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INTELLECTUAL PROPERTY DISPUTE, GATT, WIPO: OF PLAYING BY THE GAME RULES AND RULES OF THE GAME

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INTRODUCTION

The ink, on the concluding chapters of the Uruguay Round of GATT [n.1] talks is yet to dry. But the themes spawned by the incorporation of *150 TRIPS [n.2] into the Uruguay Round of multilateral trade negotiations have begun to resonate with discordant notes, particularly in the context of settlement of intellectual property disputes between States. [n.3] The formidable progress achieved by integration of the TRIPS agenda within GATT [n.4] could be seriously undermined if the discourse is not expanded beyond the parochial parameters of a "GATT v. WIPO" perspective. [n.5]

Crafting the intellectual property debate on the "GATT v. WIPO" lines betrays a lack of appreciation of how obligations arise from international agreements and mature into behavior influencing norms. More fundamentally it reflects the incapacity to fathom the interdigitation between international agreements and rules or procedure in *151 accordance with which they are made. [n.6] This is particularly true with reference to the normative basis of the formal sources in international law. [n.7] It fails to take cognizance of the subtle but significant distinction and interdeterminacy between the variegated roles and multiple functions of dispute settlement processes structured to enforce compliance. [n.8]

The purpose of this article is threefold. First, to disengage the dialog on settlement of intellectual property disputes between States from the impoverished and fruitless praxis of "WIPO v. GATT" [n.9]. Second, to suggest an approach which delineates an appropriate relationship between the dispute settlement mechanism applicable to TRIPS [n.10] and the dispute settlement mechanism for intellectual property disputes between States envisaged by WIPO's proposed treaty. [n.11] Finally, I intend to address the issue of a matrix which would foster coordination between the two institutions, such that the complementarity between the two would promote a higher level of intellectual property protection, secure a uniform interpretation of the obligations engendered *152 under different international agreements [n.12] and further the enforcement of these obligations.

Part I examines the normative themes which undergird the "GATT v. WIPO" thesis. It exposes the systemic inadequacy intrinsic to such an approach. Part II first introduces a theoretical conception which demarcates the relationship between the dispute settlement mechanism applicable to TRIPS and WIPO's proposed dispute settlement regime. It also examines, within this framework, both the nature and scope of GATT's dispute settlement system from its inception in 1947 until its most recent modification [n.13], as well as that of WIPO's proposed draft. [n.14] Part III outlines why the dispute settlement mechanism proposed by WIPO and the dispute settlement process of GATT with reference to TRIPS must coordinate and complement each other.

Part I: GATT v. WIPO Thesis

In the context of intellectual property, the emphasis of the principle players at the Uruguay Round was as much to establish a substantive standard of protection as to forge an efficacious system to adjudicate infractions of the established standard. [n.15] But this in itself cannot provide the basis for validating the proposition that a sanction based enforcement mechanism is indispensable, if not a basic prerequisite to ensure compliance with international intellectual property obligation. Nor does it afford support for the assertion that TRIPS, which provides *153 a sanction based enforcement framwork [n.16], is the appropriate, if not the sole, forum to promote international intellectual property protection and to adjudicate intellectual property disputes between States. [n.17] However, thematically, these propositions form the normative bulwark of the "GATT v. WIPO" thesis. [n.18]

The basic defect of this thesis derives not so much from its assumption that sanction based enforcement measure is the principle process of ensuring compliance with law, as in its blindness to the complex but obvious relationship between obligation and enforcement in the context of a rule. This section of the article deals briefly with the problematic of enforcement and obligation, in the context of international law. Then it outlines the contours of the debate which culminated in the integration of intellectual property into GATT [n.19]; the objective being to establish that from the beginning the complementarity and co-existence of WIPO with TRIPS, was an accepted theme.

A. Enforcement and Obligation

For rules to evolve into behavior-influencing norms which ensure compliance with the rules by the players, particularly in the context of international law, the rules must be invested with a high degree of legitimacy by the players. [n.20] Sanction or coercion is insufficient in itself to engender the legitimacy which ensures compliance with the law. [n.21] The foundations, in international law, of the obligation to comply with *154 a norm is difficult to explicate with reference to any one theory, [n.22] however there is widespread agreement that the "acceptability" of a rule is critical to a nations observance of a rule as law. [n.23]

Acceptance of a rule is distinct from consent to enforcement of the rule. Acceptance, which endows the rule with norm-generative character usually precedes consent to the rule's enforcement; sometimes however, acceptance arises after consent to enforcement of a rule. [n.24] In the event that acceptance precedes consent to the rule's enforcement, the shape of the rule begins to acquire a distinctly normative profile in its function--demarcating, with fair level of precision, the legal rights and obligations it creates. [n.25]

The roots of the "GATT v. WIPO" thesis with its pronounced emphasis on sanction based enforcement as the basis of a rule's binding character [n.26], derive from Austinian legal positivism. [n.27] Austinian affinity for *155 laws imperative nature locates the legally binding character of rules in their sanction based enforcement. Rules not supported by an effective sanction are defective for they cannot create any duty or obligation. Such laws are imperfect laws or deficient laws as they are without sanction. [n.28] In consonance with its reasoning, international law, devoid as it is of any centralized sanction based enforcement system, cannot engender any binding obligations by itself. [n.29] Thus it follows that in order to endow the rules created under international law with legitimacy it must be backed up by an enforcement mechanism.

The neo-analytic tradition, pioneered by H.L.A. Hart among others [n.30] has lucidly elucidated the basic defect innate in the process of reasoning which predicates the validity of a rule on its enforceability. Such a processes confuses "matters of fact with matters of right." [n.31] That X can by force compel Y to behave in a particular manner does not mean either that X has a right to compel Y to perform the act in question, nor can it imply that Y is under a duty or obligation to comply. Y may be "obliged" to obey but he is not under any "obligation" to do so. [n.32] Enforcement alone, cannot imbue the rule with validity. The validity of enforcement in terms of its capacity to normatively ensure compliance *156 with the rule will depend upon the legitimacy of the rule independently of the rule's enforceability. [n.33] Enforcement presupposes the legitimacy of the rule being enforced. Legitimacy of the rule arises from its acceptance by the participant, who consents to its enforcement. [n.34] "The law is not obligatory because it is enforced: it is enforced because it is obligatory; and enforcement would otherwise be illegal." [n.35]

If from the ineffective compliance with obligations created by a rule without sanctions we arrive at the conclusion that the validity or obligations of a rule originates in its capacity to be enforced, we are confusing the effectiveness of a rule with its legal validity. [n.36] The legal validity of a rule is not contingent upon its effectiveness. Effectiveness of a rule may be an empirical condition however it cannot be the criterion of a rule's validity. [n.37] Thus, if enforcement relates to the rules effectiveness alone, then it cannot be the source of the rule's legitimacy. The normative legitimacy of a rule lies in its acceptance; a rule which is internalized by its acceptance may be effective in terms of compliance with its obligations, even in the absence of any enforcement mechanism. [n.38]

Arguments which are either impervious or attribute secondary importance to the role of acceptance in the evolution of behavior forming norms, particularly in the context of

international law, are not well founded in theory and practice. Sanction-based enforcement may impart transient existence to rules in the short run, but it cannot be the basis for the normative legitimacy of the rules in the long run. In the absence of the former, rules cannot ascend to the status of behavior forming obligations.

*157 B. WIPO and GATT

It is true that disenchantment with existing multilateral forums, enervated as they are both by the absence of minimum enforceable standards as well as by the non-existence of an effective enforcement mechanism, motivated strategic interest groups to successfully lobby for the inclusion of an intellectual property agenda in the Uruguay Round of multilateral trade negotiations. [n.39] However the praxis which formed the backdrop for the debate attached, from its inception, importance to the need to promote complementarity between the work of GATT and that of WIPO and to avoid duplicating the work of WIPO. [n.40] Indeed, beyond the rhetoric, the texts of the proceedings through the different stages of the negotiations, unequivocally resonate *158 with the recognition by the dominant parties of the need for TRIP to complement WIPO's efforts. [n.41]

The discourse on linking trade with intellectual property was animated by a limited agenda from its origin. [n.42] The objective envisaged had four basic aspects: establish substantive standards for intellectual property protection; efficient enforcement measures; dispute settlement mechanism; and the application of certain GATT provision to intellectual property. [n.43] The spring board of the trade based approach was informed by the concept of trade sanction. To that extent its scope was circumscribed. [n.44] With trade based sanctions forming the anchor, the primary objective was to concretize the intellectual property standards already obtained under the aegis of WIPO by weeding out ambiguities with respect to the form and content of these obligations. [n.45] The objective was not to create an alternative regime under GATT as much as it was to build on WIPO's contributions. [n.46] The schematic frame of reference was the intellectual property regime administered by WIPO. Given the parameters which delimited the scope of the negotiations it would be difficult, without distorting facts, to characterize the debate as having proceeded on the lines of "GATT v. WIPO."

*159 Part II: Dispute Settlement Mechanisms

This section of the article lays the foundation to delineate the relationship between the dispute settlement mechanism for intellectual property disputes between States, envisioned by WIPO's proposal [n.47] and the regime applicable to intellectual property disputes under the TRIPS agreement. [n.48] Part A of this section draws upon the work of Prof. K. Abbott to provide the theoretical anchor for the discussion. [n.49] Against this construct Part B and C of this section analyze and characterize--in terms of nature and scope--GATT's dispute settlement regime and that envisaged in the Draft Treaty proposed by WIPO.

A. Public Interest/Private Interest Model

Adding to the thematically dichotomous constructs, the predominant conceptual praxis for any institutional analysis of GATT, [n.50] Abbott introduces "the dichotomy between institutions and procedures *160 designed to serve private interests and those designed to serve the public interest." [n.51] Abbott derives his model from the works of a comparativelaw scholar [n.52] and employs it as a heuristic device to explicate the underlying structure of international trade in general and of international trade as organized around GATT in particular. [n.53]

Building on Mirjan Damaska's hypothetical social systems, Abbott formulates the notion of "public interest community" and "private interest community." In the realm of international trade, "public" connotes the group of the trading nations which constituted GATT whereas "private" refers to individual states who were member of GATT. [n.54] The objective of a private interest system is to afford a basic framework for the members of the community to operationlize their respective self-goals. Thus the community does not entertain any interest independent from that of its members. Rules within such a community flow from private arrangement; however, the community may suggest certain basic rules so long as these rules are in consonance with those that the members accept as a part of the basic structure. [n.55]

The judicial institutions of a private interest community are designed to address only infractions of private interests of the members. Thus the mechanism would be triggered only at the insistance of one of the members; more importantly it would be subservient to desires of the members who have invoked its jurisdiction, both in terms of process (procedure, remedies fashioned, etc.) and control. However its neutrality would be an aspect of the basic framwork. [n.56]

In contrast, a public interest system is animated by its own conception of its objectives. It mobilizes its resources to secure its goals, which may be independent of those of its members, though they may be commonly subscribed to by its members. The rules, which manifest the community's aspirations, arise from community legislation and not from "private ordering." [n.57]

*161 The jurisdiction of a public interest system of justice would reach beyond the particular interest of its members. Possessed of the capacity to initiate proceedings on its own, and motivated by the desire to effectuate community based goals, the system of justice may intervene in privately initiated proceedings. Even at the level of private proceedings the justice system would seek to function with community goals in perspective and not just exist to settle private disputes. [n.58]

Applying this model to GATT's normative and institutional schema, Professor Abbott, concludes that "GATT is structured primarily along the lines of a private interests community." [n.59] The Uruguay Round, he argues, has strengthened the basic structure

which provides the pattern for private interaction, simultaneously concretizing the foundations of a neutral dispute settlement mechanism on private interest traditions. [n.60] The norm generative capacity of a dispute settlement process, patterned to advance a private interests community is circumscribed by the scope of its function. [n.61] Its effectiveness is judged by its capacity to ensure that the game is played by the members of the community in accordance with the established rules. [n.62] A dispute settlement system organized to promote a public interests community is more motivated and perhaps better endowed to establish the rules of the game themselves. [n.63]

*162 B. GATT Dispute Settlement System: An Overview

B1. Objective and Process

GATT's dispute settlement system, a regime that has performed relatively well since its inception [n.64], evolved gradually through successive amendments. [n.65] At each stage the emphasis has been on ensuring compliance by its members with the accepted rules. [n.66] Though the dispute settlement structure was designed to foster adherence to commonly subscribed principles which constituted the basic framwork of the GATT system, [n.67] its function as a source of rules remains controversial. [n.68]

*163 GATT's dispute resolution mechanism, which distinguishes GATT from other international multilateral economic regimes [n.69], is balkanized into different provisions [n.70] which provide for bilateral and multilateral consultations and for third party adjudication. [n.71] However, structurally GATT's dispute settlement system is anchored in Articles XXII and XXIII [n.72] supplemented by rules and procedure of understanding. [n.73] Article XXII provides for bilateral and multilateral consultation with reference to any matter affecting the operation of GATT. [n.74] Article XXIII, perhaps the cornerstone of GATT's dispute settlement regime, [n.75] provides for three principal forms of complaints: [n.76] violational *164 complaint; [n.77] non-violational complaint; [n.78] and situational complaints. [n.79] The process outlined in Article XXIII [n.80] provides first for formal consultation [n.81], triggered by the written representations of the complaining party to other contracting party or parties concerned. [n.82] Failure to settle the dispute at this stage results in the dispute being referred for resolution to the Contracting Parties [n.83] or to the GATT Council. [n.84] Such *165 references mandates the Contracting Parties to promptly investigate, make appropriate recommendations, or give rulings on the matter as appropriate." [n.85] Aggrieved parties [n.86] may request the GATT Council to establish panels to assist in the adjudication of their disputes. [n.87] Panels, pursuant to their mandate, examine the dispute from a legal perspective in "light of the relevant GATT provisions" and make such other findings as will assist the Contracting Parties in making recommendations or rulings provided for under Article XXIII:2 [n.88] Parties do not have a right to a panel, though in almost all disputes request for a panel has led to the appointment of one. [n.89]

Once appointed, the panel receives submissions from the parties to the dispute [n.90], conducts its investigations, etc., and then formulates its report. The parties to the dispute are allowed to comment on this report. Following deliberations over the comment the panel submits its report and recommendation to the GATT Council. The option is open to the parties to settle the dispute between themselves during the course of the panels deliberations. In such situations, that is the end of the matter. [n.91] For the report to have legal force it must be adopted by consensus in the GATT Council. [n.92] The system has a pronounced tilt in favor of conciliatory or amicable settlement, so as to allow for the parties to redress damages to their private interests while maintaining the basic framwork which facilitate the interaction between the parties at a community level. [n.93]

*166 Dissatisfaction with different facets of the system [n.94] along with a more deeply rooted disagreement over the role of the panel process [n.95] led the Contracting Parties to focus their attention on improving the system. The outcome [n.96], though impressive [n.97] was far from satisfactory. [n.98] The negotiation, which resulted in the codification and diversification of the dispute settlement procedures [n.99] reflects a discernible tilt in favor of a diplomatic/pragmatic view towards the dispute settlement system. [n.100] In fact not only were the provisions for enforcing panel reports ambiguous [n.101], the panel process was fashioned to promote conciliation and amicable settlement of disputes. [n.102]

*167 Post-Tokyo Round experiences accentuated perceptions of the system's incapacity to effectively address trade disputes [n.103], more so when the disputes had a political dimension to them. [n.104] Protracted delays in panel formation [n.105], absence of agreement over their composition [n.106], non-adoption of panel reports through blockading tactics [n.107] and noncompliance with the panel reports [n.108] were problems which undermined the systems efficacy in the post-Tokyo Round phase.

The mandate of the Negotiating Group, established by the Uruguay Round, for improving the dispute settlement procedure, was broad. [n.109] The final outcome [n.110], presaged by the developments at Montreal Mid-Term Review [n.111] are extremely ambitious and far reaching. [n.112] The trend has oscillated distinctly towards legalism. [n.113] In fact, the Uruguay Round has fundamentally altered the normative character of GATT obligations [n.114] Among the major innovations to the structure and character*168 of the system The Understanding [n.115] integrates the dispute settlement system under the aegis of the Dispute Settlement Body [n.116], which is empowered to establish panels, adopt panel and Appellate Body reports, keep track of the implementation of the rulings and authorize suspension of concessions. [n.117] The emphasis in the pre-panel phase of the proceeding is pronouncedly on amicable and negotiated settlement of the disputes; [n.118] the text highlights the parties option to resort to alternative resolution techniques of good office mediation and conciliation. [n.119] This emphasis is however framed within a strict time schedule. [n.120] Binding consensual arbitration "within WTO as an alternative means of dispute settlement" is an advancement in the direction of private interests community. [n.121]

The Understanding significantly improves the working of the panel phase--"moving it a considerable distance toward the affirmative private interest community ideal." [n.122] The Understanding in a major innovation creates a right to access the panel process. [n.123] It streamlines the terms of reference [n.124] and the constitution of the panel [n.125] along with the *169 panel procedures. [n.126] Under the interim review provisions, the final report of the panel will be submitted to the parties for review and comment. [n.127]

In a fundamental innovation, The Understanding provides for what amounts to "automatic adoption" of the panel reports. [n.128] In what amounts to a dramatic break from the past, The Understanding provides for appellate review of the panel reports [n.129] Of great import is the provision which makes adoption of the Appellate Report automatic and mandates its unconditional acceptance by the parties to the dispute. [n.130] Clearly The Understanding separates the judicial from the political by truncating the role of the Council in the establishment and adoption of panel reports or appellate reports. [n.131]

*170 The post panel phase improvements are in the form of concrete procedures fashioned to ensure compliance with panel recommendations. [n.132] First, The Understanding schedules a fairly tight time frame for compliance with the panel or Appellate Body report. [n.133] Second, The Understanding reinforces the procedures for surveillance of compliance with the reports. [n.134] Finally, The Understanding supplements the normative and political pressure by mandating the employment of retaliatory economic measures. [n.135]

Over the years GATT's dispute settlement process has evolved on the lines of a judicial system. [n.136] Uruguay Round reforms have moved it affirmatively and distinctly in this direction [n.137]: neutral panels composed of legal experts who will adjudicate on the basis of GATT legal obligations rendering automatically binding decisions appealable to the Standing Appellate Body, itself a permanent forum [n.138] on issues of law which again renders legally binding decisions. Whether this momentum towards legalism and the private interest community [n.139] is founded on the political reality of GATT is open to debate. [n.140]

*171 The political function of the GATT Council has been whittled in the context of the dispute settlement system; however no mechanism in the nature of a legislative process is provided to rectify or cushion possible imbalances. [n.141] Given the automatic flow of the proceedings [n.142] there is no "legislative filter" [n.143] to remedy a wrong decision. Depending on the DSB, this would be unrealistic given the consensus voting requirement. [n.144] Thus in "wrong cases" [n.145] scenarios, or where a powerful contracting party refuses to comply, [n.146] or where the losing party perceives the law as erroneous or obsolete, the absence of "some kind of 'political filter' within the procedure for approving the panel and appellate reports" [n.147] could seriously strain the political stability of the GATT institution, which in turn would attenuate the normative credibility of the dispute settlement regime. [n.148]

*172 B2. The Institution in Practice: Historical Overview

In the first decade of its existence, GATT's dispute settlement system had a fairly impressive record, [n.149] both, in terms of the volume of complaints and in their successful resolution. [n.150] This success, termed "artificial" by some scholars, [n.151] is attributed to the small number of Contracting Parties and the comparative similarity in their backgrounds and interests, [n.152] general agreement on the scope and nature of the agreement due to its recent origin, [n.153] and the desire of the participants, who had also participated in its creation, to make the institution work. [n.154]

The second and early part of the third decade witnessed a dramatic decline of the institution. [n.155] A number of factors contributed to this downslide: radical change in membership; [n.156] increased participation by developing countries; [n.157] establishment of the European Union; [n.158] erosion of support for certain GATT norms, partly due to non-compliance and partly due to the principles obsolescence; [n.159] and the economic realignment with the emergence of Japan and European Community. [n.160] The later half of the third decade witnessed signs of revival, partly due to the initiative of the United States and partly due *173 to the Tokyo Round negotiations to improve the dispute settlement process. [n.161]

The fourth decade exploded with legal activity. [n.162] While this explosion in litigative activity may reflect both, increasing willingness to use and confidence in the dispute resolution mechanism, [n.163] it is paralleled by a dramatic decline in the number of disputes successfully resolved. [n.164] More importantly, the defendant governments have shown greater bellicosity and resorted to "muscular diplomacy" in preventing aggrieved parties from pressing charges. [n.165] Professor Hudec views this as a systems overload arising from ambitious expectations, from an as yet politically fragile institution. [n.166] Thus a system which is pronouncedly legalistic when hard disputes are adjudicated they lead to situations where the parties find it politically costly to adhere and failure to comply attenuate the system's credibility. [n.167]

In sum GATT's dispute settlement system has been dominated by few large countries. Infact the developing countries have been marginal players. [n.168] The entry barriers for the developing countries has always remained high. [n.169] The system is more responsive to the interests *174 of powerful nations as compared to economically weaker nations. This is due to the fact that the powerful nations often employ their economic strengths decisively and determinedly to advance their agenda. [n.170] Shortcomings notwithstanding it is the most successful and effective international dispute settlement forum for resolving trade disputes.

Multilateral consultation and settlement of disputes within the TRIPS Agreement will be done under the aegis of GATT's dispute settlement mechanism. [n.171] TRIPS Agreement incorporates a standard which is higher in many respects then the standards currently available. [n.172] In certain matters, the standard outlined is quite specific and clear. [n.173] However in many areas the provisions are quite general. [n.174] General

provisions are susceptible to conflicting interpretation; different viewpoints, equally legitimate, can be advanced. In such situations a legalistic dispute settlement forums would not have the required flexibility to both resolve the dispute and have the parties to the dispute accept the normative basis of the decision. It may jeopardize the process of integration of the intellectual property norms into the broader matrix of international economic law.

C. WIPO's Draft Treaty: An Overview

The World Intellectual Property Organization, which arose out of the 1967 Stockholm Convention, [n.175] is distinctly patterned on a public interest communitarian approach. [n.176] It is at the heart of the international *175 intellectual property system, administering the foundation treaties of the intellectual property world-- Paris Convention [n.177], Berne Convention [n.178] and the Madrid Agreement Concerning the International Registration of Marks. [n.179] Its preeminence as an forum for the development and progress of international intellectual property received a set back during the sixties with the conflict between the divergent interests of developing and developed countries being the source of this setback. [n.180] However it continues to be the primary support system for international intellectual property protection. [n.181]

In response to widespread perception that the most significant shortcoming in the WIPO process derive from the absence of an effective dispute resolution forum [n.182] WIPO has advanced a draft treaty for the settlement of intellectual property disputes between States. [n.183] Its objective is to secure uniformity in the interpretation and application of international intellectual property rules; [n.184] particularly with reference to disputes between States or between States and intergovernmental Organizations which may arise out of enforcement of international intellectual property obligations. [n.185] Its sphere of application *176 spans from disputes between Contracting Parties [n.186] under multilateral treaties which "require the interpretation or application of one or more provision in a multilateral treaty", [n.187] to intellectual property disputes which may be a part of an broader non-intellectual property dispute, but arising under the treaty. [n.188] Parties to a dispute have the discretion to reach an agreement negating the application of this treaty to the particular dispute in issue. [n.189]

The pre-panel phase reflects a strong emphasis on negotiation and conciliation as the preferred means for settling disputes. [n.190] The parties have the option of resorting to good offices, conciliation and mediation at any stage of the of the dispute. [n.191] The parties have the option of resorting to arbitration to settle their disputes at any juncture of the dispute. [n.192] Unless the parties decide to the contrary, the treaty provides for the procedures to be followed. [n.193] The arbitration award is final and binding. [n.194] The panel phase is triggered by a request to the Director-General made by one of the parties to the dispute. [n.195] Within *177 a fairly flexible time-frame the panel process commences. [n.196] The panel report, to be adopted by majority of the panel members, makes a finding of fact and a statement of law on which it is based. [n.197] Interestingly, the scope of the panels recommendation, in the event it finds a breach of obligation, is

confined to only asking the concerned party to adhere to its obligation and not to making any recommendation as to how it should do so. [n.198] Intervention by third parties who establish substantial interest in the dispute is provided for. [n.199] The panel is to submit its report to the Director General within a outside limit of one year.

Once the panel report reaches the parties, [n.200] they are required to report within three months any action which they have taken or plan to take on the panel recommendation. [n.201] This is submitted along with the panel report to the members of the Assembly [n.202] for deliberations. [n.203] The scope of the deliberation by the Assembly is limited; it lacks the authority to mandate any form of sanction to ensure compliance with the recommendations of the panel. [n.204] The only provisions for surveillance of implementation of recommendations is voluntary reporting by the parties to the dispute to the Assembly. [n.205]

WIPO's dispute settlement proposal is patterned on public interest communitarian approach [n.206] with reference to its goals. [n.207] However the processes of settlement it provides for are fashioned on private interest *178 justice model. [n.208] The private interest tilt could be corrected if the Assembly invested itself with the authority to initiate proceedings on its own with a view to secure the uniformity of interpretation that it seeks to promote with reference to international intellectual property obligations. WIPO's system is not fashioned to be coercive. It cannot authorize the use of any form of sanctions to enforce compliance. Infact its rules rest on the normative force of organized community opprobrium. The binding force of such normative pressure originates from the underlying consensus of the Contracting Parties over the need to comply with international intellectual property rules.

III

The fragile character of international economic law originates in the effort to reconcile and accommodate disparate interests of States at different stages of development. [n.209] The integration of intellectual property norms into the broader framework of international economic law will add another dimension to this delicate balance of interests. [n.210] This is primarily due to the tensions which reside in the differing perception of developed nations and developing nations on what constitutes or ought to constitute the basic praxis for the protection of intellectual property. [n.211] The problem will be aggravated by the true social and political costs which implementation of the TRIPS Agreement will initially entail for developing countries. [n.212] The resolution of this tension by the gradual absorption of intellectual property obligations *179 into the framwork of international economic law will require "negotiated balancing of private and public interests valid for all states active in the international economic system." [n.213]

Disputes, which will arise frequently with reference to the content, nature and scope of the obligations spawned by international intellectual property rules will strain the process seeking to integrate intellectual property into international economic law. [n.214] To mitigate the disintegrative impact of such disputes, negotiated compromises premised on

realistic understanding and expectations of the social and political costs is vital. [n.215] GATT's dispute settlement process as an forum of first level is unsuitable for this. A number of reasons contribute towards this conclusion. GATT's dispute settlement process is patterned on private interest community approach and to that extent it is more focused on enforcing individual compliance and addressing issues of nullification and impairment at an inter parties level. [n.216] The absence of a "political filter" or cushion combined with the momentum towards rule based decisions makes GATT dispute settlement system unattractive for negotiated settlement. [n.217] GATT as a forum is extremely visible politically [n.218] and controversial with regards to its acceptability by developing nations. [n.219]

From an intellectual property perspective GATT's attractiveness arises from its potency in adjudicating infractions of established norms or obligations at the intra members level--that is in ensuring *180 that the game is played by the rules. But this is to be distinguished from the establishment of an consensus which would constitute the normative framework of these rules-- that is in the establishment of the rules of the game. The drive which transforms a rule into an behavior influencing norm originates in the basic consensus which undergirds rules. [n.220] WIPO with its emphasis on building a consensus based normative foundation on the nature and scope of the rules of international intellectual property would be the appropriate forum for effecting realistic negotiated compromises of the type referred to above. Again a number of factors contribute towards this conclusion. WIPO's proposed forum would be politically low cost and relatively less visible than GATT's dispute settlement forum. Partly, this is because the emphasis of WIPO's forum is more on clarifying and establishing through consensus a uniform interpretation of the obligations rather than on ensuring compliance by the States; [n.221] and partly due the credibility WIPO enjoys amongst developing nations as the appropriate forum for intellectual property matters. [n.222] Finally, WIPO's administration of the constitutional treaties of the intellectual property world, endows it with a wider mandate and expertise as an forum for the attainment of higher intellectual property standards.

To view GATT and WIPO as being in competition is to misunderstand the basic character and purpose of these two institutions. Both GATT and WIPO--otherwise disparate institutions--have a common objective as far as protection for intellectual property is concerned. WIPO's proposed forum and GATT's dispute settlement would complement each other such that together they would lead to the attainment of a higher standard for intellectual property protection. WIPO's forum would provide, atleast in the context of intellectual property the political filter or cushion which is otherwise absent in GATT's dispute settlement system. [n.223] That is parties to an intellectual property dispute would have the opportunity to negotiate in the shadows of GATT's dispute settlement system. The access to GATT's system would work in the nature of a gun in the closet to motivate parties to settle their disputes within WIPO's framwork. Parties dissatisfied could always have the option of resorting to GATT's system. Even in the event that GATT's system is resorted to at the first instance, the *181 parties to the dispute could still access the WIPO alternative either directly or through a procedure whereby GATT's panel may be required to seek the advisory opinion of the WIPO.

However the procedural relationship between the two institutions have to be carefully worked out with respect to there jurisdiction and competence in intellectual property disputes. Thus while GATT, a private interest community system, would enforce compliance with the rules of the game--that is ensure that the players play the game by the rules--WIPO, a quasi public interest communitarian institution, would provide the forum for establishing the normative foundations of the rules of the game itself.

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[n.1]. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.AS. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. The Final Act containing the results of the Uruguay Round was adopted by the TNC representing participants from 117 countries and the European Communities, Dec. 15, 1993, MTN/FA of Dec. 15, 1993, MTN/FA/Corr. 1 of Dec. 15, 1993 substitutes all reference to the MTO or Multilateral Trade Organization with WTO or World Trade Organization; selectively reproduced in 33 I.L.M. 15 (1994). If the ratification schedule is strictly complied with, the Final Act would become effective on Jan. 1, 1995. It represents a dramatic departure from the Provisional agreement of 1947 both in nature, scope and function. The Final Act establishes the World Trade Organization as "the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement." The WTO incorporates GATT by reference under Annex 1A. Incorporated as GATT 1994, it includes the original text of the GATT as modified and amended by the various rounds, however the articles of provisional application of the original text are not included. Members are to apply the articles of GATT 1994, definitively and not provisionally. This in itself reflects the radical departure in terms of the legal status of GATT. On the structure of the agreement see, Amelia Porges, Introductory Note 33 I.L.M. 1 (1994). See Jackson, World Trade and the Law of GATT (1969); Jackson & Davey, Legal Problems of International Economic Relations (1986); Jackson, The World Trading System, Law and Policy of International Economic Relations (1989); Jackson, Restructuring the GATT System (1990). For an excellent analysis of the post Uruguay Round concerns see, Jackson, GATT and the Future of International Trade Institutions, 18 Brooklyn J. Int'l L. 11 (1992); McGovern, International Trade Regulation (2 ed. 1986); Hudec, The GATT Legal System and World Trade Diplomacy (1990) [hereinafter World Trade Diplomacy]; Hudec's, Developing Countries in the GATT Legal System (1987), is one of the most comprehensive analyses of the origin of the tension which animates the relationship between GATT and the developing countries. For an update see, Hudec, GATT and the Developing Countries, Colum. Bus. L. Rev. 67 (1992). See also Dam, The GATT Law and International Economic Organization (1970). For a rather succinct but lucid profile of the Uruguay Round see Petersmann & Hilf, The New GATT Round of Multilateral Trade

Negotiations, Studies in Transnational Economic Law No. 5 (Kluwer 1988) [hereinafter The New GATT Round].

[n.2]. Intellectual Property was included in the negotiating agenda at the start of the Uruguay Round--see Ministerial Declaration of Punta del Este of September 20, 1986, GATT Doc., Min. Dec. No. 86-1572 (Sept. 20, 1986). It was referred to as "Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods." See generally Bradley, Intellectual Property Rights, Investments and Trade in Services in the Uruguay Round: Laying the Foundations, 23 Stan. J. Int'l L. 57, (1987). The final version of the TRIPS Agreement is embodied in Annex 1C of the Final Act, MTN/FA of Dec. 15, 1993. See also infra, notes 42-44.

[n.3]. World Intellectual Property Organization opened for signature July 14, 1967 Stockholm, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3 [[hereinafter WIPO]. The WIPO has proposed the draft of the treaty on the settlement of intellectual property disputes between States, see, Draft Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property, WIPO Doc. SD/CE/VI/2, [hereinafter Draft Treaty]; reproduced in Industrial Property 1994, pp. 122-33. Critics, particularly the US, argue that TRIPS is the appropriate forum for settling intellectual property disputes. This being so, there is no need for WIPO to set up an alternative forum. "The Delegation of the United States of America stated. . . TRIPS, . . . would be applicable among States members of the WTO and that any dispute that might arise concerning rights and obligations under that Agreement would be dealt with under the Understanding on Rules and Procedures Governing the Settlement of Disputes. . . . The Delegation . . . reiterated the position. . . that the participation by the Delegation of the United States of America. . . should not be construed to mean that the USA had determined that a dispute settlement treaty within the framework of WIPO was necessary or that the USA would participate in such a treaty once it was concluded."--Report adopted by the Committee of Experts on the Settlement of Intellectual Property Disputes Between States, (Sixth Session, Geneva February 21-25, 1994), WIPO Doc. SD/CE/VI/6, pp. 3-4.

[n.4]. See supra Final Act, note 1.

[n.5]. See Cordray, GATT v. WIPO 76 J. Pat. & Trademark Off. Soc'y 121. See also Reichman, Opportunities and Risks, infra note 39.

[n.6]. See Nardin, Law, Morality, and the Relations of States (Princeton, 1983), pp. 20-24.

[n.7]. Ian Brownlie, Principles of Public International Law (4th ed. Oxford, 1990), p. 1.

[n.8]. See Van Hoof & De Vey Mestdagh, Mechanisms of International Supervision, Supervisory Mechanisms in International Economic Organizations (P. van Dijk ed. 1984), pp. 11-14. Elucidating the basic functions of international "supervision," a term that accommodated dispute settlement mechanism, they suggested it to be "review, correction and creation." Review and correction functions may be distinguished from the creative function. The focus of this article inheres in this distinction insofar as the dispute settlement systems of GATT and WIPO's proposed Draft Treaty, is concerned. For additional functions which a dispute settlement process may perform see Jackson, GATT as an Instrument for the Settlement of Trade Disputes, in Proceedings of the American Society of International Law 144, 153 (1967). See Davey, Dispute Settlement in GATT, 11 Fordham Int'l L. J. 51, 67-69 (1987) [[hereinafter Dispute Settlement].

[n.9]. The discourse seems to be meandering on the lines of positing TRIPS as an institutional structure competing, perhaps for reasons of efficacy, with WIPO with reference to intellectual property issues in general and settlement of intellectual property disputes in particular. The theoretical framework of this form of argumentation is weak, both in form and content.

[n.10]. Provisions of Article XXII and XXIII of GATT 1994 supra note 1, as elaborated by Understanding on Rules and Procedures Governing the Settlement of Disputes (MTN/FA/Corr. 1 of December 15, 1993, Part II, Annex II) will apply to disputes under theTRIPS Agreement, MTN/FA, Part II, Annex 1C Part V, Article 64. Part V (Dispute Prevention and Settlement) has only two articles, Art. 63 and Art. 64. Art. 63 relates to provisions of transparency which the member countries are to comply with in the enaction of the laws and regulations pertaining to intellectual property.

[n.11]. Draft Treaty, supra note 3.

[n.12]. World Intellectual Property Organization, General Information, WIPO Publication No. 401(E), list the different international agreements in intellectual property which WIPO administers. For succinct introductions to the more important treaties, see R. Benko, Protecting Intellectual Property Rights (1987), pp. 51-56.

[n.13]. The Dispute Settlement Mechanism of GATT has "evolved gradually." From being fairly loose, if not ambiguous, to a rather well structured system. The concretization, which began in the Tokyo Round of Trade Negotiations (1973- 79) peaked in the Uruguay Round. See "GATT Analytical Index," prepared by Petersmann, looseleaf edition GATT 1985; Petersmann, Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in The New Round of Multilateral Trade Negotiations.

Studies in Transnational Economic Law No. 5 (Petersmann & Hilf, ed. Kluwer 1988), p.323. The modifications of the Uruguay Round is embodied in Understanding on Rules and Procedures Governing the Settlement of Disputes, MTN/FA, Part II, Annex II. Reproduced in 33 I.L.M. 112 (1994).

[n.14]. Draft Treaty, supra note 2.

[n.15]. See generally Reichman, infra note 39. See also infra note 40-43. See, Results of the GATT Ministerial Meeting, Hearing before the Subcommittee on Trade, House Committee on Ways and Means, 99th Cong. 2d Sess. (1985) (Statement of Hon. Clayton Yeutter). The later objective was sought to be achieved by complementing the stipulation of a substantive standard for intellectual property protection with rather iconoclastic improvements of the dispute settlement mechanism. The popularity of GATT arises from provisions which permit aaggrieved party to take cross-sectoral action in order to rectify or compensate the nullification or impairment of its rights--see e.g., GATT, supra note 1, Arts. XXII & XXIII.

[n.16]. Supra note 10.

[n.17]. See e.g., supra note 3, US position on the Draft Treaty.

[n.18]. See e.g. Cordray, supra note 5.

[n.19]. Supra note 2.

[n.20]. Thomas Franck, The Power of Legitimacy among Nations, (1990). Franck outlines legitimacy as "a property of a rule or rulemaking institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates with generally accepted right process" Id. at 24. Innate to this conception of legitimacy is the issue of acceptability as a key component in the transformation of a rule into a norm. See also Franck, Legitimacy in the International System, 82 AJIL 705 (1988). But see Alvarez, The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations by Thomas M. Franck, 24 N.Y.U. J. Int'l L. & Pol. 199 (1991). See generally Hyde, The Concept of Legitimacy in the Sociology of the Law, Wisc. L. Rev. 387, (1983).

[n.21]. See generally, Louis Henkin, How Nations Behave 92, (2ed. 1979). Emphasizing the potency of law in the absence of physical coercion orsanctions, Prof. Henkin cites the

example of obedience rendered by the US armed forces, Congress and the President to the orders of the Supreme Court "whose single marshal is unarmed," Id. at 92.

[n.22]. Oscar Schachter, Towards a Theory of International Obligation, 8 Virg. J. Int'l L. 300, 300-304 (1968). On obligations in international law see generally 1 Oppenheim's International Law 8-13 (9th ed. Jennings & Watts, eds. 1992); Trimble, International Law, World Order and Critical Legal Studies, 42 Stan. L. Rev. 811 (1990). See generally Brierly, The Basis of Obligation in International Law, (Lauterpacht & Waldock, eds. 1958).

[n.23]. Henkin, supra note 25, at 93.

[n.24]. H.L.A. Hart explaining the concept of Primary rules, draws attention to the binding force of Primary rules originating in their acceptance by the majority--Hart, Concept of Law (Oxford, 1961), at 77-88. Henkin, supra note 25, at 92-93. Elucidating that law often reflects rather than imposes order, Professor Henkin argues that it is inaccurate to say that States behave according to the law only when they want to and thus international law in the absence of sanction is ineffective. Acceptance by nations to behave in accordance with the law is a reflection of the law's correspondence with the perceptions of nations of how they ought to behave. Nations would behave in that manner, Henkin argues, even in the absence of a law to that effect. To that extent, enforcement or sanctions become irrelevant to ensuring compliance. Consent in itself would not engender a sense of obligation in the absence of a rule which validated the legitimacy of such consent. Of importance to jurisprudence is the basis of the rule which validates the legitimacy of consent. See Fitzmaurice, The Foundation of The Authority of International Law and The Problem of Enforcement, 19 Mod. L. Rev. 1, 8-9 (1956).

[n.25]. See the debate on "soft law" and "hard law" in the international context, A Hard Look at "Soft Law," 82 A.S.I.L. Proc. 371(1988). Chinkin, The Challenge of Soft Law: Development and Change in International Law, 38 I.L.C.Q. 850 (1989). Gruchalla-Wesierki, A Framework for Understanding Soft Law, 30 McGill L.J. 37 (1984). Professor Weil, explaining the co-existence of soft law with hard law writes about the evolution of rules from a sub- normative stage into hard law. He illustrates the point by reference to international law, "much of international law is for example 'soft law' commonly respected by states, and maybe moreover, a step towards the formulation of more precise conventional rules or customary law" Weil, Towards Relative Normativity in International Law?, 77 A.J.I.L. 413, 414-415 (1983). What is critical to appreciate in the transition of a rule from a sub-normative level to a binding norm is the acceptance of the rule and the subsequent consent to its enforcement.

[n.26]. Supra note 15. The argument for TRIPS being that the appropriate forum is based to a great extent on GATT dispute settlement's capacity to ensure compliance through its sanction mechanism. The theoretical focus enforcement of a rule is the essence of its binding nature. See generally Eichmann, "Any system of international law is only as strong as its mechanism of enforcement." Procedural aspects of GATT Dispute Settlement: Moving Towards Legalism, 8 Int'l Tax & Bus. Law. 38 (1990).

[n.27]. See Austin, The Providence of Jurisprudence Determined, ed. H.L.A. Hart (London, 1954), On the analytical school in general see also Roscoe Pound, Jurisprudence (St. Paul, Minn., 1959), II, 68-79, 132-163; R.W.M. Dias, Jurisprudence, 5th ed. (London, 1985); Julius Stone, Legal System and Lawyers Reasoning (Stanford, 1964) at 62-97.

[n.28]. Province of Jurisprudence Determined, pp. 14-18. For Austin's discussion of imperfect or deficient laws see Id. at 28. See also Raz, The Concept of a Legal System (Oxford, 1980), pp.12-13.

[n.29]. In keeping with his approach, Austin denied to attribute to international law the character of law--preferring to term it as "positive morality" a form of norms or "rules set or imposed by opinions" Id. at 1, 142, 201.

[n.30]. See generally, R.S. Summers, "The New Analytical Jurists," 41 New York Law Quarterly, 861 (1966); Edgar Bodenheimer, "Modern Analytical Jurisprudence and The Limits of its Usefulness," 104 University of Pennsylvania Law Review 1080 (1956); Hart, Analytical Jurisprudence in Mid- Twentieth Century," 105 University of Pennsylvania Law Review. See also H.L.A. Hart, The Concept of Law (Oxford, 1961); Hans Kelsen, The Pure Theory of Law and Analytical Jurisprudence," 55 Harvard Law Review 44, (1941); Kelsen, General Theory of Law and State, trasnl. A. Wedberg (Cambridge, Mass., 1949).

[n.31]. See generally Terry Nardin, Law, Morality, and the Relations of States (Princeton, 1983) pp. 125-129.

[n.32]. Hart, Concept of Law, pp. 80-81.

[n.33]. Terry Nardin, supra note 31, at 126.

[n.34]. Nardin, supra note 31.

[n.35]. Gerald G. Fitzmaurice, General Principles, p. 45.

[n.36]. See Raz, supra note 32. Austin's principle of efficacy postulated that the existence of a legal system depended on its efficacy. Id. at 33. See also, Terry Nardin, supra note 31, at 126.

[n.37]. Kelsen, The Pure Theory of Law, pp. 211-213. By validity Kelsen implies the existence of the norm; thereby implying its binding nature. "By validity we mean the specific existence of norms. To say that a norm is valid is to say that we assume its existence--or what amounts to the same thing we assume that it has binding force for those whose behavior it regulates," Kelsen, The General Theory of Law and State, p. 30.

[n.38]. Nardin, supra note 31, at 130-33. See also Hart, Concept of Law (Oxford 1961), pp. 77-88. Elucidating that the key to jurisprudence lies in the interdigitation of two categories of rules--Primary and Secondary, Hart explains that the binding force or legitimacy of Primary rules arises from its acceptance by the majority. Acceptance is a critical condition for the existence of Primary rules.

[n.39]. The move initially engineered by a private trade consortium gathered tremendous momentum with various governments agreeing with their arguments. See, e.g., Intellectual Property Committee, Keidanren, UNICE, Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities (1988); Turnbull, Intellectual Property and GATT: TRIPS at the Midterm, 1 J. Proprietary Rights 9, 1989; R. Benko, Protecting Intellectual Property Rights: Issues and Controversies (1987). See also For an excellent analysis of the roles, interests, and strategies of the various interest groups, both private and government, Reichman, Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection 22 Vand. J. Transnat'l L. 747, (1989) [hereinafter Opportunities and Risk]. For a more recent account see Reichman, The TRIPS Component of GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market, 4 Ford-ham Intell. Prop., Media & Ent. L. J. 171 (1993) [hereinafter Competitive Prospects].

[n.40]. See, Kastenmeier and Beier, International trade and Intellectual Property: Promise, Risk and Reality, 22 Vand. J. Transnat'l L. 285, pp. 292- 296 (1989); See also Suggestions by the United States for Achieving The Negotiating Objective, GATT-Doc. MTN. GNG/NG11/W14 (20 Oct. 1987). Developments of this annex shall be without prejudice to other complementary initiative in the World Intellectual Property Organization. . . " The revision submitted by US in 1988 however reflected a fairly

radical flavor. Suggestion by the United States for Achieving the Negotiating Objective, Revision, GATT, Doc. MTN.GNG/NG11/W/14 Rev. 1 (Oct. 17, 1988). The position of the European Community on this issue was unequivocal--"The results will strengthen both the GATT and other multilateral fora, including the World Intellectual Property Organization," Guidelines and Objectives Proposed by the European Community for the Negotiation on Trade-Related Aspects of Substantive Standards of Intellectual Property Rights, GATT--Doc. MTN. GNG/NG11/W26 (July 7, 1988). The position taken by Japan was in keeping with this trend; see e.g., submission by Japan, MTN.GNG/NG11/W/17/Add. 1 (Sept. 23, 1988). The Developing Countries, as manifest in the position of India and Brazil, were quite emphatic about their preference for WIPO as the appropriate forum. For a fairly accurate summation of the developing countries position see, Reichman, supra note 39, at 761-766.

[n.41]. See e.g. Ministerial Declaration of Punta del Este of September 20, 1986, GATT--Doc. Min. Dec. No. 86-1572 (Sept. 20, 1986) reprinted in 25 I.L.M. 1623 (1986) "These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters." Mid-Term Review Agreements, April 21, 1989, MTN. TNC/10, Reprinted in Law and Practice Under the GATT, III.A.5, p. 20. "The negotiation should be conducive to a mutually supportive relationship between GATT and WIPO as well as other relevant international organizations." Final Act embodying the results of the Uruguay Round, MTN/FA of December 15, 1993 reproduced at 33 I.L.M. 81 (1994) "Desiring to establish a mutually supportive relationship between the WTO and World Intellectual Property Organization (WIPO) as well as other relevant international organizations."

[n.42]. Kastenmeier and Beier, supra note 40, at 290-292.

[n.43]. Id. at 291.

[n.44]. Hanns Ullrich, GATT: Industrial Property Protection, Fair Trade and Development in GATT or WIPO? New Ways in the International Protection of Intellectual Property 142 (Beier and Schricker eds. 1989) [hereinafter GATT or WIPO].

[n.45]. Reichman, supra note 39, at 758-59. See also, Oddi, The International Patent System and Third World Development: Reality or Myth?, 1987 Duke L.J. 831. Dissatisfaction with WIPO's ineffectiveness as a forum to end the impasse which ensued after the failed Paris Revision Conference, aggravated by the continued intransigence of the Developing countries, motivated the movement away from WIPO to GATT as the negotiating forum. The added attractiveness of GATT was the trade linkage, which would afford an effective sanction mechanism. However the basic framework of reference for the negotiating groups was a WIPO administered intellectual property regime.

[n.46]. See generally, Frank Emmert, Intellectual Property in the Uruguay Round--Negotiating Strategies of the Western Industrialized Countries, 11 Mich. J. Int'l L. 1137.

[n.47]. Draft Treaty, supra note 3.

[n.48]. Supra note 10.

[n.49]. Abbott, GATT as a Public Institution: The Uruguay Round and Beyond, 18 Brooklyn J. Int'l L. 33 (1992) [hereinafter Public Institution]. For the extension of the framework to GATT's dispute settlement system see, Abbott, The Uruguay Round and Dispute Resolution: Building a Private-Interest System of Justice, Colum. Bus. L. Rev. 111 (1992) [hereinafter Private-Interest System].

[n.50]. The dichotomies which have been most influential in fashioning the literature are "Legalism v. Pragmatism" and "Rule Oriented v. Power Oriented" analysis. The former is evidenced in the works of Dam, The GATT: Law and International Economic Organization 3-5 (1970); Hudec, GATT or GABB? The Future Design of the General Agreement on Tariff and Trade, 80 Yale L. J. 1299, 1299-1300 (1971); O. Long, Law and its Limitations in the GATT Multilateral Trade System 61-64 (1985); Hilf, Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures, [hereinafter Comparitive Analysis], in Petersmann & Hilf eds. The New GATT Round, supra note 1; Davey, Dispute Settlement, supra note 8; Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 Cornell Int'l L.J. 145, 151-153 (1980); Eichman, Moving Towards Legalism, 8 Int'l Tax & Bus. L. 38 (1990). For a more recent update see Mora, A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes, 31 Colum. J. Transnat'l L. 103, 128-131 (1993) [hereinafter GATT With Teeth]. For the latter, Power Oriented v. Rule Oriented view see Jackson, The Crumbling Institutions of Liberal Trade System, 12, J. World Trade L. 98 (1978); Jackson, Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT, 13, J. World Trade L. 1 (1979). For a more recent approach see, Jackson, Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round, in Petersmann & Hilf eds., The New GATT Round, supra note 1, at pp. 7-10; see also Petersmann, Settlement of International and National Trade Disputes Through the GATT: The Case of Anti-Dumping Law in Adjudication of International Trade Disputes in International and Economic Law 77, 79-82 (Petersmann & Jaenicke eds. 1992). [hereinafter International Trade Disputes].

[n.51]. Abbott, Private-Interest System, supra note 49, at 113.

[n.52]. M. Damaska, The Faces of Justice and State Authority: A comparative Approach to the Legal Process (1986). Damaska builds upon the ideas advanced by Bruce Akerman, and uses the opposing approximations of social systems to examine the fundamental precepts which undergird the systems of justice in different national systems.

[n.53]. Abbott, Public Institution, supra note 49, at 34.

[n.54]. Abbott, Private-Interest System, supra note 49, at 114.

[n.55]. Id. at 114.

[n.56]. Id. at 144.

[n.57]. Id. at 115.

[n.58]. Id. at 115.

[n.59]. Id. at 115-119. He draws attention to GATT's extremely limited executive agenda. GATT's legislative process is negotiation based; and GATT's dispute settlement regime is triggered by complaints of infractions, which arise from the nullification or impairment of benefits of the complainant alone. The procedure and remedies are largely controlled and fashioned by the parties to the dispute. Id. at 116.

[n.60]. Id. at 117

[n.61]. Supra note 56. On the different functions of a dispute settlement regime see supra note 8.

[n.62]. The objective being to facilitate the actualization of the private interests of the members, the dispute settlement process acts to maintain the basic framework within which the members interact, Abbott, Private-interest System, supra note 49, at 122. Disputes which arise under Articles XXII & XXIII of GATT 1994, supra note 1, or under other arrangments of the WTO, supra note 1, will be governed by the Understanding On

Rules and Procedures Governing The Settlement of Disputes, GATT Doc. MTN/FA, Part II, Annex II, of December 15, 1993. [hereinafter "The Understanding"], reprinted in 33 I.L.M. at 112. Id. at 3.3, states "The prompt settlement of situations in which a Member considers that any benefit. . . are being impaired by measures taken by another Member is essential" Paragraph 3.7 "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution acceptable to the parties. . . is clearly to be preferred" Id. at 115.

[n.63]. Abbott, Private-interest system, supra note 49, at 123-124.

[n.64]. Hudec, Public International Economic Law: The Academy Must Invest, 1 Minn. J. Global Trade 6 (1992). While admitting to the relative success of the dispute settlement mechanism, Hudec injects a note of caution "GATT's dispute settlement machinery has been celebrated as a major victory. . . and rightly so. But on the tree of legal evolution GATT's adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute resolution ceremonies practiced among primitive societies." Id. at 6.

[n.65]. Petersmann, Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT, in The New GATT Round, supra note 1, at 324. It has been the source of constant scrutiny and change, beginning with the amendment in 1955 of Art. XXII and Art. XXIII to the agreements of 1958, 1966, 1979, 1982, 1984, 1989 and 1993. With the exception of the 1989 and 1993 changes the texts of the rest are reproduced in Appendix III of The New GATT Round, Id. at 535. For the text of 1989 modifications, see Dispute Settlement, Midterm Review Agreements, April 21, 1989, GATT Doc. MTN.TNC./11, reprinted in Kenneth & Simmonds, Law and Practice Under the GATT III. A.5 p. 23 [hereinafter Midterm Review]. For the text of 1993 modifications see Understanding, supra note 62.

[n.66]. Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 Cornell Int'l L. J. 145, p. 149. "The main reason for establishing an international regulatory structure is to create pressure that will influence government to act in conformity with certain agreed objectives. This objective exists prior to, and independent of, the regulatory structure." Id. at 149. [hereinafter Unfinished Business]. See also Hilf, Comparative Analysis, supra note 50, at 299. Hilf elucidates that the system was intended to reach credible and prompt solutions for the "realization of GATT rules, settlement of disputes and the prevention of future violations." Though he refers to the dispute procedures operating to create consensus on rules which are unclear, he points out that the scope of such function is limited. Id. at 299.

[n.67]. Hudec, Id. at 150.

[n.68]. Eichmann, supra note 50, at 39; See generally, Roesseler, The Scope Limits and Function of GATT Legal System, 8 World Econ. 287 (1985). This controversy is reflected in the Legalist v. Pragmatist, and the Rule Oriented v. Power Oriented debate, see supra note 50. For Hudec's view on this debate see Hudec, supra note 67 at 151. At the heart of this controversy lies the conflict of a private interests patterning with strong public interest community tendencies. See Abott, Public Institution, supra note 49, at 34-35.

[n.69]. Petersmann, International Trade Disputes, supra note 50, at 85.

[n.70]. See e.g. Jackson, World Trade and the Law of GATT (1969), pp. 164- 166. Detailing 19 clauses which provide for obligatory consultations: II:5, VI:7, VII:1, VIII:2, IX:6, XII:4, XVI:4, XVIII:7, XVIII: 12, XVIII:16, XVIII:21, XVIII:22, XIX:2, XXII, XXIII, XXIV:7, XXV:1, XXVII, XXVIII:1, XXVIII:4 and XXXVII:2. Additionally, 7 provisions which provide for "compensatory withdrawals or suspension of concessions," For an update see Appendix III in Petersmann & Hilf, The New GATT Round, supra note 1.

[n.71]. See Davey, Dispute Settlement, supra note 8, at 54. The complexities created by this balkanization has lead to demands for a more unified text for the whole process to cohere. See 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 (Dicke & Petersmann eds. 1988). This complaint was partly addressed in the Uruguay Round, see Understanding, supra note 62 paragraph 1. The rules and procedures enunciated in the Understanding will apply to all disputes brought under any of the agreements covered by the WTO. Id. at 1.1.

[n.72]. Davey, Dispute Settlement, supra note 8 at 54. For the text of Art. XXII & XXIII see GATT, supra note 1.

[n.73]. Supplementary procedures adopted on November 10, 1958, BISD 7th Supp. 24; Procedure adopted in 1966, BISD 14th Supp. 18; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted November 28, 1979, BISD 26th Supp. 210--[hereinafter 1979 Understanding]; Ministerial Declaration Adopted on 29th Nov. 1982, BISD 29th Supp. 13; Action by Contracting Parties on Dispute Settlement Procedures, November 30, 1984, BISD 31st Supp. 9. For the changes introduced in the Uruguay Round see, Midterm Review, supra note 65 and The Understanding, supra note 62.

[n.74]. GATT, supra note 1, Art. XXII. The decision adopted in 1958 BISD 4th Supp. 24, which regulates proceedings under this, stipulates that consultations under XXII:2 must be brought to the attention of the Director-General. Between 1948-1986, this provision has been resorted to on only ten occasions. See J.G. Castel, The Uruguay Round and Improvements to the GATT Dispute Settlement Rules and Procedures, 38 Int'l & Comp. L. Q. 834, 835 (1989).[Hereinafter Improvements].

[n.75]. Mora, GATT With Teeth, supra note 50, at 117.

[n.76]. GATT supra note 1, Art. XXIII. Petersmann forwards the view that there are six different types of complaints which can be entertained under this article. See, Petersmann, Settlement of International and National Trade Disputes Through GATT: The Case of Anti-Dumping Law in International Trade Dispute, supra note 50, at 86.

[n.77]. GATT, supra note 1, Art.XXIII:1(a). Violation complaints refer to direct abridgement of GATT obligations," any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired as the result of (a) the failure of another contracting party to carry out its obligation under this Agreement." Violational complaints are open to the presumption of being "prima facie nullification and impairment." More importantly, only violational complaints of this form are entitled to a legally binding ruling of the GATT Council. Only 14 complaints between 1948-1991 have been non-violational. See Petersmann, Violational-Complaints and Non-Violational Complaints in Public International Trade Law, 34 Ger. Y.B. Int'l L.175, 200 (1991).

[n.78]. GATT, supra note 1, Art. XXIII:1(b). Non-violation complaints refer to situations where a party is adversely effected by the actions of another party even if the actions of the latter does not violate any GATT obligation. Non-violation complaints arise whenever "any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective is being impeded as a result of. . . (b) the application by another contracting party of any measure whether or not it conflicts with the provision of this Agreement." Non-violational complaints cannot result in legally binding rulings. See Petersmann, Id. at 86.

[n.79]. GATT, supra note 1, Art. XXIII:1(c). The wide scope of Art. XXIII is understood by the fact that it was intended to be more than simply a treaty enforcing provision. It provides for dispute avoidance, dispute settlement and for rule enforcement. See Mora, supra note 50 at 117. See also Davey, supra note 8, at 57.

[n.80]. Davey, supra note 8. He observes that Art. XXIII outlines a system for processing disputes without establishing a formal procedure. Id. at 57.

[n.81]. GATT, supra note 1, Art. XXII: 1 & XXIII:1.

[n.82]. Art. XXII &XXIII provide for consultation to expand from the bilateral to plurilateral and finally to the multilateral level (XXII:2, XXIII:2). Consultation is provided with a view to identifying the context of disputes, to preempt disputes and finally to seek settlement of the disputes. See, Hilf, EC and GATT: A European Proposal for Strengthening the GATT Dispute Settlement Procedures, in GATT and Conflict Management: A Transatlantic Strategy for a Stronger Regime 63, 74 (Rode ed., 1990). Conciliation and good office procedures, which can be resorted to in the context of Art. XXIII, are rarely preferred. Petersmann is of the view that this is because of the preference of the disputing parties for a legally binding demarcation of their respective GATT rights and obligations. See Petersmann supra note 76; International Trade Disputes, at 89.

[n.83]. In consonance with tradition, Contracting Parties refers to contracting parties to the Agreement acting collectively. GATT, supra note 1, Art. XXV.

[n.84]. GATT, supra note 1, Art. XXIII:2. The GATT Council was created in order to address issues that cropped up between annual meetings of the Contracting Parties. It meets once a month and is empowered to act on behalf of the Contracting Parties on almost all matters. Its decisions are appealable to the contracting parties acting as a group. BISD 9th Supp. (1961). See Davey, supra note 8, at 55.

[n.85]. GATT, supra note 1, Art. XXIII:2.

[n.86]. Only States have standing under GATT. Individuals, persons or corporations, have to move through their governments.

[n.87]. The practice of creating panels which took root in the early 1950s (panels were first established in 1952), has evolved as standard practice in Art. XXIII disputes. See generally, Hudec, The GATT Legal System and World Trade Diplomacy (1990), pp. 66-83. Panel procedures are summarized in the 1979 Understanding, supra note 73.

[n.88]. See, 1979 Understanding supra note 73, at 16.

[n.89]. Davey, supra note 8 at 58. Both the establishment of Panels and their functioning, areas insufficiently addressed in the Tokyo Round, have been the subject of major changes in the Uruguay Round.

[n.90]. Interested third parties have a right to be heard.

[n.91]. 1979 Understanding, supra note 73, at 17.

[n.92]. 1979 Understanding, supra note 73, at 21. The consensus rule for adopting the report has been successfully used by losing parties to block or delay extensively the adoption of panel reports. See Davey, supra note 8, at 60.

[n.93]. See Castel, Improvements, supra note 74, at 838. See also Mora, GATT With Teeth, supra note 50, at 124.

[n.94]. The DISC Case is a standard reference point to highlight the system's failure. See Hudec, Reforming GATT Adjudication Procedures: The Lessons of the DISC Case, 72 Minn. L. Rev. 1143, 1457 (1988). "[o]bservers view the DISC case as the largest and most conspicuous failure in the history of GATT's litigation procedure." Id. at 1443-44. See also Jackson, The Jurisprudence of International Trade: The DISC Case in GATT, 72 Am. J. Int'l L. 747 (1978).

[n.95]. See Hudec, Adjudication of International Trade Disputes 11-23 (1978). Hudec describes and analyzes the problems which confronted the panel process.

[n.96]. The proceedings and agreements of the Tokyo Round on dispute settlement were adopted in the 1979 Understanding, supra note 73. See generally, GATT, The Tokyo Round of Multilateral Trade Negotiation (1979).

[n.97]. The 1979 Understanding, supra note 73 and its Annex, Agreed Description of the Customary Practice of GATT in the Field of Dispute Settlement, BISD 26th Supp. 210, for the first time codified the procedures that had been customarily employed in dispute settlement proceedings. See Mora GATT With Teeth, supra note 50 at 122. See also Julia Bliss, GATT Dispute Settlement Reform in the Uruguay Round: Problem and Prospects, 23 Stan. J. Int'l L. 31, 39 (1987).

[n.98]. "Viewed from outside the GATT's historical and institutional context, the Tokyo Round results will appear to be a rather timid response to the threat of deteriorating international discipline." Hudec, Unfinished Business, supra note 66 at 158. For analysis of the Tokyo Round, see generally Jackson, GATT Machinery and the Tokyo Round Agreements, in Trade Policy in the 1980s, 159 (W.R. Cline ed., 1983); Hudec, Unfinished Business, supra note 66; Davey, Dispute Settlement, supra note 8; Mora, GATT With Teeth, supra note 50; D. deKieffer, GATT Dispute Settlement: A New Beginning in International and US Trade Law, Nw. J. Int'l L. & Bus. 317 (1980).

[n.99]. Mora, GATT With Teeth, supra note 50, at 122.

[n.100]. See Phillip R. Trimble, International Trade and the "Rule of Law," 83 Mich. L. Rev. 1016, 1019 (1985) (Book Review). The principle role of the dispute settlement system was the subject of exhaustive discussion with the US strongly pressing for a legalistic approach as compared to the views of EC and Japan who favored a diplomatic approach. See Julia Bliss, supra note 97, at 39.

[n.101]. 1979 Understanding, supra note 73, at 22 provides for the complaining party to "ask the Contracting Parties to make suitable efforts with a view to finding an appropriate solution," Id. at 22.

[n.102]. 1979 Understanding, supra note 73, at Annex 4.

[n.103]. Davey, Dispute Settlement in GATT, supra note 8, at 65. This perception persevered in spite of a dramatic increase in the number of disputes brought under the GATT forum. See Hudec, Disputes Settlement, in Completing the Uruguay Round 180 (J. Schott ed., 1990).

[n.104]. See Hufbauer & Schott, Trading for Growth: The Next Round of Multilateral Trade Negotiations 79 (1985).

[n.105]. Waincymer, GATT Dispute Settlement: An Agenda for Evaluation and Reform, 14 N.C.J. Int'l & Com. Reg. 81, 111 (1989). See also Davey, Dispute Settlement, supra note 8, at 65.

[n.106]. Mora, GATT With Teeth, supra note 50, at 127. See also Waincymer, Revitalizing GATT Article XXIII--Issues in the Context of the Uruguay Round, 12 World Competition: L. & Econ. Rev. 5, 30-31 (1989).

[n.107]. Davey, supra note 92.

[n.108]. Eichmann, supra note 50, at 66.

[n.109]. Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, BISD 33rd Supp.19, at 27. See generally Patterson & Patterson, Objectives of the Uruguay Round, in The Uruguay Round: A Handbook on the Multilateral Trade Negotiations 7-13 (Finger & Olechowski eds., 1987). See also, Hilf, Settlement of Dispute in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures, in The New GATT Round, supra note 1, at 285.

[n.110]. The result of the proceedings are embodied in a lengthy document: The Understanding, supra note 62.

[n.111]. Midterm Review, supra note 65.

[n.112]. Hudec, in Transcript of Discussion Following Presentation by Kenneth W. Abbott, Colum. Bus. L. Rev. 151 (1992). See also Mora, supra note 50, at 136.

[n.113]. See Eric Canal-Forgues & Rudolf Ostrihansky, New Developments in the GATT Dispute Settlement Procedures, J. World Trade 67 (1990). See also Eichmann, supra note 50.

[n.114]. The Members of the WTO are to apply the provisions of GATT 1994 definitively and not provisionally. See Amelia Porges, supra note 1. See also Jackson, Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round in The New GATT Round, supra note 1, at 11-19.

[n.115]. Supra note 62.

[n.116]. The Dispute Settlement Body [hereinafter DSB] is established under the mandate of the Agreement establishing the WTO, supra note 1. Art IV:3 "The General Council

shall convene--to discharge the responsibilities of the DSB." This unification is in sharp contrast to Tokyo Round's emphasis on diversification of the procedures.

[n.117]. The Understanding, supra note 62, at 2.1.

[n.118]. Id. at 4, 5.

[n.119]. Id. at 5.1. The parties to the dispute have the option to resort to these techniques at any stage of the proceeding; even after the panel process has commenced. Id. at 5.3. The Director-General is affirmatively authorized to encourage these means "with a view to assisting Members to settle a dispute." Id. at 5.6.

[n.120]. Unless otherwise agreed upon by the parties to the dispute, request for consultation must be responded to within ten days and good faith negotiation should commence within 30 days of the request. Failing this the panel phase will commence at the request of one of the parties. The Understanding, supra note 62, at 4.3.

[n.121]. The Understanding, supra note 62, at 25 provides for parties with clearly defined disputes to resort to arbitration. Their only obligation in such a situation is to notify all Members of their decision to arbitrate. See also Abbott, Private Interest System, supra note 49, at 126.

[n.122]. Abbott, Id. at 128.

[n.123]. The Understanding, supra note 62, at 6.1. Though some of the Tokyo Round codes provided for the right to a panel process, this was not provided for in proceedings under Art. XXIII. This will considerably reduce the delays experienced in the establishment of panels, see Rosine Plank, An Unofficial Description of How a GATT Panel Works and Does Not, J. Int'l Arb. 53, 63-65 (1987).

[n.124]. The Understanding, Id. at 7.1. If the parties fail to agree on the terms of reference within 20 days the provisions laid down in 1 will automatically apply.

[n.125]. The Understanding, Id. at 8.7. If the parties to the dispute fail to arrive at an agreement over the composition of the panel, the Director General in consultation with the Chairman of the Dispute Settlement Board will appoint the panelists. Paragraph 8.1

read with 8.2 and 8.4 clearly reflect the preference for neutral experts as panelists and not necessarily governmental panelists.

[n.126]. The Understanding, 12. The panelists in consultation with the parties are to fix a schedule for the panel process, preferably within a week. Id. at 12.3. The panel period from the time of its composition to the submission of its reports to the parties is not to exceed 6 months and in the case of urgency, 3 months, Id. at 12.8.

[n.127]. The Understanding, Id. at 15.2. Some scholars have expressed apprehension that "the interim review would allow the parties to a dispute to inject their private concerns into the panels deliberations," Abbott, Private- Interest System, supra note 49, at 134.

[n.128]. The Understanding, Id. at 16.4. Within 60 days of the submission the panel report is to be adopted unless the parties to the dispute manifest their intention to appeal or DSB decides by consensus not to adopt the report. Thus the report will be automatically adopted unless there is consensus against its adoption. This reverses the current presumption which requires consensus for adopting a report.

[n.129]. The Understanding, Id. at 17.1 mandates the establishment of a Standing Appellate Body of seven persons. The Appellate Body will be constituted of persons of "recognized authority, with demonstrated expertise in law." Id. at 17.3. Appeal will however be confined only to issues of law, 17.6, and it can be made only by parties involved in the disputes, 17.4.

[n.130]. The Understanding, Id. at 17.14. The Appellate Report is to be adopted unless there is a consensus that it should not be adopted. This must be within 30 days, failing which the adoption is automatic and unconditionally binding upon the parties. Of interest is the tight time schedule; unless otherwise agreed upon by the parties, the entire time schedule between the formation of a panel to adoption of its report or appeal should not exceed 9 months and in the case of appeals 12 months. Id. at 20.1.

[n.131]. Many scholars entertain the view that this hiatus between the executive and the judicial institution without a legislative forum to strike a balance could seriously endanger the underlying political cohesion of the WTO. See, e.g., Abbott, supra note 49, at 142.

[n.132]. Non-compliance with panel recommendations have been one of the most serious failings of the GATT Dispute Settlement regime. See, GATT Dispute Settlement Stymied

by Non-Implementation of Reports, GATT Newsletter, Focus at 12-13 (May-June 1991). See also Mora, supra note 50, at 153.

[n.133]. The Understanding, supra note 62, at 21.1. Within 30 days of being adopted the concerned Member is to notify the DSB of its intentions with reference to compliance. If compliance is impracticable within this period, the concerned Member must comply within a reasonable period of time. This period is to be approved by the DSB or agreed upon between the parties within 45 days of the report being adopted or agreed upon through binding arbitration within 90 days from date of the reports adoption.

[n.134]. The Understanding, Id. at 21.6. Within 6 months of adoption the issue of compliance is automatically placed on the agenda of the DSB. Thereafter it shall continue to be on the agenda until the matter is resolved. Paragraph 21.5 provides that disputes regarding the sufficiency of measures taken to comply with the ruling will be resolved through recourse to the panel process.

[n.135]. The Understanding, Id. at 22.1 provides that failure to comply will lead to a phase of mandatory negotiation between the parties in order to arrive at a mutually acceptable compensation. If this is not achieved within 20 days, the aggrieved party is authorized to request suspension of trade obligations and other concessions against the noncomplying party.

[n.136]. See, e.g., Petersmann in International Trade Disputes, supra note 50, at 91.

[n.137]. Mora, supra note 50, at 159.

[n.138]. The Understanding, supra note 62, at 17.1.

[n.139]. Abbott, Private-Interest System, supra note 49, at 117.

[n.140]. Abbott, Private-Interest System, supra note 49, at 142. Professor Abbott is of the opinion that the "the underlying problem of political cohesion in GATT has now been underestimated." Id. at 142.

[n.141]. Hudec, supra note 112, at 155. Professor Hudec refers to this as an "anomaly," Id. at 155-56.

[n.142]. See supra text accompanying notes 122-135.

[n.143]. Hudec, supra note 112, at 55. Drawing attention to the capacity of the Congress to rectify a wrong or politically expensive decision; characterizing it as the "legislative filter."

[n.144]. Consensus voting would require the winning party to support the vote for non-adoption. This is highly unlikely to happen. See Hudec, Id. at 155-56.

[n.145]. "Wrong Cases" is a dispute the resolution of which would adversely impact the entire normative structure of GATT and its dispute settlement process. It was an argument developed and introduced by Professor Hudec. See Hudec, Unfinished Business, supra note 66, at 159, 166. See also Jackson, The Crumbling Institutions of the Liberal Trade System, 12. J. World Trade L. 93, 98-101 (1978).

[n.146]. This is a serious possibility between parties with asymmetrical economic strength. Economic sanctions will be brought to bear by the aggrieved parties alone. In an asymmetrical situation if the delinquent party is more powerful it can choose to ignore the threat of economic sanctions; the aggrieved party could be worse off by the sanction. In a statistical decade-by- decade analysis, Hudec and others quantitatively show that "as a group the more powerful members of the GATT comply less well with the demands of GATT law and legal process than do the weaker countries as a group." Hudec, Kennedy & Sgarbossa, A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989, 2 Minn. J. Global Trade 1 (1993) [hereinafter Statistical Profile].

[n.147]. Abbott, Private-Interest System, supra note 49, at 143.

[n.148]. Abbott, Private-Interest System, supra note 49, at 148. "[T]he unavoidable difficulty of enforcing compliance in particular cases might be better dealt with by a candid "political filter" . . . one that would come into effect somewhat earlier in the process before the community so clearly had its back to the wall." Id. at 148.

[n.149]. Seventy-five percent of all complaints were resolved satisfactorily; more importantly the positive results in terms of legal rulings partial or full satisfaction with the outcome was 100%. Statistical Profile, supra note 149 at 33. See also Davey, supra note 8, at 62. Davey strikes a note of caution against overestimating the systems success.

[n.150]. A large part of these activities resulted from the actions of individual European States. See, Statistical Profile, Id. at 18.

[n.151]. Hudec, Statistical Profile, Id. at 33. He believes that those who administered the institution were seeking to strengthen the institution and install confidence in its ability; to that end the cases were pre-selected and shepherded to result in successful resolution.

[n.152]. See Hudec, supra note 95, at 14, 21-23.

[n.153]. Hudec, Id. at 14-21.

[n.154]. Hudec, Statistical Profile, supra note 151. See also Hudec, World Trade Diplomacy, supra note 1, at 187-88.

[n.155]. The number of complaints slipped from 53 in the first decade to 7 in the second decade, increasing slightly to 32 in the third. Hudec, Statistical Profile, Id. at 18.

[n.156]. Hudec, supra note 95, at 21-23.

[n.157]. Hudec, World Trade Diplomacy, supra note 1, at 208.

[n.158]. Davey, Dispute Settlement, supra note 8, at 63.

[n.159]. Hudec, supra note 95, at 214. See also Mora, GATT With Teeth, supra note 50, at 120.

[n.160]. Hudec, Id. at 21.

[n.161]. Hudec, Statistical Profile, supra note 146, at 18.

[n.162]. Hudec, Statistical Profile, Id. at 18. The number of complaints filed increased to 115 from 7 in the 1960s.

[n.163]. Some scholars have attributed this increase in litigation to the improvements of the Tokyo Round activities. See, e.g., Mora, GATT With Teeth, supra note 50 at 125. See also Hudec, Dispute Settlement, in Completing The Uruguay Round 180, 182 (Schott ed., 1990).

[n.164]. Hudec, Statistical Profile, supra note 146, at 28. He notes that the successful ruling in violation cases drop from 100% in the first three decade to 83% in the fourth decade.

[n.165]. Hudec, Statistical Profile, Id. at 32. Analyzing the reasons for cases which were either withdrawn or abandoned, Hudec points to increased incidence of "negative withdrawal," i.e. withdrawal brought about through pressure.

[n.166]. Hudec, Id. at 28, 33. The confidence of the governments in the institution culminated in hard cases being brought before it. This led to high visibility adjudication which were objective and principle based, resulting in hard decisions politically which were unpalatable. Id. at 33.

[n.167]. The US, between 1948-1989 has had highest rates of non-compliance with GATT panel rulings. This is primarily due to the political costs involved. "One of the reasons legal failures have increased is that legal ruling have become more objective and less power sensitive." Hudec, Statistical Profile, Id. at 75.

[n.168]. US, Canada, EC, Australia and Japan account for 73% of all complaints between 1948 and 1989, as compared to 19% by the developing countries. Hudec, Id. at 47.

[n.169]. Davey, Dispute Settlement, supra note 8 at 79-80. The economically weaker nations have generally been browbeaten or bullied into withdrawing or not pressing charges. "During the forty-two year period, developing countries' complainants withdrew twice the percentage of complaints that developed countries did, 48% to 24%. Developing complainants also clearly fared worse in obtaining settlement agreements." Hudec, Statistical Profile, supra note 146, at 76.

[n.170]. Hudec, Id. at 146.

[n.171]. Art. 64, Agreement On Trade Related Aspects Of Intellectual Property Rights, Including Trade in Counterfeit Goods, [hereinafter TRIPS Agreement] MTN/FA, Part II, Annex 1C Part V.

[n.172]. Kastenmeier & Beier, supra note 40, at 292-96.

[n.173]. For example, with reference to the subject matter of protection or the duration of protection whether for copyright, patent or trademark, the provisions are fairly clear. See, e.g., TRIPS Agreement, Art. 12, 14, 15, 27, and 33.

[n.174]. See, e.g., TRIPS Agreement, Art. 41(2)--"Procedures concerning the enforcement of intellectual property shall be fair and equitable," or Art. 53(1), the provision wherein on providing the competent authorities of each Member country responsible for intellectual property protection be provided with proper security to discharge their functions or, Art. 30 which prohibits unreasonable restrictions on the patent rights conferred by the Agreement. Each of these provisions are amenable to conflicting interpretation.

[n.175]. WIPO supra note 3.

[n.176]. The objective of WIPO is "to promote the protection of intellectual property throughout the world through cooperation among States. . . " Art 3(i) WIPO, supra note 1. WIPO became a specialized agency of the UN in 1974, further establishing its communitarian character. See generally, Ulrich Joos & Rainer Moufang, Report on the Second Ringberg-Symposium, in GATT or WIPO, supra note 44.

[n.177]. Paris Convention for Protection of Industrial Property, March 20, 1883, last revised, Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305. For a detailed study of the Paris Convention see Bogsch, The First Hundred Years of the Paris Convention for the Protection of Industrial Property, 1983 Indus. Prop. 191-244. See also Bodenhausen, Guide to the Application of the Paris Convention for the Protection of Industrial Property as Revised at Stockholm in 1967 (1968).

[n.178]. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised Paris, July 1971, 828 U.N.T.S. 221. For an analysis of the convention see Bogsch, The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic Works, 22 Copyright 291 (1986). See also Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (1987).

[n.179]. Madrid Agreement Concerning the International Registration of Marks, April 14, 1891, last revised at Stockholm, July 14, 1967, 828 U.N.T.S. 389. The WIPO administers

the Madrid Protocol as well, Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, Madrid, June 27, 1989, WIPO Doc. MM/DC/27 Rev. (1989). This convention is not comparable with the other major conventions, such as Paris and Berne.

[n.180]. Reichman, Opportunities and Risks, supra note 39, at 753.

[n.181]. Kastenmeier & Beier, supra note 40, at 305-306. See also text accompanying supra note 39-46.

[n.182]. See Oman, Trade and Copyright: The Trade and Copyright "Interface" and the Enhancement of Copyright Protection Through Trade Initiatives, reprinted in. 1 Albany Law School Annual Conference on Intellectual Property, Global Competition: The Role of Intellectual Property, 8-3, 8-10 to 8-12. (1988).

[n.183]. Draft Treaty, supra note 3.

[n.184]. Id. at preamble.

[n.185]. Id. The treaty anticipates the possibility of disputes between States over the nature and scope of the obligations created under TRIPS. Given the volatility of the issue such disputes may be common initially. See, Reichman, supra note 39 Competitive Prospects, at 258-260.

[n.186]. Contracting Parties with reference to the Draft Treaty implies State or an intergovernmental organization which is Party to this treaty. Draft Treaty, Id. at Art. 1(i).

[n.187]. Draft Treaty, Id. at Art. 2(1). It posits four alternative with reference to the definition of multilateral treaties. It ranges from all inclusive alternative A to alternative B which would restrict its scope to only intellectual property treaties, to alternative C which would extend its reach to TRIPS and finally to alternative D which would confine its application only to WIPO administered treaties.

[n.188]. Draft Treaty, Id. at Art. 2(2).

[n.189]. Draft Treaty, Id. at Art. 2(3). This provision casts the treaty in a strong private interest community mold. It allows tremendous latitude for private agreements in the shadow of the Treaty which may have eroding effect on the basic structure uniformity which the Treaty seeks to promote.

[n.190]. Prior to requesting the panel procedure the parties to the dispute are required to enter into good faith consultation to resolve the dispute, Draft Treaty, Id. at Art. 3. In contrast to the GATT dispute settlement system, the time frame for the consultation process is more flexible--parties have to reply within 60 days and commence good faith consultation within 90 days unless they agree a different schedule--Id. at Art. 3(2). This is quite relaxed compared to GATT's 20 days to reply and 30 days limit to start consultations-- The Understanding, supra note 62, at 4.3.

[n.191]. Draft Treaty, Id. at Art. 4 (1).

[n.192]. Draft Treaty, Id. at Art. 7(1). Once the parties decide to resort to arbitration, other procedures under this treaty automatically cease.

[n.193]. Draft Treaty, Id. at Art. 7(2).

[n.194]. Draft Treaty, Id. at Art. 7(3).

[n.195]. Draft Treaty, Id. at Art. 5(1). The panel is established upon request automatically.

[n.196]. The relevant provisions provide for the establishment of a panel within 2 months from the date that the Director General sends to the defendant a copy of the request asking him to convene a panel, unless the parties agree to a different time frame. Draft Treaty, Id. at Art 5(5). Within 2 months of its designation the panel is to be convened by the Director General, Id. at Art. 5(5)(d).

[n.197]. Draft Treaty, Id. at Art. 5(6)(b).

[n.198]. Draft Treaty, Id. at Art. 5(6)(c). The panel is however empowered to make such suggestions at the request of the parties to the dispute.

[n.199]. Draft Treaty, Id. at Art. 5(8)(a).

[n.200]. The Director General transmits the report of the panel to the parties for action. Draft Treaty, Id. at Art 5(9)(a).

[n.201]. Draft Treaty, Id. at Art 5(9)(c).

[n.202]. Under Art. 9(1) the Union is to have an assembly of the Contracting Parties. Art. 8 provides that the Contracting Parties to the Treaty are to be constituted into a Union.

[n.203]. Draft Treaty, Id. at Art. 5(10)(d).

[n.204]. Draft Treaty, Id. at Art. 5(10)(d).

[n.205]. Draft Treaty, Id. at Art. 6.

[n.206]. See text accompanyingsupra note 53-58.

[n.207]. It has an independent vision of its objective; promotion of a universal standard with reference to the nature and scope of the obligations engendered under international treaties and rules.

[n.208]. See supra note 56 for characteristics of a private interest justice system. This is so only to the extent that the parties to the dispute have tremendous leeway with reference to mode as well as out of system settlements such as would be possible through consultation or arbitration. As long as these settlements do not erode the basic uniformity of the obligations which WIPO seeks to promote it does not fit the bill for a completely private interest system of justice.

[n.209]. Reichman, Competitive Prospects, supra note 39, at 255.

[n.210]. See, e.g., Abdulqawi Ahmed Yusuf, Transfer of Technology, in International Law: Achievements and Prospects 691, 694-695 (M. Bedjaoui ed., 1991).

[n.211]. See Reichman, Opportunities and Risks, supra note 39, at 795-96. He characterizes it as a paradox:

"On the one hand, the industrialized countries that subscribe to free-market principles at home want to impose a highly regulated market for intellectual goods on the rest of the world, one in which authors and inventors may 'reap where they have sown.' On the other hand, the developing countries that restrict free competition at home envision a totally unregulated world market for intellectual property goods, one in which 'competition is the lifeblood of commerce.'" Id. at 795-96.

[n.212]. Rajaram Dasgupta, Subsidies, Patents, and Market Access in Dunkel Draft, Econ. & Pol. Wkly. (India), May 1, 1993, at 855-58. The true social cost may outweigh the benefits in the initial phase of implementing the TRIPS Agreement.

[n.213]. Reichman, Competitive Prospects, supra note 39, at 177.

[n.214]. Reichman, Competitive Prospects, supra note 39, at 259-260.

[n.215]. The political costs could be enormous on both sides. The sequels elicited by the mere mention of relinquishing use of unilateral actions for achieving intellectual property objectives cast light on the political sensitivity of the issue in industrialized countries. See, e.g., GATT: US Law Will Take Precedence Over GATT Agreement, (BNA) Int'l Trade Daily (June 17, 1994). The rising decibel level of those who see the TRIPS Agreement as an unfair trade off manifests their ire and the resulting political costs of adherence for developing countries governments. See, e.g., Int'l Trade Rep. (BNA) 2095 (December 15, 1993) for reactions in India to TRIPS. See also, Brazilian Officials Attempt to Deter Special 301 Actions, Int'l Trade Rep. (BNA) 288 (Feb. 23, 1994), for reactions in Brazil to the TRIPS.

[n.216]. See supra text accompanying note 65-68.

[n.217]. See supra text accompanying note 140-148.

[n.218]. Hudec, Statistical Profile, supra note 146 at 5. Commenting on the high rate of litigation in GATT he forwards the explanation that "defendant governments find it difficult to settle once the complaint is launched." Id. at 5.

[n.219]. See Gadbaw & Gwynn, Intellectual Property Rights in the New GATT Round, in Intellectual Property Rights: Global Consensus, Global Conflict? 47 (Gadbaw &

Richards eds., 1988). This suspicion is partly supported by the experience of the developing countries with the dispute settlement mechanism. See supra notes 168-169.

[n.220]. See supra text accompanying notes 21-25.

[n.221]. Draft Treaty, supra note 3, Preamble. See also supra text accompanying note 179-184.

[n.222]. Reichman, Opportunities and Risks, supra note 39, at 761-762.

[n.223]. See supra text accompanying notes 141-148.