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## Dispute Settlement in Gatt

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William J. Davey

## **Abstract**

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*William J. Davey\**

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## INTRODUCTION

The dispute settlement system established by the General Agreement on Tariffs and Trade<sup>1</sup> ("GATT") is one of its more controversial aspects. A major goal of the United States in the recently commenced Uruguay Round of trade negotiations is to improve the functioning of that system.<sup>2</sup> This Article describes briefly the way in which the system now operates and the major complaints that have been lodged against it. These complaints, many of which originated prior to the Tokyo Round of trade negotiations in the 1970s,<sup>3</sup> are analyzed in

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1. The General Agreement on Tariffs and Trade is attached to the Final Act of the United Nations Conference on Trade and Employment, which was signed in Geneva, Switzerland, on October 30, 1947. It is in force by virtue of the Protocol of Provisional Application, signed by the original parties to GATT, and the subsequent accession protocols signed by new members. 61 Stat. (pt. 5) A3, T.I.A.S. No. 1700, 55 U.N.T.S. 188 [hereinafter GATT]. The text of the agreement as amended to date was published in 1969 by GATT as Volume 4 of its collection of BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter BISD]. The term "General Agreement" is used herein to refer only to the General Agreement itself. The term "GATT" is used herein to refer to the GATT trading system as an institution and as a system including the General Agreement and the various side agreements to it that were concluded in 1979 in the Tokyo Round of Trade Negotiations. Those side agreements, which were published in BISD (26th Supp. 1980), are applicable only to those parties subscribing to them.

Ninety-four nations are contracting parties to the General Agreement, including virtually all major trading nations except the Soviet Union, Saudi Arabia, Taiwan and the People's Republic of China. The latter is currently negotiating for membership. In addition, another thirty or so countries apply it on a de facto basis. As a consequence, the vast majority of world trade takes place under the auspices of GATT.

The leading treatise on GATT is J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969). See also K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1969); R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975). For more recent works, see E. MCGOVERN, *INTERNATIONAL TRADE REGULATION* (2d ed. 1986); Davey, *GATT: Its Present Operation and Prospects for Its Future*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* IN 1986, at 2-1 (J. Moss ed. 1986).

2. See, e.g., Omnibus Trade Act of 1987, S. 490, 100th Cong., 1st Sess. § 105(b)(2)(A) (1987). The Uruguay Round is the eighth general round of trade negotiations held under the auspices of GATT. It was officially launched in September 1986 at Punta del Esta, Uruguay. GATT Ministerial Declaration on the Uruguay Round, reprinted in *GATT Focus*, No. 41 (Oct. 1986) and 25 I.L.M. 1623 (1986). One of the negotiating subgroups of the Goods Negotiating Group is considering reforms to the dispute settlement system. See *GATT Focus*, Nos. 46 & 47 (May & June 1987).

3. The Tokyo Round, also known as the Multilateral Trade Negotiations or the MTN, was the seventh general round of trade negotiations sponsored by GATT. It resulted in lower tariffs and a series of side agreements that interpreted and expanded the coverage of the General Agreement in respect of such topics as customs valuation, government procurement, technical barriers to trade, subsidies, and an-

light of GATT's post-Tokyo Round experience in resolving trade disputes. This analysis demonstrates that the GATT dispute settlement system has been reasonably successful in resolving recent trade disputes.

The system is far from perfect, however, and this Article makes a number of suggestions for improvements. These suggestions are based on the conclusion that a more "legalistic" or rule-oriented approach to dispute settlement would improve the effectiveness of the GATT system. In particular, it is argued that such an approach better promotes general adherence to GATT's rules and principles than does GATT's current negotiation or consensus approach to dispute settlement. Proposals made in this article for reform of the operation of the dispute settlement system would provide for strict limitations on the existing right of one party to block adoption of dispute settlement panel decisions, increased use of retaliatory measures under the authority and control of GATT and the formation of a "superpanel" of GATT experts to serve on panels.

### I. DISPUTE SETTLEMENT IN THE GATT TRADING SYSTEM

The basic goal of GATT is to promote free international trade by establishing rules that limit national impediments to trade.<sup>4</sup> While freer trade is usually considered to be in the overall interest of a nation, particular economic sectors may be adversely affected by the resulting increase in foreign competition. Not infrequently these sectors have sufficient political power to obtain special favors from their national government

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tidumping and countervailing duties. *See generally* GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1979).

4. GATT, *supra* note 1, preamble, 61 Stat. (pt. 5) A3, A11, T.I.A.S. No. 1700, at 7, 55 U.N.T.S. 188, 194-96. GATT seeks to accomplish its goal by (1) encouraging parties to set maximum tariff rates, *see id.* art. II, 61 Stat. (pt. 5) A3, A14-A17, T.I.A.S. No. 1700, at 10-13, 55 U.N.T.S. 188, 200-04, and sponsoring periodic rounds of tariff negotiations to reduce those maximum rates; (2) banning quotas, *id.* art. XI, 61 Stat. (pt. 5) A3, A32-A34, T.I.A.S. No. 1700, at 28-30, 55 U.N.T.S. 188, 224-28; and (3) requiring most-favored-nation, *id.* art. I, 61 Stat. (pt. 5) A3, A12-A13, T.I.A.S. No. 1700, at 8-9, 55 U.N.T.S. 188, 196-200, and national, *id.* art. II, 61 Stat. (pt. 5) A3, A14-A17, T.I.A.S. No. 1700, at 10-13, 55 U.N.T.S. 188, 200-04, treatment to be given to imports.

to protect themselves from such competition.<sup>5</sup> Consequently, disputes under the General Agreement usually involve one GATT member protesting measures taken by another to provide certain of its industries with special protection or advantages that interfere with international trade.

The General Agreement contains many provisions designed to resolve trade disputes between its contracting parties.<sup>6</sup> Most of them provide initially, and sometimes exclusively, for consultations between the contending parties.<sup>7</sup> If the parties are unable to settle their differences through negotiations, however, they may resort to GATT Article XXIII, which is GATT's basic dispute settlement mechanism.<sup>8</sup>

5. See J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 17 (2d ed. 1986).

6. J. JACKSON, *supra* note 1, at 164-66.

7. See, e.g., GATT, *supra* note 1, art. VII:1, 61 Stat. (pt. 5) A3, A25-A26, T.I.A.S. No. 1700, at 21-22, 55 U.N.T.S. 188, 216; art. VIII:2, 61 Stat. (pt. 5) A3, A28-A29, T.I.A.S. No. 1700, at 24-25, 55 U.N.T.S. 188, 220; art. XIX:2, 61 Stat. (pt. 5) A3, A58, T.I.A.S. No. 1700, at 55, 55 U.N.T.S. 188, 260; art. XXII, 61 Stat. (pt. 5) A3, A64, T.I.A.S. No. 1700, at 60, 55 U.N.T.S. 188, 266. Other provisions of the General Agreement that may play a role in dispute settlement include those allowing for waiver of obligations, *id.* art. XXV:5, 61 Stat. (pt. 5) A3, A68-A69, T.I.A.S. No. 1700, at 64-65, 55 U.N.T.S. 188, 272-74, and periodic renegotiation of concessions, *id.* art. XXVIII:1, 61 Stat. (pt. 5) A3, A71, T.I.A.S. No. 1700, at 67, 55 U.N.T.S. 188, 276-78.

8. The text of Article XXIII is as follows:

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. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate

Article XXIII may be invoked, *inter alia*, when one GATT member claims that a benefit accruing to it under the General Agreement has been nullified or impaired by another member so that it has suffered some detriment.<sup>9</sup> In such a case, the contracting parties, acting as a group,<sup>10</sup> are required to investigate the matter and make appropriate recommendations or rulings.<sup>11</sup> If the contracting parties find that the circumstances are serious enough, they may authorize the complainant to take retaliatory action against the respondent to compensate the complainant for its damages.<sup>12</sup>

The scope of Article XXIII is extremely broad. Under Ar-

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

GATT, *supra* note 1, art. XXIII, 61 Stat. (pt. 5) A3, A64-A65, T.I.A.S. No. 1700, at 60-61, 55 U.N.T.S. 188, 266-68. The signatory members of GATT are cumulatively referred to in the General Agreement as the CONTRACTING PARTIES.

9. *Id.* art. XXIII:1, 61 Stat. (pt. 5) A3, A64, T.I.A.S. No. 1700, at 60, 55 U.N.T.S. 188, 266-68. It may also be invoked if the attainment of any objective of the Agreement is being impeded. *Id.*

10. GATT was never intended to be an independent international organization. It was expected that it would be subsumed under the umbrella of the International Trade Organization, which unfortunately never came into existence because the U.S. Congress failed to ratify it. Consequently, the General Agreement does not provide an organizational structure for GATT except by specifying that all of the contracting parties may in certain circumstances meet and take action. J. JACKSON, *supra* note 1, ch. 2. The contracting parties typically meet towards the end of each year. In order to deal with matters arising between these annual meetings, the GATT Council was created. It meets more or less monthly and is open to all contracting parties willing to participate. It has been delegated all of the powers of the contracting parties, except the power to grant waivers. Its decisions may be appealed to the contracting parties, acting as a group. BISD, *supra* note 1, at 9 (9th Supp. 1961). Although no provision is made for it in the General Agreement, a GATT Secretariat exists and now comprises several hundred persons. It is headed by a Director-General. Technically, the staff is employed by the Interim Commission of the defunct International Trade Organization.

11. GATT, *supra* note 1, art. XXIII:2, 61 Stat. (pt. 5) A3, A64-A65, T.I.A.S. No. 1700, at 60-61, 55 U.N.T.S. 188, 268.

12. *Id.*

title XXIII, one party's benefits may be nullified or impaired by another party's violation of the General Agreement but also by "any measure" taken by another party, even if not in violation of the General Agreement.<sup>13</sup> The precise limits of Article XXIII obviously depend on how the term "benefit" is defined. Most disputes in GATT have involved alleged violations of the General Agreement, where the complaining party has contended that the benefit impaired or nullified is its expectancy of the other party's compliance with the General Agreement. Early decisions established, however, that the term "benefit" could have a much more expansive meaning. For example, nullification and impairment were found in one case when a national subsidy program for fertilizer was revised so that certain imported fertilizer was no longer given the same, favorable treatment afforded to a competing variety of domestically produced fertilizer. The dispute settlement panel ruled that the GATT benefit nullified or impaired was the complaining party's reasonable expectation that its fertilizer product and the product produced in the respondent country would continue to be treated the same.<sup>14</sup> As a result of this and several similar decisions,<sup>15</sup> one party may be entitled to compensation even though its detriment flowed only from disappointed expectations, and the other party did not violate the General Agreement.

This broad view of Article XXIII's scope may be explained by the divergent functions that the drafters of the General Agreement apparently wanted it to fulfill. On the one hand, they wanted a procedure for adjudicating claims that the General Agreement had been violated and providing for appropriate redress; on the other hand, they also wanted a sort of mandatory renegotiation procedure for settling more general

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13. *See id.*, art. XXIII:1(b), 61 Stat. (pt. 5) A3, A64, T.I.A.S. No. 1700, at 60, 55 U.N.T.S. 188, 266-68. It may also be caused by the "existence of any other situation." *Id.* art. XXIII:1(c), 61 Stat. (pt. 5) A3, A64, T.I.A.S. No. 1700, at 60, 55 U.N.T.S. 188, 266-68.

14. The Australian Subsidy on Ammonium Sulphate, BISD, *supra* note 1, at 188 (1952).

15. GATT, Treatment by Germany of Imports of Sardines, BISD, *supra* note 1, at 53 (1st Supp. 1952); GATT Panel Report on EC Subsidies on Raisins and Canned Fruit, 20 Int'l Trade Rep. Export Weekly (BNA) 1028 (1984) (report not adopted); *cf.* GATT, United States Manufacturing Clause, BISD, *supra* note 1, at 74, 83, 89 (31st Supp. 1985).

grievances, applicable when one party had somehow impinged on another's interests or when the balance of concessions needed adjusting, even in the absence of a violation of the agreement.<sup>16</sup> Thus, Article XXIII was originally intended to be more than simply a rule-enforcing provision. Since most disputes concern alleged violations of rules, this article will focus on the rule-enforcement aspect of Article XXIII. It is important to bear in mind, however, that Article XXIII has this balancing aspect in cases not involving violations of rules, as it may color views of whether Article XXIII should be strengthened.<sup>17</sup>

Article XXIII only outlines how disputes are to be processed in the GATT system; it does not establish any formal procedures for handling them. From the outset it was evident that a general meeting of all contracting parties would be ill-suited to consider disputes. Although the procedures actually used have varied somewhat over the years, it has become the standard practice for the contracting parties to appoint a panel of individuals to consider a dispute and prepare a report so that the contracting parties can take appropriate action.<sup>18</sup>

By the early 1970s, there were increased complaints about many aspects of the panel process and a general disagreement among GATT members over whether the principal role of GATT dispute settlement panels should be to render judicial-like decisions or to promote negotiated settlements through conciliation.<sup>19</sup> As a result of these concerns, the dispute settle-

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16. See generally J. JACKSON, *supra* note 1, at 169-71.

17. In response to concern over this balancing aspect of Article XXIII, the 1982 Ministerial Declaration on Dispute Settlement provided: "It is understood that decisions in [the dispute settlement] process cannot add to or diminish the rights and obligations provided in the General Agreement." GATT, Ministerial Declaration, Dispute Settlement Procedures, BISD, *supra* note 1, at 13, 16 (29th Supp. 1983) [hereinafter 1982 Declaration].

18. See generally R. HUDEC, *supra* note 1, at 66-83. Initially, disputes were considered by working parties, consisting of the contending nations and several other GATT members. Working party reports typically stated the views of each member of the working party and did not reach decisions on the merits of the dispute, although the views of the majority were often evident and over time the reports were often treated as having reached definitive decisions. *Id.* In the early 1950s, use of panels became the standard practice in Article XXIII cases. The operation of panels is described in the text accompanying *infra* notes 20-30.

19. For a description of the problems of the panel system as of the mid-1970s, see R. HUDEC, ADJUDICATION OF INTERNATIONAL TRADE DISPUTES 11-23 (1978).

ment system was the subject of extensive discussion in the Tokyo Round, which led to the adoption of an Understanding on Dispute Settlement at the conclusion of that Round.<sup>20</sup> The Understanding mainly summarized the dispute settlement procedures that had traditionally been used in GATT and indicated that they would continue to be used.<sup>21</sup> Despite continued dissatisfaction with the operation of the panel process, a 1982 GATT Ministerial Declaration on Dispute Settlement largely reiterated the 1979 decision.<sup>22</sup>

As a result of these actions, the dispute settlement system as it currently operates can be summarized as follows: Following the inability of two contracting parties to resolve a dispute through consultations and negotiations, the aggrieved party may request the appointment of a panel to adjudicate the dispute. The request is made to the GATT Council, a body open to all GATT members, which meets every month or so and which has been delegated the authority to act on behalf of the contracting parties as a whole.<sup>23</sup> There is no absolute right to have a panel appointed. Indeed, the respondent is given the right to answer the complaint made and may argue that the appointment of a panel would be premature or otherwise inappropriate.<sup>24</sup> In fact, panels are virtually always established if requested, assuming the request is vigorously pursued.<sup>25</sup> There may be considerable delay between the initial request and the establishment of a panel, however, and it is understood that the appointment of a panel might in some cases be

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20. GATT, Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD, *supra* note 1, at 210 (26th Supp. 1980) [hereinafter 1979 Understanding]; *see also* GATT, *supra* note 3, at 104-07, 151-51.

21. Although the 1979 Understanding made no significant changes in GATT dispute settlement procedures (except for specifying certain time limits in which various actions ought to be taken), it was viewed as noteworthy because it indicated that the contracting parties were willing to continue the system as it had developed. Given the system's problems, the negotiations might well have left it in a more weakened state. *See* Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 158-59 (1980).

22. 1982 Declaration, *supra* note 17.

23. *See supra* note 10.

24. 1979 Understanding, *supra* note 20, ¶ 10.

25. U.S. INT'L TRADE COMM'N, PUB. NO. 1793, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS 57 (1985) [hereinafter ITC DISPUTE SETTLEMENT STUDY] (Report to the Committee on Finance, U.S. Senate, on Investigation No. 332-212 under Section 332(g) of the Tariff Act of 1930).

inappropriate because any decision that the panel could conceivably reach would be fruitless.<sup>26</sup>

Additional delay in the appointment of a panel may occur after a decision has been made to proceed because it is also understood that the contending parties have a right to be consulted on the composition of the panel and to reject panel members whom they consider objectionable.<sup>27</sup> Pursuant to the Understanding, parties are required to object within seven days of the Director General's<sup>28</sup> nomination of a panel member and it is understood that they should do so then only for compelling reasons.<sup>29</sup> The panel members are typically national officials responsible for GATT and international trade matters, particularly those based in Geneva who represent their countries at GATT.<sup>30</sup> In principle, panel members are to act as individuals, and not as representatives of their own countries' interests, in reaching their decisions.

Once the panel has been appointed, its task is typically to examine the dispute and make such findings as will assist the contracting parties in making recommendations or rulings as provided for in Article XXIII.<sup>31</sup> The panel receives written and/or oral submissions from the contending parties and may receive submissions from other interested parties. It then issues a proposed report on which the contending parties comment. Following its consideration of the comments, the panel submits its report to the GATT Council. The report normally resolves the major disputed issues raised by the contending parties (or at least those necessary to reach a decision) and, if nullification or impairment is found, recommends, in order of preference: that the offending measure be removed; or, if that

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26. "Before bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful." 1979 Understanding, *supra* note 20, Annex ¶ 4 (Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXXII:2)).

27. *Id.* ¶ 11.

28. *See supra* note 10.

29. *See* 1979 Understanding, *supra* note 20, Annex ¶ 12.

30. Occasionally, independent experts on GATT law or retired GATT officials serve on panels. There is, however, a stated preference for use of national officials, although in 1984 it was agreed that it would be appropriate to use nongovernmental panelists to break deadlocks over panel composition. GATT, Action by Contracting Parties on Dispute Settlement Procedures, BISD, *supra* note 1, at 9-10 (31st Supp. 1985).

31. Panel procedures are summarized in the 1979 Understanding, *supra* note 20.

is not possible, that the injured party be compensated; or, as a last resort, that the injured party be authorized to retaliate against the offending party.<sup>32</sup> Retaliation, however, has been authorized only once under Article XXIII, 35 years ago.<sup>33</sup> Throughout the panel procedure, the disputants are urged to resolve the matter amicably.<sup>34</sup>

A panel report in and of itself has no force. It must first be adopted by the Council on behalf of the contracting parties. Although the issues discussed in the report are not relitigated in the Council, the Council does not usually act absent consensus.<sup>35</sup> Thus, the "losing" party (at least an important losing party) may hold up adoption of a panel report interminably while it purports to analyze it and to explore possible negotiated solutions with the prevailing party.<sup>36</sup>

Each of the Tokyo Round agreements<sup>37</sup> has a provision on dispute settlement. Generally, these provisions either incorporate or closely follow the procedures described above. The main differences are that there is usually an unqualified right to have a panel appointed under the agreements, time limits for completion of certain stages are sometimes stricter and more precisely defined, and the panel report is adopted (or not) by the appropriate agreement's committee of signatories.<sup>38</sup>

32. 1979 Understanding, *supra* note 20, Annex, ¶ 4.

33. GATT, Netherlands Measures of Suspension of Obligations to the United States, BISD, *supra* note 1, at 32 (1st Supp. 1953); *see also id.* at 62.

34. *See, e.g.*, 1979 Understanding, *supra* note 20, ¶¶ 16, 18.

35. Although the General Agreement establishes a one-nation/one-vote system, GATT, *supra* note 1, art. XXV:3, it has traditionally operated on the basis of consensus. Thus, if any contracting party is strongly opposed to a proposed GATT action, that action will not be taken. *See E. MCGOVERN, supra* note 1, at 24.

36. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 58-61. The 1982 Ministerial Declaration stated, "The Contracting Parties reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided." 1982 Declaration, *supra* note 17, ¶ 10.

37. *See supra* note 3.

38. This article will not separately consider the dispute settlement procedures under the Tokyo Round codes except where they are particularly relevant to the matter under discussion. For analyses of the differences in the procedures adopted in those codes, *see Hudec, supra* note 21, at 174-77; *see also* Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 L. & POL'Y INT'L BUS. 21, 44-47 (1980).

## II. CRITICS AND THE GATT DISPUTE SETTLEMENT SYSTEM

The basic structure and operating procedures of the GATT dispute settlement system have not changed greatly since the early 1950s. Nonetheless, perceptions of the system's effectiveness and usefulness have varied widely over the years. It was generally viewed as effective during the first decade of GATT's existence, but during the ensuing twenty years, its reputation declined significantly.<sup>39</sup> As to the past decade, the jury is still out. This section of the article briefly reviews the operation of the system during its first two historical phases and considers the factors that made it a success in its first period and a failure in its second. It then turns to a more detailed analysis of the principal attacks that have been made against the system and considers their validity in light of the operation of the system over the last decade. Particular attention is given to the contention that use of Article XXIII as an adjudicatory dispute settlement system is fundamentally inconsistent with the basic nature of GATT, which it is claimed can operate effectively only by voluntary consensus arrived at through negotiation.

### A. Historical Overview

During its first decade—1948 to 1958—the GATT dispute settlement system was perceived to have worked well. There were a fair number of cases considered per year (three to five)<sup>40</sup> and the vast majority of cases were resolved satisfactorily.<sup>41</sup> This success can be attributed to a number of factors.

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39. The first two phases are comprehensively analyzed by Professor Hudec, the leading scholar of GATT dispute settlement, in R. HUDEC, *supra* note 1.

40. Calculating the precise number of disputes is difficult. There are obviously disputes that occur but do not ultimately result in panel reports. Most lists of disputes include some complaints that do not result in the formation of a panel, but there is disagreement over what constitutes a complaint. For example, Hudec lists seventy-seven disputes through 1974. R. HUDEC, *supra* note 1, at 275-96. The U.S. International Trade Commission study lists forty-two, ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at I-5 to I-15; and a private GATT Compilation lists forty-four. These differences, plus the difficulties in assessing the result of invoking the dispute settlement system, make precise statistical statements about the system inherently misleading. It is possible, however, to note general trends.

41. Measuring the system's success is also problematic. The necessary information is often not publicly available, and it is difficult to gauge a complainant's "satisfaction" in any event. The most careful analysis of this period is by Professor Hudec.

First, the General Agreement had only recently been negotiated and there was a general consensus on what it meant and how it should be interpreted.<sup>42</sup> Second, the number of GATT members was relatively small and their backgrounds and interests were relatively similar.<sup>43</sup> Moreover, many of the officials dealing with GATT matters during this period had personally participated in its creation and presumably thus had a greater stake in making it succeed.<sup>44</sup> The system's success in its early years should not be overestimated, however. Some disputes were resolved only after several years had passed.<sup>45</sup> Furthermore, a careful examination of that period reveals that the GATT participants were concerned with GATT's fragility and took care not to put too much stress on it through overly aggressive use of the dispute settlement system.<sup>46</sup> Even with these qualifications, however, it can be said that the system worked well.

As time passed and GATT membership grew, and as the world economy expanded rapidly, the factors that had resulted in successful dispute settlement during the 1950s inevitably diminished in importance. From 1959 through 1978, the GATT dispute settlement system fell into disrepute and disuse, and certain nations considered their experience with the system to be unsatisfactory.<sup>47</sup> It was invoked on average only about once

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He concludes that of the forty complaints filed during the period 1952-1958, thirty resulted in a settlement apparently satisfactory to the complainant, four complainants disappeared and one complainant lost. Only five resulted in an impasse. R. HUDEC, *supra* note 1, at 95. Of the satisfactory settlements, three were compromises that did not implement the basic legal claim. *Id.* The study by the U.S. International Trade Commission suggests a greater rate of success. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 62. It does not, however, consider any of Hudec's five impasse cases. Compare R. HUDEC, *supra* note 1, at 84 n.3 with ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at I-3 to I-4.

42. R. HUDEC, *supra* note 19, at 14-21.

43. *Id.* at 14, 21-23.

44. See R. HUDEC, *supra* note 1, at 187-88.

45. See, e.g., GATT, Brazilian Internal Taxes, BISD, *supra* note 1, at 181, 186 (1952); BISD, *supra* note 1, at 25 (2d Supp. 1954); BISD, *supra* note 1, at 21 (4th Supp. 1956).

46. See R. HUDEC, *supra* note 1, at 190.

47. Three cases stand out in particular. The first involved U.S. and EC tax systems that allegedly favored exports. It is described *infra* in the text accompanying notes 54-58.

In addition, in 1962 Uruguay filed a complaint against fifteen developed countries attacking numerous nontariff barriers that allegedly impeded Uruguayan exports. Uruguay did not contend that all of the barriers were illegal, but that as a

per year,<sup>48</sup> with a majority of the complaints having been brought by the United States.<sup>49</sup> A number of explanations have been offered for the decline in use. First, the formation and expansion of the European Community ("EC") diverted the attention of most European countries, which had previously been active in using the dispute settlement system. With the advent of the EC, disputes between EC members were settled within the EC institutions.<sup>50</sup> Second, because certain provisions of the General Agreement—especially in respect of agriculture, textiles and safeguards (voluntary export restraints)—were not strictly enforced, a feeling developed among some contracting parties that no GATT provisions should be strictly enforced. In lieu of such enforcement, it was argued that trade disputes should be settled by negotiations, and that the provisions of the General Agreement should not necessarily be determinative of the outcome of the negotiations. Reliance on the dispute settlement mechanism was con-

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result of their existence Uruguayan benefits under the General Agreement had been nullified and impaired. Uruguay declined to support its claims with statistical data or otherwise participate in the prosecution of the case. In essence, the complaint was a demand that GATT enforce its rules more strictly and give more consideration to the problems of developing countries. Ultimately, the panel considering the complaint refused to go forward without Uruguay's participation, although those respondents who admitted violating the General Agreement received recommendations to stop. See GATT, *Uruguayan Recourse to Article XXIII, BISD, supra* note 1, at 95 (11th Supp. 1963); BISD, *supra* note 1, at 35, 45 (13th Supp. 1965). The Uruguayan complaint caused many GATT members to want the dispute settlement system de-emphasized. The GATT members thought the system was too easily abused by those relying inappropriately on legalistic arguments in situations where negotiations were the only appropriate remedy. See R. HUDEC, *supra* note 1, at 220-23.

In the so-called Chicken War, the United States and the EC disagreed over the amount of compensation owed to the United States when the U.S. share of the EC chicken market declined as a result of the implementation of certain EC agricultural policies. Although GATT ultimately played a useful role in fixing the amount of compensation, it was felt by many that the dispute itself was one that demonstrated the inefficacy of dispute settlement by adjudicatory proceedings, especially because the dispute occurred during and jeopardized progress in the Kennedy Round. See *id.* at 219-20, 222-23.

48. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at I-11 to I-18.

49. The U.S. complaints tended to be brought in bunches, usually at times when the Executive Branch wanted to demonstrate to Congress that it was actively protecting U.S. interests so that Congress would pass trade legislation desired by the Executive Branch. R. HUDEC, *supra* note 1, at 230-31.

50. *Id.* at 216-17. In addition to the formation of the EC, the membership of GATT changed radically in this period as more and more developing countries joined. R. HUDEC, *supra* note 19, at 21-23.

sequently viewed as inappropriate.<sup>51</sup> Third, the emergence of Japan and the European Community as economic superpowers changed GATT from an organization dominated by the United States into one in which there were three recognizable power centers. These new economic powers did not necessarily view a formal dispute settlement system to be in their interests.<sup>52</sup> Their newly acquired economic strength made them more interested in negotiating solutions to disputes, a method they viewed as enabling them better to protect their interests.<sup>53</sup> They no longer needed a rule-based system to protect themselves from the United States.

During this second period, the reputation of the dispute settlement system also declined. It was perceived to be ineffective, a conclusion buttressed by the major case of the 1970s, the so-called *DISC* case, in which the EC alleged that certain U.S. tax legislation amounted to an export subsidy.<sup>54</sup> In response, the United States counterclaimed that several EC member state tax systems were also operated as export subsidies.<sup>55</sup> The conduct of the combined cases epitomized the shortcomings of the dispute settlement system; it took almost three years to appoint the panel and, when the panel upheld both claims in 1976, many felt that it had reached the wrong result.<sup>56</sup> Furthermore, implementation of the decision was unsatisfactory. The panel report was not adopted by the Council until 1981 and then only subject to qualifications.<sup>57</sup> The European tax systems remained in place, although the U.S. *DISC* legislation was effectively replaced in 1984.<sup>58</sup>

Consequently, prior to and during the Tokyo Round negotiations, there was much dissatisfaction with the GATT dis-

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51. R. HUDEC, *supra* note 19, at 14-21.

52. *Id.* at 21.

53. *Id.* at 22.

54. GATT, United States Tax Legislation, *BISD*, *supra* note 1, at 98 (23d Supp. 1977). The *DISC* case was exhaustively analyzed in Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 *AM. J. INT'L L.* 747 (1978).

55. See GATT, Income Tax Practices Maintained by France, *BISD*, *supra* note 1, at 114 (23d Supp. 1977); GATT, Income Tax Practices Maintained by Belgium, *BISD*, *supra* note 1, at 127 (23d Supp. 1977); GATT, Income Tax Practices Maintained by the Netherlands, *BISD*, *supra* note 1, at 137 (23d Supp. 1977).

56. See Jackson, *supra* note 54, at 779-81.

57. GATT, Tax Legislation, *BISD*, *supra* note 1, at 114 (28th Supp. 1982).

58. The *DISC* legislation was replaced in 1984 by legislation authorizing Foreign Sales Corporations. 26 U.S.C.A. §§ 921-927 (West 1982 & Supp. 1987).

pute settlement system. This sentiment was particularly evident in the United States, where Congressional committees complained that the system's ineffectiveness prevented the United States from enforcing its rights under GATT, thereby indirectly suggesting that perhaps the United States should not participate in GATT.<sup>59</sup> Among the many criticisms leveled at the system, the principal charges were that the system:

- a) was inappropriate and ill-conceived because it stressed judicial solutions to problems that were really resolvable only through negotiations;
- b) had become irrelevant because it was not used, except occasionally by the United States, and it was impractical to expand its usage;
- c) was inefficient because of long delays; and
- d) was ineffective because of its inability to ensure implementation of its decisions.

The first of these criticisms is philosophical in nature: How should GATT approach dispute settlement? Should third parties issue rulings on whether countries have violated the General Agreement or should they limit their role to conciliation? The other criticisms focus on operational aspects of the system: Who uses it? How long does it take? What results are produced? These criticisms will be analyzed in light of post-Tokyo Round experiences with the system. It appears that at least some of the criticisms of the past are no longer valid and that the current—third—phase of the dispute settlement system's history has been relatively successful.

#### B. *The Philosophical Debate: Adjudication or Negotiation?*

As it has operated over the years, the GATT dispute settlement system has resembled a judicial system in important aspects: neutral decision-makers have determined whether a contracting party has violated the General Agreement and have usually recommended that the violation be terminated. Critics of the system have argued that it should be made more judicial so as to promote more precise decisions on the merits of disputes and more effective implementation of decisions.<sup>60</sup>

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59. See H.R. REP. NO. 571, 93d Cong., 1st Sess. 66-67 (1973).

60. See, e.g., Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1 (1979).

At the same time, other critics have argued that the nature and basic philosophy of GATT dictate that the system should be used only to the extent it facilitates negotiated settlements of trade disputes. The decline in the use of the system in the 1960s and the 1970s probably reflects the influence of these latter critics since their position has been subscribed to by some leading GATT officials and parties.<sup>61</sup>

These two conflicting viewpoints on how the GATT dispute settlement system should operate are often referred to, on the one hand, as the "legalistic" model, which stresses adjudication, and, on the other, the "antilegalistic" model, which emphasizes negotiation and consensus.<sup>62</sup> Put simply, the legalistic view is that the General Agreement is a code of conduct and embodies a balance of concessions. If a contracting party violates the code and tips the balance, it is appropriate to label that party as a violator and to put pressure on it to conform its conduct to the code, if necessary by threatening some form of retaliation. On the other hand, the antilegalistic position is that the General Agreement is not a code of conduct *per se*, but more of a commitment by the contracting parties to deal in good faith with each other in trade matters so as to work out a mutually acceptable solution to any disagreement.<sup>63</sup> The United States is generally perceived to support the legalistic position, while the EC and Japan are considered supporters of the antilegalistic view.<sup>64</sup> Most non-European developed countries and many developing countries have tended to support the legalistic view since they see it as a more effective protector of small-country rights.<sup>65</sup> In part, these divergences in approach between the United States, the EC and Japan can be explained by different domestic traditions in respect of dispute

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61. See, e.g., O. LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* (1985) (Mr. Long was Director-General of GATT from 1968 to 1980); Phan van Phi, *A European View of the GATT*, 14 *INT'L BUS. LAW.* 150 (1986) (Mr. Phan van Phi was formerly in charge of GATT relations for the EC).

62. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 68. Another way of viewing the difference is to ask whether the system should be juridical or diplomatic in character. See GATT FOCUS, No. 47, at 2 (June 1987).

63. See ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 68.

64. *Id.*

65. *Id.* For example, Brazil proposed in the Tokyo Round that the dispute settlement be strengthened by making the developed countries subject to sanctions for illegal trade actions taken against developing countries. GATT, *supra* note 3, at 96-106; Hudec, *supra* note 21, at 157-58.

settlement—the United States is a more litigious society than Japan, which places a high premium on consensus.<sup>66</sup> The different positions may also be the result of a country's perception as to which approach will best serve its interests.<sup>67</sup>

The text of Article XXIII does not clearly mandate adoption of either the legalist or antilegalist position, although the authorization to the contracting parties to make rulings and to permit retaliation certainly suggests that GATT was intended to do more than simply provide conciliation services.<sup>68</sup> That GATT was to encompass a legalistic role is also borne out by the early history of the dispute settlement system.<sup>69</sup> In any event, the basic questions to be considered today are: What are the goals of the GATT dispute settlement system, and would they be better achieved by emphasizing adjudication or negotiation?

### 1. Goals of GATT Dispute Settlement

The GATT dispute settlement system was intended to resolve two types of disputes that may arise among GATT members: first, claims by one party that another has violated the provisions of the General Agreement; and second, objections by one party to practices of another that are not prohibited by the General Agreement, but that nonetheless have an adverse effect on the objecting party.<sup>70</sup> These types of disputes are quite different, and the role of the dispute settlement system changes, depending on which type of dispute is under consideration.

In the case of an alleged rule violation, the principal goal of a dispute settlement system is to stop the violation.<sup>71</sup> Even

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66. Phan van Phi, *supra* note 61, at 151.

67. For much of the 1970s and early 1980s, the EC was the most frequent respondent in dispute settlement proceedings and aspects of some of its basic policies (such as the Common Agricultural Policy) were under constant attack. More recently, and probably in part in response to the increasingly protectionist legislation emanating from the U.S. Congress, the EC has been a complainant more often than a respondent. See *infra* note 124. It will be interesting to see whether any shifts in the EC view of dispute settlement occur if the EC begins to have a greater interest in having decisions favorable to itself implemented.

68. See GATT, *supra* note 1, art. XXIII:2, 61 Stat. (pt. 5) A3, A64-A65, T.I.A.S. No. 1700, at 60-61, 55 U.N.T.S. 188, 268; *supra* note 8 (text of GATT art. XXIII:2).

69. Hudec, *supra* note 21, at 151-52.

70. See *supra* text accompanying notes 16-17.

71. Van Hoof and De Vey Mestdagh list three basic functions for international

if the dispute settlement system cannot compel compliance with the rule, and even if compliance without compulsion is unlikely, a lesser goal—such as achieving compliance with a watered-down version of the rule—or a goal that ignores the rule altogether would undermine the rule, and by implication all other GATT rules. GATT rules would become meaningless. So as long as there are agreed-upon rules, their enforcement must be the principal goal of the dispute settlement system.<sup>72</sup> This conclusion suggests that in determining whether the GATT dispute settlement system should be more or less

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“supervision,” a term that encompasses dispute settlement systems: review, correction, and creation. Van Hoof & De Vey Mestdagh, *Mechanisms of International Supervision*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS* 11-14 (P. van Dijk ed. 1984). In GATT, the dispute panel system performs the review and correction functions in rule enforcement cases. The correction function is to achieve compliance with the norms that have been found violated in the review function. The dispute settlement system may play a creative function in non-rule-based disputes.

There are other goals that can be mentioned. For example, in addition to promoting compliance, Jackson lists four others: promotion of friendly relations, protection of the interests of nonparties to the dispute, provision of objective decisions, and a cheap means of resolving disputes. Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, in *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 144, 153 (1967). These all seem subsidiary to the goal of promoting compliance with GATT's provisions, although some would argue that the promotion of friendly relations should take precedence. See *infra* note 72.

72. It would make sense to argue that a goal such as promotion of friendly relations among members should take precedence over achieving compliance with GATT rules only if (a) the rules were not intended to be binding or (b) promotion of friendly relations would be more effective in achieving compliance in the long run. The latter contention is examined in the text accompanying *infra* notes 100-05. As to the former, some have questioned whether the provisions of GATT were really intended to be binding obligations. The EC and Japanese tend to view GATT as establishing at most norms of aspiration (for a distinction between norms of obligation and norms of aspiration, see J. JACKSON, *supra* note 1, at 760-62), in light of which the parties to GATT are to negotiate settlements of trade disputes. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 68. This argument can be supported by the fact that GATT is to this day applied only provisionally, see *supra* note 1, which can be interpreted to mean that no binding obligations were intended to be imposed. This argument is inconsistent with much of GATT history. The history of the dispute settlement system demonstrates that from the very beginning, GATT members have complained of other's noncompliance with GATT rules. A finding of such noncompliance or by a panel was usually followed from compliance or continued pressure by the contracting parties generally to comply.

In recent years, it is certainly true that compliance with certain of the rules has been somewhat sporadic, but that does not change the parties' initial intent to be bound by the rules. Should the system still attempt to enforce such rules? It would seem that it should because to do otherwise would require a determination of which rules are no longer agreed upon, an impossible task. If enforcement of a rule is truly inappropriate, the party in violation should seek a waiver. This process would estab-

adjudicative in nature, the issue is whether a more adjudicative system would promote greater compliance with GATT rules.

In the case of non-rule-based disputes, the goal of a dispute settlement system should be the promotion of a mutually acceptable solution.<sup>73</sup> When a dispute does not involve the violation of a rule, the principal concern of the organization is the promotion of harmony among its members, since the preservation of the integrity of the agreement that binds them together is not at issue. If a mutually acceptable solution cannot be found, the best that can be done to promote friendly relations is for a neutral body, such as a dispute settlement panel, to recommend a solution.

Since most GATT disputes deal with alleged rule violations, the following discussion focuses on the rule-enforcement goal and the question of whether the adjudication model or negotiation model would better achieve that goal. Where appropriate, consideration will be given to non-rule-based disputes.

## 2. Adjudication or Negotiation

One result of emphasizing adjudication in the GATT dispute settlement system would likely be an increase in the number of cases considered by panels. While an emphasis on adjudication is not inconsistent with negotiated resolution of trade disputes, participants believing that attempts at a negotiated solution had failed would naturally request a dispute settlement panel. The existence of this possibility means that parties would probably abandon attempts at negotiated solutions more quickly than under a system where negotiation was the only alternative.<sup>74</sup> Critics of the adjudication model argue

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lish more concretely whether there is a consensus that enforcement of a particular rule is inappropriate.

73. If no rule has been alleged to have been violated, rule enforcement cannot be a goal. Considering the other goals of dispute settlement, *see supra* note 71, the promotion of friendly relations is the goal that would be most appropriate. It would be important to promote friendly relations in a manner that does not adversely affect third parties, but so long as the existence of proceedings is public, third parties will be able to monitor them and thus protect their interests.

74. It is not the case that emphasizing adjudication in GATT dispute settlement would lead to the end of any attempts at negotiation. Because GATT cannot enforce its decisions, ultimately the complaining party will not be able to obtain its principal goal—compliance with the GATT rule in question—without some negotiation with

that such increased use would poison the atmosphere within the GATT system to the eventual detriment of all parties, and that it could lead to the collapse of GATT, particularly if so-called "wrong" cases are brought. Proponents argue that it would increase overall compliance with GATT rules to the general benefit of all. These contentions are explored below.

a. *Poisoning the Atmosphere*

Critics of the adjudication model claim that it will promote conflict and contentiousness in an organization that must promote negotiated solutions to achieve its goals.<sup>75</sup> The need to promote negotiated solutions is said to exist because even if a panel report vindicates the complaining party, there is no guarantee that the other party will correct its violation. Thus, obtaining the other party's compliance with the violated GATT rule will necessarily be the subject of negotiations as to the exact form and timing of compliance. Since such diplomatic contacts will almost always be required, the legalistic approach is viewed as counterproductive because it poisons the atmosphere in which those contacts take place. Moreover, economic relations between the contending parties may deteriorate generally as positions in the dispute harden and bad feelings spill over into other areas.

It is difficult to analyze this criticism. Whether or not the atmosphere between two parties has been poisoned cannot objectively be determined by examining tangible evidence. If the atmosphere has been tainted, it is because one or both of the parties has deemed it so. One can evaluate, however, some of the reasons that are given as causes of a poisoned atmosphere.

First, it is suggested that the publicity associated with use of the dispute settlement system will make it more difficult to resolve the dispute.<sup>76</sup> Publicity may embarrass the respondent by publicly labeling it a wrongdoer, thereby causing it to be-

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the respondent. A GATT ruling in the complainant's favor may shift the balance of power in negotiations, but it does not obviate the need for negotiations.

75. G. MALINVERNI, *LE REGLEMENT DES DIFFÉRENDS DANS LES ORGANISATIONS INTERNATIONALES ECONOMIQUES* 131-32 (1974). See Hudec's summary of this argument in R. HUDEC, *supra* note 19, at 25-26. Malinverni and Long argue that it is more important to resolve the dispute than to pick a winner. G. MALINVERNI, *supra*, at 105-06; O. LONG, *supra* note 61, at 71.

76. G. MALINVERNI, *supra* note 75, at 118-19.

come intransigent. To the extent that positions taken by the parties become public, it becomes more difficult for them to modify these positions without appearing to back down. This situation impedes settlement of the dispute because neither side wants to appear to lose. These arguments seem rather weak because trade disputes are not secret. Even if they are handled through negotiations, one side will argue publicly that the other side has done something wrong. In addition, general positions on the issues will usually become known, at least to those who have an interest in the dispute.<sup>77</sup>

Second, it is suggested that the filing of a complaint is a contentious act in itself, which will worsen relations.<sup>78</sup> The weight of this argument would seem to depend on how frequently the dispute settlement system is used. If it is used only infrequently and only a few parties ever lose, initiation of a complaint would be something of a slap in the face. The ignominy of a loss would also loom larger. But to the extent that there are many cases, and the major trading nations are both winners and losers, this argument loses whatever force it had. So long as the dispute settlement system is viewed as a mechanism for resolving the myriad disputes, both major and minor, that arise between ninety-odd countries on a reasonably regular basis, there should be no poisoning of the atmosphere. As use grows, the system will be viewed as a normal part of the relationships between countries.<sup>79</sup>

Third, it can be argued that a complaint will lead the respondent in that case to bring an action against the original complainant on other grounds.<sup>80</sup> If this occurs, it will increase the number of disputes the system must handle, but that in

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77. This is particularly true in the United States where trade laws allow private parties to petition the government to commence negotiations or GATT dispute settlement proceedings in certain circumstances. See 19 U.S.C.A. §§ 2411-2416 (West 1980 & Supp. 1987).

78. Hudec reports that the reaction to one case filed by the United States when the system was not often used was "barely controlled outrage." R. HUDEC, *supra* note 19, at 12 n.25.

79. In the Tokyo Round Understanding the parties expressly agreed that the filing of a case was not to be considered a contentious act. 1979 Understanding, *supra* note 20, ¶ 9.

80. For example, when the EC challenged the U.S. DISC tax provision, the United States countered by challenging three European tax systems. The original EC challenge may have been inspired by prior U.S. complaints against EC practices. R. HUDEC, *supra* note 1, at 238.

itself is not undesirable. Indeed, if more complaints lead to a higher level of compliance with GATT rules, it would be beneficial.<sup>81</sup> It could be argued, however, that more cases will result in more unresolved disputes, which could adversely affect GATT's prestige.<sup>82</sup> For example, an increase in the number of disputes between two parties could make resolution of any one dispute more difficult if its resolution is tied to resolution of all of the others. While this may occur, it would occur in a system emphasizing negotiation as well. In any event, the tying together of different issues is not necessarily a negative result. Disputes that cannot be solved individually may be disposed of as part of a global solution. By indicating which party is in the right on the individual disputes, the dispute settlement system can play an important role in pushing the ultimate global settlement toward compliance with GATT rules. If the disputes are left entirely to negotiations, it is less clear that there would be any factor pushing the solution toward that suggested by the GATT rules.<sup>83</sup>

All in all, the argument that an adjudicative system will poison the atmosphere of GATT is not compelling. Moreover, it is arguable that such a system will improve the atmosphere of GATT. Emphasis on negotiation is likely to lead some countries to use their relative political and economic strength to take advantage of weaker countries,<sup>84</sup> a situation fundamentally incompatible with a system that stresses rules. Rules tend to treat everyone in the same fashion. Negotiated settlements tend to favor the party with the best negotiating position, which often will be the more economically powerful party. This is probably why smaller countries often support a legis-

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81. The level of compliance with dispute settlement decisions is discussed *infra* in the text accompanying notes 139-51.

82. As noted below, this danger, which is essentially a version of the "wrong case" argument, does not seem great. See *infra* text accompanying notes 86-99.

83. For example, the United States and the EC recently were able to reach a global solution in respect of several longstanding disputes involving EC preferences for Mediterranean citrus products, U.S. quotas on semifinished steel and various actions and counteractions taken in connection with EC pasta subsidies. The solution at least recognized the tenor of the panel reports. See *infra* note 203.

84. Malinverni, for example, recognizes that reliance on negotiations gives an advantage to the stronger country to impose its will regardless of the merits of its case. G. MALINVERNI, *supra* note 75, at 119. He believes the danger is less in the framework of a multilateral organization although his argument seems mainly to be that such an organization is aware of the problem. *Id.* at 120-23.

tic system, as they perceive that they will be treated more fairly under such a system. As such, it can be argued that an adjudicative approach would improve the atmosphere of GATT by stressing fairness.<sup>85</sup>

b. *Wrong Cases*

A second objection made to a legalistic system is that it will result in what Professor Hudec has called "wrong" cases being brought into the system.<sup>86</sup> A wrong case is a dispute the resolution of which undermines the GATT trading system. Several kinds of wrong cases have been suggested.<sup>87</sup>

First, there is the case where a country has violated the rules of the General Agreement, but has done so unavoidably. Typically such violation would occur because of domestic pressures that the government cannot ignore.<sup>88</sup> It is argued that condemning that government for violating the General Agreement in such circumstances is both unfair and inappropriate. It is considered unfair because the government is perceived to have no choice but to do what it did. It is considered inappropriate because the domestic political pressures will prevent the government from correcting the situation.<sup>89</sup>

This sort of wrong case is not likely to damage GATT. The argument that it will seems to be based on a criminal law analogy. This analogy holds that an adverse decision by a dispute settlement panel is wrong and unfair because such decision is tantamount to convicting the respondent of a criminal act that it did not intend and could not prevent. This analogy is, however, inappropriate. Even assuming that the respondent really could not prevent the violation and did not intend it, a violation occurred. Since the General Agreement contains a negotiated balance of obligations, it is difficult to see why one country that has upset that balance should be able to do so without any offsetting penalty. While it might be inappropriate to punish a government that was helpless to prevent the violation, it does seem appropriate to put pressure on the govern-

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85. This argument is explored in Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98-101 (1978).

86. Hudec, *supra* note 21, at 159, 166.

87. *See id.* at 159-66.

88. *Id.* at 159.

89. *Id.*

ment to correct the violation and, perhaps, to award relief to those countries adversely affected by the violation. Surely there is nothing unfair about such an outcome. Moreover, such action is appropriate since it will likely promote compliance with GATT rules.<sup>90</sup> In particular, it may help respondent's government counteract domestic pressures if that government can honestly argue that condemnation by GATT is likely and retaliation by trading partners is possible. To the extent that such an argument is successful, compliance with the General Agreement will be improved.<sup>91</sup> In short, in some cases noncompliance may be inevitable, but there would be more compliance if GATT condemned rule violations than if GATT ignored them.

The second example of a wrong case is one that is initiated in respect of an issue on which the GATT community has either not yet reached a consensus or on which past consensus has broken down. In such a case it is unthinkable that both parties will accept the panel's decision, whatever it may be.<sup>92</sup> Examples of such cases would include those challenging agricultural trade practices, such as those of the EC, the 1962 Uruguayan complaint against numerous developed country import restrictions, and the U.S. complaint against EC tax systems in the *DISC* case.<sup>93</sup>

Cases such as these undeniably put strains on the GATT system. The panel reports may generate considerable controversy, especially if they uphold the complainant's position. Moreover, the strains endure in time, as these cases are likely to remain unresolved for years. The critical point to remember, however, is that GATT has survived these wrong cases.

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90. See *infra* text accompanying notes 100-05 for a discussion of compliance with GATT rules.

91. R. HUDÉC, *supra* note 19, at 35-37.

92. See Hudec, *supra* note 21, at 160-66. Hudec differentiates between those cases that attempt to enforce rules no longer representing consensus and those that overtax the system by asking it to rule on cases where no consensus exists. In each instance, the problem is a lack of a generally supported rule.

93. See, e.g., *European Economic Community—Subsidies on Exports of Wheat Flour*, 18 Int'l Trade Rep. Export Weekly (BNA) 899 (1983); *European Economic Community—Subsidies on Exports of Pasta*, 8 Int'l Trade Rep. Import Weekly (BNA) 468 (1983); GATT, *Income Tax Practices Maintained by France, Belgium and the Netherlands*, BISD, *supra* note 1, at 114, 127, 137 (23d Supp. 1977); BISD, *supra* note 1, at 114 (28th Supp. 1982); GATT, *Uruguayan Recourse to Article XXIII*, BISD, *supra* note 1, at 95 (11th Supp. 1963); BISD, *supra* note 1, at 35, 45 (13th Supp. 1965).

Indeed, the United States and the EC have resolved a number of agricultural disputes through GATT,<sup>94</sup> and the Uruguayan complaint, while not achieving what Uruguay sought, did lead to some reduced import restrictions.<sup>95</sup> Thus, the "wrong" cases that GATT has faced so far might better be viewed as difficult cases that may sorely test the system, but that do not damage it.

What about the future possibility of wrong cases such as these? An adjudicative model of dispute settlement allows parties to push for interpretations of rules that are not commonly agreed upon. This risk exists in any system, but in a legalistic system it is more serious because the system guarantees that the party pressing the claim can obtain a decision, whereas in a system based on negotiated solutions the claim is never seriously considered.<sup>96</sup> But does guaranteeing consideration of such claims undermine GATT? To begin with, it is quite possible that the panel will reject the controversial interpretation, particularly if it is novel. Even if the claim is accepted, several points are worth noting. First, the fact that it is accepted suggests that there is some basis for it. Second, if all of the contracting parties—or at least two-thirds of them—agreed that compliance with the panel decision should not be required, they could grant a waiver of the obligation at issue.<sup>97</sup> Third, so long as there is the possibility that the GATT Council must approve a panel report, an outlandish complaint leading to an unacceptable result seems remote.<sup>98</sup> Nonetheless, it must be

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94. See *supra* note 83.

95. See *supra* note 47.

96. It is noteworthy that Hudec rejects the idea that wrong cases should be avoided by controlling access to the dispute settlement system. Hudec, *supra* note 21, at 185.

97. The General Agreement permits its obligations to be waived in exceptional circumstances on a two-thirds vote of the contracting parties. GATT, *supra* note 1, Art. XXV:5, 61 Stat. (pt. 5) A3, A68-A69, T.I.A.S. No. 1700, at 64-65, 55 U.N.T.S. 188, 272-74.

98. Hudec suggests a number of techniques that can be used by panels to defuse wrong cases. First, there can be increased use of mediation techniques and the parties can be pressured to settle. Second, the panel can avoid rendering a specific decision or engage in creative interpretation of the obligation in question. Hudec, *supra* note 21, at 185-97. It is questionable whether techniques such as avoidance or creativity should be stressed. As discussed *infra* in the text accompanying notes 152-159, because of certain perceived problems with the panel system, it is important to improve the prestige and reputation of that system. Panels should decide the issues presented to them rather than try to gauge the impact of their decision on the GATT

conceded that a profusion of wrong cases such as those mentioned above might weaken GATT.<sup>99</sup>

*c. Compliance with GATT Rules*

The principal argument in favor of a relatively more legalistic system is that it would better promote compliance with GATT rules than would a negotiation/consensus system.<sup>100</sup>

An adjudicative system would promote compliance with GATT rules in two ways. First, it would discourage infractions of GATT rules. To the extent that countries know that they will be called to account if they violate the rules, they will be less likely to do so because the perceived cost of a violation will rise. In a more legalistic system the cost may include counteraction that negates any benefits from violating the rules. Further costs involve being labeled as a rule violator, a status that in and of itself imposes some cost, particularly in future negotiations over trade issues. Thus, to the extent that an adverse

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system. After all, they are not a court of last resort. Only if the complaint is based on nonviolation nullification and impairment would use of these techniques be appropriate. In such a case, the goal of the system is to promote an amicable resolution, and creativity could undoubtedly contribute to this end. See text accompanying *supra* note 73.

99. Wrong cases may also lead to wrong decisions by dispute settlement panels. Hudec, *supra* note 21, at 166. The more disputes that are submitted to the panel process and the more legalistic the system becomes, the more likely that there will be occasions, as there are in all judicial systems, when cases will be wrongly decided. Wrongly decided, that is, in the eyes of the majority of the GATT community. This problem is not unique to a relatively legalistic system. In fact, incorrect results may be a more common outcome of negotiations. While negotiated decisions may well always be viewed as correct by the parties involved, they may be wrong in the sense that they are not accepted by other GATT parties or that they are patently inconsistent with GATT rules. See G. MALINVERNI, *supra* note 75, at 121 n.27. In any event, wrong decisions do not pose a threat as long as, one, the Council retains some control over the adoption of panel decisions, and two, they can be minimized by procedural improvements in the dispute settlement system, such as using more experienced panels. See *infra* text accompanying note 218.

100. The positive role of rules in shaping conduct by nations has been noted by many authorities. See, e.g., L. HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979); Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 *YALE L.J.* 1299, 1315-25 (1971); Jackson, *supra* note 38, at 25-28.

A more legalistic, rule-oriented system would also be, and be perceived as, a fairer system. See *supra* text accompanying notes 84-85. In addition, to the extent that the parties knew that the GATT rules as written would be enforced, they would have an incentive to keep those rules up-to-date. This would make GATT a more vital institution and would reduce pressures to avoid use of the dispute settlement system such as existed in the 1960s and 1970s. See *supra* text accompanying note 51.

dispute panel decision is anticipated, countries will hesitate to violate the rules.<sup>101</sup> Indeed, domestic political pressures may be directed elsewhere when the government can make a case against noncompliance with GATT.<sup>102</sup> By contrast, in a negotiation/consensus system, the only cost may be unpleasant diplomatic exchanges, a negligible cost compared to the domestic political and economic benefits obtained by violating the rules.

Second, to the extent that an adjudicative approach produces more panel decisions, compliance with GATT rules will improve simply because panel decisions tend to be implemented, if not immediately, then over time.<sup>103</sup> In general there has been an excellent, though admittedly at times slow, record of compliance with dispute settlement decisions that have been adopted by the Council. So long as most decisions are respected, adherence to the rules under a legalistic system will be better than in a negotiation/consensus system.<sup>104</sup>

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101. See R. HUDEC, *supra* note 19, at 28-29. Hudec notes that the existence of credible and adjudicative procedures makes negotiations over rule violations more likely to succeed. If rules are not recognized as binding, there is no reference point for negotiators and negotiations are likely to fail as more and more extraneous points are raised.

102. See *supra* text accompanying note 91. The U.S. Manufacturing Clause case is an example of how a GATT decision may influence the type of legislation that a domestic interest group seeks. The case involved a U.S. law that denied copyright protection in some instances to works of U.S. citizens that were printed abroad. The law was scheduled to expire in 1982, but was extended for four years by Congress over the President's veto. The extension was found to violate the General Agreement. GATT, U.S. Manufacturing Clause, BISD, *supra* note 1, at 74 (31st Supp. 1985). U.S. industry tried to have the law extended again in 1986, but in a modified, less protectionist form. When asked why, an industry representative replied that they had reduced their goals because of "enormous pressure from elements of the Government and elements of the Congress." *Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary on S. 1822 and S. 1938*, 99th Cong., 2d Sess. 172 (1986) (testimony of Arthur C. Prine, Jr.). That pressure came from government officials arguing that the GATT decision should be respected and industries fearful of retaliation by those countries that would be adversely affected by the extension of the clause.

103. See *infra* text accompanying notes 139-51.

104. Defenders of the antilegalistic position dispute this. They contend that if governments are told that certain long-cherished practices are no longer considered acceptable or that rules demanded by a powerful domestic constituency cannot be implemented, they may well respond by ignoring GATT altogether. A negotiation/consensus system, it is argued, recognizes these constraints on governments and does not push them too far. As a consequence, it obtains the maximum compliance with GATT rules that can be achieved and does so in a way that does not cause offense and poison the atmosphere so as to affect future negotiations. (This argument is summarized in R. HUDEC, *supra* note 19, at 25-26.) In essence, it is the same

Furthermore, even if one party initially refuses to comply with a dispute settlement decision, that decision will affect the relative negotiating positions of the two contending parties. At the very least, the loser will suffer embarrassment. Moreover, that nation will have to justify its noncompliance with the panel decision. Such noncompliance, having been sanctioned, must be dealt with in other areas which are the subject of negotiations. In these other areas, as well as in negotiations directly on the subject matter of the dispute, the winner will gain leverage from having its position vindicated by the panel report.<sup>105</sup>

Thus, all other things being equal, it is likely that compliance with panel decisions will be increased and adherence to GATT rules better served by a more legalistic system. With an increase in the number of decisions, the obligations of GATT members will become clearer and better defined. Thus, the increased compliance with GATT rules will be compliance with more precisely defined rules.

### 3. Conclusion

In comparing the adjudication and negotiation approaches and considering the arguments advanced in favor of each, the fundamental difference between them becomes more evident. A relatively more legalistic approach puts more pressure on the GATT dispute settlement system and on GATT itself. Thus, the fundamental question arises: is the GATT system too fragile to handle the pressures that a more legalistic approach to dispute settlement would place on it? To answer this question, a review of GATT's history and current status is necessary.

GATT dispute settlement was probably more legalistic during its first decade.<sup>106</sup> However, this early experience is not entirely relevant to the present day's. In its early years, GATT was much smaller and more homogenous and was run predominantly by those who had drafted the agreement.<sup>107</sup> Today, GATT is a much larger, more diverse organization, and there is no longer anyone who "knows" what was intended

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as the poison-the-atmosphere and wrong-case arguments rejected earlier. *See supra* text accompanying notes 75-99.

105. *See supra* text accompanying note 83.

106. Hudec, *supra* note 21, at 151-52.

107. *See supra* text accompanying notes 42-44.

when a particular provision was drafted. Thus, the experience of GATT's early years is probably not relevant to GATT today; at best it provides evidence that a more legalistic system has operated without endangering the GATT system.

During the middle years of GATT's history, dispute settlement was more akin to the consensus/negotiation model. During that period GATT may well have been too fragile an organization to withstand the additional pressures of a more legalistic dispute settlement system. During this period, the U.S. Congress was often ill-disposed toward GATT,<sup>108</sup> and there was much uncertainty over how the formation of the European Economic Community would affect GATT.<sup>109</sup> In those years it was not so unthinkable that GATT could collapse—or more likely gradually fade from the scene—particularly if the United States and the EEC (and later Japan) decided to deal with trade matters outside its framework.<sup>110</sup>

Of course, GATT did not collapse or fade away, and it is arguably less likely to do so now than at any time in its history. After almost forty years of existence, GATT now has a permanency it once lacked for at least three reasons. First, in its early years GATT was very much dependent on the individuals who had created it.<sup>111</sup> The individuals who drafted GATT are by and large no longer living, and GATT today draws its strength from its institutional nature.

Second, GATT's supremacy in trade matters is more secure than ever. Prior to the Tokyo Round, questions were raised as to whether GATT was the appropriate negotiating forum for certain trade issues. In particular, since some provisions of the General Agreement were deemed to require changing (or at least amplifying) and the possibility of amending them seemed remote, it was thought that another forum such as the Organization for Economic Cooperation and Development ("OECD"), composed mainly of developed western

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108. As late as 1974, in the Trade Act of that year, Congress provided that its authorization of funding for the U.S. share of GATT expenses "does not imply approval or disapproval by the Congress of all articles of the General Agreement on Tariffs and Trade." 19 U.S.C. § 2131(d) (1982).

109. R. HUDEC, *supra* note 1, at 195-97.

110. R. HUDEC, *supra* note 19, at 22.

111. Many of these individuals had been involved in negotiating trade issues since the 1930s. R. HUDEC, *supra* note 1, at 187-88.

economies, would be appropriate to manage world trade.<sup>112</sup> A similar debate ensued before the commencement of the Uruguay Round in respect of whether trade-in-services issues should be negotiated in GATT, the OECD, or UNCTAD.<sup>113</sup> The Tokyo Round codes demonstrated, however, that it was not necessary to amend the General Agreement to update it, and a similar approach is being used in the Uruguay Round. While GATT has largely lost the field of commodity agreements to UNCTAD, this loss is not very significant.<sup>114</sup> At the moment GATT seems to be the unchallenged forum for trade negotiations.

Third, GATT's members, and especially the United States, have to a certain extent conformed their domestic laws to GATT's requirements. After the completion of the Tokyo Round, many provisions of U.S. trade laws were rewritten in response to the Tokyo Round codes, thus bringing many "grandfathered" U.S. laws into compliance with GATT for the first time.<sup>115</sup> More importantly, in proposing and adopting trade legislation in the U.S. Congress, it is now much more common to provide for GATT consistency or authorize the President to compensate other parties for GATT violations than it was in the past.<sup>116</sup> This trend is true in other countries as well.<sup>117</sup> To the extent that GATT rules and procedures be-

112. The Tokyo Round Government Procurement was based on work done in the OECD. GATT, *supra* note 3, at 76. The OECD was also the forum for study of other trade problems. See, e.g., OECD, *POLICY PERSPECTIVES FOR INTERNATIONAL TRADE AND ECONOMIC RELATIONS (THE REY REPORT)* (1972).

113. See Gibbs, *Continuing the International Debate on Services*, 19 J. WORLD TRADE L. 199, 214-18 (1985); Schott, *Protectionist Threat to Trade and Investment in Services*, 6 WORLD ECON. 195, 212-13 (1982).

114. UNCTAD has approved an Integrated Program for Commodities, under which agreements are negotiated in respect of food, agricultural raw materials and minerals. These agreements have generally not been very successful. See, e.g., *Markets Test Commodity Agreements' Ability to Meet Objectives of Price Stabilization*, IMF SURVEY, Dec. 10, 1984, at 370. As a consequence, GATT may have benefitted by not having been tagged with their failure.

115. For example, the U.S. system for customs valuation was conformed to the Customs Valuation Agreement, 19 U.S.C. § 1401a (1982), and a material injury test was added to the U.S. countervailing duty statute. 19 U.S.C. § 1671(a)(2)(A) (1982 & Supp. III 1985).

116. See 19 U.S.C. § 2133 (1982); S. 490, 100th Cong., 1st Sess. §§ 304(b)(3)(A), 306 (1987).

117. See, e.g., Regulation No. 2641/84, arts. 1-2, Eur. Comm. O.J. No. L 252, at 1 (1984).

come institutionalized on a national level, GATT's position internationally is solidified.<sup>118</sup>

Thus, the GATT system is now much stronger than it was at times in the past. Consequently, it is much less likely that wrong cases would damage GATT in the future, especially since GATT survived such cases in the 1960s and early 1970s when it was a weaker institution. Thus, to the extent that the major drawback of a more legalistic dispute settlement system is the wrong case problem, that problem is becoming less significant. Because of the advantages of such a system, it is appropriate for GATT to move toward a legalistic dispute settlement system. GATT would be much more adversely affected by a general failure of its rules to be implemented than by an occasional refusal to implement a decision.

### C. Operational Criticisms

In addition to raising philosophical questions about the proper emphasis of the GATT dispute settlement system, its critics have also pointed to problems in the way it operates. Among the major problems cited are (1) the fact that some nations, especially the smaller ones, do not use the system; (2) delays in processing complaints; (3) failure to implement effectively panel decisions; (4) various defects in the panel process, such as poorly written decisions and bias; and (5) an inability to respond adequately to developing country complaints.

#### 1. Lack of Use

One of the major criticisms leveled against the GATT dispute settlement system prior to the Tokyo Round was that it was irrelevant because few nations, except occasionally the United States, made use of it.<sup>119</sup> Since the conclusion of the Tokyo Round in 1979, there has been a burgeoning of business for the dispute settlement system. Depending on how one counts disputes, there have been from five to seven disputes processed in the system per year.<sup>120</sup> Thus, nearly half of

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118. R. HUDEC, *supra* note 19, at 86.

119. *See supra* note 49.

120. A private GATT compilation suggests a slightly different number of disputes.

the cases filed in GATT's forty-year history have been brought in the short decade since the Tokyo Round. If only those disputes that lead to panel reports are considered, the conclusion is the same; that is, of the fifty-two panel reports issued in Article XXIII disputes, and the five under the Tokyo Round agreements, as of the end of 1986,<sup>121</sup> twenty-four (over forty percent) were issued from 1980 through 1986. Indeed, in the early summer of 1987, there were eight panels deliberating.<sup>122</sup> The problem of nonuse or desuetude is no more.<sup>123</sup>

The related criticism that only the United States was using the system, and that other countries, whether developed or developing, had abandoned it, is also no longer true. Since 1979 the United States has in fact been the major complainant, but it is closely followed by the EC. Canada has also made extensive use of the system. Although use by other countries has been sporadic, Hong Kong, Chile, Australia, Nicaragua, Finland, South Africa, India, and Brazil have all invoked the system at least once independently and a number of countries have jointly invoked it on one occasion.<sup>124</sup> The complaints have largely been directed at the EC, the United States, Japan, and

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121. GATT Focus, No. 46, at 2 (May 1987).

122. Letter to author from E.-U. Petersmann, GATT Office of Legal Affairs (June 16, 1987).

123. The cause of this increased use is not clear. The Tokyo Round did not work significant changes in the dispute settlement system, although the fact that much attention was focused on the system probably made parties more aware of its existence, which may have led some to try it. Additionally, as the United States started using the system more, other countries may have felt that they should too, if only to make sure that the United States had experience as a defendant and was put into a position of having to comply with adverse decisions. In any event, use of the dispute settlement mechanism in recent years has certainly been a more normal part of trade relations than it was a decade ago.

124. The ITC study shows that the following countries made multiple complaints between 1979 and 1985: United States (11); Canada (6); EC (6); Hong Kong (2). ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at I-19 to I-28. Since the cut-off date of the ITC study, frequent use of the dispute settlement system has continued and the EC has initiated at least three complaints against the United States that have been submitted to panels. The cases involve the U.S.-Japanese semiconductor trade agreement, the U.S. Customs users fee, and a U.S. tax on imported oil. 4 Int'l Trade Rep. (BNA) 192 (1987); GATT Focus, Nos. 44 & 46 (Mar. & May 1987). The EC's willingness to continue to make greater use of the system, and its general willingness to participate in the system, may depend on the results of its complaints, and particularly those in which it prevails. If effective implementation is not achieved, one can visualize the EC denouncing the adjudicative aspects of the system as inherently unsound.

Canada, although Norway, Spain, New Zealand, and Finland have also been respondents.<sup>125</sup> Thus, it would seem that the system has been tested by a wide variety of countries and that cases regularly involve the four largest western trading countries—the United States, the European Community, Canada, and Japan.<sup>126</sup> Frequent use by the largest trading countries suggests that they now have greater confidence in the system.

The increased volume of GATT dispute settlement cases has put to rest the argument that expanded use would overload the system and lead to its collapse because of a shortage of people available to serve on panels.<sup>127</sup> The fact that the EC is often involved in disputes means that officials of small EC states, often viewed as well-informed, neutral GATT experts, are often no longer available to serve on panels. Nonetheless, in general panels have been formed expeditiously to hear the relatively numerous disputes that GATT has processed in recent years.<sup>128</sup> Moreover, because a wide variety of individuals has served on panels, no countries have borne a significantly disproportionate share of panel work.<sup>129</sup>

## 2. Delays

One of the primary complaints about the GATT dispute settlement system has been the supposedly excessive amount of time that it takes to process disputes.<sup>130</sup> Delays have been of

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125. The ITC study shows the following countries have been respondents in more than one complaint between 1979 and 1985: EC (12); United States (8); Japan (5); Canada (3); Spain (2). ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 1-19 to 1-28.

126. Japan has yet to initiate a complaint, although it recently asked for formal consultations (the first step in the dispute settlement process) with the United States in respect of the U.S.-Japanese dispute over trade in semiconductors. GATT FOCUS, No. 48, at 1 (July-Aug. 1987).

127. See *Multilateral Trade Negotiations: Dispute Settlement*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 129, 135 (1980) (remarks of Thomas R. Graham); *id.* at 141 (remarks of Michael Gadbaw).

128. As demonstrated below, the significant delays associated with dispute settlement in recent years have occurred after completion of the panel's work. See *infra* text following note 138.

129. In the twenty panel reports published by GATT in the BISD supplements from 1979 to 1986, fifty-seven different individuals filled the sixty-two panel positions. In the eleven reports published from 1979 to 1982 involving three-person panels, eighteen countries were represented on the panels, with only individuals from Switzerland(6), Sweden (4) and Finland (3) serving more than twice.

130. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 71.

three sorts: delays in appointing a panel, delays in the panel's consideration of a case, and delays caused by the failure of the Council to adopt panel reports. The *DISC* case is a prime example: It took almost three years to agree on the composition of a panel and the Council did not adopt the panel's report for another five years.<sup>131</sup>

Inordinate delay in processing disputes, however, has not been a major problem in most recent cases. Since the Tokyo Round, it has been rare for more than eighteen months to elapse between the date of a complaint and the date that the relevant panel report is adopted.<sup>132</sup> Indeed, the GATT process has been completed in less than about two years in virtually all cases, except those involving U.S.-EC agricultural disputes.<sup>133</sup> Furthermore, the time has been diminished since the

131. See *supra* text accompanying notes 54-57. The *DISC* case presented unusual, perhaps unique problems. It was the first case where outside experts were included on a panel and it involved a sort of counterclaim to the initial complaint, which the United States insisted should be considered by the same panel as the EC complaint. See generally Jackson, *supra* note 54, at 762-63.

132. It is difficult to judge the exact length of time between the date of a complaint and the adoption of a panel report by the Council because the precise date on which a complaint was made is not always clear. According to the dates used in a private GATT compilation of disputes, more than eighteen months elapsed between the date of the complaint and the adoption of the panel report by the Council in the following cases: GATT, United States—Prohibition of Imports of Tuna and Tuna Products from Canada, *BISD*, *supra* note 1, at 91 (29th Supp. 1983) (25 months); GATT, United States—Imports of Certain Automotive Spring Assemblies, *BISD*, *supra* note 1, at 107 (30th Supp. 1984) (20 months); GATT, United States Manufacturing Clause, *BISD*, *supra* note 1, at 74 (31st Supp. 1985) (20 months); GATT, Canada—Administration of Foreign Investment Review Act, *BISD*, *supra* note 1, at 140 (30th Supp. 1984) (23 months). In addition, two years elapsed between the U.S. complaint against Spanish restrictions on sale of soybean oil and the decision of the Council to "note" the report, *Int'l Trade Rep. Export Weekly (BNA)*, No. 382, at 154 (Nov. 10, 1981), and at least nineteen months elapsed between the South African complaint against Canadian provincial taxes on gold and discussion of the panel report in the Council. See *GATT Focus*, No. 38, at 2 (Feb.-Mar. 1986). The latter case was settled. *Id.* Under the Government Procurement Code, almost two years elapsed between a U.S. complaint on EC practices and the adoption of the panel report by the Committee on Government Procurement. GATT, Panel On Value-Added Tax and Threshold, *BISD*, *supra* note 1, at 247 (31st Supp. 1985); see also ITC Dispute Settlement Study, *supra* note 25, at I-24.

133. In cases involving U.S. challenges to EC production subsidies for canned fruit and EC preferences for Mediterranean citrus fruit, the panel reports in favor of the United States were not adopted, although settlements were reached 47 and 52 months, respectively, after the dates of the complaints. *GATT Focus*, No. 38, at 1 (Feb.-Mar. 1986); 3 *Int'l Trade Rep. (BNA)* 1316 (1986).

Dispute settlement under the Tokyo Round Subsidies Code is the major excep-

1982 Ministerial Declaration, which stresses the need for prompt processing of disputes.<sup>134</sup> In the past five years, an average of a little more than twelve months has elapsed between the Council decision to appoint a panel and a Council decision to adopt the panel's report.<sup>135</sup> The work of the panels themselves has typically taken only about six months.<sup>136</sup> Indeed, as of this writing the most recent adoption of a panel report took place only four and one-half months after the decision was made to appoint a panel.<sup>137</sup> Given the speed at which court litigation proceeds in most countries, this is not a bad record.<sup>138</sup> Indeed, it is a very good one.

To the extent that delays have occurred in recent years, the most serious ones have resulted largely from the right of a losing party to block adoption of the panel report by the GATT Council.

### 3. Implementation of Decisions

Another of the principal criticisms leveled at the GATT dispute settlement system has been that it has been unsuccessful in ultimately resolving disputes because panel decisions may never be adopted, and, even if adopted, are not effectively implemented.<sup>139</sup> There are three instances when the GATT dispute settlement system can be said to have failed: first, where the panel report is adopted, but the recommendations are not implemented; second, where the panel report is not adopted, and the recommendations are not implemented; and

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tion to an assertion that delays have been significantly reduced. Although panel reports were issued in 1983 in respect of EC export subsidies on wheat flour (no violation found) and pasta (violation found) and in 1985 in respect of a provision of the U.S. 1984 Trade and Tariff Act, no panel reports under the Code have been adopted by the code committee. GATT Focus, No. 46, at 2 (May 1987); see BIRD, *supra* note 1, at 161-62 (32d Supp. 1986); 3 Int'l Trade Rep. (BNA) 584 (1986).

134. 1982 Declaration, *supra* note 17, at 13-16. The Declaration stressed the need to follow the targets of the 1979 Understanding on Dispute Settlement, which provided that panels should normally be constituted within thirty days of the decision to establish them and that the panel should normally report without undue delay and within three months in urgent cases. See 1979 Understanding, *supra* note 20, ¶¶ 11, 20.

135. GATT Focus, No. 46, at 2 (May 1987).

136. *Id.*

137. 4 Int'l Trade Rep. Current Reports (BNA) 192, 814 (1987) (U.S. tax on imported oil).

138. See *infra* text accompanying note 197.

139. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 71-72.

third, where the panel report is not adopted, but the recommendations are implemented. Whether this last instance should be considered a failure is discussed below.

At the outset, it must be conceded that it is difficult to evaluate the GATT dispute settlement system's performance because it is not always easy to determine objectively whether a dispute has been successfully resolved. Since complainants often seek initially more than they would happily accept, success cannot be judged on whether one party obtained complete vindication of its initial position, or even obtained all that was recommended in a panel report. It is more useful to try to determine if the contending parties have accepted a certain outcome as resolving the dispute.<sup>140</sup>

The application of this criterion to cases where the Council adopted the dispute settlement panel's report leads to the conclusion that the GATT dispute settlement system has worked quite well. According to a GATT Secretariat analysis of the results of the fifty-two cases processed under the General Agreement that have led to the issuance of panel reports, all but two findings of violations have led to compliance or settlement.<sup>141</sup> In some cases, considerable time has elapsed be-

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140. To consider whether the parties ultimately reached a satisfactory adjustment of their dispute is not to argue that the focus of the GATT dispute settlement system should necessarily be to facilitate negotiated settlements of disputes. The adjudicatory process by which one party's position is determined to be the correct interpretation of the General Agreement can play an important role in what sort of settlement the parties reach. The prevailing party in the dispute settlement system will have a stronger argument that its position should prevail in any negotiated settlement.

141. GATT Focus, No. 46, at 2 (May 1987). The GATT Secretariat may take a somewhat broader view of when settlements are successfully reached than other observers. The ITC study found that in twenty-five of sixty-three (40%) of cases where a panel decision favored complainant, the offending practices were terminated; and that in twenty-nine cases (45%) the practices were changed in part or a settlement was reached. In one case retaliation was authorized; in five cases no action was taken to correct the practice. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 62. In two of the five cases, the panel reports were later implemented when the U.S. manufacturing clause expired in 1986 and when the EC changed its practices in valuing contracts for purposes of the Government Procurement Code. As to the other three cases, two involved EC sugar subsidies where the panels arguably did not find substantive violations (except for a failure to consult, *see* GATT, EEC Refunds on Exports of Sugar, BISD, *supra* note 1, at 290 (26th Supp. 1980); BISD, *supra* note 1, at 69 (27th Supp. 1980)) and one involved U.S. measures affecting Nicaraguan sugar quotas, which the U.S. indicated were part of a broader political dispute and not a

tween the panel decision and compliance or settlement.<sup>142</sup> Nonetheless, it is extremely important to bear in mind when considering proposals for change that the current system has usually produced successful results.

When the Council does not adopt the panel report, the system seems to fail. It is important to note, however, that the failure to adopt the report does not mean that the dispute is not ultimately successfully resolved. The loser in the panel proceeding may have been the complainant.<sup>143</sup> In other cases, the dispute may have been settled—in some cases promptly,<sup>144</sup> in other cases only after the passage of several years.<sup>145</sup> To the extent that a settlement is eventually reached between the parties, the system can be considered to have worked. Even if a rather long delay ensues before settlement, settlement is still achieved.<sup>146</sup> The failure of the Council to adopt reports in these cases, however, undermines the system because it deprives the panel report of any precedential effect.<sup>147</sup>

The case where the report is not adopted after a complainant has prevailed and no settlement is reached represents a clear failure of the dispute settlement system. In fact, few of these cases have arisen, particularly because over time disputes have been settled. Particularly problematic since the Tokyo Round has been the failure of the Subsidies Code Committee to adopt reports and the failure of the parties to settle the cases. However, of the three reports that have not been adopted, one involved a loss by the complainant (U.S. complaint against EC subsidization of flour exports),<sup>148</sup> one was eventually settled (successful U.S. complaint against EC subsidies on pasta exports),<sup>149</sup> and one was eventually rendered

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subject for settlement in GATT. See GATT, U.S. Imports of Sugar from Nicaragua, BISD, *supra* note 1, at 72 (31st Supp. 1985).

142. See, e.g., *supra* note 137.

143. For example, the United States, as complainant, did not prevail in the Spanish soybean case, see Int'l Trade Rep. Export Weekly (BNA) No. 382, at 154 (Nov. 10, 1981), and the EC Wheat Flour export subsidies case. See 18 Int'l Trade Rep. Export Weekly (BNA) 899 (1983).

144. This was true of the South African complaint against Canadian provincial taxes. See *supra* note 135.

145. See *supra* note 137.

146. See *supra* text accompanying note 45.

147. See *infra* text accompanying note 195.

148. See *supra* note 143.

149. See *infra* note 205.

moot by the expiration of the legislation challenged (successful EC complaint against U.S. definition of wine industry in U.S. countervailing duty law).<sup>150</sup> Although the GATT dispute settlement system did not remove the underlying dispute in these cases, it did influence the outcome of negotiations in the *Pasta* case. Thus, the system was not a total failure. Of course, even if it does not preclude the eventual settlement of the dispute, lack of adoption of a panel report does slow down that settlement. The fact that settlements are usually reached raises the question whether automatic adoption of panel reports would encourage quicker settlements.<sup>151</sup>

#### 4. Problems of the Panel Process

A number of specific complaints have been raised about the operation and status of dispute settlement panels: a lack of distinction, questionable neutrality, and poorly crafted reports. These criticisms are at least in part well founded.

First, as we have seen, panels are usually composed of persons with limited or no prior panel experience.<sup>152</sup> This problem is magnified when, as is often the case, the dispute involves the United States and the EC, and panelists by necessity must be drawn from smaller countries. It has been questioned whether such persons have the necessary stature to render a decision that will be respected.<sup>153</sup> While the advice and assistance of GATT officials may steer panels clear of major mistakes, it is inevitable that a decision by a panel drawn from smaller countries and with little, if any, prior dispute settlement experience will not be as respected as a decision by a panel of three internationally-recognized experts.

Second, questions have been raised about the neutrality of panel members.<sup>154</sup> For the panel system to work, panelists must have some knowledge of GATT. Since use of govern-

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150. Section 612(a)(1) of 1984 Trade and Tariff Act expired on September 30, 1986. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 626(c)(2), 98 Stat. 2048, 3042-43 (1984).

151. See *infra* text accompanying notes 190-92.

152. See *supra* note 129.

153. See, e.g., R. HUDEC, *supra* note 19, at 48-49.

154. See Jackson, *supra* note 60, at 6.

mental panelists is preferred,<sup>155</sup> panels inevitably consist of government officials in the trade area. No matter how hard such panelists try to be impartial, there is always the possibility that they will be influenced in their decision by consideration of how it may influence their own personal future in their country's diplomatic service. Indeed, unconfirmed folklore suggests that a country with an interest in a dispute once reminded a panelist that his decision could affect his career. In any event, even if such pressures never occur and even if panelists are truly neutral, there will always be concern about the possibility of bias. As such, the system may not have the appearance of impartiality, and this image will undermine respect for its decisions.

Third, in respect of the panels' work, it is suggested that they often do not produce clear decisions to serve as precedent for the GATT community.<sup>156</sup> Two related problems are involved here. First, it is true that panels have sometimes attempted to avoid difficult decisions and obfuscation is obviously one means of doing so. Indeed, some commentators have encouraged panels to act in this manner.<sup>157</sup> Second, it is true that the status of a panel decision in GATT is unclear.<sup>158</sup> Although panel decisions do occasionally cite prior panel decisions as support,<sup>159</sup> there is no general acceptance in GATT of the notion that a panel decision constitutes a binding precedent to be followed in future cases. If the goal of the dispute settlement system is to promote compliance with GATT rules, however, it is clear that panel decisions would more effectively achieve that goal if they were clear and if they were understood to represent GATT law as it will be applied in similar cases in the future.

### 5. The Position of Developing Countries

Developing countries have only seldom made use of the dispute settlement system, even though special rules exist that

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155. GATT, Decision on Dispute Settlement Procedures, BISD, *supra* note 1, at 9-10 (31st Supp. 1984).

156. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 72.

157. As noted above, such an approach is undesirable. See *supra* note 98.

158. See, e.g., Jackson, *supra* note 60, at 7.

159. See, e.g., GATT, U.S. Manufacturing Clause, BISD, *supra* note 1, at 74, 88 (31st Supp. 1985).

are designed to make it easier for them to do so.<sup>160</sup> In large part, this seems to be a consequence of their belief that the system is, at best, designed to deal with disputes between the major developed countries. It is thought to be futile for them to invoke the system because GATT will not give a sympathetic ear to their claims (as demonstrated by the Uruguayan case in the 1960s)<sup>161</sup> and that even if they win their case they will not have the diplomatic or economic muscle to ensure that the decision is implemented (as demonstrated by the U.S. refusal to implement several successful findings against the United States by smaller countries).<sup>162</sup>

### 6. Conclusion

A number of problems exist with the GATT dispute settlement system. The principal problems are delay (and particularly the right of a party to block adoption of a decision), a failure of some decisions to be implemented (including some in favor of smaller countries), and a number of specific procedural or operational problems. The next section considers reforms that would reduce or eliminate these concerns.

### III. PROPOSALS FOR REFORM

The principal goal of reforming the GATT dispute settlement system must be to improve overall compliance with GATT rules.<sup>163</sup> This goal can be accomplished by adopting features that would make the system more legalistic.<sup>164</sup> While a more legalistic system will probably increase the number of disputes brought to the system,<sup>165</sup> such result would be desirable. Greater use will make recourse to the system seem normal, thereby reducing concerns about poisoning the atmos-

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160. See 1979 Understanding, *supra* note 20, ¶ 7; GATT, Procedures under Article XXIII, BISD, *supra* note 1, at 18 (14th Supp. 1966).

161. See *supra* note 47.

162. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 71. The United States did not change its agricultural quotas despite some attempt at retaliation by the Netherlands. See R. HUDEC, *supra* note 1, at 165-82. More recently, the United States ignored an adverse panel decision concerning U.S. restrictions on sugar imports from Nicaragua. GATT, U.S. Imports of Sugar from Nicaragua, BISD, *supra* note 1, at 67 (31st Supp. 1985).

163. See *supra* text accompanying notes 70-73.

164. See *supra* text accompanying notes 100-05.

165. See *supra* text accompanying note 74.

phere in which GATT operates.<sup>166</sup> In addition, more rulings will increase the corpus of GATT law and result in more detailed rules, both of which will lead to increased overall compliance with GATT rules.<sup>167</sup>

This section will consider changes to the system that will address the criticisms and problems discussed in the foregoing section in a way that emphasizes adjudication in dispute settlement. Three major reforms are proposed. First, to reduce delays, panel reports should normally be adopted automatically, absent certain special circumstances. Second, the GATT system should not hesitate to authorize (and thereby regulate) the use of retaliatory actions to encourage implementation of GATT decisions. Finally, a number of procedural improvements should be made in the way the panel process operates. In particular, panelists should be drawn exclusively from a limited roster, or so-called superpanel, of GATT experts.<sup>168</sup>

#### A. *Reducing Delays: Changing the Rule on Consensus*

Three elements to the problem of delays were previously identified: delays in the establishment of panels, delays in panel consideration of cases, and delays in adoption of panel reports.<sup>169</sup>

##### 1. Panel Establishment

Turning first to the problem of panel establishment, delays may occur because a complainant does not have a right to have a panel appointed and because the appointment process itself may be lengthy.<sup>170</sup> Two reasons can be advanced for not automatically appointing panels when a complaint is made: first, the desire to see the dispute resolved amicably; and second, the wish to prevent wrong cases from entering the system. To respond to the former concern, it is necessary to bal-

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166. See *supra* text accompanying notes 78-79.

167. See *supra* text accompanying notes 100-05.

168. These proposals will be contrasted as appropriate with other proposals to reform the system, particularly those made by Professors Jackson and Hudec and by the U.S. government. See R. HUDEC, *supra* note 19; Bliss, *GATT Dispute Settlement Reform in the Uruguay Round*, 23 STAN. J. INT'L L. 31, 51-52 (1987) (summary of U.S. government proposals); Jackson, *supra* note 60.

169. See *supra* text accompanying notes 130-38.

170. See *supra* text accompanying notes 24-29.

ance GATT's interest in promoting friendly relations and the complainant's interest in having its complaint heard. As to the latter point, we have already noted that it is inappropriate to handle the wrong case problem by controlling access to the system.<sup>171</sup>

The basic issue is: how long should the complainant be required to seek a negotiated settlement? By the terms of Article XXIII, the complainant will already have entered negotiations with the respondent before making its complaint.<sup>172</sup> The filing of the complaint indicates that those negotiations have failed and that the complainant is serious, and suggests that it may be time to try another approach to resolve the dispute. Providing for automatic establishment of panels would not be a major change since panels are virtually always appointed now.<sup>173</sup> Moreover, this is the rule under the Tokyo Round Codes and has not in itself caused problems.<sup>174</sup> Nonetheless, to avoid unnecessary panel proceedings, it would be useful to allow the respondent one last chance to settle. This can be accomplished by requiring that one Council meeting intervene between the filing of the complaint and the appointment of the panel. If no settlement is reached in that period, the interest in promoting amicable settlements has been satisfied and there is no reason not to establish a panel. The desire to promote negotiated solutions should not be stressed so strongly that the dispute settlement system is not used.

A second type of delay in the panel establishment process occasionally arises when panels are not promptly constituted.<sup>175</sup> As discussed below, it would be desirable for GATT to adopt a system whereby panelists are selected from a superpanel.<sup>176</sup> If such a change is implemented, any delay in

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171. See *supra* note 96.

172. GATT, *supra* note 1, art. XXIII:1, 61 Stat. (pt. 5) A3, A64, T.I.A.S. No. 1700, at 60, 55 U.N.T.S. 188, 266-68.

173. Although this change seems minor, it was a contentious issue in the Tokyo Round. GATT, *supra* note 3, at 105. Most proposals for reform would provide automatic access. See R. HUDEC, *supra* note 19, at 71-75; Jackson, *supra* note 60, at 16.

174. This conclusion might be challenged because of the unsatisfactory experience of dispute settlement under the Subsidies Code. See *supra* note 137. However, the problems under that Code stem mainly from definitional uncertainties. GATT Focus, No. 46, at 2 (May 1987).

175. The *DISC* case is the classic example. See *supra* text accompanying note 131.

176. See *infra* text accompanying notes 217-21.

panel selection could be minimized. Since the amount of delay occasioned by slowness in the establishment of panels is not great, these changes would have only a minor effect on reducing delays in the average case, but they would eliminate problems that arise from time to time.

## 2. Panel Deliberation

Delay may also arise in panel consideration and decision of cases.<sup>177</sup> The major source of delay is footdragging by one party in providing information or otherwise participating in the procedure.<sup>178</sup> To solve this problem, panels should be authorized to go forward on the basis of the best information available.<sup>179</sup> This power should be exercised cautiously, as decisions based on incomplete information will be suspect, even if the respondent is the cause of the problem.<sup>180</sup> Its existence, however, will likely improve cooperation by the parties.

In order to speed up panel deliberations, general goals for prompt consideration of cases should be established. Although it has become very fashionable in U.S. trade law to specify time limits for almost every sort of decision,<sup>181</sup> the varying complexity of international trade disputes means that setting specific deadlines for various stages of a proceeding is unrealistic.<sup>182</sup> Many GATT disputes involve more difficult

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177. See *supra* note 136.

178. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 71.

179. GATT recognizes that this is an appropriate response in antidumping and countervailing duty cases. GATT, Agreement on Implementation of Article VI, art. 6:8, BISD, *supra* note 1, at 171 (26th Supp. 1980); Agreement on Interpretation and Application of Articles VI, XVI and XXIII, art. II:9, *id.* at 56.

180. See R. HUDEC, *supra* note 19, at 74-75. Hudec opposes such a rule for this reason. Not to give the panel this power, however, would allow a party to cripple the system, and that is a greater threat in the long run.

181. See, e.g., 19 U.S.C.A. §§ 1671a-1671e, 1673a-1673b, 1673d-1673e (West 1980 & Supp. 1987); 50 U.S.C. App. § 2409 (1982 & Supp. III 1985); see also 4 Int'l Trade Rep. (BNA) 926 (1987) (EC External Affairs Commissioner De Clercq: "Americans love deadlines, they just adore them.").

182. U.S. proposals for revising the GATT dispute settlement procedures would establish such deadlines. See Bliss, *supra* note 168, at 51. Moreover, failure to meet deadlines would be a justification for some form of retaliation. Although retaliation may be a useful tool in resolving a dispute once the decision has been made as to which party is in the right, retaliation at earlier stages of the process would be premature and could truly poison the atmosphere and exacerbate trade problems by promoting conflict over arguably extraneous issues. Given that major problems of delay do not occur at this stage, this proposal seems unnecessary as well as risky. Recog-

problems than U.S. trade law cases, which often concern only the evaluation of statistical evidence to calculate dumping margins or subsidies or to determine injury issues. While these evaluations may sometimes be difficult, they are largely mechanical processes that are routinely repeated by an administrative agency. Disputes in GATT are much more likely to be *sui generis*. As such, establishing specific deadlines will likely lead only to more failures to meet the deadlines. However, parties should be encouraged, even pressured, not to be obstructive. Use of experienced panelists, as suggested below,<sup>183</sup> would probably make panel procedures on the whole more efficient than they are at present.

### 3. Blockage

The third form of delay results when parties (usually the losing party, but sometimes joined by others) block adoption of a panel report by the GATT Council.<sup>184</sup> This situation is possible because GATT has traditionally operated by consensus, even though the General Agreement establishes a one-nation/one-vote system.<sup>185</sup> Thus, if the losing party prevents formation of a consensus, the report is not adopted and has no effect.<sup>186</sup> GATT has recognized that this problem is a serious one: Under the 1982 Ministerial Declaration it is suggested that outright obstructionism for no reason might not be viewed as acceptable.<sup>187</sup> Unfortunately, so long as a country offers some excuse—such as a need to explore further the possibility of a negotiated solution to the dispute—the lack of consensus is accepted as blocking adoption of a panel report.

Before considering means of addressing this problem, however, it is useful to consider how the right of blockage might be justified. Two reasons can be advanced for allowing blockage. One is that it is wrong or at least counterproductive to label one side a loser over its objections. This is essentially

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nizing the panel's right to use the best available information would better solve the problem of uncooperative parties.

183. See *infra* text accompanying notes 217-21.

184. See *supra* text accompanying notes 143-151.

185. GATT, *supra* note 1, art. XXV:3, 61 Stat. (pt. 5) A3, A68, T.I.A.S. No. 1700, at 64, 55 U.N.T.S. 188, 272; see *supra* note 35.

186. 1982 Declaration, *supra* note 17, ¶ (x).

187. *Id.*

a reprise of the argument, previously rejected, that the GATT dispute settlement system should be based on negotiation rather than adjudication.<sup>188</sup>

Second, it is asserted that blockage is an appropriate right because it is the responsibility of the contracting parties to interpret the General Agreement, and absent consensus (GATT's traditional method of decision-making) the contracting parties cannot act. While it is true that the ultimate responsibility for interpretation of the General Agreement rests with the contracting parties,<sup>189</sup> this argument over-simplifies matters because it does not adequately consider the role of panels in dispute settlement. Essentially the contracting parties have delegated their responsibility for dispute settlement to the panel system. As a consequence of this delegation, it is reasonable to contend that the panel's decision should be presumed to be the decision of the contracting parties, and that the party opposed to the decision should bear the onus of showing that it should not be adopted. Thus, it would make more sense for a decision to be deemed adopted unless there is some special reason for requiring consensus for adoption of the report.<sup>190</sup>

Such a procedure would obviously be a change from the present practice, but it is not a fundamental attack on the use of consensus for decision-making in GATT. The rule being interpreted by the panel would have been adopted by consensus, the dispute settlement system itself would have been adopted by consensus, and, assuming the use of a superpanel, the body from which the panel was drawn would have been chosen by consensus. Since dispute settlement was initially delegated to the panel process because the contracting parties as a group were not deemed well suited to engage in dispute settlement,<sup>191</sup> it seems inappropriate to allow them to take control of a dispute at the very end of the panel process.

In addition to solving the problem of delay caused by blockage, such a change would remove the appearance of bias

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188. *See supra* text accompanying notes 106-18.

189. This conclusion is mandated by the wording of Article XXIII. *See supra* note 8.

190. It would also be inappropriate to deem a report adopted if a majority of the contracting parties opposed adoption.

191. *See supra* note 18 and accompanying text.

inherent in a system where a party is indirectly a judge of its own conduct. Making the system appear to be fairer in this manner would be particularly valuable to the extent that domestic interest groups must be persuaded to accept the results of the system. As long as the right of blockage exists, those groups will urge their governments to avoid use of the system, or, if their position loses, they will want their government to exercise the right. Either way, GATT suffers.

There is, however, one instance where automatic adoption of panel reports should be considered inappropriate. While panels should not interpret the General Agreement so freely as to impose obligations where none existed before,<sup>192</sup> it is possible that they may do so, or at least may be perceived as having done so by some contracting parties. Since a panel under the dispute settlement system does not represent all parties to GATT, if the panel in fact imposes a new obligation, it should be implemented only if there is a consensus. This case must be distinguished from nonviolation cases, where it is understood that panels are not imposing obligations, but are only recommending solutions to disputes.

The obvious problem is determining who decides whether the decision interprets an existing obligation or imposes a new one. The solution lies in presuming that a superpanel report is deemed adopted after consideration at two Council meetings without objection. That presumption would not apply if the superpanel voted that a new obligation had been imposed, or, that for some other reason (such as the decision was unexpected or novel or even wrong), adoption should be by consensus. To ensure that the interests of GATT as a whole would be considered in the decision, it should be provided that (i) the superpanel for such decisions would include the Director-General and/or one or two other GATT officials (for example, the chairman of the contracting parties) and (ii) that less than a majority (for example, 4 of 12) could rule that adoption of the decision would be only by consensus.

This proposal would eliminate blockage except in cases where new obligations have been imposed or where there is a strong feeling that adoption should not take place absent consensus. In those cases, to allow blockage does not seem inap-

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192. 1982 Declaration, *supra* note 17, ¶ (x).

appropriate. Since one of the principal causes of delay is blockage, solving the blockage problem would largely solve the delay problem.<sup>193</sup> In addition, this proposal provides a reasonable procedure for submitting to consensus those cases that are too controversial. It is also realistic in that it does not place an undue burden on the losing party. No new obligation is being imposed on the losing party. The party still retains control over whether and how it will respond to the decision. The only change is that it will no longer be able to pretend that it did not lose when negotiations are held on the question as to how the decision will be implemented. Nor would GATT as a whole lose control of disputes. If a decision were perceived by many as wrong, adoption by consensus would presumably be required by the superpanel. Moreover, if for some reason the superpanel did not require adoption by consensus, two thirds of the contracting parties could grant a waiver or a majority could vote not to adopt the report.

This proposal would have two additional advantages. First, because the panel's decision would be reviewed by the superpanel, the proposal establishes an appellate review process of sorts.<sup>194</sup> The precise scope of review would have to be defined since frequent "appeals" should be discouraged. In addition, the superpanel could consider the correctness of a panel decision in ruling on whether the panel report would be automatically adopted. Second, this proposal would largely eliminate the practice whereby some panel reports are simply "noted" or otherwise consigned to limbo.<sup>195</sup> Even if the underlying dispute is resolved, the failure to adopt the panel report technically deprives the GATT system of useful precedents. Assuming the superpanel does not rule that consensus is needed for adoption, all reports should be adopted.

This proposal would work a significant change in GATT procedures. An alternative proposal that is more modest would be for the contracting parties to decide that consensus for purposes of adopting a panel decision would not include the two disputing parties.<sup>196</sup> It is questionable whether this

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193. Even if the Council decision was stayed for referral to the contracting parties, a poll could be taken promptly.

194. Jackson, *supra* note 60, at 7-8.

195. See *supra* cases cited in notes 143-44.

196. The United States has made this proposal. See Bliss, *supra* note 168, at 51.

proposal would reduce blockage. Presumably any major power could persuade a stalking horse to present its position. Moreover, it will often be the case that other parties will have an interest in the outcome as great as the disputant's. Thus, this proposal is unlikely to work absent an amount of good faith that would be sufficient to make the present system work.

In summary, under the procedure as outlined above there would be little delay in the adoption of panel reports. After a conciliation period, a party could file a complaint prior to a GATT Council meeting. The respondent would be expected to respond at the next Council meeting, normally a month or so later. If the response was inadequate in that the dispute continued, a panel would be appointed. If the superpanel proposal is adopted, the panel could easily be constituted and establish its work program in the following month. Allowing the parties three months to present their arguments in writing and orally would probably suffice in most cases, and another month or two would suffice for the panel to draft its decision and receive the parties' comments. Absent a superpanel decision to the contrary, the report would be automatically adopted at the second Council meeting. Thus, most cases could be resolved in six or seven months after a complaint was filed. Even the most determined footdragging would not lead to the typical case lasting for more than one year.

Is this fast enough? In the United States, the typical federal appellate case takes about 10 months, not counting the possibility of applying for certiorari.<sup>197</sup> Since the GATT panel must engage in fact finding, as well as in considering the parties' arguments, it is eminently reasonable to allow it a year or so to process a dispute.

### *B. Implementation of Decisions: Use of Retaliation*

Most disputes are settled once the panel report has been adopted.<sup>198</sup> Nonetheless, not all disputes are settled and some are settled with less than full compliance with the panel decision.<sup>199</sup> It is therefore appropriate to consider ways to im-

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197. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 123 (1985).

198. See *supra* text accompanying notes 141-42.

199. See *supra* note 141.

prove implementation of panel recommendations.

As a first step, GATT needs to monitor implementation of recommendations. Information about a party's implementation is not now generally available.<sup>200</sup> It would be appropriate to require a losing party to report regularly to the Council on the status of its implementation of the panel recommendation. This obligation may lead to more peer pressure to comply and is consistent with early GATT practice.<sup>201</sup>

Two other methods might also improve implementation: first, the more frequent authorization of retaliation; and second, the use of sanctions. Historically, GATT has not authorized retaliation, with one ancient exception.<sup>202</sup> Retaliation is, of course, completely antiethical to the antilegalist position. Nonetheless, retaliation occurs, and it is arguably helpful in resolving otherwise intractable disputes. It is therefore appropriate to consider how retaliation might be used in the GATT dispute settlement system.

Retaliation heightens the intensity of a dispute. As such it should be authorized only after serious review of the status of noncompliance. Generally, retaliation would not be appropriate unless some time had passed and the panel recommendations had not been accepted. It would be difficult to fix a general time limit, but panels could indicate in each case when they would consider an application for authority to retaliate. That time might vary, for example, depending on whether implementation required legislative approval or could be implemented by executive action, or whether the case involved a rule violation or a non-rule-based claim of nullification and impairment.<sup>203</sup>

Would more frequent authorization of retaliation be desirable? In GATT's early years, retaliation was rare and seldom

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200. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 72.

201. See R. HUDEC, *supra* note 1, at 186.

202. See GATT, Netherlands Measures of Suspension of Obligations to the United States, BISD, *supra* note 1, at 32, 62 (1st Supp. 1953).

203. Retaliation authorized by a panel should not need to be reviewed by the Council, although it could be treated as a new panel report. Implicit in adoption of a report should be recognition of the possibility that retaliation may be authorized. In non-rule-based cases, retaliation should probably be used more sparingly, but should still be available. Because the panel's decision in those cases essentially holds that the respondent's actions should be redressed, it is appropriate to pressure the respondent to take such action.

serious.<sup>204</sup> It has been on the upswing in recent years. Although done without GATT authorization, it has often occurred in connection with GATT-related disputes between the United States and the EC, particularly those where panel decisions have not been adopted. In these cases, it has had some positive results in leading to negotiated settlements. For example, it has led to settlements of the EC-U.S. disputes over steel import controls, citrus preferences, pasta export subsidies and Spanish-Portuguese accession to the EC, as well as improved adherence by the Japanese to the U.S.-Japanese trade agreement on semiconductor trade.<sup>205</sup>

The basic reason why retaliation can work is that a trade dispute typically involves a GATT-violating provision that affords some advantage to a domestic industry. So long as that industry is pushing hard against implementing an adverse decision, and no other domestic constituency is arguing the contrary position, government officials may not be politically able to implement the decision, even if they wish to do so. Once retaliation occurs, however, another domestic constituency will consider its interests harmed by the failure to resolve the dis-

204. As of 1977, Hudec noted six cases of non-GATT authorized retaliation. R. HUDEC, *supra* note 19, at 82-83. With one possible exception, Hudec characterizes the retaliation as symbolic in nature. *Id.*

205. For example, on November 1, 1985, the United States increased tariffs on pasta. 2 Int'l Trade Rep. (BNA) 1389 (1985). The EC retaliated by raising tariffs on U.S. walnuts and lemons. In August 1986 a compromise was reached which involved a settlement of the citrus preferences and semifinished steel disputes, and also included the EC removing restrictions on U.S. walnuts and lemons in return for the tariff on pasta being removed. As part of the settlement, it was agreed that there would be further negotiations aimed at settling the issue of export refunds on pasta by July 1, 1987. 3 Int'l Trade Rep. (BNA) 1024 (1986). A settlement was ultimately achieved. 4 Int'l Trade Rep. (BNA) 1004 (1987).

In the Spain-Portugal accession case, the United States and EC threatened to impose tariffs. *See, e.g.*, Proclamation 5601 of January 21, 1987, 52 Fed. Reg. 2663 (1987). The dispute was settled without actual implementation of retaliatory measures when the EC guaranteed that Spain and Portugal would continue to import certain minimum quantities of farm products over the next four years and agreed to lower tariffs on a variety of other agricultural and chemical products. *See* 4 Int'l Trade Rep. (BNA) 122 (1987).

In the semiconductor case, following claims that Japan had not lived up to Agreement on Semiconductor Trade with Japan, the United States imposed 100% duties on certain Japanese computers, television sets, and power tools in retaliation. Proclamation No. 5631 of April 17, 1987, 52 Fed. Reg. 13,412 (1987). The duties on television sets were later removed because of increased Japanese compliance with the Agreement.

pute. If the other country has carefully targeted its retaliation, that constituency will be a relatively powerful one, such that there will be considerable pressure placed on the government to resolve the trade dispute. Since the domestic pressures will to some degree be offsetting, it will be easier to act contrary to the interest defending the condemned practice.<sup>206</sup>

Counterretaliation is clearly contrary to the General Agreement, but it is possible (perhaps even likely) if the U.S.-EC experience is a guide.<sup>207</sup> Now, of course, neither retaliation nor counterretaliation is authorized. If, however, GATT were to authorize retaliation but not counterretaliation, then parties might be hesitant to counterretaliate. Even if the parties did counterretaliate, this would not offer relief from pressure from the initial victim of the retaliation. Relief from pressure could be attained if some countervailing benefit were offered. However, such concessions would be very difficult where the target for retaliation has been carefully selected. Thus, retaliation will have the beneficial effect of increasing pressures for settlement. As we have seen, settlements negotiated after a panel decision tend to incorporate the panel's findings in the settlement agreement.<sup>208</sup> Thus, authorizing retaliation will tend to increase GATT compliance overall.

Authorization of retaliation would represent a clear change in recent GATT policy. Those opposing a more legalistic model because it supposedly poisons the GATT atmosphere would vehemently oppose increased authorization of retaliation, because retaliation is obviously more contentious than making a complaint. Nonetheless, there are good reasons why GATT should authorize retaliation more regularly. First, the novelty of retaliation will decrease with use and it will eventually be accepted as the normal consequence of an inability to resolve a dispute. This will lessen the poisonous effects that retaliation entails.<sup>209</sup> Second, retaliation would improve the efficiency of the GATT dispute settlement system by encourag-

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206. The decision not to extend the U.S. Manufacturing Clause is an example of this. *See supra* note 102.

207. *See supra* note 205.

208. *See supra* note 141 and accompanying text. In the instances cited in note 205 *supra*, the settlements were in the direction of enforcing panel decisions and previously negotiated agreements.

209. *Cf. supra* text accompanying note 78.

ing speedy conflict resolution. Third, retaliation is fair because it reestablishes the balance of concessions between the two parties, a balance that is thrown into disequilibrium when one party has violated GATT's rules. Fourth, and most important, retaliation will often occur anyway if disputes are not resolved. Given that this is the case, it would be desirable for GATT to exercise greater control over retaliation when it occurs. Indeed, it is possible that retaliation will become more common, in the future, because of its proven effectiveness in recent U.S.-EC trade disputes.<sup>210</sup> With GATT supervision some control can be exercised, particularly as to the amount of retaliation, which reduces the likelihood that a massive trade war would erupt.

In the past, retaliation was authorized only once and was considered to have been ineffective. This was because it involved a small country (the Netherlands) retaliating against a very large one (the United States).<sup>211</sup> Retaliation will probably continue to be ineffective in such cases, but that does not mean that it will not work in cases where the disputing parties are roughly equivalent in size, particularly if they are also relatively large as in the case of the U.S., the EC, and Japan. Retaliation should be authorized where it may work. The U.S.-Netherlands case does raise the question, however, of how GATT can better enforce decisions obtained by a small country against a larger one.<sup>212</sup> One possible solution would be to allow smaller nations "excess" retaliation. This would not be inconsistent with the terms of Article XXIII,<sup>213</sup> but it is probable that even massive retaliation by a small country would be unnoticed by a larger one.

To make retaliation against large countries effective, should GATT authorize other parties to retaliate in such circumstances, *i.e.*, should there be sanctions placed on larger countries? Or should any country be sanctioned that fails to

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210. *See supra* note 205. In addition, threats of retaliation seem to have played a role in the recent EC decision not to adopt an oils and fats tax harmful to U.S. agricultural exports. *See* 4 Int'l Trade Rep. (BNA) 866 (1987).

211. *See* Netherlands Measures of Suspension of Obligations to the United States, BISD, *supra* note 1, at 32, 62 (1st Supp. 1953).

212. Retaliation may also be ineffective where both disputants are relatively small countries since there may be relatively little trade that occurs between them.

213. *See supra* note 8. Article XXIII allows for "appropriate" retaliation.

implement a panel decision?<sup>214</sup> Realistically, use of sanctions may offer the only hope of ensuring that the dispute settlement system works for smaller country complaints against larger countries, and not surprisingly, it has been proposed by smaller countries.<sup>215</sup> Nonetheless, it would probably be unwise to adopt such a policy because it would generalize trade conflicts. Retaliation may be inevitable between the actual disputants, thus suggesting that GATT should recognize and attempt to channel it. Moreover, only the actual disputants are involved and they can always resolve their dispute at any time. Sanctions go beyond that and put GATT in the position of promoting conflicts between parties that had no conflict. In addition, sanctions probably would not work against a major power unless they were massive and applied by other major powers. Involving major powers in such a conflict would seem unwise.<sup>216</sup> Moreover, the use of sanctions is probably inappropriate in a system concerned with maintaining a balance of concessions. This leaves the smaller countries to rely on the good faith of the larger countries, a not particularly satisfactory solution, but perhaps the best that can be expected.

Generally speaking, dispute panel decisions have been implemented. GATT's record in this regard could be improved, however, by more frequent authorization and control of retaliatory measures, at least when major powers are involved.

### C. *Procedural Improvements: Establishing a Superpanel*

A number of valid criticisms have been made in respect of the panel system: panels may have insufficient stature to render decisions that will be accepted by the major powers; panelists may not be neutral because they are typically diplomats with careers to keep in mind; panel decisions are sometimes not well written and fail to address the relevant issues forthrightly; and there is a shortage of acceptable persons willing to serve on panels.<sup>217</sup>

These problems could all be largely eliminated if panelists

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214. It is not clear that Article XXIII currently allows this. See R. HUDEC, *supra* note 19, at 84 n.140; *supra* note 8.

215. See *supra* note 65.

216. R. HUDEC, *supra* note 19, at 85.

217. See *supra* text accompanying notes 127, 152-59.

were selected from a small group of experts chosen in advance.<sup>218</sup> This group or superpanel, as I have referred to it, could be limited to 10 or so generally-accepted GATT legal experts. The effect of this selectivity would be to heighten the panel's status, resulting in greater respect for its decisions. Because the group would stand ready to hear all cases, the problem of staffing panels would disappear. Since the panelists would have more experience in the panel process, one would expect them to write better decisions and address the issues more directly. Solving the problem of neutrality, of course, depends on how the superpanel is selected, which is the most difficult question.

To reduce the neutrality problem, it would be desirable to appoint nongovernmental experts as well as governmental trade officials who have retired from active service. Could such people be found? Certainly over the years as interest in trade matters has increased, there has been a significant increase in those knowledgeable about GATT and its rules and traditions. Thus, it is likely that a sufficient number of qualified panelists could be found in academia. However, a superpanel composed exclusively of academics would probably not be accepted. In addition, the number of retired trade officials of sufficient stature who would be interested and acceptable may be limited. An alternative source would be the secondment of current trade officials knowledgeable in GATT affairs. This would not solve the problem of career-consciousness affecting decisions, although the problem could be reduced if the panelist were appointed for several years and therefore were involved in a number of decisions. A mixture of trade officials, retirees, and academics would seem a reasonably acceptable way to staff such a panel.

To ensure an experienced superpanel, members would be appointed for staggered terms of three or four years, subject to reappointment. To reduce potential bias or the appearance of favoritism, a panelist who had been an official of a particular country should probably be disqualified from hearing disputes involving that country, at least until a number of years has

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218. This proposal or variations of it are commonly suggested as a useful reform of GATT procedures. See, e.g., R. HUDEC, *supra* note 19, at 50-51; Bliss, *supra* note 168, at 51; Jackson, *supra* note 60, at 18-20.

passed since the panelist's last government service. In addition, each disputant (or each side if there are multiple complainants) should be allowed to strike one or two panelists. This would make the proposal more palatable to those contracting parties desiring more control over panel selection than merely selecting the superpanel. The Director-General could then appoint the panel or it could be chosen by lot from the remaining members of the superpanel. Random selection would probably be preferable so as to isolate the Director-General from charges of favoritism.

Is it conceivable that the contracting parties would agree to use a superpanel? In some ways the proposals seem relatively limited in scope. The GATT Secretariat already compiles lists of potential panelists.<sup>219</sup> The interests of the contracting parties are protected through the right to be involved in the selection of the superpanel and the right to strike superpanel members in constituting specific panels. There would be one major difference, however. As we have seen, panel membership has been quite diverse.<sup>220</sup> Putting dispute settlement in the hands of the small group on the superpanel would work some change in this respect. Moreover, the prestige of the panel decisions would probably be considerably enhanced since every decision would be a product of this elite group. Panel decisions would be viewed as precedents since they would indicate the views of those likely to be on future panels.<sup>221</sup> This would have the beneficial effect of making GATT rules more precise. Thus, although using a superpanel can be characterized as a change only in the panel selection process, it would in fact make the GATT dispute settlement system significantly more adjudicative in nature, a desirable consequence.

#### D. Other Reforms

A number of other reforms have been proposed. First, it

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219. GATT, Action by Contracting Parties on Dispute Settlement Procedures, BISD, *supra* note 1, at 9-10 (31st Supp. 1985).

220. *See supra* note 129.

221. While prior decisions may sometimes be treated as precedents now, *see, e.g.*, GATT, U.S. Manufacturing Clause, BISD, *supra* note 1, at 74, 88 (31st Supp. 1985), the exact status of panel decisions is unclear, a situation that has been criticized as undesirable. ITC DISPUTE SETTLEMENT STUDY, *supra* note 25, at 72.

is sometimes suggested that increased use should be made of conciliation or mediation.<sup>222</sup> This is certainly a good idea, although care must be taken so that these mechanisms are not used as a means of delay. To be effective they must be structured, and probably should be conducted under the auspices of the Director-General.<sup>223</sup> To the extent that legal issues are involved, the Office of Legal Affairs could issue advisory opinions.<sup>224</sup> Mediation should be viewed, however, as an initial process that may obviate the need for formal dispute settlement procedures. It should not be viewed as a substitute.

A second, often-proposed reform is to create two tiers of obligations: one subject to strict dispute settlement procedures; the other to current procedures.<sup>225</sup> In other words, the provisions of GATT would be divided into those that the parties agree should be strictly enforced and those that are simply goals that need not be followed or enforced. The proposal is made to render reform of the dispute settlement more palatable. Since enforcement of obligations that are no longer widely respected is considered to be a major fear of the contracting parties, this alternative would allow them to choose affirmatively those that were to be enforced. The two-tier proposal was first made prior to the Tokyo Round when there was much dissatisfaction with GATT dispute settlement procedures and a feeling that consensus had broken down on many issues.<sup>226</sup> The past decade of more successful dispute settlement and the improved consensus that resulted from the To-

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222. See, e.g., Bliss, *supra* note 168, at 51; Jackson, *supra* note 60, at 15-16.

223. While the Director-General needs to be perceived as neutral by the parties, he may be the only person with sufficient prestige to make mediation effective. If it is thought that acting as a mediator would impede his other functions, mediation could be handled by another high ranking official charged with that function. At present, panels are encouraged to promote settlements. 1979 Understanding, *supra* note 20, at 16. This probably interferes with their need to render detached decisions. *Can the GATT Resolve International Trade Disputes?*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 287, 291 (1983) (remarks of John H. Jackson).

224. These views would not be definitive since it would not be appropriate to bind dispute settlement panels to the views of the staff. Nonetheless, since the Office of Legal Affairs plays an important role in advising dispute settlement panels now and would continue to do so, their views would be quite authoritative. Thus, parties could informally seek the views of the Office, which when given might well lead to an amicable settlement.

225. See, e.g., R. HUDEC, *supra* note 19, at 53-54; J. JACKSON, *supra* note 1, at 784-85; Bliss, *supra* note 168, at 51.

226. See *supra* note 225.

kyo Round and hopefully will result from the Uruguay Round may make the proposal less attractive than it once was.

In any event, the proposal seems fatally flawed. Those GATT obligations not made subject to strict enforcement would be ignored, even though many GATT members continued to believe in their validity. Indeed, it is likely that very few rules would be accorded this higher status, so most GATT rules would effectively cease to exist.<sup>227</sup> This is a high price to pay. Even with stricter dispute settlement procedures, there is still no guarantee that panel decisions will be implemented. Thus, the potential gains are relatively limited given the risk of gutting GATT.

Third, it has been suggested that the GATT dispute settlement system adopt aspects of a so-called surveillance model.<sup>228</sup> The surveillance model refers to the dispute settlement mechanism of the Multifiber Arrangement ("MFA"), which establishes a Textiles Surveillance Body ("TSB") that is charged with reviewing certain actions taken by MFA parties to restrict textile and apparel imports.<sup>229</sup> Although the TSB has no power to force changes in these actions, it was viewed in the mid-1970s as having been generally successful in keeping MFA parties from deviating too much from their obligations.<sup>230</sup> More recent analysis suggests that the TSB has not been all that successful.<sup>231</sup> In any event, it is not clear how a surveillance model would be appropriate for much of GATT dispute settlement. The major difference between the GATT dispute

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227. Hudec notes this possibility. See R. HUDEC, *supra* note 19, at 54. The experience of the International Court of Justice may be analogous. Given a choice, few countries have accepted unlimited compulsory jurisdiction. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 234 (3d ed. 1986).

228. This model is discussed in R. HUDEC, *supra* note 19, at 62-69, 78-81. Another alternative sometimes considered is a prosecutorial model of dispute settlement. The model would eliminate the need for a complainant, thereby perhaps reducing the confrontational aspect of dispute settlement. The decision of what complaints to pursue, however, would have to be invested in somebody, presumably in the GATT Secretariat, and would reduce its ability to act as a mediator. The usefulness of this model is questionable. If no one is willing to bring a complaint, it is doubtful that a serious violation is occurring. See generally *id.* at 76-77.

229. See generally R. HUDEC, *supra* note 19, at 62-65; Perlow, *The Multilateral Supervision of International Trade: Has the Textiles Experiment Worked?*, 75 AM. J. INT'L L. 93 (1981).

230. R. HUDEC, *supra* note 19, at 65.

231. Perlow, *supra* note 229, at 130-31.

settlement system and the TSB is that certain actions are required to be reported to the TSB. Thus, it is a question of how disputes come into the system for review. It would probably be unrealistic to think that governments would or could meaningfully agree to report all measures that might affect international trade for review, or even all those that might involve GATT issues. It is conceivable that future codes, especially a safeguards code, would establish a surveillance system for specified actions, but that could be handled by the superpanel proposed above. Members of the superpanel could simply be assigned to the surveillance function for certain periods of time. Probably the most important lesson to be learned from the TSB experience is that it was perceived to have been relatively successful, given the lack of any enforcement powers, and it was generally held in high regard, in large part because of its expertise.<sup>232</sup> This suggests that a superpanel could enhance the prestige of the GATT panel process.

### CONCLUSION

Two points need to be stressed in conclusion. First, much of the dissatisfaction with the GATT dispute settlement system stems from its failure to resolve satisfactorily specific disputes. Those disputes often involve rules that are no longer generally accepted by the GATT community. No dispute settlement system will solve the problem of outdated rules, although the reforms suggested here, particularly those concerning adoption of panel reports and use of retaliation, may speed resolution of such disputes. But in the end, the best way to ensure that countries comply with GATT rules is to ensure that the rules generally represent the views of the parties. Realistically, there will be little chance that the proposed reforms will be adopted so long as some GATT members believe that GATT rules are outdated. The Uruguay Round will hopefully help to reinforce a consensus on GATT's rules.

Second, it must be remembered that GATT is an international organization whose members can repudiate it at any time. It is therefore important not to place unreasonable strains upon the organization in implementing a more legalistic dispute settlement system. At the same time, it is just as

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232. R. HUDEC, *supra* note 19, at 65.

important to remember that GATT can be damaged as much by failing to enforce its rules as by too strictly following them. Because GATT is no longer the fragile organization it once was, it should not shrink from enforcing its rules more rigorously.<sup>233</sup>

The recent, increased use of the GATT dispute settlement system is likely to continue in the future, especially as U.S. trade laws will continue to encourage its use by the United States. It is therefore critical that the system be strengthened so that increased use does not lead to a breakdown of the GATT system. The principal goal of dispute settlement is to ensure compliance with GATT rules. Adoption of the reforms suggested herein would create a more legalistic system that would more efficiently process disputes and achieve that goal.<sup>234</sup>

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233. Experience in federal systems, such as the United States and the EC, indicates that court decisions directed against members who view themselves as sovereign and direct them to comply with federal law do not lead to the collapse of the organization, even if those decisions take some years to implement.

234. Although this Article has focused on Article XXIII procedures, it would be appropriate for these changes to be embodied in an understanding applicable to all GATT dispute settlement. Although some Tokyo Round codes have more detailed provisions on dispute settlement and stricter time limits, they have worked no better than Article XXIII procedures. Indeed, the Subsidies Code is viewed as having the strictest procedures but its dispute settlement experience has not been at all successful. See *supra* note 133. Nothing would be lost by standardizing procedures. The one exception would be to continue those provisions authorizing the appointment of technical experts.