Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT

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I. Introduction

THE TRUE EFFECT of international legal obligations or "rules" have for centuries been the subject of comment and perplexity. As the world becomes smaller and economic interdependence increases, more attention is given to those rules in particular which govern national government economic activities. For a major portion of world economic relations the most important system of rules is that which may be called the "Bretton Woods System". In broad perspective this system includes the rules established in the post world war II era in the context of both the International Monetary Fund (IMF) and the General Agreement on Tariffs and Trade (GATT).[1] During the last decade or so, however, there has been increasing criticism of those rule systems. Some of the criticism has been aimed at the substance of the rules:[2] that they are out of date; unbalanced or unfair, or leave loopholes which render them ineffective or worse. Other criticism, however, has been directed to institutional aspects of the rule systems:[3] namely that the rules are no longer being

[1] Concerning the GATT, see J. Jackson, *World Trade and the Law of GATT—A Legal Analysis of the General Agreement on Tariffs and Trade* (1969) (hereinafter cited as *World Trade and the Law of GATT*); R. Hudec, *The GATT Legal System and World Trade Diplomacy* (1975); J. Jackson, *Legal Problems of International Economic Relations—Cases, Materials and Text*, chs. 6 and 7 (1977). Concerning the International Monetary Fund, see J. Horsefield, M. de Vries, J. Gold, M. Gumbart, G. Lovasy and E. Spitzer, *The International Monetary Fund 1945-1965*, 3 vols. (1969).

[2] For example, the developing countries have been very critical of the existing trade and economic rules, and have been proposing new rules in the context of a "new international economic order". See, e.g., J. Bhagwati, ed., *The New International Economic Order: The North-South Debate*, (1977); Jackson, *Legal Problems of International Economic Relations*, ch. 17. Other criticisms have also been mentioned in some of the works cited in note 3, *infra*.

[3] See *World Trade and the Law of GATT*, chs. 29 and 30; Jackson "The Jurisprudence of International Trade: The DISC Case in GATT", 72 A.J.I.L. (Oct 1978); Resolution of the American Bar Association on International Dispute Settlement, *ABA Summary of Action of the House of Delegates, Reports of* Sections, No. 102 (Feb. 1978); Report of the Panel on International Trade Policy Institutions of the American Society of International Law, "Remaking the System of World Trade: A Proposal for Institutional Reform", *Studies in Transnational Legal Policy* No. 12 (1976); and materials cited in notes 4–9 *infra*.

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followed; that there is no adequate system of revising or adding to the rules; that there is no adequate system of applying the rules or resolving disputes about them. Indeed, with particular reference to GATT, which in its early years boasted that it was one of the few international economic institutions with concrete rule obligations and with an objective system for applying those rules and resolving disputes about them, there has more recently been growing criticism of the laxity in GATT rule compliance and the inadequacy of its dispute settlement system. The United States Congress has legislated[4] a mandate for U.S. negotiators to seek to improve the GATT "decision-making procedures" and has officially complained that "Today, many GATT principles are observed more in the breach."[5] Individual Congressmen have expressed disgust about the GATT disputes procedure,[6] and U.S. Executive Branch officials have stated publicly their concerns about these procedures.[7] Likewise, GATT officials themselves have directed attention to the perceived growing non-compliance with the rules,[8] and similar implications can be seen in statements made by representatives of other governments.[9]

Without trying in this article to analyze or justify the role of "rules" in international affairs,[10] it can be said that there is considerable opinion that effective rules or legal obligations are at least an useful tool of diplomacy, bringing a measure of predictability and stability to a risk-rife world. In economic affairs particularly, rules may have a role of greater importance: to facilitate decentralized enterprise decisions such as those concerning investments; to allow a myriad of detailed actions to be taken at lower levels of government officialdom, thus sparing higher authorities; to give governments some argumentative ammunition to counter parochial short term citizen demands which could have long range damaging effect on the world economy.

[4] United States Trade Act of 1974, Pub. L. 93-618, §121(a)(1), 88 Stat. 1978, (1975) (The Trade Act of 1974 is codified at 19 U.S.C. §§2101-2487).

[5] *Senate Comm. on Finance, Trade Reform Act of 1974, S. Rep. No. 93—1298,* 93d Cong. 2d Sess. 83 (1974).

[6] See, e.g., *European Community Restrictions on Imports of United States Specialty Agricultural Products: Hearings on H.R.238 and H.R.320 Before the Subcomm. on Trade of the House Comm. on Ways and Means,* 95th Cong., 1st Sess. 7, 15–16 (1977) (hereinafter cited as *Trade Hearings*).

[7] *Trade Reform: Hearings on the Trade Reform Act of 1973 Before the House Comm. on Ways and Means,* 93d Cong. 1st Sess. 343 (1973) (statement of William Eberle).

[8] Address by Mr. Olivier Long, Director General, General Agreement on Tariffs and Trade to the Zurich Economic Society, Zurich, 9 Nov. 1977, *GATT Press Release* 1199 at 10.

[9] Agence Internationale d'Information pour la Presse, No. 2038 (N.S.), August 25/26, 1976, at 10 (report of Aug. 1976 speech of Mr. Lardinois before the U.S. National Soybean Association), portions reprinted in J. Jackson, *Legal Problems of International Economic Relations,* at p. 989; M. Limouzy, Rapporteur, *Rapport fait au nom de la Commission d'enquête parlementaire* chargée d'examiner les conditions dans lesquelles ont lieu des importations ≪sanvages≫ de diverses catégories de marchandises, No. 3230, *Assemblée Nationale,* Première session ordinaire de 1977–1978. 18 nov. 1977, at 140–141; GATT doc. L/4585, reprinted in GATT, *24th Supp. BISD* 58 (1978).

[10] See particularly L. Henkin, *How Nations Behave* (1968); Schachter, "Towards a Theory of International Obligation", in *The Effectiveness of International Decisions: Papers and Proceedings of Conference of the Am. Soc. of Intl Law* 9 (S. Schwebel ed. 1971).

In this article we will examine the institutional setting or "legal system" for applying and resolving disputes about one particular type of rule—those relating to national government trade actions (such as import or export controls, non-discrimination obligations, subsidies, dumping, and a host of other trade related measures.) Because most (but not all) of the currently existing rules on this subject are those contained in or related to GATT, naturally the focus will be on GATT. It will be clear, however, that the proposal discussed is not restricted to GATT rules.

This article will begin by briefly examining possible philosophical objectives of a rule applying system. It will then turn to a brief review of the weaknesses of the GATT dispute resolution procedures as an important example of existing rule applying systems. Next, attention will be directed to the goals or criteria for improvements to the system. Finally a detailed proposal will be outlined, primarily for two purposes: first, to demonstrate that it is logically possible to draft an international agreement which will meet the goals or criteria set forth earlier, even though some of those goals may appear at first reading somewhat conflicting; and second, to stimulate discussion and further thought regarding a number of important although technical details of a rule applying system. Some of the clauses in the detailed proposal are deliberately designed to be "farreaching" or "provocative", so as to better achieve this second purpose. The reader's attention is directed to several other works of this author which also discuss the rationale of possible reforms or criticisms of the existing trade rule system.[11]

II. The Techniques of International Dispute Settlement: Power Oriented versus Rule Oriented

In broad perspective one can roughly divide the various techniques for the peaceful settlement of international disputes into two types: settlement by negotiation and agreement with reference (explicitly or implicitly) to relative power status of the parties; or settlement by negotiation or decision with reference to norms or rules to which both parties have previously agreed.

For example, countries A and B have a trade dispute regarding B's treatment of imports from A to B of widgets. The first technique mentioned would involve a negotiation between A and B by which the most powerful of the two would have the advantage. Foreign aid, military maneuvers, or import restrictions on other key goods by way of retaliation would figure in the negotiation. A small country would hesitate to challenge a large one on whom its trade depends. Implicit or explicit threats (e.g. to

[11] See *World Trade and the Law of GATT*, chs. 29 and 30; Jackson, "The Crumbling Institutions of International Trade", 12 *J.W.T.L.* 93 (1978); Jackson, *supra* note 3; Jackson, "United States—EEC Trade Relations—Constitutional Problems of Economic Interdependence", *Common Mkt. L. Rev.* (1978).

impose quantitative restrictions on some other product) would be a major part of the technique employed. Domestic political influences would probably play a greater weight in the approach of the respective negotiators in this system, particularly on the negotiator for the more powerful party.

On the other hand, the second technique suggested—reference to agreed rules—would see the negotiators arguing about the application of the rule (e.g. was B obligated under a treaty to allow free entry of A's goods in question?). During the process of negotiating a settlement it would be necessary for the parties to understand that an unsettled dispute would ultimately be resolved by impartial third party judgments based on the rules so that the negotiators would be negotiating with reference to their respective predictions as to the outcome of those judgments and not with reference to potential retaliation or actions exercising power of one or more of the parties to the dispute.

In both techniques negotiation and private settlement of disputes is the dominant mechanism for resolving differences; but the key is the perception of the participants of as to what are the "bargaining chips". Insofar as agreed rules for governing the economic relations between the parties exist, a system which predicates negotiation on the implementation of those rules would seem for a number of reasons to be preferred. The mere existence of the rules, however, is not enough. When the issue is the application or interpretation of those rules (as compared with the formulation of new rules), it is necessary for the parties to believe that if their negotiations reach an impasse the settlement mechanisms which take over for the parties will be designed to fairly apply or interpret the rules. If no such system exists, then the parties are left basically to rely upon their respective "power positions", tempered (it is hoped) by the good will and good faith of the more powerful party (cognizant of his long range interests).

III. Weaknesses of the Existing System in GATT

As observers of international trade and economic relations readily notice, the existing mechanisms for the resolution of trade and other economic disputes in international affairs leave much to be desired. There are, of course, a variety of dispute resolution techniques and mechanisms. Under the GATT agreement, for example, various provisions in a variety of articles of GATT provide for various techniques of resolving differences among trading partners.[12] Some of these techniques are really processes by which the parties agree on new norms or new rules, such as the negotiation of a major tariff and trade liberalization "round". Other

[12] Jackson, supra n. 1, Ch. 8; Jackson, "GATT As An Instrument for the Settlement of Trade Disputes", *Proc. Am. Soc. Intl. Law.* (April 27–29, 1967) 144–156; Hudec, *op. cit.*

techniques, such as those in the escape clause of Article XIX of GATT truly contemplate reciprocal or retaliatory type action on the part of an aggrieved party to "offset" or "compensate" for the trade damage occasioned by the other's activity (in this case a permitted activity.) In any conceivable system of international trade rules for the near future, such techniques will continue, and will in many cases be the central if not the exclusive process of resolving differences as to what rules *should* be, or redressing imbalances that occur from permitted activities under the rules. For the most part this article does not address those types of activities or mechanisms.

This article is designed to address the type of dispute that involves the application and interpretation of a previously agreed norm or rule such as a "tariff binding" or a rule regarding the circumstances which permit a country to apply a countervailing duty to the imports from another country. A good many of the disputes of this type under the GATT system are considered to fall under the central dispute resolution mechanism of Articles XXII and XXIII (Article XXII calling for consultation between the disputing parties; and Article XXIII calling for a procedure possibly culminating in a voting action by the ruling GATT body, the CONTRACTING PARTIES.). While this procedure had considerable promise in the early decades of GATT history, in recent years it has become apparent that the procedure is woefully inadequate. Among other manifestations of this fact, many governments have hesitated or refused to invoke the procedures of Article XXIII. This hesitation stems partly from a lack of faith in the fairness of the process, particularly since in many ways an imbalance of power between the disputing parties tends to bias the dispute resolution mechanism. A small country, even if allowed to retaliate against a large country, appropriately doubts that such retaliation would have any concrete effect on the large country.[13]

There are a series of other weaknesses involved in the GATT mechanism outlined in Articles XXII–XXIII. In many cases a dispute is subject to inordinate delays.[14] A "footdragger" has many procedural opportunities to slow down the process.[15] In some circumstances a dispute,

[13] *World Trade and the Law of GATT*, at 186. The only case in GATT which proceeded all the way to the application of "sanctions" or suspended obligations by complaining party because of an infringement or nullification and impairment of another, was that in which the Netherlands was authorized to depart from its GATT obligations so as to limit the amount of imports of wheat from the United States, in response to the United States' quotas placed on dairy products. For several years the Netherlands applied this quota on wheat, but it seemed to have no affect on United States action mandated by Congress, concerning dairy products. *See* Jackson, note 1 *supra* at 185 n.22; GATT, *1st Supp. Basic Instruments and Selected Documents* (hereinafter *BISD*) 31 (1953); *2d Supp. BISD* 28 (1954); *3d Supp. BISD* 46 (1955); *4th Supp. BISD* 31 (1956); *5th Supp. BISD* 28 (1957); *6th Supp. BISD* 14 (1958); *7th Supp. BISD* 23 (1959); see also GATT, *14th Supp. BISD* 18 (1966); paragraphs 41–45, GATT doc. L/2614 of 5 April 1966, reprinted in GATT, *14th Supp. BISD* 129 (1966), at 139.

[14] Jackson, *supra* note 3; *Trade Hearings, supra* note 6, at 9 (statement of Rep. John McFall).

[15] See Jackson, *supra* note 3.

whether or not brought under the mechanism of Article XXIII, "festers on" for many years with no resolution.

Part of the Article XXIII process has been a tradition of appointing "panels" of persons who are not citizens of either of the disputing parties to "hear the case" as presented by the disputing parties, and come to some conclusion. This tradition of panels was a welcome innovation in the early years of GATT history, but it has not been sufficiently developed and it is posing a number of problems in recent years. For one thing, it has become increasingly difficult to obtain the services of appropriately trusted persons to sit on these panels. This is partly due to the tradition of selecting them from the officials who represent governments to GATT—a busy group. Likewise, the fact that usually each of the persons on the panel, although ostensibly acting in his individual capacity, nevertheless is an official representing his country in GATT makes it difficult if not impossible for him to view his actions in such a panel as insulated from the influences of his government's foreign economic policy, and consequently the relationship of that government to other countries in the world, including the disputing parties.

The panels have also been weakened with tasks that are probably mutually conflicting or beyond their competence. To a certain extent the panels have tried to play the role of conciliators between the disputing parties,[16] to urge them to come to an agreement about the dispute. In so doing, the panel often is assisting the negotiation with reference to the *power* positions of the respective parties, and not only with reference to whether an agreed rule favors one or the other party. At a later stage, absent agreement between the disputants, the panel is called upon to write a report for the CONTRACTING PARTIES in which it may determine whether a GATT rule has been "breached". However, under the provisions of GATT Article XXIII, it is not merely or even necessarily a breach of a GATT rule which is critical; it is "nullification and impairment". This is a vague and ambiguous concept which relates to "damage" to the complaining nation's trading "expectation" under the GATT agreement.[17]

Partly as an attempt to remedy the ambiguity of GATT Article XXIII, a concept of "*prima facie* nullification" has been developed. This concept applies in certain cases, namely: (i) a breach of the GATT legal obligations; (ii) the establishment of a quantitative restriction on imports; or (iii) establishing a new subsidy for domestic production of a product for which a previous GATT tariff "binding" was undertaken.[18] If a *prima facie* case is established, then the theory is that the burden shifts to the infringing country to show under GATT Article XXIII that there

[16] Hudec, *op. cit.* 190; GATT doc. L/4636 of 28 April 1978. *See* also GATT doc. L/4594 of 18 Nov. 1977, at 16.
[17] *World Trade and the Law of GATT*, *supra* note 1, 181.
[18] *Id.* at 182.

has been *no* nullification and impairment. Although an ingenious addition to the GATT jurisprudence, the *prima facie* concept is still subject to criticism. Even in such a *prima facie* case, the ultimate test under the Article XXIII procedures depends on the ambiguities of the phrase "nullification or impairment." For example, it is still not clear to what extent the breach by Country A of a rule gives rise to rights to another country B claiming potential or future harm from the illegal action. On the other hand, the *prima facie* concept may be abused to lead a panel to brand a country's action as Article XXIII "nullification or impairment" when only a minor technical breach of a rule has occurred and the culprit cannot prove that no *possible* nullification or impairment has or could occur.[19]

The ambiguities of the "nullification and impairment" concept, as well as the implied invitation to act "*ex aequo et bono*" or in an "equitable" as opposed to a "legal rule application" manner thrusts a considerable burden on the panel, one that it is probably not competent to undertake. Similarly, the panels often assume a duty to make a recommendation in the dispute. Such recommendations can be political or "rule making" in nature, as opposed to merely establishing whether and how a previously agreed rule applies to a situation. This, too, forces the "judges" to play a too political role, detracting from the appearance of impartiality of the panel.

Thus, the GATT dispute mechanism enjoys less than great confidence by parties of GATT. The uncertainties of the process, plus the suspicion of taint of political and power influences, often renders the mechanism suspect, and arguably makes it simply a conciliation process in a negotiation between the disputants.

Other weaknesses include:[20] (i) The procedures for initiating a complaint process are ill defined, subject to delay and arguably subject to "permission" of a political body through vote of the Contracting Parties (which may in practice necessitate agreement of the disputants); (ii) The delay plays into the hands of a "*fait accompli*" approach to trade policy. A nation will argue that while its parliament or executive considers an action and before it is implemented, it is premature for an international body or foreign government to investigate or intervene. But after the action is taken, it is often unrealistic to undo it, since domestic political forces have already positioned themselves in its favour; (iii) Meager resources of personnel, staff, and money may contribute to inadequate consideration of the facts and arguments of particular cases; (iv) Fact finding resources and procedures are inadequate; (v) There are inadequate procedures for reopening a complex case when a panel seems to

[19] See Jackson, *op. cit.* "The Jurisprudence of International Trade: The DISC Case in GATT."
[20] *Id.* at pt. 3.

have made a mistake; (vi) The legal effect of "findings" of a panel are ambiguous; (vii) Finally, the implementation phases of the procedures are too loose, too ill defined, and subject to the criticism that they involve political calculations and "trade offs" that are inappropriate to an adjudicating type procedure that needs to develop confidence and trust of future participants.

IV. Improving the Dispute Settlement Mechanism

Some Criteria for An Improved Dispute Settlement Mechanism

No enumeration of goals or objects for an international dispute settlement mechanism is likely to be considered complete or immutably authoritative. Yet some attention to such goals is essential for an intelligent discussion of possible reforms. Consequently the following catalog of criteria or goals for such procedures is offerred as an "initial hypothesis", in hopes that it will stimulate further reflection and research, possibly suggesting the addition of other goals to the list.

1. A valid and improved system should encourage settlement by the disputants, giving them assistance in the process of settlement, but it should encourage that settlement primarily by reference to the existing agreed rules rather than simply by reference to the relative economic or other power which the disputants possess. Clearly power will enter into the process of rule formation, but once the rules are formulated, they achieve their greatest utility if they in fact are applied and thus enhance the stability and predictability of economic relations, giving each party in those relationships the opportunity to rely upon those rules and compliance with them by others.

2. A dispute settlement mechanism should be built on modest expectations, at least at the start. For example, it should not be expected that all rules will be immediately complied with, or that all judgments of the disputes settlement mechanism will be immediately followed. However, the mechanism should be designed so that as time goes on, greater and greater confidence will be placed in the system, so that it will be more utilized, and so that gradually greater responsibilities can be put upon it. This criterion suggests several others which might be considered corollaries.

3. The improved dispute settlement mechanism should separate the functions of (a) conciliation, (b) decision on the interpretation or application of the rule, (c) rule or policy formulation, and (d) recommendation or sanction. In order to establish that the dispute settlement mechanism relies primarily on reference to rules and their application, the fulcrum of a mechanism should be the establishment of an opportunity to obtain an impartial and trusted decision as to the interpretation or application of a

previously agreed rule. To avoid tainting the process of that judgment, that is, to avoid reducing the trust placed in that decision because the process of obtaining it might be mixed with other goals, the impartial third party decision of rule interpretation or application should be (as it most often is in the various legal systems of the world) relatively isolated from other processes such as the process of assisting in negotiation for settlement, or the process of rule formulation (left to legislatures in typical legal systems.)

4. It is unlikely that at the international level, nations are prepared to render themselves subject (at least often) to concrete sanctions. Consequently, at this stage of history it may be wise to avoid any sanctions, or to at least have the application of sanctions subject to a political process which would involve a political check. This does not mean, however, that the rule application-interpretation decision would not have impact. If parties, and the rest of the world, believed in the trustworthiness of this judgment process, the mere formulation of such a decision and its publication would have an impact.

5. The mechanism should be designed so that its prestige would grow, and so that predictability of its anticipated decision would be enhanced. Some of the criteria mentioned above relate to this criterion—thus prestige is likely to grow if an institution is not given more responsibilities than it can satisfactorily handle. But other features can assist in the enhancement of the prestige and therefore trust in the system. One of these would be a firm rule that all decisions as to interpretation and application of previously agreed rules would be published and made available for the world of citizens, officials, and scholars, to examine, criticize, and analyze. These decisions would also form part of the material on which disputants in future cases would base predictions as to the outcome of their particular dispute if it went so far as to be judged by the mechanism.

6. It is important to be explicit as to what rules come within the dispute mechanism, and it is better to begin modestly by listing the rules (e.g. particular treaties such as GATT, or even merely portions of such treaties), leaving it open for future addition of rules or sets of rules to the system. Some of the current rules of GATT probably do not lend themselves to an adjudicatory system of this type (e.g. Article XXIV of GATT), and it might be better at the outset to specify that such rules would not be subject to this particular dispute settlement mechanism. Rather the more precise and less "political" of the rules of GATT (such as most of Articles III through XVII) should be subject to the new dispute procedures. (For rules not covered by this mechanism, or for disputes involving nations not accepting the mechanism, it would be understood that existing procedures such as those under GATT Article XXIII would continue to apply.)

7. It should be explicitly understood that an impartial third party panel of arbitration, should pursue a restrictive method of interpretation and application of agreed rules, rather than an "expansive" method. This distinguishes the system from many national adjudicatory systems. Within a particular nation there is a great deal more agreement and consensus as to basic notions of justice, and policy goals, on which courts can rely in their (sometimes remarkably expansive) interpretations of rule language. Internationally, a case can be made that in order to encourage nations to be willing to submit themselves to an adjudicatory system, it will be necessary for that system to be cautious in interjecting the judges' choices of policy goals into previously agreed rules. Therefore, the rules should be cautiously and restrictively interpreted or applied. Needless to say, it is useful that there be an adequate mechanism for rule *change*, if this criterion is to operate effectively. Thus the adjudicatory system can defer to the rule change mechanism (negotiations in trade rounds, etc.) for the cases not covered by the existing rules.

8. The cost of the system should be explicitly and automatically provided for. Likewise, there should be developed a permanant small cadre of international "civil servants", to help service the system, as conciliators, court clerks or "marshalls", or as "judges".

9. Consistent with the need for the *gradual* enhancement of prestige and trust in the system, nations should be allowed to adhere to the dispute resolution process for only specified international rules. They would become parties to the dispute settlement protocol and share in the overall costs of the system, but would agree to submit themselves to the system only for the rules which they specify (such as a portion of the GATT rules, and other international economic treaties.) A system of reciprocity would prevent imbalance of the application of the mechanism, and encourage nations to add to the list of rules which they submit to the system. Indeed part of trade negotiations on particular agreements, could involve agreement as to whether the dispute settlement mechanism would apply or not to the particular norms negotiated.

10. Great care must be taken in the processes by which the panel members in the system are selected, and it will likely be necessary, at least at the outset, for each nation participant to retain a considerable amount of control over the selection of the individuals for a panel to which its dispute is submitted.

Multiple or Unified Dispute Settlement Mechanism?

Although the GATT dispute settlement mechanism of Articles XXII and XXIII has formed the central core for dispute settlement in GATT, there have been a number of alternative mechanisms developed in the past within particular "side agreements" to the GATT (such as the

multifiber "textiles" agreement with its "textile surveillance body"). In the current negotiation ("Tokyo Round" in Geneva) it now appears that there will be a series of non-tariff barrier codes (such as those for product standards, for government procurement, for subsidies and countervailing duties) analogous perhaps to the Antidumping Code developed during the Kennedy Round (1967). As was the case in the past, the question of dispute settlement is an important one that must be considered in connection with each of these non-tariff barrier codes. Considerable ambiguity exists in the case of some past agreements and their relationship to the dispute settlement mechanisms of Articles XXII and XXIII of GATT. One possible approach, of course, is to have a separate and independent dispute settlement mechanism for each of the various agreements to be negotiated. Although the practicalities of negotiation procedures and tactics (with its consequent tendency towards the timid or short range approach) will probably lead to this result, it should be recognized that a number of dangers are inherent in this fragmented approach:

1. The possibility of multiple overlapping procedures, with duplication of personnel and increased costs.
2. Multiple procedures add to the complexity of the total system, and mean that officials who must represent their governments in the system must learn a variety of procedures. Particularly for small countries this would be impossible, and consequently the system would be misused, or not used at all.
3. Informed public understanding of the dispute settlement mechanism would be greatly diminished, since its complexity would make it more difficult to explain or educate the public as to how the system operates. Consequently, some of the opportunity to develop prestige and trust in the system would be lost.
4. It is likely to be more difficult to develop a career cadre of persons who can service the system, if there exist multiple small organizations.
5. Countries may find ways to avoid or prolong procedures if a particular dispute seems to fit two or more processes. There can develop "forum shopping" manipulations by disputants.
6. There is likely to be an increase in the number of disputes about the *procedures* of each of the mechanisms, since the experiences of one system will not necessarily be considered as precedent for procedures in another system. By way of contrast if there is a unified system, the procedural precedents will develop more quickly because the number of cases under the unified single procedure will be more than the number of cases under any one separate procedure would be. Consequently, the procedural

tradition will progress more rapidly, can be given more attention, and should be better.

7. The documents and published reports will not likely be as easily found and understood by the public, by government officials, and scholars.

V. Proposal for a Protocol for Resolution of Trade and Economic Disputes

In this part of this article, an outline of a particular dispute settlement mechanism that would seem to meet many of the criteria suggested in Part IV will be presented. Clearly the purpose of this presentation is to stimulate discussion and further thought. In the process of negotiating such a protocol, many ideas will be refined, and the negotiation will undoubtedly involve various "swaps" so that it would not be wise to consider the procedure outlined below as a final proposal.

Basic to the "adjudication procedure" outlined below, is the concept that it will be a unified procedure which can apply to any international trade or economic rules which the parties desire, either by way of advance agreement, or by agreement after a dispute arises. For the facilitation of advance agreement, the dispute settlement mechanism will, in an Annex specify generally the rules or international agreements to which the procedure will apply, unless in particular cases an exception has been explicitly stated.

The Protocol would specify the various steps in a dispute settlement procedure, how the costs and administration of the procedure are to be applied, and what the results of the procedure would be. A separate Annex would specify the countries which have agreed to submit themselves to the procedure, and much like the GATT tariff schedules, it could be permitted that each country indicate which of the agreements or rules in the other Annexes it would be willing to submit (or, perhaps more efficiently, specify those which it would not submit) with the understanding that in any dispute, for the mechanism to apply, both parties would need to have previously indicated that the rule involved is part of their agreed submittal to the dispute settlement mechanism.

How would these proposals be implemented? Clearly it is unlikely and undesirable to try to legally graft this Protocol onto an existing treaty such as GATT, through the amending process. A separate Protocol offers the opportunity for a particular configuration of interested nations to launch the procedures for their own use, in hopes that the procedures will demonstrate their usefulness and attract other adherents. Thus a group of nations might find it useful to consider the formulation of such a protocol, leaving all existing institutions in place to handle (to the extent possible) those disputes that would not come under the new procedure.

Such a Protocol might have come out of the MTN negotiation process at Geneva, but it now appears that this opportunity, for a variety of reasons, has been lost. Consequently, attention must be directed to the post-MTN period. Various possibilities exist. An interested larger group of countries might begin a negotiation towards a dispute settlement protocol as a way to consolidate a variety of procedures which now exist or which will exist as a result of various "codes" or agreements stemming from the MTN.

In the absence of such broader support for the initiatives suggested above, however, it is possible to develop more limited initiatives. A small group of nations or even a bilateral agreement between just two nations would suffice to launch the "experiment". In fact, it is even possible for one nation to unilaterally offer the procedure, declaring that it will undertake to follow procedures of a draft protocol in its disputes with other countries in such cases (or for such periods of time) for which other countries agree reciprocally to follow the procedures. If a very limited group of nations or only a pair agree to go forward, however, it would seem best for those nations first to obtain comment and suggestions during the process of formulating the procedures or Protocol from certain other key nations who might at a later date be most sympathetic to the idea of joining.

For example, to suggest a concrete but purely hypothetical "scenario", the United States might announce its preparedness to enter into discussions leading to a Dispute Protocol. If Canada, Mexico and Singapore found it feasible to join in those discussions, the four nations could consult the EEC, Japan, India, and a few others merely asking, "Without any commitment on your or our part, what features would you like to see in a general dispute procedure?" To the extent possible, the four could shape their protocol to accommodate the comments received, then prepare a final Protocol, accept and implement it. After some experience with the procedures is achieved, other nations might find it in their interest to join. Particularly, developing nations might find an advantage in joining a set of dispute settlement procedures with a major nation like the United States, as a way to partly compensate for the power differences existing between them. Finally, it should be noted, that a dispute protocol could, at first be limited to an experimental period of time (five years?) at the end of which changes would be considered and a new Protocol would replace the old.

Outlines of a Protocol for the Resolution of Trade and Economic Disputes

Part I. *Introductory*

101. Nations agreeing to this Protocol shall be listed in Annex A and shall be called "members". Members agree to abide by the procedures of

this protocol in the event of any disagreement between them as to the application or interpretation of the rules in any document listed in Annex B, unless one of the members has excluded the rule concerned by express reference after its name in Annex A.

102. Members (Annex A) may agree at any time to follow the procedures of this protocol after a disagreement has arisen, if the dispute involves any rule in a document listed in Annex B or Annex C.

103. Annexes Summarized

Annex A. List of nations agreeing to the Protocol.

Annex B. List of documents and rules to which procedure is mandatory (unless reserved in Annex A) [Examples might include the GATT, a code on Government Procurement, a particular commodity agreement such as on coffee, etc.].

Annex C. List of rules which procedure may cover by express agreement *after* a dispute arises.

104. Other nations, not listed in Annex A, may agree to submit disputes after they arise, to the procedure of this protocol if (i) the dispute involves a rule contained in a document in Annex B or Annex C; and (ii) if the Council (described below) approves.

105. Customary rules of international law are not the subject of the procedures of this Protocol, although they may be utilized if appropriate in the process of interpreting a rule (but not as a *preferred* aid in interpretation.) The purpose of this Protocol is to establish procedures for the interpretation and application of conventional (treaty made) rules, relating to economic and trade relations of nations.

Part II. *Administration*

121. A "Council for Disputes Procedure" hereinafter called the Council, shall be established, composed of a representative of each of the nations listed in Annex A. The Council shall designate one of its members as President, to hold office for two years.

122. Each representative shall have one vote. [Each representative of a nation which has reserved *no* exception as to rules in Annex B subjected to the Protocol prodecures, shall have an additional vote. (i.e. a total of two votes)].

123. Decisions shall be by a majority of votes cast at a meeting or by mail or telegraph ballot, unless otherwise specified and provided that a quorum has cast a ballot (including an "abstain" ballot.) A quorum shall be a majority of nations listed in Annex A. A vote is yea or nay. A ballot is yea, nay, or abstain.

124. The Council shall appoint a Director who shall establish and direct a Secretariat. The Director and personnel of the Secretariat may all be personnel of the secretariat of an existing or new international organization, and unless otherwise provided by the Council shall be personnel of the ICITO (GATT) secretariat. The Director shall serve for a five year term, which may be renewed, but the Council may at any time remove a Director by a two-thirds vote.

125. Expenses of the operation of this Protocol shall be apportioned among

the Annex A nations according to population. No additional charge shall be imposed on a nation due to its utilization of the procedures of this Protocol. The location of the headquarters of the Council and Secretariat shall be decided by the Council. The annual Budget and Scale of Assessments shall be adopted by the Council.

126. The Secretariat shall be responsible for providing the necessary services to carry out the procedures of this Protocol, including:

—Meeting space, translators, transcribing, and recording facilities, communication facilities

—Professional personnel to advise the participants on procedure

—Facilities for keeping necessary records of all proceedings, and keeping and publishing all decisions and determinations

—Trained secretariat personnel to act as conciliators in privately assisting nation disputants to reach agreed settlements

—Trained secretariat personnel to assist in the fact finding—research and investigation efforts of panels under this procedure

—If requested by the Council, trained personnel to be available for selection as panel members, to be designated as persons on the "Panel List" (para. 141 below.)

—The secretariat will arrange the meetings and necessary training sessions, provided for elsewhere in this agreement. It will carry out other functions called for in this agreement or assigned by the Council.

Part III. *The Dispute Settlement Procedure*

131. Every member agrees to consult with any other member on any matter directly or indirectly connected with any subject relevant to the documents listed in Annex B. The Director shall be treated as a member for the purposes of this paragraph [or the other paragraphs under this part.]

132. If after consultation in para. 131, any member feels that it is not satisfied with the results of such consultation, it may address a request for mediation assistance to the Director. The Director himself may initiate an offer of mediation services if he deems it appropriate in pursuance of the goals of this Agreement.

132.1 Mediation services shall consist of the good offices of a person from the secretariat trained in such services, or someone else of high caliber selected by the Director, or the Director himself.

132.2 If any party to a dispute objects to a mediator proposed by the Director, within 14 days after the proposal, the Director shall propose another mediator.

132.3 The mediator's role shall be to privately consult the parties to a dispute, separately or together, with a view to promoting between or among those parties a settlement agreement which will be satisfactory to them, and will not violate important policy objectives of the documents in Annex B or C. No records will be kept of proposals or counter proposals for a settlement, but a confidential report of any agreed settlement achieved will be

made by the mediator to the Director stating the nature of the dispute and the full and precise terms of the settlement, and this report will be furnished to each party to the dispute. If no written or telegraphed objection to the report is received by the Director from a party within 14 days after the parties have received this report, it will be deemed that the parties have accepted the report and the settlement therein, and agree to be bound by it.

132.4 If the Director makes a judgment that a settlement violates the objectives of any rule or document with which it concerns, such that the interests of members or nations not parties to the dispute might be detrimentally affected, he will draw the attention of the settlement parties to his judgment, stating his reasons therefore. In this case the parties are obligated to continue their consultations with the mediator with a view to achieving a settlement that does not so detrimentally affect other nations.

133. If either party to a dispute refuses to consult, or to accept a mediator after three proposals by the Director of a mediator, or in the event that after mediation has occurred the parties still have not achieved a settlement, then in any such case a party to the dispute may notify the Director that he wishes to initiate a panel proceeding. In such case the Director shall institute such proceeding.

133.01 From a list of names of individuals eligible to be panel members, the "Panel List", the Director shall privately draw up a list of seven persons, none of whom are citizens, habitual residents in the territory of, or employees of any party to the dispute (unless this requirement is waived by the parties), and notify this list to the parties.

133.02 If there are two parties to the dispute, each shall have the right within 14 days after receiving the list, to object in writing to two names on the list. The Director shall then certify to the parties to the dispute a list of three persons whose names were not objected to. This list of three shall be the "Panel".

133.03 If either party to the dispute, within 14 days after receiving the certification of the panel notifies the Director that its strong overriding national interest is jeopardized by the constitution of the panel as certified, the Director shall withdraw the panel and begin the process outlined in paragraph 133.01 again. But after one such objection of this type, the Director may choose not to withdraw a subsequently certified panel.

133.04 [Reserved: Where more than two parties. Possibility of intervenors.]

133.05 The Panel shall afford each party to the dispute the opportunity to propose a statement of the dispute. The Panel will then make a statement of the dispute, specifying the issue or issues involved. If none of the issues involve a question of interpretation of a rule in Annex B (or Annex C if specifically agreed) or a question of applying such rule (that is, whether such rule has been violated

in connection with facts to be ascertained) then the Panel must certify its judgment that the dispute is not within its competence.

133.06 If on the other hand one or more issues involves the interpretation or application of a rule in Annex B or Annex C, to which all disputing parties have agreed to apply the procedure of this Protocol, the Panel shall proceed under rules of procedure provided in Part IV below, to afford all parties to the dispute the opportunity to present arguments and to prove facts, and the Panel shall in addition conduct such investigation as it deems necessary, to enable it to discharge its responsibilities under 133.07 below.

133.07 The responsibility of the Panel is to come to a decision* or "sentence" about the disputed issue or issues which involve the interpretation or application of a specified rule or rules in Annex B (or C if so agreed by all disputing parties.) The Panel shall not make recommendations or suggest or impose sanctions.

133.08 The decision of the Panel must be accompanied by a full statement of the facts found and a full statement of reasons. The decision shall be notified to each party to the dispute which shall have 14 days in which to object to any part or all of the statements or judgments. The Panel shall consider any such objections, and in the absence of a decision to reopen the matter, shall decree its decision as final.

133.09 The final decision with full statement of facts and reasoning shall be certified to the parties and to the Director and shall be immediately published. This will discharge the Panel.

133.10 Parties to the dispute have the obligation to accept the decision of the Panel and to act accordingly unless action under appropriate proceedings described in para. 134 below, is taken which excuses a party from acting according to the decision.

134. Upon certification of a Panel decision, the Director shall immediately forward the decision to the disputing parties and to the appropriate body determined as follows:

134.1 If the decision involves a document (such as a code or rules of a treaty or an Agreement such as GATT) which contains an expressly agreed procedure to follow after a panel decision has been certified, the Director shall notify the appropriate body under the terms of the document, drawing attention to the decision and to the ensuing procedure to be followed.

134.2 If there is no expressly agreed procedure described in 134.1 then if the document terms establish any governing body (such as the CONTRACTING PARTIES of GATT), the Director shall notify that body of the decision, so that the body may take such action as may be appropriate. In such a case, the disputing parties shall be deemed to have agreed to consideration of the decision by this body and shall be deemed to agree that this

* The terms "decision" or "sentence" are intended to be identical when used in this draft and to mean the same as "sentence of arbitration."

body may make recommendations to the parties for actions on their part designed to resolve the dispute. Such recommendations will recognize the binding nature of the decision, but may recommend measures such as waivers (if waiver power exists for such body) or other actions to be taken to provide for a legitimate exception to the rule involved in the decision. In the case that the document concerned is all or part of GATT and the decision is sent to the CONTRACTING PARTIES, it will also be deemed to be the equivalent of a finding by a GATT panel under Article XXIII of GATT that nullification or impairment exists.

134.3 In case there is no appropriate body under the provisions of 134.1 or 134.2, the Director shall forward the decision to the Council which may consider it and make recommendations as in 134.1 or 134.2.

135. Sanctions for failure to comply with a decision shall not be imposed under this dispute settlement Protocol, but the terms and procedures for sanctions specified in documents or international rules other than those specified herein may be applicable as the case may be, and nothing contained in this dispute settlement Protocol shall be considered to change or diminish the rights of either party to invoke sanctions under any document listed in Annex B or C or elsewhere, except that the decision rendered under this Protocol shall be deemed to obligate the parties.

Part IV. *Panels and Procedures*

141. The "Panel List" shall be a list of names of individuals who are eligible to be included in a Panel.

141.1 The list shall include the citizenship, the country of habitual residence of each person, and employment. [Customs unions and free trade areas?]

141.2 The Director shall have the duty to draw up the list pursuant to principles specified below and to the additional conditions, if any, specified by the Council. The Director may change the list at any time, but shall reconsider the whole list with a view to revision at least one time per year.

141.3 The list shall consist of 20 names unless the Council shall specify a different number. No more than three persons on the list may be citizens or habitual residents of the same nations. Persons need not be citizens or residents of a member (Annex A) nation, but such citizens or residents shall be preferred for placement on the list.

141.4 The criteria for selection to be included on the list shall include the following and such additional criteria from time to time specified by the Council:

—The person must have a judicial temperament and reputation, meaning that his judgments and opinions are considered fair and objective.

—The person must be age 35 or older, in good health, and

with sufficient formal training or practical experience to have an understanding of the operation of international legal rules and an understanding of economic relations among nations.

—The person must be considered of good character and excellent ability.

141.5 Before a person is selected to be on the list, he or she shall accept a commitment for a specified period of time not less than two years to be reasonably available to serve on panels and to refrain from activity that could be deemed in conflict with his potential obligations as a member of a panel or which would bring the dispute settlement procedure of this Protocol into disrepute. The Director may at anytime remove the name of any person from the "Panel List" whenever he feels in his discretion that continuation of a name on the list detracts from the goals and purposes of this Protocol and he shall do so whenever a person has breached his agreement under this paragraph. The Council may specify additional rules and regulations pertaining to conflict of interest or other matters relating to this paragraph.

141.6 All persons on the Panel List shall receive an annual retainer whether or not they are selected as panel members, the amount of such retainer to be specified by the Council, but to be not less than ( ) per year. In addition to reimbursement of all expenses, persons serving on a panel shall receive an additional fee plus a *per diem* stipend, which shall be from time to time fixed by the Council. Until such are fixed, the additional fee and stipend shall be ( ) plus ( ) *per diem*, respectively.

141.7 Any member may nominate persons to be on the Panel List. The Director may nominate persons after receiving recommendations from reputable private groups anywhere established. All nominations shall be notified to all members of the Council, and only those persons to whom no more than 20 per cent of the members have objected will be considered for the Panel List when the Director draws up that list. At least once a year each person on the Panel List shall be notified to the Council as a nominee under the procedures of this paragraph.

142. The persons listed on the Panel List shall meet from time to time, and shall select among their member a President who shall preside at their meetings. Meetings shall occur at least once per year, and shall be convened by the Director on his own motion, or request of the President, or request of the Council acting by majority vote.

143. The meetings of the Panel List persons shall be for the purpose of taking action called for under this agreement or for action necessary for the operation of this agreement, and for educational purposes designed to familiarize the persons present with the procedures under this agreement. Substantive principles of interpretation and application of rules in documents B and C may be privately discussed with a view to

increasing the uniformity and predictability of decisions of different panels.

144. The Panel List persons shall prepare regulations regarding the detailed rules of procedure to be followed under this Protocol, including rules for investigations and receipt of evidence, arguments, length and language of written or oral statements, qualifications of persons appearing before a panel, *locus* of proceedings, and other procedural matters. Such regulations shall become binding when they have been notified to all members of the Council and written objection has been received within 90 calendar days of such notification from no more than 25 per cent of the total votes in the Council. Changes can be made from time to time by the same method. If it proves impossible to arrive at regulations through this means, the proposed regulation shall be considered at a meeting of the Council which shall adopt regulations upon a majority of votes cast.

145. The Panel List persons may make recommendations to the Council concerning any matter related to this agreement.

Part V. *Surveillance of Rule Compliance*

151. The Director may on his own initiative, upon direction by the Council, or upon request by an appropriate body provided in any document in Annex B, study alleged departures from any rules in Annex B. Private citizens' complaints may be received by the Director or his agents, and the secretariat may receive information from any source or may conduct private investigations.

152. If as the result of activity described in the previous paragraph, the Director finds there are good grounds to conclude on the basis of information available to him that a rule in Annex B is being breached, he may privately draw this finding to the attention of the member or members allegedly breaching the rule and to any member likely to be harmed by the rule breach. If in the light of this information any member desires to proceed under Part III above, it may do so.

153. If a private citizen formally lodges a complaint with the Director that alleges the action of a member breaches a rule of Annex B such as to cause harm to the complainant, the Director may, if he feels the complaint has substance, study the matter further as in para. 151 above, and may also proceed under para. 152 above. If as a result of the study, the Director finds that there are good grounds to conclude that the complaint allegations are true, and if the Director concludes that the matter is serious enough to warrant such action, the Director shall notify the members complained against and the member of whom the private complainant is a citizen, and unless the latter member objects within 30 days, the Director may proceed under the procedures of Part III above as if the Director were a disputing party.

Part VI. *Amendments, Annexes, and Members*

161. This Protocol may be amended at anytime by a three-fourths vote of the Council, followed by one year during which two-thirds of the

members ratify the amendment. The amendment is binding on all members, but any member may withdraw from the agreement by express notice to that effect received by the Council before the amendment goes into effect, if it seriously objects to the amendment.

162. Any nation may become a member of this Protocol (and thus be added to the Annex A list) by notifying the President of the Council of its desire to do so, and by accepting the obligations of the Protocol (subject to the exceptions stipulated pursuant to para. 163 below). By four-fifths vote including two-thirds of the members, the Council may expell any member from this Protocol. A member found by the Council persistently to refuse to comply with its obligations under this agreement, including the obligation to accept Panel judgments, may be suspended from membership by two-thirds vote and a majority of the members.

163. Any nation may, at the time it becomes a member, specify exceptions to the rules and documents in Annex B to which it is willing to apply this Protocol. These exceptions shall be listed immediately following a member's name listed in Annex A. For all purposes of this agreement relating to such a member, Annex B shall be deemed to include the rules and documents as if those excepted for a member in Annex A are excluded from Annex B. Exceptions may be the subject of bilateral or multilateral negotiations between members, whether or not in connection with other negotiations or agreements on economic matters.

164. The Council may at any time by majority vote add rules or documents to Annex B, effective as of a date specified not less than three calendar months from the vote providing for the addition. During the period prior to the effective date, any member may add as exceptions in Annex A any portion of the proposed additions.

165. Any member may withdraw from membership in the Protocol after two years notice. Any member may withdraw exceptions on its list in Annex A at anytime. Any member may add exceptions to its list in Annex A after two year's notice, subject to any other international obligations it may have pursuant to express agreement with other members.