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I The Legal Framework

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2 Legal Issues in US-EC Trade Policy: GATT Litigation 1960–1985

Robert E. Hudec

2.1 Introduction

Recent years have witnessed a sharp growth of friction between the United States and the European Community in the realm of trade policy. In few areas has this friction been as apparent as in the growing volume of GATT litigation between the two parties.

In one respect, the large number of GATT lawsuits can be viewed merely as a symptom of more fundamental substantive problems of the relationship. Increasingly, however, the litigation itself has come to be seen as a cause of conflict.

The European Community has repeatedly accused the United States of misusing GATT legal procedures, charging that many U.S. lawsuits have no real legal foundation but are instead primarily political gestures made to satisfy domestic policy needs. The United States, in turn, has accused the Community of trying to subvert GATT litigation procedures—and indeed the integrity of GATT law itself—by resisting many of the suits brought by the United States.

This paper examines US-EC GATT litigation from its inception in the early 1960s, until the end of 1985. The paper is divided into two main sections. Section 2.2 presents what is called a quantitative profile of US-EC litigation: Who has sued whom? How often? Over what issues? The US-EC litigation is compared with all other GATT litigation that took place during the same period.

Section 2.3 then analyzes the US-EC litigation in its historical and political context. It seeks to identify the factors underlying the litigation

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N.B. GATT lawsuits are cited by their number in appendix A.

behavior of the two parties, and offers a prediction of how these factors are likely to affect US-EC legal relations in the future.

2.2 A Quantitative Profile

2.2.1 The Sample

The General Agreement on Tariffs and Trade (GATT) is an international agreement that establishes rules of behavior for governments in the area of international trade policy. The General Agreement also contains an adjudication procedure that permits member countries to bring "lawsuits" about violations of those rules. Since the GATT came into force in 1948, over 130 such GATT lawsuits have been initiated.[1]

This section of the paper examines the 80 GATT lawsuits filed from 1960 to the end of 1985—the time during which the European Community has been a full participant in GATT legal affairs.[2] It focuses particularly on the 26 suits between the United States and the European Community during this period. (Appendix A presents a table listing all 80 lawsuits; Appendix B contains a separate list of the 26 US-EC lawsuits.)

2.2.2 The Parties

Table 2.1 lists the number of appearances that each GATT member has made in GATT lawsuits from 1960 to 1985, listing separately the number of appearances as a defendant and as a plaintiff. Table 2.2 provides a detailed list of exactly which other parties were suing, and being sued by, the five most active GATT litigants—the EC, the United States, Canada, Japan, and Australia.

The following data in tables 2.1 and 2.2 seem significant:

1. Almost one-third of the GATT lawsuits during this period (26 of 80) were lawsuits *between* the United States and the EC.

2. In addition to the 26 lawsuits between the U.S. and the EC, 45 of the remaining 54 lawsuits involved either the U.S. or the EC as one of the parties. Only 9 of the 80 lawsuits involved neither.[3]

3. The EC and the U.S. litigated more frequently with each other than with others. The United States accounted for 26 percent of the complaints filed against other GATT countries, but 53 percent of the complaints filed against the EC. The EC accounted for only 11 percent of the complaints filed against others, but 56 percent of the complaints filed against the U.S. The same disproportionate shares appear when one examines the activity of the U.S. and the EC as defendants. The EC was the target of 30 percent of the complaints filed by other GATT countries, but was the defendant in 57 percent of the U.S. complaints. The U.S. was the target of only 13 percent of the complaints filed by

Table 2.1 Appearances as Defendant and Plaintiff

Defendants		Plaintiffs	
EC[a]	33[b]	U.S.	31
U.S.	15[c]	EC[d]	15
Japan	9	Canada	7
Canada	7	Australia	6
U.K.	3	Brazil	3
Spain	2	Japan	2
Greece	1	Chile	2
Denmark	1	Hong Kong	2
Norway	1	India	2
New Zealand	1	Uruguay	1
Finland	1	Israel	1
Switzerland	1	Korea	1
Jamaica	1	Argentina	1
Brazil	1	Poland	1
Chile	1	Nicaragua	1
		South Africa	1
		Finland	1
Total	78	Total	78
Plus one case with 10 defendants, and one case submitted jointly by the 2 parties		Plus one case with 15 plaintiffs, and one case submitted jointly by the 2 parties	

[a]Includes complaints both against the EC and against member states:

EC itself	27
France	3
Italy	1
Belgium	1
Netherlands	1

[b]17 by U.S.

[c]8 by EC.

[d]There were no separate complaints by individual EC member states.

others, but 53 percent of the EC complaints were brought against the United States.

4. The US-EC litigation is *not* distinctive in terms of each party's role as plaintiff and defendant. The United States sued the EC twice as often as the EC sued in return (17 to 8), but the United States also sued other GATT countries twice as often as it was sued by them (14 to 7). The EC likewise played the same defendant-oriented role in GATT litigation with other countries, suing other GATT members less than half as often as it was sued by them (7 to 16).

5. With or without the EC, the United States was responsible for initiating a very large share of the GATT lawsuits during this period. It accounted for 40 percent of all complaints since 1961, with the EC

Table 2.2 **Opposing Parties**

	As Plaintiff, Sued:		As Defendant, Sued by:	
1. EC	U.S.	8	U.S.	17
(49[a])	Canada	3	Australia	5
	Chile	1	Canada	3
	Finland	1	Chile	2
	Switzerland	1	Korea	1
	Japan	1	Brazil	1
			Hong Kong	1
			Argentina	1
			Japan	1
			(10 countries)	1
		15		33
2. United States	EC	17	EC	8
(47[a])	Japan	5	Canada	3
	Canada	3	Japan	1
	Greece	1	India	1
	Denmark	1	Poland	1
	Jamaica	1	Nicaragua	1
	Spain	1		
	U.K.	1		
	Brazil	1		
		31		15
3. Canada	U.S.	3	U.S.	3
(14)	EC	3	EC	3
	Japan	1	South Africa	1
		7		7
4. Japan	U.S.	1	U.S.	5
(11)	EC	1	Australia	1
			Canada	1
			India	1
			EC	1
		2		9
5. Australia	EC	5		
(6)	Japan	1		
		6		

[a]Total includes one case submitted jointly by the U.S. and the EC.

a distant second at 21 percent. Excluding all lawsuits between the U.S. and the EC, the United States still accounted for a 26 percent of the rest, with Canada next at 13 percent.

6. With or without the U.S., the European Community has been the target of a very large share of the lawsuits during this period. The EC or a member state has been the defendant in 42 percent of the GATT lawsuits since 1961, with the United States a distant second at 20 percent. Excluding suits between the EC and U.S., the EC was the

defendant in 30 percent of the remaining cases, with Japan next at 17 percent.

Summing up, it would seem that the United States and the European Community each had a rather pronounced legal tendency—legal aggressiveness in one case, and legal vulnerability in the other. It is perhaps no surprise, therefore, that the two parties litigated with disproportionate frequency when dealing with each other.

2.2.3 The Volume of Litigation over Time

Table 2.3 presents a year-by-year breakdown of GATT lawsuit activity since 1960. The total number of all GATT lawsuits filed in the year is given in the first column of numbers. The following six columns give a breakdown of the litigation activity of the United States and European Community during each of those years.

When GATT litigation is viewed over time, the following significant patterns emerge:

Table 2.3 GATT Lawsuits, by Year

Year	All Cases	All v. U.S.	U.S. v. All	U.S. v. EC	All v. EC	EC v. All	EC v. U.S.
1960	none						
1961	2	—	—	—	—	—	—
1962	3	—	3	2	2	—	—
1963	1[a]	—	—	[a]	—	—	[a]
1964–1969	none						
1970	4	—	3	—	1	—	—
1971	—	—	—	—	—	—	—
1972	4	—	3	2	2	—	—
1973	4	1	3	3	3	1	1
1974	2	—	—	—	1	—	—
1975	1	—	1	—	—	—	—
1976	4	—	2	2	3	1	—
1977	3	1	1	—	1	—	—
1978	6	1	1	—	3	1	1
1979	4	—	2	—	1	—	—
1980	6	2	1	1	2	—	—
1981	5	2	1	1	3	1	1
1982	15	1	9	6	9	2	—
1983	7	4	1	—	—	5	3
1984	6	1	—	—	2	2	1
1985	3	2	—	—	—	2	1
Total	80	15	31	17	33	15	8

[a]The 1963 case was the joint US-EC submission known as the "Chicken War."

1. The volume of US-EC litigation has been increasing, but so has the volume of GATT litigation in general. There were only 3 US-EC lawsuits in the 1960s, followed by 9 in the 1970s, and then 14 in the six years 1980–85. Other GATT litigation followed roughly the same rising curve—3 in the 1960s, 23 in the 1970s and 28 in the six years 1980–85.

2. The unequal distribution of plaintiff and defendant roles noted in the previous section occurred mainly in the period before 1980. In that period, the U.S. filed nine complaints against the EC while the EC filed only two in return. The same imbalance occurred, for both the U.S. and the EC, in their litigation against other GATT members during this period. In the years before 1980, the U.S. enjoyed a 10:1 plaintiff/defendant ratio while the EC suffered a rather galling 1:8 ratio.

3. Since 1980, the plaintiff/defendant ratios of both the U.S. and the EC have become more balanced. The ratio in US-EC litigation in the 1980s has been only 8:6 in favor of the United States. In GATT litigation against other countries, the U.S. ratio has actually fallen into deficit (4:6), while the EC ratio has risen to an almost equal balance (6:8).

4. The single most striking change in the years after 1980 has been the emergence of the EC as a GATT plaintiff. Having filed only 3 GATT lawsuits in the years 1960–80, the EC filed 11 lawsuits in the years 1981–85.

2.2.4 Subject Matter

Having examined which GATT countries were suing which other countries and when, we now turn to the question of what they were fighting about. Tables 2.4 and 2.5 present two sorts of data pertaining to the subject matter of these lawsuits.

Table 2.4 presents a breakdown of disputes according to the product area affected by the trade policy measure in question.[4] Disputes are divided into three broad categories: (1) complaints about measures that affect trade in agricultural and fishery products; (2) complaints about measures that affect trade in industrial and mining products; (3) complaints about trade measures of a general character that have, in the case at hand, no particular product focus or effect.

The significant data in table 2.4 appear to be the following:

1. Of all the GATT lawsuits from 1960 to 1985, 54 percent of the complaints (43 of 80) involved trade in agricultural products.

2. The European Community has been the target of 58 percent of all lawsuits involving agricultural products (25 out of 43).

3. The percentage of agricultural complaints in litigation against the EC is twice as high as the percentage in litigation against other GATT countries. Litigation against other GATT countries involves agricultural trade measures only 38 percent of the time. Litigation against the EC,

Table 2.4 Subject Matter, by Product Area

Grouping of Cases[a]	Agricultural & Fishery		Industrial & Mining		General	
	No.	%	No.	%	No.	%
All Cases (80)	43	54	27	34	10	13
All v. EC (33)	24	73	5	15	4	12
U.S. v. EC (17)	13	76	1	6	3	18
Other v. EC (16)	11	69	4	25	1	6
All v. U.S. (15)	6	40	6	40	3	20
EC v. U.S. (8)	3	38	3	38	2	25
Other v. U.S. (7)	3	43	3	43	1	14
All v. Other (30)	12	40	16	53	2	7
EC v. Other (7)	2	25	4	63	1	12
U.S. v. Other (14)	6	43	7	50	1	7
Other v. Other (9)	3	33	6	67	0	0
Unclassified (2)	2	100	—	—	—	—

[a]The term "Other" in the Grouping of Cases column means all other litigants except the EC and/or the U.S.

on the other hand, involves complaints about agricultural trade in 73 percent of the cases.

4. Lawsuits over agricultural trade measures are clearly the reason why the EC is the GATT's most frequent defendant. In disputes not involving agricultural products, the EC has been sued no more often than the U.S.—nine times each.

5. The volume of "agriculture" lawsuits against the EC is not due to any peculiarity of US-EC litigation. Other governments accounted for 44 percent of the agriculture lawsuits against the EC (11 of 25), and agriculture complaints represented an almost equally high percentage of their total complaints against the EC as did the agricultural complaints of the United States—69 percent to 77 percent. Everyone, it seems, had special problems with EC agriculture.

In sum, table 2.4 points the finger for most of the EC's litigation problems at agricultural policy—meaning, of course, the EC's Common Agricultural Policy (CAP). The data also show that the litigation-generating effect of the CAP is general, and not merely a peculiar U.S. reaction.

Table 2.5 presents a breakdown according to the type of trade policy measure being complained about.[5] Disputes are divided according to three basic types of policy measure: (1) complaints about subsidies,

including both export subsidies and domestic production subsidies; (2) complaints about tariffs, including EC variable levies; (3) complaints about nontariff barriers, including both border measures and internal measures, and both quantitative and tax-type measures.

Table 2.5 also contains a final column that examines the extent to which discrimination has been a ground of complaint. Since trade barriers involving discrimination will already have been counted in the Tariff and Nontariff Barrier categories, the Discrimination category is separated from the other totals by being presented in parentheses in the column to the far right.

The data in table 2.5 is less striking, but the following points may be noted:

1. Subsidies accounted for an important share of litigation against the EC (13 of 33 complaints—39 percent), but were only a negligible factor in the lawsuits against other GATT members during this period (3 of 45 complaints—7 percent). Of the 13 subsidy complaints against the EC, 10 involved agriculture.[6]

2. Subsidy complaints were an even larger share of U.S. complaints against the EC—8 of 17, or 47 percent.

3. The importance of subsidies led to further analysis of subject matter which revealed another phenomenon that cannot be shown on

Table 2.5 **Subject Matter, by Policy Measure**

Grouping of Cases	Subsidies		Trade Barriers				Discriminatory Element[a]	
			Tariff		Nontariff			
	No.	%	No.	%	No.	%	No.	%
All Cases (78)[b]	16	21	12	15	50	64	(18	29)
All v. EC (33)	13	39	3	9	17	51	(6	30)
U.S. v. EC (17)	8	47	1	6	8	47	(1	11)
Other v. EC (16)	5	31	2	13	9	56	(5	45)
All v. U.S. (15)	2	13	3	20	10	67	(5	38)
EC v. U.S. (8)	2	25	2	25	4	50	(1	17)
Other v. U.S. (7)	0	0	1	14	6	86	(4	57)
All v. Other (29)	1	3	6	21	22	76	(7	25)
EC v. Other (29)	0	0	2	33	4	67	(0	0)
U.S. v. Other (14)	1	7	2	14	11	79	(4	30)
Other v. Other (9)	0	0	2	22	7	77	(3	33)
Joint Submission	—	—	1	100	—	—	—	—

[a]The number and percentage of "Trade Barrier" complaints containing a clear leagl attack on a discriminatory element.

[b]Two cases (1, 68) could not be classified by type of measure.

table 2.5. The United States suffered almost exactly the same percentage of complaints as did the EC (6 of 16, or 38 percent) against what might be called *anti*subsidy measures. Four complaints against the United States involved legal objections to some aspect of the U.S. countervailing duty law.[7] A fifth complaint involved a U.S. export subsidy on sales of wheat flour to Egypt, an act of retaliation against the EC wheat flour subsidy.[8] And finally, a sixth complaint involved a U.S. corporate income tax law called DISC, an export subsidy justified in part as a response to alleged export subsidies built into the "territorial" income tax systems of other countries.[9] It would seem, in short, that the U.S. response to subsidies caused as much irritation in other capitals as subsidies were causing in Washington.

4. Antisubsidy measures were the target of an even larger percentage of EC complaints against the U.S.—4 of 8, or 50 percent.

5. The fact that 51 out of 64 trade barriers complained about during this period were nontariff trade barriers is not unexpected. After the 1967 Kennedy Round tariff cuts, tariff levels have fallen so low that they are rarely used anymore as instruments of trade policy. The relative proportion of tariff and nontariff litigation between the U.S. and the EC is not out of the ordinary.

6. The number of discrimination cases is perhaps a bit lower than one might have expected, but not much. Many observers, the author included, have remarked on the declining respect for the MFN principle over the past 20 years. Evidently, however, governments have not been overly preoccupied with the problem. The total of 18 out of 62 trade barrier complaints—a bit over one quarter—is not an insignificant share, but neither is it very large.

7. Discrimination is almost nonexistent as a factor in the US-EC litigation. In only 2 of the 26 lawsuits between them was discrimination a major issue.[10] This is particularly surprising in view of the rather extensive discrimination practiced by the EC against the United States. Trade policy officials often call attention to the fact that, of all GATT countries, only the United States, Japan, Australia and New Zealand pay the full rates of the EC Common External Tariff anymore. Maybe so, but it does not seem to be bothering them very much.

8. Interestingly, 12 of the 17 discrimination complaints were made by "other" GATT countries. This tends to confirm the view often expressed in developed countries that discrimination is more dangerous for smaller countries than for the larger ones. At least smaller countries seem to react to it more vigorously when they end up on the wrong side.

Of these various findings pertaining to the type of policy measure at issue, the only ones of any real significance to the US-EC legal relationship are the first four. The number one substantive issue in GATT litigation between the U.S. and the EC has been subsidies and measures

responding to subsidies. These subsidy-related matters have been more prominent in US-EC litigation than in GATT litigation generally.

2.3 US-EC Litigation in Context

2.3.1 A Brief History of US-EC Litigation

Several threads run through the history of US-EC litigation from 1960 to 1985. The timing of the U.S. lawsuits is quite closely related to events in Congress, with a majority of the lawsuits occurring either just before the Congress was to vote on new trade legislation, or seemingly in response to demands made by the Congress when passing such legislation. The timing of EC lawsuits, in turn, seems most closely related to the volume and vigor of U.S. lawsuits, with an increase in EC lawsuits following each major increase in U.S. litigation. The one substantive issue that seemed to dominate litigation strategy on all sides was the ever-present EC Common Agricultural Policy.

Legal Actions in the 1960s

The 1960s opened with a lawsuit by Uruguay that produced a significant challenge to the Common Agricultural Policy. The first phase of the lawsuit was directed to all developed countries, including the member states of the EC, attacking any and all trade restrictions against Uruguayan exports. Uruguay then added a second set of issues by asking for a legal ruling on the conformity of the EC's Common Agricultural Policy (CAP) with GATT, and on the conformity of the variable levy in particular. The GATT panel hearing the complaint twice declined to rule on this second set of issues, saying that the contracting parties had considered the variable levy before and had been unable to come to a decision.[11]

Had the United States wished to challenge the legality of the CAP *in toto,* this would have been a good opportunity. Apparently, however, the United States was not willing to do so. There is no evidence that the United States gave any support to Uruguay's request for a ruling.

The first GATT legal complaints by the United States in the 1960s were a pair of 1962 complaints against France and Italy, attacking quantitative restrictions that were being maintained, without legal excuse, on products for which France and Italy had granted Dillon Round tariff concessions.[12] The two complaints were the first GATT lawsuits filed by the U.S. in six years. They appear to have been intended to demonstrate the U.S. administration's resolve in enforcing trade agreement rights, for both were filed just at the time when the U.S. Congress was considering major trade legislation that became the Trade Expansion Act of 1962.

The two 1962 complaints also had the secondary purpose of warning the European Community against further expansion of its Common Agricultural Policy. The primary focus in both suits were restrictions affecting processed food such as canned fruits—products that had not been included in the original variable levy system and for which GATT tariff bindings were still in force. The United States apparently wanted to demonstrate that it had no intention of surrendering its GATT rights on such products.

The complaint against Italy was settled at an early stage with a promise of liberalization on certain products. The French complaint could not be settled immediately, and so the United States asked for a panel decision ruling on its rights. A generally favorable ruling was made, but the panel asked the United States to defer its request for authority to retaliate pending another round of negotiations. The case was then settled with a promise by France of partial liberalization.[13]

The next major legal event of the 1960s was the celebrated "Chicken War" dispute.[14] The European Community had withdrawn all GATT tariff bindings on variable levy products. This was legally permitted, but the Community was required to pay compensation, in the form of tariff concessions on other products, for the legal rights being taken back. If other governments did not regard the compensation offered as adequate, they were free to restore the balance in their own way by withdrawing an equivalent number of their own concessions.

The Chicken War arose when the United States declined to accept the compensation offered for withdrawing the West German binding on poultry, and announced it would retaliate by withdrawing concessions of its own on $44 million worth of EC trade. The European Community contested the size of the retaliation, and this collateral dispute was submitted to a GATT panel. The United States then retaliated by withdrawing concessions of the amount determined by the panel—$26 million.

The real purpose of the Chicken War retaliation was to give a dramatic expression of U.S. displeasure with the level of protection adopted in the CAP on poultry. One can never be certain what impact such retaliation has had, because one cannot know what would have happened without it. From all visible signs, however, the retaliation had no effect at all. The European Community went about finishing the CAP and setting its support prices much as before, with levels of protection uniformly higher than the United States thought appropriate.

For the rest of the 1960s, US-EC legal relations remained quiet. This was part of a general lull in GATT legal affairs, for there were no GATT lawsuits of any kind during the years 1964–69. During these years, the United States directed its concerns about the CAP to the negotiating arena. It made a determined effort during the Kennedy Round to secure

some kind of legal ceiling on the level of protection in the CAP, repeatedly threatening to end the negotiations if such limits were not included. In the end, however, the United States did agree to go ahead with the industrial tariff cuts in the Kennedy Round, having received nothing more than a fig leaf in agriculture—the short-lived 1967 International Wheat Agreement.

Legal Actions in the 1970s

In the early 1970s, the United States brought a flurry of new GATT lawsuits. This new legal assault was intended partly as a foundation for another major piece of trade legislation—the Trade Act of 1974. But it was also a genuine effort to restore the effectiveness of GATT adjudication procedures by giving them work to do.

U.S. legal relations with the European Community took a bad turn early in the 1970s with a rather long skirmish over EC tariff preferences on citrus products in favor of Mediterranean suppliers.[15] The United States repeatedly protested the illegality of such preferences, but never formally demanded a legal ruling. The matter was eventually settled in 1973 with an agreement adjusting the seasonal tariff rates in a manner favorable to U.S. exporters. (It was about this time that U.S. and EC leaders reached a broad political agreement, known as the Casey-Soames agreement, in which the United States agreed to accept the general principle of EC preferential arrangements with the states of Africa and the Mediterranean.)

The first formal legal complaints against the European Community were two lawsuits filed in 1972. One involved temporary "compensatory taxes" that the European Community had placed on imported agricultural products to adjust for the effects of the monetary disturbances of the time.[16] The measures were acknowledged to violate GATT tariff bindings, and the Community promised prompt removal when conditions permitted. The United States repeatedly demanded a formal legal ruling, but the Community managed to delay GATT legal proceedings until the tax had been almost completely withdrawn, and the United States then agreed to drop the matter.

The other 1972 lawsuit was a renewal of the 1962 complaint against France.[17] The United States reopened the case by filing a formal request for authorization to retaliate, charging that France had not yet removed all of the quantitative restrictions found in violation. The retaliation proceeding was averted at the eleventh hour by an undertaking to remove the remaining restrictions.

The U.S. legal campaign evidently caused some irritation in Brussels, and it may also have raised some concern about the possibility of still further legal attacks upon EC policy. Prior to 1973, the European Community had responded to such "legalistic" forays by lecturing the United

States on the folly of seeking legal solutions to foreign trade problems. In 1973, however, the Community took up the legal sword itself. For the first time in its history, it filed a GATT lawsuit, charging that the newly enacted U.S. DISC law constituted a subsidy to U.S. exporters.[18] While it is impossible to document the suspicion, most GATT observers believed that the Community had filed the lawsuit primarily because it believed that U.S. legal attacks were getting out of hand, and that the United States needed a lesson in legal humility.

The United States was not chastened. It responded by filing three counterclaims against the Community—lawsuits against France, Belgium, and the Netherlands charging that the "territoriality" feature of their income tax systems had the same economic effects as DISC; if DISC was an export subsidy, said the United States, so were those tax laws.[19] The United States insisted that the four complaints be adjudicated as an ensemble by a single GATT panel; it also demanded that the panel include outside tax experts skilled enough to understand the issues of tax theory raised by the U.S. legal position. Thus began a long and tortured proceeding that did not end until 1981.

The United States took a fairly severe public relations beating throughout the history of the DISC cases. Everything the United States did was regarded as wrong by the majority of GATT countries. The U.S. legal position never had any support; DISC was a blatant subsidy, while territorial systems of income taxation were something that virtually every GATT government had employed since long before GATT existed.[20] The techniques used by the United States to support its legal claim were likewise roundly criticized. In the view of most GATT countries, the U.S. insistence on linkage of the cases was totally improper. The insistence on special experts was also much criticized, and, though it was not the only cause of delay (the Community itself delayed for long periods), it certainly did add to the delay substantially. The U.S. isolation continued after the panel finally reported in 1976. Although the panel reports found all four defendants equally guilty, most other governments agreed that the findings against the EC countries were in error and that only the DISC finding was correct. Standing alone, the United States insisted that all four findings must rise or fall together and persisted in this position for five years. In 1981, the United States finally accepted the majority view and agreed to a vaguely worded decision that was understood by everyone to set aside the adverse rulings on the French, Belgian, and Netherlands tax systems but not the ruling on DISC. In 1984, the United States repealed DISC and replaced it with a superficially more conforming law.

If the purpose of the DISC case had been to show up the less-than-perfect quality of U.S. legal compliance, it could hardly have worked better. But, however embarrassing the DISC case proved to be, it did

not slow the U.S. campaign to revive GATT dispute settlement procedures.

Part of the reason may have been a new factor that entered the picture shortly after the DISC case began. In 1974, the United States executive branch went to the U.S. Congress to obtain new negotiating authority for the Tokyo Round trade negotiations. One of the conditions Congress added was a new procedure, known as section 301, that was designed to compel the U.S. executive branch to enforce U.S. legal rights more vigorously than it had in the past.[21] Congress was no longer satisfied with a few demonstration lawsuits on the eve of each major trade law. It was now demanding a permanent, institutionalized permanent procedure that would create and maintain continual pressure for enforcement. Congress made clear that legislative approval of the Tokyo Round agreements would depend on a satisfactory record in the years ahead.

The pressures generated by section 301 proceedings yielded seven GATT lawsuits by the United States during the years of the Tokyo Round negotiations (1975–79)—three against Japan, two against the European Community, and one each against Canada and Spain.[22] Both complaints against the Community were filed in 1976. Both involved short-term trade measures in the agricultural sector, taken to alleviate surplus situations in product sectors benefitting from CAP price supports. One case involved a minimum-import-price regime for imported tomato products, and the other involved a mixing regulation requiring the use of surplus dairy products with imported animal feeds.[23] Significantly, the imported products being restricted in both cases were once again products on which GATT tariff bindings had remained in effect. In both cases, the restrictive measures were withdrawn before the GATT panel proceedings could be completed, but in both cases the proceedings were carried out to a formal decision anyway, and both measures were found in violation. The GATT panel agreed with the U.S. position that a formal legal ruling of illegality was appropriate in order to deter similar "hit-and-run" measures in the future.

In 1978, not long after the two 1976 complaints were decided, the European Community filed its second GATT complaint against the United States. It was a curious lawsuit. The United States had a quite strict countervailing duty law that had been partially suspended during the Tokyo Round negotiations in order not to prejudice negotiations for a new Subsidies Code. The suspension had expired before the end of the negotiations, and a crowded legislative calendar had delayed the U.S. Congress in passing a new law to extend it. As a consequence of the delay, several suspended investigations were suddenly in danger of triggering countervailing duties. In what appeared to be a warning of dire consequences if the suspension were not quickly renewed, the Community filed a formal GATT complaint charging that any imposition

of countervailing duties would constitute a nullification and impairment of GATT benefits under Article XXIII.[24] The legal grounds of the EC complaint were dubious because the U.S. law was pretty clearly covered by a reservation for pre-1947 mandatory legislation and had been used often before. The tone of the complaint was nonetheless quite demanding.

The threatening tenor of the EC's Article XXIII action introduced a new type of Community legal response that was to be seen fairly frequently in the coming years—a quick, sharp, and rather belligerent threat of retaliation, often listing the actual products.[25] Governments often make such threats for the purpose of providing tangible evidence of harm for friendly officials in the other government. On other occasions, such threats are understood as demonstrations to satisfy interests back home. But there is a thin line between such showcase threats and plain old-fashioned muscular diplomacy, and it was often difficult to tell which side of the line the EC was standing on. In either case, the Community was emerging from the defensive legal posture of its early years.[26]

Legal Actions in the 1980s

In 1979, the U.S. Congress passed major legislation approving and implementing all the trade agreements negotiated in the Tokyo Round. The price of its approval was a promise from the Executive Branch that there would be even more vigorous enforcement of GATT legal rights in the future.

To make sure that the promise was kept, Congress strengthened section 301 still further by increasing its scope, its retaliation authority, and its automaticity.[27] Congress also made it clear that it now wished to become a permanent partner in the business of trade policy, with the relevant congressional committees exercising more or less constant oversight over day-to-day affairs. Needless to say, enforcement of GATT legal rights would be a central focus of that oversight. The message of the 1979 legislation amounted to a demand for some quick GATT legal victories to prove the value of the legal rights gained in the Tokyo Round.

The climate within GATT had also become more conducive to litigation by this time. The pressure from the United States lawsuits in the early 1970s had brought about a general increase of government interest in GATT litigation. The Tokyo Round negotiations were followed up by the devoting of considerable time and effort to improving the GATT's litigation machinery. The results were significant—an extensive restatement of the Article XXIII panel procedure[28] and a series of new and more rigorous panel procedures for most of the Tokyo Round "Codes."[29] Encouraged by all this attention, GATT litigation

began to increase noticeably after about 1977. Although most of the initial increase was litigation other than US-EC lawsuits, it was inevitable that these forces would eventually have an impact upon the US-EC legal relationship as well.

Nothing very exciting happened during the first few years following the Tokyo Round. The United States initiated a legal proceeding against the Community in 1980 to challenge a new United Kingdom regulation on poultry processing that required foreign suppliers to comply two years earlier than domestic suppliers.[30] Although the new regulation seemed clearly in violation of both GATT Article III and the new Tokyo Round Standards Code, the United States eventually allowed the complaint to lapse when U.S. exporters reported that they had already learned to comply and were no longer concerned.

The European Community responded with a 1981 complaint charging that the United States had impaired GATT tariff concessions on Vitamin B-12, because of the way in which it had converted the tariff to a new valuation basis.[31] A GATT panel found that, although the U.S. mode of implementation had caused severe adverse trade effects, the method of tariff conversion had not been in violation of U.S. obligations. But the panel's report then went on to muddy the legal waters by suggesting that the United States should nonetheless modify its tariff anyway, voluntarily. The United States refused to comply with this suggestion, and the Community chose to regard U.S. inaction as a failure to abide by GATT obligations. The dispute still smolders.[32]

The relative legal quiet of these first years was deceptive because during this time a number of legal grievances against the European Community were working their way through U.S. internal procedures in Washington. Finally, in late 1981 the storm broke. Between December 1981 and July 1982, the United States filed seven GATT lawsuits against the European Community. Five concerned subsidies on agricultural products, one involved a renewal of the 1970–73 complaint about preferential tariffs on citrus products, and one involved an industrial trade problem—whether the EC's Value Added Tax (VAT) should be counted in calculating the price threshold for transactions subject to the new Tokyo Round Procurement Code. The seven complaints were:

Export Subsidy on Wheat Flour (Subsidies Code)
Export Subsidy on Pasta (Subsidies Code)
Export Subsidy on Poultry (Subsidies Code)
Production Subsidy on Canned Fruit and Raisins (Art. XXIII)
Export Subsidy on Sugar (Subsidies Code)
Preferential Tariff on Citrus Products (Art. XXIII)
Treatment of VAT in Price Calculations (Procurement Code)[33]

The sugar complaint was not pursued, and the poultry complaint evolved into a slow-moving series of discussions between the U.S., the EC, and Brazil. The other five complaints were pressed quite hard, resulting in long and often bitterly contested proceedings that eventually produced legal rulings by a GATT panel.

The legal claims in all five of the contested cases called for changes in EC policy that ranged from extremely difficult to politically impossible. The legal claims in the three agricultural subsidy cases attacked critical aspects of the CAP. The wheat flour case sought to establish legal limits on the amounts of CAP surplus production that could be disposed of via subsidized exports—limits that would have created impossible surplus disposal problems if the EC were to continue price supports, without production limits, at the high levels that had been considered politically necessary in the past. The pasta complaint sought to prevent, or at least seriously hinder, the Community from giving subsidies on exports of processed foods, a result that would have virtually destroyed the export markets of many EC food processors who, under the CAP, were being forced to pay extremely high prices for their raw materials. The canned fruit complaint would have caused similar effects on food processors selling within the EC market, for the complaint sought to bar subsidies to domestic producers for products whose EC tariff had been "bound" in previous GATT negotiations. This would have meant that local processors would have had to pay the full CAP prices for raw materials and then compete, without tariff protection, against imports made from raw materials at world prices.

The legal claims in the citrus and VAT cases were of similar proportions. The citrus complaint attacked preferential tariff advantages that were a key economic incentive holding Mediterranean countries inside the European political orbit. The VAT complaint made demands on the EC's own procurement policy which the EC insisted were impossible to meet.

All five of the panel decisions fell short of satisfactory resolution. The VAT decision was accepted but still appears to face great difficulty being implemented. In the other four cases, the panel reports were rejected by one of the parties and thus never became official GATT rulings.[34] The wheat flour panel was unable to reach a decision on whether EC wheat flour exports had exceeded the "equitable share" standard of Subsidies Code Article 10. The United States attempted, unsuccessfully, to override the panel report by persuading the full Committee of Subsidies Code signatories to make a finding of violation itself, and when this failed the U.S. blocked adoption of the panel's no-decision report. The panel in the pasta case issued a 4–1 divided report in which the majority found that the export subsidy on pasta products was prohibited by Article 9 of the Subsidies Code. The EC,

supported by several other governments, refused to permit adoption of the majority report. Both the canned fruit and citrus panels rendered unanimous rulings that the EC measures in question constituted non-violation nullification and impairment under GATT Article XXIII, but the EC blocked adoption of both these reports as well.

At the close of 1985, the net outcome of the five U.S. complaints remained unclear. The VAT complaint was alive, unsettled, and under discussion. There were some more positive signs of movement in the four other cases. The legal complaint in the wheat flour complaint seemed quite dead, but the EC was heard to claim that it was limiting its wheat and wheat flour exports to a specified percentage of the world marked (14 percent)—an assertion that sounded a good deal like a claim of compliance with some new "equitable share" standard (defined by the EC).[35] The canned fruit complaint appears to have been settled, without adoption of the panel report, on the basis of the EC's agreement to eliminate that part of the production subsidy which exceeded the difference between CAP prices and world prices for raw materials. The impasse of the citrus case caused the United States to retaliate unilaterally on pasta products (thereby snatching a bit of relief for the pasta case as well), but this action was then met by a counterretaliation from the EC.[36] As the year ended, both parties claimed to be making progress toward a negotiated solution that would settle both the citrus and pasta cases at the same time.

The years from 1981 to the end of 1985 found the United States occupied with carrying out the litigation started in 1981–82. These drawn out legal battles seem to have satisfied whatever political needs for GATT litigation the U.S. government might have had during this period. Following the 1981–82 complaints, the United States filed only one new GATT complaint up to the end of 1985, and that one was only a reopening of an earlier 1978 complaint against Japan.[37]

The European Community, however, was not too busy to respond. Between March 1983 and the end of 1985, the Community took seven legal actions against the United States—five conventional GATT lawsuits and two instances of retaliation. The five lawsuits were:

Import Restrictions on Printed Matter—the "Manufacturing Clause" (Art. XXIII)
Subsidy on Exports of Wheat Flour to Egypt (Subsidies Code)
Tariff Reclassification of Machine-Threshed Tobacco (Art. XXIII)
Ban on Steel Pipe and Tube Imports (Art. XXIII)
Countervailing Duty Action on Wine (Subsidies Code)[38]

The two retaliation actions were a 1984 action exercising compensation rights under Article XIX in response to a U.S. "escape clause" action

on specialty steels,[39] and the action mentioned above in response to unilateral retaliation by the United States in the Citrus case.[40]

Of the five GATT lawsuits filed by the European Community, three led to no decision. The pipe and tube case became moot, and the Egypt wheat flour and machine-threshed tobacco cases have not been prosecuted. The wine case also became moot when the law expired without having produced any new restrictions, but the EC nonetheless obtained a panel ruling that the law in question was inconsistent with the Subsidies Code. (Later, the United States would block acceptance of this ruling in retaliation for EC blockage of the several earlier panel rulings favorable to the U.S.). The Manufacturing Clause complaint also produced a panel ruling that the U.S. law was in violation of GATT, and here the Community followed up the decision by making a product-specific threat of retaliation if the U.S. Congress extended the law past its scheduled expiration in June 1986. (The law was later allowed to expire.)

In addition to these specific legal actions, the European Community made what appeared to be a major change of legal policy in 1984 when it adopted a procedure modeled after the infamous (in Community terms, anyway) U.S. section 301 procedure.[41] The new procedure, called the New Commercial Policy Instrument, permits private citizens to complain about GATT violations of other countries, and establishes a series of steps that could well force EC officials to respond with GATT complaints about such matters, in much the same fashion as section 301 does.

As the curtain comes down on the first 25 years of US-EC litigation, the final scene shows neither party in retreat from the legal wars of the early 1980s. Both the European Community and the United States remain clad in full legal armor, both seemingly prepared and waiting for bigger and better GATT litigation in the years to come. The Community's New Commercial Policy Instrument is reportedly about to yield its first GATT complaint.[42] Meanwhile, the U.S. Congress continues to grind out legislative proposals for stronger and stronger GATT enforcement procedures, and the executive branch has created a "strike force" looking for new GATT violations and a "war chest" to help induce discipline in subsidy matters.[43]

Both sides have agreed that the GATT dispute settlement is a problem that should be included on the agenda of any forthcoming round of GATT trade negotiations. From what has been seen so far, however, it is not at all certain that they have the same "problem" in mind.

2.3.2 The Underlying Reasons for US-EC Litigation

What explanation can be given for the explosion of difficult and contentious GATT litigation in the early 1980s? More important, what

does the experience mean about the likely course of future legal relations between the United States and the European Community? Will the United States continue to follow the aggressive litigation practices it has followed in the past? And what legal policy will the European Community follow in the years ahead?

The present section examines the factors behind the litigation just described, with an eye to answering these questions about the future.

The Experience of the United States

The one lesson that emerges most clearly from the history of the past 25 years is that GATT litigation has come to play an important role in maintaining political support for liberal trade policy in the United States. Throughout this period, the U.S. Congress has been willing to enact legislation authorizing trade negotiations and to resist most protectionist initiatives, but on each occasion the price for such liberal policies has been progressively more rigorous undertakings to enforce GATT obligations against other governments. The political importance of such enforcement mechanisms has reached the point where, in 1985, virtually every piece of new trade legislation introduced in Congress has contained some provision calling for more vigorous GATT enforcement.[44]

The political importance of enforcing GATT legal rights grows out of the public character of trade policy politics in the United States. Unlike arcane monetary policy issues, which are little understood, trade policy issues have a direct impact that is perceived by almost everyone. As a consequence, political leaders are held rather strictly accountable for what they do on trade policy matters. Leaders need little further justification for supporting protectionist positions, but they do need to justify support for liberal trade policies. The two concepts that work best as justifications in United States politics are "reciprocity" and "fair trade." Neither of these concepts ranks very high on the scale of economic rationality, but both have proved their effectiveness politically many times over. GATT legal enforcement happens to be an effective way for U.S. officials to demonstrate, in a politically credible manner, the existence of both reciprocity and fairness.

The reciprocity justification is simple. To explain why foreign producers should be given trade opportunities in the U.S. market, political leaders must show that similar opportunities have been given to U.S. producers in foreign markets. The first step is to show that promises of equal access have been obtained from other governments. The second step is to show that such promises are actually being carried out.

This second step has become a difficult hurdle in U.S. politics. Fact and myth have combined to create a fairly widespread belief that the U.S. executive branch fails to enforce most of the legal rights it receives

in trade negotiations—in order to maintain good political relations. GATT litigation is frequently used to answer these doubts. Although one or two lawsuits hardly proves anything about a government's attitude toward the hundreds of other enforcement issues that arise each year, they are nonetheless a useful symbol to back up declarations of good intentions. They give the executive branch something tangible to show to Congress and, perhaps more important, something tangible for Congress to show to its constituents.

The importance of GATT lawsuits in demonstrating reciprocity has grown considerably in the past two decades due to the increasing importance of nontariff barriers in world trade. Nontariff barriers cannot be traded for one another the way that tariffs can. There is no common measure, for example, by which to trade the relaxing of an unduly restrictive safety standard on baseball bats for limiting the scope of an overly broad countervailing duty law. The only credible form of reciprocity in nontariff barrier negotiations is the reciprocity that comes from each country's adherence to the same set of legal obligations pertaining to each nontariff barrier. Such rule-compliance reciprocity is difficult to demonstrate, however, because most nontariff barrier rules consist of prohibitions, and it is always difficult to demonstrate that a government is *not* doing something. Lawsuits tend to meet this problem by providing a tangible sort of evidence that a rule-enforcement mechanism does exist, and that the mechanism is working—at least this once.

In addition to providing a reciprocity justification, political leaders in the United States have also found it increasingly necessary to demonstrate that trade liberalization will take place only with respect to "fair" trade, and that U.S. producers will be protected from competition with various kinds of "unfair" trade. The primary source of such assurances has been the enactment of laws that stop unfair trade at the border, such as antidumping, antisubsidy, and similar anti-unfair trade remedies. In recent years, however, effective GATT regulation of subsidies has also been demanded, particularly as a political quid pro quo for curbing the excess rigor of the U.S. countervailing duty law. This is the reason for U.S. insistence on the Tokyo Round Subsidies Code, and for the fact, noted in section 2.2 of this paper, that subsidies have played such an important role in the history of GATT litigation to date.

The political role served by GATT litigation in the United States explains the general litigiousness of the United States during this period. More must be said, however, about the large number of legal claims against the EC, and in particular the rash of legal claims that precipitated the litigation impasse in the early 1980s.

The data in section 2.2 showed that the European Community was the most frequent defendant in U.S. lawsuits, and that measures af-

fecting agricultural trade were at issue in the great majority of these cases. In one respect, this was a perfectly understandable choice. Given a political need to litigate against trade barriers in order to demonstrate reciprocity, the EC's Common Agricultural Policy was an obvious target. Although the CAP was certainly not the only trade distortion in the world, it had three characteristics that made it politically the most visible: (1) it was large; (2) it involved agriculture;[45] and (3) it was new. Novelty was perhaps the most important characteristic, for the loss of something currently possessed is always the loss most keenly felt. The CAP presented a new threat to a wide range of existing and potential U.S. export markets—both markets inside the EC and third-country markets where surpluses created by the CAP were likely to be disposed of.

As politically irritating as the CAP was, however, it was not so completely damaging to U.S. interests that the U.S. government was prepared to risk a trade war over it. Many U.S. officials were persuaded by EC arguments that the CAP was the only cement that could hold the European Community together. For those who believed that the existence of a healthy European Community was of paramount importance to the long term security interests of the United States, acceptance of the CAP was thus a geopolitical necessity. Moreover, many sectors of the U.S. economy were benefitting from trade and investment opportunities created by the formation of the Community, and these sectors were also a political force of some importance opposed to risking trade war for the sake of lost agricultural exports. There were even some important agricultural interests on this side, for the CAP did not close all markets to exporters of U.S. agricultural products. United States agricultural exports to the Community actually grew, in round numbers, from $1 billion in 1960 to over $9 billion in 1980; these exports gave the United States a substantial export surplus in its agricultural trade with the Community throughout the period.[46]

The U.S. legal attacks on the CAP during this period can be understood only when viewed in terms of these opposing U.S. interests. The GATT lawsuits must be viewed, not as a simple attack on the CAP, but rather as an attempt to steer a middle course between the conflicting U.S. interests on this problem. The U.S. government was required to act vigorously in defending the agricultural interests injured by the CAP, for failure to do so would have been seen as a failure to protect U.S. reciprocity interests, and this would have caused a serious loss of political support for the liberal orientation of U.S. trade policy. If the U.S. government pressed too hard, however, it could very well damage the many other important economic and geopolitical interests benefitting from maintenance of the status quo. As the pressure mounted,

it would become clear that these latter interests were decidedly the stronger.

GATT litigation provided the sort of compromise policy instrument that was needed in this situation. GATT lawsuits could achieve some positive results for the threatened U.S. interests. Legal pressure could in fact accomplish something: It could sometimes deter protectionist extensions of the CAP that were not essential to its basic operations. Indeed, on occasion GATT lawsuits might even be able to induce some self-restraint on larger issues by creating "events" that would focus pressure of all kinds on the problem in question. Most of the GATT litigation in question was in fact a good faith effort to make use of GATT legal forces in this manner.

But—and this is the critical point—lawsuits were essentially a soft response. Despite their aggressive tenor, lawsuits themselves are just words; they merely threaten hostile action, putting off the actual implementation until the final decision is made, usually a year or two after the lawsuit is filed. Consequently, even on issues where the EC was unwilling to move at all, GATT lawsuits were a good way to buy time. They were aggressive enough to satisfy the political need for a reciprocity-protecting action, and yet did involve actual warfare. In other words, it would often make sense to file even a hopeless GATT lawsuit, because it would allow the U.S. government to avoid, for a while at least, the possibly damaging political reactions of those domestic interests who were going to be disappointed.

This second part of the process may well have been the most valuable in terms of maintaining an open and liberal trade policy relationship between the United States and the EC. If a fully grown CAP, 1985 edition, had been presented to U.S. agricultural interests in 1961, the shock would probably have been too great to permit maintenance of normal trade relations. As it happened, of course, the CAP was revealed only in stages. Its economic effects could thus be accepted in smaller bites, each time with an assurance that this was as far as the United States would go. GATT lawsuits helped to convey such an assurance in a politically credible manner. In some instances, such delaying effects would solve the problem by themselves, for time alone can sometimes lead injured parties to accept their losses and to lose interest in further complaints. But even where the hurt persisted, the delays would serve to put off the day of reckoning for a while, thereby allowing normal relations to continue in the meanwhile.

The U.S. GATT litigation during this period can be viewed in terms of this contain-and-retreat strategy. The first line of containment, once the U.S. government had accepted the basic design of CAP and its variable levy, was the effort during the early 1960s to persuade the

Community to limit the level of the variable levy, to keep support prices down, and to use production controls to manage supply. This was the objective of the Chicken War retaliation and of the Kennedy Round negotiating efforts. When this approach failed, U.S. officials drew two other "lines in the sand" to assure U.S. interests that the CAP would not be allowed to expand beyond the variable levy regimes protecting the European market. The second line of containment would be U.S. insistence upon preserving GATT bindings and other GATT disciplines on those products not covered by variable levy regimes (chiefly certain animal feeds and certain processed products). The third line would be insistence the effects of the CAP be limited to the EC market itself, so that they would not distort third-country export markets.

The effort to hold the second line was evident in many of the GATT lawsuits challenging EC measures inconsistent with GATT bindings and obligations. A number of relatively small legal victories during the 1970s permitted U.S. officials to claim that the line was being held. In the case of animal feeds, this was generally true, for exports rose throughout the period. For processed products, there were problems. Given the very high primary product prices created by the CAP, it was unrealistic to expect that the EC would agree not to assist food processors disadvantaged by those abnormal raw material costs. Consequently, when the issue was finally forced directly, in the canned fruit and pasta lawsuits of 1982, the U.S. legal claims were almost guaranteed to produce an impasse. And, of course, they did. By the end of 1985, it looked as though the United States was prepared to make a partial retreat, at least to the extent of accepting EC assistance to food processors that reduced raw material costs to world price levels.

The third line of containment, the defense of third-country markets against the subsidized export of EC surpluses, was initially to be held by GATT Article XVI:3 obligations on export subsidies. When EC export subsidies began to run wild in the early 1970s, the effort shifted to negotiating new and stronger legal prohibitions against export subsidies in the Tokyo Round Subsidies Code. Once again, of course, the idea of containing CAP surplus disposal without containing prices and production was wishful thinking. This became quite apparent in the late 1970s, when the EC indicated that it was unwilling to accept any new discipline in the Subsidies Code, and, indeed, was not even willing to sign the rather weak Subsidies Code it had helped to draft without first obtaining a private assurance of benign U.S. intentions (the not-so-secret Strauss/Gundelach letter).[47] The EC's unwillingness to limit its export subsidies was driven home in 1978 when the EC successfully "stonewalled" a pair of rather strong legal claims by Australia and Brazil challenging CAP export subsidies on sugar under the old Article XVI:3 rules.[48]

United States officials continued to claim, nevertheless, that the Subsidies Code had improved GATT discipline over the CAP. This somewhat dubious claim of success no doubt seemed justified by the political situation at the time, for without some show of "reciprocity" in the new Subsidies Code the U.S. Congress would not have been able to justify legislation implementing the many important trade agreements negotiated in the Tokyo Round, including much-needed reforms in the U.S. countervailing duty statute. Eventually, however, the claim of legal containment had to be demonstrated. The 1981–82 GATT lawsuits were the effort to provide that demonstration. Some U.S. officials may actually have believed that the Tokyo Round Subsidies Code had created workable new obligations. Others may have known better but were hoping that litigation could somehow achieve what the Tokyo Round had not. But even if there had been no hope at all, the lawsuits would have been necessary.

In the actual context, the flurry of U.S. GATT lawsuits in 1981–82 can be viewed as a rather moderate action. The Tokyo Round had created expectations of changes in EC policy that had not occurred. The economic harms being caused by the CAP were growing, particularly in U.S. export markets in third countries. The situation had produced strong political pressure for some kind of vigorous response—something more than another round of tea-and-cookies diplomacy. GATT lawsuits were a response vigorous enough to satisfy the call for action, but still short of real economic warfare. They did not solve the problem, but they did buy more time.

Unfortunately, by the end of 1985 the process of accommodating the conflicting U.S. attitudes towards the CAP had not yet played itself out, and so it is not possible to know whether the role played by GATT litigation will ultimately be a positive one. It may be that the promises of legal enforcement used to buy time in the short run will turn out to have exacerbated the reaction in the long run when it becomes clear that legal containment has not occurred. If so, the eventual reaction against the CAP may be more violent than it would otherwise have been.

On the other hand, there are signs that the process of gradual accommodation may still be working. Even though most of the key lawsuits themselves have ended in legal impasse, they have produced changes in some aspects of CAP policy. So far, these changes have involved relatively small adjustments that in no way alter the basic course of the CAP. But the final settlements may turn out to be just meaningful enough to keep alive the idea that GATT law, used together with other instruments of diplomatic pressure, can impose limits worth having. Moreover, there is another round of negotiations in the offing, and these negotiations should produce at least something in the way

of new agreements and new legal reforms to bolster claims of better enforcement in the future. It is still quite possible, therefore, that more lines-in-the-sand will be drawn, that a few more interests on the U.S. side will learn to live with disappointed expectations, and that the process of adjusting to the CAP will continue along much the same path as before.

Up to this point, therefore, the balance sheet on US-EC GATT litigation does not appear to be as unfavorable as the world has been led to believe. The effects of any litigation have to be appraised against the background of realistic alternatives. Given a setting in which the EC's implementation of the CAP was causing major economic harms to U.S. export interests, it is difficult to avoid the conclusion that, until now, the U.S. lawsuits probably have bought more peace than war.[49] The issue for the future will be whether the procedure can retain enough political credibility to continue performing this function.

The Experience of the European Community

Almost as remarkable as the United States' litigiousness during these years was the European Community's reluctance to become an active litigant. Throughout the 1970s, the Community seemed willing to submit to a rather considerable number of legal complaints without responding in kind, not only complaints from the United States but from other GATT governments as well. The DISC case was one instance of legal retaliation, but there were few others. Great powers do not usually accept such legal mistreatment so quietly.

The Community explained its reluctance to litigate in terms of its basic approach to GATT and to international economic relations in general. Time and again the EC would lecture the United States and others on the theme that diplomacy was the best means to conduct trade relations. Lawsuits, the Community would argue, do not solve the economic and social problems at the root of most trade problems. The U.S. attempt to "legalize" GATT was, sad to say, merely the warped thinking of a naive and lawyer-ridden society.

It happened, however, that this antilegalism also suited the EC's particular legal situation at the time. Although the EC's architects had done a reasonably good job of conforming to GATT rules, there were still several aspects of EC policy that did not fit comfortably within those rules. The Common Agricultural Policy had potential problems, both in the area of subsidies and with respect to the many consequential measures that might be needed to adjust for the impact of the CAP in peripheral product areas. In addition, a series of discriminatory arrangements with countries of Africa and the Mediterranean raised serious problems of compliance with GATT's MFN obligation. And finally, there were likely to be a number of corners to be cut as the EC expanded

to include new members, and also arranged economic relations with the countries of Europe who were not members. It was, in short, a time when a major realignment of European trade relationships was in process, and thus not a time when the Community wanted to encourage attention to legal obligations that defined the old order.

If one accepts this analysis of the reasons for EC legal policy in the 1970s, the next question to ask is what has happened to that policy in the 1980s. Were the EC lawsuits of the 1980s just an outburst of irritation not likely to be repeated? Or were they a more deliberate strategy designed to dampen the litigation ardor of the United States and other GATT legalists? Or, perchance, has the EC policy changed in some more fundamental way? Is it possible that the EC has begun to believe in the efficacy of GATT law?

For the present, it is probably wisest to remain rather skeptical about the possibility of any fundamental change in legal policy. Although the Community's early policy of antilegalism was certainly convenient, that does not mean it lacked conviction. To the contrary, it rested on longstanding traditions of economic diplomacy that will probably be very slow to change.

In addition, although the European Community may no longer suffer from the exceptional number of GATT legal problems it once had,[50] the Community still has more to fear from international legal obligations than do most other GATT members. The Community is a hothouse institution created by treaty rather than a sovereign nation-state. As a consequence, its internal powers are more exposed to charges of legal irregularity than is true of most other GATT members. International obligations tend to have greater legal effects internally, and once such obligations are found applicable it is much more difficult for Community organs to change them. The first few court decisions on GATT have indicated that at least some GATT norms do not have the kind of legal status that is needed to become fully binding obligations within the EC's internal law. But EC jurisprudence has not yet pronounced its final word on this subject. Some legal scholars are currently arguing that GATT law should be given a much higher place—that it should be considered binding on Community institutions as a way of making them conform to the original economic policy goals of the Rome Treaty.[51] Anything that made GATT obligations more definitive might well encourage developments in this radical direction. Consequently, as long as the status of GATT within EC law is at all unsettled, it is to be expected that the political leadership of the Community will do nothing that would augment the legal status of GATT itself.

If this is a correct analysis of Community legal objectives, what can be the reason for the Community's vigorous legal activities in the 1980s? The answer would seem to be that these legal activities have simply

been a more vigorous form of defense against the more vigorous U.S. litigation policies of the early 1980s. In the terminology of the sport of boxing, the EC lawsuits would be called counterpunching. This reactive and defensive character seemed particularly clear in a recent US-EC exchange on legal policy in December 1985. Commissioner for External Relations Willy de Clerq presented U.S. Trade Representative Clayton Yeutter with a "very long and technical" list of U.S. trade practice that the EC Commission considered "unfair." According to news reports, the list had been prepared partially in response to a similar list of EC legal sins issued by the United States a few months earlier. A statement issued by Commissioner de Clerq explained that his own list was meant to show that "the United States does not have a prerogative on fair trade." News reports also quoted de Clerq as saying, "I underlined to Mr. Yeutter the Community view that it is necessary that the notion of fair trade be applied in the same manner on both sides of the Atlantic."[52]

It is doubtful that the EC's counterpunching strategy will reduce the volume of U.S. litigation very much. The analysis of U.S. policy in the previous section argues that U.S. GATT litigation is not the product of fuzzy legalistic thinking, but that it is rather a response to basic political needs in the conduct of U.S. trade policy. Counterpunching will not make those political needs go away. The most likely outcome in the near future, therefore, is that the United States will continue punching, and the Community will continue counterpunching, and together the two of them will continue to generate a substantial quantity of GATT litigation.

Some Thoughts about the Future

The analysis in this paper suggests that the United States and the EC are likely to continue to engage in frequent GATT litigation, but with neither side having its heart in quite the right place. The United States will often be litigating for the purpose of meeting certain political needs back home, and the Community will be litigating primarily for defensive purposes, without really believing in the process.

The analysis suggests that these not-quite-real lawsuits may have been less irritating to US-EC trade relations than is commonly supposed. To the contrary, it appears that such lawsuits may well have been providing a peaceful alternative to real economic warfare. But there are clearly serious problems on the horizon.

There is certainly reason to wonder whether, in view of the current state of legal impasse, GATT litigation can continue to retain its political credibility. It would be premature, however, to sign a death certificate. Despite the impasse to date, it may yet be possible to achieve certain meaningful results. In addition, GATT governments appear ready to

undertake further efforts to make GATT law work better, with a great deal of official optimism that improvements can be made. The optimism is significant. Political leaders' belief in the possibility of further GATT legal reform seems to be as durable as their belief in the value of "reciprocity"—and for the same reason. Whether or not the belief is true, believing leads to better outcomes than not believing.

The other serious danger in the present situation is that the use (or misuse) of GATT legal procedures in these not-quite-real lawsuits will damage the long-term development of GATT law. Here again, however, the situation also has some brighter possibilities. The failures of US-EC litigation during the past decade have already stimulated a number of procedural reforms that have made GATT litigation work better, in routine cases, than it did ten years ago. The need to keep GATT litigation credible will probably cause the strengthening process to continue. It is possible, therefore, that the well-functioning side of GATT law will be able to continue building on its already impressive record, and that one day governments will wake up to find that they have created a stronger legal institution in spite of themselves.

Appendix A
GATT Litigation, 1960–1985

There is no official classification of GATT "lawsuits" nor have scholars adopted any common definition. In this paper, the author uses the term to denote any GATT proceeding in which one GATT member has attempted to obtain an authoritative legal ruling that another member's action is either (1) in violation of GATT law or (2) has "impaired" the value of GATT rights (a special kind of GATT legal claim). The term is limited to legal claims against specified governments; it does not include requests for more general kinds of legal rulings. It includes all cases in which the complaining government *began* a lawsuit on the public record—i.e., took at least the first step in pursuit of such a legal ruling in a formal GATT proceeding or document.

The list of lawsuits in this Appendix is based in part on data published in Hudec (1975, 227–96) and in part on the author's subsequent research, as yet unpublished except for a brief synopsis of the 1975–79 data in Hudec (1980, 200–203). This paper has reworked some of the previously published data, including a few cases not found in the earlier research and excluding several cases which, upon reexamination, could not be called a lawsuit under the criteria used here.

Each entry in the Appendix presents a rather concise view of the lawsuit in question. The top line records the defendant, then a title

describing the measure complained of, then the plaintiff, and finally the date of the first public complaint. The bottom line contains a pair of symbols describing the author's classification of the case according to two categories—the product sector affected by the trade measure complained of, and the nature of the trade measure itself. The symbol *before* the slash records the product sector:

A = Agricultural and Fisheries
I = Industrial
G = General

The symbol *after* the slash records the type of measure:

T = Tariff
T–D = Discriminatory Tariff
NT = Nontariff Measure
NT–D = Discriminatory Nontariff Measure
S = Subsidy

The classifications describe the primary focus of the case, and do not mean that other elements may not have been present.

Defendant	Title	Complainant	Date
1. Fifteen developed countries and EC	"Recourse to Article XXIII" (effect of 562 restrictions on Uruguayan exports; request for ruling on variable levies) [A / not classified]	Uruguay	1961
2. U.K.	Tariff preference on bananas [A / T-D]	Brazil	1961
3. France	Residual BOP restrictions [A / NT]	U.S.	1962
4. Italy	Residual BOP restrictions [A / NT]	U.S.	1962
5. Canada	Antidumping duty on potatoes [A / NT]	U.S.	1962
6. [EC/US]	Joint submission: Trade value of U.S. withdrawal rights to compensate for EC withdrawal of poultry concessions [A / T]	[EC/US]	1963
7. Greece	Tariff preferences to USSR (on 30 industrial products) [I / T-D]	U.S.	1970
8. EC	Import restrictions on apples [A / NT]	Australia	1970

Defendant	Title	Complainant	Date
9. Denmark	Quota restrictions on grain [A / NT]	U.S.	1970
10. Jamaica	Excessive margins of preference [G / T-D]	U.S.	1970
11. EC	Compensatory taxes on imports [A / NT]	U.S.	1972
12. U.K.	Import restrictions on textiles [I / NT]	Israel	1972
13. France	Import restrictions (proposal for retaliation in complaint no. 3) [A / NT]	U.S.	1972
14. U.K.	Quotas on dollar area imports [A / NT-D]	U.S.	1972
15. U.S.	DISC tax legislation [G / S]	EC	1973
16. France	Income tax practices [G / S]	U.S.	1973
17. Belgium	Income tax practices [G / S]	U.S.	1973
18. Netherlands	Income tax practices [G / S]	U.S.	1973
19. EC	Adequacy of Article XXIV:6 compensation [A / T]	Canada	1974
20. Japan	Import restrictions of beef [A / NT]	Australia	1974
21. Canada	Import quotas on eggs [A / NT]	U.S.	1975
22. EC	Minimum import prices, etc. [A / NT]	U.S.	1976
23. EC	Minimum import prices, etc. (same as complaint no. 22)	Australia	1976
24. EC	Mixing requirement for imports of animal feed [A / NT]	U.S.	1976
25. Canada	Article XXVIII:3 retaliation [I / T]	EC	1976
26. U.S.	Ruling on definition of subsidy (*Zenith* case) [I / NT]	Japan	1977

Defendant	Title	Complainant	Date
27. Japan	Import restrictions on thrown silk [I / NT-D]	U.S.	1977
28. EC	Export subsidies on malted barley [A / S]	Chile	1977
29. EC	Discriminatory import restrictions on TVs [I / NT-D]	Korea	1978
30. Norway	Discriminatory import restrictions on textiles [I / NT-D]	Hong Kong	1978
31. Japan	Import restrictions on leather [I / NT]	U.S.	1978
32. EC	Export subsidies on sugar [A / S]	Australia	1978
33. EC	Export subsidies on sugar [A / S]	Brazil	1978
34. U.S.	Countervailing duty actions [G / NT]	EC	1978
35. EC	Discriminatory import restrictions on apples [A / NT-D]	Chile	1979
36. Japan	Import restrictions on leather [I / NT]	Canada	1979
37. Spain	Restrictions on domestic sale of soybean oil [A / NT]	U.S.	1979
38. Japan	Restraints on import and sale of manufactured tobacco [I / NT]	U.S.	1979
39. U.S.	Import prohibition on tuna [I / NT-D]	Canada	1980
40. Spain	Discriminatory tariff treatment of coffee [A / T-D]	Brazil	1980
41. EC	Discriminatory import restrictions on beef [A / T-D]	Canada	1980
42. Japan	Import restrictions on leather [I / NT]	India	1980
43. EC	Internal restraints on imports of poultry (Spin Chill case) [A / NT]	U.S.	1980

Defendant	Title	Complainant	Date
44. U.S.	Discriminatory application of injury test in CVD cases [I / NT-D]	India	1980
45. U.S.	Import duty on vitamin B-12 [I / T]	EC	1981
46. EC	Production subsidies on canned fruit [A / S]	Australia	1981
47. U.S.	§337 restraints on imports of automobile spring assemblies [I / NT]	Canada	1981
48. EC	Export subsidy on wheat flour (Subsidies Code complaint) [A / S]	U.S.	1981
49. EC	Import restrictions on watches, radios, etc. [I / NT-D]	Hong Kong	1981
50. EC	Export subsidy on pasta (Subsidies Code complaint) [A / S]	U.S.	1982
51. EC	Export subsidy on poultry (Subsidies Code complaint) [A / S]	U.S.	1982
52. EC	Production subsidy on canned fruit and raisins [A / S]	U.S.	1982
53. Canada	Restrictions on imports in Foreign Investment Review Act [I / NT]	U.S.	1982
54. EC	Export subsidy on sugar (Subsidies Code complaint) [A / S]	U.S.	1982
55. EC	Sugar regime (export subsidy) [A / S]	Argentina Australia Brazil Colombia Cuba Dominican Republic India Nicaragua Peru Philippines	1982
56. EC	Falklands War embargo [G / NT-D]	Argentina	1982

Defendant	Title	Complainant	Date
57. EC	Preferential tariff on citrus [A / T-D]	U.S.	1982
58. EC	Treatment of VAT in price calculations (Procurement Code complaint) [I / NT]	U.S.	1982
59. Brazil	Export subsidy on poultry (Subsidies Code complaint) [A / S]	U.S.	1982
60. Japan	Internal regulations on softball bats (Standards Code complaint) [I / NT]	U.S.	1982
61. Finland	Internal regulations on footwear [I / NT]	EC	1982
62. Switzerland	Article XIX measures on table grapes [A / T]	EC	1982
63. U.S.	Denial of MFN tariff treatment [G / T-D]	Poland	1982
64. EC	Restraints on imports of VTRs [I / NT]	Japan	1982
65. Japan	Import restrictions on leather (revival of complaint no. 31) [I / NT]	U.S.	1983
66. U.S.	Import restrictions on printed matter ("Manufacturing Clause") [I / NT]	EC	1983
67. U.S.	Export subsidy on wheat flour sales to Egypt (Subsidies Code complaint) [A / S]	EC	1983
68. Japan	Nullification and impairment of benefits in general [G / not classified]	EC	1983
69. U.S.	Discriminatory import restrictions on sugar [A / NT-D]	Nicaragua	1983
70. U.S.	Tariff reclassification of machine-threshed tobacco [A / T]	EC	1983

Defendant	Title	Complainant	Date
71. Canada	Antidumping investigation of electrical generators from Italy (Antidumping Code complaint) [I / NT]	EC	1983
72. EC	Import restrictions on newsprint [I / NT]	Canada	1984
73. Chile	Measures on dairy imports [A / NT]	EC	1984
74. Canada	Internal tax on gold coins [I / NT]	South Africa	1984
75. New Zealand	Antidumping duties on electric transformers [I / NT]	Finland	1984
76. EC	Operation of beef and veal regime [A / NT]	Australia	1984
77. U.S.	Ban on steel pipe and tube imports [I / NT-D]	EC	1984
78. Canada	Internal regulations on alcoholic beverages [I / NT]	EC	1985
79. U.S.	Import restrictions on products containing sugar [A / NT]	Canada	1985
80. U.S.	Countervailing duty action on wine (Subsidies Code complaint) [A / NT]	EC	1985

Appendix B
US-EC GATT Litigation, 1960–1985

Defendant	Title	Complainant	Date
3. France	Residual BOP restrictions [A / NT]	U.S.	1962
4. Italy	Residual BOP restrictions [A / NT]	U.S.	1962
6. [EC/US]	Joint submission: Trade value of U.S. withdrawal rights to compensate for EC withdrawal of poultry concession [A / T]	[EC/US]	1963
11. EC	Compensatory taxes on imports [A / NT]	U.S.	1972
13. France	Import restrictions (proposal for retaliation in complaint no. 3) [A / NT]	U.S.	1972
15. U.S.	DISC tax legislation [G / S]	EC	1973
16. France	Income tax practices [G / S]	U.S.	1973
17. Belgium	Income tax practices [G / S]	U.S.	1973
18. Netherlands	Income tax practices [G / S]	U.S.	1973
22. EC	Minimum import prices, etc. [A / NT]	U.S.	1976
24. EC	Mixing requirement for imports of animal feed [A / NT]	U.S.	1976
34. U.S.	Countervailing duty actions [G / NT]	EC	1978
43. EC	Internal restraints on imports of poultry ("Spin Chill" case) [A / NT]	U.S.	1980
45. U.S.	Import duty on vitamin B-12 [I / T]	EC	1981
48. EC	Export subsidy on wheat flour (Subsidies Code complaint) [A / S]	U.S.	1981
50. EC	Export subsidy on pasta (Subsidies Code complaint) [A / S]	U.S.	1982

Defendant	Title	Complainant	Date
51. EC	Export subsidy on poultry (Subsidies Code complaint) [A / S]	U.S.	1982
52. EC	Production subsidy on canned fruit and raisins [A / S]	U.S.	1982
54. EC	Export subsidy on sugar (Subsidies Code complaint) [A / S]	U.S.	1982
57. EC	Preferential tariff on citrus [A / T-D]	U.S.	1982
58. EC	Treatment of VAT in price calculations (Procurement Code complaint) [I / NT]	U.S.	1982
66. U.S.	Import restrictions on printed matter ("Manufacturing Clause") [I / NT]	EC	1983
67. U.S.	Export subsidy on wheat flour sales to Egypt (Subsidies Code complaint) [A / S]	EC	1983
70. U.S.	Tariff reclassification of machine-threshed tobacco [A / T]	EC	1983
77. U.S.	Ban on steel pipe and tube imports [I / NT-D]	EC	1984
80. U.S.	Countervailing duty action on wine (Subsidies Code complaint) [A / NT]	EC	1985

Notes

1. In an earlier study using somewhat more inclusive criteria, Hudec (1975, 278–90), the author counted 54 lawsuits from 1948 through 1959. Appendix A of the present study, based partly on the earlier work and partly on unpublished research, counts 80 lawsuits from 1960 to the end of 1985. The introduction to Appendix A explains the author's definition of a GATT lawsuit.

2. The EC was created by the Treaty of Rome in 1957, but began to function only gradually. The key event in the EC's assumption of GATT legal responsibility was the 1960–61 Dillon Round trade negotiations in which the GATT

bindings of EC member country tariffs were replaced by bindings of the EC Common External Tariff. The year 1960 provides a convenient breaking point for there were no GATT lawsuits that year.

3. The nine cases not involving either the U.S. or the EC were complaints no. 2, 12, 20, 30, 36, 40, 42, 74, and 75. (Note that, here and throughout the study, suits against EC member states are treated as EC litigation only when the defendant was a member state at the time of the suit.)

4. It must be emphasized that this classification is based on the author's judgment as to the main product interest in the dispute, where such a product or product sector can be identified; it does not mean that no other products were involved.

5. Once again it must be emphasized that the classification is based on the author's judgment as to the primary subject of the complaint and does not mean that no other types of trade barriers were involved. With respect to discrimination in particular, it should be noted that cases were counted only if the complainant made a major legal issue of the fact; several cases involving barriers with elements of discrimination were not counted because not enough was made of that aspect.

6. The ten agricultural subsidy cases were complaints no. 28, 32, 33, 46, 48, 50, 51, 52, 54, and 55. The three other subsidy complaints against the EC were complaints no. 16, 17, and 18—the U.S. complaints about the subsidy effects of the "territoriality" principle in French, Belgian, and Netherlands income tax law. These three complaints were counterclaims in response to the EC's DISC complaint, discussed at notes 18–19 *infra*.

7. The complaints involving the U.S. countervailing duty law were complaints no. 26, 34, 44, and 80.

8. Complaint no. 67.

9. Complaint no. 15.

10. Complaints no. 57 and 77.

11. GATT, BISD, 11th Supp., pp. 100–101 (1963); id., 13th Supp., pp. 48–49 (1965).

12. Complaints no. 3 and 4.

13. The complaint returned to the GATT agenda ten years later. See complaint no. 13, discussed at note 17 *infra*.

14. Complaint no. 6.

15. The controversy is not listed as a lawsuit in Appendix A. It is described in Hudec (1975, 232).

16. Complaint no. 11.

17. Complaint no. 13.

18. Complaint no. 15. (DISC: Domestic International Sales Corporation)

19. Complaints no. 16, 17, and 18. Roughly speaking, the theory was that territorial systems permitted the shifting of some export income to "tax havens" and that DISC was merely an equivalent tax haven within the United States.

20. The United States itself had once permitted taxpayers to shift many kinds of income to off-shore (in other words, "territorial") tax havens, before outlawing this practice in its so-called Subchapter S reforms in the 1960s.

21. Section 301, Trade Act of 1974, as amended 19 USC 2411 *et seq.*

22. The seven complaints were complaints no, 21, 22, 24, 27, 31, 37, and 38. All but the last were the direct result of private companies filed under section 301.

Since 1979, section 301 proceedings have yielded only four more *new* GATT complaints, all against the EC. They were the wheat flour, pasta, canned fruit,

and citrus cases, complaints no. 48, 50, 52, and 57, discussed at notes 33–36 *infra*. One other GATT lawsuit was filed pursuant to section 301 after 1979, but it was a 1983 complaint reopening an earlier lawsuit against Japan on leather goods (complaint no. 65); it was then extended in 1985 to some other leather products. (The 1985 extension is not listed as a separate complaint in Appendix A).

23. Complaints no. 22 and 24.

24. Complaint no. 34.

25. Instances of actual retaliation include: the Article XIX retaliation in response to Australia's escape clause measures on autos and shoes (see GATT DOCS. C/M/154, −155, −156 [1982]); the Article XIX retaliation in response to the U.S. escape clause measures on specialty steels (see GATT DOC. L/5524/Add.15 [1984]); and the "lemons and walnuts" counterretaliation in response to the U.S. unilateral retaliation on pasta products in the citrus case (see note 36 *infra*). Notable threats of retaliation included those directed at the 1982 U.S. countervailing duty proceeding on carbon steel, at the 1984 U.S. Wine Equity Act, and at the 1985–86 proposed legislation to extend the U.S. Manufacturing Clause law.

26. It is difficult for a U.S. observer to judge whether the Community's posture in these cases was really more belligerent than, say, the average U.S. reaction to such situations. It seems so to the author, but U.S. citizens tend not to take their own government's rhetoric very seriously.

27. Trade Agreements Act of 1979, Title IX, codified as 190 USC 2411 *et seq.*

28. "Understanding Regarding Notification, Consultation Dispute Settlement, and Surveillance," printed in GATT, BISD, 26th Supp., pp. 210–18 (1980).

29. The new panel procedures are described in detail in Hudec (1980).

30. Complaint no. 43.

31. Complaint no. 45.

32. For example, the B-12 problem is still listed as one of the unfair U.S. trade practices in the de Clerq memorandum of December 1985, described at note 52 *infra*.

33. The seven complaints are, respectively, complaints no. 48, 50, 51, 52, 54, 57, and 58.

34. The only GATT body with power to make legal rulings is the plenary assembly of GATT members, called the Contracting Parties, or its agent, the somewhat smaller executive assembly called the GATT Council. Typically, both bodies rule by "accepting" the reports and rulings prepared by the GATT panel that hears the case. By tradition, however, decisions of the Contracting Parties or the Council are taken by consensus, which means that any country, including the defendant, can block the decision to accept a panel report. This power to defeat legal rulings is held in check by another tradition that GATT bodies should not relitigate cases decided by panels, but should accept all but the most clearly erroneous decisions. Prior to 1976, this second tradition had been quite strong, with only one panel report ever having been rejected. Since then, however, there have been at least 12 instances where acceptance of a panel report has been blocked—in whole or in part—by one of the parties. All the rulings in the 4 DISC cases (complaints no. 15, 16, 17, and 18) were blocked by the losing party—the first for about five years and the other three permanently. After that, blocking actions by either the defendant or a losing plaintiff occurred in complaints no. 37, 47, 48, 50, 52, 57, 74, and 80.

35. See, for example, Brown (1985, 177).

36. The two retaliations went into effect in a complex series of halting, linked steps that stretched over a good part of 1985. The United States raised duties to prohibitive levels against pasta (ameliorated somewhat by exchange rate behavior), and the Community responded in kind on walnuts and lemons, items that represented an equivalent amount of trade. See *International Trade Reporter,* vol. 2 (Washington, D.C.: Bureau of National Affairs, 1985), pp. 835, 898, 1131, 1389–90.

37. Complaint no. 65. Another leather product was added to the complaint in 1985.

38. The five complaints are, respectively, complaints no. 66, 67, 70, 77, and 80.

39. See note 25 *supra.*

40. See note 36 *supra.*

41. Council Regulation (EEC) No. 2641/84, of 17 September 1984, O.J. (1984) L252/1. For one recent discussion of the new instrument, see Van Bael and Bellis (1985, 197–216).

42. The subject of the complaint is the United States' section 337 remedy which permits restrictions on imports accused of patent infringement and other "unfair" characteristics.

43. The strike force was created in September 1985 as part of an executive branch campaign to counter a tidal wave of protectionist sentiment in the Congress—another case, by the way, of how promises of legal enforcement are used to justify support for liberal trade policy positions. For an amusing account of the first three months of strike force activities, see "Trade Strike Force, Hamstrung by Turf Battles, May Prove Political Liability to Administration," *Wall St. Journal,* 7 January 1986, p. 60.

For two legislative proposals to fund a war chest to match foreign subsidies, see H.R. 3296 and H.R. 3667, 99th Cong., 1st Sess. (1985).

44. See, for example, the list of pending bills on this one subject alone in *International Trade Reporter,* vol. 3 (Washington, D.C.: Bureau of National Affairs, 1986) pp. 75–76.

45. It is a commonplace among trade policy experts that agricultural interests have political clout. This political clout is usually observed in the context of rent-seeking at home, where agricultural interests appear to have better-than-average success in persuading their governments to grant benefits such as price or income supports, protection against import competition, or export subsidies. But that same clout can also be expected to earn better-than-average results when agricultural interests believe their export markets are being damaged by foreign actions like the CAP, and ask their government to do something about it. Clout is clout, whatever the issue.

46. For a discussion of these trade figures, see Talbot (1985, 39) and also Brown (1985, 176). The $9 billion figure was a peak, but U.S. exports in the following four years averaged well above $7 billion.

47. The author has never seen the letter, but he has heard descriptions from both EC and U.S. officials whom he has interviewed. As might be expected, each side has a somewhat different description of the contents. One side views the letter as a U.S. undertaking not to challenge the level of CAP exports as they stood in 1979; the other side views it as a more general assurance that the U.S. was not seeking to destroy the CAP as such. Given the EC's knowledge that the letter was not to be made public, the EC would not have been justified in treating it, whatever its contents, as a meaningful commitment. The letter belongs more to the category of symbolic gestures salvaged by the losing side on an issue. Its significance here is simply that it was needed at all—that after

having insisted that the 1979 Subsidies Code be limited to a rather tame repetition and elaboration of existing GATT obligations, the EC was still unable to give an unqualified commitment to observe it.

48. Complaints no. 32 and 33. It is quite interesting to note that the United States, usually an active voice in most GATT legal proceedings, sat rather conspicuously on its hands during the litigation phase of this case—up to the end of 1980. It would appear that the highest priority for the U.S. delegation during this time was to obtain the EC's signature on the Subsidies Code, an objective that required tender treatment. The United States finally joined the fray in the working party consultations that followed the litigation, but by then the game had been lost. Indeed, a good case can be made that the subsequent wheat flour case was lost on these playing fields as well.

49. The use of GATT litigation as a peace-keeping device should be interesting to social scientists interested in primitive legal societies. One cannot help being struck by the similarity between the legal behavior of the GATT governments described in this paper and the behavior of primitive Anglo-Saxon clans described by Malone (1970, 1):

> The primordial seed from which [legal actions of] both crime and tort were to germinate was the blood feud that was characteristic of any barbaric society organized along lines of blood kinship. The defense of the honor of the clan by resort to warfare against the harm-inflicting outsider and his entire kin was a traditional practice with roots deep in the need for survival of the family unit. The outrage that cried for revenge lay not so much in the desire to enforce atonement for the bodily harm inflicted upon the wounded family member as in the humiliation that was suffered by his entire kin group. The primary object of law was to provide a substitute for the feud; and, as would be expected, the remedy that eventually emerged was of a character to offer balm where the hurt was deepest—in the clan's profound sense of indignity.

50. The problem of discriminatory favors for developing countries has been largely taken off the legal agenda by the GATT's adoption of the Enabling Clause in 1979 at the end of the Tokyo Round, and by the considerable amount of ad hoc discrimination now practiced by most other developed countries—for example, the current United States and Canadian policies of granting special trade favors to certain Caribbean nations. As for other legal problems that appeared significant in the 1970s, most have by now been addressed and debated, usually inconclusively, leaving most complainants with a sense that their complaints have achieved as much as possible. In addition, the EC practices in question are beginning to acquire the legitimacy of existence over time. Time, of course, is not a full guarantee of legal security, as was clearly shown by the 1982 U.S. complaint about long-standing EC citrus preferences (no. 57).

51. For a recent article reviewing the status of GATT obligations in the Community's internal law and arguing for a more prominent role, see Petersmann (1985).

52. The exchange is reported in *International Trade Reporter*, vol. 2 (Washington, D.C.: Bureau of National Affairs, 1985) pp. 1567–68; id., vol. 3 (1986), p. 50.

Another fact which tends to confirm the Ec's less-than-complete legal commitment to GATT litigation is that, to the author's knowledge, all GATT litigation continues to be handled, not by the EC Commission's legal staff, but by policy officials in the Directorates General responsible for diplomatic representation of the EC on commercial policy matters.

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Comment Per Magnus Wijkman

Papers on GATT reform seem to fall into one of three interrelated categories. Most debate the need to change the *rules* of the trade game. In this category fall arcane papers on reform of the safeguard clause, the intricacies of "graduation," and the sophistry of conditional most-favored-nation treatment. Others are concerned with the need to change the *players* in the game in order to restore a liberalizing momentum to the trade regime. Their authors claim that this momentum is exhausted because the existing distribution of bargaining power has deadlocked negotiations. Introducing new issues—or reviving old ones—could attract new players to the game and change the balance of negotiating power. In this category fall discussions in the corridors of power on whether to include services, high-tech goods, agriculture, and apparel in a new round of negotiations. Finally, we have a few papers discussing whether to change the *referee* in the game. Professor Hudec's paper falls in this exclusive category dealing with dispute settlement procedures. Its takeoff is his valuable statistical compilation that shows that half of the GATT lawsuits between 1960 and 1985 occurred during the

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1980s. Robert Hudec's contribution is to explain why litigation has become so fashionable today.

In the tradition of good detective novels, the author first presents the most litigious parties and quickly identifies the most frequent plaintiff—the United States—and the most frequent defendant—the EC. One third of GATT lawsuits were between these two protagonists. Thereafter, Hudec presents the most common subject matter of disputes: agriculture and nontariff barriers (NTBs). He shows that the EC has been sued primarily for its use of subsidies and NTBs to protect agriculture while the United States has been sued primarily because of its application of countervailing duties. Finally, he explains the motives and the behavior of these two major parties with the master detective's psychological insight.

Hudec presents three explanations for the American administration's recourse to litigation, of which I find the third the most interesting. First, he suggests that the intention of American administrations is to achieve reciprocity in the term's new American sense. However, litigation based on this misinterpretation of reciprocity is doomed to be ineffectual. GATT's nondiscrimination principle ensures the United States of equal access to a foreign market only in the sense that U.S. goods need not pay higher tariffs than other foreign goods pay. It does not provide the United States with equal access in the sense that tariff levels on American goods exported to, e.g., Brazil, cannot be higher on average than tariffs on Brazilian exports to the United States. It is this latter discrepancy in terms of bilateral market access that has concerned the Americans recently. If the American objective is to "level the playing field," a policy of litigation is flawed. Tariff negotiations are the appropriate and classical remedy to this problem.

Consequently and secondly, Hudec explains increased litigation by the spread of NTBs. This explanation is based on his explicit assumption that elimination of NTBs cannot be negotiated through reciprocally balanced concessions as can tariffs.[1] Instead, general rules concerning their use must be formulated, after which litigation can be used to enforce rule observance. This observation is correct for some types of NTBs. However, it does not apply to quantitative restrictions. Gray-zone measures, such as "voluntary" export restraints (VERs), normally reflect an out-of-court settlement, by which a country agrees to limit its exports to a particular market in exchange for part of the scarcity rents generated by restricting trade. The proliferation of VERs is not an explanation of litigation but an alternative to it. Hudec's second explanation thus only holds for other NTBs such as subsidies and public procurement, and these account for but half of GATT lawsuits.

1. For a different view see L. Alan Winters, "Negotiating the Abolition of Non-Tariff Barriers," *Oxford Economic Papers* 39, no. 3 (1987):465–80.

Hudec's third explanation of the increased frequency of litigation is that American administrations have used it as a way to accommodate Congress and to placate domestic pressure groups. In particular, litigation over the common agricultural policy (CAP) has been a means to accustom constituencies to unpleasant commercial policy realities rather than a way to change these realities. This explanation dominates the first two and makes them superfluous. If administrations have been aware of their ineffectiveness in modifying the CAP, they have been conducting a policy to deceive pressure groups. If unaware, they have been engaged in a policy of self-deception. Hudec seems inclined to the former, Machiavellian view. To be successful for any length of time such a policy requires tacit collusion between governments, since each government must fool its own constituency but not its adversary. The policy assumes that pressure groups will not tire of ineffective policies—whether ineffectiveness is intended or not—and lobby the administration for more effective action but instead resign themselves to political realities.

The U.S. propensity to go to court in order to placate domestic interests has increased international trade tensions. Hudec shows how the rash of litigation in the 1980s results from increased U.S. aggressiveness and the EC's adoption of a counterpunching strategy. The "trade hostilities" in 1986 occasioned by Spain's and Portugal's membership in the EC support this thesis. Towards the end, Hudec's paper portrays the two commercial superpowers standing "clad in full legal armor" anticipating "bigger and better GATT litigation." This prospect fills an observer from a small country with fear of being crushed under the heavy armor of falling giants. It is often claimed that small countries need the protection of legal institutions more than large countries do. This observation implies that small countries can be expected to use litigation more often than large countries do. Hudec's statistics do not bear this out. Big countries sue more often than small countries. Big countries sue other big countries. When small countries sue they also sue big countries. This reflects the obvious fact that countries litigate when their bargaining power is too small to negotiate a satisfactory out-of-court settlement. But it also suggests that large countries are more confident than small countries that litigation will provide satisfaction. This is a worrisome conclusion.

A first cause for concern is that the strategy attributed to the United States by Hudec risks overloading GATT's dispute settlement capacity. This capacity is already insufficient and would become even less accessible to small countries whose needs for dispute settlement may be greater, though less dramatic, than the two superpowers' needs.

A second cause for concern is that this strategy risks discrediting the dispute settlement mechanism. Its basic purpose is to settle dis-

putes, not to *appear* to be settling disputes. Dispute settlement has taken on the characteristics of a Norman jousting tournament in which the battles are for the benefit of the spectators rather than for the spoils of war. While recognizing that these ritual jousts may help avoid general trade wars, one still may ask whether it is not an abuse of the dispute settlement system. What will happen when a real dispute arises and needs to be settled? This prospect worries small countries, which lack negotiating strength to fall back on in bilateral dispute settlement. It should also worry the EC and the U.S. in case either should need conciliation to settle a major dispute.

Therefore, let me conclude with some reflections on the real culprit: a flawed dispute settlement mechanism. The tendency to litigate for the sake of litigation rather than to seek a remedy cannot be forbidden. However, it can be discouraged by measures which increase the costs of litigation. Displeasure with an adversary's action should not be sufficient cause to go to court. In addition, the outcome of a lawsuit should be unpredictable. If predictable, both parties have strong incentives to reach an out-of-court settlement provided that the dispute settlement mechanism is credible. The concurrence of a large number of lawsuits and a high predictability of outcome indicates that the mechanism is being used for other purposes than dispute settlement. This will reduce its credibility in the long run.

How can one increase the risks to litigants of litigation? One way is to reduce members' ability to influence the outcome. Their influence is both indirect via the selection of panel members and direct by vetoing the Council's adoption of a panel's report. Members cannot only "pack the jury" but also "hang the judge" and large countries tend to exercise this power more often than other GATT members. Having a number of standing panels, sitting for four-year periods, would increase the independence and continuity of the panel mechanism. Not allowing parties to a dispute to vote on Council adoption of a report (the "GATT-minus-two" formula) would diminish the predictability of the outcome. These are minor changes. Major changes are not possible in the GATT system. The GATT contract depends on self-enforcement for compliance with its basic principles.

Comment J. P. Hayes

I would like to pick up Dr. Wijkman's remark, that "some trade disputes are serious." It struck me that one of the most serious disputes,

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over the possibility of U.S. countervailing duties on EC steel in 1982, does not qualify for inclusion under Professor Hudec's definition of GATT lawsuits (although the Community raised the matter in the GATT Committee on Subsidies and Countervailing Duties).[1]

Is it the case that the GATT dispute settlement procedure leads to concentration on the particular points at issue, and does not allow wider trade-offs? Whatever the answer, US-EC trade disputes typically have to be seen in a broader context of transatlantic relations. For example, on the Washington view of the 1982 steel dispute, Levine reports:

> At a time when harmony was needed, US-EC relations were bad and seemingly getting worse. The Soviet Union was in Afghanistan, Poland was in turmoil, and the proposed stationing of additional U.S. missiles in Europe and President Reagan's vocal anti-communism were testing the alliance. . . .
>
> Washington was also concerned about undermining the EC. Steel was, along with the Common Agricultural Policy, one of the underpinnings of the Community.[2]

This case suggests the question: Why do some trade disputes lead to GATT "lawsuits," under the definition, and others not?

Professor Hudec suggests that the Gatt dispute settlement procedures perform a useful political function in the U.S. On the Community side, there are feelings of irritation which I think are by no means entirely synthetic. Thus, in the Commission one hears complaints that the U.S. had been "testing GATT dispute settlement to destruction."

One complaint on the Community side is that, given the separation of powers between the executive and legislative branches, the U.S. cannot be relied on to comply with GATT findings. (Reference is made to the U.S. manufacturing clauses and the Wine Equity Act; also to the delay in replacing DISC.) The Community may feel vulnerable not only because it has policies which are subject to attack but also because the strength of the executives in Community countries removes a plausible excuse for noncompliance.

In fact, I suggest that we have a curious game here, in which each side wishes to use the dispute settlement mechanism to restrain the other from doing certain things, but wishes to avoid being restrained itself. (The question why governments wish to follow some of the policies to which they are attached raises wider issues, which I will just touch on later.)

1. For the issues as seen from the Community's side, see Frank Benyon and Jacques Bourgeois, "The European Community–United States Steel Arrangements" *Common Market Law Review* 21, no. 2 (June 1984): 305–54.

2. Michael K. Levine, *Inside International Trade Policy Formulation: A History of the 1982 US-EC Steel Arrangements* (New York, etc.: Praeger, 1985), 37–38.

Another aspect of the Community's attitude is dislike of the idea that GATT panels might in effect make law by establishing precedents.[3] In this view, rules for international trade should be established by negotiation, and the GATT dispute settlement procedures can only lead to firm conclusions when the relevant rules have already been agreed upon. The problem then is that in important areas—subsidies and countervailing duties being a notable example—the rules have not been agreed upon. Professor Hudec's paper might be read as suggesting that the arrangements are reasonably satisfactory as they are; but in some quarters, at least, there seems to be a felt need for improvement. The proposals I have seen might be roughly grouped in five categories.

First, there are what might be roughly called administrative improvements—for example, time limits and increase of the professionalism of GATT panels. However, such changes might still leave the outcome subject to negotiation between the parties.

A more far-reaching change, which perhaps goes beyond the boundaries of this category, is that the last word on a dispute should rest with the panel rather than with the GATT Council. This (like the proposal that the parties to the dispute should abstain in the final vote on the adoption of the panel report) appears to move dispute settlement nearer to a judicial process. I am not clear whether this would be acceptable, at any rate to the Community; and in any case the problem of securing compliance would remain.

The *second* category is strengthening of the machinery for monitoring compliance. The problem of sanctions would remain. I understand that the GATT has been very reluctant to authorize retaliation against countries found to be in breach of GATT rules: there is a clear danger that the "remedy" could be as bad as, or worse than, the disease. Thus, even with strengthened monitoring, dispute settlement might continue to depend on moral suasion.

Third, it has been suggested that, where a case turns on a disputed interpretation of the GATT, the panel should make recommendations for the revision or interpretation of the relevant provision. Because any such revision or interpretation might alter the previously negotiated balance of concessions, the issue should be sent to the appropriate committee or a special working party for negotiation.[4] A possible prob-

3. The present dispute settlement process has been described by de Lacharrière: "The common purpose of all the procedures for the settlement of disputes is not, strictly speaking, to ensure compliance with the law but to arrive at settlements acceptable to the parties concerned. Hence it is not a matter of sanctioning a breach of a rule, still less of punishing it, but of restoring the balance of advantage in trade between the parties" (Guy Ladreit de Lacharrière, "Case for a Tribunal to Assist in Settling Trade Disputes," *The World Economy,* 8, no. 4, [December 1985] 340).

4. Gary Clyde Hufbauer and Jeffrey J. Schott, *Trading for Growth,* Policy Analyses in International Economics no 11 (Washington, D.C.: Institute for International Economics, 1985); cited in Gardner Patterson and Eliza Patterson, "Importance of a GATT Review in the New Negotiations," *The World Economy* 9, no. 2, (June 1986):153–69.

lem with this is that issues would be dealt with one at a time, thus giving little or no opportunity for trades. It may be better to continue the practice of storing up disputed issues to be negotiated simultaneously in a GATT round.

Fourth, there are suggestions that GATT rules should be incorporated into national law, so that private parties could invoke them in the national courts. I am inclined to doubt whether this is in the area of practical politics.[5]

Fifth (and going further afield), it might be said to be a function of the GATT to prevent governments from doing things which they ought not to want to do in any case. Public education has a part to play here. In the United Kingdom, cost of protection studies seem to be having a certain effect. (In France, on the other hand, a senior official told me that no such studies have been made, and that there is no demand for them). In any case, we should not be overoptimistic about the influence of economists.

It might be more effective to build up countervailing power by strengthening the machinery for consulting consumer, user, and importer interests. However, governments may be reluctant. At present, they can secure political benefit by conferring advantages on producer groups, and those who bear the costs do not appear to be particularly aggrieved. With greater and more balanced consultation, someone would be aggrieved in the end—the producers if the upshot were to withold protection, and the consumers, other users, or importers if protection were granted over their objections. Nevertheless, more extensive consultations on matters of trade policy would be highly desirable in the general interest.[6]

I live in hope that someone may have proposals that will solve all the problems.

5. "I would propose that the main international effort should be directed to securing more perfect national justiciability of the personal rights which it is the ultimate function of international agreements to protect. Adjudication procedures at the international level—determinations by GATT panels, for example—are procedures of the executive branch which any truly independent national judiciary should have the full right to ignore" (Jan Tumlir, "Conceptions of the International Economic and Legal Order," [book review article], *The World Economy,* 8, no. 1 (March 1985): 87).

6. I must confess that I had not, and still have not, thought out the implications of the idea that individuals might have access to the GATT dispute settlement proceedings; nor of the different suggestion that third parties should be encouraged and helped to complain (*Trade Policies for a Better Future: Proposals for Action,* Report of an Independent Group under the Chairmanship of Fritz Leutwiler [Geneva: GATT Secretariat, 1985], 46–47; cited in Patterson and Patterson, *op. cit.*). Also relevant to parts of this discussion may be: Ernst-Ulrich Petersmann, "International and European Foreign Trade Law: GATT Dispute Settlement against the EEC," *Common Market Law Review,* 22 (1985): 441–87.