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?

On December 20, 1991, GATT Director-General Arthur Dunkel issued a text in the Uruguay Round multilateral trade negotiations, begun in 1986. The Dunkel text covers nearly the full gambit of trade negotiations, from intellectual property, services, and investment to agriculture, textiles, subsidies, dumping, and preshipment inspection. The only major subject not covered is market access agreements for both products and services.

This article reviews the major modifications proposed to current GATT rules concerning dispute settlement. While, as of this writing, the Dunkel text has not been accepted, major changes are not expected in the dispute settlement area. It is timely, then, to review how the Dunkel regime could be expected to work and how it presumably would affect use of the major U.S. trade remedy to open foreign markets, section 301 of the Trade Act of 1974.

I. The Understanding on Rules and Procedures Governing the Settlement of Disputes

At the 1988 Midterm Review in the Uruguay Round multilateral trade negotiations, as reported earlier in this series,[1] Contracting Parties of the General Agreement on Tariffs and Trade (GATT)[2] negotiated and agreed to implement,

*Partner in the Washington, D.C., office of Sidley & Austin. Ms. Bello was previously General Counsel to the United States Trade Representative.

**Partner in the Washington, D.C., office of Sidley & Austin. Mr. Holmer previously served as Deputy United States Trade Representative.

1. Alan F. Holmer & Judith H. Bello, *Settling Disputes in the GATT: The Past, Present and Future*, 24 INT'L LAW. 519 (1990).

2. *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 1987 [hereinafter GATT].

ad referendum, major procedural improvements to the GATT rules for settling disputes. However, negotiations continued for the next three years on more substantive reforms.

On December 20, 1991, GATT Director-General Arthur Dunkel, exercising his leadership, issued a nearly comprehensive text designed to jumpstart the long stalemated negotiations. In the agricultural negotiating group, the heavily subsidizing European Communities, the United States, and the so-called Cairns Group of agricultural exporting nations repeatedly failed to breach the impasse in negotiations. Led by Dunkel, the GATT Secretariat resolved differences to the best of its ability and, by issuing a text without brackets (which are used to denote disagreement), illustrated how tantalizingly close the Contracting Parties were to a dramatic strengthening of the international trading system.

Among many other agreements in the nearly 500-page text the Dunkel document includes an Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding).[3] Under GATT dispute settlement procedures a Contracting Party complaining about the actions of another Contracting Party first requests consultations. If those consultations fail to achieve a mutually satisfactory result, the complaining party may request the establishment of a panel to investigate the complaint and make recommendations to the GATT Council. In the 1988 Midterm Review, Contracting Parties adopted *ad referendum* new procedures designed principally to expedite these stages of dispute settlement.[4]

Under the current system, the complaining party has no opportunity for appeal once the panel issues its report. However, the report technically has no legal effect or formal status unless and until it is adopted by the GATT Council (all the Contracting Parties). A single Contracting Party—including the party whose actions are the subject of the dispute—can block adoption of the report by formally objecting to it.

Even if a report is adopted by the GATT Council, the complaining party has no assurance that the offending party will either come into conformity with its GATT obligations (by withdrawing the offending measures or compensating adversely affected trading partners) or suffer the consequences (GATT-authorized retaliation against its trade, to restore the balance of concessions). Actions found either to violate the GATT or to nullify and impair benefits reasonably anticipated from the GATT can continue indefinitely, with no automatic or even clear recourse for the Contracting Party that "won" its legal case but continues to lose trade benefits. Moreover, in the unusual event that a Contracting Party seeks GATT authorization to retaliate against a delinquent trading

3. *Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade,* Section S attached to GATT MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Understanding].

4. *Improvements to the GATT Dispute Settlement Rules and Procedures,* 28 I.L.M. 1031–34 (1989).

partner, an effective, credible procedure to quantify the adverse trade effects to establish the level of retaliation does not exist.

The Understanding addresses these remaining deficiencies of the current procedures. First, it provides for automatic establishment of a panel[5] and automatic adoption by the GATT Council of a panel report,[6] unless the Council, by consensus, decides to the contrary. A recalcitrant Contracting Party seeking to delay and avoid the resolution of a dispute would no longer be able to do so.

Second, the Understanding provides an opportunity for appellate review. It establishes a seven-member standing appellate body, three of whom would be empaneled to hear a particular case.[7] An appeal is limited to issues of law, and an appellate report is automatically adopted by the GATT Council unless the Council decides, by consensus, not to adopt it.[8]

Third, the Understanding focuses on the surveillance of implementation of adopted panel reports. It stresses the importance of prompt compliance and ensures that a period of time is established (by arbitration, if necessary[9]) for adoption of the GATT's recommendations and rulings.[10] Moreover, it requires the GATT Council to review the implementation of recommendations and rulings by including them on the agenda of the Council meeting six months following the establishment of the reasonable period for compliance and at each subsequent meeting until the issue is resolved.[11] At least ten days before each such meeting, the GATT Contracting Party concerned must provide the Council with a written status report of its progress in implementing the recommendations or rulings.

The Understanding provides that compensation and the suspension of concessions are temporary measures available when a Contracting Party does not conform with its GATT obligations within the specified time period.[12] In the absence of such conformity or agreement on compensation the Understanding provides for automatic approval by the GATT Council of a request for authorization to suspend concessions (to retaliate) unless the Council decides, by consensus, to reject the request.[13] Moreover, in the event of any disagreement about the level of suspension proposed, the matter is referred to expeditious arbitration.[14]

Finally, the Understanding requires Contracting Parties seeking redress of a practice they consider a GATT violation (or a nullification and impairment of GATT benefits) to have recourse to, and abide by, the GATT dispute settlement procedures.[15] In such cases Contracting Parties are prohibited from making their

5. Understanding, *supra* note 3, para. 4.1, at S.6.
6. *Id.* para. 14.4, at S.12.
7. *Id.* para. 15.1, at S.13.
8. *Id.* para. 15.14, at S.14.
9. *Id.* para. 19.3(c), at S.15.
10. *Id.* para. 19.3.
11. *Id.* para. 19.6.
12. *Id.* para. 20.1, at S.16.
13. *Id.* para. 20.3, at S.17.
14. *Id.* para. 21.1, at S.18.
15. *Id.* para. 21.1, at S.18.

own determinations whether their rights have been violated or nullified and impaired.[16] Moreover, they are required to follow the GATT procedures to determine both the reasonable period of time for compliance[17] and the level at which they propose to suspend concessions.[18]

Through these reforms the Understanding dramatically enhances the credibility of GATT procedures for settling disputes effectively and expeditiously. A government whose policies contravene its GATT obligations or nullify and impair GATT benefits can neither run nor hide from its responsibilities. If a complaining Contracting Party requests the establishment of a GATT panel, it will be established promptly and will render a report that the Council is virtually certain to adopt. If the panel report is regarded as aberrant, an appeal may be taken. The Council will call upon the offending government to provide the GATT written reports of its progress in implementing the recommendations or rulings within the reasonable time period established by agreement or arbitration. If it fails to implement the recommendations or rulings or provide adequate compensation within the reasonable period of time for compliance, then the GATT Council is virtually certain to authorize the complaining party to suspend concessions.

While these reforms are impressive, what effect will they have on the U.S. section 301 program?

II. Relationship Between the Understanding and Section 301 of U.S. Trade Law

Section 301 of the Trade Act of 1974, as amended,[19] is the principal trade remedy aimed at enforcing U.S. rights under trade agreements, opening foreign markets to U.S. goods and services, and improving foreign protection of intellectual property rights. It enables private parties in the United States to petition the U.S. Trade Representative to initiate an investigation of foreign government acts, policies, and practices that violate a trade agreement or are otherwise actionable under section 301. If the U.S. Trade Representative determines that a foreign government practice violates a trade agreement, she must take responsive action unless a statutorily specified exception applies.[20]

Section 301 originated primarily as a means of enforcing U.S. rights under the GATT. However, over time a major use of section 301 has been as a credible

16. *Id.* para. 21.2(a), at S.18.

17. *Id.* para. 21.2(b).

18. *Id.*para. 21.2(c).

19. Trade Act of 1974, § 301 (as amended), Pub. L. No. 93-618, 88 Stat. 1978, 2041 (1975) (codified at 19 U.S.C. §§ 2101, 2411 (1988)) [hereinafter Trade Act], in particular as amended by the Omnibus Trade and Competitiveness Act of 1988, § 1301, Pub. L. No. 100-418, 102 Stat. 1107, 1164–76 (codified at 19 U.S.C. §§ 2411 *et seq.* (1988)).

20. *See generally* Judith H. Bello & Alan F. Holmer, *Unilateral Exercises to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197 (1988); Judith H. Bello & Alan F. Holmer, *Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211 (1987).

threat of U.S. retaliation to increase pressure on a foreign government to adopt reforms not required by the GATT. For example, section 301 has been used to achieve adequate and effective protection abroad of intellectual property rights—a subject only peripherally addressed in the current GATT (although the Dunkel text last December includes an Agreement on Trade-Related Aspects of Intellectual Property Rights[21]).

However, where the subject of a section 301 petition involves the GATT, current law requires the Trade Representative to request proceedings on the matter under GATT dispute settlement procedures.[22] While section 301 does not require the Trade Representative to conform her unfairness determination[23] with that of a GATT dispute settlement panel,[24] the Office of the U.S. Trade Representative (USTR) has never found a practice to be unfair following a GATT determination that it was fair, or vice versa.

What, then, would be the effect of the Understanding on section 301? Arguably the Understanding internationalizes section 301 by providing dramatically more effective international enforcement against unfair traders. By providing for automatic establishment of panels and adoption of panel reports, arbitration if needed (as regards the reasonable period for implementation and the appropriate level of suspension of concessions), strict surveillance of implementation, and near-automatic GATT authorization for retaliation, it makes the GATT[25] a more powerful international cop. By increasing the prospect of effective and expeditious enforcement against GATT offenders, the Understanding, like section 301, may deter GATT offenses. If not, it at least restores a reasonable balance of rights and obligations.

While the Understanding is unquestionably a boon for GATT plaintiffs, it is conversely a bane for defendants. Any action that violates GATT obligations or nullifies and impairs GATT benefits may be the subject of relatively prompt GATT action, resulting in GATT recommendations for the offending party to withdraw the objectionable measures. A recalcitrant party refusing to shoulder its obligations and implement the recommendations, and unable (or unwilling) to compensate adversely affected Contracting Parties, faces the prospect of virtually assured retaliation with the full sanction of the GATT.

Consequently, while the Understanding internationalizes section 301, it also somewhat diminishes the credibility of the threat of unilateral retaliation by the

21. Understanding, *supra* note 3, at 57, Annex III. While the Dunkel "TRIPS" text represents significant progress, key U.S. private sector interests consider it seriously flawed (e.g., by unduly long transition periods for developing countries and lack of "pipeline" protection for existing patented subject matter).

22. Trade Act § 303(a)(2), 19 U.S.C. § 2413(a)(2).

23. That is, the determination whether the acts, policies, and practices of a foreign government are actionable under section 301.

24. *See generally* Trade Act § 304, 19 U.S.C. § 2414.

25. If the Uruguay Round is concluded and implemented, the GATT may be called instead the Multilateral Trade Organization.

United States under section 301. Any such retaliation—consisting in all cases to date of either an increase in duties or imposition of quantitive restrictions on imported goods—is likely to be in violation of GATT articles I,[26] II,[27] or XI, or all three.[28] If the United States takes such action without GATT authorization, then it is likely to be challenged. And, if challenged, the United States' retaliation is likely to be found in violation of the GATT.

Of course, this is true under existing GATT rules. Already, unilateral U.S. increases in bound tariffs or imposition of quotas, if challenged under current GATT dispute settlement procedures, are likely to be found by a panel to violate the GATT. Under the Understanding, however, a panel report adverse to the United States could not be blocked by the United States alone.[29] Further, a reasonable period for compliance would be established (if not by agreement, then through arbitration), and the GATT would monitor U.S. progress in implementing the recommendations of an adopted GATT panel report. Current GATT rules arguably deter the use of unilateral retaliation in violation of the GATT. The significantly improved procedures for dispute settlement provided in the Understanding would further erode the already circumscribed credibility of threats of unilateral action by the United States under section 301 (or by any other Contracting Party under national law).

Does that mean that the Understanding would require the United States to eliminate section 301? It definitely would not. Section 301 could continue to be used, consistently with the GATT, as the complement in U.S. domestic law to international legal action in the GATT under the dispute settlement procedures. To a large degree it would function as the U.S. private sector's insurance policy that the United States Government would use the dispute settlement procedures aggressively against foreign governments engaged in unfair practices.

Would the United States be precluded from using section 301 unilaterally without GATT authorization? It definitely would not. As a sovereign nation the

26. Article I provides most-favored-nation (MFN) treatment, under which no Contracting Party may be treated less favorably than other Contracting Parties with respect to, inter alia, customs duties and charges.

27. Article II generally prohibits any increase in duties beyond the levels agreed to in schedules of tariff concessions.

28. Article XI generally prohibits quotas, subject to specified exceptions.

29. However, the legal right to block adoption of an adverse GATT panel report does not necessarily ensure that such right will be exercised indefinitely in the face of united international condemnation of a particular practice. For example, in 1988 a GATT panel ruled that section 337 of the U.S. Tariff Act of 1930, *as amended*, 19 U.S.C. § 1337, denied national treatment as required by GATT article III. The U.S. blockage was ultimately determined to outweigh its benefits. Reluctantly, in November 1989, the United States permitted the report to be adopted. The United States clarified that it did not approve the report, and would implement the report in the context of a satisfactory agreement on trade-related intellectual property rights. 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 the office of the U.S. Trade Representative). Memorandum for the United States Trade Representative on Enforcement of Section 337 of the Tariff Act of 1930, 25 WEEKLY COMP. PRES. DOC. 1699 (Nov. 7, 1989).

United States would retain the legal right to take actions inconsistent with its GATT obligations. However, the Understanding would be more likely than the current GATT rules to preclude the United States (and all other GATT Contracting Parties) from doing so "for free." If challenged, U.S. action adversely affecting a GATT Contracting Party and inconsistent with the GATT—no matter how well intended, or trade-liberalizing in its ultimate effect—would likely result in GATT authorization for retaliation against the United States. While this could happen as well under current GATT rules, it is more likely to happen, and more quickly, under the Understanding.

For example, suppose the United States and U.S. private parties complained that a developing country failed to provide any patent protection for certain chemical products. While the Dunkel text includes an intellectual property agreement, it expressly allows developing countries five years to implement the agreement in general. And it permits ten years with respect to patent protection for certain chemical products. Thus, the United States would have no basis to complain in the GATT of inadequate action by a developing country to provide such protection during the ten-year period. On the other hand, if the United States initiated a section 301 proceeding against such country, the developing country presumably would not consider the threat of retaliation credible because retaliation through tariff increases or quotas probably would violate the GATT and lead to GATT authorization for the developing country to retaliate against the United States.

Even so, in the future the United States could continue to use section 301 unilaterally in selected cases. Where the domestic political pressure is great enough, the U.S. administration may be prepared to suffer the international consequences. Moreover, section 301's threat of retaliation may remain credible in cases in which geopolitical developments or other bilateral factors make a trading partner willing to accept, however reluctantly, U.S.-advocated trade reforms. While access to the American market is one of the U.S. administration's major sources of leverage in trade negotiations, it is certainly not the only arrow in the U.S. quiver. Trading partners will continue to value other U.S. actions (for example, support for a U.N. resolution or a candidate for office in an international organization; a favorable response to developments in a foreign capital; support for a head of state's agenda or proposal for an international plenipotentiary conference).

III. Conclusion

The Understanding on Rules and Procedures Governing the Settlement of Disputes in the Dunkel text of December 1991 is a quantum leap forward for effective and expeditious resolution of international trade disputes. While the Understanding does not preclude sovereign Contracting Parties from occasionally disregarding their GATT obligations, it ensures that the international com-

munity responds swiftly (at least in international terms) to restore the balance of rights and obligations among trading partners. In this regard, the Understanding will be a valuable asset to the United States in its efforts to eliminate GATT-illegal practices of other GATT Contracting Parties.

However, the Understanding also could further hamper U.S. efforts to eliminate unfair practices that do not violate the GATT by using the credible threat of unilateral retaliation under section 301 of the Trade Act. While unilaterally imposed tariff increases and quotas may violate the present GATT rules, a losing party today may delay and retard any effective response by the Contracting Parties. Under the Understanding, however, any losing party that fails to shoulder its obligations within a reasonable period of time is likely to face the prospect of retaliation against its trade with the express authorization of the GATT.

If the Understanding is ultimately accepted and implemented, the United States must be prepared to live with the international trade rules that it negotiates. Although current GATT rules limit the ability of the United States in many circumstances to achieve a better result bilaterally through the threat of unilateral action under section 301, the Understanding would further erode the credibility and, therefore, the effectiveness of such retaliation threats.