

## Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats

When the General Agreement on Tariffs and Trade (GATT) contracting parties finally met in Punta del Este to launch the Uruguay Round of negotiations, they agreed to devote some considerable part of their energies to improvements in the dispute-resolution processes of the GATT.<sup>1</sup> Enthusiasm for this venture differed significantly among countries. As the Declaration itself makes clear, some countries thought that improvements in dispute resolution would not be particularly useful unless the GATT disciplines themselves were improved. More importantly, however, at the time, the parties were in substantial disagreement over the fundamental premises underlying dispute resolution in the context of multilateral trade.

Historically, some countries, particularly the members of the European Union (EU), have preferred a more diplomatic, flexible, or equitable approach to dispute

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1. The contracting parties declared:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, 33 GATT/BISD 19, 25 (1987).

resolution in the context of the GATT.<sup>2</sup> These countries, highlighting the ambiguity of GATT rules, the political sensitivity of trade disputes, and the complex trade-offs of competing interests that go into the formulation of any trade rule have argued that GATT dispute resolution should not be particularly formal, legal, or adjudicatory.<sup>3</sup> Rather, it should be characterized by consultations, negotiations, and diplomatic compromises. The goal of dispute resolution in the GATT context should not be to create clear-cut, binding rules or rigorous applications of the law. Instead, the process should be designed to end the dispute by ending the violation as soon as possible. Given the sovereign nature of the disputants, this goal is best accomplished through careful negotiations and appropriate compromises.<sup>4</sup>

Other countries have preferred a more adjudicatory and legalistic approach to GATT dispute resolution. The United States has usually been the leading proponent of this view, in which the rules, and thus the expectations, will become much clearer and more predictable if GATT dispute resolution is characterized by rule-based decisions rendered through an adjudicatory dispute-resolution process.<sup>5</sup> The clarity and certainty produced by building a credible body of GATT jurisprudence will increase compliance with GATT standards. Moreover, a rule-oriented approach will reduce the differences in rigor of application of GATT rules that result when countries of differing economic power and clout are left to their own devices to work out questions of interpretation and application among themselves.

Proponents of the more adjudicatory approach also argue that more rigorous and effective enforcement of GATT rules will help stave off protectionist pressures in various countries. As one commentator has noted, an adjudicatory-type process to ensure “ ‘reciprocity,’ ‘fair trade’ and avoidance of real trade warfare is a domestic political necessity for the United States executive, prescribed by Section

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2. For an excellent discussion of these differences of view among countries and the way in which these underlying philosophical differences have affected various countries' approaches to dispute resolution within the GATT, see Miquel Montaña i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 128-36 (1993).

3. For a particularly strong expression of that view (by someone in a particularly good position to know the views of certain important trading countries), see R. Phan ran Phi, *A European View of the GATT*, 14 INT'L BUS. LAW. 150 (1986). See also Meinhard Hilf, *EC and GATT: A European Proposal for Strengthening the GATT Dispute Settlement Procedures*, in GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME 63 (Reinhard Rode ed., 1990).

4. For an interesting analysis of the arguments in favor of a less legalistic approach in at least one important area of trade, see Lisa S. Klainman, *Applying GATT Dispute Settlement Procedures to a Trade-in-Services Agreement: Proceed with Caution*, 11 U. PA. J. INT'L BUS. L. 657 (1990).

5. For an exceptionally articulate presentation of this view, see John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1 (1979). See also Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980); Donald E. deKieffer, *GATT Dispute Settlement: A New Beginning in International and U.S. Trade Law*, 1 NW. J. INT'L L. & BUS. 317 (1980); E. Petersmann, *Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 323 (E. Petersmann & M. Hilf eds., 1988).

301 of the Trade Act of 1974 and politically imperative for demonstrating to Congress the executive's active enforcement of American rights."<sup>6</sup> Some commentators believe that a more legalistic approach to GATT dispute resolution might even help reduce pressure within the EU for more protectionist measures now that parties within the EU are entitled to rely on the GATT in bringing complaints before the EU.<sup>7</sup>

The results of the Uruguay Round negotiations move the GATT significantly in the direction of those who prefer a more adjudicatory, legalistic approach. The agreements are not free from ambiguity, however, and the movement to legalism is not complete. A careful historical and textual analysis of the agreements is necessary to understand what the agreements accomplished and what was left undone, as well as to predict how disputes will be resolved under the new rules.<sup>8</sup>

## I. A Brief History of Dispute Resolution in the GATT

### A. PRE-TOKYO ROUND: PANELS AND POLITICS

The initial GATT dispute resolution provisions, articles XXII<sup>9</sup> and XXIII,<sup>10</sup> fell pretty much on the nonlegalistic side of the line. Article XXII required only

6. E. Petersmann, *Strengthening GATT Procedures for Settling Disputes*, 11 *WORLD ECON.* 55, 77 (1988).

7. See Montaña i Mori, *supra* note 2, at 135.

8. For a discussion that analyzes GATT dispute-resolution provisions not in terms of the lawyer versus the diplomat, but rather in terms of their effectiveness in advancing "public" versus "private" interests, see Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 28 *BROOK. J. INT'L L.* 31 (1992); Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 *COLUM. BUS. L. REV.* 111.

9. Article XXII:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

General Agreement on Tariffs and Trade, *entered into force* Jan. 1, 1948, 61 Stat. A5, 55 U.N.T.S. 187 [hereinafter GATT].

10. GATT art. XXIII:

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.

consultations and "sympathetic consideration" to the complaints of an allegedly aggrieved country. If the dispute was still unresolved after bilateral consultations, the complainant could escalate the matter, seeking consultations on a multilateral level with the contracting parties.

Article XXIII had slightly, but only very slightly, more teeth. In cases of article XXIII disputes, the complainant again had a right to consultations and sympathetic consideration. If this attempt at resolution failed, the unhappy complainant could take the matter to the contracting parties, who were then required to "promptly investigate" and "make appropriate recommendations . . . or give a ruling on the matter, as appropriate."<sup>11</sup>

Article XXIII goes on to provide that appropriate measures might, if the "circumstances are serious enough," include the suspension of concessions or other GATT obligations by the aggrieved party against the offending party. The threat of suspension of concessions has not been particularly dire over the years, however, having been invoked only once.<sup>12</sup> It would appear that the general GATT practice of requiring that all decisions of the contracting parties be unanimous has been a bit of a barrier to authorizing the withdrawal of concessions. Allegedly offending countries apparently do not often find it in their interest to authorize retaliation against themselves. Thus, even these enhanced procedures were hardly supportive of adjudication or arbitration procedures.

Those who favored more adjudicatory-type proceedings undoubtedly anticipated that such a mechanism would be part of the planned Multilateral Trade Organization (MTO) that was intended to implement, interpret, and, over time, improve upon the basic substantive rules agreed upon in the GATT. The failure

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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 I(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 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.

11. GATT art. XXIII(2).

12. See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 165-84 (1990).

to enact the MTO left much of the GATT, especially its institutional aspects, in some substantial philosophical and legal limbo. Nowhere was this lack of legal coherence felt more acutely than in the dispute-resolution provisions. Nevertheless, over time and out of necessity, article XXIII became the basis for a somewhat more formal dispute resolution process, though, for many years, not to the degree the legalists had advocated.<sup>13</sup>

From the beginning until 1952 the contracting parties carried out their responsibilities under article XXIII by forming working parties. These working parties consisted of representatives of the various governments and were charged with the task of investigating and recommending an appropriate solution in line with the principles and provisions of the GATT. The contracting parties were then to consider and, in most cases, adopt the working parties' recommendations.

While the working parties could have evolved into arbitral tribunals, they initially operated more as conciliatory or mediatory institutions. The parties to the dispute were involved in all the proceedings, and the main function of the working parties was to mediate and guide the parties to a solution acceptable to all, rather than to impose a solution based on a considered interpretation of the provisions of the GATT. In most cases, by the time the working parties made a recommendation to the contracting parties, the disputants were in agreement, and adoption by the contracting parties was almost a formality.<sup>14</sup>

In 1952, upon the suggestion of the chairman of the seventh session of the contracting parties, the working parties were transformed into panels and became more adjudicatory. The secretariat of the GATT began to play a stronger role in the selection of the panelists, and the parties to the dispute were increasingly required to offer their views more in the form of briefs than negotiating positions. The panel reports began to resemble arbitration decisions much more than negotiated compromises.<sup>15</sup> As a result, until the late 1950s or early 1960s, those who favored a more legalistic approach found much to be happy with. Indeed, a number of commentators have labeled these the "golden years of the GATT,"<sup>16</sup>

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13. For a comprehensive discussion of GATT dispute-resolution rules and practices over the years, see PIERRE PESCATORE, WILLIAM J. DAVEY & ANDREAS F. LOWENFELD, *HANDBOOK OF GATT DISPUTE SETTLEMENT* (1994).

14. See John H. Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 61 AM. SOC'Y INT'L L. PROC. 144 (1967) [hereinafter Jackson, *GATT as an Instrument*]; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989); Jeffrey M. Waincymer, *GATT Dispute Settlement: An Agenda for Evaluation and Reform*, 14 N.C. J. INT'L COM. REG. 81 (1989).

15. See Jackson, *GATT as an Instrument*, *supra* note 14, at 148 (noting the international court "flavor" of the panels).

16. R. Gadbow, *The Outlook for GATT as an Institution*, in *MANAGING TRADE RELATIONS IN THE 1980s*, at 34 (S. Rubin & T. Graham eds., 1990); see J. FAWCETT, *INTERNATIONAL ECONOMIC CONFLICTS: PREVENTION AND RESOLUTION* 82 (1977); HUDEC, *supra* note 12, at 95.

at least from the perspective of a legalistic, adjudicatory-based, dispute-resolution process.<sup>17</sup>

As the 1960s began, the contracting parties gradually had more trouble adopting the reports, especially those reports that would have authorized any kind of compensatory withdrawal of concessions. Moreover, with the increased membership in the GATT, the "consensus underlying basic GATT principles" started to erode.<sup>18</sup> Disputes also arose in areas and with respect to problems not even vaguely anticipated by the original drafters of the GATT.<sup>19</sup> Finally, at least one major trading bloc, the European Community, began to centralize its decision making on trade matters, a move un contemplated by, and decisively unsettling for, the original GATT.<sup>20</sup> The upshot of these developments was a decline in the use and effectiveness of the emergent GATT dispute-resolution procedures.

The 1970s saw a slight resurgence in the use of the GATT dispute-resolution procedures. The different underlying views on dispute resolution, however, were probably never more apparent than during this period. The number of cases brought to panels increased, but so did the length of time necessary for their resolution and the level of dissatisfaction with the results, or lack thereof.

## B. THE TOKYO ROUND: UNDERSTANDING OF 1979

The unhappy experiences of the 1970s led to the "Understanding of 1979," an agreement regarding dispute resolution reached during the Tokyo Round negotiations.<sup>21</sup> The Understanding, while of uncertain legal status, basically confirmed and refined the customary practices that had developed during the prior two decades.

At first blush, the Understanding of 1979 appears to move slightly in the direction of legalism. It first reaffirms the right of a party under article XXIII(2) to refer the matter to the contracting parties.<sup>22</sup> It mandates time limits within which

17. For discussions of how the GATT dispute settlement processes gradually evolved into something more legalistic, see Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. L. 38 (1990); Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, in WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE 9 (M. Hart & D. Steger eds., 1990).

18. Montañà i Mora, *supra* note 2, at 119.

19. *Id.* at 121.

20. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 759 (1969); Montañà i Mora, *supra* note 2, at 120.

21. The Understanding of 1979 was formally titled the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance." It contained an annex, the "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement." 265 GATT/BISD 210, 215 (1980) [hereinafter Understanding of 1979].

22. The Understanding of 1979 also specifies that such referral will not be considered a contentious act in the context of the GATT. The Understanding also gives the parties the alternative of referring the matter to conciliation in the event consultations are unsuccessful, but this requires the consent of all the parties to the dispute. *Id.* ¶ 8.

the panel must be formed after the director general makes a recommendation to the contracting parties.<sup>23</sup> It formalizes the principles governing the composition of the panel.<sup>24</sup> It also specifies that if a matter goes to a panel, a report must issue and that report shall be adopted by consensus within a "reasonable time."<sup>25</sup> Finally, such adoption also makes the report binding upon the parties.<sup>26</sup>

At the same time, however, the Understanding of 1979 contains provisions that provide strong, and possibly definitive, support for the diplomatic approach to dispute resolution. For example, the Understanding starts by suggesting the practice of a little preventive medicine, urging parties to notify each other of any steps they might take that would affect the operation of the GATT.<sup>27</sup> It then reaffirms the desirability of solving disagreements through consultations.<sup>28</sup> Though it suggests the consultations should proceed "expeditiously,"<sup>29</sup> it places no time limits on them. The description of the panel's function and the compositional preference for government experts, moreover, appears to give primacy to the panel's mediatory, not adjudicatory roles.<sup>30</sup> In addition, the Understanding does not provide any mechanism for adopting a panel report over the objection of the offending party whose behavior is criticized in the report. It also does little to improve the oversight, supervision, or monitoring of the implementation of a panel's recommendations. Finally, the Understanding does not appear to give the aggrieved parties—and perhaps not even the contracting parties—any real powers to enforce the recommendations of a panel, even those recommendations that are finally adopted.<sup>31</sup> At least for the moment, the diplomats had successfully beaten back the lawyers.<sup>32</sup>

The diplomats' victory was not entirely satisfactory, however. Employment

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23. *Id.* ¶ 11.

24. *Id.* ¶ 14.

25. *Id.* ¶ 21.

26. Montaña i Mora, *supra* note 2, at 123.

27. Understanding of 1979, *supra* note 21, ¶ 3.

28. *Id.* ¶ 6.

29. *Id.* ¶ 4.

30. See Hudec, *supra* note 5, at 183-87; Philip R. Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1018-19 (1985). The annex itself makes clear that "mutually acceptable" solutions are preferable. Understanding of 1979, *supra* note 21, annex ¶ 4. Preferable to what is not expressed, but the tenor of the Understanding of 1979 and annex leave little doubt that the preference is to adjudicated or imposed solutions.

31. See Montaña i Mora, *supra* note 2, at 123-24.

32. The Tokyo Round also made another notable contribution to the GATT dispute-resolution process, namely, the establishment of many separate dispute-resolution procedures in each of the separate codes negotiated during the Tokyo Round. See John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21 (1980). Some applauded this development, while others saw it as a step backwards for the development of a coherent, consistent body of GATT law that might be useful in imposing real disciplines on the behavior of member states. For a discussion of both views, see Montaña i Mora, *supra* note 2, at 124-26. Whatever the merits of those various views, however, it is clear that this aspect of the Tokyo Round did not particularly contribute to the legalization of the basic GATT dispute-resolution machinery.

of the GATT dispute-resolution machinery did increase after the Tokyo Round.<sup>33</sup> Some cases were resolved expeditiously and effectively, especially when the political stakes were relatively low.<sup>34</sup> But, by most accounts, whenever the stakes were high, the procedure was less successful than the authors had hoped.

The list of complaints was long and not wholly unfamiliar. As one author put it: "The main problems included disputes over when the consultation phase had been exhausted, delays in the formation of panels, disagreements over their composition and their terms of reference, discussions as to their function, blockages of the panel reports, and noncompliance with the recommendations."<sup>35</sup> The stage was set for the Uruguay Round.<sup>36</sup>

## II. Dispute Resolution in the Uruguay Round

The ultimate result of the Uruguay Round negotiations on dispute resolution must be judged as a decisive, though imperfect, step in the direction of a more legalistic, adjudicatory process. The movement in that direction is far from complete, at least when viewed from the perspective of common-law judicial tradition. But, even if the pace of the change is not entirely satisfactory, the direction is relatively clear. The legalists have gained a modest advantage over the diplomats.<sup>37</sup>

The Uruguay Round changes proceeded in two steps. The first step was adoption of the "Improvements of 1989." These were adopted in April 1989 and embodied the results of the negotiations as of the time of the 1988 Mid-term Review.<sup>38</sup> The second step, embodied in the 1994 "Understanding on Rules and Procedures Governing the Settlement of Disputes," is a relatively comprehensive

33. See Robert E. Hudec, *Dispute Settlement*, in *COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS* 180 (J. Schott ed., 1990); U.S. INT'L TRADE COMM., *REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND TOKYO ROUND AGREEMENTS* (1985).

34. See Montaña i Mora, *supra* note 2, at 125.

35. *Id.* at 127 (footnotes omitted).

36. For a comprehensive commentary on the state of pre-1988 GATT dispute settlement and the proposals for change made at the start of the Uruguay Round, see E. Petersmann, *Proposals for Improvements in the GATT Dispute Settlement System: A Survey and Comparative Analysis*, in *FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER* 340 (D. Dicke & E. Petersmann eds., 1988).

37. For discussions of why some of the diplomats gradually shifted to legalism, see Remarks by Christoph Bail, former legal adviser to the European Community's permanent delegation to Geneva from 1985-1991, in *What's Needed for the GATT after the Uruguay Round*, 1992 AM. SOC'Y INT'L L. 71; Montaña i Mora, *supra* note 2, at 127-36. For a discussion of why the United States may have lost some of its enthusiasm for legalism by the end of the Uruguay Round, see David Palmeter & Gregory J. Spack, *Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict*, 24 L. & POL'Y INT'L BUS. 1145 (1993).

38. *Conciliation, Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT/BISD 36/61 (1990) [hereinafter *Improvements of 1989*].



elaboration of the rules and procedures governing dispute resolution under the GATT, though not a formal amendment to either article XXII or XXIII.<sup>39</sup>

#### A. IMPROVEMENTS OF 1989

The Improvements of 1989 took seven important steps in the direction of a more formal, legalistic, adjudicatory-oriented regime. First, the Improvements required a targeted contracting party to respond to a request for consultations within a strict and relatively short time period; they then permitted an allegedly aggrieved country to call a halt to the consultations and request the establishment of a panel within another fixed time period.<sup>40</sup>

Second, the Improvements addressed the issues of good offices, conciliation, and mediation, making various technical, but useful refinements in those procedures. For example, they added specific time periods within which those activities should take place and the basic procedures that should be followed.<sup>41</sup> The basic character of these procedures did not change, but the refinements gave them a greater air of formality and created concrete steps in a process that, in the event the problem is not solved, leads inexorably and quite quickly to a modified and formalized panel procedure.

Third, the Improvements addressed various aspects of the panel formation process. They made more formal the procedures for establishing the terms of reference<sup>42</sup> and eliminated the preference for governmental experts.<sup>43</sup> This latter step, in particular, has been considered a useful move towards the legalization of the dispute-resolution process, because it signals an intention to create panels of independent experts who make decisions free of the biases that inevitably attend government service.

Fourth, the Improvements apparently vested a right in third parties to intervene in proceedings of interest. Article F(e)(2) states that “[a]ny third contracting party having a substantial interest . . . shall have an opportunity to be heard . . . and to make written submissions.”<sup>44</sup> In practice, interventions were generally allowed, but the Improvements left no doubt as to third party’s standing.

Fifth, and very importantly, the Improvements addressed the problem of pro-

39. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 404, annex 2 (GATT Secretariat ed., 1994) [hereinafter *Understanding of 1994*].

40. A party must reply to a request for consultations within ten days and then commence consultations within thirty days. Improvements of 1989, *supra* note 38, § C.1. The complainant may request the establishment of a panel sixty days after first requesting consultations. *Id.* § C.2.

41. *Id.* § D.

42. *Id.* § F(b).

43. *Id.* § F(c).

44. *Id.* § F(e)(2). The *Understanding of 1979* suggested that third parties “should” have an opportunity to make written submissions and be heard. While a strong exhortation to admitting third parties, the *Understanding of 1979*, with its use of the more wishy-washy “should,” did not create the right that the Improvements of 1989 created by using the talismanic word “shall.”

tracted panel deliberations, establishing a method for determining the length of time a panel might take in completing a proceeding. The Improvements provided that in no case was a panel to take more than nine months from time of establishment to the time of submission.<sup>45</sup>

Sixth, the Improvements addressed, albeit in a limited way, one of the most vexing problems of the panel procedures, monitoring the implementation of the panel's recommendations. They enhanced the powers available to monitor implementation, although they did not vest in any entity any greater power to enforce implementation or authorize self-help in the event implementation was less than stellar.<sup>46</sup> Still, given the sensitivity and importance of this area, this step was clearly one forward for the legalists.

Finally, the Improvements took a tentative step towards a strong adjudicatory approach by authorizing the parties to settle their disputes by resort to binding arbitration.<sup>47</sup> Though the matter is not entirely free from doubt, the parties probably could have done this in any event. Yet the formal recognition of binding arbitration as a useful device within the GATT context was significant and signaled an important, though obviously limited, step in the direction of supporting formal adjudicatory-type dispute resolution for GATT trade disputes.<sup>48</sup>

Major hurdles still confronted the legalists, however, even after the Improvements of 1989. Most importantly, the Improvements did not address questions surrounding adoption and implementation of panel reports. A contracting party could enjoy the application of more clear-cut procedural rules and the satisfaction of a more speedy determination by a panel with a more independent composition, but that putatively successful party still might not enjoy real fruits from that victory. The responding party might still block the adoption of a report, relegating the decision to that netherworld of persuasive, but nonbinding decisions. Even if a decision were adopted, the mechanisms for monitoring compliance were limited at best, and the tools for implementation were virtually nonexistent. The GATT's teeth had been sharpened, but the strength of the jaws was still decidedly limited.<sup>49</sup>

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45. *Id.* § F(f).

46. *Id.* § I.

47. *Id.* § E.

48. For interesting and useful discussions of the various practical and conceptual problems binding arbitration raises in the context of the GATT, see Montaña i Mora, *supra* note 2, at 138-40; Petersmann, *supra* note 5, at 323 *et seq.* For more detailed analysis of the Improvements of 1989, see Erice Canal-Forgues & Rudolf Ostrihansky, *New Developments in the GATT Dispute Settlement Procedures*, 24 *J. WORLD TRADE* 67 (1990); W. Davey, *GATT Dispute Settlement: The Montreal Reforms*, in *LIVING WITH FREE TRADE: CANADA, THE FREE TRADE AGREEMENT AND THE GATT* 167 (R. Dearden ed., 1989); Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 *INT'L TAX & BUS. LAW.* 38 (1990).

49. For a thorough analysis of the Improvements and the need for further refinements, see E. Petersmann, *Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlement Procedures*, 32 *GERMAN Y.B. INT'L L.* 280 (1989).

## B. UNDERSTANDING OF 1994

In a final act of desperation to save what appeared to be a dying Round, the director general of the GATT offered a Draft Final Act in December of 1991 that contained an "Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade." This proposal, in only slightly modified form, was adopted and signed by the Ministers in Marrakech in April 1991 and became the "Understanding on Rules and Procedures Governing the Settlement of Disputes."

Though still paying some lip service to the diplomats, this document embodies the biggest move of all into the legalist camp and deserves close attention. It repeats, almost verbatim, many of the Improvements' innovative provisions, especially regarding consultations, good offices and mediation, and panel procedures. However, it also contains some rather far-reaching provisions dealing with a number of important aspects of GATT dispute resolution. Of those many changes, seven deserve particular comment and scrutiny.

### 1. *Establishment of the Dispute Settlement Body*

First, the Understanding creates the Dispute Settlement Body (DSB) to administer the rules and procedures of the Understanding and otherwise assume the role of the General Council (and the committees under the various special agreements), particularly with respect to providing good offices and conciliatory or mediatory services.<sup>50</sup> Article 2 of the Understanding specifically mentions the authority of the DSB to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements." The DSB, as an integral part of the newly created World Trade Organization (WTO), will consist of members of that latter organization who choose to join the DSB. Thus, presumably all the members of the WTO will also be members of the DSB.

### 2. *Expanded Scope of the Basic GATT Dispute Resolution Process*

Second, in stark contrast to the Tokyo Round, which created different dispute-resolution mechanisms for many of the Codes negotiated thereunder,<sup>51</sup> the Understanding substantially increases the scope of coverage of the general GATT dispute-resolution process. It explicitly provides that the Understanding's dispute-resolution rules and procedures shall apply to disputes arising under all the Agreements listed in Appendix 1, which includes the Agreement Establishing the World Trade Organization (WTO); the Multilateral Trade Agreements (Trade

50. Understanding of 1994, *supra* note 39, art. 2.

51. For a good discussion of the various dispute resolution mechanisms, their relationship to the GATT, their relationship to each other, and their desirability, see Jackson, *supra* note 32, at 12-44.

in Goods; Trade in Services; Trade-Related Aspects of Intellectual Property); and, upon agreement by the participants, the Plurilateral Trade Agreements (Civil Aircraft; Government Procurement; Dairy; and Bovine Meat).<sup>52</sup>

This change is not total, however. Article 1 further requires the parties to follow, in preference to the rules in the Understanding, some of the "special or additional rules and procedures on dispute settlement" contained in some of the specific GATT agreements, particularly those rules referenced in appendix 2.<sup>53</sup> Nevertheless, the Understanding is undoubtedly a substantial step towards unifying the GATT dispute-resolution processes and away from the philosophy of the Tokyo Round.

### 3. *Exclusivity of GATT Dispute Resolution Process for GATT Disputes*

Third, the Understanding leaves no doubt that it is intended to strengthen the multilateral trading system. In an article clearly signaling this intent, entitled "Strengthening of the Multilateral System," the ministers impose upon the member states a requirement to seek "recourse to, and abide by, the rules and procedures of this Understanding," when seeking redress of a "violation of obligations or other nullification or impairment of benefits under the covered agreements. . . ."<sup>54</sup> Article 23 goes on to specify that the members "shall . . . not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding. . . ." In short, the Understanding leaves no doubt that freelance, unilateral, or even unauthorized bilateral dispute resolution is not acceptable.

However, the Understanding does not forbid the parties from resolving a dispute by means other than a panel decision. Negotiations and consultations are still allowed, indeed encouraged. The Understanding specifically invites the parties to resolve disputes through mutual agreement. It also adopts, virtually intact, the provisions of the Improvements of 1989 regarding negotiation, consultation, good offices, conciliation, and mediation.<sup>55</sup>

The Understanding also allows the parties, by mutual agreement, to submit a

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52. Understanding of 1994, *supra* note 39, art. 1. Regarding the Plurilateral Trade Agreements, the appendix predicates applicability of the Understanding on "the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2. . . ." *Id.* app. 1.

53. Appendix 2 lists particular provisions of a variety of agreements, including, for example, numerous articles from the Agreement on Textiles and Clothing; article 14.2 through 14.4, annex 2, of the Agreement on Technical Barriers to Trade; and a variety of articles in the Agreement on Subsidies and Countervailing Measures. *Id.* app. 2.

54. Understanding of 1994, *supra* note 39, art. 23.

55. *See id.* 3-5. A few time limits are tightened here and there and a few words changed, but otherwise the Understanding of 1994 largely echoes the Improvements of 1989.

dispute that concerns "issues that are clearly defined by both parties" to binding arbitration as an alternative to the establishment of a panel.<sup>56</sup> As noted earlier, grants of permission to the parties to use binding arbitration may not have been necessary previously. In light of the new provisions that proscribe the parties from using any dispute-resolution processes other than those contained in the Understanding, however, this specific authorization now becomes necessary if the parties are to employ binding arbitration to resolve these disputes.<sup>57</sup>

In general terms, the intent of this imposition of exclusivity of procedures and substance appears designed to limit the distortions of procedure and, more importantly, substance that might occur when countries of vastly different economic and political power are in disagreement. Nonpanel resolution of disputes is permitted, even encouraged in some forms, but the range of possible alternatives to which the parties can have recourse and the substantive rules the parties can apply are all limited. In theory, the parties may resolve disputes only in the approved ways and using the approved substantive rules. Of course, the extent to which the imposition of these requirements will really insulate disagreements from exogenous political and economic factors is much harder to predict, but the goal of the Understanding is unmistakable.

#### 4. *Facilitation of Establishment of a Panel*

Fourth, the Understanding takes a number of steps that make the establishment of a panel not only a certainty, but also more quickly and efficiently accomplished. In the first place, the Understanding makes it clear that the DSB must establish a panel at the request of an aggrieved party.<sup>58</sup> In theory, the DSB can decline a

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56. *Id.* art. 25. The Understanding of 1994 limits use of arbitration to disputes concerning issues "that are clearly defined by both parties." *Id.* The Understanding also contains rules regarding notification to all members, but limits intervention of third parties to situations where all the parties to the arbitration agree to allow participation of the third party. The Understanding also requires application of its rules regarding surveillance of implementation of recommendations (art. 21) and compensation and the suspension of concessions (art. 22).

57. The status of arbitration decisions in the broader scheme of GATT dispute resolution is still a bit unclear, however. The Understanding of 1994 does not specifically address the jurisprudential status of arbitral decisions or the relationship of the arbitral decisions to decisions of the panels and the appellate body, and thus fails to resolve fully the problem of precisely what contribution the decisions of arbitral tribunals are to make to the development of a coherent, consistent body of GATT jurisprudence.

At the same time, however, the Understanding of 1994, in its quest to unify GATT procedure and substantive GATT law, takes steps that will facilitate integration of arbitral decisions into the general corpus of persuasive GATT law. First, the Understanding clearly specifies that binding arbitrations take place within the WTO. Second, by requiring the parties in various places to resolve all disputes through application of the agreed-upon substantive GATT rules, the Understanding would seem to require the tribunals to apply those, and only those, rules. These two aspects of the Understanding may well increase the degree to which one can view arbitration decisions as helpful, and occasionally even persuasive, in resolving sticky GATT problems. Of course, the degree to which parties resort to arbitration and the degree to which tribunals become persuasive expositors of GATT rules still remains to be seen.

58. Understanding of 1994, *supra* note 39, art. 6.

country's request if all DSB members agree by consensus not to establish a panel. But since the requesting country would presumably not join such a consensus, as a practical matter the DSB must always establish a panel when requested.

This reversal of the normal presumption regarding the operation of the consensus rule is just one of the ways the Understanding has made the operation of the general adjudicatory-type dispute rules much more automatic. In the past, Council consensus was usually required to act. This requirement rarely, if ever, resulted in a refusal to establish a panel. It often delayed the establishment, however, while the parties engaged in meaningless semantic struggles over whether anyone had a right to the establishment of a panel and the precise remit of the panel. The new rule, on the other hand, requires unanimity to stop a particular act, in this case, the establishment of a panel. The Understanding makes the establishment of a panel—as well as various other actions—virtually automatic and completely assured.

The Understanding also obligates the DSB to act with dispatch in establishing a panel. To assist in this process, the secretariat is required to maintain a list of qualified individuals.<sup>59</sup>

The Understanding also attempts to eliminate drawn-out disputes over the terms of reference. It gives the parties twenty days to establish their own terms of reference for the panel and then provides default terms of reference in the event the parties cannot agree.<sup>60</sup>

##### 5. *Automatic Adoption of Panel Reports*

Perhaps the most startling innovation of the Understanding is its creation of a rule of almost automatic adoption of panel reports. Article 16.4 provides: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting [footnote omitted] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report." One of the main complaints of the prior regime concerned the difficulty of securing adoption of panel reports. Panel reports frequently remained unadopted for years because one or more member states disagreed with the panel's ruling or recommendations. Countries also occasionally withheld approval of a panel report in retaliation for some country's unwillingness to allow adoption of a panel report favorable to the first country. In short, to the great dissatisfaction of many countries, panel reports often were relegated to the status of debating points, rather than serving as binding decisions with which a country had to comply.

59. *Id.* art. 8.4.

60. *Id.* art. 7. The fallback terms of reference contained in *id.* art.7.1 are:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the manner referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

The new rules ensure that a victorious party will at least have the satisfaction of an authoritative, putatively binding decision in its favor. As an astute commentator has noted:

This provision not only eliminates one of the main stumbling blocks of the former regime—the requirement of consensus for the adoption of panel reports—but also introduces a shift of influence from the Contracting Parties to the panels and the Appellate Body. This enhances the judicial nature of the panel process.<sup>61</sup>

Of great interest in this regard, though beyond the scope of this paper, is the debate over the effect of panel and appellate body rulings on domestic law.<sup>62</sup>

#### 6. *Establishment of the Standing Appellate Body*

Sixth, in what is perhaps the most definitive move in the direction of legalism, the Understanding requires the DSB to establish a standing appellate body to hear appeals from panel cases.<sup>63</sup>

To establish the appellate body, the DSB is required to appoint seven nongovernmental individuals “of recognized authority, with demonstrated expertise in law, international trade and the subject matter of covered agreements generally” to serve four-year terms.<sup>64</sup> Any party to the dispute, except for third parties, may appeal the ruling. The appellate body, sitting in panels of three, then must hear the appeal and, as a general rule, issue its report within sixty days of a party’s notification of its decision to appeal.<sup>65</sup> The appellate body may uphold, modify, or reverse the legal conclusions of the panel.<sup>66</sup> In clear support of American legalism, however, the appellate body may, in reaching its decision, review only “issues of law covered in the panel report and legal interpretations developed by the panel.”<sup>67</sup>

The establishment of the appellate body in no way diminishes the automatic adoption of binding decisions, however. A party may slightly delay the day of reckoning by seeking appellate review of an adverse ruling. Nevertheless, the appellate body’s ruling is subject to basically the same rule as that of the panel, namely, adoption is automatic unless the DSB members agree otherwise by consensus.<sup>68</sup> This automatic adoption occurs within thirty days following the circulation of the appellate body’s report.

61. *Montañà i Mora*, *supra* note 2, at 150.

62. For an insightful analysis of that issue, see Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 21: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT’L LAW. 795 (1992). See also *Montañà i Mora*, *supra* note 2, at 163-76.

63. Understanding of 1994, *supra* note 39, art. 17.

64. *Id.* The members may be reappointed once. Moreover, in order to ensure that all the terms of the members of the appellate body do not expire at the same time, article 17 requires that three of the first seven appointees receive only two-year terms.

65. *Id.* art. 17.5.

66. *Id.* art. 17.13.

67. *Id.* art. 17.6.

68. *Id.* art. 17.14 reads, in part: “An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report. . . .”

### 7. *Surveillance of Implementation of Recommendations and Rulings*

Among the biggest problems facing the GATT over the years was the disinclination of countries to follow the recommendations of panel reports—even when those reports were adopted—and the relatively weak GATT response to that disinclination. The Understanding, in some of its most important innovations, directly addresses this issue in a variety of ways. In particular, the Understanding creates rules that will either strongly encourage a party to comply or allow an aggrieved party to withdraw appropriate concessions almost at will.

First, the Understanding requires the concerned member to report to the DSB, within thirty days of adoption of the panel report or the appellate body report, its “intentions in respect of implementation of the recommendations and rulings of the DSB.”<sup>69</sup> If the party indicates that it cannot implement the recommendations immediately, the Understanding establishes procedures to ensure the determination of a reasonable time within which the party should comply.

The first step in those procedures is a proposal by the offending party itself. That proposal must be approved by the DSB, apparently by consensus. If the DSB does not approve that proposal—and, of course, the aggrieved party can assure such approval is withheld if it is unhappy with the proposal—then the parties are apparently thrown back to negotiations, at least for forty-five days. If agreement cannot be reached within that time period, then the provisions of the Understanding commit the issue of timing to binding arbitration.<sup>70</sup> Since neither party can force its will on the other in these circumstances, it is quite possible that arbitration will frequently be invoked to determine a reasonable period of time, at least until notional guidelines are developed regarding this issue.

Second, the Understanding makes specific provision to evaluate and monitor the consistency of proposed compliance measures with the GATT, as well as the adequacy of the implementation in general. For example, in the event the parties are in disagreement about whether the offending party’s implementation measures are consistent with the GATT, recourse may again be had to the dispute resolution procedures, with a preference expressed for submitting the matter to the original panel, if possible.<sup>71</sup>

Third, if an aggrieved party does not think the offending party’s compliance has been adequate or timely, it may require the offending party to enter into negotiations “with a view to developing mutually acceptable compensation.”<sup>72</sup> If agreement is not reached within twenty days, the aggrieved party “may request authorization from the DSB to suspend the application to the Member concerned

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69. *Id.* art. 21.

70. *Id.* art. 21.3.

71. *Id.* art. 21.5.

72. *Id.* art. 22.2.



of concessions or other obligations under the covered agreements.’’<sup>73</sup> The DSB is required to approve the aggrieved party’s request within thirty days unless it decides by consensus to reject it, or unless the offending party objects to the level of suspension proposed.<sup>74</sup> In the latter event, the matter—that is, the level of suspension and whether such suspension is permitted under the covered agreement—is referred to arbitration, the results of which the parties must accept and the DSB must approve (unless the DSB decides unanimously to the contrary).<sup>75</sup> Finally, the Understanding requires the DSB to monitor and periodically review the implementation.

As is evident from these rules, the new dispute-resolution procedures are designed to increase substantially the likelihood of compliance with panels’ or the appellate body’s rulings. Adoption of reports is virtually automatic. If the offending party does not agree to conform with sufficient speed, the aggrieved party can force the timing issue to binding arbitration, the results of which are again automatically adopted. If the aggrieved party is not happy with the nature or degree of compliance, however, it can unilaterally specify which concessions it intends to withdraw, a result the DSB must again automatically approve. The offending party can object to the level of the other party’s withdrawal of concessions and force that particular issue to binding arbitration. But the results of that arbitration are binding on the offending party and, as the Understanding states, “the parties concerned shall not seek a second arbitration.”<sup>76</sup> In short, the offending party is eventually told in no uncertain terms that it is to accept all these rulings and decisions.

### III. Conclusion

#### A. A CLEAR STEP TOWARDS LEGALISM

The Understanding decisively moves the GATT dispute-resolution process towards a unified, coherent adjudicatory system. No party to a dispute can force resolution outside the established GATT procedures. Aggrieved states have a functional right to invoke the panel process. Third parties have limited rights to

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73. *Id.* art. 22.2. The Understanding also establishes relatively concrete “principles and procedures” to guide the aggrieved party in its determination of what concessions or other obligations to suspend. *Id.* art. 22.3.

74. *Id.* art. 22.6.

75. *Id.* art. 22.7. The Understanding is explicit that the arbitral tribunal is not to “examine the nature of the concessions or other obligations to be suspended,” but rather only “whether the level of such suspension is equivalent to the level of nullification or impairment . . . if the proposed suspension of concessions or other obligations is allowed under the covered agreement,” and, if requested by the offending party, whether “the principles and procedures set forth in paragraph 3 have not been followed. . . .” *Id.* In the event the aggrieved party has not followed the proper principles and procedures, that party, and not the arbitrators, apparently goes back to the drawing board and applies the principles and procedures in accordance with paragraph 3. *Id.*

76. *Id.* art. 22.7.

intervene in cases of particular interest. The panelists, who must have considerable GATT knowledge or experience, must follow prescribed procedures and apply the principles and rules of the GATT. Appellate review of legal issues by a standing body assigned to that task is assured. Rulings and recommendations of either the panels or the appellate body must be adopted. The rulings and recommendations are binding on the parties and must be accepted and implemented within a reasonable period of time. In the event a party fails to implement the recommendations within a reasonable period of time, the aggrieved party can unilaterally withdraw concessions, as long as those concessions are within the guidelines of the Understanding. These, and numerous other smaller changes, make the GATT dispute-resolution process begin to look very judicial and adjudicatory in character and application.

## B. UNRESOLVED ISSUES

At the same time, important issues regarding dispute resolution remain unresolved. For example, standing to bring a complaint within the GATT is still limited to member states. If the goal is to depoliticize completely the dispute-resolution process, then the advantages of recognizing complaints by nonstate actors must be seriously weighed. Depoliticization has been the goal of many investment treaties, and accordingly, these treaties allow unhappy foreign investors to dispute directly with the offending state in a neutral arbitral forum.<sup>77</sup>

The procedural rules governing the panel, arbitration, and appellate body proceedings also receive only passing attention in the Understanding or, for that matter, in any other formal GATT document. The legal status of panel, arbitration, and appellate body rulings also still remains somewhat unsettled. Will these rulings establish precedents or is their force entirely limited to their persuasive power?<sup>78</sup>

Several other areas of the Understanding may not pass the test of time, but three specific areas are of particular concern as threats to the integrity and efficacy of the GATT dispute-resolution process.

### 1. Confidentiality

First, the Understanding basically maintains the confidential, closed nature of GATT dispute-resolution proceedings. While the arguments for confidentiality are certainly powerful, many groups whose interests are immediately and directly affected by GATT decisions and rulings do not find this arrangement satisfactory.

A most telling example involves matters relating to the environment. GATT panel decisions involving environmental issues have come under particular attack,

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77. See, e.g., Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727, 731-37 (1993).

78. See *supra* text accompanying note 57.

not only for their frequently inadequate reasoning, but also for the secretive nature of the process by which the decisions are rendered.<sup>79</sup>

After the issuance of some of the panel rulings regarding the environment, some parts of the environmental community launched serious, sustained attacks against the GATT in general and the dispute-resolution processes in particular. During the final stages of negotiation of the Uruguay Round, these groups sponsored full-page advertisements in major U.S. newspapers, attacking faceless GATT bureaucrats bent on destroying the environment. Those advertisements make it clear that the particular objects of the environmental community's ire were not necessarily the negotiators, but rather the members of the GATT panels who issued the problematic rulings.

Nor is the environmental community's attention on the dispute-resolution process necessarily misplaced. It is fair to say that given trade negotiators' normal, though sometimes unfortunate, penchant for explaining and defending (and sometimes even presenting) their positions in the press, the last remaining bastion of real secrecy in the GATT is in the dispute-resolution process.

The environmental community's unhappiness over this process is not about to go away, and more groups, including those representing labor, development, and even human rights, are beginning to pick up the refrain. One can predict that the pressure on the GATT to make its dispute-resolution processes more public and open will increase significantly over the next few years.<sup>80</sup>

## 2. *Enforcing Compliance*

A second major issue involves the degree to which application of the procedures outlined in the Understanding will adequately encourage compliance with panel and appellate body rulings and recommendations. The Understanding takes a clear step forward in encouraging compliance in two important respects. First,

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79. For thorough presentations of the two extremes of this debate, see GREENPEACE INT'L, *UNCED UNDERMINED: WHY FREE TRADE WON'T SAVE THE PLANET* (1992); *Expanding Trade Can Help Solve Environmental Problems, Says Report*, GATT Doc. 1529 (Feb. 3, 1992); and GATT, *TRADE AND THE ENVIRONMENT* (1992).

80. The environmental community and other interest groups have also expressed concern that GATT panels are composed solely of trade experts and thus the environmental or other "nontrade" perspectives are slighted. The Understanding addresses this issue to some extent in article 13.2, which provides:

Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

This provision is helpful, in that it explicitly acknowledges the authority of the panel to seek additional information and establishes a procedure to facilitate the provision of such information. At the same time, it does not take the one step most sought by various environmental groups, namely, the inclusion of an environmental expert as a full-fledged member of the panel (or, one presumes, the appellate body). Accordingly, one suspects that this solution, while a movement in the environmentalists' direction, will ultimately not satisfy them.

rulings and recommendations are almost automatically binding on the offending country. This outcome will have some impact because countries generally prefer to live up to their international obligations, especially in the economic arena. Second, retaliation, or withdrawal of concessions in the event of noncompliance is likewise almost automatic, and that prospect can be daunting.

At the same time, the only real pressure an aggrieved country can put on a recalcitrant disputant is the withdrawal of concessions. If the economic disparity between the disputants is great, this threat may be of relatively little significance to the offending country. Moreover, as economists often note, withdrawing concessions is the oddest sort of sanction because it frequently hurts the country enforcing the sanction almost as much as it hurts the country against which the sanction is imposed.

So far, the GATT does not provide for any concerted action against an offending party, expulsion from the GATT, or any of the other types of international sanctions that would genuinely ensure compliance. Again, the reasons for hesitating to allow or require such sanctions may be compelling,<sup>81</sup> but until the sanctions for noncompliance are enhanced, enforcement of rulings and recommendations will always remain somewhat problematic.

### 3. *Depoliticization*

Third, and finally, one wonders whether the Understanding will really achieve the ministers' goal of insulating GATT disputes from political pressure. As the Uruguay Round negotiations themselves demonstrate with graphic clarity, trade matters, almost by their very nature, remain highly political, both domestically and internationally. The automaticity of the new dispute-resolution procedures will certainly make it harder for a country to evade its responsibilities and will even give an offending country some political cover to make necessary changes. After all, at a purely domestic level, people are more likely to accept adverse political decisions if those decisions are made by political institutions they consider legitimate.

But this last statement highlights the major issue. Will the people consider the GATT dispute-resolution mechanisms legitimate institutions to which they must defer their political preferences? This question is not easy to answer.

Certainly many of the changes made through the Understanding will add considerable credibility and legitimacy to the GATT. Moreover, the dispute-resolution processes will occur under the guidance of, and within the context of, the WTO and, accordingly, borrow whatever prestige and stature that institution develops.

Problems still remain, however. Institutions that operate entirely out of the public view have a much harder time developing the credibility and legitimacy required to ensure docile compliance.

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81. See, e.g., James R. Cannon & Karen L. Bland, *GATT Panels Need Restraining Principles*, 24 L. & POL'Y INT'L BUS. 1167 (1993).

While process is very important, legitimacy is also earned by the quality of the substantive action the institution takes. Consistency, coherence, and persuasiveness, along with many other qualities, are all necessary to give the decisions of various institutions the legitimacy that ameliorates domestic opposition. In this regard, GATT panels are going to have to improve the less than persuasive analysis that has sometimes been seen in panel reports. Panel reports like those issued in the U.S.-Mexico dispute over the U.S. embargo of Mexican tuna demonstrate the need for improved quality and persuasive force. Only then will GATT panel decisions become effective tools for quelling domestic opposition to the strict application of GATT rulings.

Fair procedures are necessary to instill an institution with legitimacy, but in the absence of completely effective enforcement power, the quality of the decisions issued by the institution will also be an important determinate of legitimacy and effectiveness. On that score, the Understanding is understandably and necessarily silent.

### C. A PROMISING START

On balance the changes generated by the Understanding are a clear step in the direction of creating a more coherent, consistent, comprehensive, and obeyed set of GATT principles and rules. The provisions of the Understanding appreciably increase the likelihood that GATT disputes will be more efficiently resolved and that the parties will enjoy more of the benefits for which they negotiated. Whether the dispute-resolution processes mandated by the Understanding will also increase the likelihood that disputes will be effectively resolved and that GATT rules will be effectively enforced remains to be seen. The proof will be in the practice.

