cases. It implies that a panel has some flexibility in deciding whether incidental disadvantages are significant enough to require the prohibition of the differential treatment.

Ideally, perhaps, the MFN rule of Article I ought not to be exposed to such flexible administration. But the rule and its policy were formulated at a time when more complex restrictions such as voluntary restraints were not much in evidence. The issues posed by voluntary restraint practice remain to be decided, but it is hardly surprising that, in the meanwhile, panels would be careful not to foreclose the issue. The more flexible view of Article I suggested by the U.S.-EEC decision is the sort of interpretative adjustment that panels have to make to keep pace with the evolving trade policy practices of GATT governments.168

Creative interpretative techniques always raise questions of propriety, especially in the context of international obligations. The General Agreement is a rather special legal instrument, however, that does not correspond to most generalizations about international agreements. The force of GATT legal rules has always been particularly dependent on the force of the normative consensus they represent. This particular dependence is the consequence of a deliberate decision to forego a conventional legal structure based on formal ratification, genuine sanctions, and judicial tribunals. Having been cast in a less rigorous form, GATT rules must necessarily draw the major part of their authority from their consistency with the norms and values current in the GATT community. This particular dependence on community consensus can be seen in the cautious and impressionistic nature of GATT jurisprudence, and in the practice of staffing panels with veteran diplomats rather than lawyers. In the early days of the GATT, panels frequently were able to reach into the GATT's unwritten consensus to expand GATT provisions beyond their literal text in order to give effect to the underlying common objectives of the General Agreement.169 Observers admired this rule expansion because it seemed to strengthen GATT law. The task of limiting obsolete rules is less appealing, but serves the same function of maintaining the essential bond between the rules and the

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168. This analysis is not meant to suggest any excuse for the imposition of more severe quotas on noncooperating countries. Certainly, the panel report offers no such excuse.

169. See the case studies in R. HUDEC, supra note 6, at 100-43.
underlying consensus. The same creative interpretative techniques are necessary, and they are no less appropriate.

In the final analysis, one has to ascertain whether the panels are doing violence to the words and precedents they apply, given a consensus that strict application of outmoded rules is not desirable. The two examples of reinterpretation just discussed present somewhat different questions in this regard. The MFN analysis in the U.S.-EEC case does not take very substantial interpretative liberties. The Article XI(2)(c) interpretation in the U.S.-Canada case is another matter. In a practical sense, the decision involves a type of reinterpretation with low visibility, because it rests on factual judgments that are difficult to evaluate. Assuming, however, that there was little actual restraint of domestic production, the decision involves a considerable wrench of language and history. In the author’s view, however, the manner in which the GATT community had ignored Article XI, virtually since its inception, offers a legitimate basis for such a reinterpretation. Contract lawyers have little difficulty accepting a radical interpretation of contract terms when the parties to the contract have shown, by their “course-of-performance,” that they do not consider themselves bound to the literal words of the contract. Application of the same concept to an international agreement may appear somewhat radical, but it is no more radical than the legal situation being addressed.

The collection of avoidance techniques described in this section constitutes a rather impressive testimonial to the diplomatic skill with which the GATT panel procedure has been navigated past the various “wrong cases” of recent years. This finesse is not a new characteristic of GATT adjudication, of course. GATT panels have traditionally employed these or similar techniques to circumvent the many imperfections of GATT substantive rules. Moreover, such techniques will undoubtedly remain an essential part of GATT adjudication in the future, for even in the best of worlds the GATT’s substantive obligations will never be completely free of such imperfections.

The efficacy of such techniques is not unlimited, however. There is surely a limit on the extent to which panels can use delay-and-deferral strategies without making them available to defendants generally. Likewise, there is surely a limit on the extent to which panels can announce daring reinterpretations without impairing confidence. A stable solution to the “wrong case” problem perceived by the Tokyo Round negotiators will require more than technique.
THE UNFINISHED BUSINESS

Any international legal reform that invites governments to make increased use of adjudicatory proceedings is a risky venture. All the Tokyo Round dispute-settlement reforms involve such a risk. The Tokyo Round reforms have created a particularly serious risk, however, with regard to Article XXIII adjudication. The reform package will probably produce a significant overall increase in the use of Article XXIII, at a time when a number of the legal obligations that can be invoked under Article XXIII have lost, in whole or in part, the support of the GATT community. Even with the best management, this situation could easily provoke a dramatic failure of GATT adjudication procedures. A serious failure under Article XXIII could destroy the entire law reform package.

The only long-term solution to this dangerous situation is renegotiation of the key rules that have become obsolete. The present dispute-settlement reforms will remain dangerously unstable until these substantive gaps are filled. If there is any one final conclusion the author would wish to be drawn from this analysis of the Tokyo Round reforms, it is that the task of legal reform is unfinished.

Currently, negotiations are in progress concerning the most important of the outdated rules, the Article XIX escape clause provision. Representatives attempted to renegotiate Article XIX during the Tokyo Round, but, after a certain amount of progress, ended in deadlock. They have agreed to continue the negotiations following the Tokyo Round, but the absence of negotiating deadlines seems to have lessened the pressure.

The impending crisis in dispute settlement should make this renegotiation a matter of the highest priority.

GATT rules concerning restrictions on agricultural imports, primarily GATT Article XI, are the other priority subject for renegotiation. So far, Article XI has seemed immune from any serious consideration of scaling

170. The NTB codes are hardly free from such risk. Although the obligations of the codes are freshly negotiated, governments may in fact not be able to abide by the rules they have just written for themselves. Every Tokyo Round participant is aware of this risk, and there is already a broad consensus that governments will have to take a careful approach to adjudication under the NTB Codes.

171. A significant number of trade restrictions appear to either violate, or escape the supervision of, Article XIX. See notes 42-45 supra and accompanying text.


down its largely unobserved standards. The dangers in this area are quite real. The United States has felt no hesitancy about litigating under the existing standard,\textsuperscript{174} and agricultural trade in general seems to be a primary source of GATT litigation at the present time.\textsuperscript{175} The sentiment for discipline in agricultural trade policy has not died. There is a concern to limit the range of products that benefit from the de facto repeal of Article XI(2)(c), and there is also some residual consensus on the need for discipline in price-support programs themselves. The existing rule cannot serve as an effective vehicle for these sentiments. It can only invite legal rulings that will discredit the legal machinery governments might one day want to use to enforce a realistic discipline.

It is difficult to visualize renegotiation in the third major area of legal breakdown, the MFN obligation of Article I. The disrespect for the rule seems more sporadic and less-widely accepted. Article I also enjoys a symbolic, "cornerstone" significance in GATT tradition that makes it difficult to think of basic reform. Nevertheless, some type of effort at rebuilding a consensus in this area is necessary, because a continued accumulation of ad hoc deviations will eventually set off a wave of litigation. At the moment, community attitudes toward such litigation are simply unpredictable.

There are other outmoded rules in the General Agreement, but their renegotiation is not as urgent since they do not pose serious risks of adjudication. The critical areas are the three discussed above. These are, in every sense, the unfinished business of GATT legal reform.


\textsuperscript{175} Of the 18 complaints filed since 1975, 13 involved agricultural products. Ten involved restrictions on agricultural imports. \textit{See} Appendix, cases 78-95.
APPENDIX

GATT COMPLAINT PROCEEDINGS, 1960-1980

The following table contains a chronological list of GATT complaint proceedings during the past two decades. To indicate that there were 54 complaints in the years 1948-1959, unlisted because they are not pertinent to this Article, the numbering starts with 55.

Identification of an episode as a "complaint" is a matter of the author's judgment. The effort is to isolate the adjudicatory phase of dispute settlement at an early enough stage so as to convey an idea of the overall use of adjudicatory remedies, threatened as well as actually employed. The basic criterion for inclusion on the list is a legal claim by one contracting party against another, brought to the attention of the contracting parties (or GATT Council) in a manner that appears to be the first public step toward seeking a legal ruling.

Cases are listed in the chronological order of the complaint rather than the decision. The title, usually an abbreviated form of the title on relevant GATT documents, states the name of the defendant and the disputed practice, with additional information in parenthesis as necessary. The complainant is listed separately, followed by the date of the complaint, and finally the most accessible documentation (a decision or report if published in the GATT BISD series, otherwise the most pertinent GATT document or documents that have been de-restricted).

For a detailed tabulation of cases 1-54 and additional information on cases 55-75, see R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY, Appendix A, at 275-96 (1975).

<table>
<thead>
<tr>
<th>Title</th>
<th>Complainant</th>
<th>Date</th>
<th>Documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>55. Uruguayan Recourse to Article XXIII (against 15 defendants; over 600 diverse barriers listed)</td>
<td>Uruguay</td>
<td>1961</td>
<td>BISD (11th Supp.) 95 (1963); BISD (13th Supp.) 35 (1965); BISD (13th Supp.) 45 (1965) (panel decisions)</td>
</tr>
<tr>
<td>58. Italy—Residual QR's</td>
<td>U.S.</td>
<td>1962</td>
<td>L/1830 (1962); SR.20/2 (1962) (settled)</td>
</tr>
<tr>
<td>Title</td>
<td>Complainant</td>
<td>Date</td>
<td>Documents</td>
</tr>
<tr>
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<tr>
<td>63. Spain—Import Restrictions on Cod</td>
<td>Denmark</td>
<td>1969</td>
<td>L/3221 (1969); C/M/55 (1969) (settled)</td>
</tr>
<tr>
<td>64. Italy—Administrative Fees</td>
<td>U.S.</td>
<td>1969</td>
<td>L/3279 (1969); C/M/59 (1969) (deferred)</td>
</tr>
<tr>
<td>66. EEC—Tariff Preferences on Citrus</td>
<td>U.S.</td>
<td>1970</td>
<td>C/M/62 (1970); C/M/81 (1972) (settled)</td>
</tr>
<tr>
<td>69. EEC—Compensatory Taxes</td>
<td>U.S.</td>
<td>1972</td>
<td>L/3715 (1972); C/M/79-80 (1972) (settled)</td>
</tr>
<tr>
<td>70. Netherlands—Tariff Preferences</td>
<td>U.S.</td>
<td>1972</td>
<td>L/3726 (1972) (result not reported)</td>
</tr>
<tr>
<td>72. France—Residual QR’s (II)</td>
<td>U.S.</td>
<td>1972</td>
<td>L/3744 (1972); C/M/80 (1972) (settled)</td>
</tr>
<tr>
<td>76. EEC—Amount of Art. XXIV:6 Compensation</td>
<td>Canada</td>
<td>1974</td>
<td>L/4107 (1974); C/M/105 (1975) (settled)</td>
</tr>
</tbody>
</table>

* The "Cattle War" episode is listed in this series because the U.S. retaliation was justified, under U.S. law, on the grounds that the Canadian restrictions were in violation of GATT.
It is not counted in the numbered list of GATT complaints, however, because the U.S. justified its action under GATT as an exercise of the right to withdraw concessions, unilaterally, under Article XIX(3)(a). The United States did not ask for a GATT legal decision; it simply notified the action. The case is discussed in Hudec, supra note 5, at 535-39.

** Derestricted documents not available.
<table>
<thead>
<tr>
<th>Title</th>
<th>Complainant</th>
<th>Date</th>
<th>Documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>94. U.S.—Prohibition of Tuna Imports</td>
<td>Canada</td>
<td>1980</td>
<td>** (pending)</td>
</tr>
</tbody>
</table>

** Derestricted documents not available.