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by
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Any system of international law is only as strong as its mechanism of enforcement. In international trade, the system of law and its dispute settlement mechanism are only beginning to mature, evolving slowly as nations become willing to give up pieces of their sovereignty for the common good and their self-interest. The General Agreement on Tariffs and Trade (GATT) has endeavored to establish such a workable system of law for international trade. Although its tenets were agreed upon in 1947,[1] only recently have they been strongly enforced.[2] The GATT requires governments to use only transparent and non-discriminatory trade measures, subject to certain pre-arranged exceptions, and contains dispute settlement procedures that serve to resolve conflicts in the interpretation or implementation of these rules. While

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. The text has been revised several times since 1947, most recently in 1965. The official current version can be found at THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT Sales No. 1986-4 (1986), and GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 4TH SUPP. 1 (1969) [hereinafter BISD].

Standard references on the history and policy of the GATT include: O. LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM (1985); R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975); K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); J. JACKSON, WORLD TRADE LAW AND THE LAW OF GATT (1969).

2. More dispute settlement panels are currently at work than at any other time in the GATT's history. *Record Number of GATT Investigations Shows Reliance on Arbitration, GATT Official Says*, 5 Int'l Trade Rep. (BNA) 1432 (Oct. 26, 1988); *see also* Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443, 1456 n.44, 1465 n.75 (1988) (counting number of dispute settlement panels).

originally comprising only two short paragraphs,[3] the dispute settlement procedures have grown so complex that today's negotiators advocate a single, unified text so as to make the procedures more clear.[4]

GATT dispute settlement does not follow a strictly "legal" model. Under a pure legalistic system, an adjudicatory body would ascertain the applicable law, apply the facts, weigh selected policy issues and rule in favor of one of the disputing parties. The parties would then implement the body's decision. Instead, the GATT legal system is a mixture of law and diplomacy in that disputes of law intermesh with the realities of power politics.[5] Oftentimes, the outcome of GATT disputes is better explained through recourse to both legal theory and political necessity. The relative political strengths and trading positions of the disputing parties may be as determinative of the dispute's eventual outcome as the persuasiveness of the legal arguments.

The United States' complaint regarding Japanese import restrictions on twelve agricultural products (the "GATT-12" case) is illustrative of the evolution of GATT dispute settlement.[6] Substantively, this case was the first to effectively enforce the Article XI prohibition against agricultural trade barriers, and it created a powerful precedent with which to attack the unfair agricultural practices of numerous GATT members. Previously, governments and commentators had seen GATT's agricultural provisions as unenforceable.[7] Because of the considerable political clout of domestic

3. For a survey of the preparatory work for these two paragraphs (Articles XXII and XXIII), see J. JACKSON, *supra* note 1, at 166-71.

4. Petersmann, *Proposals for Improvements in the GATT Dispute Settlement System: A Survey and Comparative Analysis*, in FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 340, 384 (D. Dicke & E.U. Petersmann eds. 1988) [hereinafter Petersmann].

Not only have the dispute settlement procedures grown complex, but so has GATT "case law." Unfortunately, GATT case law is not as transparent as it could be. Although the GATT Secretariat publishes panel reports annually in BISD, the only index for GATT "cases," the GATT ANALYTIC INDEX, prepared by E.U. Petersmann of the GATT Legal Office in 1984, is updated infrequently and not widely available. As private citizens do not have standing to bring complaints in the GATT, J. JACKSON, *supra* note 1, at 187-89, and GATT documents do not become de-restricted immediately after their issuance, A. Porges, GATT Law: A User's Guide (1989) (unpublished manuscript), only the governments of the contracting states can and need to know the relevant GATT case law.

However, since private parties can petition the U.S. government to enforce violations of the GATT under section 301 of the Trade Act of 1974, 19 U.S.C. §§ 2411-2419 (1988), private parties also need to know current legal developments within the GATT. *See also* J. JACKSON, J.-V. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 208 (1985) [hereinafter IMPLEMENTING THE TOKYO ROUND] (advocating allowance of private complaints to the GATT).

5. *See generally* Roessler, *The Scope, Limits and Function of the GATT Legal System*, 8 WORLD ECON. 287 (1985).

6. *Japan—Restrictions on Imports of Certain Agricultural Products*, GATT Doc. L/6253 (Nov. 18, 1987), BISD 35TH SUPP. 163 (1989), *reprinted in* 27 I.L.M. 1539 (1988) [hereinafter *Japanese Agriculture*].

7. *See, e.g.*, Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 160 n.41 (1980) ("Except for occasional bursts of righteousness by the United States, GATT governments appear to have given up the idea of ever enforcing Article XI(2)(c)."); *Multilateral Trade Negotiations: Dispute Settlement*, 74 AM. SOC'Y INT'L L.

agricultural interests, governments were not seen as willing to change their domestic agricultural regimes even to conform with a GATT panel ruling.[8]

Procedurally, the GATT-12 case exemplifies both the strengths and weaknesses of the pre-1989 dispute settlement procedures. In 1983, when the United States first brought the complaint to the GATT, Japan still retained a mercantilist trade stance that was not amenable to such multilateral fora as the GATT.[9] Through a mixture of political and legal pressure, the United States guided its complaint through the maze of GATT adjudication and emerged with a liberalization of the Japanese agricultural import market. Along the way, Japan played upon the shortcomings of the multilateral procedures and caused numerous delays in an apparent attempt to extend the process until it became meaningless.[10] However, Japan's eventual agreement to alter its agricultural import regime to conform to the findings of a GATT dispute settlement panel represented a genuine success, especially considering the political significance of agriculture in Japan.

The dispute's outcome strengthened the role of legalism within the GATT by demonstrating that contracting parties' politically-sensitive domestic programs could be changed through GATT dispute settlement. While the panel could have issued a report that did no more than split the parties' differences in favor of a political solution,[11] the GATT-12 panel found ten of the twelve Japanese import restrictions to be GATT-illegal by nature and held that the remaining two needed procedural modifications to align them with GATT disciplines. Japan's implementation of these findings gave rise to a renewed respect for the efficacy of GATT dispute settlement and unleashed a number of new filings of agricultural cases.[12] However, the experience of the

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PROC. 129-30 (1980) [hereinafter *MTN Panel*] (remarks of Hudec). Moreover, agricultural disputes have caused the longest delays in GATT dispute settlement proceedings. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 84 (1987) (GATT dispute settlement generally takes about two years, except for U.S.-EC agricultural disputes where settlement took up to 52 months.).

8. *See* Hudec, *Legal Issues in US-EC Trade Policy: GATT Litigation 1960-1985*, in ISSUES IN US-EC TRADE RELATIONS 17, 38 & n.45 (R. Baldwin, C. Hamilton & A. Sapir eds. 1988).

9. *See, e.g.*, Edelman, *Japanese Product Standards as Non-Tariff Trade Barriers: When Regulatory Policy Becomes a Trade Issue*, 24 STAN. J. INT'L L. 389, 408-10 (1988).

10. The delaying tactics in GATT lawsuits have ample precedents. For example, in 1972 the United States complained about European Community "compensatory taxes" that were placed only on imported agricultural products. Although the Community acknowledged that the taxes violated its GATT tariff bindings, "the Community managed to delay GATT legal proceedings until the tax had been almost completely withdrawn, and the United States then agreed to drop the matter." Hudec, *supra* note 8, at 28.

11. *See European Community—Subsidies to Exports of Wheat Flour*, GATT Doc. SCM/42 (Mar. 21, 1983), *reprinted in GATT Dispute Panel Report on U.S. Complaint Concerning EC Subsidies to Wheat Farmers*, 18 Int'l Trade Rep. (U.S. Export Weekly) (BNA) 899 (Mar. 8, 1983) (where the panel found that "it was unable to conclude as to whether the increased share has resulted in the EEC having 'more than an equitable share' in terms of Article 10 [of the Subsidies Code]").

12. The agricultural disputes brought under the GATT after the definitive ruling in the GATT-12 case are reported in GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1988 (1989). They include Japanese restrictions on imports of beef and citrus (complaint

GATT-12 may not be generally applicable to all GATT contracting parties since the successful resolution of the case may have been determined through an effective usage of United States trading leverage.

In the midst of the case's procedural maneuverings, GATT negotiators contemplated improvements to the dispute settlement system. In 1986, trade ministers at Punta del Este, Uruguay launched the eighth round of multilateral trade negotiations within the GATT (the "Uruguay Round") declaring that the "negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines."[13] At the time, Clayton Yeutter, then the United States Trade Representative, warned that the GATT itself would collapse unless its dispute settlement mechanisms were strengthened.[14]

For the last three years, negotiators have been discussing the improvement of GATT dispute settlement. They have built on the experience in the GATT-12 case to strengthen legalism within the GATT by reducing many of the procedural roadblocks.[15] These improvements will increase the predictability of GATT dispute settlement by eliminating areas where larger contracting parties could formerly exert political or trading power over weaker opponents. In December, 1988, trade ministers convened in Montreal, Canada to assess the Uruguay Round's mid-term results and agreed to implement these improvements on a provisional basis (the "Montreal Understanding").[16]

This article will examine the experience and potential improvements of GATT dispute settlement. Part I will analyze the Japanese agriculture case

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brought by the United States and Australia), *id.* at 80; Korean restrictions on imports of beef (complaint brought by the United States, Australia, and New Zealand), *id.* at 83; Norwegian and Swedish restrictions on imports of apples and pears (complaint brought by the United States) *id.* at 84; European Economic Community's payments and subsidies to processors and producers of oilseeds and related animal-feed proteins (complaint brought by the United States), *id.* at 70; U.S. restrictions on imports of sugar (complaint brought by Australia), *id.* at 80; Canadian quantitative restrictions on imports of ice cream and yogurt (complaint brought by the United States), *id.* at 65.

13. *Ministerial Declaration on the Uruguay Round, September 20, 1986*, BISD 33RD SUPP. 19, 25 (1987).

14. Dearden, *Yeutter, GATT Headed for Oblivion Unless . . .*, J. Com., Sept. 12, 1986, at 2A, col. 5.

15. The GATT Contracting Parties agreed to carry out negotiations on trade in goods in the context of 14 Negotiating Groups established by the Group of Negotiations on Goods (GNG). The Negotiating Group on Dispute Settlement constitutes one of these groups. *Ministerial Declaration on the Uruguay Round*, *supra* note 13, at 19.

16. *Trade Negotiations Committee Meeting at Ministerial Level*, GATT Doc. MTN.TNC/7 (MIN) (Dec. 9, 1988), *reprinted in* INSIDE U.S. TRADE, Dec. 10, 1988, at 10-14 [hereinafter Montreal Understanding].

Since the ministers did not reach agreement on agriculture, intellectual property, textiles or safeguards, the implementation of the dispute settlement improvements awaited finalization of the entire package. The package was completed and implemented in Geneva, Switzerland on April 5-8, 1989. 6 Int'l Trade Rep. (BNA) 442, Apr. 12, 1989; *All Uphill from Here*, ECONOMIST, Apr. 15, 1989, at 72.

as exemplary of the tension between the legal and political modes of discourse within the GATT system. The section will detail the various procedural ploys, roadblocks and agreements that led to the ultimate lifting of the GATT-illegal measures, over six and one-half years after the case was first raised. Part II will explore the highlights of the Montreal Understanding and determine whether these improvements would have eased the procedural difficulties that plagued the GATT-12 case. The section will also discuss the procedural and political pitfalls that remain for future GATT disputes. Drawing from the GATT-12 procedural experience and the Montreal Understanding, Part III will then propose solutions for the remaining difficulties.

I.
JAPANESE RESTRICTIONS ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS (THE GATT-12 CASE)

Japanese agricultural restrictions had existed in some form since Japan's accession to the GATT in 1955,[17] but, at the time, Japan invoked the Article XII balance of payments protection so as to fall outside the GATT's agricultural strictures.[18] In March, 1963, Japan disinvoked its balance of payments justification for the quotas, subjecting their application to all relevant GATT Articles. However, it was not until October, 1981[19] that the United States first formally raised the inconsistency of Japanese agricultural restrictions with Article XI.[20]

A. Bilateral Consultations Outside the GATT

Bilateral consultations generally constitute the first step in an international trade dispute and aim to settle matters diplomatically. Governments would rather settle their differences to the mutual satisfaction of both parties than bring the dispute to a multilateral, legalistic forum, such as the GATT, where one party might lose. Even the implicit threat of bringing the dispute before the GATT will often force the parties to negotiate harder. Indeed, a

17. *See Protocol of Terms of Accession of Japan to the General Agreement on Tariffs and Trade*, BISD 4TH SUPP. 7 (1956).

18. Article XII:1 allows the maintenance of quantitative or value restrictions in order to safeguard the external financial position or the balance of payments of a contracting party, GATT, *supra* note 1, art. XII:1.

19. *Japan Agrees to Raise Annual Import Quota for American Beef by 6,900 Tons*, Jiji Press Ticker Service, Apr. 9, 1984.

20. Article XI:1 forbids all "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import licenses or other measures." GATT, *supra* note 1, art. XI:1. Article XI:2(c) provides an exception to Article XI:1 for certain agricultural quotas that are necessary to a government program that restricts the quantity of a like domestic product. GATT, *supra* note 1, art. XI:2. Under Article XXIII:1, any contracting party may invoke consultations and then formal adjudication if it "consider[s] that any benefit accruing to it directly or indirectly under [the General] Agreement is being nullified or impaired or that the attainment of any objective of the [General] Agreement is being impeded . . . ." GATT, *supra* note 1, art. XXIII:2.

negotiator in the 1947 Preparatory Work to the GATT described conditions before the advent of GATT dispute settlement as the

> jungle stage in international relations[,] . . . [a] stage when countries lay in wait and pounced on the commerce of other countries without even giving the roar of warning which the lion gives before he springs upon his prey. We were then definitely in the jungle stage, but if we agree to meet, gentlemen, around this table over these things, I think we have made a very big advance.[21]

At meetings of the U.S.-Japanese Trade Subcommittee in 1982, the United States proposed examination of import restrictions on 19 agricultural and 3 marine categories.[22] The United States expressed its belief that some of the import restrictions were inconsistent with GATT. The Japanese reportedly replied that they did not claim justification under a Grandfather Clause and argued that certain categories could be justified under various GATT Articles.[23]

On May 28, 1982, the Japanese announced a package of import liberalization measures in an attempt to diffuse the trade tensions. This package satisfied neither the U.S government nor various Japanese constituencies. While the United States declared that it was "at the end of its rope" regarding the Japanese barriers,[24] the Japanese Minister of Agriculture, Forestry, and Fisheries (MAFF), the Consumers' Federation and farm lobbies were adamantly opposed to any agricultural import liberalization.[25] Japan subsequently offered increased quotas on six items if the United States would agree to a ceasefire.[26] Although no conclusive arrangement was reached and the

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21. U.N. Doc. E/PC/T/A/PV.5, at 8 (1947), *quoted in* J. JACKSON, *supra* note 1, at 179.

22. The U.S.-Japan Trade Subcommittee is a bilateral government-to-government working group, which meets periodically to discuss trade issues. *See Review—Nakasone*, Kyodo News Service, Dec. 23, 1982; *Produce*, Kyodo News Service, Dec. 18, 1982; *USTR Official Warns Japan It Is Moving Too Slowly in Import Liberalization*, 18 Int'l Trade Rep. (U.S. Export Weekly) 224 (BNA), (Nov. 16, 1982); *MacDonald—Action Against Japan*, Jiji Press Ticker Service, Feb. 19, 1982.

23. The Grandfather Clause under the Protocol of Provisional Application of the GATT and the Protocols of Accession of most contracting parties, including Japan, provides an exception from GATT disciplines for all "existing legislation" at the time of a contracting party's accession which "is by its terms or intent of a mandatory character—i.e., which imposed on the executive authority requirements which could not be modified by executive action." *Import Restrictions of the Federal Republic of Germany*, BISD 6TH SUPP. 55, 60 (1958); *Organizational and Functional Questions*, BISD 3RD SUPP. 231, 249 (1955). Article XI:2(c) exempts certain import restrictions on agricultural and fisheries products, and Articles XVII and XX(d) exempt certain practices imposed under state trading organizations.

24. *USTR Official Warns Japan it Is Moving Too Slowly in Import Liberalization*, *supra* note 22.

25. *Farm Market Liberalization Measures Delayed by Stiff Opposition Movement*, 405 Int'l Trade Rep. (BNA) 103 (Apr. 27, 1982).

26. The increased quotas were reported to include tomato juice and five other items. *Trade—Agriculture*, Kyodo News Service, Dec. 23, 1982. The other items were presumably those on which Japan agreed to increased quotas in January, 1983—non-citrus juice, tomato ketchup and sauce, fruit puree and paste, beans and peanuts. *Latest Trade Liberalization Package to Include Tariff Cuts, Quota Hikes*, 18 Int'l Trade Rep. (U.S. Export Weekly) (BNA) 509 (Jan. 4, 1983).

United States agreed to no ceasefire, delays in action from the rounds of offers and subsequent negotiations gave Japan additional time.

Throughout these bilateral talks, the United States found the Japanese responses to be insufficient. Seeking a resolution, the United States indicated a willingness to ask for GATT consultations, and implied a possible U.S. retaliation against Japan. As the process stretched through the year, the United States began considering bringing a complaint against the Japanese agricultural barriers to the GATT under Article XXIII:1.[27] The consultations would have covered 17 farm products under Japan's residual import restriction, the 22 items under discussion minus beef, citrus fruit and three fisheries products.[28] The United States then delayed decision pending developments at the U.S.-Japan Trade Subcommittee talks in December.

With the United States threatening to file a GATT complaint, Japan stated that if the agricultural restrictions were to be brought into GATT, Japan would not include the six items under offer in its forthcoming third package of trade liberalization.[29] Japan's Foreign Minister, Shintaro Abe, even approached the U.S. Ambassador to Japan, Mike Mansfield, to ask the United States not to resort to GATT at a time when Japan was working on liberalization.[30] Abe warned that strong reactions would follow such U.S. action in the GATT and could jeopardize the next market liberalization.[31] The United States reportedly replied that if Japan would only act on six agricultural categories, the improvements would have to be substantial to forestall U.S. action in the GATT. By the end of December, the two sides evidently reached a compromise whereby the Japanese market liberalization could go forward without necessarily conforming to GATT strictures. Although not explicitly announcing any agreement, the United States notified its intention not to appeal immediately to the GATT, and Japan decided to cut tariffs on forty farm products by an average of twenty percent.[32] The trade row was temporarily postponed.[33]

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27. Under Article XXIII:1, a contracting party who considers 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" may undertake consultations with the contracting party or parties concerned. GATT, *supra* note 1, art. XXIII:1.

28. *Review—Nakasone*, *supra* note 22.

29. *Japan to Make No Further Concessions on Japan-U.S. Trade Issue*, Jiji Press Ticker Service, Dec. 20, 1982.

30. *Id.* Moreover, the threat of bringing action in the GATT seemed to have hardened the attitude of MAFF toward farm liberalization. *Id.*

31. *Review—Nakasone*, *supra* note 22.

32. *Trade—Agriculture*, *supra* note 26. Japan further decided to eliminate duties on farm tractors, internal combustion engines for land use and forging machines. *Id.*

33. Japanese officials announced the third trade liberalization package in early January so as to smooth Prime Minister Yasuhiro Nakasone's visit to Washington. Tariff cuts were to be made on tobacco, chocolates, biscuits, 28 industrial products and 44 agricultural goods. The tariff cuts were to go into effect on April 1, 1983 and represented the acceleration of commitments made in the Tokyo Round of GATT negotiations in 1979. Import quotas were also to be increased on six items still under the residual restrictions, *see supra* note 26, and minimum import targets were to be set for non-citrus juice, peanuts and beans. *Latest Trade Liberalization*

At this stage, diplomatic solutions were seen as superior to legal recourse, especially as Japan unilaterally liberalized its agricultural markets (albeit partly as a result of U.S. pressure). Nonetheless, GATT legal argumentation formed the intellectual underpinning of the United States' pressure. Since the Japanese agricultural restrictions appeared to be in clear violation of Article XI, Japan feared that the United States might actually bring the agricultural restrictions to dispute settlement. Later, as the United States became increasingly dissatisfied with the extent of the Japanese market liberalization, it relied even more on GATT leverage.

After many months of smoldering, the agricultural dispute erupted anew. At an April, 1983 meeting in Washington, Japan again offered another package of limited quota expansion. The United States rejected the offer and still insisted on a full liberalization of all agricultural imports by a specified date in the future.[34] By late May, signals emanated from Washington as to the likelihood of a U.S. request for Article XXIII:1 consultations.[35] When deciding on the proper time for the request, the Office of the United States Trade Representative (USTR)[36] was concerned with finding the proper political moment between or after two upcoming politically sensitive events—the Williamsburg Economic Summit on May 31,[37] and the Japanese Upper House elections on June 26.[38] Instructions to ask for consultations were sent to USTR's Geneva office in early June.[39] And on July 1, 1983, the United States formally delivered the request for consultations on 13 agricultural categories to the GATT.[40]

Package to Include Tariff Cuts, Quota Hikes, supra note 26. However, since Japan only agreed to expand these quotas in exchange for a U.S. ceasefire on the other agricultural items, these six items would effectively remain under discussion.

The United States expressed disappointment that beef and citrus fruit would not be included in the trade opening, while Foreign Minister Abe suggested that no more liberalization should be expected soon because even these measures "were decided upon at considerable political and social expense domestically. They provoked heated debate and resistance within the government, the LDP and other quarters and they were achieved only with Prime Minister Nakasone's strong leadership." *Id.* In short, the Japanese government professed that it could do no more.

34. *U.S.-Japan Farm Trade Issues to Be Discussed at GATT Meeting*, Kyodo News Service, May 24, 1983.

35. *See id.*

36. USTR/Washington creates and monitors most of the United States' trade policy; USTR/Geneva implements the mechanics of GATT-related work. Interview with C. Chris Parlin, Legal Attache, Office of the USTR, Geneva, Switzerland (Dec. 18, 1988) [hereinafter Parlin Interview].

37. *U.S. to File Complaint with GATT on Japan's Farm Produce Market*, Jiji Press Ticker Service, June 6, 1983.

38. *U.S. Seeks GATT Talks on Japan's Farm Import Curbs*, Kyodo News Service, July 2, 1983; *but see Block Threatens Action Against Japanese Farm Import Controls*, Kyodo News Service, June 27, 1983 (denying a political implication to the delaying of the Article XXIII:1 request).

39. *U.S. to File Complaint with GATT on Japan's Farm Produce Market, supra* note 37; *U.S. to Sue Japan on Farm Trade Under GATT Rules*, Kyodo News Service, June 4, 1983.

40. *U.S. Seeks GATT Talks on Japan's Farm Import Curbs, supra* note 38. Among the thirteen categories were processed cheese; peanuts; tomato sauce and ketchup; and other food preparations. *Id.*

B. Bilateral Consultations Under the GATT

Before a GATT dispute settlement panel can be convened, the disputing parties must first consult bilaterally under GATT auspices. Even though the wording of the General Agreement suggests that Article XXIII:1 consultations are not a prerequisite to Article XXIII:2 panel[41], the 1979 Understanding regarding dispute settlement[42] explicitly requires formal Article XXIII:1 consultations before resort to Article XXIII:2 panel.[43] The set of mandatory Article XXIII:1 consultations are intended as a chance for fact-finding and delineation of the dispute, if the parties have not already done so, and an opportunity for the parties to reach a mutually satisfactory (i.e., diplomatic) solution.[44] Furthermore, the 1979 Understanding requires the parties to respond to consultation requests promptly and to attempt to conclude them expeditiously.[45]

After the United States formally requested Article XXIII:1 consultations, Japan was effectively forced to participate. Unfortunately, a request for consultations does not necessarily imply a speedy conclusion. The first consultations, held on July 11, saw no movement of positions. The United States submitted a lengthy questionnaire on the details of the thirteen agricultural categories and was disappointed when the Japanese delegation could not provide detailed answers about the administration of their quota system.[46] The United States then expressed hopes that the dispute could be settled by mid-September but stated that if no solution had been reached by the October 3 GATT Council meeting, the United States might go ahead and request an Article XXIII:2 panel.[47] The Japanese did not explicitly respond to the United States, but did ask that an Article XXIII:2 request be postponed until further consultations had been held. Japan then indicated that it would try to

41. Petersmann, *supra* note 4, at 352.

42. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD 26TH SUPP. 210 (1980) [hereinafter *1979 Understanding*]. Adopted in the Tokyo Round negotiations, the 1979 Understanding codified the then-existing practice under Article XXIII dispute settlement and included a set of norms for further procedural improvements.

43. *Id.* at 211 ("Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2."). However, consultations under Article XXII:1 may substitute for consultations under Article XXIII:1 or Article XXXVII:2. *Procedures for Dealing with New Import Restrictions for Balance-of-Payments Reasons and Residual Import Restrictions*, BISD 9TH SUPP. 18, 20 (1961) ("it being understood that a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII"); *Procedures under Article XXIII*, BISD 14TH SUPP. 18, 20 (1966) ("it being understood that a consultation held under paragraph 2 of Article XXXVII in respect of such restrictions will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree").

44. *See 1979 Understanding*, *supra* note 42, at 211.

45. *Id.*

46. *U.S.-Japanese Trade Talks Occur Amid Fears of Increasing Trade Tensions*, 19 Int'l Trade Rep. (U.S. Export Weekly) (BNA) 580 (July, 19, 1983).

47. *Id.*

respond to the U.S. questions at a second consultation.[48] The United States was not alone in finding the Japanese responses inadequate. Even the Japanese press criticized the stubbornness of the Japanese negotiating team and stated that it was exactly Japan's initial refusal to respond to American initiatives that caused the United States to bring the dispute into the GATT process.[49]

Before the next set of consultations, the Japanese retrenched their position even further. Director-General Minoru Tsukada of the MAFF International Affairs Department gave a press interview during which he warned that any progress would be difficult unless the United States adopted a more realistic approach.[50] He thought the GATT consultations stemmed from Congressional pressure on President Reagan, and foresaw little reason for a complete liberalization of Japanese agricultural markets. Minoru stated that Japan could neither presently comply with full liberalization of agricultural imports nor fix such a date in the future. He explained that Japan's agricultural market was already liberalized in comparison with the United States and specifically cited the numerous American farm quotas that were GATT-legal pursuant to a 1955 waiver.[51] He charged that the United States' quotas were inequitable and that Japan's farm trade policy could not be called unfair by any measure.

The second consultations were held on September 8-9, 1983.[52] As promised, Japan presented extensive information on the operation of its import regime and explained that it had made great strides in reducing agricultural barriers to only twenty-two residual restrictions. Japan explained that it could not further liberalize for a number of reasons. The Japanese then stressed that not only Japan, but the United States and other countries maintained their own restrictions. The United States replied that it intended to move to an Article XXIII:2 panel if Japan would not offer satisfactory liberalization by October.[53]

In April 7, 1984, the two sides reached a bilateral solution in the technically separate dispute over Japanese beef and citrus fruit quotas.[54] As part of

48. *U.S. Hints It Will File Another GATT Complaint*, Kyodo News Service, July 12, 1983.

49. *Complaint with GATT*, Japan Econ. J., July 12, 1983.

50. *No Progress in Sight in Japan-U.S. Farm Trade Talks*, Jiji Press Ticker Service, July 29, 1983.

51. Section 22 of the Agricultural Adjustment Act of 1933 provides for the imposition of import quotas on certain agricultural commodities, or for the imposition of fees to prevent interference with agricultural price support programs. 7 U.S.C. § 624 (1988). In 1955, the GATT Contracting Parties granted the United States a waiver from its GATT obligations under Articles II and XI to the extent necessary to prevent conflict with section 22. *Waiver Granted to the United States in Connection with Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), as Amended*, BISD 3RD SUPP. 34 (1955).

52. *Japanese Agriculture, supra* note 6, para. 1.2, at 163.

53. *Japan, U.S. Remain Split over Farm Trade Issue*, Jiji Press Ticker Service, Sept. 8, 1983.

54. The beef and citrus quotas were also residual import restrictions, with similar alleged GATT-illegalities as the other agricultural restrictions. However, public attention had centered

that agreement, the parties committed themselves to a quick settlement of the now 13 residual restrictions on agriculture.[55] Japan and the U.S negotiators met for bilateral working-level talks outside the GATT framework starting on April 21. Within two days, they provisionally agreed to a two-year truce on the thirteen agricultural categories. Under the agreement, Japan would implement a trade package to liberalize six quotas, increase nine others, and reduce tariffs on thirty-six items.[56] In return, the United States agreed to drop its GATT complaint for another two years.[57] After the appropriate approval process, the bilateral agreement was signed in July, 1984, two and a half years after the United States first raised the alleged GATT violations.

The ceasefire agreement showed the efficacy of diplomatic solutions to GATT disputes. When the two parties can reach a mutually satisfactory solution outside the GATT's legal proceedings, such a solution should usually be commended. On the other hand, solutions outside the legal framework often result from the exercise of one party's political and trade leverage and weaken the facade of a rule-bound international trading regime. Here, even after the additional round of market liberalizations, Japan retained quotas that violated GATT strictures. Though this ceasefire solution moved Japan closer to the GATT rules, a ceasefire agreement could, in and of itself, serve to legitimize an otherwise GATT-illegal practice or perpetuate harm to third parties. While political and diplomatic processes may temporarily relieve trade tensions, the proposed solutions often still violate legal norms. The ultimate losers are third parties with less trading leverage, especially if they come to see the GATT as a two-tier system: enforceable by strong contracting parties and unenforceable against strong contracting parties.

C. Establishment of the Panel

With the agreement set to expire in April, 1986, the United States again began seeking the best means to liberalize the Japanese agricultural markets. The United States could have chosen to continue bilateral negotiations under

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on the beef and citrus talks, as these were high value-added products with the largest trade value. Porges, *Introductory Note*, 27 I.L.M. 1539 (1988). The beef and citrus quotas had been originally lumped with the other agricultural residual restrictions during the U.S.-Japan Trade Subcommittee talks in 1982, but were split into a parallel set of negotiations by the time that the request for Article XXIII:1 consultations was made in July, 1983. *See supra* text accompanying notes 39-40. Although the linkage between the beef and citrus talks and the GATT-12 dispute was rarely made explicit, it remained as a sub-plot throughout both disputes. For a text of the final beef and citrus agreement, see Porges, *supra*.

55. *Japan Agrees to Raise Annual Import Quota for American Beef By 6,900 Tons*, Jiji Press Ticker Service, Apr. 9, 1984.

56. The six items for quota liberalization were those with little or no domestic Japanese production. These items did not correspond to the six items on which Japan originally offered concessions and included tropical fruit juice, processed pork and fruit puree. The nine items for quota expansion included peanuts, tomato sauce and ketchup, canned pineapples and tomato juice, some of which were on the original list of concessions. *Details of U.S.-Japan Farm Trade Agreement Disclosed*, Kyodo News Service, Apr. 26, 1984; *U.S., Japan Fail to Narrow Agriculture Quota Differences, Reach Salmon Accord*, 3 Int'l Trade Rep. (BNA) 430 (Apr. 2, 1986).

57. *Details of U.S.-Japan Farm Trade Agreement Disclosed*, *supra* note 56.

Article XXIII:1 or could have invoked the panel procedures of Article XXIII:2. Article XXIII:2 states that the "CONTRACTING PARTIES shall promptly investigate any matter referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned or give a ruling on the matter, as appropriate."[58] The complaining contracting party provides official notification via a letter to the GATT Director General with an attached communication to be circulated to all contracting parties.[59] This document defines the legal basis for the complaint, as well as the products involved, and sets the contours for the panel's deliberations. Panels, though, are not automatically established upon demand. Once a contracting party requests the establishment of a panel, the GATT Council must meet and approve the request.[60]

Under the GATT rules then in force, the Council could only establish a panel with the consensus of all contracting parties, including the one against whom the complaint was filed.[61] Although the defending party could theoretically postpone the panel's establishment indefinitely by blocking the consensus, the Council's practice had been to establish a panel upon request, usually within a few Council meetings.[62]

The United States maintained its position that the agricultural quotas were inconsistent with Japan's GATT obligations. Accordingly, the United States made clear its intentions to revive the suspended GATT case if Japan would not immediately eliminate the quotas, or at least agree on quota elimination for all categories.[63] Japan again favored a bilateral negotiating process with a view toward another interim arrangement and offered a package of expanded quotas and tariff reductions.[64] In particular, the Japanese press identified three items on which Japan was considering concessions.[65] When another round of talks ended without agreement, the United States decided to request the establishment of a panel at the next GATT Council meeting, and alleged that "[t]he quotas deny us the ability to compete fairly for sales of

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

59. Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB., Dec. 1987 at 53, 62; *reprinted from* 29 SWISS REV. INT'L COMPETITION L. 62. Rosine Plank was formerly a counsellor in the GATT Agriculture Division.

60. The GATT Council includes representatives from all contracting parties who wish to participate and meets monthly between annual sessions of the contracting parties. *Id.* at 63.

61. Under the Montreal Understanding, *supra* note 7, GATT dispute settlement will now provide for an automatic right to a panel. *See infra* text accompanying notes 194-96.

62. Petersmann, *supra* note 4, at 359.

63. Interview with James Truran, Agricultural Attache, U.S. Mission, Geneva, Switzerland (Nov. 21, 1988) [hereinafter Truran Interview]; *U.S., Japan Fail to Narrow Agricultural Quotas Differences, Reach Salmon Accord*, *supra* note 56.

64. *U.S., Japan Fail to Narrow Agricultural Quotas Differences, Reach Salmon Accord*, *supra* note 56.

65. These three items were fruit juice, tomato catsup and sauce, and fruit puree and paste.

high quality products in Japan while distorting the Japanese market for many consumer goods."[66]

At the July 15, 1986 Council meeting, the United States made a formal request for an Article XXIII:2 panel. Japan blocked the consensus for a panel and replied that consultations should continue.[67] At the next Council meeting on October 27, the United States again requested a panel. During the subsequent debate, the Japanese representative reiterated that a practical bilateral solution could still be found but finally acceded to the panel's establishment.[68] Japan explained that its acceptance of the panel process was coupled with the United States' agreement to continue bilateral talks in parallel but declared that it would cooperate fully with the panel to reach a "realistic and fair" solution.[69]

D. Panel Formation

The Japanese acquiescence to an Article XXIII:2 panel did not mean that the panel could begin its work immediately. Under GATT rules then in force, the parties first needed to agree on both the selection of panelists and their terms of reference before work could begin.[70] Thus, when the Council established a panel, it simultaneously authorized the Council Chairman to propose the panel's composition and terms of reference after securing the agreement of the parties concerned.[71] In practice, the GATT secretariat member who was designated as panel secretary consulted with the parties, formally and informally, until both sides accepted the nominations of individual panel members and their terms of reference.[72]

The terms of reference serve as the panel's mandate and delimit its deliberations. The "standard" terms of reference enable the panel to examine the matter raised by the complaining party in its Article XXIII:2 request with

66. *U.S. Seeks Measures Against Japanese Farm Quotas*, USTR Press Release, July 14, 1986.

67. Minutes of Meeting, Jul. 15, 1986, GATT Doc. C/M/201 (Aug. 4, 1986) 13; *U.S. Asks GATT to Set Up Int'l Panel on Japan's Farm Import Quotas*, Jiji Press Ticker Service, July 15, 1986. One observer notes that the defendant "usually feigns shock and surprise at the Council meeting that the complainant has taken matters to such a point. Most often the defendant will ask for more time to consider the matter . . . ." Plank, *supra* note 59, at 63.

68. *Kato Explains Tokyo's Acceptance of GATT Farm Trade Panel*, Jiji Press Ticker Service, Oct. 27, 1986. Until 1987, the longest debate to establish a panel after its request took four Council sessions, for the politically sensitive issue of the European Community's agreements with the Mediterranean countries. Plank, *supra* note 59, at 64.

69. *GATT Panel to Mull Japan-U.S. Dispute on Farm Trade*, Kyodo News Service, Oct. 28, 1986.

70. *1979 Understanding*, *supra* note 42, at 212, annex at 216.

71. *Id.*, at 212.

72. Plank, *supra* note 59, at 64. The panel secretary is chosen from the GATT operational division that handles the dispute. In the GATT-12 dispute, the Agricultural Division was naturally assigned to the case. Interview with Gretchen H. Stanton, Counsellor, Agricultural Division, GATT Secretariat, Geneva, Switzerland (Nov. 8, 1988) [hereinafter Stanton Interview].

regard to the relevant provisions of the General Agreement.[73] Although the "standard" terms of reference are written neutrally and have existed for over twenty years, parties sometimes try to prejudge the outcome by including or excluding some particular consideration into the terms of reference.[74]

Japan did not want to accept the "standard" terms of reference. Evidently, there was a dispute between the Ministry of Agriculture, Forestry and Fisheries and the Ministry of International Trade and Industry (MITI), in which MAFF wanted to include language similar to that used in the Japanese Leather Panel.[75] In that panel, Japan wanted to include terms of reference that would require the panel to make findings "taking into account economic and social factors."[76] This position reflected the Japanese concern that the panel would follow strictly legal reasoning, without including the relevant political considerations. Indeed, at the October 27 Council meeting, Japan had stressed that the panel should pay due attention to the factual aspects of the case because "import restrictions on each item had a social and political, as well as an economic, background."[77] The United States initially opposed the request for such non-standard terms of reference.

By the next Council meeting on November 21, the terms of reference had still not been agreed upon.[78] The two sides agreed on language whereby "the panel may take into account all pertinent elements including the Council's discussion on the matter at its meeting on October 27, 1986."[79]

With respect to panelists, both parties had to agree to the same three individuals.[80] Under the 1979 Understanding, the Director-General proposes names of panelists, the disputing parties respond to the nominations within seven working days, and the disputing parties "would not oppose nominations except for compelling reasons."[81] In practice, the panel secretary consults continually with both parties,[82] who may oppose nominations for any reason.[83]

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73. These "standard" terms of reference enable the panel "[t]o examine the matter raised by (name of contracting party and reference number of GATT document) in the light of the relevant provisions of the General Agreement and to report to the Council." *1979 Understanding*, *supra* note 42, annex at 216.

74. Plank, *supra* note 59, at 64-65.

75. *Japanese Measures on Imports of Leather*, BISD 26TH SUPP. 320 (1980).

76. Truran Interview, *supra* note 63.

77. Minutes of Meeting, Oct. 27, 1986, GATT Doc. C/M/202 (Nov. 11, 1986) 8-9.

78. Minutes of Meeting, Nov. 21, 1986, GATT Doc. C/M/205 (Dec. 12, 1986) 14-15.

79. *Japanese Agriculture*, *supra* note 6, para. 1.2, at 163.

80. Moreover, under the procedures of the time, the parties also were required to agree to the number of panelists, choosing between three and five. *1979 Understanding*, *supra* note 42, at 212.

81. *Id.*

82. The panel secretary comes from the GATT operational division assigned to handle the case. Plank, *supra* note 59, at 64. Since the U.S. complaint involved agricultural issues, Gretchen Stanton of the Agricultural Division was assigned to be the panel secretary. Stanton Interview, *supra* note 72.

83. Parlin Interview, *supra* note 36. For a panel secretary's view on the difficulties of choosing panel members, see Plank, *supra* note 59, at 66-72.

The 1979 Understanding specifies that the Director-General should give preference to governmental officials in nominating panel members. People who are citizens of countries whose governments are parties to the dispute may not be selected for the panel.[84] In practice, the panel secretary finds possible panelists by examining the list of governmental delegates to GATT and the formal non-governmental roster.[85] The choice of possible panelists could then be further limited if some of the qualified panelists are serving on another panel or chairing a major GATT working body.[86]

The selection of panelists may well be the most crucial phase of the panel process. First, panelists may be predisposed toward one of the parties or toward legal or political theories that would militate in favor of a particular outcome. Fear of panelist prejudgment has made it increasingly difficult to find suitable panelists. GATT panelists were once almost exclusively drawn from the government delegations of neutral countries,[87] but in an increasingly interdependent world, true neutrality is becoming rare.[88] For example, the neutrality of any European governmental representative can be questioned if the European Community, as a whole, participates in the panel proceedings as a disputing or third party.[89] Second, panelists who are governmental officials at GATT delegations in Geneva may find it difficult to forget their own government's economic policy and national interests.[90] Third, by selecting government officials who are career diplomats, the panel may overemphasize conciliation and may find it difficult to reach legal conclusions.[91] A poor

84. *1979 Understanding*, *supra* note 42, at 212. To facilitate panel composition, the contracting parties have directed the Director-General to maintain an informal roster of qualified governmental and nongovernmental persons. *Id.* Governmental members may be selected from either the contracting parties' permanent delegations in Geneva or from national administrations. Plank, *supra* note 59, at 65. Contracting parties may nominate other potential panelists "who are not presently affiliated with national administrations but who have a high degree of knowledge of international trade and experience of the GATT." *1984 Dispute Settlement Procedures*, BISD 31ST SUPP. 9 (1985). This list of non-governmental panelists "was originally intended to act as a whip to make governments less demanding in challenging panelists," Hudec, *supra* note 2, at 1466 n.76, but has by now become indispensable in finding qualified, acceptable, panelists.

85. Letter from Gretchen H. Stanton to Erwin P. Eichmann (Apr. 20, 1989) [hereinafter Stanton Letter].

86. Hudec, *supra* note 2, at 1466.

87. Since many of the disputes arose between major trading blocs, delegates from the neutral Nordic countries were often called to be panelists. Waincymer, *Revitalising GATT Article XXIII—Issues in the Contest of the Uruguay Round*, AUSTRALIAN BUS. L. REV. 3, 28 (Feb. 1988), *reprinted in* 12 WORLD COMPETITION: L. & ECON. REV. (No. 1 1988).

88. Hudec, *supra* note 2, at 1465.

89. Indeed, in this case, the European Community intervened as a third party. *Japanese Agriculture*, *supra* note 6, para. 4.2, at 220.

90. Van Bael, *The GATT Dispute Settlement Procedure*, 22 J. WORLD TRADE, Aug. 1988, at 67, 72.

91. Professor Jackson has noted that "[i]n assuming that role [of conciliator], the panel often is assisting the negotiation in reference to the power positions of the disputing parties and not with reference to the interpretation or application of an agreed-upon existing rule." Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21, 42 (1980).

selection of panelists could thus impair the competence or objectivity of the panel and lead to a wrong result.[92] Indeed, some contracting parties insist on geographic diversity in panelists,[93] while other contracting parties select only those individuals with extensive knowledge and experience in the GATT panel process.[94]

The two sides twice agreed on three panelists, only to discover that two of them were unable to serve.[95] Since parties to a dispute generally pick panelists as a group (i.e., while each individual panelist must be acceptable, the group as a whole must also be acceptable), Japan and the United States were repeatedly forced to restart the panelist selection process.[96]

Matters remained complicated for some time, since the United States had accepted the establishment of a Panel on U.S Taxes on Petroleum and Certain Imported Substances (the "Superfund Panel") after Japan had accepted the establishment of the GATT-12 Panel.[97] The United States apparently did not want to see the Superfund Panel begin its work before the GATT-12 Panel. Instead, the United States may have hoped to use an implicit political linkage to exert indirect leverage on Japan to accept the proposed panelists. By February 27, Japan and the United States agreed to three panelists who agreed to serve on the panel. Those selected were Sermet R. Pasin (of Turkey, Retired Assistant Director General of GATT), Johannes Feij (The Netherlands GATT delegate), and Sandor Simon (Hungarian GATT delegate).[98]

E. Panel Meetings

Panels generally follow the Suggested Working Procedures found in the July 1985 note of the GATT Office of Legal Affairs.[99] Under current practice, the panelists first hold a short procedural meeting and decide on a schedule for deliberations.[100] The schedule usually includes submission of written

92. *But see* Hudec, *supra* note 2, at 1508 ("Good panelists make better decisions than not-so-good panelists, but the difference at the margin may not be as great as the panelists would like to believe.").

93. *See 1979 Understanding*, *supra* note 42, annex at 217, ("The practice has been to appoint a member or members from developing countries when a dispute is between a developing and a developed country.").

94. Parlin Interview, *supra* note 36.

95. Stanton Letter, *supra* note 85, at 1.

96. Parlin Interview, *supra* note 36.

97. *United States—Taxes on Petroleum and Certain Imported Substances* BISD 34TH SUPP. 136 (1987). In the Superfund case, Canada requested an Article XXIII:2 panel on January 20, the European Community requested an Article XXIII:2 panel on January 22, and Mexico made a similar request on January 13. The GATT Council established such a panel on February 4, and by the February 27 Council meeting, the parties had already reached agreement on the composition of the panel. *Id.* at 136-37.

98. *Japanese Agriculture*, *supra* note 6, para. 1.2, at 163.

99. Petersmann, *supra* note 4, at 364.

100. For details of the procedural meeting, see Plank, *supra* note 59, at 73.

statements,[101] a substantive meeting where the parties present oral testimony, second written (rebuttal) statements, and a second substantive round of oral testimony.[102] Panelists may request additional information from either of the parties at any time and will often put questions to the parties during the substantive meetings. In this case, the panel held its procedural meeting on March 17, setting the date for written submissions in mid-April and the first substantive meeting in early May.[103]

Panel proceedings follow the relevant provisions of the 1979 Understanding,[104] the 1982 Ministerial Declaration,[105] the decision on dispute settlement procedures adopted by the GATT Contracting Parties in November 1984,[106] and any further procedures established by the panel. Panels meet in closed session and request the disputing parties not to release any papers or make any public statements about the dispute.[107] To ensure additional confidentiality, the panel keeps no official records of its correspondence or working papers in the GATT registry.[108] At each of the panel's substantive meetings with the parties, each party gives an opening statement, with the complaining party going first. The panelists then ask questions of the parties, but generally keep their interventions to a minimum, so as to reveal as little as possible of their interpretation. The panelists' questions range from elaborations of the parties' legal arguments to requests for more factual information. Unlike proceedings in the American court system, if the parties cannot answer the panel's questions, they may reserve their rights and submit subsequent written answers. The substantive meetings end with the disputing parties presenting oral rebuttals.[109]

Third parties have only limited rights in the panel process. Any contracting party with a "substantial interest" in the matter will be given the opportunity to present its views to the panel, after first having notified the GATT Council.[110] Third parties, however, do not have the right to attend all panel sessions. Third parties may only be present at the invitation of the

101. Under GATT practice then in force, parties generally submitted their written submissions simultaneously. Plank, *supra* note 59, at 77. Sequential submissions, though, were not unknown; indeed, in the GATT-12 case, the first U.S submission was solicited two weeks before that of Japan. Stanton Letter, *supra* note 85, at 1. The 1988 Montreal Understanding, however, makes sequential submission the rule, with simultaneous submission only if the panel agrees otherwise. Montreal Understanding, *supra* note 16, pt. F(f), para. 4.

102. *See 1979 Understanding*, *supra* note 42, annex at 217.

103. Truran Interview, *supra* note 63. All in all, the panel would receive seven rounds of submissions from each side, totalling over 600 pages. Porges, *supra* note 54, at 1540.

104. *1979 Understanding*, *supra* note 42, and accompanying text.

105. *Ministerial Declaration*, BISD 29TH SUPP. 9, 13 (1983) [hereinafter *1982 Ministerial Declaration*].

106. *Dispute Settlement Procedures*, *supra* note 84, at 9.

107. *See 1979 Understanding*, *supra* note 42, annex at 217 ("Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute.").

108. Plank, *supra* note 59, at 73.

109. Parlin Interview, *supra* note 36.

110. *1979 Understanding*, *supra* note 42, at 213.

panel, and panels will only invite third parties for the limited purpose of presenting their views and answering questions from the Panel and the disputing parties. Once the third party has offered its statement and responded to the questions, it is ushered out of the Panel meeting.[111] Third parties may not receive official copies of the disputing parties' briefs nor responses to questions put by the Panel. In practice, however, third parties might surreptitiously receive copies of the relevant documentation.

The GATT Secretariat plays a more significant role in panel proceedings and deliberations. The Secretariat originally had a no lawyers policy that stressed diplomatic resolution of trade disputes over legal argumentation; however, when Arthur Dunkel became Director-General in 1980, he rethought the policy and established a legal staff.[112] Now, in addition to the panel secretary, one member of the GATT legal office is assigned to each panel. This GATT legal representative is present at all panel meetings and may be called on to assist the panel in resolving procedural and substantive legal questions. Although the panel chairman makes the ultimate procedural rulings, he often decides based on the advice of that legal advisor.[113] Generally, however, the secretariat's style "is one of quiet influence and guidance as well as neutrality."[114] The Secretariat never intervenes orally at the substantive meeting with the parties, unless directly invited to do so. Instead, he takes an active role in the panel's internal deliberations. In fact, secretariat members describe their role in terms similar to law clerks for U.S. court justices. They handle the procedural correspondence, cull together the factual aspects, do the detailed research and analysis of case law, synthesize the arguments, and draft the opinions.[115] The Secretariat, though, does not decide the case; rather the panelists judge the outcome and sign their names to the panel report.

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111. Parlin Interview, *supra* note 36.

However, panels running in parallel may be possible, even with all parties (some of them being technically third parties) attending on all sessions. *See* the panels on the Korea Import Restrictions on Beef, GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 12. For the three technically distinct Korea Beef Panels, established from respective complaints by the United States, Australia, and New Zealand, the complaining parties and Korea agreed that in each of the Panel sessions, the other two parties could attend as "silent observers" (i.e., for the United States-Korea Panel, Australia and New Zealand could attend as "silent observers" and vice versa). *Id.* In the *Panels on Tax Legislation (DISC)*, BISD 23RD SUPP., In that set of cases, complaints by the European Community against the United States and by the United States against France, Belgium, and the Netherlands were heard by one five-member panel. The disputing parties agreed that the panel would be officially treated as four separate panels, but that all four cases would be heard simultaneously. Minutes of Meeting, Jul. 30, 1973, GATT Doc. C/M/89 (Aug. 17, 1973) 10-11.

112. Hudec, *supra* note 2, at 1487 (describing the formation of the GATT Legal Office).

113. Petersmann, *supra* note 4, at 73. The GATT legal office has only persuasive influence because the panel members remain ultimately responsible "for the panel proceeding, for the elaboration of the panel report and for its presentation to the competent GATT body." *Id.*

114. Plank, *supra* note 59, at 75.

115. Stanton Interview, *supra* note 72; Plank, *supra* note 59, at 77.

The GATT-12 Panel held its first substantive meeting on May 7 and 8, 1987.[116] Often, the first meeting of a GATT panel establishes the broad outlines of the case, while the second meeting focuses on specific disagreements on factual or legal problems. On the first day, the parties presumably made opening statements and began discussing the factual and legal merits of the case. On the second day of the meeting, Australia, the European Community, and Uruguay, as interested third countries, made presentations to the Panel and disputed the legality of the quotas.[117] The second substantive meeting took place on June 23 and saw a continuation of the legal and factual argumentation.[118]

After each set of proceedings, both sides presented the panel with copies of their oral statements, as well as copies of their item-by-item analyses.[119] By providing copies of their oral statements, the parties in effect give themselves a second chance at written rebuttals, and by allowing the submission of oral statements the panel maintains the parties' good will and reduces concerns that the losing party will block adoption of the panel report.[120]

During the presentations, the United States reviewed the facts and the history of the case and addressed the inconsistency of the quotas under Articles XI:2(c) and XX(d).[121] The United States rejected the Japanese argument that the special characteristics of agriculture should be taken into account, noting that GATT disciplines pertain equally to agriculture. The Japanese mentioned various political factors affecting the case, including the special characteristics of agriculture, the import restrictions available to the United States under the 1955 Waiver, the agricultural negotiations in the Uruguay Round, and the ongoing bilateral negotiations between Japan and the United States.

The two sides argued extensively over the interpretation of the Article XI:2(c) exceptions and also analyzed the legality of the quotas on the twelve agricultural products item-by-item. The United States discussed Article XI:2(c), commented on the implications of the recently adopted Superfund

116. *Japanese Agriculture*, *supra* note 6, para. 1.3, at 163.

117. *Id.* paras. 4.1.1-4.3, at 219-220.

118. *Id.*

119. Parlin Interview, *supra* note 36.

120. As the losing party must also consent to the Council's adoption of the panel report, panels must remain above any allegation of bias, so that the losing party will not later reject the report due to procedural misconduct. On the other hand, the practice of submitting oral comments may not be as significant as it first appears. The GATT Secretariat takes written notes during formal panel proceedings for the use of the panelists and Secretariat, so that the submission of oral statements only makes them available to one other party, the opposing party. The GATT Secretariat also usually tape records all meetings that the panel holds with the parties, for those rare circumstances when the panel questions their memory of what had been said. Stanton Letter, supra *note* 85, at 1.

121. For a complete account of the arguments, see *Japanese Agriculture*, *supra* note 6, paras. 3.1-3.6.2, at 183-219.

Panel report,[122] and gave an item-by-item analysis. Japan also discussed the legal interpretation of Articles XI:2(c) and XX(d), mentioned its various political elements, and gave an item-by-item analysis.

After the second substantive meeting, the United States thought that the face-to-face meetings were over and that the panel could then start drafting its report.[123] However, in the following weeks, contrary to general GATT practice, Japan asked for a third meeting of the panel. Japan's ostensible explanation for the third meeting was to give the panel a further chance to clarify the difficult technical issues of the case. Japan's true reason for requesting a third substantive meeting, may have more to do with domestic politics than GATT issues. First, the Japanese government presumably had to convince its farmers, the political underpinning for the ruling Liberal Democratic Party, that the government was doing everything possible to win the case.[124] Second, the MAFF and the Ministry of Foreign Affairs (MOFA) disagreed on the legal argumentation of the case. MAFF had won the first round of this bureaucratic war and directed the arguments during the two substantive meetings; however, the Japanese government evidently sensed that the arguments were not carrying well and requested the third meeting to put forward the MOFA's arguments.[125] Thus, the third substantive meeting, which took place on October 5,[126] saw a reopening of the legal issues.

During and after panel meetings, parties have been known to apply pressure on the secretariat or panelists to decide the case in their favor.[127] Once, in a prior case, the pressure became so great that a panel chairman chose to quit the panel rather than make a ruling.[128] Given the political sensitivity of the issue, it would not be surprising if such lobbying occurred, though unsuccessfully, on behalf of Japan in the GATT-12 case. It is a tribute to GATT panelists that they do not allow themselves to be swayed, and, indeed, overly persistent lobbying by a party could be resented and cause an effect opposite to that intended.

On October 30, 1987, the panel told the parties of their decision:[129] ten of the twelve quotas were GATT-inconsistent by nature, and the remaining

122. Panel reports do not become part of GATT "law" until after their adoption by the GATT Contracting Parties. Under accepted GATT practice, "the Council is empowered to act for the CONTRACTING PARTIES." *1979 Understanding*, *supra* note 42, annex at 215 n.1. The Council adopted the Superfund Panel Report on June 17, 1987. *United States—Taxes on Petroleum and Certain Imported Substances*, *supra* note 97, at 136.

123. Truran Interview, *supra* note 63.

124. *See, e.g.*, *GATT Likely to Ask Japan to Decontrol Farm Imports*, Kyodo News Service, Dec. 3, 1987.

125. Moreover, MITI, which had conducted the litigation in the Japanese Leather Panel, had gotten a third panel meeting in those proceedings; MAFF may have also desired a third panel meeting to secure its bureaucratic position against MITI.

126. *Japanese Agriculture*, *supra* note 6, at 163.

127. Plank, *supra* note 59, at 81.

128. *Id.*

129. *Japanese Agriculture*, *supra* note 6, at 163.

two, though GATT permissible, excessively restricted imports in their present form.[130] Even though only the governments of Japan and the United States were officially told the outcome (the other GATT contracting parties were to be informed on November 13),[131] the decision appeared on the front pages of all the major Tokyo newspapers within a few days. The *Asahi Shinbum* even reported that Japan would try hard to make a deal whereby the United States would withdraw the GATT case.[132] Barring a last minute settlement, the United States intended to press for adoption of the report as part of a strategy to gain access to other Japanese agricultural markets, including citrus, beef, and rice.[133]

Even after the conclusion of panel meetings, GATT dispute settlement still favors a bilateral settlement. Thus, the panel will first release the descriptive section (introduction, factual aspects, and legal arguments) to the parties, then the legal findings to the parties, and only two weeks later will it distribute the report to the contracting parties. Parties will sometimes settle after receiving the descriptive part of the panel report. In the Panel on Japanese Import Restraints on Manufactured Tobacco,[134] the parties even settled between the time when the report was finalized, and when it was released.[135] In the GATT-12 case, Japan tried to cut such a bilateral agreement. However, because the panel's report favored the United States, it was unlikely that the United States would bargain it away.[136]

On November 5, a week before the panel report was to be publicly released, Japanese Prime Minister Nakasone sent President Reagan a personal letter calling for a bilateral settlement of the case.[137] On November 12, MAFF's Director General for Economics, Hidero Maki, met with the Deputy USTR Alan Holmer in Washington but failed to reach a bilateral solution.[138] On November 13, the report was made public despite attempts by the Japanese to postpone its release. At a press conference, Deputy USTR Michael Samuels declared that Japan would have to "either make complete changes domestically or find some way to compensate the U.S.;" barring such

130. For the full text of the panel report, see *Japanese Agriculture*, *supra* note 6.

131. The panel will first release the results to the parties, privately, for factual corrections and a possible last minute settlement. *MTN Panel*, *supra* note 7, at 130.

132. Asahi Shinbum, Nov. 1, 1987.

133. *U.S., Japan Fail to Resolve Farm Quotas Dispute*, Reuter Bus. Rep., Nov. 12, 1987; *GATT Panel Favors U.S. in Dispute with Tokyo over Import Restraints on 12 Processed Foods*, 4 Int'l Trade Rep. (BNA) 1423 (Nov. 18, 1987).

134. *Japanese Restraints on Imports of Manufactured Tobacco from the United States*, BISD 28TH SUPP. 100 (1981).

135. Plank, *supra* note 59, at 83.

136. *GATT Ruling on Japan Farm Imports Inevitable*, Jiji Press Ticker Service, Nov. 12, 1987.

137. *Japan Seeks Farm Trade Talks With U.S.*, Jiji Press Ticker Service, Nov. 6, 1987.

138. *U.S., Japan Fail to Resolve Farm Quotas Dispute*, *supra* note 133.

a Japanese response, he stated that the United States would be forced to retaliate.[139]

Japan renewed its efforts to settle the dispute bilaterally before the next GATT council debate. On November 16, the Japanese Ambassador to Washington, Nabuo Matsunaga, called on USTR Clayton Yeutter, and made a detailed settlement offer. Matsunaga reportedly offered to liberalize the ten categories found illegal in the panel report, but maintained that some import quotas must remain for limited categories of products. However, as to timing, Matsunaga reportedly proposed a "preparation period" of several years prior to the liberalization of some items.[140]

In addition to Matsunaga's efforts, visiting Japanese Dietmen met with Agriculture Secretary Lyng and Deputy USTR Michael Smith on November 16 and 17 in an attempt to resolve the dispute.[141] Two days later, at talks between the MAFF's Director General of Economic Affairs, Hidero Maki, and Deputy USTR Michael Smith the United States made a counteroffer. The United States offered to accept continued import restrictions only if Japan were to provide compensatory measures, equal to the economic benefits, for the effects of liberalizing the ten agricultural products.[142] Thus the United States remained committed to the basic implementation of the panel report, with or without its adoption by the GATT Council. Japan, on the other hand, was not yet ready to agree to the report's implementation.

On November 30, USTR Yeutter met with Japanese Foreign Minister Uno in Geneva at the latter's request to discuss adoption of the panel report.[143] Uno reportedly offered liberalization of eight of the ten quotas found GATT-illegal in exchange for U.S. withdrawal of the complaint on the other two.[144] From Japan's perspective, this offer may have seemed to be a major concession. Under GATT practice, even duly adopted panel reports may take years to implement,[145] with little possibility for the winning party to take GATT-sponsored retaliatory action. Japan's agreement to liberalize

139. *GATT Panel Favors U.S. in Dispute with Tokyo over Import Restrictions on 12 Processed Foods*, *supra* note 133.

140. *Sato Foresees Farm Trade Issue Settlement*, Jiji Press Ticker Service, Nov. 17, 1987. However, the United States officially rejected this offer two days later. *U.S. Rejects Japanese Offers for Cutting Import Curbs*, Kyodo News Service, Nov. 19, 1987.

141. *Farm Trade Issue to Be Resolved Through Talks*, Jiji Press Ticker Service, Nov. 18, 1987.

142. *U.S. Still Favoring GATT Farm Trade Ruling*, Jiji Press Ticker Service, Nov. 20, 1987.

143. *Uno Seeks Limited Farm Import Curbs at GATT*, Jiji Press Ticker Service, Dec. 1, 1987; *Uno Meeting with Yeutter on Farm Trade*, Jiji Press Ticker Service, Nov. 27, 1987.

144. *Yeutter Urges Adoption of GATT Report on Japanese Agriculture*, Reuter Libr. Rep., Nov. 30, 1987. The two categories that Japan refused to liberalize presumably were starch and dairy products. Nebehay, *Japan Refuses to Accept GATT Farm Report*, Reuter Bus. Rep., Dec. 3, 1987; *see also* Stanton Letter, *supra* note 85, at 2.

145. *See United States—Tax Legislation (DISC)*, BISD 28TH SUPP. 114 (1981) (decision), BISD 23RD SUPP. 98 (1976) (report). The DISC report took eight years to implement. Hudec, *supra* note 2, at 1488-1500.

eight agricultural categories effectively offered no delay in liberalization of those categories.

The United States, however, insisted on adoption of the panel report in order to maintain the effectiveness of the GATT dispute settlement machinery. USTR Yeutter declared in a press conference that the United States would consider a partial implementation to be "inappropriate—an unfortunate precedent."[146]

F. Adoption of the Panel Report

Under the dispute settlement procedures, panel reports do not become part of GATT "law" until after their adoption by the GATT Contracting Parties. The Contracting Parties can adopt panel reports at the monthly GATT Council session or at a formal GATT Contracting Parties session.[147] In the early years of the GATT, the contracting parties adopted panel reports by majority vote, pursuant to Article XXV:4.[148] Since the 1950s, however, contracting parties have only adopted reports by consensus. This practice enables any contracting party, including the losing party, to block the report's adoption. Even though the contracting parties have previously agreed that "obstruction in the process of dispute settlement shall be avoided,"[149] contracting parties continue to block or delay the adoption of reports.[150]

If the report is not adopted, contracting parties have no legal obligation to implement the panel's recommendation. Consequently, the GATT will not officially publish the report, and the report will have no precedential value.[151] However, through 1987, only five panel reports under Article XXIII:2 dispute settlement were not adopted.[152]

On the other hand, some commentators have advocated the blocking of certain panel reports. For example, Ernst-Ulrich Petersmann of the GATT

146. *Id.*; Deputy USTR Michael Samuels also warned that "[l]egally, GATT has treated reports of investigative panels as units. Partial adoption of a report would be unprecedented and would render the whole system meaningless. Attempts to block the report partially will have a disastrous effect on the Uruguay Round." *Japan Blocks GATT Panel Report Backing U.S. Complaint on Import Barriers to Farm Goods*, 4 Int'l Trade Rep. (BNA) 1523 (Dec. 9, 1987).

147. "The Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice." *1979 Understanding*, *supra* note 42, annex at 215 n.1.

148. Petersmann, *Strengthening GATT Procedures for Settling Trade Disputes*, THE WORLD ECONOMY, Mar. 1988, at 55, 74. Article XXV:4 provides that "[e]xcept as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast." GATT, *supra* note 1, art. XXV:4.

149. *1982 Ministerial Declaration*, *supra* note 105, at 16.

150. Parlin Interview, *supra* note 36. After the GATT Council meeting that discussed adoption of the GATT-12 panel report, the GATT press spokesman, David Woods, acknowledged that "[t]here is nothing in the GATT rules which prevents a panel report from being rolled over to the next meeting of the Council. This has been done before." *Japan Blocks GATT Panel Report Backing U.S. Complaint on Import Barriers to Farm Goods*, *supra* note 146.

151. However, several non-adopted GATT panel reports have been published in private journals, in one case with mistakes. Petersmann, *supra* note 148, at 76.

152. Plank, *supra* note 59, at 89; however, panel reports under the Code Committees can and have also been blocked. *See, e.g., European Community*, *supra* note 11.

Legal Office finds such continued blockage to be warranted when a "relevant number" of contracting parties decide that the report was inadequately reasoned, or differ with the panel on the interpretation of the substantive GATT rules at issue.[153] Petersmann goes on to state that

> [t]he need for adoption of panel reports by the politically responsible GATT body provides a legal and political "filter" for panel reports and enables the rejection of reports that are widely considered as "opaque, questionable and incomplete" and as inconsistent with previously accepted interpretations of GATT law.[154]

In short, since GATT provides no appeals process for incorrect panel reports, Petersmann would argue that the Council could act as such an appeals body. The United States, as well as a number of other countries, expected an uphill battle to convince Japan not to block the report.[155]

At the December 2 meeting of the GATT Council, Japan expressed strong doubts about the panel's interpretation of "like product" and "perishability" as found in Article XI:2(c). Japan also took issue with the panel's interpretation of the provisions relating to state-trading monopolies.[156] Japan then suggested that the report be adopted in part. The United States reaffirmed its belief in the report's soundness and stated that, legally, the GATT treats reports as units so that parties cannot choose which findings to accept.[157] Although other contracting parties, including the European Community and Canada, did not like parts of the report, no contracting party wanted to see a precedent whereby the Council would adopt only parts of a report.[158]

If reports can only be blocked as a whole, a contracting party must strongly disagree with the conclusions as a whole, instead of only particular sections, in order to upset the process of dispute settlement. Allowing contracting parties to block reports by section would have reduced the level of disagreement with a report's conclusions that a contracting party would need to advocate blockage and thus this would have substantially increased the politicization of report adoption. The Japanese Ambassador, Yoshio Hatano,

153. Petersmann, *supra* note 148, at 72-73; *see also* Hudec, *supra* note 2, at 1485 ("If the majority of GATT governments have changed their mind about the wisdom of a legal obligation, it is enough that the panels establish what the existing law is .... There is nothing blameworthy about rulings that are not accepted.").

154. Petersmann, *supra* note 148, at 73. Thus, Petersmann would see the GATT Council or Contracting Parties session operating as an "appeals court" for bad rulings. *See, e.g.*, Hudec, *supra* note 2, at 1490 (advocating some form of appeals board).

155. New Zealand, Argentina, Australia, Uruguay, Chile, Hungary, Brazil, and the Philippines (speaking for the ASEAN nations) all spoke during the Council meeting in support of full adoption of the report. *Japan Blocks Gatt Panel Report Backing U.S. Complaint on Import Barriers to Farm Goods*, *supra* note 146.

156. *Id.*

157. *Id.* (remarks of U.S. Ambassador Michael Samuels, GATT Council Session, Dec. 2, 1987).

158. Stanton Interview, *supra* note 72.

asked for and was given a twenty-four-hour delay in the debate to consult Tokyo.[159]

On December 3, Japan formally blocked adoption of the panel report.[160] Since the Council did not reach a consensus, the Secretariat noted the statements and delayed further consideration of the matter until the next Council meeting.[161] In an attempt to diffuse pressure, Japan also announced a unilateral liberalization of import restrictions on eight of the ten goods held to be GATT-illegal.[162] In actuality, these import restrictions were not removed until the entire dispute was settled, many months later.[163]

In a press release after the Council meeting ended, USTR Yeutter hailed the panel report as "one of the most important decisions handed down by the GATT in many years" and threatened that if Japan did not live up to its GATT responsibilities, "the United States will have no choice but to pursue its legitimate interests in the matter through other means."[164] The allusion to "other means" presumably relates to unilateral retaliation by the United States under section 301 of the Trade Act of 1974.[165] Under that section, the President, through the USTR, can take action to enforce "the rights of the United States under any trade agreement" or to respond to foreign trade practices that are "inconsistent with the provisions of, or otherwise den[y] benefits to the United States under, any trade agreement."[166] Since the USTR has interpreted "any trade agreement" to include the GATT,[167] the United States could retaliate against Japan under American domestic law if Japan did not adopt the panel report.[168] However, retaliation under section

159. *Japan Blocks GATT Panel Report Backing U.S. Complaint on Import Barriers to Farm Goods*, *supra* note 146. Because of the time differences between Geneva and various foreign capitals, it is not unusual for GATT delegations to require several hours to consult with their governments. Parlin Interview, *supra* note 36. Nevertheless, Tran Van Tinh, head of the European Community's mission to the GATT, thought that Japan was simply playing for time. Others thought the delays resulted from a battle between MITI and MAFF. Nebehay, *supra* note 144.

160. *Japan Deflects GATT Report Upholding U.S. Complaint Against Barriers to Farm Goods*, No. 232 Daily Rep. for Executives (BNA) 7 (Dec. 4, 1987).

161. Parlin Interview, *supra* note 36.

162. *Japan to Remove Curbs on 8 Farm Items*, Jiji Press Ticker Service, Dec. 4, 1987.

163. *Japan Agrees to Comply with GATT Ruling in Dispute over 11 Processed Food Products*, 5 Int'l Trade Rep. (BNA) 1057 (July 27, 1988).

164. Ambassador Yeutter's Response to Japanese Action Blocking a GATT Finding on 12 Agricultural Import Quotas, USTR Press Release, Dec. 3, 1987; *see also Japan Deflects GATT Report Upholding U.S. Complaint Against Barriers to Farm Goods*, *supra* note 160 (U.S. Ambassador Samuels remarked that "[w]e are going to have to consider very carefully the sort of action we are taking to combat this" and warned that rejection of the report would open a "Pandora's Box" of other actions in GATT and elsewhere.)

165. 19 U.S.C. §§ 2411-2419 (1988).

166. 19 U.S.C. § 2411(a)(1) (1988).

167. Bello & Holmer, *Section 301 of The Trade Act of 1974: Requirements, Procedures, and Developments*, 7 NW. J. INT'L L. & BUS. 633, 635 (1986). Various GATT codes are also included in the category of "any trade agreement." *Id.* at 634 n.4.

168. Invocation of Article XXII consultations or an Article XXIII panel may in fact arise out of a section 301 petition. Private litigants may bring petitions under section 301 to request that the President enforce the United States' rights under the GATT. 19 U.S.C. § 2411(a)

301 may not have been consistent with the United States' GATT obligations.[169]

By mid-January, Japan dropped numerous hints that it would accept the panel's report. On January 8, Prime Minister Takeshita told a visiting U.S. Senator that Japan would comply with the ruling.[170] On January 12, Japanese Foreign Minister Uno told U.S. Secretary of State George Shultz at a meeting in Washington that Japan would deal with the GATT ruling "in good faith" and implied that Japan would accept the panel report.[171] By January 13, the Japanese Mission to the GATT had reportedly received instructions to accept the report at the next session of the GATT Council.[172] The two sides evidently reached a compromise whereby the United States would not hold Japan to every conclusion on the panel report if Japan would unequivocally accept the report in Council.[173] In short, they agreed to discuss alternative trade-offs to the panel's conclusions if Japan officially accepted the report and thereby kept GATT dispute settlement ostensibly intact.

At the next Council meeting on February 2, 1988, Japan formally abandoned its opposition to the panel report and allowed its adoption,[174] provided that the Council took note of and put on record the Japanese statement in its entirety. Japan's remarks centered on its disagreements with the panel's interpretation on the perishability of tomato juice and fruit products (Japan granted itself a reasonable time for the implementation of the necessary reforms for tomato juice and fruit), on the report's logic regarding certain dairy

(1988). In fact, eleven of the sixteen GATT complaints filed by the United States between 1975 and 1985 arose from section 301 petitions. U.S. INT'L TRADE COMM., PUB. NO. 1793, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS 49, 51 (1985).

169. As originally drafted, section 301 would have required the President to take retaliatory action compatible with the international obligations of the United States; the Senate, though, deleted this provision. S. REP. NO. 1298, 93d Cong., 2d Sess. 166 (1974).

Unilateral U.S retaliation, without prior approval by the GATT Contracting Parties, however, could in itself be GATT-illegal and give rise to a new dispute settlement panel. Parlin Interview, *supra* note 36; *see also* Montreal Understanding, *supra* note 16, pt. A, para. 2 ("[A]ll solutions to matters formally raised under the GATT dispute settlement system . . . shall be consistent with the General Agreement and shall not nullify or impair benefits accruing to any contracting party under the General Agreement, nor impede the attainment of any objective of the General Agreement."). Nevertheless, the United States has before and will probably continue to take retaliatory action inconsistent with the GATT.

170. *Takeshita Says Japan Should Open Market to Farm Products*, Asahi News Service, Jan. 8, 1988. The remark was made to Senator Lloyd Bentsen, Chairman of the Senate Finance Committee, the Senate committee that oversees U.S. trade policy.

171. *Foreign Minister Uno Hints Japan Will Accept GATT Ruling on Farm Products*, Kyodo News Service, Jan., 12, 1988.

172. *Japan Said to Accept GATT Panel Finding Against Its Quotas on Agricultural Imports*, 5 Int'l Trade Rep. (BNA) 38 (Jan. 13, 1988).

173. *Japan Seeks Compromise to Keep Two Food Product Quotas*, Asahi News Service, Feb. 3, 1988.

174. Nebehay, *Japan Agrees to Full GATT Panel Report to Lift Farm Quotas*, Reuter Bus. Libr., Feb. 2, 1988.

products and starch (Japan stated that it would defer decision on the applicability of the panel's interpretation), and on the appropriateness of the panel's interpretation of the state trading provisions (Japan stated its understanding that the report's adoption would not establish a general precedent for state trading).[175]

Japan may thus have placed a statement of its intentions regarding the panel report on the record. This raises an interesting, and as yet, unanswered question of GATT law: do statements during the debate on adoption of a panel report affect the contracting parties' obligations toward the panel report? Under accepted GATT practice, contracting parties may explicitly reserve their rights to the adoption of a panel report under dispute settlement or to any committee report.[176] However, Japan evidently avoided using the word "reservation" in its Council intervention, so that, legally, Japan accepted the report unconditionally. But, regardless of the legal technicalities, the Council's effect on the precedential value of panel reports is unclear—the Council may be acting as an appeals board, that simply affirms the decision as if it were a case report from the judiciary, or the Council may be acting as a legislature, whereby statements in Council could be considered as part of a legislative history. If one decides that adoption follows a judicial model, then reservation of rights is meaningless because the Council would not have the power to affect precedent.[177] Thus, the report's text would establish the only precedent, and the Council's consensus would act as a zipper clause to exclude all conflicting extra-textual interpretations. If, however, one decides that the Council session begets a legislative approach, then the contractual obligations of contracting parties to the General Agreement may vary. To pinpoint any contracting party's obligations, one would have to identify their reservations and distinguish which "obligations" they had undertaken. Thus, under the legislative model, the GATT would become an extensive matrix of contractual obligations whereby the balance of concessions could be altered dramatically by the reservation of one's rights.

The political process leading to the report's adoption also highlights the diplomatic nature of even the "legalistic" aspects of GATT dispute settlement. Since adoption is far from automatic, GATT contracting parties must convince the "losing" party not to block adoption. Two principle reasons explain why Japan acceded to the report. First, the United States offered a compromise on implementation. The United States indicated a willingness to discuss alternatives to full agricultural liberalization if Japan would agree to

175. Parlin interview, *supra* note 36.

176. *Id.*

177. For example, the 1982 Ministerial Declaration affirmed that "[i]t is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement." *1982 Ministerial Declaration*, *supra* note 105, at 16.

accept the GATT ruling.[178] Thus, the United States implicitly accepted Japan's December offer of liberalizing only eight products in exchange for adoption plus compensation.[179] Second, a Japanese refusal to adopt would have isolated it within the GATT at a crucial stage of trade negotiations in other subject areas. Japan had just presented its proposal to liberalize agricultural trade under the rubric of the Uruguay Round of multilateral negotiations. In addition to agriculture, Japan was also engaged in trade disputes with the United States over semiconductors and barriers to U.S. construction firms. Because of these other pressures, Japan needed the goodwill of the United States and other contracting parties. It could have decided that adoption of the panel report would be a justifiable price to pay for such goodwill.[180]

The United States twice reached settlements with Japan regarding these twelve residual restrictions, a two-year truce in 1983 and the adoption of the panel report in 1988. Both times, settlement involved considerations external to the legal and procedural argumentation of the case itself. In 1983, the two-year truce came about largely because of Japan's related trade concerns with beef and citrus. Similarly, Japan's 1988 adoption of the panel report coincided with the growing concern regarding semiconductor restrictions and the Uruguay Round negotiations. In both instances, it was the United States' trade leverage that led to the substantive settlement. On the other hand, the settlement might have been reached regardless of the United States' leverage because in this arena of international relations, parties may value their ongoing relationship more than any position in a specific dispute.

Under either explanation, GATT dispute settlement is only a means to an end, not the end in itself. Legal and procedural argumentation affect the boundaries of possible settlement, but the actual ability of parties to settle is instead decided by exogenous factors including the parties' relative power positions. Thus, GATT legal rules may serve to shift the modes of diplomatic discourse, but they do not, in and of themselves, define the outcome eventually achieved.

178. *Japan Seeks Compromise to Keep Two Food Product Quotas*, Asahi News Service, Feb. 3, 1988. Deputy USTR Michael Smith indicated that the alternative to liberalization could take the form of compensation. *Id.*

179. An offer of compensation may be a GATT-legal option for a contracting party that does not wish to implement a report's finding. *1982 Ministerial Declaration*, *supra* note 105, at 15.

180. *Japan Said to Accept GATT Panel Finding Against its Quotas on Agricultural Imports*, 5 Int'l Trade Rep. (BNA) 38, (Jan 13, 1988). One European ambassador to the GATT observed that "[t]he Japanese were completely alone on this subject, and they were well aware of it. There were a lot of other wider-ranging negotiations coming up in which they will need support, particularly in the agricultural field, and it was apparently felt in Tokyo that it was easier to cut losses on this one in exchange for more support elsewhere in the next months." *Id.*; *see also* Waincymer, *supra* note 87, at 14.

G. Implementation

Implementation of adopted panel reports has consistently been a grey area of GATT practice. Under Article XXIII:2, the GATT Contracting Parties may authorize suspension of "such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances."[181] Further action "might include a recommendation for compensatory adjustment with respect to other products."[182] For surveillance of implementation measures:

> [T]he CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution.[183]

Unfortunately, the losing party can easily block any enforcement of implementation. This is because any decision by the contracting parties to withdraw concessions or recommend compensation requires a consensus among the contracting parties, including the losing party to the dispute. Indeed, only in one case, a 1952 Netherlands complaint against the U.S wheat flour import regime, did the contracting parties authorize the suspension of concessions under Article XXIII:2. One study found that domestic implementation action has been taken in 72 percent of disputes through 1985, but the implementation rate drops to 57 percent in the 1975 to 1985 period.[184]

In essence, GATT dispute settlement only provides contracting parties with a judgment. Enforcement of that judgment must be worked out diplomatically between the contracting parties involved. Here again, the relative strengths of the contracting parties may determine when (or whether) implementation takes place. The United States and Japan, following accepted GATT practice, entered into bilateral negotiations for implementation.

After several rounds of talks, the two sides agreed on the report's implementation. By July 20, 1988, the accord and referendum was completed, though only after a U.S threat of retaliation should agreement not be reached by the July Council meeting.[185] Under the agreement, Japan should end import quotas on seven categories by April 1, 1990 and provide partial lifting, substantial access or compensation on the other four categories. The United States and Japan will continue consulting on the remaining quotas with a

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

182. *1982 Ministerial Declaration*, *supra* note 105, at 15.

183. 1979 Understanding, *supra* note 42, at 214.

184. U.S. INT'L TRADE COMM., *supra* note 168, at 61.

185. *Japan Agrees to Comply with GATT Ruling in Dispute over 11 Processed Food Products*, 5 Int'l Trade Rep. (BNA) 1057 (July 27, 1988).

view toward further market openings.[186] Six and one-half years after the initial decision to discuss quota liberalization and two years from the first request for a GATT panel, the United States and Japan agreed on the liberalization of these Japanese agricultural markets, although implementation would still not take place for another two years.

II.
DEVELOPMENTS IN THE MONTREAL MID-TERM REVIEW

The Uruguay Round's opening declaration established a Group of Negotiations on Goods, which in turn created a Negotiating Group with a mandate to improve the GATT's procedures.[187] By December, 1988, this Negotiating Group had conducted two years of negotiating sessions, received written proposals from many countries and agreed to produce interim results for trial application until the close of the Uruguay Round. These improvements have removed many procedural roadblocks of dispute settlement but, still, could have been much more extensive. Even under the improved panel process, the parties could mutually agree to extend many of the deadlines. So, temporary ceasefires, such as those in the United States-Japan case, could legally reoccur, much to the chagrin of domestic industries.[188]

A. Article XXIII:1 Consultations

Although the wording of the General Agreement suggests that invocation of Article XXIII:1 consultations is not a prerequisite to a request for an Article XXIII:2 panel,[189] the 1979 Understanding does require such consultations before resorting to Article XXIII:2.[190] The Montreal Understanding effectively mandates such consultations but establishes strict deadlines for initiating and conducting bilateral consultations.

When a contracting party requests Article XXII:1 or Article XXIII:1 consultations, the defending party must now reply within ten days and enter into good faith consultations within thirty days of the request; otherwise, the

186. The agreement was formally signed on August 2, 1988. *Yeutter Announces Resolution on Japan GATT Case*, USTR Press Release (Aug. 2, 1988); Porges, *supra* note 54, at 1541. For a summary of the agreement, *see Japan Agrees to Comply with GATT Ruling in Dispute over 11 Processed Food Products*, *supra* note 182.

187. *Ministerial Declaration of the Uruguay Round*, *supra* note 13, at 27, 34.

188. However, temporary ceasefires may no longer be possible under current U.S. domestic law as section 301 now requires the USTR to report back within eighteen months on U.S. efforts to rectify violations of the GATT. 19 U.S.C. § 2414 (1988). If a ceasefire causes the dispute settlement proceedings to exceed eighteen months, the USTR could now be forced to take mandatory action to enforce the United States' rights under the GATT, even if the panel were still deliberating or were subject to a "ceasefire." *Id.* On the other hand, there may still be no problem with temporary ceasefires as the USTR may interpret this mandatory provision so as to "preserve[] . . . discretion in the USTR." Bello & Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1, 18 (1988) (reflecting the views of the former USTR General Counsel and former Deputy USTR).

189. Petersmann, *supra* note 4, at 352.

190. *See supra* note 43.

complainant may directly request the establishment of a panel or working party under Article XXIII:2.[191] The complaining party can also request a panel if the consultations do not resolve the dispute within sixty days, or if the parties mutually decide that consultations cannot settle the dispute.[192]

These improvements would not have expedited matters much in the GATT-12 case. There, the United States initially delayed requesting consultations for political reasons. Such a delay could also take place under the new system. In addition, once the United States did ask for consultations, Japan agreed to hold first consultations within ten days, well short of the thirty day cut-off for an automatic panel request. In fact, second consultations were held within sixty-nine days, only slightly beyond the sixty-day cut-off for an automatic panel request. With respect to the move from Article XXII:1 consultations to an Article XXIII:2 panel request, political rationales and a two-year ceasefire delayed the process in the GATT-12 case. Thus, although the new rules for Article XXIII:1 consultations would have regularized the process followed by the United States and Japan, they would not have necessarily expedited matters.[193]

B. Establishment of a Panel

The Montreal Understanding's most significant success in the movement toward legalism is its agreement on the automatic right to a panel. While several of the Tokyo Round Agreements have explicitly recognized the right to a panel,[194] this is the first such recognition under Article XXIII dispute settlement. The Montreal language may still allow some delay, but it explicitly mandates that:

> a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at the meeting the Council decides otherwise.[195]

Thus, the Montreal Understanding has shifted panel establishment from a positive to a negative consensus basis. Whereas a consensus was previously needed to establish a panel, now a consensus is needed *not* to establish one. Since the party bringing the complaint will rarely vote against establishment, the negative consensus should rarely occur in practice.

The Montreal Understanding would still allow the defending party to defer a request for the ostensible reason of studying the request, as Japan did in the GATT-12 case. This delay of one Council meeting (approximately one

191. Montreal Understanding, *supra* note 16, pt. C, para. 4.

192. *Id.* pt. C, para. 2.

193. In other cases, however, the new procedures will greatly smooth bilateral consultations. From time to time, a contracting party will refuse Article XXIII:1 consultations as not ripe or will stretch them out past sixty days. Parlin Interview, *supra* note 36.

194. *See Agreement on Technical Barriers to Trade*, BISD 26TH SUPP. 9, 23 (1980); *Agreement on Government Procurement*, *id.* at 33, 49; *Agreement on Implementation of Article VII*, *id.* at 116, 129; *Agreement on Implementation of Article VI*, *id.* at 171, 185-6.

195. Montreal Understanding, *supra* note 16, pt. F(a).

month) would be allowed notwithstanding the fact that the dispute may have been smoldering for years or that the parties had already bilaterally discussed the establishment of a GATT panel. During discussions in the Negotiating Group on Dispute Settlement, smaller countries, both developed and less-developed alike, favored this buffer of an additional Council meeting so that they would not be caught unaware if a panel were to be requested.[196]

The Montreal negotiators have ensured that each complainant will get its day in court. Under the prior rules, the defending party could, and sometimes did, block a panel request so that the complaint would never be heard. For complaints brought by small countries against large ones, blockage of the panel's establishment often left no recourse for redress of the grievance. Although contracting parties may still block the report's adoption, it is hoped that the issuance of a negative report will pressure the defending party to change its practices. Automatic panel establishment has moved GATT dispute settlement toward a more legalistic model.

The agreement on the right to a panel did not come easily. The text sent by the Group on Negotiations on Goods to Montreal had included another round of procedural wrangling after the panel's establishment. The text stipulated that

> [i]n cases where the Council cannot agree on whether a matter falls within the scope of GATT Article XXIII, the Council shall establish the panel or working party which shall then make a recommendation on the jurisdictional issue as a preliminary matter.[197]

Thus, the panel would have first held a preliminary procedural hearing, similar to a motion to dismiss in the American court system.[198] The preliminary procedural decision would presumably have created an additional avenue for delay.[199] The negotiators had included this provision as a compromise between an automatic right to a panel and a concern over "wrong" cases. Some contracting parties had espoused Robert Hudec's view that there exists a set of "wrong" cases that should not be brought before a GATT panel.[200] The

196. Parlin Interview, *supra* note 36. Under the 1979 Understanding, a third party will only be afforded an opportunity to be heard by the Panel if it has "a substantial interest in the matter" and notifies the Council of this at the time of the panel's establishment. *1979 Understanding*, *supra* note 42, at 213. Smaller countries were concerned that they be given a proper chance to consider the establishment of any particular panel and reserve their right to make a presentation, if necessary. Parlin Interview, *supra* note 36.

197. Parlin Interview, *supra* note 36.

198. FED. R. CIV. P. 12(b)(6).

199. The GATT relevance of a few prior Article XXIII complaints has been questioned. In one instance, the Council made a supplementary decision that "it be presumed that the Panel be limited in its activities and findings to within the four corners of GATT." *Canada—Administration of the Foreign Investment Review Act*, BISD 30TH SUPP. 140, 141 (1984). In another, the Council incorporated the defendant's view into the terms of reference that "the Panel could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States in this matter." Minutes of Meeting, Oct. 10, 1985, GATT Doc. C/M/192 (Oct. 24, 1985) 6.

200. Robert Hudec analyzed the concern that the GATT regulatory system should not stake its prestige in adjudicating "wrong" cases. According to Hudec, such "wrong" cases include

preliminary determination of jurisdiction was expected to dispose of these "wrong" cases.[201] Under considerable pressure from various contracting parties in Montreal, the language allowing a jurisdictional hearing was dropped.[202]

C. *Panel Formation*

Even after the establishment of the panel, defending parties have stalled panel deliberations by simply not agreeing to either the terms of reference or the panelists themselves. Generally, disputing parties agree on the membership and terms of reference within two months.[203] In the GATT-12 case, however, the parties took four months to reach agreement on the terms of reference.[204] Similarly, other panels have disagreed over the number of panelists, with the parties quibbling over whether three or five panelists would be needed. For terms of reference, the Montreal Understanding mandates usage of standard terms of reference, "unless the parties to the dispute agree otherwise twenty days from the establishment of the panel."[205] The Understanding then stipulates that, unless the disputing parties agree within ten days to have a five member panel, panels "shall be composed of three members."[206]

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those requiring decisions on politically imperative violations that would not respond to GATT legal actions, demanding implementation of inoperative rules whose legal criteria are unrealistic or politically impossible, or overtaxing the decision-making capacity of the panel procedure. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159-66 (1980). In addition, Hudec has noted that the European Community "had been the chief proponent of the antilegalist point of view, partly out of conviction and partly out of concern to avoid GATT legal rulings against certain imperfections in its newly formed customs union." Hudec, *supra* note 2, at 1456.

201. One contracting party has already attempted to have a panel rule on jurisdiction as a preliminary matter. In that case, the Panel ruled that under its standard terms of reference, it had competence to hear all arguments, including the jurisdictional question, but would not rule on it as a preliminary matter. Parlin Interview, *supra* note 36.

202. *Id.* Even if adopted, the jurisdictional hearing may not have kept "wrong" cases from being adjudicated on their merits. As the panels rely on the goodwill of the parties to implement the reports, panels would more likely choose the less antagonistic route of allowing the matter to be argued on the merits than deciding on jurisdictional grounds. Waincymer, *supra* note 87, at 27.

203. U.S. INT'L TRADE COMM., *supra* note 168, at 57.

204. *See supra* text accompanying notes 70-98. At the time of the GATT-12 panel, a study by the Secretariat's legal office showed that the average time for agreement on terms of reference and members had increased and now took almost four months; thus, the GATT-12 panel's formation may not have been unusual. Stanton Letter, *supra* note 85, at 2.

205. Montreal Understanding, *supra* note 16, pt. F(b), para. 1. The standard terms of reference are

> [t]o examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of the contracting party) in document L/. . . and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.

Id. If the parties agree to non-standard terms of reference, though, any other contracting party may challenge them in the Council. *Id.* pt. F(b), para. 2.

206. *Id.* pt. F(c), para. 4.

Although the Montreal Understanding foresees the entire process of panel formation being completed within thirty days, it provides a loophole for continued delays by allowing a great deal of flexibility in the choice of individual panelists. The Understanding grants the parties twenty days to debate the names of panelists, after which, at the request of either party, the Director-General "shall form the panel by appointing the panelists whom he considers most appropriate" within ten additional days.[207]

Although this provision appears to place an absolute cap of thirty days on panel formation, in practice, parties will rarely ask the Director-General to form the panel unilaterally. Disputing parties will undoubtedly continue to choose the panelists carefully, since the panelists actually adjudicate the dispute. Consequently, the Director-General may not often be asked to break a deadlock over who will make up the panel.

The option to request the Director-General's assistance in choosing panel members has actually existed since 1984, but that assistance has never been used.[208] The 1984 decision on dispute-settlement procedures provided that after thirty days from the panel's establishment, "the Director-General shall, at the request of either party and in consultation with the Chairman of the Council, complete the panel by appointing persons from the roster of non-governmental panelists to resolve the deadlock . . . ."[209] In one case under Article XXIII:2, the United States did consider asking the Director-General to complete the panel under the 1984 provisions, but decided against allowing the Director-General to make such an important decision. Thus, while the Montreal Understanding envisions panel formation lasting thirty days, in practice the parties will probably abstain from requesting the Director-General to "form the panel," unless the deadlock appears absolutely intractable; panel formation may still last upwards of several months.[210]

D. Panel Meetings

The Montreal Understanding regularizes panel meetings by formalizing the working procedures and establishing a deadline. Previously, panels could choose to follow the Suggested Working Procedures found in the GATT legal

207. *Id.* pt. F(c), para. 5.

208. *See* Hudec, *supra* note 2, at 1466 n.76 ("Although several cases have missed the 30-day deadline, to the author's knowledge no government has yet requested [the Director-General to choose unilaterally]."). *Id.*

209. *Dispute Settlement Procedures*, *supra* note 84, at 10. The 1988 text, though, does grant the Director-General slightly greater powers than the 1984 decision. While formerly the Director-General could only "complete" the panel from the non-governmental roster, he can now "form" the panel from either the governmental or non-governmental roster and may even replace panelists already agreed upon. As the Montreal Understanding is a supplement to prior texts and does not supersede them, both the 1984 and 1988 options may now be available.

210. Moreover, it is unlikely that any party will make such a request after only twenty days. Since disputing parties have seven working days to reject proposed panelists, twenty days would allow no more than two rounds of proposals. Parties will probably not consider the panel composition to be deadlocked after only two rounds of nominations.

office's July 1985 note. They are now mandated to do so.[211] More significantly, the Understanding places a fifteen months time limit from "the request under Article XXII:1 or Article XXIII:1 until the Council takes a decision on the panel report."[212] In the GATT-12 case, nineteen months passed between the U.S. request for an Article XXIII:2 panel and the Council's decision on the report.[213]

The Montreal text may not offer much improvement in this area. First, the Montreal time limit does not significantly reduce the average time for GATT cases to be completed. A 1985 study found that since 1948, the average time from an Article XXIII:2 complaint to the report's adoption has been about ten months, though it increased to fourteen months for 1979-85.[214] Adding the sixty-day time limit for Article XXIII:1 consultations, the average time under the Montreal count was twelve months since 1948, and sixteen months for 1979-85, as compared to fifteen months allowed in the new text. Thus, the fifteen-month time limit should only affect the most complex cases. Second, the fifteen-month time limit has no teeth since the text does not specify how it will be enforced. For example, if the parties do not form the panel within the thirty-day limit, is the fifteen-month limit also extended, or would the panel be given less time for deliberations?[215] Moreover, if the defending party requests a third substantive meeting, as Japan did, should the panel reject the request?[216] Future GATT practice will presumably answer these

211. Montreal Understanding, *supra* note 16, pt. F(f), para. 2.

212. *Id.* pt. G, para. 4. This fifteen-month time limit squares quite neatly with the eighteen-month time limit within which the USTR must report on alleged violations of the GATT brought under section 301. 19 U.S.C. § 2414 (1988).

213. The United States initially requested Article XXIII:1 consultations in July, 1983, three years before its Article XXIII:2 request for a panel. *See supra* text accompanying note 47. Because of the two-year ceasefire and the negotiations leading to it, the Article XXIII:2 request is a more apt place from which to count.

Part of the delay in the GATT-12 case could perhaps be attributed to its Chairman's serious health problems. He fell ill and almost died after the second panel meeting. The requested third meeting was delayed during his convalescence. Such delays can, of course, continue to occur despite the Montreal Understanding. In fact, if parties rely more on the non-governmental roster, which includes many retired officials often residing far from Geneva, delays due to health and the logistics of transmitting documents and arranging meetings might actually increase. Stanton Letter, *supra* note 85, at 2.

214. U.S. INT'L TRADE COMM., *supra* note 168, at 58.

215. Experience under the Subsidies Code, for example, has found its rigid deadlines unworkable. The Code specifies that "[a] panel should be established within thirty days of a request therefor and a panel so established should deliver its findings to the Committee within sixty days after its establishment." *Agreement on Interpretation and Application of Articles VI, XVI and XXIII*, BISD 26TH SUPP. 56, 76 (1980) (Subsidies Code). The first case under these deadlines not only exceeded its allotted time, but raised the additional legal question of whether it could continue deliberations past sixty days. Plank, *supra* note 59, at 94. The problem with the Subsidies Code, though, may have simply been that the time limit was unrealistic. With the more realistic deadline of the 1988 Montreal Understanding, panels will hopefully feel pressure to complete their work on time.

216. Petersmann, for example, suggests that all extensions should be subject to approval by the Chairman of the GATT Council. Petersmann, *supra* note 148, at 79. Such an approval process, though, might only serve to re-politicize the panel proceedings.

enforcement problems, but only a new agreement by the contracting parties could put teeth into the time limits.

E. Adoption of Panel Reports

Although legal scholars and contracting parties alike have criticized GATT dispute settlement for allowing the losing party to block the adoption of a panel report, neither the Negotiating Group on Dispute Settlement nor the ministers in Montreal were able to agree to a "consensus minus" approach whereby the consensus for adoption would no longer include the disputing parties.[217] However, for adoption of panel reports, the Montreal Understanding includes a thirty-day buffer period after issuance of the report before the Council may consider adopting it, and a requirement that contracting parties having objections to panel reports provide written reasons for their objections at least ten days prior to the Council meeting.[218] These two measures will aid transparency, but will not in themselves ease the report's adoption.

A consensus minus approach would have far-reaching implications for the entire dispute settlement process, as it would give teeth to all procedural rules. In domestic court systems, parties follow procedural rules because a court would otherwise find them in default and grant victory to their opposition. In GATT, on the other hand, the panel has no such sanctioning power, nor does it have *any* real sanctioning power.[219] Thus, even if a party submits its brief late, the panel will accept it without question for fear that the submitting party may otherwise block adoption of the panel report.[220] The consensus minus approach would shift GATT dispute settlement from a quasi-power-oriented model to a firmly legalistic one in that parties would be required to listen to their judges.

The current consensus approach also forces contracting parties to exert political power in convincing losing parties not to block the consensus. Political or diplomatic power may thus become more determinative of a dispute's

217. Montreal Understanding, *supra* note 16, pt. G, para. 3 ("The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making that remain applicable. However, the delaying of the process of dispute settlement shall be avoided."). Moreover, negotiators had considered and rejected "consensus minus" once before, in 1982. *See 1982 Ministerial Declaration*, *supra* note 105, at 16 ("The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided."). Interestingly, no negotiators have yet discussed whether third parties who presented their views to the panel could block the report's adoption.

218. Montreal Understanding, *supra* note 16, pt. G, paras. 1-2.

219. Only the contracting parties, acting by consensus through the Council, have sanctioning power.

220. For example, in one recent panel, a contracting party did not submit its brief until the day before the Panel's first substantive meeting. In addition, that contracting party submitted its brief in French, one of the GATT's official languages, and neither the Panel nor the opposing contracting party could receive an official translation before the meeting. As no one wanted any further delay, the panel met anyway. Parlin Interview, *supra* note 36.

outcome than legal argumentation. If so, stronger contracting parties will resort to GATT dispute settlement more often because they can exert leverage in assembling the consensus for adoption. Indeed, a recent study found that larger contracting parties have brought more GATT complaints.[221] Consensus minus would be a substantial move from the diplomatic to the legalistic mode of international discourse.[222]

F. Implementation of Reports

The enforcement of panel judgments, the nub of any trade dispute, has not been dramatically changed by the Montreal Understanding. As the GATT is a consensual organization without police powers, implementation of reports will depend largely on the diplomatic leverage of the winning party and the acquiescence of the losing party. Although the contracting parties may authorize the suspension of concessions or compensation if a contracting party does not implement a report, the losing party to a dispute may block the consensus for any such sanction.[223] Not surprisingly, the contracting parties have only authorized retaliatory action in one case, and even then the withdrawal of concessions was not applied.[224] While large trading nations can use the threat of unilateral retaliation as an effective sanction, small trading nations often have no real means for enforcing a panel judgment.[225]

International moral suasion may be the only presently available power-neutral means to implement panel reports; the Montreal Understanding recognizes this fact and reinforces it. The Understanding requires the losing party to inform the Council of its implementation plans. It allows any contracting party to raise the issue of implementation at any Council meeting. The Understanding also places the subject of implementation on the agenda

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221. Of the 78 GATT complaints described in Hudec's study of 1960-1985, 46 were brought by either the United States or the European Community, two of the most powerful contracting parties. Hudec, *supra* note 8, at 19.

222. Not all commentators advocate strengthening legalism under the GATT. Phillip Trimble, for example, notes that international application of the "rule of law" may de-emphasize the value of representative government:

> There also is no reason why free trade or economic factors should be automatically or even normally entitled to priority over political factors, even foreign policy concerns. The law of comparative advantage may dictate that the United States should sell computers to the Soviet Union and that steel should be made in Korea, but even the legalists agree that there must be limits to the pursuit of profit and free trade theory.

Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1029 (1985).

223. *See supra* text accompanying notes 146-52.

224. *United States—Import Restrictions on Dairy Products, Suspension of Obligations by the Netherlands*, BISD 1ST SUPP. 32 (1953).

225. Small trading nations, though, may have some leverage if they export items of strategic interest, *e.g.*, uranium, or where the trade value of a particular item is large.

Prior drafts of the Montreal understanding had included provisions for compensation, as a separate option to the withdrawal of concessions, but this was rejected by the Negotiating Group. Parlin Interview, *supra* note 36.

of every Council meeting automatically six months after the report's adoption, and requires the losing party to provide a written status report before each Council meeting.[226] However, the Montreal Understanding may have also created a new delaying tactic to contracting parties by allowing a "reasonable period of time" to implement "[i]f it is impracticable to comply immediately with the recommendations or rulings."[227] While these provisions should maintain pressure on contracting parties to implement panel reports, they cannot force contracting parties to change their policies.

IV.
CONCLUSION

GATT dispute settlement procedures work in either of two modes—legal or diplomatic. In the legal mode, procedural blockages have been streamlined under the Montreal Understanding, though they could use further improvement. However, since disputes between sovereign nations will always involve some element of political power, it is incumbent on the negotiators to choose the correct mix of legal and diplomatic discourse.

The GATT-12 case highlights the convergence of the legal and political within seemingly neutral procedural rules. Movement between stages of the dispute settlement proceedings often needed threats of retaliatory action or concerted international pressure, neither of which are readily available to smaller countries. More automaticity, as envisioned by the Montreal Understanding, would help smaller contracting parties by reducing the need for trade leverage. However, since larger contracting parties will not bargain away their trading leverage without some benefit to themselves, smaller contracting parties should link improvements in the dispute settlement system with something to benefit larger contracting parties (e.g., rules for agriculture or intellectual property). Indeed, smaller contracting parties have been infrequent participants in GATT dispute settlement.[228] Perhaps they recognize their retaliatory disadvantage in the pre-1989 procedures for dispute settlement but will now make more use of the improved system.

Procedural improvements to the system should endeavor to limit the opportunity for delay and make the reasons for delay more transparent. Such an approach would place the greatest international pressure on the offending party. Indeed, the Montreal Understanding makes routine many aspects that had previously been subject to negotiation and delay.[229] Such improvements should be commended and strengthened.

226. Montreal Understanding, *supra* note 16, pt. I, paras. 2-3.

227. *Id.* pt. I, para. 2.

228. *See* Hudec, *supra* note 8, at 19.

229. For example, parties can no longer delay the panel by haggling over the number of panelists. *See supra* text accompanying note 80.

On the other hand, possible delays could also have beneficial effects. Even the most carefully circumscribed legalistic regime would require recourse to diplomatic means at some point to convince the losing party to implement rulings. Delays would then lessen the shock of losing and buy the losing party's goodwill. Moreover, if delays allow a party's diplomats to convince their superiors back home of the correctness of the complaint and encourage a more conciliatory response, delays may build flexibility into the system.[230] Since, at its core, the GATT system remains a dispute settlement system for sovereign states, states must feel that their interests are being served justly; a small measure of diplomatic delay and flexibility may thus insure compliance with an essentially legalistic system.

The Montreal Understanding left three major areas for blockage substantially untouched. Unsurprisingly, these three areas—panelist selection, report adoption, and implementation of results—provide the greatest opportunities for political leverage.[231] Perhaps smaller contracting parties should offer further concessions in areas of GATT substantive rights in exchange for more legalism, and less diplomacy, in dispute settlement.

First, continued reliance on the disputing parties to agree on panelists may provide a significant obstacle to the progress of a dispute settlement proceeding. As it is one of the few remaining blockages, contracting parties may make more use of it under the "improved" system. Here, automaticity is needed. Either the Director-General should be empowered to form the panel if the parties cannot agree within a specified period of time (a provision that would lead both sides to negotiate more seriously over proposed panelists) or contracting parties should agree to a permanent roster of officials acceptable to all.[232] This permanent roster could be used by the Director-General or the disputing parties to fill any spots still empty after the expiration of a specified period of time.

Second, the disputing parties should not be allowed to participate in the consensus for adoption of panel reports. Most legal systems do not allow the accused to sit as judge in his own case;[233] neither should the GATT. If the losing party cannot find a single other contracting party that shares its point of view, perhaps it should consider itself wrong. Moreover, so long as a losing party can block its own report, the panel itself will not have sanctioning power to prevent procedural escapades.

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230. Waincymer, *supra* note 87, at 16.

231. Indeed, the negotiators at Montreal agreed to an automatic right to a panel, which eliminated one method of political leverage for a larger contracting party. *See supra* text accompanying notes 60-62.

232. This would be similar to a "supercourt" as proposed elsewhere. *See* IMPLEMENTING THE TOKYO ROUND, *supra* note 4, at 210.

233. *See* Advisory Opinion of the Treaty of Lausanne (Turkey v. Iraq), art. 3, para. 2, 1925 P.C.I.J. (ser. B) No. 12, at 32 (Nov. 21, 1925) (construing unanimity in League of Nations dispute settlement not to include the disputing parties because of "[t]he well-known rule that no one can be judge in his suit holds good").

Third, the contracting parties should assure the implementation of adopted reports. Regardless of whatever other procedural niceties the contracting parties agree on, a dispute settlement system is only as strong as the enforcement of its substantive rules. Substantive rules will continue to slip through the cracks until the procedures for implementation are tightened. Since these are exactly the provisions that would damage large countries' diplomatic leverage the most, smaller countries should exchange concessions in other GATT areas for improved or guaranteed implementation. After all, the General Agreement is a contractual obligation based on a balance of concessions. Although the General Agreement may yield a positive sum for all participants, contracting parties should realize that distinct parts may hurt individual economies or sectors.

Large developed countries may desire to strengthen dispute settlement to regularize their trading. However, less developed countries should recognize that easier adoption and improved implementation of panel reports will benefit them as well. A reformed method of dispute settlement would give smaller countries trade leverage where they now have none. Unlike the United States, which can use section 301 to open foreign markets, and the European Community, which can vary aid levels under the Lome Convention or retaliate under the New Commercial Policy Instrument,[234] smaller nations can only rely on multilateral fora to air their grievances. As the GATT operates on a consensual basis, it gives smaller nations as much of a voice as anyone else. This voice can be strengthened through the dispute settlement system.

While better adoption and implementation procedures would bring increased influence for smaller countries, strengthened dispute settlement will also yield positive results for larger contracting parties—increased regularization and transparency of international trade. Improvements to GATT dispute settlement are no "zero sum" game and benefit all by increasing international economic efficiency. Only those contracting parties whose trading systems currently violate GATT obligations should fear a strengthened system.

234. The Community modeled its retaliatory procedure, the New Commercial Policy instrument (NCPI), after section 301. This procedure, adopted in 1984, permits private citizens to complain about GATT violations of other countries and allows the Community to retaliate in certain circumstances. *Council Regulation (EEC) No. 2641/84, of 17 Sept. 1984* 27 O.J. EUR. COMM. (No. L 252/1) 1 (1984). For a discussion of the NCPI, see I. VON BAEL & J.-F. BELLIS, INTERNATIONAL TRADE LAW AND PRACTICE OF THE EUROPEAN COMMUNITY 197-216 (1985). The NCPI has already spawned a dispute settlement panel under Article XXIII:2, the panel on the United States' section 337 remedy against unfair trade practices in the field of intellectual property. *See* Hudec, *supra* note 8, at 35 & n.42.