

RECENT DEVELOPMENTS

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The marathon Uruguay Round multilateral trade negotiations are entering their last, most perilous stretch in Geneva. Trade negotiators from the nearly 100 member nations of the General Agreement on Tariffs and Trade (GATT) must try to clear the impasses that remain in the talks, the eighth round of negotiations since the GATT's founding in 1947. Their reach is unprecedentedly ambitious—not only to improve the rules of the GATT for trade in products, but also to establish clear and workable rules for trade in services, investment, and the protection of intellectual property rights.

The real test of any new rules will be in their trial by dispute settlement proceedings. No matter how carefully and precisely negotiated, the rules will engender disputes about their application to particular facts. Expedient, effective, and fair procedures are essential to resolve such disputes satisfactorily, or the rules lose much of their value.

This article outlines the GATT dispute settlement process, describes what Uruguay Round negotiators have already agreed to, and assesses the prospects

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for agreement on further dispute settlement issues. In addition, it highlights recent significant decisions by GATT panels and assesses the significance of these unfolding developments.

I. GATT Dispute Settlement Prior to the Uruguay Round

The heart of GATT dispute settlement procedures lies in articles XXII and XXIII of the GATT.¹ Article XXII:1 requires a Contracting Party at the request of any other Contracting Party, to consult and to afford "sympathetic consideration" to representations regarding any matter affecting the operation of the GATT. If consultations under article XXII:1 do not result in a satisfactory solution, article XXII:2 permits a Contracting Party to consult with any other Contracting Party or Parties regarding the matter concerned.

Article XXIII:1 authorizes a Contracting Party to make written representations or proposals to another Contracting Party or Parties whenever it feels 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. . . .²

Article XXIII:1 essentially provides another more formalized opportunity for consultations about the broadest possible range of matters affecting the operation of the GATT. It is specifically *not* limited to complaints about violations of the Agreement. Rather, it expressly applies "whether or not" actions are in conflict with GATT provisions, to the "existence of any . . . situation" that results in the nullification or impairment of benefits accruing under the GATT, or in the establishment of an impediment to the attainment of any GATT objective.

Article XXIII:2 provides for referral of such disputes to the Contracting Parties, but only if consultations under article XXIII:1 do not result in a satisfactory solution to the problem. In response to such a referral, the Contracting Parties must investigate promptly and make "appropriate recommendations" or "give a ruling" on the matter, "as appropriate." In sufficiently serious circumstances, the Contracting Parties may authorize the aggrieved 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

1. GATT T.I.A.S. No. 1700. For an excellent, detailed description of GATT dispute settlement procedures, see Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53 (Dec. 1987).

2. GATT, *supra* note 1, art. XXIII:1.

they determine to be appropriate in the circumstances."³ In other words, failure to implement the recommendations of the GATT Council (the body through which the Contracting Parties function) or to take actions in conformity with a GATT Council ruling may lead to GATT authorization for proportional countermeasures (in common parlance, retaliation).⁴ Any Contracting Party against whom such countermeasures are taken is permitted for sixty days to give notice of its intention to withdraw from the GATT, which takes effect on the sixtieth day following receipt of the notice by the GATT Secretariat.⁵

Article XXIII does not refer to the means by which the GATT Contracting Parties, acting through the Council, make recommendations or give a ruling. The custom is to use panels to assist the GATT Council in fulfilling its investigative and quasi-judicial responsibilities under article XXIII.⁶ These panel practices were codified in the Tokyo Round multilateral trade negotiations in 1979 in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (the Understanding).⁷

The Understanding first elaborates on the procedures for consultations. The Contracting Parties undertake to attempt to conclude consultations expeditiously, "with a view to reaching mutually satisfactory conclusions."⁸ Any party requesting consultations must state the reasons for that request. Contracting Parties are required to give special attention to the particular problems and interests of less developed countries and exhaust the consultative procedures of article XXIII:1 before resorting to article XXIII:2.⁹

Most notably, the Understanding explicates and reaffirms the panel procedures and practices that evolved after the conclusion of articles XXII and XXIII. It stresses that use of article XXIII:2 dispute settlement procedures is not a "contentious act," and that all Contracting Parties engaged in such procedures must act "in good faith in an effort to resolve the disputes."¹⁰ It prohibits the linking of complaints and countercomplaints in regard to distinct matters.¹¹

Next, it requires the Contracting Parties to "decide on" the establishment of a panel (or working party¹²) when so requested by a Contracting Party under

3. *Id.* art. XXIII:2.

4. See generally E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984).

5. *Id.*

6. Plank, *supra* note 1, at 54.

7. GATT Doc. No. L/4907 (adopted Nov. 28, 1979, as part of the Framework Agreement).

8. *Id.* para. 4.

9. *Id.* paras. 4-6.

10. *Id.* para. 9.

11. *Id.*

12. In the 1960s, Contracting Parties often used working parties rather than panels in matters of widespread interest and application. For example, when the European Community was enlarged from the original six member states to nine as the result of the accession of Denmark, Ireland, and the United Kingdom, the GATT trade consequences were reviewed by a working party rather than a panel.

article XXIII:2.¹³ Importantly, the Understanding expressly provides for panels composed of three or five members (“depending on the case”) selected by the parties to the dispute and the Director-General of the GATT. It prohibits representatives of any government that is a party to the dispute from serving as panelists, and calls for the prompt selection of panelists, “normally” within thirty days of the GATT Council’s decision to establish a panel.¹⁴ To try to meet this thirty-day target, the parties to the dispute are obliged to respond to nominations of panel members within seven working days and are prohibited from opposing nominations “except for compelling reasons.”¹⁵

The Understanding states a preference to use as panelists representatives of governments,¹⁶ who are required to serve as panelists in their individual capacities and not as government representatives.¹⁷ Nevertheless, the Understanding also requires the Director-General to maintain an informal list of governmental and nongovernmental persons qualified to serve as panelists. The list is intended to facilitate the expeditious constitution of panels and is revised annually to include one or two names suggested by each Contracting Party.¹⁸

Any Contracting Party with a substantial interest in the matter may notify the GATT Council of its interest and be heard by the panel. Each panel has the right to seek information and technical advice from any “appropriate” individual or body and is prohibited from revealing confidential information without the formal authorization of the party providing it.¹⁹

The panel is charged to make “an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement.”²⁰ Panels “should aim” to issue their reports “without undue delay”; in cases of urgency, this normally means three months from the establishment of the panel.²¹

The panel must first submit the descriptive part of its report to the parties to the dispute, in order to provide one last opportunity for a mutually satisfactory settlement of the matter.²² Absent a mutually satisfactory solution, the panel submits its written findings and recommendations, including the rationale.²³

13. GATT Doc. L/4907, *supra* note 7, para. 10. However, paragraph 10 does not bestow an absolute *right* to a panel, which was granted much later in the Midterm Review of the Uruguay Round multilateral trade negotiations. *See infra* note 32 and accompanying text.

14. *Id.* para. 11.

15. *Id.* para. 12.

16. *Id.* para. 11.

17. *Id.* para. 14. Governments are prohibited from giving instructions to their officials, when serving as GATT panelists, regarding the panel process or outcome.

18. *Id.* para. 13.

19. *Id.* para. 15.

20. *Id.* para. 16.

21. *Id.* para. 20.

22. *Id.* para. 18.

23. *Id.* para. 17.

Contracting Parties must give panel reports prompt consideration and take "appropriate action" within a "reasonable period of time."²⁴ Additionally, the Parties must keep under surveillance any matter on which they have made a recommendation or given a ruling. If such recommendations are not implemented within a reasonable period of time, the party that brought the case may ask the Contracting Parties to "make suitable efforts with a view to finding an appropriate solution."²⁵

Thus, the GATT approach in articles XX and XXIII provides first for consultations between the interested parties. If those consultations fail to settle the dispute, the complaining party may request the GATT Council to establish a panel. If the Council does so and the panel is established, the interested parties argue their cases to an independent panel of experts who make findings and recommendations to the GATT Council. The GATT Council then decides whether to adopt and approve the panel report.

One veteran observed that the GATT dispute settlement procedures provide "no magic formula" for success in resolving trade policy problems, but rather facilitate "modest progress."²⁶ Such progress, however, can be stymied at various stages of the proceedings. Consultations can be prolonged by an interested party, and likewise a single party can delay the establishment of a panel by opposing the establishment in the GATT Council. In controversial cases, the constitution of a panel can be significantly delayed, and in extraordinary cases, panel proceedings can be put off due to the death or disability of a member.²⁷

Even when all the procedures are completed, a single Contracting Party, including an interested party to whom the panel report is adverse, can block the GATT Council's adoption of the panel report indefinitely.²⁸ Finally, there is no right of appeal of an adverse panel report.

II. Midterm Review Agreement and Continuing Negotiations

In light of these shortcomings, the current round of multilateral trade negotiations, launched in the fall of 1986 in Punta del Este, Uruguay, includes a negotiating group on dispute settlement. At the Midterm Review²⁹ in December 1988 in Montreal, Canada, Contracting Parties agreed on a number of improvements to the dispute settlement rules and procedures. In a follow-up

24. *Id.* para. 21.

25. *Id.* para. 22. The Understanding includes an Annex that elaborates on the procedures and practices of panels.

26. See Plank, *supra* note 1, at 56.

27. *E.g.*, the *EC Citrus* case, GATT Doc. No. L/5776 (on file at the GATT).

28. *E.g.*, the U.S. complaint about discriminatory European Community (EC) tariffs on citrus products.

29. The Midterm Review is so called because it falls at the midpoint in negotiations, two years after their initiation and two years prior to their scheduled conclusion.

session in Geneva in April 1989,³⁰ the Contracting Parties approved these changes and agreed to apply them on a trial basis from May 1, 1989, to the end of the Uruguay Round.³¹

First, the new rules specify a fifteen-month timetable for the conclusion of panel procedures. Panels must enter into article XXIII:1 consultations within ten days of request, and complete them within sixty days (thirty days in urgent cases, such as those involving perishable products). A panel must be established no later than the second GATT Council following the appearance on the Council agenda of a request for establishment. The panel must use standard terms of reference unless all interested parties agree on other terms. If agreement on panelists is not achieved within twenty days, either party to the dispute may ask the Director-General of the GATT to select the remaining panelists within ten days. The new rules do not state a preference for governmental representatives, as the Understanding did.³²

Whenever feasible, multiple complaints about the same matter should be heard by a single panel. Normally, the complaining party or parties shall submit its written views first, followed by the first submission of the responding party. Thereafter written submissions may be submitted simultaneously.

As a rule, the panel shall complete its examination and issue its report to the parties within six months after the agreement on panelists and terms of reference. In urgent cases, however, the panel shall aim to provide its report within three months. The report should never be submitted later than nine months.

The GATT Council may not consider a panel report for adoption until thirty days after it has been issued to the parties to the dispute. Any party objecting to such adoption must state its reasons in writing for circulation at least ten days prior to the Council meeting at which the report will be considered. However, "[t]he practice of adopting panel reports by consensus shall be continued."³³

While the Midterm Review rules and procedures include significant improvements, some important issues remain for further negotiation in 1990. First, the issue of adoption of panel reports remains controversial. Should the parties to the dispute alone be able to block adoption of a panel report favored by the other,

30. Although Contracting Parties reached broad agreement in all other areas, they were unable at the Midterm Review to resolve differences in four areas: agriculture, intellectual property protection, textiles, and safeguards. Trade Negotiations Committee, *Trade Negotiations Committee Meeting at Ministerial Level: Montreal, December 1988*, Doc. No. MTN.TNC/7 (Min.) (Dec. 9, 1988) (on file at the GATT, Geneva). The negotiations were therefore continued the following April. Office of the U.S. Trade Representative, *GATT Uruguay Round Mid-Term Agreements Achieved* (Apr. 8, 1989) (on file at USTR).

31. General Agreement on Tariffs and Trade, *Improvements to the GATT Dispute Settlement Rules and Procedures: Decision of 12 April 1989*, Doc. No. L/6489 (Apr. 13, 1989).

32. *Id.* But see *supra* note 16 and accompanying text.

33. See General Agreements on Tariffs and Trade, *supra* note 31. At the Midterm Review, the United States urged a "consensus minus two" proposal, under which the two parties to the dispute would be unable alone to block adoption of a panel report. This proposal was rejected in favor of the long-standing requirement for consensus, enabling a party to the dispute alone to block adoption.

disinterested Contracting Parties? Second, should there be some avenue of appeal, whether of right or discretionary, or at least an opportunity for an extraordinary challenge? Third, should there be additional safeguards regarding the selection of panelists? Fourth, what procedures should be adopted to review the implementation of panel reports, or to authorize retaliation in response to nonimplementation?

The negotiations are scheduled to conclude at a final negotiating session in Brussels in November-December 1990.

III. Recent Significant GATT Panel Decisions

As if to illustrate the importance of the Uruguay Round dispute settlement negotiations, recent GATT panel activity has increased dramatically. The clear trend is toward trade liberalization, with nations that complain about others' practices winning most of the time. While far from exhaustive, the following discussion highlights some of the more controversial cases.

A. U.S. COMPLAINT ABOUT EC OILSEED PRACTICES

In December 1987 the American Soybean Association (ASA) filed a petition with the Office of the U.S. Trade Representative (USTR) under section 301 of the Trade Act of 1974, as amended (the Act).³⁴ ASA complained that the EC provides subsidies for the production of oilseeds and related animal feed proteins, and for the processing of oilseeds. ASA alleged that these and other practices were inconsistent with and denied rights of the United States under the GATT, and were unjustifiable, unreasonable, burdensome and unduly restrictive of U.S. commerce.

As required by the Act,³⁵ the United States resorted to the dispute settlement proceedings of the GATT, and requested consultations under article XXIII:1. Despite repeated consultations, the parties were unable to achieve a mutually satisfactory resolution of the dispute. The United States then requested the establishment of a panel under article XXIII:2. At the GATT Council of May 4-5, 1988, the EC refused to authorize the formation of a panel, and even when the EC did agree to form a panel (at the June 15-16, 1988, GATT Council session), it took many months to reach agreement on the particular panelists and the terms of reference.³⁶

34. Trade Act of 1974, § 301, as amended, 19 U.S.C. § 2411 (1989) [hereinafter Act]. The term "section 301" often refers broadly to the trade remedy provided at §§ 301-309, 19 U.S.C. §§ 2411-2419.

35. Act § 303(a), 19 U.S.C. § 2413(a) (1989).

36. Office of the U.S. Trade Representative, *Report to Congress on Section 301 Developments Required by Section 309(a) of the Trade Act of 1974 (January-June 1989)* 7-8 (undated) (on file at USTR) [hereinafter *Semi-Annual Report on Section 301 Developments*].

This case illustrates some past perils of GATT dispute settlement; it was rife with delays in politically sensitive or commercially substantial cases. Yet it also symbolizes the promise of GATT dispute settlement—the United States finally obtained a favorable GATT panel report in December 1989.³⁷ While the United States has not received compensation from the EC or exported one ton more of soybeans to the EC,³⁸ this legal victory deals U.S. trade officials several aces in a card game with the EC, and it enables U.S. negotiators to leap over years of otherwise protracted debate.

The case also symbolizes the potentially enormous reach of the GATT, which makes actionable not only violation of its letter, but also activity that is inconsistent with its spirit. Even though the EC domestic subsidies were not “GATT-illegal,” they nullified or impaired a benefit reasonably expected to accrue to the United States after the EC’s tariff concessions on soybeans in the Kennedy Round.

B. U.S. COMPLAINT ABOUT JAPANESE AGRICULTURAL IMPORT RESTRICTIONS

Another major victory for trade liberalization was achieved in the “GATT-12” case, in which the United States complained of Japanese import restrictions on twelve agricultural products.³⁹ While the value of trade in these items was not earthshaking, the practices challenged were quotas that the United States considered inconsistent with article XI of the GATT (which generally prohibits the use of quotas). Significantly, Japan restricted imports of higher value beef and citrus on the basis of the same GATT arguments as applied to the GATT-12 products. Presumably, the outcome of the U.S. challenge to the twelve agricultural quotas presumably would presage the outcome of any GATT challenge to the beef and citrus quotas as well.

In February 1988, after three rounds of argument and seven rounds of written submissions, the panel reached a decision. On both the major issues—(1) whether the Japanese practices were authorized by an exception to article XI’s general prohibition of quotas; and (2) whether Japan’s use of state trading

37. *Id.* at 8. The panel ruled that the EC subsidies nullified or impaired the reasonably expected benefits of the tariff concession made by the EC when it bound its tariff on soybeans at zero.

38. Ambassador Hills reportedly stated her expectation that the EC will implement this panel report in time for the 1991 soybean planting season. She acknowledged that it probably would not be feasible for the EC to act accordingly earlier. *Daily Report for Executives* (BNA) A-12 (Dec. 21, 1989).

39. Prepared and preserved milk and cream, processed cheese, dried peas and beans, starch and inulin, peanuts, prepared and processed beef, nonsucrose sugar and syrups, fruit purees and pastes, fruit pulp and canned pineapple, noncitrus fruit and vegetable juices, tomato juice, ketchup and sauce, and other sugar- and dairy-based food preparations. See generally the introduction by the USTR lawyer who argued and won this case, A. Porges, *General Agreement on Tariffs and Trade, Dispute Settlement Reports on Japanese Agricultural Import Quotas and Japanese-U.S. Exchange of Letters on Beef and Citrus*, 27 I.L.M. 1539 (1988).

immunized those practices from GATT challenge—the panel ruled in favor of the United States.

This panel's report's significance is twofold. First, it represents a successful use of GATT dispute settlement procedures with respect to agricultural practices, which historically had eluded resolution under article XXIII. Second, by eliminating a credible GATT defense for the restrictions on imports of beef and citrus as well, the panel report expedited the market-liberalizing agreement concluded by the United States and Japan just four months later.⁴⁰

C. U.S. COMPLAINT ABOUT KOREAN BEEF IMPORT RESTRICTIONS

The Republic of Korea also limits the amount of beef that may be imported. Following long-running, unsuccessful consultations with the Korean government, the United States formally requested consultations under article XXIII:1 and subsequently the establishment of a panel under article XXIII:2.⁴¹ Australia and New Zealand were also interested parties; like the United States, they are substantial producers and exporters of beef.

As in the GATT-12 case, the issue was whether the GATT quantitative restrictions were prohibited under article XI of the GATT and not otherwise authorized by an exception to the GATT. As in the GATT-12 case, the panel ruled that the Korean beef restrictions were subject to article XI's prohibition on the use of quantitative restrictions and were not authorized by any exception to article XI.

Unlike the Japan case, however, the Korea case was complicated by Korea's claim that article XVIII warranted the restrictions on the basis of Korea's alleged need to safeguard its external financial position and ensure a level of reserves adequate for the implementation of its economic development program. The panel ruled, however, that Korea's import restrictions on beef were not justified for balance-of-payments purposes, especially in light of improvements in Korea's balance-of-payments situation.⁴² The panel recommended prompt establishment of a timetable for phasing out Korea's restrictions on beef.⁴³ Korea objected to adoption of the panel report at GATT Council meetings in June, July,

40. 27 I.L.M. 1588 (1988).

41. Like the *EC Oilseeds* case, *Korea Beef* was begun in response to the filing of a petition under section 301 of the Trade Act, in this instance by the American Meat Institute on February 16, 1988. *Semi-Annual Report on Section 301 Developments*, *supra* note 36, at 8.

42. In a separate but related development, the GATT Balance of Payments Committee had "taken note" of the evolution of Korea's balance-of-payments situation, as well as the statement by the International Monetary Fund on the strength of Korea's reserves position and the positive results of its economic policies. In response, Korea agreed to disinvoke article XVIII:B by January 1, 1990, and to phase out by 1997 all its import restrictions "or otherwise bring them into conformity" with the GATT. *Inside U.S. Trade* 6 (Nov. 3, 1989).

43. *Semi-Annual Report on Section 301 Developments*, *supra* note 36, at 9.

and October 1989,⁴⁴ but at the November GATT Council meeting agreed to permit the report to be adopted.⁴⁵

The significance of the Korea beef case is the consolidation of the trend toward trade liberalization, even in the controversial area of agricultural trade, in a developing country that until now has restricted imports based on balance-of-payments grounds.

D. U.S. COMPLAINT ABOUT CANADIAN ICE CREAM AND YOGURT RESTRICTIONS

In 1988, the United States requested consultations with Canada under article XXIII:1 about its quantitative restrictions on imports of ice cream and yogurt. In the absence of a satisfactory resolution, in December 1988, the United States requested the establishment of a panel under article XXIII:2. As in other cases of import quotas, the United States argued that such measures were contrary to article XI's general prohibition on import quotas and not justified by any of the exceptions provided therein.

In the fall of 1989, a panel ruled for the United States and found that the Canadian restrictions were inconsistent with article XI. To date, Canada has blocked adoption of the panel report, with which it has said it has major difficulties.⁴⁶ Like the previous article XI cases, this case consolidates the trade-liberalizing trend in GATT dispute settlement, even in the controversial agricultural arena.

While the above-described cases are notable victories for the United States in GATT dispute settlement, the United States has suffered some notable losses as well. We now examine other trade-liberalizing GATT panel decisions, in which the United States unsuccessfully attempted to justify its practices.

E. EC COMPLAINT ABOUT U.S. SECTION 337

Section 337 of the Tariff Act of 1930, as amended (Tariff Act),⁴⁷ broadly authorizes relief for U.S. industries against unfair methods of competition with respect to imports into the United States. The principal application of section 337 has been to protect U.S. intellectual property right owners from imports that infringe those rights, including product and process patents, copyrights, and trademarks.⁴⁸ Section 337 relief is available solely with respect to imports. By

44. *Id.* at 8.

45. See *Daily Report for Executives* (BNA) A-12 (Nov. 8, 1989).

46. *E.g.*, Canada blocked adoption of the panel report at the November 7 GATT Council. *Daily Report for Executives* (BNA) A-11, A-12 (Nov. 8, 1989).

47. 19 U.S.C. § 1337 (1988).

48. Simplistically, a complaining U.S. person petitions the U.S. International Trade Commission to provide relief (as through an exclusion order or cease and desist order) against infringing imports. The case is heard by an administrative law judge, who makes an initial determination subject to review by the Commission.

contrast, relief under the core intellectual property laws of title 35 of the United States Code is available with respect to both imports and domestic goods and parties.

For some time section 337 has provoked opposition by foreign governments that complain of an alleged lack of national treatment. Years ago, Canada sought to obtain a panel under article XXIII:2 and complained of the section 337 order issued by the Commission against spring assemblies.⁴⁹ The United States successfully defended its use of section 337 on the basis of the broad exception in article XX(d) for “measures . . . necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.”⁵⁰

However, the *Spring Assembly* decision did not deter the EC in 1987 from requiring consultations under article XXIII:1, and the establishment of a panel under article XXIII:2. The EC contested section 337 in general as well as its application in the *Aramid Fiber* case.⁵¹ In *Aramid Fiber*, the Commission issued an order, which the President permitted to take effect without acting,⁵² that excluded imports produced by a Dutch company, Akzo, that were found to infringe a valid patent held by E.I. DuPont de Nemours. The Dutch company sought to include several counterclaims in the section 337 proceeding, but that provision does not permit counterclaims. Akzo then sued in U.S. district court and lost.⁵³

Nonetheless, the EC argued, and the panel found, that section 337 denies the national treatment that article III of the GATT provides to products of the territory of GATT contracting parties with respect to all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, and use. While the panel report noted differences between the provisions of U.S. patent law and section 337, it held that any differences between those two that resulted in less favorable treatment of imports violated article III—even if other differences treated domestic products less favorably than imports.⁵⁴ The panel thus failed to judge whether the differences between the two regimes as a whole constitute a denial of national treatment.

The panel further rejected the United States’ arguments that section 337 was justified under article XX(d) as necessary to secure compliance with laws to

49. *In re Spring Assemblies and Components Thereof; and Method for Their Manufacture*, Inv. No. 337-TA-88 (USTIC Pub. 1172) (Aug. 1981).

50. GATT, *supra* note 1, art. XX(d).

51. *In re A Certain Aramid Fiber*, Inv. No. 337-TA-194 (USTIC Pub. 1824) (Mar. 1986).

52. The Commission’s decision is subject to review by the President, who may approve it, disapprove it, or let it take effect without his action. Tariff Act, § 1337(j), 19 U.S.C. § 1337(j).

53. *Akzo N.V. v. E. I. DuPont de Nemours*, 635 F. Supp. 1336 (E.D. Va. 1986).

54. *E.g.*, the absence of substantial in rem relief in title 35 cases, and the greater difficulty of obtaining in personam jurisdiction.

protect patents. The panel ruled that the availability of alternative means of protecting patents—proceedings in U.S. district courts under Title 35 of the United States Code—prevents section 337 from being considered as “necessary” to secure compliance with intellectual property laws.

The United States blocked the adoption of this panel report by the GATT Council seven times.⁵⁵ Subject to unprecedented pressure in Geneva, and at an important juncture in the Uruguay Round negotiations, the United States finally ceased its resistance at the GATT Council meeting on November 7, 1989.⁵⁶ However, in so doing, the Trade Representative stressed that the United States did not approve the panel report. “Although we did not block GATT Council adoption of the panel report on Section 337, the United States did not join that consensus or accept the report’s findings.”⁵⁷ Moreover, while the Trade Representative agreed to seek to conform her practices in this regard with the GATT panel report, she nonetheless emphasized that implementation of any such solution would be part of the overall implementation of any agreements concluded in the Uruguay Round. In addition, any such solution would “need to reflect [the United States’] commitment to strong enforcement of intellectual property rights.”⁵⁸ Finally, the White House issued an extraordinary press release stating that the GATT panel report “should not provide a basis for changing current practice with respect to Presidential review or for disapproving section 337 orders.”⁵⁹

This case, like prior blocking cases (more often than not involving agriculture and the European Community’s opposition to adoption⁶⁰), illustrates the long-standing limitations on GATT dispute settlement. The procedures allow a single interested party to block the adoption of a panel report. Many observers believe this shortcoming ultimately stems from the political, rather than judicial, nature of dispute settlement in an international forum of sovereign nations. To date,

55. Ironically, in the dispute settlement negotiations in the Midterm Review in December 1988 in Montreal, the United States promoted adoption of a “consensus minus two” approach, under which opposition by parties to the dispute alone could not prevent adoption of a panel report. However, other Contracting Parties rejected the United States approach. In blocking adoption of the section 337 report, then, the U.S. simply exercised its right to block—which it had been fully prepared to relinquish, but which other Contracting Parties insisted on retaining.

56. Office of the U.S. Trade Representative, *Ambassador Hills Announces GATT Council’s Adoption of Panel Report on Section 337* (Nov. 7, 1989) (on file at USTR).

57. *Id.* at 2. Intellectual property protection in general, and section 337 in particular, feature prominently in the Omnibus Trade and Competitiveness Act of 1988, through the inclusion of broad trade negotiating objectives on intellectual property rights, so-called “Special 301,” and amendments to section 337 designed to make it a “more effective” and more broadly applicable remedy. Omnibus Trade and Competitiveness Act of 1988, §§ 1101(b)(10), 1303, 1342, Pub. L. No. 100-418, 102 Stat. 1123-24, 1179-81, 1212-16 (1988).

58. *Daily Report for Executives* (BNA) A-11, A-12 (Nov. 8, 1989) (quoting Ambassador Rufus Yerxa).

59. Memorandum for the United States Trade Representative Enforcement of Section 337 of the Tariff Act of 1930, 25 WEEKLY COMP. PRES. DOC. 1699 (Nov. 7, 1989).

60. *E.g.*, the *EC Citrus* case, *supra* note 27.

GATT Contracting Parties have elected to tolerate the frustration of dispute settlement through blocking rather than lose the safety valve that blocking creates. Currently a Contracting Party may not be legally compelled to permit a panel report to be adopted. Nevertheless, the section 337 case reflects the potency of political pressures as a means through which beneficiaries of dispute settlement may achieve the adoption of favorable reports over opposition by the "losing" party.

F. CANADIAN, EC, AND MEXICAN COMPLAINTS ABOUT U.S. SUPERFUND

Another case in which the United States was a respondent rather than a complainant involved the 1986 legislation enacted to fund the Superfund cleanup program. The Superfund Amendments and Reauthorization Act⁶¹ established an 11.7 cents per barrel fee on imported petroleum as compared to 8.2 cents per barrel for domestically produced petroleum. With respect to certain imported chemicals, the legislation established taxes on downstream chemicals equivalent to the tax the chemicals would have borne had their inputs been sold in the United States.

Canada, the EC, and Mexico objected to the fees and requested consultations almost immediately after the enactment of the legislation. The failure to resolve this matter led to the establishment of a panel under article XXIII:2.

The complainants charged that the 3.5-cent differential in taxes denied the national treatment with respect to internal charges as provided by article III:2 and nullified or impaired GATT benefits. The United States replied that the differential was so small that it caused no trade damage and did not impair GATT benefits. However, the panel ruled that a per se violation of the GATT warranted an irrebuttable presumption of trade damage. It therefore ruled on behalf of the complaining parties.⁶² The U.S. obtained a favorable ruling with respect to the fees imposed on refined products. The panel straightforwardly applied GATT law and practice and ruled that this was a GATT-consistent border tax adjustment.⁶³

The GATT Council adopted the *Superfund* panel report on June 17, 1987. After a long delay, the United States enacted legislation to enter into compliance with the panel report in November 1989.⁶⁴

The *Superfund* case underscores the need for the Administration in some instances to obtain legislation in order to conform with an adverse GATT panel report. In limited cases the President is authorized to provide compensation in

61. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

62. See General Agreement on Tariff and Trade, *Dispute Settlement Panel Report on United States Superfund Excise Taxes, Introductory Note*, 27 I.L.M. 1596 (1988).

63. *Id.*

64. Conformity was accomplished through the enactment of the Steel Trade Liberalization Program Implementation Act, § 8, 135 CONG. REC. H9704 (daily ed. Nov. 21, 1989).

the event of adverse GATT action.⁶⁵ When Congress enacts legislation later challenged and found to be GATT-inconsistent, however, such compensation is not generally provided.

G. AUSTRALIAN COMPLAINT ABOUT U.S. SUGAR IMPORT QUOTAS

In September 1988, Australia requested consultations with the United States concerning certain import quotas on sugar.⁶⁶ Absent a mutually satisfactory resolution through such consultations, Australia requested and obtained the establishment of a GATT panel. Australia maintained that as administered the quotas were inconsistent with article XI and not justified by any exception allowed by article XI. In response, the United States maintained that its import quota was permissible as part of its tariff schedules which are incorporated into and recognized by the GATT. The panel found the quota was in contravention of the GATT because import restrictions are permitted only according to narrow exceptions specified in article XI, which the U.S. program did not satisfy.

On June 22, 1989, the GATT Council adopted the report. In her statement commenting on this action and the United States' acceptance of this report, the Trade Representative characterized the panel's finding as focused solely on the U.S. administration of the quota system, rather than the quotas themselves. Ambassador Hills noted that the Administration would consider its options on how to bring such administration into conformity with the GATT in close consultation with the industry and Congress.⁶⁷

In explaining the United States' prompt decision to accept this adverse panel report, Ambassador Hills stressed that "all members of the GATT have an interest in an effective dispute settlement process for agricultural products, as well as other goods. It's to our benefit to have a system that works and can deal effectively with agricultural trade disputes."⁶⁸

IV. Conclusion

Burgeoning GATT practice and continuing GATT negotiations regarding dispute settlement offer great promise to all those committed to the rule of law.

65. *E.g.*, Telecommunications Trade Act of 1988, § 1378, 19 U.S.C. § 3107; Trade Act of 1974, § 123, *as amended*, 19 U.S.C. § 2133 (1988).

66. This complaint related exclusively to quotas imposed under the authority of Headnote 3 to the former Tariff Schedules of the United States. United States sugar quotas imposed under section 22 of the Agricultural Adjustment Act are being challenged separately by the EC in the GATT.

67. Office of the U.S. Trade Representative, *Statement by Ambassador Hills on GATT Sugar Panel* (June 22, 1989) (on file at USTR). Ambassador Hills also stressed that the quota dealt with by the panel report is separate and unrelated to Uruguay Round agricultural negotiations. She noted that these negotiations are aimed at substantially reducing all trade-distorting policies regarding all agricultural commodities, including sugar. However, she emphasized that the United States would not "unilaterally eliminate support for U.S. sugar producers."

68. *Id.*

Rules lose their value unless a means for resolving disputes about their application can be expeditiously applied and reliably enforced.

The current trend in the GATT is clearly toward more effective enforcement of existing rules. Likewise, the direction of ongoing negotiations is toward the improvement of dispute settlement procedures where they have to date proved deficient. Such developments are likely to strengthen the GATT's position significantly for the remainder of this decade and into the next century.

