European Community Resistance to the Enforcement of GATT Panel Decisions on Sugar Export Subsidies

Jeffrey S. Estabrook

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EUROPEAN COMMUNITY RESISTANCE TO THE ENFORCEMENT OF GATT PANEL DECISIONS ON SUGAR EXPORT SUBSIDIES

INTRODUCTION

The recent Tokyo Round of multilateral trade negotiations, instituted under the General Agreement on Tariffs and Trade (GATT), adopted substantive rules regulating certain non-tariff


2. The acronym GATT refers to both the 1947 General Agreement on Tariffs and Trade and the international body supervising the agreement. This Note shall employ the
trade restrictions\textsuperscript{3} and dispute settlement procedures for the enforcement of those rules.\textsuperscript{4} Although similar dispute settlement procedures existed under the original 1947 General Agreement,\textsuperscript{5} they had fallen into disuse during the late 1960's and early 1970's.\textsuperscript{6} The Tokyo Round procedures prompted a revival of the GATT dispute settle-

3. The Tokyo Round adopted six new Codes regulating non-tariff barriers to trade. They are:


5. GATT Article XXIII\textsuperscript{(s)} allows signatory nations to submit disputes to the Contracting Parties. It states: "The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate." BISD (4th Supp.) 40 (1969). After an early unsettled period, the dispute settlement process now relies on a standard procedure in which three to five officials from nations without any interest in the dispute sit as a tribunal and render a decision based upon the General Agreement. For a discussion of the early development of this panel procedure, see R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 66-83 (1975).

6. Commentators have suggested many reasons for the 1960's breakdown in GATT dispute settlement; among them: procedural weakness in the panel process delaying the institution of a panel and the final rendering of a decision; a shift in GATT political power from "legalistic" tribunal-oriented Anglo-American nations to pragmatic negotiation-oriented nations such as Japan and the EC; and the growth in the number of inoperative rules which are unenforceable by the panel procedure. See generally MTN AND THE LEGAL INSTITUTIONS OF INTERNATIONAL TRADE SUBCOMMITTEE ON INTERNATIONAL TRADE, SENATE COMMITTEE ON FINANCE, 96TH CONG., 1ST SESS. 14-17 (COMM. PRINT 1979); Hudec, supra note 5, at 193-99; Graham, Results of the Tokyo Round, 9 GA. J. INT'L & COMP. L. 153, 171 (1979); Hudec, supra note 4, at 151-53.
ment process. Two cases brought during this revitalization, one by Australia, the other by Brazil, claimed that the European Community's (EC) sugar export subsidies violated GATT Article XVI. In a carefully worded opinion, a GATT panel in the Australian case found that factual complexities precluded a finding of EC liability under the specific GATT provision applicable to agricultural export subsidies, Article XVI:3, but that the EC's sugar export subsidies nevertheless constituted a "threat of serious prejudice" to Australia under a more general GATT provision, Article XVI:1. In particular, the panel objected to the unlimited subsidies available under the EC program. The panel left little doubt that the EC subsidy was inconsistent with GATT standards, but its decision, relying on the general and not the specific GATT provision, was not a model of authoritative decision making. Similarly, in the Brazilian case a GATT panel found no violation of Article XVI:3, but held that EC sugar subsidies violated the serious prejudice standard of Article XVI:1. As in the Australian case, the panel objected to the unlimited funds available to finance export refunds.

As a practical matter, the GATT itself has no power to sanction an offending member. It "enforces" panel decisions by relying on the normative pressure exerted through organized community condemnation by the GATT signatories. Thus, the enforcement of a panel's decision can result in a diplomatic "tug of war" between the GATT signatories and the adjudged offender. In reaction to the criticism of GATT signatories, the EC has modified its sugar subsidy

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7. At a panel discussion on GATT dispute settlement sponsored by the American Society of International law Professors, Robert Hudec stated:
   The amount of attention given to dispute settlement during the Tokyo Round generated a kind of momentum behind dispute settlement in general. More complainants were inspired to bring their legal problems to the disputes procedure, and once they got there, it was a little more difficult for dependent governments to resist. AM. SOC. OF INT'L L., PROCEEDINGS OF THE 74TH ANNUAL MEETING, 129, 133 (1980) (comments of R. Hudec).
10. Because the term "serious prejudice" has a specific meaning in the context of international trade disputes, it will hereinafter be referred to in text and footnotes as serious prejudice.
12. Id. at 316, 319.
13. Id. at 319. See Hudec, supra note 4, at 192.
15. Id.
16. Id. at 150.
program. The GATT signatories remain unsatisfied, however, and further modifications are unlikely. They persist in their efforts to enforce mandatory production or financial limits, which they claim GATT Article XVI:1 requires.

The decisions in the Australian and the Brazilian cases should not be enforced strictly. While both panels expressed displeasure at the EC sugar subsidy program, they based their decisions on the indefinite and weak serious prejudice provision of GATT Article XVI:1. Upon a finding of serious prejudice, Article XVI:1 merely requires discussions concerning "the possibility of limiting the subsidization." EC participation in 1981 GATT discussions and subsequent CAP reforms may have satisfied the Article XVI:1 requirements.

As a matter of GATT law, the strict enforcement of the Australian and the Brazilian decisions presents questions concerning the consensus behind recent Tokyo Round amendments to GATT Article XVI, and the potential for making the amendments effective practical tools for regulating agricultural export subsidies. The Tokyo Round multilateral trade negotiations changed GATT Article XVI:3 significantly, by replacing its indefinite standard with more precise and more easily demonstrable provisions. A compromise between the United States, a primary product exporter, and the EC, a primary product subsidizer, made the amendment possible. Nevertheless, the consensus behind the meaning of the amendment standard is uncertain. After applying nearly the same standard that was subsequently codified at the Tokyo Round, the panel in the

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17. For a discussion of CAP sugar subsidy modifications, see infra text accompanying notes 222-42.
18. See infra text accompanying notes 246-50.
21. GATT, supra note 1, art. XVI, para. 1.
22. See infra note 242 and accompanying text.
23. See infra text accompanying notes 126-33.
24. See infra text accompanying notes 35-37. For the purposes of this Note, the meaning of the term "primary product" shall correspond to the official GATT definition as provided in a note to the original agreement, deleting only the official text's reference to minerals, as mandated by the Subsidies Code (Art. 9, n. 7 BISD (26th Supp.) 68 (1980)): "A 'primary product' is understood to be any product, of farm, forest or fishery, . . . in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." GATT, Note Ad. Art. XVI, Section B, paragraph 2, BISD (4th Supp.) 68 (1969).
25. See infra text accompanying notes 133-43.
26. For a comparison of the legal standards applied in these decisions and those codified at the Tokyo Round see infra text accompanying notes 156-58. Both the sugar decisions and the Tokyo Round adopted the displacement standard that was applied in a late 1950's GATT panel decision. GATT, French Assistance to Exports of Wheat and Wheat Flour, BISD (7th Supp.) 46 (1959). [hereinafter cited as FRENCH WHEAT DECI-
Australian case was unable to find a violation of Article XVI:3. Similarly, the panel in the Brazilian case applied the Tokyo Round standard for interpreting Article XVI:3 yet found no violation. Thus, the decisions are inconsistent with the Tokyo Round standard. Although the attempts to enforce the decisions strictly are popular with agricultural interests of GATT primary product exporters, these efforts conflict with the overriding goal of achieving a broad consensus behind the Tokyo Round amendments. Attempts to enforce these decisions strictly should cease, and new complaints, initiated under the Tokyo Round amendments, should replace them.

I. THE COMMON AGRICULTURAL POLICY AND WORLD AGRICULTURAL TRADE

The Common Agricultural Policy (CAP) is the EC's agricultural price support regime. It is calculated to achieve three goals: common pricing, Community preference, and unlimited common financing. The CAP covers ninety percent of EC farm production. Potatoes and agricultural alcohol are the only major products exempted. It guarantees producers in all member states a uniform internal price (common pricing) which is usually above the prevailing world market price. Generally, agricultural agencies of the member governments intervene in agricultural markets and purchase regulated commodities when market prices fall below the internal price. The variable levy, an import tax calculated to raise import prices above the internal price, prevents imports from capitalizing on the high internal price. EC regulations ensure greater demand for EC produced goods than for imported goods (Community preference). The EC, rather than individual member governments, finances this program through the European Agriculture Guidance and Guarantee Fund (known by its French acronym FEOGA), which has unlimited resources and constitutes a major

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28. Australian Decision, supra note 11, at 319.
29. Brazilian Decision, supra note 14, at 90-92, 97.
32. Id. at 53. See infra note 35 and accompanying text.
33. Farming in the EEC, supra note 30, at 52.
34. For an explanation of the calculation of the variable levy, see GATT Study No. 12, supra note 29, at 163-64.
35. GATT Study No 12, supra note 29, at 166.
share of the total EC budget (common financing).\textsuperscript{36}

The CAP is exceedingly protectionist. Although other forms of assistance are possible, such as direct subsidies to inefficient farmers, the EC has selected price level regulation as its exclusive form of assistance.\textsuperscript{37} The Council of Ministers, composed of the farm ministers of the EC member nations, fixes farm prices annually.\textsuperscript{38} The EC Farm Commissioner, an EC official, suggests CAP modifications, but the final decision remains with the Council of Ministers, each member of which attempts to extract the maximum benefit for his own country and his own farmers.\textsuperscript{39} Consequently, agricultural prices tend to be fixed at very high levels with little regard to supply and demand.\textsuperscript{40} Some have concluded that the CAP's effect is such that, "for several basic farm products Community agriculture has been effectively isolated from the world market."\textsuperscript{41}

The inflated CAP price encourages production. For example, production under the CAP in 1972-73 compared to the pre-CAP 1962-63 average increased 26\% for wheat and 128\% for corn.\textsuperscript{42} Such production increases create agricultural surpluses, as the minimum price guaranteed by the CAP encourages more production by farmers than consumers are willing to purchase at that price.

A subsidizing government, in this case the EC, has various options in disposing of agricultural surpluses. It may stockpile the surplus, incurring storage costs,\textsuperscript{43} or it may send the surplus abroad as a form of foreign aid.\textsuperscript{44} The EC relies heavily on export subsidies

\textsuperscript{36} In 1973, the FEOGA accounted for 76\% of the EC budget. \textit{Id.} at 208. In 1981 high world farm prices held spending down so that the CAP only constituted approximately 71\% of the EC budget. \textit{Saved by World Food Prices?}, ECONOMIST, May 30, 1981, at 46.

\textsuperscript{37} GATT STUDY No. 12, \textit{supra} note 29, at 210.

\textsuperscript{38} \textit{Farming in the EEC, \textit{supra} note 30, at 52.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.}; GATT STUDY No. 12, \textit{supra} note 29, at 210.

\textsuperscript{41} ATLANTIC COUNCIL OF THE UNITED STATES, GATT PLUS—A PROPOSAL FOR TRADE REFORM 26 (1976).

\textsuperscript{42} GATT STUDY No. 12, \textit{supra} note 29, at 164.

\textsuperscript{43} For instance, the EC maintains “mountains” of dairy products, particularly butter, which is the most costly product to store. \textit{How to Cut Your Milk Bill by Raising Other People’s}, ECONOMIST, June 6, 1981, at 53.

\textsuperscript{44} As with export subsidies, food aid may dislocate world agricultural trade by displacing commercial food sales. K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 266-270 (1970). EC officials complain privately that the U.S. Food for Peace program, providing food aid to less developed countries, is merely a less obvious form of agriculture subsidization. Patterson, \textit{Keeping Them Happy Down on the Farm} 36 FOREIGN POLICY 63, 68-9 (1979). With respect to international regulation of food aid, see generally, R. Bard, \textit{Food Aid and International Agricultural Trade} (1972); \textit{FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, FAO Principles of Surplus Disposal and Consultative Obligations of Member Nations} (1972).
to promote private foreign sales of surpluses. The CAP encourages private producers to sell their goods abroad by offering refunds equal to the difference between the world market price and the internal market price.

Export subsidies cause dislocation in international trade. They encourage inefficient production in the subsidized market, and cause other nations that perceive the subsidies as aggressive measures to enact competing trade restrictions. For example, if subsidized exports capture an unacceptably large share of a foreign market, injuring a competing domestic producer, the foreign government may protect local industry by instituting countervailing import duties, thereby nullifying the effect of the export subsidy. When export subsidies allow an exporter to gain an unacceptably large share of a third country market at the expense of another exporter, that exporter’s government may respond with equally competitive export subsidies. This process easily may deteriorate into a competitive subsidization race. Such a race allegedly was discovered in 1961 when a GATT working party found that twenty of thirty-four countries studied maintained some form of cereal subsidy.

Alternatively, governments harmed by export subsidies may pursue remedies within the GATT framework, alleging a breach of GATT Article XVI. Article XVI contains five paragraphs. The original 1947 GATT contained only the general first paragraph. In 1955 the contracting parties amended the GATT, adding the remaining four paragraphs that deal specifically with export subsidies. By 1969 all signatories had acceded to the 1955 amendments except paragraph four, which deals with export subsidies on nonprimary

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45. In the agricultural sector, the Europeans had gone so far as to institutionalize export subsidies. Restitution payments on the export of agricultural goods were a central part of the EC’s Common Agricultural Policy.” Rivers & Greenwald, supra note 27, at 1452.

46. H. MALMGREN, INTERNATIONAL ECONOMIC PEACEKEEPING IN PHASE II 125-26 (1972); see generally Farming in the EEC, supra note 30, at 51-54.


48. The right to impose a countervailing duty under the GATT is restricted to cases where there is a showing of “material injury” to the importing nation. GATT, supra note 1, art. VI BISD (4th Supp.) 10-12 (1969); Subsidies Code, supra note 3, art. 2, BISD (26th Supp.) 57, n.4 (1980).

49. Some specific examples of such competing export subsidies are mentioned in K. DAM, supra note 44, at 136.

50. Id.


52. GATT supra note 1, art. XVI.

53. Id., para. 1; Rivers & Greenwald, supra note 27, at 1459.

54. Rivers & Greenwald, supra note 27 at 1460.

55. J. JACKSON, supra note 51, at 376.
products.\textsuperscript{56} Article XVI:1 requires a nation "which grants or maintains any subsidy . . . which operates directly or indirectly to increase exports of any product from, or reduce imports of any products into, its territory . . . [to] notify the Contracting Parties."\textsuperscript{57} In addition, if such subsidization causes or threatens to cause serious prejudice to the interests of any other contracting party, discussions may be requested concerning the possibility of limiting the subsidization.\textsuperscript{58} The notification and consultation requirements of Article XVI:1 do not impose arduous restraints on governments.\textsuperscript{59} In practice, GATT signatory nations use the Article XVI:1 consultation provision to establish bilateral discussions that the nations conduct independent of any GATT determination of serious prejudice.\textsuperscript{60} After agreeing to consult, Article XVI:1 merely requires the party imposing the subsidy to "discuss the possibility of limiting the subsidization."\textsuperscript{61} One commentator has suggested that "[t]he legal or moral force of this obligation is probably not sufficient to overcome the domestic politics behind many presently existing subsidies."\textsuperscript{62} According to a recent article, "there is no record of any country ever having limited a subsidizing practice as a result of consultations under Article XVI, paragraph 1."\textsuperscript{63}

Article XVI:4 prohibits export subsidies on nonprimary products which result in export prices lower than domestic prices.\textsuperscript{64} Primary product export subsidies are not prohibited. Article XVI:3 states, "contracting parties should seek to avoid the use of subsidies on the export of primary products."\textsuperscript{65} If a signatory does grant a primary product export subsidy, however, Article XVI:3 provides that "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

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\bibitem{56} Id. at 374-75.
\bibitem{57} GATT, supra note 1, art. XVI, para. 1.
\bibitem{58} Id. The actual text does not specify who may request discussions. It states: In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.
\bibitem{59} GATT, supra note 1, art. XVI, para. 1.
\bibitem{60} J. JACKSON, supra note 51, at 391.
\bibitem{61} GATT, supra note 1, art. XVI, para. 1.
\bibitem{62} J. JACKSON, supra note 51, at 392.
\bibitem{63} Rivers & Greenwald, supra note 27, at 1459-60.
\bibitem{64} GATT, supra note 1, art. XVI, para. 4.
\bibitem{65} GATT, supra note 1, art. XVI, para. 3 (emphasis added).
\end{thebibliography}
contracting parties in such trade in the product during a previous representative period.\textsuperscript{66} Thus, without more, the text of Article XVI:3 provides no meaningful prohibition on primary product export subsidies. "[T]here is no guidance as to what is and what is not an equitable world market share."\textsuperscript{67}

Until the mid-1970's, two major factors inhibited the adjudication of complaints under Article XVI:3. First, prospective litigants were frustrated by the inherent ambiguity of the Article's standard.\textsuperscript{68} Second, during the 1960's and early 1970's, GATT signatories abandoned the dispute resolution process almost entirely.\textsuperscript{69}

The Article XVI:3 standard presented numerous definitional questions to both prospective litigants and adjudicating panels. The "equitable" standard was indefinite,\textsuperscript{70} and the frame of reference, "world export trade," was ineffective because so few subsidies substantially affected world market shares.\textsuperscript{71} The lone decision effectively invoking Article XVI:3 demonstrated this definitional difficulty. In 1958, Australia filed a complaint with the GATT alleging that subsidized French wheat flour had displaced Australian flour from its traditional Southeast Asian markets.\textsuperscript{72} The panel that decided the case avoided the equitable share question, and instead focused on the "displacement" of Australian flour by subsidized French flour.\textsuperscript{73} Eventually, the Australians and the French concluded a bilateral agreement on exports of flour to Southeast Asia that resolved the matter.\textsuperscript{74}

In addition to definitional uncertainties, the overall breakdown in the GATT dispute resolution process during the 1960's and early 1970's drastically reduced the number of complaints heard pursuant to the GATT panel procedure.\textsuperscript{75} Only one consultation applied Article XVI in the 1960's.\textsuperscript{76} During this period, however, agricultural protection and the attendant use of export subsidies continued

\textsuperscript{66.} Id. (emphasis added).
\textsuperscript{67.} Rivers & Greenwald, supra note 27, at 1461 & n.77.
\textsuperscript{68.} Id.
\textsuperscript{69.} See supra note 6.
\textsuperscript{70.} K. DAM, supra note 44, at 142-43.
\textsuperscript{71.} Id. at 143.
\textsuperscript{72.} FRENCH WHEAT DECISION, supra note 27, at 22-23, 46-57; Rivers & Greenwald, supra note 27, at 1461 n. 77.
\textsuperscript{73.} Rivers & Greenwald, supra note 27, at 1461 n.77. Because the term "displacement" has a specific meaning in the context of GATT panel decisions, it will hereinafter be referred to in text and footnotes as displacement.
\textsuperscript{74.} J. JACKSON, supra note 51, at 380.
\textsuperscript{75.} See supra note 6.
\textsuperscript{76.} In 1968 Malawi complained about U.S. tobacco export subsidies. GATT, United States Subsidy on Unmanufactured Tobacco, BISD (15th Supp.) 116-18 (1967). No decision was rendered on the claim as Malawi only requested a consultation, not a dispute settlement panel.
unabated.\footnote{See generally, H. Malmgren, supra note 46, at 122-33.} Cases clearly could have been brought, but Article XVI was not invoked. Instead, the contracting parties resorted to self-help measures.\footnote{For example, in 1965 the United States targeted competitive export subsidies on chicken destined for the Swiss and Austrian markets as a countermeasure to export subsidies provided by the EC. K. Dam, supra note 44, at 136.}

In the uncertain economic climate of the early 1970's, a wave of protectionist sentiment influenced the national governments of most major GATT participants.\footnote{Hudec, supra note 4, at 153.} This shift in trade policy attitudes at the political level threatened the relatively liberal post-war trading environment developed under the auspices of the GATT.\footnote{Id. at 153-54.} The GATT responded to this danger by sponsoring a new series of trade negotiations, the Tokyo Round.\footnote{Id.}

II. THE TOKYO ROUND: GATT ARTICLE XVI MODIFICATIONS

A. INTRODUCTION

Six times between 1947 and 1967, the GATT sponsored multilateral negotiations, called rounds, aimed principally at lowering tariffs.\footnote{For a brief discussion of the six rounds see J. Jackson, Legal Problems of International Economic Relations 473-84 (1977).} One commentator estimated that these rounds affected $57.4 billion worth of trade.\footnote{Id. at 473.} As the average level of tariff protection fell, however, the use of non-tariff barriers to trade, such as restrictive government procurement policies, import-excluding product standards, and trade-distorting subsidies, became more prevalent.\footnote{Marks & Malmgren, Negotiating Nontariff Distortions to Trade, 7 L. & Pol'y in Int’l Bus. 327, 328 (1975); Rivers and Greenwald, supra note 27, at 1450-51.} The latest GATT multilateral negotiations, the Tokyo Round, attempted to regulate non-tariff barriers through the enactment of six new objective codes of conduct.\footnote{See supra note 3.} Each of the new codes added detailed rules and procedures to the comprehensive general code found within the GATT itself.\footnote{Hudec, supra note 4, at 147, 154 n. 18.} In particular, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade\footnote{Subsidies Code, supra note 3.} (Subsidies Code) addressed the interrelated problems of countervailing duties and subsidies, and by means of a major agreement between the United States and the EC,
refined the primary products export subsidy regulations.88

B. BACKGROUND OF THE SUBSIDIES CODE NEGOTIATIONS

GATT Article VI requires signatory nations to demonstrate "material injury" to a domestic industry before enacting countervailing duties against subsidized exports.89 The United States Tariff Act of 193090 mandated the imposition of countervailing duties against subsidized exports without regard to any injury criterion,91 and was exempt from GATT Article VI because it pre-dated the 1947 General Agreement.92 The prospect of increased United States countervailing duty activity without regard to the injury caused to domestic industry posed both political and economic problems for United States trading partners.93 To them, the paramount issue in the negotiation of the Subsidies Code was United States acceptance of the requirement that a country must show a material injury before instituting countervailing duties.94

At the outset of the Tokyo Round, the United States offered to negotiate an injury test into its law,95 but linked this concession to achieving an international agreement concerning discipline in subsidy practices.96 Unlike the United States, which opposes governmental involvement in international commerce, most nations view subsidies as facts of modern economic life and important tools of national policy.97 Further, the Europeans were reluctant to sacrifice these practices in exchange for the mere acceptance of the existing GATT rules by the United States.98 Thus, the major Subsidies Code

88. Commentators repeatedly have alluded to the importance of the Subsidies Code to the Tokyo Round negotiation. Echols, Section 301: Access to Foreign Market from an Agricultural Perspective, 6 INT'L TRADE L. J. 4, 11 (1980) ("effect of the negotiation . . . will be judged largely by the implementation of the [Subsidies Code] and the Agreement on Technical Barriers to Trade"); Graham, Revolution in Trade Politics, FOREIGN POL'Y, Fall 1979, 49, 52 ("centerpiece" of the Tokyo Round); Rivers & Greenwald, supra note 27, at 1450 ("had the subsidies/countervailing duty negotiations not succeeded, the 'success' of the [multilateral trade negotiations] would have been a good deal less").
89. GATT, supra note 1, art. VI, para. 1.
91. Id.; see also THE TOKYO ROUND, supra note 59, at 58.
93. Rivers & Greenwald, supra note 27, at 1453.
94. Id. at 1453-54; THE TOKYO ROUND, supra note 59 at 59.
95. Rivers & Greenwald, supra note 27, at 1454.
96. SUBCOMMITTEE ON INTERNATIONAL TRADE, SENATE COMMITTEE ON FINANCE, 96TH CONG., 1ST SESS., 6 MTN STUDIES—PART 1 105 (Comm. Print 1979).
98. Id. at 1454.
negotiations revolved around the extent of international subsidy discipline which the United States would receive for its countervailing duty concession.99

Regarding subsidies, the United States had two goals. First, the nation had an overriding interest in establishing a "legalist" approach to the Tokyo Round negotiations.100 That is, the United States sought to define rules clearly and to encourage resort to third-party adjudication.101 Consistent with these objectives, the United States committed itself to an agreement which would improve international discipline concerning the use of subsidies. A recent article states that "there was a . . . general appreciation that, given the significant and growing government involvement in international commerce, some form of agreement establishing ground rules for such behavior was essential in order to avoid sharp conflict over trade matters in the future."102

This "legalist" motivation, however, was tempered by more selfish special interest opposition to specific subsidy practices.103 In particular, United States agricultural interests opposed the CAP export subsidy system.104 They shared this opposition with other primary product exporters, particularly Australia.105

The initial negotiating position of the United States, embodied in "concepts papers" submitted to the negotiations, condemned subsidies as intrinsically bad.106 It became clear, however, that other delegations would not negotiate on the basis of the "concepts papers." In response, the United States revised its approach, making several "concessions."107 In particular, "the United States agreed to drop its insistence that subsidies be classified as intrinsically good or bad and to focus instead upon the effects of subsidies on trade."108 A

99. Id. at 1454-55.
100. "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." Hudec, supra note 4, at 151. The United States originally designed the "legalist model," and played an important role in establishing the "legalist" direction of the Tokyo Round negotiations. See generally id. at 149-58.
101. Id.
102. Rivers & Greenwald, supra note 27, at 1452.
103. Id. at 1451-52.
107. Id. at 1466.
108. Id.
parallel development occurred in the negotiations concerning primary products. During the first two and one-half years of negotiations, the United States attempted to force the EC into giving up the CAP, a process Robert Strauss, Chief U.S. negotiator at the Tokyo Round, described as, "baying at the Moon." Strauss persuaded U.S. farm leaders of the futility of the negotiations and softened the U.S. opposition to the CAP. He instituted more pragmatic negotiations aimed at liberalizing the CAP. The Subsidies Code provisions refining GATT Articles XVI reflect the revised U.S. position regarding subsidy practices and the CAP.

C. THE SUBSIDIES CODE AS APPLIED TO AGRICULTURAL EXPORT SUBSIDIES

The Subsidies Code is divided into two sections, or tracks, that are distinguished by the remedies allowed under each. Track I, the countervailing duty law, covering Articles 1-6 of the Code, allows unilateral reaction when foreign trade practices disrupt a domestic industry. Track II, covering Articles 7-19 of the Code, authorizes government-to-government complaint procedures when a foreign trade practice disrupts either domestic or foreign markets. Thus, for disruptions in the domestic market, either remedy is potentially available.

Subsidies Code Articles 7-13 regulate subsidies. These provisions, like GATT Article XVI, provide two potential standards to regulate primary product export subsidies: serious prejudice and displacement.

First, as with GATT Article XVI:1, there is the general serious prejudice standard. Subsidies Code Articles 8 and 12 provide that bilateral consultations, and possibly dispute settlement procedures, may result from a signatory's claim of serious prejudice. Upon a signatory's charge of serious prejudice, two procedural paths allow

110. Id
111. Id
114. Barcelo, supra note 47 at 266.
116. Id., art. 8, para. 3(c); art. 12, para. 3.
access to dispute settlement mechanisms. In particular, Article 8 states that “Signatories... agree that they shall seek to avoid causing, through the use of any subsidy... (c) serious prejudice to the interests of another signatory.” Both paths require at least sixty days of bilateral consultations before third party adjudication.

A commentator has expressed hope that the adoption of countermeasures triggered by claims of serious prejudice will increase GATT strength in the subsidies area. There is little apparent reason, however, why the serious prejudice standard should prompt any greater discipline than it did when embodied in GATT Article XVI:1. As with Article XVI:1, this indefinite standard is contained in general anti-subsidy provisions. The language of Subsidies Code Article 8 does not prohibit subsidies that cause serious prejudice. Rather, signatories merely promise that they will “seek to

117. The first path derives from the serious prejudice standard in Article 8. Article 8(3) states that “signatories further agree that they shall seek to avoid causing, through the use of any subsidy... serious prejudice to the interests of another signatory.” Id. art. 8, para. 3. Under Article 12(1), a signatory believing serious prejudice has occurred under Article 8(3), may request consultations with the subsidizing signatory. Id. art. 12, para. 1. The request must contain a statement of available evidence. Id. art. 12, para. 2. The subsidizing signatory is required to enter such consultations as quickly as possible. Id. art. 12, para. 5. If a mutually acceptable solution is not reached within thirty days, any signatory may refer the matter to the Subsidies and Countervailing Duties Committee for conciliation. Id. art. 13, para. 1. If after a conciliation period of thirty days, the matter is still unresolved, any signatory involved may request a panel. Id. art. 20, para. 3.

The second path derives from the serious prejudice standard in Article 12. Article 12(3) states, “whenever a signatory has reason to believe that any subsidy is being granted or maintained by another signatory and that such subsidy... causes... serious prejudice to its interests, such signatory may request consultations with such other signatory.” Id. art. 12, para. 3. The request must include a statement of available evidence regarding the existence and nature of the subsidy, and the adverse affects caused. Id. art. 12, para. 4. The subsidizing signatory is required to enter into such consultations as quickly as possible. Id. art. 12, para. 5. If a mutually acceptable solution is not reached within sixty days any party may refer the matter to the Subsidies and Countervailing Duties Committee for conciliation. Id. art. 13, para 2. If after a conciliation period of thirty days, the matter is still unresolved, any signatory involved may request a panel. Id. art. 17, para. 3. The panel should be established within thirty days of the request, and should deliver its findings within sixty days. Id. art. 18, para. 2.

118. Subsidies Code, supra note 3, art. 8, para. 3 (emphasis added). The language creating the obligation, “seek to avoid,” is the same as that in GATT Article XVI:3.

119. The first path, triggered by Article 8(3), requires thirty days of consultations. Id. art. 13, para. 1, and thirty days of conciliation, id. art. 17, para. 3. The second path, triggered by Article 12(3), requires sixty days of consultations. Id., art. 12, para. 5, and thirty days of conciliation. Id. art. 17, para. 3.


121. For a discussion of the ineffectiveness of GATT Article XVI:1, see supra text accompanying notes 57-63.

122. GATT Article XVI:1 applies to “any subsidy... which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory...” GATT, supra note 1, art. XVI, para. 1.
avoid” causing serious prejudice. In addition, although the Code adds the prospect of eventual third party adjudication, it appears that it also increases access to GATT Article XVI:1 type consultations. Signatories thus may resolve their differences without recourse to third party adjudication. Particularly when applied to primary product export subsidy litigation, where the Code enacted significant changes, the serious prejudice provisions do not appear to strengthen the traditionally weak standard.

In contrast to the Subsidies Code’s repetition of serious prejudice, the indefinite “more than equitable share of world export trade” standard of GATT Article XVI:3 was made tighter and more precise. One commentator has called the improvement, “a major step toward resolving the main problems in our important agricultural export markets.” Subsidies Code Article 10 deals specifically with primary product export subsidies, relying on concepts of displacement and price undercutting. Paragraph 2 refines and clarifies the “more than an equitable share of world export trade” standard found in GATT Article XVI:3. First, the paragraph adopts the reasoning of the French Wheat case, stating that “‘more than an equitable share of world export trade’ shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets.” It further clarifies the standard by stating that “‘a previous representative period’ shall normally be the three most recent calendar years in which normal market conditions existed.” Finally, paragraph 3 states that the “[s]ignatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices

123. Id. art. 8, para. 3. The language “seek to avoid” was used in GATT Article XVI:3. When compared with GATT Article XVI:4, which created a prohibition on non-primary product export subsidies, GATT Article XVI:3 was interpreted not to create a prohibition on primary product export subsidies. The Tokyo Round, supra note 59, at 54-55.


127. Subsidies Code, supra note 3, art. 10.

128. Rivers & Greenwald, supra note 27, at 1478.

129. Subsidies Code, supra note 3, art. 10, para. 2.

130. For a brief discussion of the French Wheat case see supra text accompanying notes 71-74.

131. Subsidies Code, supra note 3, art. 10, para. 2, sec. (b) (emphasis added).

132. Id. art. 10, para. 2, sec. (c).
materially below those of other suppliers to the same market.’  

The *displacement* standard arose from a significant United States-EC compromise. Each party had its own reason for accepting the new standard. The EC acceded to the *displacement* rule because it could downplay criticism of their “concessions” by claiming that the new standard merely codified GATT common law precedent, i.e. the French Wheat case. The United States accepted the new standard because the requisite preliminary factual showing of *displacement* made it easier for an aggrieved party to state a prima facie case than did the “equitable share” standard. As such, the *displacement* standard offered something to both parties.

The unsettled question underlying the Subsidies Code Article 10 negotiations concerned how strictly the agreed upon standard would regulate the CAP. The adoption of the *displacement* standard has not settled the question. In the words of one critic,

> International agreements can mean all things to all people, and the new code is no exception; had the EC believed the code would prevent what it considers an internal agricultural policy—export restitution—the EC surely would not have initialed the new agreement. U.S. negotiators meanwhile assured Congress that the Code would bring more discipline to the use of export subsidies.

Between these two poles, however, each side conceded something in creating the standard. Although the EC would not tolerate a direct assault on the CAP, the Tokyo Round negotiators perceived some EC flexibility, which enabled them to modify CAP subsidy effects on international trade. While United States agricultural interests, as well as those of other primary product exporters, vehemently opposed the CAP, they conceded its continued existence. Thus, United States agricultural interest agreed to the overall goal of achieving an international accord regulating subsidization.

This lack of agreement on the operation of the *displacement* standard ironically highlights a strength of the Tokyo Round results. One commentator states that the most important element of the new Codes is that “they . . . constitute the beginning—and not a final

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133. Id. art. 10, para. 3.
134. Rivers & Greenwald, supra note 27, at 1476-79.
135. Id. at 1478.
136. Id.
137. Id.
138. Patterson, supra note 44, at 67.
139. Rivers & Greenwald, supra note 27, at 1477.
140. See supra notes 103-05 and accompanying text.
141. The desire to create an international agreement regulating subsidization and the need to appease U.S. agriculture’s opposition to the CAP were principal U.S. motivations in the Subsidies Code negotiations. See supra notes 100-05 and accompanying text.
D. CONCLUSION: THE PREDOMINANCE OF DISPLACEMENT IN AGRICULTURAL EXPORT SUBSIDY LITIGATION

The result of the negotiations shows that in regard to primary product export subsidy regulation, the codification of the displacement standard was more important than the reassertion of the serious prejudice standard. Despite the uncertainty regarding how it ultimately would be applied, the displacement standard tightened the ill-defined “more than an equitable share of world export trade” concept, and to some extent signified the willingness of the participants to work within international limits. The Code’s repetition of serious prejudice, a historically ineffective and general standard, does not signify such an achievement. In particular, the language of Article 8 creates no obligation, the signatories merely “seek to avoid” causing serious prejudice.

Further, the Codes established at the Tokyo Round require ongoing application and elaboration. They invite governments to make increased use of adjudicatory proceedings, reactivating the GATT dispute settlement mechanism. Commentators generally are cautious, however, about the future of GATT dispute settlement. In particular, they fear that the dispute settlement process may discredit itself by attempting to enforce inoperative or overly-ambitious rules. In the words of one commentator,

A dispute settlement mechanism should be built on modest expectations, at least at the start. For example, it should not be expected that all rules will be immediately followed. However, the mechanism should be designed so that as time goes on, greater and greater confidence will be placed in the system, so that it will be more utilized, and so that gradually greater responsibilities can be put upon it.

The attempt to enforce a decision based upon the serious prejudice standard of Subsidies Code Articles 8 and 12 seems overly ambi-

144. See Hudec, supra note 4, at 198.
145. Id.
146. Id.
147. Id. at 198-99.
tious. Moreover, it could threaten the credibility of the dispute settlement process.

Due to United States legislation enacting the Tokyo Round agreements, complaints under Article XVI:3 have increased. Provisions in the Trade Act of 1974,\textsuperscript{149} as modified by the Trade Agreements Act of 1979,\textsuperscript{150} authorize private parties to initiate suits alleging GATT violations. Although private parties have no standing to sue under GATT,\textsuperscript{151} they may file a petition with the United States Trade Representative (USTR) who then has forty-five days to make a preliminary decision regarding whether to pursue the investigation.\textsuperscript{152} Since 1975, four parties have filed complaints alleging EC/CAP Article XVI:3 violations.\textsuperscript{153} Two still are pending.\textsuperscript{154}

This increase in Article XVI litigation mirrors the aggregate increase in GATT dispute settlement litigation generally. Spurred in part by Tokyo Round reforms in dispute settlement procedures, litigation under the GATT is at its highest level ever.\textsuperscript{155} While many cases are pending, few, in fact, have been decided. Among the few are two complaints alleging violations of Article XVI by the CAP sugar export subsidy program.

### III. SUGAR DECISIONS

Australia filed a case with the GATT in 1978 challenging EC sugar export subsidies on the grounds that they violated GATT Article XVI. Although the panel decided the case before the ratification of the Subsidies Code, the decision foreshadows the Tokyo Round modifications to GATT Article XVI. The Subsidies Code negotiations had concluded by the time of the decision,\textsuperscript{156} and it is likely

\begin{itemize}
  \item \textsuperscript{149} 19 U.S.C. § 2422 (Supp. III 1979).
  \item \textsuperscript{150} 19 U.S.C. § 2501 (Supp. III 1979).
  \item \textsuperscript{152} Procedures for Complaints Filed Under Section 301 of the Trade act of 1974, As Amended, 15 C.F.R. § 2006.3 (1980) [hereinafter cited as Complaint Procedures]. For a discussion of procedures in filing complaints, see \textit{id}. at 327-33.
  \item \textsuperscript{154} The Great Western Malting complaint was terminated by negotiation with the EC. 45 Fed. Reg. 41558 (June 19, 1980). The Great Plains Wheat complaint also was terminated after negotiations with the EC. These negotiations, especially as related to the Tokyo Round negotiations, are discussed in Patterson, supra note 44. The Miller's National Federation complaint was submitted to the GATT for final adjudication on December 14, 1981, as part of a broad U.S. assault on the CAP. 388 U.S. EXPORT WEEKLY (BNA) 332, 333 (Dec. 22, 1981).
  \item \textsuperscript{155} AM. SOC. OF INT'L L., supra note 7, at 132-33 (comments of R. Hudec).
  \item \textsuperscript{156} The Article XVI:3 modifications were negotiated and tabled in December, 1978. THE TOKYO ROUND, supra note 59, at 56. The panel reported their decision on Novem-
that the panel members were aware of the results. The standards applied regarding displacement and "previous representative period" were substantially identical to those established by the Subsidies Code. As such, the Australian decision represents relevant GATT precedent. The Brazilian case, also filed in 1978, attacked EC sugar export subsidies on the same Article XVI grounds. The panel in the Brazilian case expressly applied the standards adopted at the Tokyo Round. These decisions are best analyzed with reference to the EC's sugar policy and the features of the world sugar market.

A. THE CAP SUGAR POLICY

The CAP sugar policy is a three-tiered system of escalating price restrictions without mandatory production limits. Through member states, the CAP assigns quotas to each producer and grower in the EC. Each producer may produce as much as it desires, but will receive full subsidies only up to its "basic quota" (type A sugar). Using a production levy, the CAP partially withholds subsidies assessed against production up to a specified quantity in excess of the basic quota. This is termed "maximum quota" (type B

157. The panelists were senior GATT representatives of countries neutral to the dispute: Finland, Switzerland and Turkey. Australian Decision, supra note 11, at 291. Thus the panelists were most likely aware of the Tokyo Round results.

158. Cf. Australian Decision, supra note 11, at 310 ("The Panel was of the opinion that the term 'more than an equitable share of world export trade' should include situations in which the effect of an export subsidy granted by a signatory was to displace the exports of another signatory, bearing in mind the development in world markets.") with Subsidies Code, supra note 3, art. 10, para. 2(a) ("more than equitable share of world export trade' shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the development on world markets").

159. The panel analyzed market changes with reference to a previous representative period of three years as specified in the Subsidies Code. Compare Australian Decision, supra note 11, at 308 ("The three most recent calendar years for which market conditions could be considered as normal"), with Subsidies Code, supra note 3, art. 10, para. 2(c) ("[A] 'previous representative period' shall normally be the three most recent calendar years in which normal market conditions existed."). The panel took great pains to apply the three year standard, excluding 1975, when abnormal market conditions existed. Australian Decision, supra note 11, at 307-08. The panel also rejected an Australian request for a seven year reference period. Id. at 297-98.

160. Brazilian Decision, supra note 14, at 69.

161. Id. at 88.


164. Id.

165. Id.
The CAP allows no subsidy on any amount over maximum quota (type C sugar), although producers may produce type C sugar and sell it at world market prices.\textsuperscript{167} In establishing the system, the EC member nations agreed that guaranteed internal prices would be set at a relatively high level and that production would be limited by quotas.\textsuperscript{168} The system thus depends heavily upon the quantities selected for quotas, both basic and maximum, and upon production levies, to determine output and cost. The CAP estimates consumption for the year and sets the basic quota to account for consumption and imports mandated by the Lomé Convention.\textsuperscript{169} The amount of sugar permitted within the maximum quota and the production levies on type B sugar are then set.\textsuperscript{170} In principle, the amount of the levy should equal the cost of export subsidies and surplus disposal.\textsuperscript{171} In fact, the EC Council traditionally has placed a ceiling on the production levy well below the actual disposal cost.\textsuperscript{172}

In 1975, in response to high EC consumption and high world prices, the EC Council of Ministers increased the basic quota by 8.7\% (from 8.4 million tons to 9.136 million tons).\textsuperscript{173} In addition, the maximum quota was increased from 118\% of the basic quota to 145\% of the expanded basic quota.\textsuperscript{174} Finally, the production levy was abolished for two years.\textsuperscript{175} Producers reacted strongly to the 1975 plan. The area planted in sugar beets established a record in 1976-77, but due to poor weather production did not increase appreciably until 1978, when exports of sugar rose 107\% from 1.696 million tons in 1977 to 3.508 million tons.\textsuperscript{176} These developments created a sugar surplus which eventually gave rise to the 1978 Australian and Brazilian claims.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id. For a more complete explanation of CAP sugar export subsidy mechanics, see \textit{Australian Decision}, supra note 10, at 301-04. \textit{See also GATT Study No. 12, supra note 29, at 183-90.}
\item \textsuperscript{168} Smith, supra note 163, at 96.
\item \textsuperscript{169} Id. The Lomé Convention is an agreement between the EC and developing African, Caribbean and Pacific states. Under Protocol 3 of the Convention, the EC undertakes to buy 1.3 million tons of sugar from the developing nations. For a discussion of the role played by Lomé Convention sugar imports in the allocation of EC sugar quotas see \textit{id.} at 104-10.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} GATT Study No. 12, supra note 29, at 189.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Smith, supra note 163, at 97-98.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id. at 98.
\item \textsuperscript{177} Id. at 103.
\end{itemize}
B. Features of the World Sugar Market

World sugar trade takes place in a narrow, supply sensitive market.\footnote{178} The amount of sugar in world free trade is very small compared to total world production.\footnote{179} One commentator described the world sugar trade as follows:

Out of a total world production of about 91m. tonnes of raw sugar in 1978-79, only about 18m. tonnes was traded internationally. Of this, about 8m. tonnes was traded at negotiated prices under either special arrangements or long-term bilateral contracts which major importing countries have concluded with their principal overseas suppliers. Thus the market which fixes the world price represents little more than 10m. tonnes, and on such a market comparatively small changes in supply can produce enormous changes in price.\footnote{180}

The world sugar market also is marked by a well-known cyclical price fluctuation in which short periods of high prices are followed by long periods of depressed prices.\footnote{181} A period of high prices prompts the planting of sugar cane which takes two years to develop. Sugar from the cane is available for a number of years without replanting, even though world prices may have fallen below production costs in the interim.\footnote{182}

These market characteristics have engendered a price-stabilizing accord, the 1977 International Sugar Agreement (ISA).\footnote{183} All major sugar producing nations are signatories.\footnote{184} (The EC is not.) Sugar-producing signatories to the ISA agree to withhold supplies from world markets in periods of depressed prices.\footnote{185}

As noted above, the EC released 3.508 million tons of sugar into the 1978 world export sugar trade. Due to the peculiar characteristics\footnote{186} of the international sugar market, most significantly the comparatively small amount of sugar in world free trade, the EC's contribution in 1978 was a significant factor in sugar market supplies.\footnote{187} The EC's share of the total market in sugar exports increased from an average of 3.325% during 1973-76 to 19.1% during 1978.\footnote{188}

\footnotesize{\begin{itemize}
\item 178. Id. at 102-03.
\item 179. Id.
\item 180. Id. at 102.
\item 181. Id. at 103.
\item 182. Id.
\item 184. Casterside, ECONOMIST, March 1, 1980, at 72.
\item 185. AUSTRALIAN DECISION, supra note 11, at 305.
\item 186. See id.
\item 187. Smith, supra note 163, at 102.
\item 188. Id. (averages extrapolated from author's computations).
\end{itemize}}
C. GATT PANEL DECISIONS

In the Australian case, the GATT panel first analyzed the facts under the displacement standard applied in the earlier French Wheat case. After direct displacement and equitable share analyses, the panel was unable to find that the EC subsidies had enabled it to attain "more than an equitable share of world export trade" within the meaning of Article XVI:3. The panel concluded that, with the possible exception of the Chinese market, EC sugar had not directly displaced Australian sugar in any individual market. Noticing, however, that EC refined sugar exports had made strong inroads into important raw sugar outlets (the lower EC price reduced the incentive to purchase raw sugar and refine it), the panel felt that continued subsidization of EC refined sugar could displace raw sugar sales which could, in turn, displace Australian raw sugar in residual markets. Although the panel found no "clear evidence" of such "indirect" displacement, the panel concluded that Australian producers might be injured upon the expiration of their long-term bilateral agreements. Finally, reductions in sugar exports by ISA members complicated the world export market so that the panel was unable to determine whether the EC's increased market share was inequitable.

Failing to find an express violation of Article XVI:3, the panel assessed the effects of the EC sugar subsidy regulations. The panel noted that the CAP had failed to prevent an increase in subsidized exports, despite some efforts toward that end. The panel not only found that EC measures were ineffective, but also that subsidization was unrestricted. If FEOGA allocations were insufficient, the Commission could have recourse to a supplementary budget so that, "there would . . . be no legally fixed budgetary limits for how much could be spent on export refunds for sugar." Based upon this finding the panel concluded that the EC system constituted a threat of serious prejudice within the meaning of Article XVI:1.

189. Id. at 313-14. See supra text accompanying notes 70-74.
190. AUSTRALIAN DECISION, supra note 11, at 310-13. The panel divided world sugar trade into five relevant groupings: markets of direct EC-Australian competition, Australian exports to the EC, major outlets for Australian exports, certain markets in the Mediterranean and Middle East where EC exports had increased, and other destinations. Id.
191. Id. at 313-15.
192. Id. at 315.
193. Id. at 319.
194. Id. at 316.
195. FEOGA is the French acronym for the EC agency administering the CAP. See supra text accompanying note 41.
196. AUSTRALIAN DECISION, supra note 11.
197. Id. at 319.
The reasoning of the Brazilian decision mirrors that of the Australian case. The panel's "close examination of individual markets did not produce clear and general evidence that [EC] exports had directly displaced Brazilian exports." The panel found a simultaneous "decline in Brazilian sales and an increase in imports from the [EC] in only a few markets of minor importance." The panel therefore concluded that EC sugar subsidies had not resulted in the EC "having more than an equitable share of world export trade," in terms of Article XVI:3. As in the Australian case, the panel rendering the Brazilian decision complained that EC regulations had failed to prevent increased export levels and that financing was unrestricted. These factors again formed the basis of the panel's decision that "the [EC] system of granting export refunds on sugar . . . constituted a serious prejudice to Brazilian interests, in terms of Article XVI:1."

Both sugar decisions are legally makeshift, although they are politically sound. The panels in the Australian and Brazilian decisions engaged in exhaustive applications of displacement analysis. In each case, however, factual complexities prevented formal rulings under Article XVI:3, the GATT provision specifically addressing agricultural export subsidies. Instead, the panels expressed their displeasure to the CAP sugar export subsidy using Article XVI:1, a historically ineffective provision imposing weak notification and consultation requirements on all subsidizing nations. Considering the exhaustive and unsuccessful survey of potential liability under Article XVI:1, these decisions appear to have an artificial quality. Politically, these decisions wisely avoid a direct challenge to the CAP. Article XVI:1 merely requires discussions concerning "the possibility of limiting the subsidization." These discussions started in 1980.

198. Brazilian Decision, supra note 14, at 97.
199. Id.
200. Id.
201. Id. at 94.
202. Id. at 97.
203. Id.
204. For a discussion of GATT Article XVI:3 provisions and their ineffectiveness see supra text accompanying notes 65-78.
205. For a discussion of Article XVI:1 provisions see supra text accompanying notes 59-63.
206. Hudec, supra note 4, at 192.
207. GATT, supra note 1, art. XVI, para. 1.
D. Impasse in the Enforcement of the Sugar Decision

The GATT panel procedure exists in an ill-defined area between law and diplomacy. GATT panels decide cases with reference to a legal code, the GATT, but have no enforcement powers. Theoretically, the GATT may sanction offending nations, but it has done so only once since 1947. The GATT relies on the normative force of organized community condemnation, as expressed through diplomatic channels, to achieve compliance from offending members. In the instant case, the community condemnation largely consists of discussions between the GATT signatory nations, principally the other primary product exporters, and the EC. In the two years since the adjudication of the Australian complaint, enforcement efforts have failed to force EC reforms of the CAP that were satisfactory to the GATT signatory nations. They claim that, despite some reforms, the CAP still violates GATT Article XVI.

Due to internal EC concerns, however, reforms satisfactory to the GATT signatories are highly unlikely.

Initially, the sugar decisions brought little change. The GATT Council adopted the Australian decision in November 1979. Throughout 1980, Australia regularly reminded the Council of the panel’s findings. At the 1979 Council meeting, the EC indicated that all measures possible would be implemented by the Community. In fact, the EC Commission proposed a limited modification of the sugar export subsidy system in November 1979, but it was rejected by the EC Council of Ministers.

After mid-1980, the EC altered its subsidy system while GATT enforcement efforts accelerated. Starting in December 1980, after

208. GATT Article XXIII (2) empowers the Contracting Parties to “authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.” GATT, supra note 1, art. XXIII, para. 2.

209. Graham, supra note 6, at 156 n. 8, 171. See generally Hudec, supra note 4, at 149-53.

210. Hume, supra note 4, at 150.

211. Hume, Porges & Ehrenhaft, supra note 20 at 847; Riddle-me-ree, supra note 19.

212. See infra notes 246-48 and accompanying text.

213. GATT, GATT ACTIVITIES IN 1979, 72-75 (1980).


216. The EC Commission proposed a modification in the sugar subsidy which would have reduced the aggregate EC basic and maximum quotas. Smith, supra note 163, at 99. The proposed system would have had little effect on actual production, however, because the overall quota reduction would have been achieved through a reallocation of quotas from EC members failing to achieve their original allocation to members surpassing their initial quotas. Id. at 100. The plan would not have satisfied the GATT signatories because it imposed no mandatory limits on production or exports. In any event, the EC Council of Ministers rejected the proposal, insisting that high production be maintained as insurance against a shortage. A Sweeter Pill, Economist, Oct. 4, 1980, at 54.
the GATT Council had accepted the Brazilian decision, a Working Party conducted discussions with the EC concerning its compliance with the panel decisions in both the Australian and Brazilian cases. Exporters sought assurances that the EC would enforce some limits on its subsidies, but the EC rebuffed their suggestions, claiming that its system complied with GATT Article XVI:1, and that the current high price of sugar had removed the need for sugar export subsidies.

While GATT enforcement efforts met stiff resistance, the EC did institute some modifications in the sugar export subsidy system. In late 1980, the EC feared that it would overspend its budget. EC Farm Commissioner, Finn Gundelach, seized upon this fear to prepare a broad CAP reform, limiting support to surplus production of cereals, dairy products, sugar, beef, tobacco, and fruits and vegetables. During early 1981, however, high world prices for cereals, sugar and dairy products cut CAP export subsidy spending and increased EC revenues, temporarily removing the budget constraints prompting the reform. In April, 1981 the EC Council of Ministers rejected most of the reform. The major survivor was a "co-responsibility" tax on all sugar production within the maximum quota. The survival of the sugar reform apparently resulted from an agreement between the French and the English rather than from GATT pressure.

The EC claims that the new "co-responsibility" levies will cause producers, and not the FEOGA, to bear the cost of sugar sur-

217. GATT ACTIVITIES IN 1980, supra note 214, at 47.
218. Id. at 49.
220. Id.
221. The resources of the EC are limited to one percent of the Value Added Tax (VAT) collected by its member nations. The proposed 1981 EC budget, without accounting for farm price increases and corresponding CAP expenses, was just below the VAT imposed ceiling. They Took an Axe and Gave the Budget 40 Whacks, ECONOMIST, Sept. 27, 1980, at 60.
222. Gundelach proposed three "co-responsibility" devices (flat rate taxes, superlevies, and production quantums) calculated to reduce CAP costs by increasing private industry's financing of surplus disposal. Consumers Always Pay, ECONOMIST, Oct. 25, 1980, at 49-50; Mend, Don't End, the CAP, ECONOMIST, Nov. 22, 1980, at 56.
225. We'll Fight the Good Fight Another Day, supra note 223, at 44.
The reform may have two ameliorative effects. Private financing would eliminate FEOGA support. The panel strongly criticized the CAP subsidy program due to unlimited FEOGA financing. More significantly, to the extent that the subsidy would no longer be government funded, it may be beyond the scope of GATT scrutiny.

The new regulations do not, in fact, guarantee private financing. A close examination of the new EC subsidy regulations demonstrates that the presence of government financing is dependent on the world market price for sugar. When prices are high, relative to the EC internal price, as they were in 1981, the government is not required to provide financing. When world prices are sufficiently low, relative to the EC internal price, the export subsidies needed may exceed the “co-responsibility” levies collected from producers. The prospect of public financing arises because maximum production levies on type A and type B sugar are fixed by the regulation. A newly instituted tax, the basic production levy on all type A and B sugar, purports to cover the losses generated by export subsidies, but it is limited to 2% of the sugar intervention price. A levy placed only on type B sugar finances losses in excess of the basic...
production levy, but it is limited to 37.5% of the intervention price. Although this is an improvement over the previous 30% levy, it may be insufficient to cover the difference between the world market price and the intervention price, which has at times equaled 75% of the intervention price. Unless the Council of Ministers sets the sugar intervention price at a surprisingly low level, the FEOGA will have to provide price support financing if the world price falls sufficiently. Given the cyclical fluctuations of world market sugar prices, the EC's claim of private export subsidy financing will certainly be tested.

In addition, the new regulations do not limit sugar production. As before, type C sugar receives no subsidies. Under the regulations, the production of type C sugar may continue unrestrained. Moreover, it must be exported. The new regulations, then, fail to respond to the core of the panel's decision, that the lack of limits on the sugar subsidy system threatens serious prejudice to other GATT signatories.

As a result of the sugar subsidy modifications, the EC may argue in good faith that it has complied with Article XVI:1. Upon a finding of serious prejudice under Article XVI:1, a subsidizing nation must "discuss . . . the possibility of limiting the subsidization." In the instant case, the EC participated in Working Party discussions and reduced its subsidies on type A and type B sugar through "co-responsibility" levies.

Despite EC compliance with the minimal Article XVI:1 requirements, the GATT signatories, especially Australia and the United States, are continuing enforcement efforts. The Australians renewed their attack on EC sugar subsidies at the GATT September 1981 meeting, and were joined for the first time publicly by the United States. The GATT established another Working Party to discuss the question but it disbanded without progress.

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234. Id. sec. 4, at 19.
235. See supra note 232.
236. For a discussion of the political nature of the EC Council of Ministers, see supra notes 37-41 and accompanying text.
237. See supra notes 181-82 and accompanying text.
238. Covering Note, supra note 227, at 3.
239. Council Regulation, supra note 227, art. 26, sec. 1 at 18.
240. Id.
241. AUSTRALIAN DECISION, supra note 11, at 319.
242. GATT, supra note 1, art. XVI, para. 1.
243. Riddle-me-ree, supra note 19.
244. Id. While this is the first public effort by the United States to enforce either of the sugar decisions, the U.S. previously has lent its weight to the enforcement process. AM. SOC. INT'L L., supra note 7, at 140 (comments of M. Gadbow).
245. Telephone Interview with Irving Williamson, Office of the U.S. Trade Representative (Oct. 6, 1981).
The new EC regulations do not satisfy the GATT signatories. Further compliance with the panel decision is highly improbable, however, due to two fundamental EC considerations. First, the EC is particularly sensitive to foreign attacks against the CAP. As the single effective cooperative enterprise administered through the EC, it has been described as the “glue” that binds the European states into a community.  

Thus, complaints concerning the CAP represent a threat to EC unity. Second, reductions in CAP subsidies are politically unpopular among European farmers, who are outspoken and politically powerful. During the 1981 EC Council of Ministers price setting meeting in Brussels, the farmers protested in the streets and clashed with police. Before the meeting, budgetary constraints pressured the Council of Ministers to consider CAP reforms, but when the budgetary pressures temporarily subsided, the Council of Ministers quickly rejected the reforms in response to farm pressures. In addition, the absence of budgetary pressures, caused by currently high food prices, removes any immediate incentive for EC reform of this popular policy.

E. DANGERS OF STRICT ENFORCEMENT

The GATT signatories should terminate their attempts to strictly enforce the sugar decisions. The holding in these decisions, relying on the serious prejudice rather than the displacement standard, are inconsistent with a major accomplishment of the Tokyo Round’s Subsidies Code—the codification of displacement as the applicable standard for GATT review of agricultural export subsidies. Politically, strict enforcement of these decisions heightens tension surrounding the CAP. As for future decisions, reliance on the serious prejudice provision threatens the development of case law based on the displacement standard. Evolution of the displacement standard within the GATT panel procedure is important not only because it helps implement the consensus reached at the Tokyo Round, but also because it is hoped that the standard will regulate the CAP with greater precision and fairness. Undoubtedly, strict enforcement is more popular among Australian and United States

246. Rivers & Greenwald, supra note 27, at 1452; see 2 MTN STUDIES, supra note 96, at 24: “Without a CAP, it is unlikely that the original six nation Common Market could have been achieved. It is also unlikely that the Community of today could remain intact without some form of common farm and food policy.”

247. The EC has used this argument in resisting the reform of their wheat export subsidies that is urged by the United States. U.S. EXPORT WEEKLY, supra note 154, at 333.

248. We’ll Fight the Good Fight Another Day, supra note 224.

249. Id.

250. See supra note 223.
agricultural interests, but it may come at the expense of an international code of conduct governing agricultural export subsidies. In addition, unsuccessful attempts at strict enforcement discredit the effectiveness of GATT dispute settlement procedures at a time when the panel procedure is a necessary instrument for the orderly elaboration of the Tokyo Round codes.

CONCLUSION

With respect to agricultural export subsidies, the major advance of the Subsidies Code is the codification of the displacement standard, which is much more precise than its equitable share predecessor.\textsuperscript{251} Although the Subsidies Code recognizes a general cause of action if any subsidy causes serious prejudice to GATT signatories, it merely repeats the ineffective standard of GATT Article XVI:1.\textsuperscript{252} It seems clear that despite the potential availability of two remedial paths to litigants alleging harm from agricultural subsidies, the codification of the displacement standard is more significant to the continuing process of agricultural export subsidy regulation.

The decisions in the Brazilian and Australian sugar cases are inconsistent with the results of the Tokyo Round. Neither panel was able to find displacement.\textsuperscript{253} Instead, both panels held against the EC based on the serious prejudice standard of Article XVI:1.\textsuperscript{254} Each case was thus a makeshift expression of displeasure with the CAP sugar export subsidy. Following the GATT Council's acceptance of the decisions and subsequent GATT Working Party discussions, the EC adopted “co-responsibility” levies on sugar.\textsuperscript{255} Dissatisfaction with the EC's “co-responsibility” modifications has prompted further enforcement efforts by the GATT signatories.\textsuperscript{256} These efforts are likely to fail for political reasons.\textsuperscript{257}

These enforcement efforts conflict with the necessary development of the displacement standard because they accentuate the divisive and extreme opinions surrounding the CAP, but lack the legitimizing effect of the standard agreed to at the Tokyo Round. The GATT signatories desire to enforce the panel's suggestion of restraints regardless of the legal bases of the decisions. In response, the EC adamantly claims that their subsidy is consistent with Article XVI:1. Granted, the GATT signatory nations urging strict enforce-

\textsuperscript{251.} See supra text accompanying notes 126-33.
\textsuperscript{252.} See supra notes 120-21 and accompanying text.
\textsuperscript{253.} See supra notes 189-92 and accompanying text.
\textsuperscript{254.} See supra notes 194-97 and accompanying text.
\textsuperscript{255.} See supra notes 218-41 and accompanying text.
\textsuperscript{256.} Id.
\textsuperscript{257.} See supra notes 244-45 and accompanying text.
ment have trade interests at stake. In the present case, however, these interests conflict with the need to create legitimate, enforceable, and effective rules regulating international trade. Tremendous effort has been invested in the development of the Tokyo Round regulations. The future effectiveness of those rules requires continuing consultation and litigation. Nevertheless, the GATT signatories seek to strictly enforce decisions that are inconsistent with the essence of the Tokyo Round agreement on displacement.

Given the extreme opinions surrounding the CAP, the end of the compromise was perhaps inevitable. The Tokyo Round rules were created to give some substantive structure and legitimacy to the regulation of non-tariff barrier excesses, including those instituted by the CAP. The EC agreed to regulate the CAP according to the displacement standard, although the strength of their resolve is in doubt. The EC decision to regulate the CAP according to the indefinite serious prejudice standard is not as clear. The decisions are inconsistent with the standard negotiated at the Tokyo Round. Thus, strict enforcement of the present decisions demeans the "legalist" purpose of the Tokyo Round.

Moreover, the ineffective enforcement of these decisions threatens the newly re-invigorated GATT dispute settlement process. At least initially, the dispute settlement process must have modest goals. Yet the GATT signatories ambitiously have attempted to enforce decisions based on a weak GATT provision. The GATT dispute settlement mechanism will lose credibility when EC compliance is not forthcoming. This is particularly regrettable due to the present need for an effective dispute settlement process to continue the "legalist" process begun by the Tokyo Round codes.

Because the decisions in the Australian and Brazilian cases are inconsistent with the Subsidies Code displacement standard, and because their enforcement threatens the GATT dispute settlement mechanism, enforcement efforts should cease and the GATT signa-

258. See supra notes 103-05 and accompanying text.
259. See supra notes 142-43 and accompanying text.
260. The United States and the EC quietly compromised their differences regarding CAP wheat export subsidies during the Tokyo Round negotiations. A complaint by Great Plains Wheat Co. that CAP wheat export subsidies violated GATT Article XVI was quickly settled in 1978. See Patterson, supra note 44, at 64-66. Since the completion of the Tokyo Round, however, the United States has complained sharply about CAP wheat export subsidies, and has filed a complaint in GATT for a formal adjudication. U.S. EXPORT WEEKLY, supra note 154, at 333.
261. See supra notes 137-38 and accompanying text.
262. See supra notes 144-47 and accompanying text.
263. See supra notes 142-43 and accompanying text.
tories should institute new complaints alleging CAP export subsidy violations of the *displacement* standard.

*Jeffrey S. Estabrook*