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**ARTICLE: POST-URUGUAY ROUND GATT/WTO DISPUTE SETTLEMENT:
SUBSTANCE, STRENGTHS, WEAKNESSES, AND CAUSES FOR CONCERN**

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LEXISNEXIS SUMMARY:

... Dispute settlement under the General Agreement on Tariffs and Trade ("GATT") has come under increasing strain in recent years. ... A primary purpose of the Uruguay Round was revision of the GATT dispute settlement system. ... This paper analyzes the GATT dispute settlement system arising out of the Uruguay Round. ... The GATT 1947 dispute settlement system is rife with weaknesses. ... Unfortunately, the GATT 1947 dispute settlement procedure contains serious faults. ... Unfortunately, the weaknesses of the GATT dispute settlement system are not limited to these general problems. ... The GATT 1994 dispute settlement system mimics the GATT 1947 system in many ways. ... As indicated above, delay was a major problem under the GATT 1947 dispute settlement system. ... As alluded to previously, an appellate body is now also an integral part of the GATT dispute settlement system. ... **PROBLEMS IN THE GATT 1994 DISPUTE SETTLEMENT SYSTEM** ... It should bear up to the same standards as the dispute settlement system for actual GATT violations. ...

TEXT:

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I. INTRODUCTION

Dispute settlement under the General Agreement on Tariffs and Trade ("GATT") has come under increasing strain in recent years. The major powers often ignore GATT dispute settlement decisions which do not comport with their economic interests. This situation undermines the credibility of the GATT and threatens the system's framework. If dispute settlement under the GATT continues to be ineffective as it has been through much of the 1980s and early 1990s, GATT member states ("Members") may well lose faith in the system, begin reimposing the tariffs that were present before the GATT, thereby risking worldwide trade war and possibly consequences as serious as the Great Depression. ¹ A primary purpose of the Uruguay Round was revision of the GATT dispute settlement system.

This paper analyzes the GATT dispute settlement system arising [*170] out of the Uruguay Round. The paper initially examines many of the weaknesses existing in the pre-Uruguay Round GATT dispute settlement system, on both theoretical and empirical levels. The paper then discusses the post-Uruguay Round dispute settlement system and how this system attempts to rectify certain weaknesses of the previous system. Finally, the paper discusses problems of the new dispute settlement system, and comments on some implications of these weaknesses. The paper concludes that the Uruguay Round modifications to the GATT dispute settlement system were incomplete and fail to solve certain core problems.

The post-Uruguay Round GATT fails because of both general and specific weaknesses. For example, on a general level, the revised dispute settlement system still allows delay; those applying the system retain a strong aversion toward retaliatory sanctions; and, the makeup of the panels excludes the most qualified individuals. On a more specific level, the revised dispute settlement process fails to remedy weaknesses in the area of non-violation nullifications or impairments. Disputes generally find their root in "either a "violation nullification or impairment' (a breach of general agree-

ment provisions) or a "non-violation nullification or impairment" (a disruption of benefits accruing under the GATT through measures not in conflict with the GATT, but resulting in the nullification or impairment of benefits negotiated within the GATT framework)." ⁿ² While the revised system does make it easier to sanction a Member who is found to have directly violated the GATT (a violation nullification or impairment), it is still well nigh impossible to sanction a Member for a non-violation nullification or impairment. Since it is relatively easy to nullify the effects of the GATT without actually violating the rules as they are set forth within the GATT (by domestic subsidies, for example), Members retain an incentive to impair the GATT by non-violation methods, which cannot be sanctioned. Hence, we are likely to see a continuing trend toward indirect violations of the spirit of the GATT and a concomitant weakening of the free trade regime.

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II. DISPUTE SETTLEMENT PRIOR TO THE GATT 1994 ⁿ³

A. Dispute Settlement Procedures Under the GATT 1947

The GATT 1947 dispute settlement system is rife with weaknesses. Before delving into these weaknesses however, it is useful to gain a better understanding of how the GATT 1947 dispute settlement procedures work.

The GATT 1947 dispute settlement procedures appear effective. Pursuant to these procedures, "any contracting party which feels aggrieved by another party's action has a right to set into motion the dispute settlement procedure. In case of failure of conciliation under Article XXII it has, as the expression goes, "a right to have a panel' instituted." ⁿ⁴ A panel generally consists of three members who are not nationals of any of the disputant states.

Guided by certain Terms of Reference (the standards by which findings are made), the panel then accepts written submissions from the parties, followed by oral hearings. Following these hearings, the panel produces a final report containing its findings and provides this to the parties. The report takes legal authority two weeks after its release if the parties cannot reach a settlement on their own. In the report a panel can find a measure directly inconsistent with the GATT (a violation nullification or impairment), or find that the [*172] measure indirectly nullifies or impairs some benefit accruing under the GATT (a non-violation nullification or impairment). In either case, panels have traditionally recommended that competition be restored, either through withdrawal of the measure or some other method. Failing that, the General Council may suggest that the offending party provide compensation. Finally, and only as a last resort, the Council can suggest retaliation by suspension of concessions (i.e., imposing like restrictions). ⁿ⁵ At this point then, the GATT 1947 dispute settlement procedure seems fairly effective (and rather similar to the GATT 1994 dispute settlement procedure). It appears relatively time efficient, makes use of non-interested panel members, and produces a report that only becomes final if the parties cannot come to a negotiated settlement. Unfortunately, the GATT 1947 dispute settlement procedure contains serious faults.

B. Dispute Settlement Weaknesses Under the GATT 1947

One general problem for the GATT 1947 dispute settlement system revolves around notions of unilateralism and multilateralism. Unilateralism implies a sovereign actor unhindered in its decision making and having narrowly defined interests. Multilateralism, on which the GATT is based, implies cooperation among a number of actors having interests defined by the greater community.

Multilateralism has proven a rather fragile and vulnerable construct. Multilateral trade law is desired because of the existence of assorted and often conflicting domestic laws which, if enforced, would lead to havoc in the international arena. ⁿ⁶ Thus, multilateral trade law's very raison d'etre is born of stress. Further, multilateralism depends upon cooperation (a rare commodity in an anarchic environment characterized by self-interested units) and provides little disincentive for free riding. Hence, we are initially faced with a fragile system buffeted by noncooperation and the threat of free rid [*173] ing.

A trend further eroding the GATT's effectiveness finds its genesis in unilateralism. Unilateralism encourages taking disputes outside of a given multilateral framework. Unilateralism tends to breed upon itself, creating an ever increasing spiral of destruction to the GATT system. "The increasing number of trade conflicts and GATT dispute settlement proceedings over unilateral trade sanctions against perceived international distortions (e.g., caused by discrimination, environmental measures, subsidies, dumping and restrictive trade practices) demonstrates that this aggressive unilateralism risks undermining the multilateral trading system." ⁿ⁷

International trade law also suffers, of course, from all the theoretical problems inherent in any dispute settlement system that lacks an effective enforcement mechanism. The GATT system of dispute settlement, however, is even weaker than conventional international law. This is due to the departure by the GATT from certain generally accepted principles of international law which allow parties to discontinue performance under treaties when other parties do the same. Along these lines, Professor Ronald A. Brand notes that:

International law is often criticized for the lack of enforcement mechanisms similar to those we are accustomed to in domestic legal systems. Respect for each nation's sovereignty means that all those subject to the law are of equal stature; and that no delegations of superstature occurs. In the general treaty context, the enforcement issue is addressed in Article 60 of the Vienna Convention on the Law of Treaties. That Article provides that upon a material breach of a treaty by one party, another party has the right to discontinue performance under that treaty... It is not the same in the GATT... [which does] not allow discontinuation of treaty performance in general. ^{ns}

So then, in addition to the over-arching weaknesses of multilateralism, in addition to destructive tendencies toward unilateralism, and in addition to the lack of an enforcement mechanism in interna [*174] tional law, the GATT also has a structural weakness other international law does not have: discontinuance of treaty performance is not allowed. Unfortunately, the weaknesses of the GATT dispute settlement system are not limited to these general problems. The internal dispute settlement rules and procedures of the GATT 1947 are also replete with weaknesses.

The exceptions and safeguard clauses are demonstrative of these weaknesses. These clauses result from the intransigence of the developed economies to see certain economic sectors (textiles, for one example of many) damaged by developing economic powers. The result of such anomalies in the GATT is that these sectors are exempt from GATT rules and immune to GATT dispute settlement. They represent areas of continuing trade restrictions, implicitly weakening the principle of nondiscrimination and the philosophical basis of the GATT. These examples encourage the notion that self-interested trade restrictions are acceptable. Even were these sectors susceptible to the GATT 1947 dispute settlement, there are other weaknesses in the system which militate against effective dispute settlement.

Ernst-Ulrich Petersmann believes the GATT 1947's weakness in dispute settlement stems from an approach that is not legalistic enough. ^{ns} Petersmann divides his criticism into three related areas. First, he sees the dispute settlement system as result-oriented. Rather than reaching decisions based upon some rule of law regarding actions, those making decisions seek results which are acceptable to all parties and less likely to risk non-compliance. The reports created by the panels are thus persuasive documents, "not decisive" documents, often avoiding or attempting to hide contentious issues, and creating only non-legalistic or "soft-rules." Such a dispute settlement process is problematic because such decisions tend toward inconsistency and create few clear rules for later dispute settlement bodies to rely upon.

Petersmann next takes issue with what he sees as diplomatic methods of treaty interpretation rather than legalistic methods. GATT emphasizes compromise and a reliance on unpublished [*175] documents and negotiations rather than building legal standards and precedents. If legal methods were employed states would be more apt to accept panel reports because the system would be more predictable.

Finally, Petersmann takes issue with secretive sectoral trade management taking the place of legalistic dispute settlement. This refers, in part, to bilateral negotiation between players such as the U.S. and Japan. Other observers agree that the 1980s have seen an increase in sectoral trade management. ⁿ¹⁰ Such management acts as an alternative to the GATT method of dispute settlement, and flies in the face of GATT principles of multilateralism and nondiscrimination.

Although the non-legalistic approach is troublesome in its own right, perhaps the greatest procedural problem under the GATT 1947 is that most decisions require agreement by consensus. For example, all reports must be adopted by consensus by the Council. But consensus under the GATT 1947 is something more stringent than the ordinary course of usage implying general agreement. Consensus under the GATT 1947 actually means that if any party refuses to assent to the report (or to any other decision that must be reached by consensus), the report (or other decision) is not adopted. Hence, the very party against whom a report finds can block that report's adoption by refusing to assent (as the U.S., the E.C., and Japan have all done); effectively a veto. This has led to fewer and fewer reports being adopted. One observer noted in late 1993 that under the Tokyo Round rules only one of four anti-dumping reports has been adopted and only two of nine subsidies and countervailing complaints has been adopted. ⁿ¹¹ The problem goes beyond these committees and exists GATT-wide.

This lack of true enforcement ability is not surprising in an anarchic environment because states loathe to relinquish sovereignty, or even the perception thereof. Notwithstanding, so long as the [*176] GATT continues to lack an enforcement mechanism, the GATT will be forced to rely on the cooperation and magnanimousness of those it seeks to discipline, certain decisions of the GATT dispute settlement bodies will be ignored, and the GATT will remain far less effective than it could be.

Another level of the consensus problem exists in the area of retaliation. Although couched in assorted terms and often discouraged because it is believed to harm other GATT principles such as nondiscrimination, the sanction of arguably greatest utility for a GATT member is retaliation. At least two problems are related hereto. First, retaliation is seen as viable only to great powers. Second, Article XXIII, which along with Article XXII provides the basis for GATT 1947 dispute settlement, allows only multilateral retaliation (a euphemism for the consensus requirement).ⁿ¹² Of course, the consensus requirement allows easy subversion of retaliation by the defendant's veto. In this regard it is noteworthy that, though the Council may recommend retaliation, it "has been formally authorized only once in GATT history."ⁿ¹³

C. Oilseeds - An Example

The previously discussed problems often manifest themselves in an ability of parties involved in a GATT dispute to delay resolution of that dispute almost indefinitely. "One of the principal criticisms of the operation of the GATT dispute settlement mechanism is that its anti-legalistic aspects furnish a contracting party far too many opportunities to delay proceedings and to block any real action by the GATT Council..."ⁿ¹⁴ Professor Brand demonstrates how many of [*177] the above problems arise and how dispute settlement can fail in his analysis of the Oilseeds case.

The facts of the Oilseeds case are rather convoluted, but can be summarized as follows. The E.C. established certain oilseed subsidies to E.C. processors of E.C. produced oilseeds (thereby effectively providing a subsidy to the oilseed producers because their oilseeds would be cheaper to process and thus more desirable to the oilseed processors) in 1966, as modified in 1974, 1979, and 1985. The U.S. viewed these subsidies as cause for the decline in the U.S. share of the E.C. oilseed market and eventually brought a case before a GATT dispute settlement panel.

After one panel found in favor of the U.S., the E.C. engaged in numerous delays. (It should be noted that the U.S. has engaged in the same tactics in other GATT disputes). For example, the E.C. used the consensus requirement outlined above to prevent adoption of the panel report. The report was finally adopted under the threat of U.S. Section 301ⁿ¹⁵ sanctions. The E.C. then, however, developed a new set of subsidies, this time provided directly to the oilseed producers. Of course, since the panel report dealt with subsidies to processors only and not producers, these new subsidies were not technically a violation of the panel report, though certainly they represented a violation of the spirit of the report.

As a result of the new subsidy regime, the U.S. requested that the panel reconvene, which request was granted. This panel also found in favor of the U.S. on a "non-violation claim." The non-violation claim finding was necessary because, while "subsidies exclusively to domestic producers" are not prohibited by the GATT (see GATT Article III:8(b)), these subsidies were denying the U.S. benefits granted under the GATT, though not specifically enunciated.ⁿ¹⁶ This panel report "was unanimously rejected by Community [E.C.] agricultural ministers" and the E.C. refused to allow adoption thereof.ⁿ¹⁷ The U.S. again threatened Section 301 sanctions, and eventually the E.C. compromised with the U.S. on 20 November 1992, only 15 days before the sanctions would have gone into effect (here the apparent success of unilateral sanctions increases the likelihood of their use in the future, and thus hastens the downfall of multilateralism). The frustrations of the U.S. were set forth most poignantly by U.S. Ambassador Yerxa addressing E.C. delay tactics and E.C. objections to the U.S. use of Section 301 sanction: "'You cannot have it both ways,' he told Tran (the E.C. Ambassador). 'You cannot admonish us for threatening to act outside the system while at the same time doing everything possible to ensure that the system does not work.'"ⁿ¹⁸ Unfortunately, the Oilseeds case can be characterized as rather typical of the GATT dispute settlement process in the second half of the 1980s and into the 1990s.

GATT 1947 dispute resolution is thus vulnerable to failure on a number of levels. Perhaps most distressing, however, is the system's vulnerability to unilateral avoidance, as evidenced by the Oilseeds case. Opportunity for unilateral avoidance can arise throughout the dispute settlement process. It can arise prior to the institution of the panel, at the report adoption stage, and/or during performance of obligations. "In all these circumstances unilateral action comes to the forefront because the multilateral system has not been allowed to function properly."ⁿ¹⁹ The problems inherent in the GATT 1947 system of dispute resolution are thus varied and imposing. Wholesale change appears required.

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III. THE NEW SYSTEM OF DISPUTE SETTLEMENT UNDER THE GATT 1994

The Uruguay Round represented an attempt to rectify many of the previously discussed problems. The changes in the dispute settlement area address many of the more important problems, albeit to varying degrees. One observer believes the changes create a "more legalistic dispute settlement mechanism" that discourages violations of GATT rules, increases predictability, creates a more precise timetable, and thus "encourages parties to rely more heavily on panel actions rather than respond to perceived trade infringements by resorting to unilateral measures."ⁿ²⁰

Before identifying specific changes in dispute settlement and analyzing their utility, it is helpful to identify the general nature of changes in the system as outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter, the "Understanding").ⁿ²¹ The GATT 1994 dispute settlement system mimics the GATT 1947 system in many ways. This paper only concerns itself with changes between the two systems. Generally, the changes create

detailed rules and deadlines for settlement of disputes under the WTO Agreement... The understanding will be administered by a Dispute Settlement Body (DSB) which will make decisions solely by consensus [see below for new definition of consensus]. Disputes will be considered by a panel of three experts and may be appealed to a new seven-member standing Appellate Body. A panel will be established upon request of a complaining party and the report of the panel or of the Appellate Body will be adopted, unless the DSB decides by consensus otherwise; similarly, in cases of non-compliance with panel recommendations and rulings, requests for suspension of concessions which are consistent with the requirements of paragraph 22 will be approved unless the DSB decides by consensus to reject a request.ⁿ²²

It is now useful to review specific changes in the dispute settlement mechanism.

A. Improvements in Adoption of Panel Reports

One area of improvement in the GATT 1994 occurred in the adoption of panel reports. As noted previously, prior to the GATT 1994, "a relatively large number of reports [were] not implemented, and some [were] implemented with less than full compliance with the panel decision. The new understanding seeks to improve this serious imperfection by laying down clearly what steps are to be followed if the party concerned does not abide by the panel report."ⁿ²³ This has been achieved in a number of ways. First, the GATT 1994 includes time deadlines to reduce delay. Second, there is also a surveillance period during which the DSB monitors compliance with the reports' recommendations.ⁿ²⁴ Third, there are distinct penalties (such as compensation and suspension of concessions) for those parties who still refuse to adopt a report and its recommendations.ⁿ²⁵

But perhaps the most important change for increasing the number of adopted reports relates to the voting rules of the GATT 1994. As noted above, the consensus requirement (which actually required unanimity) allowed reports to be delayed or vetoed by defendants. A major "practical improvement in the Dunkel text is that a panel report would now have to be adopted unless it is decided by consensus not to adopt the report [my emphasis]."ⁿ²⁶ The issue of consensus [*181] voting (or more accurately, rejection by consensus) has broader application than the adoption of reports.

B. Rejection by Consensus Voting

The new concept of rejection by consensus has application throughout the dispute settlement process. It is relevant not only for adopting reports,ⁿ²⁷ but also for establishing panels,ⁿ²⁸ in the adoption of appellate reports,ⁿ²⁹ and finally, in granting the authorization to suspend concessions.ⁿ³⁰ The threat of retaliation (at least in violation complaints) now appears to have teeth; it cannot be vetoed. These then, are all examples of the new concept of rejection by consensus.

It is clear why this issue is important. An offending party, rather than having the ability to frustrate the GATT dispute settlement process at every turn by simply vetoing decisions, is now in the position of having policy dictated. It can, to be sure, still refuse to follow such dictate, in the name of sovereignty or some other such concept. But it will then open itself to the loss of concession, a serious threat in today's interdependent world.

C. Reduction in Delay

As indicated above, delay was a major problem under the GATT 1947 dispute settlement system. The Understanding reduces delay in establishing panels, in considering cases, and in adopting panel reports.ⁿ³¹ Ample evidence of this trend is provided by re [*182] viewing the Understanding. For example, Paragraph 1.2 regarding Coverage and Application holds that the parties to any dispute shall have 20 days from the time of the establishment of the panel to determine any special rules and procedure governing that panel. Should this prove impossible, the Chairman of the DSB shall set forth such special rules within 10 days of a request made by either party. Regarding the operation of the panel, Paragraph 12 of the Understanding (Panel Procedures) and Appendix 3 of the Understanding (Working Procedures) provide specific deadlines on most panel functions. For example, a panel has one week after its composition and terms of reference have been agreed upon to set its own timetable. This timetable is subject to numerous suggested constraints set forth in the Understanding.ⁿ³² Generally, a panel must provide an interim report to the parties for review within six months of the panel's formation.ⁿ³³

Once the panel submits the interim report of its findings to the parties, the parties may submit comments to the panel. The panel shall hold further meetings with the parties to discuss the comments. Unfortunately, there is no time limit on this comment stage. It appears possible for the offending party to offer piecemeal comments again and again at this stage, thereby delaying the production of the final report.ⁿ³⁴ A solid panel, however, should make it clear that all comments must be offered at one time, and that new issues will not be accepted after the initial comment period for the interim report. After these comments are accepted and discussed with the parties, the final report shall be issued to all Members.ⁿ³⁵ Within 60 days of the report's issuance, it shall be adopted, unless rejected by consensus or appealed.ⁿ³⁶ The dispute settlement appellate process under the GATT 1994 is similarly time limited. In total, DSB decisions should [*183] be rendered within 9 to 12 months.ⁿ³⁷

Once the decision is rendered, the Member has 30 days to inform the DSB of how it will implement the recommendations of the report.ⁿ³⁸ The issue of implementation shall remain on the DSB's agenda until the recommendations are fully complied with to the DSB's satisfaction. The offending party shall provide status reports every six months.ⁿ³⁹ If the recommendations are not implemented within the reasonable period of time, the aggrieved party may seek compensation or even suspension of concessions to the offending party (i.e., retaliation).ⁿ⁴⁰

The time frames discussed in this section are all in sharp contrast to the previous approach to timeliness in dispute settlement, as evidenced by the ample opportunity for delay demonstrated in the Oilseeds case above.

D. Addition of Appellate Body

As alluded to previously, an appellate body is now also an integral part of the GATT dispute settlement system. Any losing party may appeal a panel report to an impartial, standing appellate body. Previously, there was no such mechanism. Its addition appears, in part, to be a quid pro quo to those states who were worried about the loss of sovereignty implicit in the rejection by consensus voting system. Consequently, even though it is now much easier to force compliance with the GATT rules through dispute settlement, losing states gained a right of appeal.

Some characterize the appellate body as making "the dispute settlement system significantly more adjudicative in nature."ⁿ⁴¹ Indeed, the appellate procedure should enhance building a body of precedent such that some predictive nature can evolve in GATT dispute settlement. A body of GATT law on which panels may rely can [*184] now evolve, in part, through the decisions of the appellate body. At the same time, it should also be noted that the appellate system is not as legalistic as it might be because its proceedings tend to be secretive.ⁿ⁴²

One potential problem with the appeals process is that it tends to allow parties to further delay the overall dispute settlement process. Although the delays should not be more than three to six months, states will doubtlessly take advantage of the opportunity. Still, authorities do not appear overly concerned with such possibility for delay.ⁿ⁴³

The GATT 1994 dispute settlement system thus appears a significant improvement over the system as it existed under the GATT 1947. Arguably, the most influential change is the new rejection by consensus method of voting. Panel reports will be much easier to adopt and sanctions appear easier to apply. The reductions in delay and the addition of the appellate body also seem to improve the system. Unfortunately, a closer examination of the Understanding reveals unresolved problems.

IV. PROBLEMS IN THE GATT 1994 DISPUTE SETTLEMENT SYSTEM

Although the dispute settlement system in the GATT 1994 seems an improvement over the system in the GATT 1947, the new system retains problems and weaknesses. Most of these are fairly straightforward and need little analysis beyond identification. For example, there still appears room for delay within the system, perhaps up to two years or more. Two years is, nonetheless, an improvement over the almost unlimited potential for delay under the GATT 1947.

Similarly, it is unclear whether the DSB will, de facto, allow any suspension of concessions or retaliation. This sanction is the teeth of dispute settlement under the GATT 1994. In the past, however, there existed a strong aversion toward using what was viewed [*185] as a rather draconian measure. Retaliation is still seen as threatening to the multilateral system. This is made clear by a review of Section 22 of the Understanding which sets forth a preference for any sanction but suspension of concessions. It is unclear how strong this aversion is in the GATT's bureaucratic sub-conscious. If the aversion remains strong, the GATT may again be left with no enforcement mechanism, which could prove fatal to the GATT dispute settlement system, and possibly the WTO.

There is also some concern about the makeup of the panels. It is widely believed that the individuals most capable of serving on the panels are nationals of the major industrial powers (including, inter alia, the E.C., Japan, and the U.S.). However, these are also the states most likely to use the dispute settlement process (as they have been in the past). Since the GATT 1994 does not allow nationals of involved parties to serve on the panels, ⁿ⁴⁴ the very best individuals may be precluded from serving. ⁿ⁴⁵

The greatest weakness in the GATT 1994 dispute settlement mechanism, however, may lie in a section of the Understanding not yet discussed in this paper. Professor Brand appears to have identified this potential problem first (although Pescatore also notes it), but Professor Brand's analysis seems flawed.

The Understanding is to be used in conjunction with Articles XXII and XXIII of the GATT 1947. ⁿ⁴⁶ The problem revolves around a distinction pointed out earlier herein regarding violation and non-violation nullifications or impairments.

One important feature of this dispute settlement system is that, in addition to violation complaints, contracting parties may also raise non-violation complaints whenever their reasonable expectations as to the competitive benefits deriving from tariff binding are being nullified or impaired by unforeseen measures of another government (such as the granting of trade-distorting production subsidies on the concession product) [the Oilseeds [*186] case]. ⁿ⁴⁷

This is to say, pursuant to Article XXIII, parties have the right to raise complaints over activities which, while not in open violation of the GATT, do violate the spirit of the GATT and do harm competition. Direct subsidies to domestic producers are one obvious example of this phenomenon. Another possible example might be structures within the domestic market which operate to impinge the ability of external firms to compete, such as distribution systems catering to domestic firms or tying arrangements among domestic firms encouraging each to buy the other's products, rather than those imported. This, of course, is what critics of Japan argue.

The distinction between violation and non-violation complaints becomes significant in the sanctions stage of a case. In the violation case, the approach is clear: the complaining Member first seeks withdrawal of the offending measure; the complaining Member next seeks compensation "only if the immediate withdrawal of the measure is impracticable..."; finally, and only as a last resort, the complaining Member seeks suspension of concessions, or retaliation. ⁿ⁴⁸ In the non-violation case, however, the sanctions stage is less clear. ⁿ⁴⁹

Paragraph 26.1 of the Understanding modifies application of Article XXIII:1(b), which governs certain non-violation complaints. Regarding sanctions under non-violation complaints, Professor Brand notes that Paragraph 26.1 requires "'no obligation to withdraw the [offending] measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a [*187] mutually satisfactory adjustment.'" ⁿ⁵⁰ While there is no obligation to withdraw the offending measure, the Understanding does provide that "compensation may be a part of a mutually satisfactory adjustment as final settlement of the dispute." ⁿ⁵¹ From this, Professor Brand concludes "it seems logical to assume that the question of retaliation (not dealt with in paragraph [26.1]) is left to other provisions of the Draft Understanding." ⁿ⁵² That is to say, Professor Brand does not preclude retaliation as a mode of sanction for a the non-violation complaint falling under Article XXIII:1(b), even though withdrawal of the offending measure is no longer a possible sanction and compensation must be "mutually satisfactory". Professor Brand does admit that his interpretation might be incorrect because, since the drafters of the Understanding felt compelled to include compensation, but did not include retaliation, the inclusion of the former might imply preclusion of the latter.

It is this paper's position that Professor Brand's first interpretation is wrong and indeed, the second interpretation he discounts is correct. First, it is noteworthy that sanctions are repeatedly referred to in the Understanding from a least intrusive to most intrusive order (i.e., withdrawal, compensation, and retaliation or suspension of concessions). Where the least intrusive sanction of withdrawal of the concession is disallowed, one would expect a clear delineation of what is to remain allowed. That is to say, if the drafters felt compelled to tell us that withdrawal is not allowed and that compensation is allowed, they should also have felt compelled for clarity sake to tell us that the more intrusive sanction of retaliation is allowed. In fact, one might argue it is the drafter's obligation to include any remaining effective sanctions once they eliminate the less intrusive sanction. As Professor Brand admits, why include compensation and not retaliation, unless this approach is intended to indicate that the [*188] latter is to be precluded. Where the general obligation to withdraw a measure is deleted, one would expect all others of greater force to be withdrawn as well, unless otherwise specifically mentioned. This view would appear to be in congruence with generally accepted standards of statutory interpretation. There is, quite simply, no reason to include compensation and exclude retaliation, unless retaliation is to be precluded.

As regards Professor Brand's argument that since compensation "'may' be part of a mutually satisfactory adjustment," other sanctions not enumerated "may" also be part of an adjustment, one could more easily argue that the word "may" is included only to make clear that compensation does not have to be part of any settlement (in which case "shall" would have been used in place of "may" as it was in Paragraph 26.1(b)).

Finally, if even compensation must be "mutually satisfactory" (that is to imply, agreed upon by both complainant and defendant, or purely voluntary),ⁿ⁵³ how can a more intrusive sanction (retaliation) be allowed with no mention of mutual agreement? Any complainant, rather than seek mutual agreement on compensation, would instead go to the rest of the Understanding concerning retaliation where no mutual agreement is required. It is illogical of the drafters to leave out retaliation, especially if it is to be involuntary as to the defendant. Surely the drafters would have included the involuntary sanction of retaliation in this paragraph if they intended it to be an option. One may not argue that retaliation is also intended to be voluntary because no defendant would agree to such a sanction as made clear by current GATT dispute settlement problems.

Regarding Article XXIII:1(c), only a few conclusions can be reached. Most importantly, no one really seems to understand Article XXIII:1(c), though this fact does nothing to diminish the Article's importance. This point seems to have engendered a sense of wariness toward the article.

The negotiators were more cautious, however, with regard to the much broader Article XXIII:1(c) complaints, which have been [*189] so little used that no one understands what they mean. The Understanding provides that all of the automaticity in the early part of the procedure will apply, so that complainants invoking Article XXIII:1(c) can obtain a panel ruling without the defendant's consent, but that after a panel ruling is made, the older consensus principle will apply, i.e., defendants can veto rulings and requests for retaliation authority based on Article XXIII:1(c).ⁿ⁵⁴

So then, this article, which may become increasingly important in the future (as more sophisticated methods of non-violation trade restrictions evolve), has had its enforcement weapons eviscerated. States will thus likely strive to bring actions under other sections of the WTO. Actions that can only be brought under Article XXIII:1(c) may continue to labor under the threat of unilateral sanction such as the Super 301 legislation, even though the Understanding makes a strong statement against such unilateralism (see Understanding, Paragraph 23).

There is a final note that may make this entire discussion regarding non-violation complaints moot: "mutually satisfactory adjustment." Paragraph 26.1(b) holds that a panel "shall recommend that the Member concerned make a mutually satisfactory adjustment." While "shall" clearly leaves no room for debate and implies "must," "mutually satisfactory" implies agreement of one's own free will (i.e., voluntarily). The entire exercise of adding legality to the GATT dispute settlement process was intended to remove notions of compromise. Yet, "mutually satisfactory," appear to reopen the Pandora's Box of negotiation and compromise in the area of non-violation complaint sanctions. Thus, in this area, it is not clear that any solution can be imposed by the Council on an unwilling Member if the agreement is not "satisfactory" to said party.

The problems with sanctions under non-violation complaints have been outlined in a theoretical sense above. If one reexamines the Oilseeds case (involving a non-violation complaint), one can take a more empirical view of these problems. It seems clear that com [*190] pensation would have been permitted in Oilseeds (for the benefit of the U.S.)

pursuant to paragraph 26.1(d) of the Understanding. Even Professor Brand recognizes, however, that compensation would have to be mutually agreed upon ("compensation may be part of a mutually satisfactory adjustment...").ⁿ⁵⁵ Mutually acceptable compensation appears a return to the consensus voting of old; an effective veto inuring to the benefit of the defendant (Professor Brand disagrees with this sentiment). It appears that the U.S. in Oilseeds would have been limited to some mutually satisfactory adjustment, without apparent recourse to Section 301 sanction (according to GATT 1994 rules). Further, it is unlikely that the E.C. would mutually agree to any compensation award that might be domestically unpopular, given the usual response of industrialized states to domestically unpopular GATT dispute settlement decisions. In any event, as the preceding analysis makes clear, no retaliation would have been permitted. A similar argument can be made regarding any claim asserted by the US against Japan for its allegedly closed markets (automobile and otherwise). The Japanese are apparently not in direct violation of GATT standards. Consequently, a non-violation Article XXIII:1(b) or XXIII:1(c) complaint would have to be filed. Even if the US were successful in attaining a favorable report, however, the sanctions allowed by the GATT 1994 are unlikely to open Japan's market. Under an Article XXIII:1(b) compliant only compensation would be permitted and even that would have to be "mutually satisfactory." Under an Article XXIII:1(c) complaint old consensus rules would apply whereby Japan would retain its veto ability. The non-violation complaint section of the Understanding is far too weak to be acceptable in present form. It should bear up to the same standards as the dispute settlement system for actual GATT violations.

V. CONCLUSION

This paper has attempted to analyze dispute settlement under the GATT, both in the past and in the future. Specifically, it has discussed weaknesses existing in the past and how the Uruguay Round attempted to correct these problems. The paper concludes that, while the Dunkel Text solved obvious problems in GATT dispute settlement, it has not dealt with less obvious problems that are likely to arise in the future. Most problematic is the GATT 1994's inability to effectively sanction non-violation breaches. Given this gaping hole in enforcement, Members are increasingly likely to tailor their methods of avoiding GATT rules such that this avoidance takes the form of non-violation breaches. The future may well see an entire new area of ungovernable trade barriers leaving us in the same position we occupied in the late 1980s and early 1990s: the oncoming death of free trade with its concomitant consequences.

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence Documentary Evidence Writings General Overview International Trade Law Trade Agreements Intellectual Property Provisions Transportation Law Carrier Duties & Liabilities GATT & NAFTA

FOOTNOTES:

- n1. Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 238 (1993).
- n2. Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 238 (1993).
- n3. The reader may note that the GATT has undergone assorted modifications and changes since 1947, including, inter alia, both the Kennedy and Tokyo Rounds. Nonetheless, for simplicity sake the pre-Uruguay Round GATT will be referred to generically as the GATT 1947. The post-Uruguay Round GATT will be referred to as the GATT 1994. The new organization to be created by the Uruguay Round is the World Trade Organization (the "WTO"). Some scholars seem to use the WTO and the GATT 1994 interchangeably. This is incorrect. The GATT 1994 is a part of the broader WTO. Unfortunately, at the time of this writing, the GATT 1994 is the only part of the WTO to be negotiated. For the time being, the WTO represents only the superstructure of a broader trade regime.
- n4. Pierre Pescatore, *The GATT Dispute Settlement Mechanism - Its Present Situation and its Prospects*, *Journal of World Trade*, February 1993, at 7. Except where otherwise noted, this section relies heavily on Pescatore's article, especially the information found in pages 7-12. Hereinafter, footnotes will only be used to identify specific quotations or where a non-Pescatore source is used.
- n5. See generally Brand, *supra* note 2, at 120.
- n6. Ernst-Ulrich Petersmann, *International Competition Rules for the GATT - WTO World Trade and Legal System*, *Journal of World Trade*, December 1993, at 35-6.
- n7. *Id.* at 40.
- n8. Brand, *supra* note 2, at 134.

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n9. Except where otherwise noted, the following three paragraphs rely upon Petersmann, supra note 6, at 68-75. See also, Pescatore, supra note 4, at 12-14.

n10. See generally, Robert Gilpin, *The Political Economy of International Relations* (1987).

n11. Petersmann, supra note 6, at 67.

n12. Pescatore, supra note 4, at 15. Pescatore adroitly notes that, in compliance with international law, unilateral action should be allowed here. Retaliation would be allowed under Article 60 of the Vienna Convention on Law of Treaties, noted hereinabove.

n13. Brand, supra note 2, at 120.

n14. *Id.* at 127. What follows is a truncated version of Professor Brand's review of the facts in the Oilseeds case. For a full understanding of the case and Professor Brand's analysis, one should review both the actual case materials and Professor Brand's article. This summary is provided at this point for purposes of example as well as an introduction to certain issues of the GATT 1994 dispute settlement process which will be more fully discussed later.

By way of definition, oilseeds are seeds grown mainly for the oil they produce.

n15. Unites States Trade Act of 1974, 19 USCA 2411 (1974). Section 301 demands unilateral retaliation in certain circumstances for perceived trade violations.

n16. See Brand, supra note 2 at 130-1.

n17. *Id.* at 130.

n18. *Id.* at 133 (quoting from GATT Council Fails to Solve U.S.-E.C. Dispute Over Oilseed Subsidies, *BNA International Trade Daily*, October 2, 1992).

n19. This paragraph draws on Pescatore, supra note 4, at 15.

n20. Edwin Vermulst, *A European Practitioner's View of the GATT System*, *Journal of World Trade*, April 1993, at 69.

n21. *Understanding on Rules and Procedures Governing the Settlement of Disputes* 33 *International Legal Materials* 1, 112 (1994) (hereinafter "Understanding"). The Understanding found its origin in the Dunkel Text.

n22. Amelia Porges, *Introductory Note to General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 *International Legal Materials* 1, 4-5 (1994). For a more detailed review of the new dispute settlement procedures under the GATT 1994, one should review the Understanding.

n23. Vermulst, supra note 20, at 68.

n24. See generally Understanding, Paragraph 21.

n25. See generally Understanding, Paragraph 22.

n26. *Id.* at 67. Note that the definition of "consensus" has not changed. A consensus still requires no objection by any Member (see footnote 1 to Paragraph 2.4 in the Understanding). What has changed is how consensus is used in the Understanding. Rather than requiring a consensus to approve a ruling, which has proved difficult to achieve, the Understanding now requires a consensus to reject any decision made by a lower body, thus making it much easier to approve dispute settlement decisions; a subtle change with major implication

n27. See Understanding, Paragraph 16.4.

n28. *Id.*, Paragraph 6.1 where a panel will be established, unless "the DSB decides by consensus not to establish a panel...."

n29. *Id.*, Paragraph 17.14, where the appellate report shall be adopted by the DSB "unless the DSB decides by consensus not to adopt the appellate report...."

n30. *Id.*, Paragraph 22.6, where the DSB "shall grant authorization to suspend concessions... unless the DSB decides by consensus to reject the request...."

n31. *Id.* at 65-7.

n32. See Working Procedure in Appendix 3 to the Understanding.

n33. See Understanding, Paragraph 12.

n34. On the lack of timetable here, see generally Understanding, Paragraph 15 (Interim Review Stage).

n35. *Id.*, Paragraph 15.2.

n36. *Id.*, Paragraph 16.4.

n37. *Id.*, Paragraph 20.1.

n38. *Id.*, Paragraph 21.3.

n39. *Id.*, Paragraph 21.6.

- n40. *Id.*, Paragraph 22.
- n41. *Id.* at 68.
- n42. See Understanding, Paragraph 17.10
- n43. Brand, *supra* note 2, at 136.
- n44. Understanding, Section 8.3.
- n45. This paragraph draws on the analysis of Pescatore, *supra* note 4, at 18-19.
- n46. Understanding, Paragraph 3.1.
- n47. Petersmann, *supra* note 6, at 43-44.
- n48. Understanding, Paragraph 3.7.
- n49. Here, the Understanding makes a further distinction between Article XXIII(1)(b) type non-violations and Article XXIII(1)(c) type non-violations. An Article XXIII(1)(b) type "nullification or impairment [occurs] as the result of 'the application by another contracting party of any measure, whether or not it conflicts with the Agreement'..." An Article XXIII(1)(c) type "nullification or impairment [occurs] as the result of 'the existence of any other situation'..." Brand, *supra* note 2, at 139-140. Professor Brand ultimately concludes that almost all non-violation cases will be of the Article XXIII(1)(b) types, and thus limits his analysis to those. This paper moves beyond Article XXIII(1)(b) where necessary.
- n50. *Id.* at 140. Professor Brand's article was forced to rely on the Draft Understanding, not the final Understanding available at the time of this paper. Consequently, the numbering of certain sections may have changed. This paper uses the final numbering.
- n51. Understanding, Paragraph 26.1(d).
- n52. Brand, *supra* note 2, at 139-140.
- n53. See Understanding, Paragraph 26.1(d).
- n54. Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 238 (1993).
- n55. Brand, *supra* note 2, at 141-142.