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The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go from Here?

I. Introduction

The eighth round of multilateral trade negotiations (MTN) conducted under the auspices of the General Agreement on Tariffs and Trade (GATT)1 will begin in early 1987.2 Convening over one hundred nations to deliberate current international trade problems is itself remarkable; for some time several major trading nations have successfully blocked efforts to organize a new round.3 This agreement to meet, however, marks only the beginning of a complex series of events. Most difficult of these are pre-MTN meetings at which initial tactical decisions are made concerning issues to be discussed, ideology to be adopted, and future goals to be pursued.4 Each nation, or special interest group of nations, lobbies to have its own particular interests discussed while working equally hard to prevent antithetical interests from being considered.

Although a minimum of self-interest is expected, current trade problems indicate that a failure to attend to any one crucial issue may trigger the ultimate demise of GATT. Compliance with the General Agreement has deteriorated at such a rate that some believe it may have already outlived its useful life.5 Thus, the task presented negotiators is twofold: (1) to maintain a suitable level of diplomacy


so that no nation is angered enough to destroy the realization of a truly multilateral, cooperative trade agreement; and (2) to identify the structural weaknesses in the legal framework of the existing agreement and supply the reinforcement necessary to restore order to international trade. To appreciate the complexity of the problem one must understand that there is considerable interplay between these elements. Indeed, achieving a proper balance between the two is at the heart of GATT's current problems.

Dispute settlement has gained notoriety as one of GATT's greatest weaknesses. The United States and the less developed countries (LDCs) are particularly dissatisfied with the dispute settlement process and want considerable time spent on its restructuring. Those that share their view argue that an effective dispute settlement process is tantamount to the success of the General Agreement. There is a certain amount of validity to this argument: the dispute settlement process is inherently limited and substantially relies upon the parties' good faith. Once the process is analyzed from a proper perspective, however, its weaknesses fade, making the argument appear as an attempt to shift attention from more important matters.

This Comment will examine the GATT dispute settlement procedure in relation to its operative context. Emphasis is on determining the true origin of the dispute settlement system's inefficacy. An overview of historical developments will be followed by an explanation of the dispute settlement law and procedure. Noncompliance with GATT rules and remedial efforts to correct that noncompliance will be examined at some length. Finally, the necessity for future reform of the dispute settlement procedure will be discussed.

II. The Seeds of Disenchantment

The General Agreement embodies the remnants of an interna-
tional trade liberalization system conceived in the 1930s, proposed in the early 1940s, and opened for signature in 1947. Originally, GATT was but one part of the many-faceted International Trade Organization (ITO). Together, GATT and ITO were designed to implement eighteenth century economist Adam Smith’s free trade theory of noninterventionism. The drafters believed that comparative advantage and maximum efficiency would reduce trade barriers and promote worldwide economic growth. Alone, GATT provided a set of trade rules designed to encourage international cooperation, maintain a balance of concessions and obligations, and, primarily, reduce tariffs. ITO provided the apparatus to administer the General Agreement and numerous other anticipated agreements. When ITO was rejected, GATT was forced to fill its void. Thus, GATT’s skeletal framework became the sole regulator of international trade. Despite its unauspicious beginnings, GATT took hold, tariffs fell, and international trade flourished.

Ironically, these very successes have contributed to GATT’s failures. Increased international economic interdependence produced major structural changes that individual countries were not prepared to absorb. Intense domestic and regional political pressures arose for governments to forestall industrial readjustment precipitated by the

10. GATT was proposed at the Bretton Woods Conference at the same time work was being finalized on the International Monetary Fund and the International Bank for Reconstruction and Development. Together these organizations were to create a new world economic order. See generally J. Jackson, supra note 1, at 40; ITC Report, supra note 7, at 3, 70.

11. The International Trade Organization was to be a standing organization with a variety of duties. Its primary duties were to include establishing rules for international commercial and economic activity, restrictive business practices, and commodity agreements. In regard to GATT, it was to provide for resolution of the more serious disputes. Suggested Charter for the International Trade Organization of the United Nations, Dep’t of St. Pub. 2598, Commercial Policy Series 93 (1946), cited in ITC Report, supra note 7, at 7; see also J. Jackson, supra note 1, at 35-57.

12. J. Jackson, supra note 1, at 53-57; see Reich, Beyond Free Trade, 61 Foreign Aff. 773, 777 (1983).

13. Comparative advantage refers to the theory that geographic differences in natural endowments result in a static distribution of advantages. Thus, some areas naturally are better suited to carry out some tasks than others. Over time, those areas with the best comparative advantage will take over all production of a certain item. Reich, supra note 11, at 777-78.

14. Maximum efficiency occurs when comparative advantage reaches its maximum potential. See id.

15. GATT proposed to achieve this goal by eliminating discrimination via the Article I most-favored-nation clause, the cornerstone of the General Agreement, and quantitative restrictions via Article XI. High tariffs, as stated in the preamble, were viewed as the major obstacle to worldwide economic growth. See generally O. Long, supra note 5, at 8-10.

16. GATT, supra note 1, preamble.

17. See generally id, art. I:1, art. II:1; O. Long, supra note 5, at 65.

18. GATT, supra note 1, preamble.

19. For further explanation, see supra note 10.

20. See J. Jackson, supra note 1, at 59-85; O. Long, supra note 5, at 1-2.

21. United States tariff rates have fallen from a high average of 26% in 1946 to an expected low of 5% by 1987. Graham, supra note 5, at 127.

22. Since GATT came into effect on January 1, 1948, the volume of trade has expanded almost tenfold. O. Long, supra note 5, at 5.
Responses to these internal problems have varied. Sometimes, governments have attempted to draft economic redevelopment plans that tailor their nation's domestic goals to its international obligations under the General Agreement. Other times, governments have acted in violation of the rules, caring little about long-term economic goals or GATT trading rules; and sometimes, governments have designed activities that purposely avoid strict adherence to any GATT rule.

The final tack is the most troublesome. That approach utilizes unilateral and bilateral rule-making, addresses trade problems immediately and clearly, and is easily implemented. Thus, governments prefer this method and use it most often. However, because it is designed to avoid per se rule violations and has gained increased acceptance by the contracting parties, it is the least amenable to the dispute settlement process.

Although the rule avoidance approach causes the most concern, all three governmental responses are problematic and form the genesis of what Professor Hudec, a well known GATT scholar, calls the "wrong case" analysis. Simply stated, wrong cases are those which the GATT system was not designed to handle. The responses are the result of forcing an evolutionary economic system to operate around static trade laws. Essentially, all three involve technical violations of GATT.

A verbal assault upon the efficacy of the dispute settlement pro-
cess resulted from GATT's inability to curb this creative trading. Nonetheless, few countries formally took their complaints about these activities to GATT. At least two possible explanations for this exist. First, many nations were utilizing the very practices about which they complained. Though governments did not like their competition escaping discipline, they did not want to jeopardize their own opportunities to pursue the same practices. Nations certainly will not file a complaint against themselves, and to file against another risks retaliation.

Furthermore, some practices are complaint-proof. For example, voluntary restraint agreements (VRA's) are bilateral agreements made between two parties under relatively amicable conditions: the exporting country voluntarily agrees to limit its exports to the importing country in return for some benefit. Both parties are satisfied, thus neither files a complaint. Outside parties who suspect their trade may be effected by such an agreement cannot prove the cause of their injury because of the secrecy. No complaint is filed. One commentator speculates that most international trade is conducted pursuant to VRA's.

The second reason for the underutilization of GATT procedures is that LDC's perceive the developed countries as being beyond reproach. Less developed countries regard economic power differentials as insuperable under the current dispute settlement process. The result in the Netherlands' case against the United States lends credence to this belief. The Netherlands filed a complaint in connection with United States dairy restrictions. Although the Netherlands was authorized to limit imports of wheat and flour from the United States for several years, the proportion of United States trade con-

29. During the 1960s when these new trading activities began to appear, only six complaints were formally filed with GATT. ITC REPORT, supra note 7, app.

30. Voluntary restraint agreements, also known as voluntary export restraints, are designed to circumvent Article XI (Elimination of Quotas) and Article XIX (the Safeguards Clause). They are perhaps one of the greatest problems facing international trade today. Yet, because they are so popular, little can be done to prevent them. For more detailed information, see Sauremilch, Market Safeguards Against Import Competition: Article XIX of the General Agreement on Tariffs and Trade, 14 CASE W. RES. J. INT'L L. 83 (1982); see also O. LONG, supra note 5, at 57-61.

31. There is speculation that some VRA's are not voluntary at all but the result of a more powerful country successfully pressuring a less powerful country into accepting its terms.


33. See deKieffer, GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law, 2 Nw. J. INT'L L. & BUS. 317, 324 n.25 (1980); see also Reich, supra note 12.

34. See ITC REPORT, supra note 7, at 70; Hudec, supra note 8, at 158; Roschke, The GATT: Problems and Prospects, 12 J. INT'L L. & ECON. 85, 92 (1977).

ducted with the Netherlands was small enough to render the sanctions ineffective. Thus, in order to avoid a similar situation, LDC's seek alternate methods to resolve their disputes.

In short, GATT contains the rudiments for a liberalized trade system. As that system evolved, the contracting parties were forced to look elsewhere for operating guidelines; however, when international trade concerns arose, GATT was the only multilateral forum available. Thus, when the system failed to unilaterally counter the effects of ad hoc rule-making, nations vented their frustrations by criticizing the dispute mechanism.

III. Dispute Settlement — The Law

The dispute settlement process has worked well for most disputes that have been brought before the GATT, although there have been exceptions. Nonetheless, few of the failures were caused by weaknesses within the dispute settlement process itself. A brief explanation of the dispute resolution mechanism will be helpful.

Basically, GATT was meant to be a self-executing document used primarily to maintain a balance of concessions and obligations amongst the contracting parties. There are over thirty dispute-related procedures scattered throughout the General Agreement, most of which call for efforts by the interested parties to settle their differences bilaterally. Usually the procedure consists of consultations between the parties. There are instances, however, when compensatory withdrawal or suspension of concessions is allowed by the complaining party.

There is no single, definite dispute settlement procedure found in GATT. ITO was to have had ultimate responsibility for the settlement of disputes. Nonetheless, two GATT articles are considered central to settling disputes. They are Articles XXII, Consultations.

36. See supra note 20.
37. Implementation action was taken in 72% of all completed cases. No action was taken in only seven of 75 completed cases. But see Jackson, supra note 5.
38. See, e.g., O. Long, supra note 5, at 70.
39. See, e.g., J. Jackson, supra note 1, at 164.
41. See id. at arts. II:5, XII:4, XVIII:7, XVIII:21, XIX:3, XXII, XXVII, XXVIII:3, XXVII:4. Compensatory withdrawal or suspension of concessions refers to the right of a complainant to withdraw its commitment to levy no more than a stated tariff on a particular item. The amount is usually agreed upon during various trade negotiations, see infra note 58, and is contained in a schedule. J. Jackson, supra note 1, at 201-48.
42. J. Jackson, supra note 1, at 164; O. Long, supra note 5, at 71.
43. Article XXII states as follows:

Consultation
1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting
and XXIII, Nullification and Impairment. Both articles can be used to solve any problem covered by the General Agreement. Both also provide for the involvement of the CONTRACTING PARTIES. When bilateral consultations between the parties reach an impasse, Article XXII permits the CONTRACTING PARTIES, “at the request of a contracting party, [to] consult with any contracting party or parties in respect of any matter.” This section exemplifies the drafters’ stress on international cooperation and discussion, but falls short of impelling any settlement.

Article XXIII is broader in scope than Article XXII. Before a party may initiate proceedings under Article XXIII, it must show “nullification and impairment” of benefits obtained directly or indirectly under the agreement. There is no explanation of this test anywhere in GATT. Despite a body of GATT law that discusses nullification and impairment, the concept remains vague, subject to a vast amount of discretion by the one making injury determinations. The leading case in this area describes nullification and impairment as an impairment that “could not reasonably have been anticipated” upon “taking into consideration all the pertinent circumstances and the provisions of the General Agreement” when an action was taken.

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the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.
GATT, supra note 1, art. XXII.
44. Article XXIII states, in pertinent part, as follows:

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

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

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

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES.
Id. at arts. XXII:1, XXIII:1.
45. Id. at arts. XXII:2, XXIII:2.
47. Id. at art. XXII:1.
48. Id. at art. XXIII:1.
49. Chile v. Australia, GATT, 2d Supp. BISD 188 (1952), cited in Jackson, The Juris-
Next, the cause of nullification and impairment must be determined. If the cause is a breach of any GATT rule by another contracting party, a prima facie case of nullification and impairment is presented. If "any other situation" causes an injury, the burden of proof remains with the complainant. Although current practice indicates more concern with finding a breach of the rules than finding an injury, the "any other" language still permits a complaint against a party acting within the rules for its own benefit. This apparent contradiction adds a confusing twist to Article XXIII applications.

Minimum procedural guidelines are set out in Article XXIII. Pursuant to paragraph 1, a contracting party finding nullification and impairment may consult with other concerned parties. If consultations should fail, paragraph 2 authorizes the CONTRACTING PARTIES to investigate and make recommendations upon request.

GATT officials discovered from their early cases that reliance upon these guidelines alone would not be possible; therefore, they established a de facto dispute settlement procedure from their own ad hoc activities.

IV. Dispute Settlement — The Process

GATT's dispute procedure was formally documented in the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (Understanding) and the annex entitled "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)" (Annex). The CONTRACTING PARTIES reemphasized that the role of dispute settlement is to restore the balance of concessions and advantage between the parties in dispute. Both documents were written at the Tokyo Round of Multilateral Trade Negotiations, the last major round of trade negotiations conducted by GATT from 1973-1979. Nine separate agreements, or codes, were drafted at the Tokyo Round of Multilateral Trade Negotiations, the last major round of trade negotiations conducted by GATT from 1973-1979.
The Understanding and Annex were included in the agreement entitled "Framework for Conduct of International Trade." Each code focused on modernizing regulations for specific trading problems, primarily nontariff barriers. A few changes were made to the dispute settlement process to strengthen its method of operation, such as recommendations regarding time limits for certain procedures.

The Understanding retained the panel procedure as the basic model in dispute settlement. The structural elements remained basically the same. Elements one and two, notification and consultation, are dispute avoidance techniques. Once these fail, element three, the panel procedure for dispute settlement, is invoked. Panels are composed of three to five disinterested persons. The panel's initial task is to provide mediation services to the interested parties. If those efforts fail to resolve the dispute, the panel makes an objective assessment of the facts to determine whether there has been a violation of any pertinent GATT rule.

Following its investigation, the panel presents the CONTRACTING PARTIES with a report containing its findings and recommendations. The CONTRACTING PARTIES usually, though not always, adopt the panel report. Notably, however, the CONTRACTING PARTIES have limited enforcement power as there are no sanctions provided for under GATT. The complainant might receive authorization to suspend application of concessions or other obligations. This final retaliatory measure has been approved only once, in the Netherlands case discussed previously, and then it was ineffective.

Element four, surveillance, is new. It permits the CONTRACTING PARTIES to conduct a "regular and systematic re-

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59. Separate agreements are a method used to alter the legal framework of the GATT because it is too difficult to obtain the two-thirds majority required to amend the provisions. See infra note 106. The separate agreements are incorporated in the GATT system but apply only to those parties that elect to sign them. O. LONG, supra note 5, at 16-18.


62. Id.; see also O. LONG, supra note 5, at 77-78; Hudec, supra note 8, at 170-71.

63. In recent cases the CONTRACTING PARTIES have been less willing to adopt reports automatically. This can be explained in part by the fact that adoption of panel reports requires a consensus by the CONTRACTING PARTIES, which means the losing country can block a negative report. For a synopsis of the cases in which panel reports have been rejected, see ITC REPORT, supra note 7, at 58-61.

64. See generally O. LONG, supra note 5, at 65-66.

65. Id. at 66.
view of developments in the trading system.\textsuperscript{66} This is read to include any matter on which they have made recommendations. If the contracting parties' recommendations are not implemented within a reasonable time, a resumption of consultations and negotiations may result.\textsuperscript{67} The aim of surveillance is to exert moral and political pressure on the defendant country.\textsuperscript{68}

The 1982 Ministerial Declaration reported ten agreements concerning dispute settlement.\textsuperscript{69} The agreements were made by the CONTRACTING PARTIES during their 1982 session. All ten agreements improved or clarified the Understanding but essentially did little to change the substance of the process.

V. Dispute Settlement — The Problems

Compared to a domestic judicial system, GATT's Article XXIII procedure appears grossly inadequate. There are no extensive fact-finding capabilities,\textsuperscript{70} no sanctions, and no prosecutorial powers.\textsuperscript{71} Moreover, the absence of strict timing principles present numerous opportunities for defendant countries to delay the process.\textsuperscript{72} An outrageous example of the potential for delay was the United States' response to the cases filed against its tax treatment of Domestic International Sales Corporations (DISCs).\textsuperscript{73} The DISC provisions adopted in 1971 allowed the United States company to defer income tax on fifty percent of its export-related profit if it met various requirements. In 1972, the EEC requested consultations pursuant to Article XXIII, paragraph 1, claiming the DISC law was an export subsidy prohibited by Article XVI. The next year, 1973, a formal complaint was filed under Article XXIII, paragraph 2. The United States countered with complaints against similar tax provisions of Belgium, France, and the Netherlands.

The United States would not agree to go forward unless the panel included tax experts. Since the panel had never included outside experts, a two and a half year stalemate ensued before the parties agreed to a panel. The United States prevailed.

\textsuperscript{66} H.R. Doc. No. 153, \textit{supra} note 56.
\textsuperscript{67} O. LONG, \textit{supra} note 5, at 78.
\textsuperscript{68} \textit{Id.; contra} Harris, \textit{The Post-Tokyo Round GATT Role in International Trade Dispute Settlement}, \textit{1 Int'l Tax Bus. Law.} 142, 157 (1983) (calling the surveillance function "an elegant euphemism for helplessly watching").
\textsuperscript{69} 18 \textit{GATT Focus} 2 (1982), reprinted in part in \textit{ITC Report, supra} note 7, app. G.
\textsuperscript{70} \textit{See, e.g., ITC Report, supra} note 7, at 72 (inadequate staff and funding).
\textsuperscript{71} This presents particular problems in regard to voluntary restraint agreements. \textit{See supra} note 30.
\textsuperscript{72} Jackson, \textit{Government Disputes in International Trade Relations: A Proposal in the Context of GATT}, \textit{13 J. World Trade L.} 1, 5-6 (1978); \textit{see also ITC Report, supra} note 7, at 71.
\textsuperscript{73} For an in depth discussion of the case, see Jackson, \textit{supra} note 49.
The panel issued four reports on the DISC dispute in 1977. The panel concluded that the income tax practices of all the parties violated Article XVI. Because the European practices were actually acceptable under GATT's grandfather clause, the Council could not issue a decision until an agreement with the United States was reached. The Council's 1981 decision effectively required the United States to repeal the law.

Legislation to repeal the DISC provisions was not introduced until 1982. DISC was finally replaced in 1984; thus, the United States delayed the resolution of a dispute against it for thirteen years.

The 1984 Ministerial Declaration emphasized the CONTRACTING PARTIES' concern with the dispute settlement process. It concentrated on the need to establish time-frames with respect to the panel process, the decision on the dispute, and the follow-up to be given to that decision. It set a firm deadline for the formation of panels, thirty days, and required panels to set precise deadlines when requested.

Another problem, in addition to the opportunities to delay, is that Article XXIII procedures are not coordinated with the six disparate dispute mechanisms adopted by nine of the codes at the Tokyo Round. This "balkanization," as described by Professor John Jackson in his treatise on the GATT, has been praised and criticized. Whether good or bad, the absence of jurisdictional parameters unduly complicates the functioning of Article XXIII.

VI. Noncompliance — The Genesis of the Problems

While the above-noted problems with Article XXIII are troubling, they must be viewed in light of three considerations. First, GATT is a unique international contractual obligation, not a domestic legal system. Therefore, diplomatic and political considerations must be accounted for, and sanctions are not an option. Sec-

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75. GATT Doc. L/5271, 28th Supp. BISD 114 (1982), cited in Harris, supra note 68, at 152 n.42.
76. Id. at 154.
78. Jackson, supra note 60, at 44 (considering the fragmentation of dispute settlement to be a balkanization).
79. ITC REPORT, supra note 7, at 73.
80. See, e.g., J. JACKSON, supra note 1, at 59-85.
ond, the GATT dispute resolution system enjoyed relative success in its early years. Third, there has been a dramatic increase in the number of disputes brought before GATT since the late 1970s. Those disputes that are technical in nature and clearly within the confines of a GATT rule continue to be successfully resolved. Thus, notwithstanding its inherent weaknesses, the dispute mechanism's efficacy is influenced more by external conditions than by its internal procedures, or by Professor Hudec's "wrong cases."  

The premise that conditions outside the dispute settlement procedure itself influence its effectiveness finds support in the statistics. In the 1950s, twenty-one complaints were submitted for resolution pursuant to Article XXIII:2. The following decade only six cases were submitted to GATT. Although that number increased to eleven between 1970 and 1975, the system was still being underutilized. Concurrent with this decrease was the beginning of severe economic disruptions caused by industrial relocation, technological advancements, and increased energy costs. Each of these factors had a substantial effect upon the entire GATT structure.

Increased participation by more economically diverse countries led to a substantial derogation in GATT's most-favored-nation (MFN) and reciprocity principles. Nations with state-trading economies and LDC's brought to the GATT system of cooperation special problems. State-trading nations have difficulty harmonizing with GATT because their ideology is antithetical to the free-trade

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81. ITC REPORT, supra note 7, at 12-20.
82. Id. at 48, 82.
83. Hudec, supra note 8, at 147-48; see generally Reich, supra note 11 (discussing the revolutionary changes in the international economy).
84. ITC REPORT, supra note 7, app. 1.
85. Id. at 1-6 to 11.
86. Id. at 1-11 to 13.
87. Id. at 1-13 to 15.
88. Membership in the GATT has increased substantially, from 22 nations in 1948 to 90 today. About two-thirds of the members are less developed countries; five have state-trading economies. The membership as a whole represents the entire spectrum of economic developmental stages. See id. at app. D-3; Nau, The NICs in a New Trade Round, in HARD BARGAINING AHEAD: U.S. TRADE POLICY AND DEVELOPING COUNTRIES (1985) (Overseas Development Council, Washington, D.C.).
89. GATT, supra note 1, art. 1. The most-favored-nation (MFN) clause is the cornerstone to GATT. It is essentially a nondiscrimination requirement. There are a number of such clauses scattered throughout GATT, all of which require that goods of any contracting party be given "no less favorable" treatment than that given any other contracting party. See J. JACKSON, supra note 1, at 249-72.
90. Reciprocity has not been specifically defined by the CONTRACTING PARTIES, yet the requirement that negotiations be on a "reciprocal and mutually advantageous" basis arises in several areas. GATT, supra note 1, arts. XXVIII bis, XXVIII, XXXIII (implicitly); see also J. JACKSON, supra note 1, at 241-45.
91. Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia. ITC REPORT, supra note 10, app. D-3; see generally J. JACKSON, supra note 1, at 329-64; Ianni, State Trading: Its Nature and International Treatment, 10 INT'L BUS. LAW. 374 (1982). In August 1986, China petitioned to become a party to the agreement.
theory explained above. The LDC's cannot survive if subjected to the reciprocity requirements under GATT. Consequently, some GATT rules must give way in order to accommodate these countries within the framework of the Agreement. Because these countries are generally immune from a majority of complaints, other countries have come to expect like treatment.

Additionally, abuse of the various explicit exceptions to GATT principles increased as countries sought to alleviate severe economic shifts. As a rule, each exception fails on two levels: vagueness and obsolescence. Governments have taken advantage of such failures by making the rules fit their own needs. The result has been a de facto rewriting of some rules. Most troublesome of the several exceptions are the escape clause, the grandfather clause, the provisions governing customs unions and domestic subsidies. In reference to the Article XXIV rule on customs unions, Professor Hudec has said the "EEC has so bent and bruised this rule that it's no longer effective."

The Carbon Steel case illustrates the EEC's rule bending in regard to domestic subsidies. Economic disruptions severely crippled the steel industry in several of the member nations. In the late 1970s when the European steel industry began to collapse, the European Coal and Steel Community enacted a complex plan that included setting prices and quantities, subsidies, exchanges with third countries, and social measures. The plan was probably legal under GATT. Nonetheless, there were legitimate arguments that could be made that the preferences given members' steel violated the intent of Article XXIV as well as the constraints upon the use of domestic subsidies. In the end, the plan was simply too complex to be ana-

92. Only about 50 out of every 1,000 people added to the world population in the next 20 years will live in developed countries. LDC's have built up unmanageable debts that are closely linked to export earnings. The consequences of this is felt worldwide. Report of Eminent Persons, supra note 23, at 11-17. See Roschke, supra note 34, at 92.

93. See Hudec, supra note 8, at 152-53.

94. ITC REPORT, supra note 7, at 73; accord Reich, supra note 12, passim.

95. ITC REPORT, supra note 7, at 71; accord Hudec, supra note 8, at 160-61.

96. GATT, supra note 1, art. XIX; see also Sauermilch, supra note 30.

97. GATT, supra note 1, art. I:2, 4. The grandfather clause permits historical preferences to continue even if they would technically conflict with GATT obligations. J. JACKSON, supra note 1, at 264-70.

98. GATT, supra note 1, art. XXIV.

99. Id. at art. XVI.

100. Hudec, Graham, Jackson, deKeiffer & Gadbaw, Multilateral Trade Negotiations: Dispute Settlement, AM. SOC'Y INT'L L. PROC. 129, 130 (Ann. 80) (transcript) [hereinafter Transcript].

101. Coal and steel were the first two products subjected to a European common market. The European Coal and Steel Community (ECSC) was created by the Treaty of Paris of 1951. Benyon & Bourgeois, supra note 24, at 305.

102. Id. at 307-310; accord Dominick, supra note 24.
alyzed in terms of GATT's rudimentary rules.\textsuperscript{103}

Although Article XXIII:1:c\textsuperscript{104} permits a party to file a complaint if its benefits under GATT are being nullified and impaired by the existence of "any other situation," the uncertainty of the nullification concept makes enforcement impracticable when no rule has been clearly violated. Under such circumstances, GATT would be forced to extensively review the political decisions and domestic and international economic policies of the defendant government. It would then have to make an international comparative assessment to determine the causative agent. In the end, GATT would be forced to pass judgment on a nation's entire economic plan without authority from any one rule. Because of the complexity of today's economic structure, GATT is neither financially, intellectually, nor structurally equipped to conduct such analyses.\textsuperscript{105} If it were, it is unlikely that countries would accept its recommendations.

While the rules have become increasingly anachronistic, substantive changes have been prevented by the requirement that amendments be approved by a two-thirds majority of the CONTRACTING PARTIES.\textsuperscript{106} Although most contracting parties agree that change is needed, few agree on what changes to make. Therefore, the rules remain vague and obsolete, inviting noncompliance.

GATT's goal is to maintain a balance of concessions and obligations, not to restructure nations. Therefore, it has concentrated on preventing violation of specific rules. That fact is inherently more fair in the eyes of the defendant nation; thus, GATT's recommendations are more likely to be followed. However, this method permits many potential cases to avoid the dispute settlement process because the rules are not consonant with modern trade practices.

VII. Noncompliance — The Remedial Efforts

The Tokyo Round was convened primarily to draft new rules concerning nontariff barriers (NTB's).\textsuperscript{107} GATT has been so successful at reducing tariffs that nations have increasingly relied on nontariff measures for protection. Imprecision in the rules permitted countries to avoid formal complaints against them. In an effort to rectify this situation, the Tokyo Round Codes set out new rules governing some of the practices.

\begin{itemize}
  \item 103. Dominick, supra note 24.
  \item 104. GATT, supra note 1, art. XXIII:1(c).
  \item 105. Cf. Hudec, supra note 8, at 163-65 (discussing "overtaxing the procedure"); Jackson, supra note 72, at 7-8.
  \item 106. GATT, supra note 1, art. XXX:1. Modifying the GATT is difficult because of its provisional character and rigid amendment procedures. For a discussion of these difficulties, see J. Jackson, supra note 1, at 73-82; O. Long, supra note 5, at 15-19.
  \item 107. See, e.g., REPORT OF THE DIRECTOR-GENERAL, supra note 4.
\end{itemize}
Unfortunately, the negotiators did not go far enough in modernizing GATT. Some of the most abused rules were not updated because a consensus could not be reached. Thus, the escape clause is constantly used to justify VRA’s, which countries claim are valid responses to “disruptions” in their markets. While that may be so, VRA’s still violate the MFN clause, notification requirements, and reciprocity. Rules concerning agriculture and free trade areas were also left unrevised.

The Codes themselves, though more specific than the original rules, are still imprecise. For example, the Subsidies Code prohibits a specified list of export subsidies. It also states that domestic subsidies are permitted, but then fails to define domestic subsidies. The question is whether the list of export subsidies is exhaustive. Thus, governmental activities that may be designed to stimulate exports, such as tax credits or job training subsidies, may be illegal but cannot be stopped because the law is unclear.

This evasive drafting is the natural consequence of a ninety nation negotiating process. Because GATT seeks maximum participation in a cooperative effort, compromises ending in innocuous language are struck. This hedging ensures maximum participation in multilateral consultations. Consultations, as viewed by the drafters and current GATT officials, are the key to a liberalized trade system. There is an inordinate reliance on diplomacy at this level just to ensure the parties get through the process.

GATT is a legal instrument, however, and at some point, decisions concerning legal obligations must be made. Most of the con-

108. See O. Long, supra note 5, at 59; Hudec, supra note 8, at 198-99.
109. GATT, supra note 1, art. XIX.
110. Market disruption occurs when, among other things, there is “a sharp and substantial increase or potential increase of imports of particular products from particular sources.” GATT Docs. SR.17/111 (1960); L/1397, at 15 (1960); GATT, 9th Supp. BISD 26 (1961), cited in J. Jackson, supra note 1, at 571 n.13. For a discussion of market disruptions, see id. at 567-73.
111. Agricultural protectionism is utilized by almost every nation. Although it is usually in violation of Article XVI or XI of GATT, the long-standing practice of permitting it has made it impossible to prevent the more flagrant abuses. GATT has been trying for many years to place more stringent restrictions on agricultural measures. See Hudec, supra note 8, at 198-99; see also Estabrook, European Community Resistance to the Enforcement of GATT Panel Decisions on Sugar Export Subsidies, 15 Cornell Int’l L.J. 397, 401-02 (1982) (describing the EEC’s Common Agricultural Policy (CAP)); Harris, supra note 68, at 164.
112. Following the EEC’s success in avoiding obligations pursuant to GATT Article XXIV, many of the contracting parties have been forming free trade areas. This has become a most abusive area. O. Long, supra note 5, at 69-71; accord J. Jackson, supra note 1, at 581-86.
114. O. Long, supra note 5, at 65-77.
115. See J. Jackson, supra note 1, at 59-85; Jackson, supra note 32, at 505.
tracting parties realize this. They also realize that in adopting a legalistic stance during the rule-making process, they run the dual risks of limiting their own trade options and alienating potential trading partners. The result has been an effort to delay the point at which legal issues are addressed for as long as possible.

Focusing attention on the dispute settlement process has the effect of delaying legal considerations for as long as possible, short of completely ignoring them. It directs efforts away from clarifying actual obligations and substitutes the threat of a trip through the panel process for an entire legal system. Also, it relieves countries from advocating unpopular rule changes. Although the law must play a major part in the settlement of differences, the absence of comprehensive norms makes it difficult to determine what those differences are. Nonetheless, the debate for an improved dispute settlement procedure has become increasingly detailed in recent years.

Legalism and pragmatism are the two classic approaches to resolving disputes. Legalists generally seek a system that permits conciliation to impasse, then final adjudication by a third party according to the rules of GATT. Pragmatists generally endorse a more flexible approach in which settlements are achieved through negotiation. Legalists anticipate more predictable results whereas pragmatists anticipate results more fitting to the parties involved. The difference is best illustrated by the difference between the United States judiciary’s common law and equity courts.

The United States and the LDC’s are the primary proponents of the legalist approach. For years the United States was the world’s major trading power. During that time it profited greatly from the more flexible negotiation approach; therefore, the current practice of working around the rules developed. Only after the EEC and Japan became major trading powers and a threat to United States trade did the United States push for the adoption of the adjudicatory approach.

116. See ITC REPORT, supra note 7, at 73; Jackson, supra note 60, at 57. Compare Jackson’s proposition that government officials will not limit their power with the following paragraph discussing contrary indications. Id.
117. O. LONG, supra note 5, at 65.
118. Professor Jackson has proposed an extensive restructuring of the dispute settlement process. See Jackson, supra note 72, at 13-21; see also ITC REPORT, supra note 7, at 73-74.
119. See, e.g., Harris, supra note 68, at 145.
120. See, e.g., Jackson, supra note 72, at 8, 17.
121. See O. LONG, supra note 5, at 84; see also ITC REPORT, supra note 7, at 68.
122. ITC REPORT, supra note 7, at 68, 70.
123. The United States actually had designed the legalist mode. However, a system of negotiations became the working model in the early years. O. LONG, supra note 5, ch. IV. The United States, as the major trading power, felt comfortable with the consultation method. Hudec, supra note 8, at 152.
124. The formation of the EEC and economic resurgence of Japan transformed GATT into a triad of economic super powers. Each felt entitled to a less restrictive form of regulation.
Professor Jackson has offered the most detailed proposal for the creation of a legalistic dispute settlement mechanism. Briefly, he suggests an umbrella organization with centralized power. This would prevent further balkanization of the dispute procedure, assure greater efficiency, and provide for a consistent body of GATT common law. Jackson's proposal is hauntingly reminiscent of the failed ITO, whose raison d'etre was to coordinate a variety of trade agreements.

Arguably, GATT is already evolving into the trade organization it was to have been a part of at its inception. GATT's supervisory role over major trade rounds and their subsequent agreements is indicative of this movement. By following the legalistic approach, Jackson hopes to bring this evolution under control. He believes control of trade will make business transactions more predictable, therefore encouraging investment and reinvigorating free trade.

An adjudicatory dispute mechanism has been repeatedly rejected by the CONTRACTING PARTIES. The EEC, Japan, and GATT officials all prefer the pragmatic approach. They are unwilling to accede too much power to an outside agency, believing negotiations to be the more practicable solution. It follows that countries that are unwilling to submit their trade practices to outside review will either refuse to comply with adjudicatory rulings or refuse to participate in the process. Either way, the results threaten the larger objective of an open, multilateral dialogue.

VIII. Noncompliance — Implications for the Next Round

There is a way out of this debate. The parties can accept that noncompliance with GATT is the key problem they face, and that improving the dispute settlement process is one way to prevent noncompliance. There is another way, however, that may be more effective.

The alternative is to inject legalism into the system at an earlier stage. Energies can be directed toward reaching a consensus on more relevant rules. Once the parties agree to a specific set of rules, en-
forcement will become easier. Any legal system gains its legitimacy through acceptance by those that it regulates. Thus, when parties agree to the rules, they impart a sense of legitimacy that is hard to ignore. Further, when rules are concise, there is less opportunity for a government to challenge a finding on legal grounds when the facts are clear. Under those circumstances, even moral persuasion becomes an effective enforcement tool.

Success at rewriting the rules will occur only if the CONTRACTING PARTIES do three things. First, they must undertake to establish national trade policies in harmony with the international obligations to which they agree. Economic interdependence places greater responsibilities on countries. Increasingly, more and more private citizens find their jobs, businesses, and quality of life affected by international trade. Therefore, governments must formulate national trade policies designed to give notice to others of contemplated actions in given areas. This is especially true for the most dynamic areas of agriculture, textiles, and industrial redevelopment. When domestic policies are so linked with the international, violations become less likely.

Second, the contracting parties must recognize that the free trade ideal has been consistently undermined. Various intervention devices have been selectively used by even the staunchest supporters of free trade. More common examples include subsidies to farmers, aid to steel companies, and limits on the importation of automobiles. In each case, the intervention has been a necessary response to structural change within a nation. Each intervention also has likely violated at least one GATT rule.

Managed trade is replacing free trade in some countries. It helps countries cope with dramatic changes in their economies by applying interventionist measures in a logical fashion. Managed trade also gives them a measure of control over external forces influ-

133. See O. Long, supra note 5, at 67; Reform of the International Trading System (Especially Dispute Settlement), 84 F.R.D. 590, 594 (1980).
134. Report of Eminent Persons, supra note 23, at 42 (suggesting governments regularly explain trade policies); see also Graham, supra note 5, at 134-37; Reich, supra note 12, at 788.
135. Reich, supra note 12, at 788.
136. Id. at 774-75; Graham, supra note 5, passim.
137. The United States has granted subsidies, utilized quotas, and granted tax breaks, just to name a few.
138. The European CAP program regularly subsidizes farmers. Estabrook, supra note 111. In 1982, the United States spent over $20 billion on farm subsidies. Reich, supra note 12, at 779.
140. Japan voluntarily limits its exports of automobiles to Western Europe. Reich, supra note 12, at 783.
141. See id. at 783-84; see also Jackson, supra note 60, at 37.
142. Jackson, supra note 60, at 37.
encing their economy. Sovereignty is still important. New trade rules must address this shift in practice and ideology if they are to have any binding force.

Last, the parties must lower their expectations.\(^{143}\) GATT is limited in scope to trade concerns and does not apply to all economic concerns. If the parties want to expand that scope they must seek to formally coordinate efforts between the IMF, the Organization for Economic Cooperation and Development,\(^ {144}\) the United Nations Conference on Trade and Development,\(^ {145}\) and GATT. Also, the difficulty of working through multilateral negotiations must be recognized from the beginning. It is this very difficulty that makes the negotiations so important: by working out differences under peaceful conditions, countries avoid the fiery collision that occurs between competitors absent such agreements.

Today the parties to the General Agreement cannot even agree upon the goals they seek to achieve.\(^ {146}\) This is a fundamental prerequisite to an effective dispute settlement procedure.

It is a truism that a treaty is only worth what its members make of it. If respect for rules and commitments is eroded, if member countries hesitate to intervene when there is a breach of the legal rule simply to keep open the possibility of circumventing the rule themselves, the means of constraint must lose a great part of their force and effectiveness.\(^ {147}\)

IX. Conclusion

As Herman Walker observed in his article on the Chicken War, “pragmatism is a matter of emphasis; and as emphasis it is neither preclusive nor incompatible with progressive enlargement of the rule of law.”\(^ {148}\) The delicate interplay between pragmatism and the GATT legal framework is an inherent feature of a system charged with balancing the trade interests of ninety nations. The contracting parties are aware of this, as evidenced by their debate concerning reform of the dispute settlement process. The difficulty lies in determining where the law needs strengthening. To artificially tilt the bal-

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143. ITC REPORT, supra note 7, at 69.
144. The Organization for Economic Cooperation and Development is an international group of industrial countries. It provides research, planning, and policy services, covering the entire range of economic issues. See generally J. JACKSON, supra note 1, at 10-12.
145. The United Nations Conference on Trade and Development is an arm of the United Nations. Most of its members are LDC's. It provides aid to its members in trade matters in terms of information and negotiating support. Id.
146. See O. LONG, supra note 5, at 88; Dominick, supra note 24, at 358-60; see generally Reich, supra note 12.
147. O. LONG, supra note 5, at 67.
There are flaws in the current dispute settlement process. Some cases have remained unresolved, others have been outright rejected. Overall, though, the process has given disputants an avenue by which to avoid a crisis. At this level, the dispute mechanism is functioning well, as a recent increased reliance upon it proves.

There are also flaws in the substantive rules of GATT. Noncompliance has reached such proportions that deviations have essentially become legalized. At this stage, the rules have become dysfunctional, lending a sense of urgency to their repair.

Some of the problems with the dispute settlement process can be rectified by a revision of the rules that it enforces. For instance, in 1982, a panel was requested by the United States to examine European Community pasta subsidies, pursuant to the Subsidies Code. The panel report was never adopted because the panel's findings were not unanimous on whether there were in fact subsidies. Had there been a more concise rule, the issue may have been resolved favorably for the United States. Thus, in approaching the next round of multilateral negotiations, the CONTRACTING PARTIES must concentrate first on revising the rules. If that can be accomplished, the pragmatic approach to resolving disputes will itself be reinvigorated.

Patricia Kalla

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149. One recent unresolved case is the "Citrus Case." In 1982, the United States filed a complaint against EC tariff preferences granted to citrus products from certain Mediterranean countries. The United States claimed the preferences violated the MFN clause in Article I of the GATT. The EC has blocked adoption of the report partially in favor of the United States. See GATT activities in 1982, at 54-55 (1983); GATT activities in 1983, at 42-43 (1984); GATT activities in 1984, at 36-38 (1985), cited in ITC REPORT, supra note 7, at 61 n.1.

150. See O. Long, supra note 5, at 84.

151. ITC REPORT, supra note 7, at 71.

152. Id. at 70.