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# GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law

*Donald E. deKieffer\**

Although the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> has been in existence for over two decades, a workable system has only recently developed for resolving disputes between contracting parties. Since its inception, the GATT has been designed to promote the gradual dissolution of trade barriers between the major mercantile countries of the world.<sup>2</sup> In its early years, the GATT approached this ambitious goal solely through irregular negotiating "rounds" at which the Contracting Parties (the nations signatory to the GATT) mutually agreed to reduce their tariff barriers. There was little attempt to develop an effective enforcement mechanism to monitor the respective obligations undertaken by the contracting parties.

Although rudimentary dispute settlement procedures were incorporated from the very earliest drafts of the GATT, the implementation of these procedures was desultory at best. Contracting parties relied upon good faith amongst their trading partners and regarded the GATT itself as being self-enforcing. As membership in GATT ex-

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<sup>1</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. GATT has been modified in several respects since 1947. The current version of the agreement is contained in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969).

<sup>2</sup> For a thorough discussion of the history of the General Agreement and a description of the international organization, also known as "the GATT," which administers the Agreement, see generally J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969); K. DAM, THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975).

panded beyond the major mercantile countries, however, and the demands of the Less Developed Countries (LDC's) intensified for recognition of their development needs and thus for trade preferences and protection,<sup>3</sup> a three-way conflict developed between GATT's traditional objective of tariff reduction, the desire of the LDC's for preference and protection, and the corresponding desire of the developed countries to protect themselves from what they perceived as unfair practices in international trade. Thus, as the GATT became increasingly sophisticated<sup>4</sup> and imposed its tariff-cutting objective more forcefully upon a greater and more diverse number of contracting parties, the need for a more thorough dispute settlement procedure became obvious.

The most recent round of trade negotiations, the Tokyo Round,<sup>5</sup> has given the GATT dispute settlement function a new and added importance. Not only have the procedures for dispute settlement changed, but the type of issues which are likely to be considered by the dispute settlement panels has been significantly expanded. The Tokyo Round laid down new authority for the GATT to resolve disagreements among its members. The degree to which this new authority is effective may well govern the patterns of international trade for the next five to ten years.

#### DISPUTE SETTLEMENT BEFORE THE TOKYO ROUND

The first step in the GATT dispute settlement process consists of consultations concerning alleged GATT violations<sup>6</sup> among the coun-

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<sup>3</sup> See generally Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, 13 CORNELL INT'L L.J. 239 (1980).

<sup>4</sup> The first six negotiating rounds were concerned primarily with tariff reductions. See generally R. HUDEC, *supra* note 2. While tariff reductions were attained in the latest round, the Tokyo Round, its principal objective was the reduction or harmonization of non-tariff barriers. S. REP. NO. 249, 96th Cong., 1st Sess. 2, reprinted in [1979] 6A U.S. CODE CONG. & AD. NEWS 9.

<sup>5</sup> For a discussion of some of the history of the Tokyo Round see R. BALDWIN, *THE MULTILATERAL TRADE NEGOTIATIONS: TOWARD GREATER LIBERALIZATION* (1979). For the text of the agreements concluded at the Tokyo Round, see *AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS*, H.R. DOC. NO. 153, pt. 1, 96th Cong. 1st Sess. 7 (1979) [hereinafter cited as H.R. DOC. NO. 153]. For a discussion of the agreements and their expected impact on international trade see *Symposium on the Multilateral Trade Agreements* (pt. 1-2), 11 LAW & POL'Y INT'L BUS. 1257-1526 (1979), 12 LAW & POL'Y INT'L BUS. 1-334 (1980); (Symposium), 13 CORNELL INT'L L.J. 145-290 (1980).

<sup>6</sup> The types of trade practices that may constitute violations of the GATT are as varied as the ingenuity of traders seeking commercial advantages. Aside from the traditional mechanisms of dumping and subsidization which are addressed by the International Antidumping and Subsidies Codes, *infra* note 10, a plethora of acts can trigger complaints to the GATT. These range from imposition of import restrictions without the requisite showing that the exporting country has engaged in any "unfair" pricing practices, to more sophisticated practices of trade diversion. For

tries party to a dispute.<sup>7</sup> Matters not settled through consultations may be referred to the GATT Council, the general steering body of the Contracting Parties, which can convene either a small panel of impartial experts or a larger working party of national representatives to review the case at hand. If the "panel of conciliation" or working party does not mediate an amicable settlement, the group's recommendations of fact and law are submitted to the Council, which reviews the group's decision and either provides further guidance to the parties in mediating an amicable settlement, or makes a ruling on the dispute. The Contracting Parties may authorize trade retaliation against recalcitrant offending parties if the Contracting Parties consider the circumstances to be serious enough.<sup>8</sup>

Prior to 1980, the dispute settlement procedures were more form than substance. Countries could, and did, request the GATT to intervene in cases where they felt they had been wronged by another member's policies. The substantive rules of international behavior, however, were so poorly defined by the GATT itself that few disputants wanted to take a chance on permitting an international panel to make what would have amounted to *ad hoc* international law.

Within the panels themselves, determinations on sensitive issues were avoided. The panelists justifiably felt that the GATT would lose credibility if the panels openly challenged major economic policies of the larger trading nations. Although the deliberations of the GATT panels are of interest to students of international trade and economics, they are not benchmarks of jurisprudence. Except with respect to highly technical issues, adjudicative GATT dispute settlement had been ineffective, particularly in the years preceding the Kennedy Round.<sup>9</sup>

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example, Country A, fearful of Country B's countervailing duty laws, does not subsidize exports to Country C. The low price of A's products in C's market drives down the volume of B's exports to C. Such trade diversion behavior may not be reachable under the Subsidies Code, *infra* note 10, but clearly is a policy which could be brought to GATT dispute settlement.

Similarly, most countries maintain a variety of non-tariff barriers (NTB's) to trade, many of which are allegedly designed to promote social or political rather than economic objectives. Many such NTB's are manifestly discriminatory and can certainly be challenged in the GATT. For example, if under the guise of consumer safety, Country A insists that consumer electric products sold in its jurisdiction be tested within its borders, this would certainly be a NTB cognizable under the GATT, particularly if such restrictions were put in place after the Tokyo Round.

<sup>7</sup> GATT, *supra* note 1, art. XXII provides (1) that each contracting party "shall afford adequate opportunity for consultation regarding representations by another party . . .," and (2) that the Contracting Parties may be requested by any contracting party to consult with any other contracting party or parties regarding any matter.

<sup>8</sup> GATT, *supra* note 1, art. XXIII(2).

<sup>9</sup> In addition to a lack of substantive rules, discouraging submission of controversies to GATT, and the panelists' practice of avoiding controversy, other reasons advanced for nations'

The reluctance of countries during this period to submit substantial questions to panels, and the practice of the panels themselves in ducking controversy as often as possible, actually reflected one of the strengths of the GATT as well as one of its weaknesses. The GATT as a multilateral treaty was designed to be effectively self-executing. All the major trading nations realized it was in their long-term self-interest to have a rational mechanism governing international commerce. To the extent this perception was shared, the enforcement mechanism was of secondary importance.

While this concept was hardly comforting to judicially-oriented scholars, it was a milestone in international law and international relations. Coercion by the Contracting Parties of an offending GATT signatory, even if agreed upon in advance and implemented only in accordance with elaborate procedures for ensuring due process and fairness, was simply too much to expect at the inception of the GATT. After almost three decades of development, however, the GATT concept has matured to the point where more formalized methods of dispute settlement have become necessary.

### THE TOKYO ROUND NEGOTIATIONS

Just as the loosely structured dispute settlement system of the 1960's and 1970's was appropriate for the Dillon and Kennedy Round Multilateral Trade Agreements, a new structure was necessary to give credibility to the new technical codes agreed to in the Tokyo Round.<sup>10</sup> It is difficult to overstate the importance of the codes agreed to in the

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reluctance to use the dispute settlement procedures include: (1) the process is subject to both inordinate delays and to political pressures; (2) the role of panels is poorly defined; (3) the GATT lacks the administrative personnel and resources needed to conduct adequate investigations; (4) the implementation phases of the procedure are loose and poorly defined. See Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21, 41-43 (1980); See also Graham, *Reforming the International Trading System: The Tokyo Round Negotiations in the Final Stage*, 12 CORNELL INT'L L.J. 1, 28-30 (1979); Roschke, *The GATT: Problems and Prospects*, 12 J. INT'L L. & ECON. 85 (1977).

<sup>10</sup> The major code agreed to in the Tokyo Round, which is juridically separate from the General Agreement, includes:

(1) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, done Apr. 12, 1979, GATT Doc. MTN/NTM/W/299/Rev. 1, reprinted in H.R. Doc. No. 153, *supra* note 5, at 7 [hereinafter cited as Customs Valuation Code];

(2) Agreement on Government Procurement, done Apr. 11, 1979, GATT Doc. MTN/NTM/W/211/Rev. 2, reprinted in H.R. Doc. No. 153, *supra* note 5, at 69;

(3) Agreement on Technical Barriers to Trade (known as the Standards Code), done March 29, 1979, GATT Doc. MTN/NTM/W/192/Rev. 5, reprinted in H.R. Doc. No. 153, *supra* note 5, at 211;

(4) Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the

latest round of negotiations, both in terms of their actual substantive content and as evidencing a further maturation of international commercial practice. While some might consider the reduction of tariff barriers as one of the great accomplishments of the Tokyo Round, such reductions were merely a continuation of the process which engendered the GATT in the first place. Of far more lasting consequence was the Contracting Parties' acceptance of reductions in non-tariff barriers. Even more novel was the approach adopted to deal with these issues. Rather than achieve reductions in non-tariff barriers through the strict mathematical formulae which had characterized the mutual tariff reductions of the Tokyo Round, negotiators established a system of procedures to judge the practices of GATT members against an absolute standard of conduct without specific reference to the current policies of any given nation. Some commentators contend there was nothing new in all this because the GATT itself had specified standards of conduct for its members since its inception.<sup>11</sup> I venture to suggest, however, that the general rules adopted at the GATT's founding, including such allegedly specific provisions as Article XIX,<sup>12</sup> were, and remain, so vague as to defy consistent judicial interpretation. To those who adhere to an adverse analysis, I merely point to the fact that the negotiators themselves cited the vagueness of the GATT provisions as one of the justifications for adopting the Subsidies Code.<sup>13</sup>

In Geneva, both Third World and developed countries argued that the advantages of such specific standards of conduct could be offset by the acrimony which would surely follow in dispute settlement.<sup>14</sup> The

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General Agreement on Tariffs and Trade, done Apr. 12, 1979, GATT Doc. MTN/NTM/W/236, reprinted in H.R. Doc. No. 153, *supra* note 5, at 259 [hereinafter cited as Subsidies Code];

(5) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done Apr. 9, 1979, GATT Doc. MTN/NTM/W/232, reprinted in H.R. Doc. No. 153, *supra* note 5, at 311 [hereinafter cited as International Antidumping Code].

<sup>11</sup> See *The Multilateral Trade Negotiations: Dispute Settlement* [1980] PROCEEDINGS AM. SOC. INT'L L. 140 (panel discussion with participation of Michael Gadbow, Thomas R. Graham, Robert E. Herzstein, Robert E. Hudec, John H. Jackson, and the author).

<sup>12</sup> GATT, *supra* note 1, art. XIX. Under certain conditions, Article XIX permits an importing nation to suspend partially or entirely an obligation toward a contracting party in order to prevent or remedy serious injury to its domestic producers resulting from unforeseen developments. This right to "escape clause" relief is embodied in U.S. domestic legislation in § 201 of the Trade Act of 1974, 19 U.S.C. § 2251 (1980).

<sup>13</sup> See generally Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327, 343-50 (1975).

<sup>14</sup> See (Conference), *Reform of the International Trading System*, 84 F.R.D. 590, 592 (1980) (statement of Mr. Greenwald, Assistant General Counsel at USTR, indicating greatest resistance to change in dispute settlement process was on part of the Europeans and Japanese). Though the latest round of multilateral trade negotiations opened in 1973 with a meeting in Tokyo, the Tokyo Round was actually held in Geneva.

institutionalization of formal and specific standards, it was alleged, would open the gates to a flood of GATT litigation. Some countries feared a nightmare of "American-style litigation," with parties substituting an adversarial relationship for one previously based on non-confrontational negotiated settlements. Nevertheless, a clear majority of GATT members recognized the need for greater specificity in the substantive rules of international behavior so as to bring greater certainty in the means for resolving their disputes. The resulting codicils to the General Agreement were remarkable in that opposition ranging from skepticism to horror had been overcome in their adoption. The magnitude of this accomplishment can be measured by the fact that only one of the proposed codes, albeit one of the most controversial, the Safeguards Code, was not ultimately agreed upon.<sup>15</sup> Thus the stage was set for the creation of a new dispute settlement structure to adjudicate the new corpus of international law.

### *The New Disputes Settlement Process*

Having achieved possibly one of the hallmarks of international diplomacy in creating the Agreements of the Tokyo Round, the negotiators seem to have been exhausted by their achievement. The provisions for resolving disputes were modified to conform with the new codes more as an afterthought than as an integral part of the codes themselves. Many of the negotiators will dispute this conclusion in view of the hundreds of hours spent on the procedural changes, but the results speak for themselves. The substantive improvements in the dispute settlement procedures are neither as profound nor as satisfactory as the changes in the normative trade rules embodied in the various codes.

The dispute settlement process under the GATT was the subject of two Agreements which clarified and affirmed the customary practices which had evolved under the traditional GATT panel procedure.<sup>16</sup> In addition, separate dispute settlement procedures were created for handling disputes arising under each of the new major non-tariff codes, each of which is juridically independent of the General Agreement.<sup>17</sup> The improved procedures for dispute settlement under the General

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<sup>15</sup> H.R. REP. NO. 317, 96th Cong., 1st Sess. 20 (1979).

<sup>16</sup> Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, GATT Doc. MTN/FR/W/20/Rev. 2, art. XXIII:2, reprinted in H.R. Doc. No. 153, *supra* note 5, at 641; Draft Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT Doc. MTN/FR/W/20/Rev. 2, reprinted in H.R. Doc. No. 153, *supra* note 5, at 634.

<sup>17</sup> The relationship of the dispute settlement procedures under Article XXIII of the General

Agreement were generally incorporated into the dispute settlement procedures under the separate major Tokyo Round codes.

The modifications in the dispute settlement procedures are both explicit and illusory. Time limits have been established for both the creation of panels and the ultimate resolution of disputes.<sup>18</sup> Although the time limits appear straightforward (seven days for objections to appointment of panel members; three months for final dispute resolution in urgent cases), it is difficult to imagine that "slippage" will not occur given the vagaries of the international civil service. Still, whether the time limits are treated as firm deadlines or merely as guidelines, they signal an improvement over present practice.

A "standing roster" of potential panelists is to be maintained by the GATT Secretariat. Although an informal roster has been kept for years, it was comprised predominantly of civil servants from Scandinavia and Switzerland. The new rules encourage inclusion of private sector panelists, and the United States has already submitted such names.<sup>19</sup> It remains to be seen, however, whether any U.S. private sector panelists will be accepted by disputants given the tradition of empaneling "neutral" Europeans and the almost inevitable involvement of U.S. interests in any significant trade dispute.

The new rules also specify, in general terms, the procedures of the panels. Although the newly codified procedural rules are vague compared to the Administrative Procedure Act,<sup>20</sup> they represent a step forward as panel procedures previously often depended upon the personalities of the panelists.

### *Effectiveness of the New Dispute Settlement Process*

There is currently an active debate among the observers of the GATT as to whether the new dispute settlement authority will be effective. Some international trade experts have taken the view that the To-

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Agreement with those incorporated in the new non-tariff codes is still unsettled. See Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153, 171-72 (1979).

The possibility of selective accession by individual nations only to those Agreements in which they have a special economic interest, raises the prospect of a trading world no longer strictly divided between "developed" and "developing" countries, but characterized by a loose coalition of small trading systems grouped around individual MTN Agreements. Graham, *Revolution in Trade Politics*, 36 FOR. POL'Y 49, 59 (Fall 1979).

<sup>18</sup> For a detailed examination of the modifications in dispute settlement see Hudec, *GATT Dispute Settlement After Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 146, 170-97 (1980).

<sup>19</sup> See e.g., Solicitation of Individuals to Serve as Panelists for the GATT Dispute Settlement Process, 45 Fed. Reg. 7362 (1980).

<sup>20</sup> 5 U.S.C. § 551 (1976).



kyo Round provides a vital new means for resolving multilateral trade disputes, and that even in prior years, the very existence of the GATT and its dispute settlement authority had itself encouraged countries to observe agreed-upon norms of trade policy.<sup>21</sup> This school of thought points to the new elaborate system of panel selection and procedures and to the substantive Agreements<sup>22</sup> as providing both the substantive and procedural groundwork upon which a truly effective means of international adjudication can be based. This school suggests that countries will find it in their own interests not to reject cynically their prior agreements under the GATT, and notes that countries have already submitted themselves to the jurisdiction of the dispute settlement process.<sup>23</sup>

In contrast to this line of thought, other commentators suggest that the new provisions are little more than windowdressing and that serious disputes will still be settled on an *ad hoc* basis by the parties themselves.<sup>24</sup> This school of thought points to the historic trend of major trading nations to resolve differences through informal—sometimes secret—agreements when significant trading problems arise.<sup>25</sup> This is exemplified by the European-Japanese steel trade agreements, the existence of which was not even publicly acknowledged by the parties for years after their inception.<sup>26</sup> These critics also note the unwillingness of major Western trading nations to yield what they regard as their own national sovereignty in determining the appropriate response to cases of real or perceived discrimination by other countries. They cite, for example, the Chicken War,<sup>27</sup> in which the United States unilaterally retaliated against European agricultural policy with only a gesture

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<sup>21</sup> See, e.g., remarks of John H. Jackson in panel discussion, *supra* note 11.

<sup>22</sup> See note 10 *supra*.

<sup>23</sup> See Hudec, *supra* note 18, at 181-83.

<sup>24</sup> See e.g., remarks of Thomas R. Graham in panel discussion, *supra* note 11; see also Herzstein, *The Role of Law and Lawyers Under the New Multilateral Trade Agreements*, 9 GA. J. INT'L & COM. L. 177, 196 (1979). (Lack of rules allows for *ad hoc* decisionmaking within dispute settlement process itself).

<sup>25</sup> See Graham, *Revolution in Trade Politics*, 36 FOR. POL'Y 49, 60-61 (Fall 1979) ("Close to 50 per cent of British imports from Japan are thought to be subject to [secret] private bilateral agreements. Japan is suspected of limiting imports through more than 200 such private deals with exporters, many of which are newly competitive LDC's. Many of these private deals are struck between the ailing industry in the importing country (with the blessing of its government) and the robust industry in the exporting nation: thus, they are technically untouchable by trade rules that apply to governments only.").

<sup>26</sup> See A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 249 (1979).

<sup>27</sup> See Lowenfeld, *'Doing Unto Others'*. . . —*The Chicken War Ten Years After*, 4 J. MAR. L. & COM. 599; 5 J. MAR. L. & COM. 317 (1973, 1974); Walker, *Dispute Settlement: The Chicken War*, 58 AM. J. INT'L L. 671 (1964).

at resolving the issue through the GATT.<sup>28</sup> In the view of this group of observers, the "expanded" role of the GATT in settling international disputes is one of appearance rather than substance. These observers foresee the employment of the GATT dispute settlement mechanism only in the most limited cases, where the critical trading interests of neither of the parties are involved, as a mere gesture to international comity.

These opposing perceptions of the future effectiveness of GATT dispute settlements constitute more than a mere academic debate. The GATT dispute settlement procedure currently in place may well govern the patterns of international trade for the next five to ten years. In my view, neither of the above-referenced schools is entirely correct in its analysis of the role that GATT dispute settlement will take in the near future. Though acknowledging both the inefficacy of GATT dispute settlement procedures in the past and the relative superficiality of the changes within those procedures compared to the revisions agreed to at Geneva in the normative rules of international trade, thoughtful observers should, nevertheless, find reason for optimism for the future. The new dispute settlement panel procedure should be much more effective than in the past for several reasons:

*First.* Panelists will have the luxury of considering issues narrowly defined in terms of substantive law.<sup>29</sup> They will not, in other words, be charged with making broad-brush international trade policy on each issue they decide. This should enhance the panelists' resolve to confront difficult issues and render decisions, leading to the development of a corpus of jurisprudence in international commerce.<sup>30</sup>

*Second.* As GATT members will be permitted to limit the consideration of the panels, disputants no longer run the risk of having the entire base of their domestic policy undermined by a sweeping panel decision and thus will be more inclined to bring disputes to the settlement process.

*Third.* The substantive specificity of the new codes and the new procedures discouraging overly-broad rulings should improve the content of decisions. Dispute settlement panelists in the 1980's will be called upon to resolve significant and specific questions of law. The

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<sup>28</sup> See 45 Fed. Reg. 35,057 (1980) (the legacy of the Chicken War still persists with a recent unilateral increase in duties by the United States on truck chassis, one of the targets in the decade-long trade war).

<sup>29</sup> *Accord*, (Conference), *Reform of the International Trading System*, 84 F.R.D. 590, 597 (1980) (statement of Mr. Herzstein noting increased specificity of new rules).

<sup>30</sup> *But see Id.* at 598 (suggesting that the dispute resolution procedures stress conciliation rather than adjudication, forestalling the development of a corpus of jurisprudence).

sharper focus of investigation will permit and even require much more discrete analysis of the facts (and "law") in individual cases.

Will the new dispute settlement panels be merely another College of Cardinals debating esoteric questions of interpretation? I think not. Under the new ground rules established by the Tokyo Round, panelists will be called upon to give definitive pronouncements on the codes, requiring of the panelists judicial, as opposed to academic, temperaments and a hard-nosed practicality heretofore largely lacking in the dispute settlement process.

*Fourth.* There seems to have been a recognition among GATT members that the prior practices of asking only civil servants to sit on GATT panels does not necessarily lend credibility to the dispute settlement process.<sup>31</sup> Although inclusion of private-sector individuals in GATT panels is not required by a multilateral agreement,<sup>32</sup> it was tacitly recognized in Geneva that the inclusion of such persons might lend not only credibility, but the appearance of credibility to the process itself.

Whether the GATT dispute settlement procedure will be an effective means of adjudicating provisions of the codes adopted in Geneva remains to be seen. A promising start, however, has been made. The law, procedures, and even the attitudes of those affected by the new procedures have been changed. The thoughtful observer will recognize that the Tokyo Round has established totally new ground rules, under which pessimistic projections of the dispute settlement system's effectiveness, rooted largely on past state practice, may not validly stand.

Undoubtedly, there will be legitimate criticism of the manner in which the codes are interpreted, as well as, perhaps, of the entire dis-

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<sup>31</sup> See Jackson, *supra* note 9, at 42 (panel members were usually officials who represented governments to the GATT who, although ostensibly acting in their individual capacities, could not be fully insulated from potential political influences of their governments' desires and policies).

<sup>32</sup> See e.g., Draft Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, *supra* note 16, at para. 6 (Resolution of Disputes), reprinted in H.R. Doc. No. 153, *supra* note 5, at 634 ["the Director-General *should* maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels" (emphasis added)]; Customs Valuation Code, *supra* note 10, at Annex III (Ad hoc Panels), para. 2, reprinted in H.R. Doc. No. 153, *supra* note 5, at 61 [the Chairman of the Committee on Customs Valuation in maintaining an informal indicative list of prospective panel members "*may* also include persons other than government officials" (emphasis added)]; Subsidies Code, *supra* note 10, at pt. VI, art. 18, para. 4, reprinted in H.R. Doc. No. 153, *supra* note 5 at 289 ["the Chairman of the Committee on Subsidies and Countervailing Measures *should* maintain an informal indicative list of governmental and nongovernmental persons" (emphasis added)].

pute settlement process.<sup>33</sup> Criticism of the dispute settlement procedures will arise, though the effectiveness of the new dispute settlement policy is dependent more upon the substance of the codes themselves than on the procedures which have been adopted for dispute resolution. In the presence of structural changes that have diminished the obstacles to truly judicial decisions, the best use of criticism, at the present time, will be to encourage submission of disagreements to the panels, and then to urge thoughtful analysis of the results.

*U.S. Private Party Access to GATT Dispute Settlement*

Although neither individual industries, labor unions, nor trade associations have *per se* standing to raise issues directly in the GATT, most GATT contracting parties have developed internal procedures by which their own industries can request their governments to take action in the GATT dispute process on their behalf. In the United States, the domestic procedure under which private parties can "trigger" presidential action to enforce the rights of the United States under any trade agreement was first outlined in the Trade Act of 1974,<sup>34</sup> and modified by the Trade Agreements Act of 1979.<sup>35</sup>

Under section 302(a) of the amended Trade Act, an interested person may file a petition with the United States Trade Representative (USTR) requesting the President to take action under section 301<sup>36</sup> and setting forth allegations in support of the request.<sup>37</sup> It is then wholly

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<sup>33</sup> See e.g., Jackson, *supra* note 9, at 44-46 [(1) fragmentation of dispute settlement under several Agreements increases the danger of increased costs, complexity, and forum shopping; (2) the ambiguous standard of "nullification or impairment" still remains in some Agreements; (3) the panels' role of conciliation vs. adjudication remains unclear in some Agreements]; (Conference), (statement of Mr. Herzstein), *supra* note 29, at 598 [(1) procedures stress conciliation rather than adjudication; (2) stress for published written panel opinion inadequate; (3) no initiation of complaints by independent bodies provided for].

<sup>34</sup> 19 U.S.C. § 2411 (Supp. III 1979).

<sup>35</sup> 19 U.S.C. § 2501 (Supp. III 1979).

<sup>36</sup> 19 U.S.C. § 2411 (Supp. III 1979). Under section 301 the President is authorized to take "all appropriate and feasible action within his power to enforce" U.S. rights under any trade agreement or "to respond to any act, policy, or practice of a foreign country . . . that is (A) inconsistent with the provisions of . . . any trade agreement, or (B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." *Id.* at § 2411(a). In addition, the President is expressly authorized to:

(1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country or instrumentality involved; and (2) impose duties or other import restrictions on the services of such foreign country or instrumentality for such time as he determines appropriate.

*Id.* at § 2411(b).

<sup>37</sup> Trade Act of 1974, 19 U.S.C. § 2412(a) (Supp. III 1979). For a definition of an "interested party" and regulations promulgated by the USTR concerning the filing of petitions and the conduct of investigations and hearings, see 15 C.F.R. § 2006 (1980).

within the discretion of the USTR to decide whether to initiate an investigation of the allegations.<sup>38</sup> Under section 301 of the Trade Act of 1974 there existed no time limit within which the USTR was required to exercise his discretion,<sup>39</sup> whereas, under section 302(a) of the amended Act, the USTR must make a preliminary decision no later than forty-five days after the date on which he received the petition.<sup>40</sup>

If the USTR determines that an investigation is not warranted, he must inform the petitioner of his reasons and publish a summary of these reasons and his decision in the *Federal Register*.<sup>41</sup> If, on the other hand, the USTR determines that an investigation is in order, he must publish the text of the petition in the *Federal Register* and provide opportunities for the presentation of views concerning the issues, including an opportunity for a public hearing within thirty days if a hearing was requested in the petition.<sup>42</sup> In addition, on the same day the USTR reaches an affirmative preliminary determination, he must request consultation with the foreign country concerned.<sup>43</sup> If the case involves rights or benefits recognized under a trade agreement,<sup>44</sup> and a resolution is not reached through consultation with the foreign country concerned within the period specified in the agreement, the USTR must "promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement."<sup>45</sup> During this period, the USTR must seek information and advice from both the petitioner and appropriate representatives of the private sector.<sup>46</sup> The re-

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<sup>38</sup> In reporting out the Trade Agreements Act of 1979 the Senate Committee on Finance noted:

this discretion must be exercised in light of the need to vigorously insure fair and equitable conditions for U.S. commerce, and in cases involving the enforcement of U.S. rights under the agreements negotiated in the [Multilateral Trade Negotiations] or where a petition has been filed requesting a response to an action inconsistent with such agreements, this discretion normally should be exercised by proceeding to investigate and to pursue valid claims in appropriate international fora when the petition properly presents issues covered by section 301 as amended by this bill.

S. REP. NO. 249, 96th Cong., 1st Sess. 238 (1979), reprinted in [1979] 6A U.S. CODE CONG. & AD. NEWS 27, 246.

<sup>39</sup> *Id.* at 237.

<sup>40</sup> Trade Act of 1974, 19 U.S.C. § 2412(a) (Supp. III 1979).

<sup>41</sup> *Id.* § 2412(b)(1).

<sup>42</sup> *Id.* § 2412(b)(2).

<sup>43</sup> *Id.* § 2413.

<sup>44</sup> The petition procedures provided under section 302 of the Trade Act of 1974 are applicable not only to disputes under trade agreements but also to "unjustifiable, unreasonable, or discriminatory activities not covered by the dispute settlement provisions of the international trade agreements or the GATT but which, in fact, burden or restrict U.S. commerce." S. REP. NO. 249, 96th Cong., 1st Sess. 231 (1979), reprinted in [1979] 6A U.S. CODE CONG. & AD. NEWS 27, 240.

<sup>45</sup> Trade Act of 1974, 19 U.S.C. § 2413 (Supp. III 1979).

<sup>46</sup> Section 135 of the Trade Act of 1974, 19 U.S.C. § 2155(i) (Supp. III 1979), requires the USTR to consult with the appropriate general policy advisory committees for industry, labor,

quirements of consulting with the foreign country as well as of submitting the matter to the dispute settlement process are provisions which were not present in the Trade Act of 1974.

On the basis of his investigation and consultations with foreign governments, the USTR must submit a report to the President recommending what action, if any, should be taken with respect to the petition. Four specific deadlines for the submission of this report are established under section 304 of the amended Act.<sup>47</sup> The Trade Act of 1974 did not contain provisions which stipulated time limits within which the USTR was required to submit his report to the President. Nor did the Trade Act of 1974 specify a time within which the President must respond. Under section 301(c)(2) of the amended Act, the President must make a determination of what action he will take with respect to a petition no later than twenty-one days after receiving the USTR's recommendation.<sup>48</sup> Regardless of the recommendation of the USTR, further action by the President is entirely within his discretion under both the old Trade Act and the new Trade Agreements Act.<sup>49</sup>

As a practical matter, utilization of the GATT dispute settlement procedure has a number of advantages for the prospective American petitioner:

*First.* Trade practices of other countries, such as trade diversions, which cannot be addressed under the traditional mechanisms of antidumping, countervailing duty or "escape clause" relief, can be challenged.<sup>50</sup>

*Second.* The GATT dispute settlement process is relatively inexpensive compared with other forms of relief from import competition. Most of the cost of prosecuting a GATT dispute is borne by the government.

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agriculture, and services established by the President as well as with private organizations or groups representing labor, industry, agriculture, small business, service industries, consumer interests, and other interests.

<sup>47</sup> 19 U.S.C. § 2414 (Supp. III 1979). The USTR must make his recommendation not later than

(A) 7 months after the date of the initiation of the investigation . . . if the petition alleges only an export subsidy covered by the [Subsidies Agreement]; (B) 8 months after the date of the investigation initiation if the petition alleges any matter covered by the Subsidies Agreement other than only an export subsidy; (C) in the case of a petitioner involving a Tokyo Round trade agreement other than the Subsidies Agreement, 30 days after the dispute settlement procedure is concluded; or (D) 12 months after the date of the investigation initiation in any case not described in subparagraph (A), (B), or (C).

*Id.*

<sup>48</sup> 19 U.S.C. § 2411(c)(2) (Supp. III 1979).

<sup>49</sup> S. REP. No. 249, 96th Cong., 1st Sess. 238 (1979), reprinted in [1979] 6A U.S. CODE CONG. & AD. NEWS 27, 246.

<sup>50</sup> See note 6 *supra*.

*Third.* Procedures adopted in the Trade Agreements Act of 1979 guarantee at least a "no" or "maybe" answer within a short time after filing a petition.

The GATT dispute settlement procedure as presently made available to American petitioners is not, however, without its problems and practical disadvantages:

*First.* The disposition of petitions by the USTR is without substantive review, and, as such, is discretionary. Although the current law provides the appearance of administrative regularity, so as to limit potential abuses of executive discretion, it is an elaborate gossamer curtain. The Trade Agreements Act of 1979 established deadlines within which the USTR must initially decide whether to act on a request by adversely affected domestic petitioners; it did not, however, establish statutory criteria as to when, given certain facts, the USTR must bring a particular complaint to the GATT dispute settlement process. The Trade Agreements Act of 1979 merely removed one of the means by which the USTR could kill a proceeding by doing nothing at all. The deadlines, the USTR's decision, and appeals from his decision, are procedural rather than substantive safeguards.

*Second.* A domestic petitioner is now guaranteed he will be told early in the process that no action will be taken by the USTR, but the petitioner has no assurance at all with regard to the type of relief he can expect if the USTR decides to initiate an investigation. Unlike antidumping or countervailing duty proceedings, no particular remedy is specified either in U.S. law or in the GATT. Under current procedures, the U.S. government has virtually unquestioned authority to negotiate the relief it deems best, without consulting with the affected domestic industry. Furthermore, if dispute settlement fails, economic retaliation against the offending country may be in areas totally unrelated to the injured domestic industry. Although procedural regularity in initiating complaints with the USTR is a step forward, lack of certainty as to the remedy ultimately available renders it a hollow promise.

This result is not altogether unjustifiable, and indeed, was explicitly contemplated by the framers of the 1979 Act. To constrict executive branch discretion with regard to the enforcement of U.S. trade rights would have been to deny the fact that international trade conflict resolution is a matter of negotiation. The law purposely did not bind the government to guarantee an outcome of negotiations; such a course would have been manifestly ridiculous.

Executive branch discretion in the enforcement of U.S. international trade rights is not and should not be absolute, however, and it is

clear that Congress, in the 1979 Trade Agreements Act, rejected such a notion. For too long, American workers and industries adversely affected by unfair foreign business practices had been given short shrift by various Administrations, for reasons wholly unrelated to the merits of the claims contained in import relief petitions. In the areas of antidumping and countervailing duties, in particular, the rules have been tightened to limit the discretionary authority of the executive branch in settling or even ignoring claims brought by American producers and workers.<sup>51</sup> In these areas, domestic petitioners were given rights of judicial review, and the administering authorities were severely restricted in their ability to "settle" cases on terms less than those specified in the statutes. In my view, these types of restrictions, particularly in the cases of internationally acknowledged unfair trade practices, are not only desirable, but necessary.

In the case of actions brought under section 302, however, the issues are much less clear. The types of practices which can be complained of and brought before the central GATT disputes settlement panel, are much less clear-cut than those subject to the International Antidumping Code,<sup>52</sup> or the Code on Countervailing Measures.<sup>53</sup> The contracting parties both implicitly and explicitly agreed to submit these unique questions to an international tribunal, rather than unilaterally to resolve them in their own judicial systems. To require by particular domestic legislation a specific outcome of a negotiation would be a repudiation of our international agreements.

This is not to suggest that additional strictures on the ability of our government to ignore complaints brought under section 302 would not be desirable.<sup>54</sup> While the United States should not seek to insist on particular results from international tribunals before cases are even brought before such panels, it can and should give the broadest possible rights to domestic petitioners to participate in the dispute settlement process. Neither the GATT dispute settlement procedures nor applicable U.S. law directly recognize the right of private parties to participate directly in the international dispute settlement process. In this regard,

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<sup>51</sup> See generally Comment, *The New Antidumping Procedures of the Trade Agreements Act of 1979: Does it Create a Non-tariff Barrier?*, 2 NW. J. INT'L L. & BUS. 200 (1980).

<sup>52</sup> International Antidumping Code, note 10 *supra*.

<sup>53</sup> Subsidies Code, note 10 *supra*.

<sup>54</sup> Although some procedural tinkering may be required in the sections 301-302 provisions, substantive requirements will be much more difficult to obtain. The primary reason for the difficulty of obtaining substantive requirements is that our prior agreements under the Subsidies Code have severely limited future substantive adjustments in the sections 301-302 provisions absent fresh international negotiations.



significant questions of due process and the right to representations by counsel remain unanswered. As one commentator recently and pointedly inquired.

- [1.] To what extent will private lawyers for the affected business interests on both sides be allowed to participate in the proceedings?
- [2.] Will they be permitted to work along with the officials of the United States government and the foreign government, who are acting for their countries in the proceedings?
- [3.] Will all the pertinent information possessed by the government be made available to them?
- [4.] Will they be consulted on the factual evidence and length of argument to be presented?
- [5.] Will they be allowed to present to the international forum, perhaps through their government channels, evidence and arguments of their own in addition to those presented by the government?<sup>55</sup>

It is clear that many American industries have been discouraged from relying on the current sections 301-302 procedures because they are totally at the mercy of U.S. trade negotiators not fully cognizant of the economic factors involved in trade of an industry's particular commodity. The United States should seek to encourage and institutionalize participation by private parties, both on a domestic and international level, in the dispute settlement process, amending both the Trade Act and the GATT to permit such direct representation. Participation by private parties may not guarantee the outcome of international trade dispute settlements as desired by the domestic industry. Nonetheless, some benefit would derive from USTR decisions no longer being made in a vacuum, divorced from the needs of the affected industry. Should the mere participation of counsel for domestic petitioners in the decisional process be found inadequate to provide the requisite "backbone" for the USTR, then additional, more severe restrictions should be placed upon the USTR's negotiating authority.

*Third.* As a *practical* matter, filing a section 302 petition can prejudice chances of prevailing in a pending "escape clause" action, or

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<sup>55</sup> Herzstein, *supra* note 24, at 201. In regard to Herzstein's third inquiry, under section 305 of the amended Trade Act, 19 U.S.C. § 2415 (Supp. III 1979), the USTR must disclose upon receipt of a written request all nonconfidential information available to the USTR or other federal agencies concerning the nature and extent of a specific trade policy or practice of a foreign government with respect to particular merchandise. Private parties may also request information concerning U.S. rights under any trade agreement and the remedies which may be available under that agreement and U.S. law, and information concerning past and present domestic and international proceedings or actions with respect to the policy or practice concerned. The purpose of the disclosure provision is to aid private parties in deciding whether to initiate section 302 proceedings. S. REP. NO. 249, 96th Cong., 1st Sess. 242 (1979), *reprinted in* [1979] 6A U.S. CODE CONG. & AD. NEWS 3, 250.

in even such apparently legalistic remedies as section 337, antidumping or countervailing duty relief.

The sections 301-302 rules are so new, vague and uncertain that domestic firms and labor unions have generally opted for the more legalistic forms of relief.<sup>56</sup> Since the GATT method is intensely political, however, prospective domestic petitioners should discuss their options with the USTR before making a final decision about the most appropriate avenue of relief.

In sum, it is still too early to tell whether the GATT dispute settlement procedures adopted in the Tokyo Round will answer the criticisms previously leveled at the mechanism. Although American petitioners are denied direct access to the GATT dispute settlement process, they can obtain some of its protection. The degree to which they are successful, however, rests almost exclusively upon the USTR's willingness and ability to prosecute aggressively these complaints. It appears desirable, therefore, that greater and more direct access be given to American petitioners than appears to be the case under current law. Until there is more domestic and international experience under this regime, however, proponents of the new GATT dispute settlement practice cannot brag and cynics cannot gloat.

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<sup>56</sup> Approximately 25 cases have been brought under section 301 of the Trade Act and its predecessor statutes. Herzstein, *supra* note 24, at 183.