ARTICLES

SETTLEMENT OF DISPUTES IN GATT UNDER THE SUBSIDIES CODE: TWO PANEL REPORTS ON E.E.C. EXPORT SUBSIDIES

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I. INTRODUCTION

The Tokyo Round of trade negotiations successfully yielded several multilateral agreements, or “codes,” primarily designed to reduce non-tariff barriers to international trade.1 The “Agreement on Inter-

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1 The reduction of the distorting effects on world trade of tariffs and other
Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade,2 or "Subsidies Code," is probably the most complex and important of these multilateral trade agreements. The Subsidies Code was constructed to discourage the subsidization of domestic products and to clarify the rights of importing states to counteract foreign subsidies by imposition of countervailing duties. In broad terms, a subsidy is a bounty or grant that a government provides which creates an economic benefit for the production or distribution of goods or services.3

As the official title of the Subsidies Code suggests, the original GATT discipline on subsidies and countervailing duties provides the trade barriers has been the objective of seven "rounds" of multilateral trade negotiations. The latest and most comprehensive round was the Tokyo Round, held in Geneva from 1973 to 1979, which aimed particularly at reducing and regulating non-tariff barriers through the establishment of several codes of conduct. The main Tokyo Round codes on non-tariff barriers are the Subsidies Code, the Anti-Dumping Code, the Government Procurement Code, the Standards Code, the Customs Valuation Code, and the Licensing Code. These codes are international treaties to which only states already parties to the General Agreement on Tariffs and Trade [hereinafter referred to as "GATT" or "General Agreement"] can accede. The General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 51 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1950), is applied by virtue of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. pts. V, VI, 55 U.N.T.S. 308, T.I.A.S. No. 1700, or the subsequent Protocols of Accession. See generally K. Dam, The GATT Law and International Economic Organizations (1970); R. Hudec, The GATT Legal System and World Trade Diplomacy (1975); J. Jackson, World Trade and the Law of GATT (1969); E. McGovern, International Trade Regulation: GATT, the United States and the European Community (1982 & Supp. 1983); T. Flory, Le GATT: Droit international et commerce mondial (1968); D. Carreau, P. Juillard & T. Flory, Droit international economique 255-314 (2d ed. 1980).


3 It is difficult to characterize conclusively a governmental practice as a "subsidy." A distinction is generally made between subsidies available for exported goods ("export subsidies") and subsidies available for all goods produced ("domestic subsidies" or "production subsidies"). GATT regulations restrict export subsidies much more than production subsidies. However, there has been a growing recognition that both types of subsidies can hinder free trade, as evidenced by the insertion of a provision in the Subsidies Code, article 11, concerning production subsidies. Curiously, neither the General Agreement nor the Subsidies Code expressly defines "subsidy," although a non-exhaustive Illustrative List of Export Subsidies has been annexed to the Code. Professor E. McGovern has recently described a subsidy as "a measurable economic advantage afforded to an enterprise by or at the direction of a government, without adequate recompense, and in a way which discriminates against some other enterprise or economic activities in the same country." E. McGovern, supra note 1, at 246.
parameters of this agreement. Before the Tokyo Round, article XVI and article VI of the General Agreement, along with the corresponding Notes and Supplementary Provisions of Annex I, regulated the area of subsidies and countervailing duties. Article XVI originally consisted of only one paragraph, which required member states to notify the GATT of any subsidy operating to increase exports or to decrease imports, and to engage in good faith discussions regarding the possibility of limiting subsidizations. At the GATT’s Ninth Session in 1955, article XVI was extensively amended to reflect concern over the increasing use of export subsidies. Article XVI, as amended, distinguished "primary" from "other than primary" products by establishing a looser discipline for export subsidies on primary products. Article XVI:3 provides that member states “should seek to avoid” subsidies on the export of primary products and that, in any event, they cannot apply such subsidies to secure “more than an equitable share of world export trade in that product.” On the other hand, article XVI:4 prohibits member states from placing export subsidies on non-primary products that would create an export price for those products lower than the state’s domestic price. This is the so-called “bi-level pricing” or “dual pricing” requirement.

Article VI authorizes member states to counteract either an export or a domestic subsidy by imposing countervailing duties equal to or less than the subsidy. It prohibits a state from imposing a countervailing duty, however, unless the foreign subsidy causes or threatens to cause “material injury” to that state’s domestic industry. A member nation’s retaliatory response to a foreign subsidy is therefore not dependent upon the subsidy’s legal status under article XVI, but is determined rather by the subsidy’s injurious effects upon the state’s home market.4

The Subsidies Code has effected several noteworthy clarifications of the law governing subsidies and countervailing duties under articles VI and XVI of the General Agreement. Among the changes the Code introduces are the strict prohibition of export subsidies on non-primary products,5 the treatment of minerals as non-primary prod-

4 Under customary international law, the levy of a countervailing duty against a subsidy that complies with article XVI of GATT might be categorized as a "retorsion," i.e., a measure adopted in response to an unfriendly, though not illegal, act of another state. On the other hand, the levy of a countervailing duty against a subsidy which is illegal under article XVI could be seen as a "reprisal," i.e., a measure adopted in retaliation for an illegal act of another state. See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 888-89 (1980).

5 Article 9 of the Subsidies Code contains no reference to the condition of lower
ucts, the adoption of an updated illustrative list of export subsidies, and the recognition that domestic subsidies can also have harmful trade effects. In addition, the Code restricts the use of export subsidies for primary products and clarifies the administration of national laws on countervailing duties.

Besides providing the substantive law on subsidies and countervailing duties, the Subsidies Code also establishes, like other Tokyo Round codes, its own dispute settlement procedure for any controversy that arises with regard to its provisions. This procedure is essentially modeled after the general GATT procedure for the settlement of legal claims. Although a detailed description of this system is not within export prices, thus abolishing the "bi-level pricing" requirement of article XVI:4 of the General Agreement. Obviously, the bi-level pricing rule still applies to GATT members who are not parties to the Subsidies Code. See generally Barceló, Subsidies, Countervailing Duties and Antidumping after the Tokyo Round, 13 CORNELL INT'L L.J. 257, 265 (1980); Rivers & Greenwald, The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences, 11 L. & POL'Y INT'L BUS. 1447, 1475-76 (1979) (authors suggest that the Subsidies Code has not completely eliminated the bi-level pricing requirement).

Under the General Agreement, a primary product is "any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." Note at article XVI, section B, para. 2. The Subsidies Code has adopted this definition in its entirety with the exception of the words "or any mineral." The states acceding to the Subsidies Code are therefore obliged, for the purposes of the Code, to regard minerals as non-primary products. See generally E. McGovern, supra note 1, at 258-59.

The United States delegation obtained at the Tokyo Round the first clear acknowledgement that domestic subsidies may adversely affect the economies of other countries. See generally Graham, Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final Stage, 12 CORNELL INT'L L.J. 1, 22-23 (1979); Barceló, supra note 5, at 261-64; Rivers & Greenwald, supra note 5, at 1470-75.

The Subsidies Code, besides clarifying the concept of "more than an equitable share of world export trade" (article XVI:3 of the General Agreement), prohibits subsidies on primary products when they involve material price undercutting in a particular third market (i.e., selling at prices materially below those of other exporters to the same market). See generally Rivers & Greenwald, supra note 5, at 1476-79.


the scope of this Article, a brief explanation of the procedure will facilitate a better understanding of the two cases that are the focus of this study.

Although the GATT mechanism for the resolution of trade disputes settles most disputes at the consultations stage, the matter can be referred to the Contracting Parties if consultations fail. In this event, the Contracting Parties usually appoint a Panel, which is an ad hoc body consisting of individuals acting in their individual capacities. The Panel conducts its proceedings much like a judicial or arbitral body in that contesting parties make written and/or oral arguments. The Panel may consult experts on technical matters and ask questions of the parties, and other interested states can intervene. If this procedure fails to produce a settlement, the Panel submits its factual and legal findings in the form of a non-binding final report to the Contracting Parties. Finally, the Contracting Parties may adopt, reject, or disregard the report. Upon adoption, the Contracting Parties may formally recommend that the offending member state discontinue its harmful practices, or may authorize retaliation. The primary aim

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12 The Contracting Parties are composed of all GATT member states acting jointly and is the main organ of the organization, according to article XXV of the General Agreement. Additionally, another GATT organ called the "Council" — a body composed of all member states willing to be part of it — is empowered to act on behalf of the Contracting Parties. See GATT Docs. SR.16/11, 160 (1960), W. 16/15/Corr. 1, 2 (1960); Amendments to the Rules of Procedure for Sessions of the Contracting Parties, Basic Instruments and Selected Documents 8 (9th Supp. 1961). Therefore, any action taken by the Contracting Parties to resolve GATT disputes might also be taken by the Council. See generally J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 410-11, 418-19 (1977). For a discussion of the legal differences between a body composed of states (such as the Contracting Parties or the Council) and a body composed of individuals (such as a dispute settlement Panel), see Morelli, STATI E INDIVIDUI NELLE ORGANIZZAZIONI INTERNAZIONALI, 40 RIVISTA DI DIRITTO INTERNAZIONALE 3 (1957).

13 Article XXIII of the General Agreement provides that, under "serious circumstances," the Contracting Parties may authorize the harmed parties "to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances." So far, the Contracting Parties have authorized this "suspension of concessions or obligations" only once. GATT, BISD 32 (1st Supp. 1953). The remedy is essentially ineffective, especially when a small country suspends an obligation towards a large
of this dispute resolution procedure, however, is to promote conciliation, as evidenced by the emphasis on negotiated solutions and the fact that a Panel report is not legally binding upon the parties to the dispute.\textsuperscript{14}

The first two disputes under the Subsidies Code resulting in Panel reports involve separate United States complaints against the European Economic Community (E.E.C.) concerning export subsidies on wheat flour and pasta. Both disputes originated from petitions filed with the United States Government by private parties pursuant to Section 301 of the U.S. Trade Act of 1974.\textsuperscript{15} This Article discusses

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\textsuperscript{14} Under general international law, the GATT dispute settlement method might be classified as one that attempts to promote conciliation. For a discussion of conciliation and of the legal differences between conciliation and other methods of international dispute settlement, see 2 L. OPPENHEIM, INTERNATIONAL LAW 12-20 (7th ed. 1952); Fox, Conciliation, in INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 93-100 (H. Waldock ed. 1972); J. P. COT, LA CONCILIATION INTERNATIONALE (1968); Arangio-Ruiz, Controversie internazionali, 10 ENCICLOPEDIA DEL DIRITTO 381, 401 (1962). But cf. Capotorti, Sugli aspetti quasi-arbitrali di talune forme di conciliazione, 14 COMUNICAZIONI E STUDI 137 (1975) (emphasizes the loose legal nature of conciliation and its multiple similarities with arbitration). The simultaneous presence in the GATT dispute settlement procedure of negotiation and mediation characteristics on the one hand, and arbitration elements on the other, make it difficult to define its legal nature explicitly.

\textsuperscript{15} See 19 U.S.C. § 2411 et seq. (1982 & Supp. 1983). Under section 301 of the Trade Act of 1974 (19 U.S.C. § 2411), as amended by the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984, Congress grants broad authority to the President to either "enforce the rights of the United States under any trade agreement" or to "respond to any act, policy or practice of a foreign country or instrumentality" that is unfair. 19 U.S.C. § 2411 (1982). "Unfair," as defined by this provision, is anything which: "(i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." \textit{Id.} The President can either initiate an action on his own or be prompted by private petition, as has occurred in the two cases discussed in this analysis. In either event, the President has complete discretion as to the form of action he will take. The President may exercise his authority under section 301 with respect to any goods or sector on either a discriminatory or a non-discriminatory basis, without regard to whether such goods or sector were involved in the unfair act, policy, or practice which is counteracted. \textit{Id.} In addition, the President's determination is not subject to judicial review. An analysis of the legal and political significances of
these cases and analyzes several legal questions raised by the two Panel reports. For example, did the two Panels effectively distinguish between primary and non-primary products? How satisfactory was one Panel's definition of "equitable share of world export trade"? Which product truly benefited from the disputed E.E.C. subsidies? Would the so-called refund or restitution by the E.E.C. more logically have been classified as an export subsidy under GATT law? Was the United States legally entitled to dispute the legality of the E.E.C. practice? Finally, some general remarks are made regarding the problem of dispute settlement procedures under the legal framework of GATT.

II. FACTS OF THE CASES

A. The Wheat Flour Case

On December 1, 1975, the Millers' National Federation filed a section 301 petition on behalf of United States producers of wheat flour, alleging that the E.E.C.'s subsidization of its wheat millers hindered United States wheat flour exports to third-country markets. The petition specifically alleged that the subsidies violated article XVI of the GATT. In response to this petition, the United States Government initiated consultations with the E.E.C. in accordance with articles XXII and XXIII of the GATT. Due to the ongoing Tokyo Round of trade negotiations, however, consultations were postponed until September 1981, and at that time the United States and the E.E.C. resumed discussions under the new Subsidies Code. When


17 Id.

18 See Future of Bilateral Trade Uncertain as Wheat Flour Dispute Continues Unabated, 18 U.S. EXPORT WEEKLY (BNA) No. 25, at 1029 (Mar. 29, 1983).
bilateral consultations failed, the United States formally requested that a Panel be assembled to hear the dispute. The Committee on Subsidies and Countervailing Measures established the Panel on January 22, 1982, for the following purpose:

To examine, in the light of the relevant provisions of the [Subsidies Code], the facts of the matter referred to the Committee by the United States concerning subsidies maintained by the European Communities on the export of wheat flour and in the light of such facts to present to the Committee its findings as provided for in Article 18 of the [Code].

The three-member Panel ultimately rejected the United States complaint and released its finding on March 3, 1983.

B. The Pasta Case

On October 16, 1981, the National Pasta Association filed a Section 301 petition on behalf of major United States producers of pasta, alleging that the E.E.C. was providing export subsidies for pasta in

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19 The Committee on Subsidies and Countervailing Measures was established after the Tokyo Round in accordance with article 16 of the Subsidies Code. The Committee is composed of representatives from each state that is a party to the Code and must meet at least twice a year. This Committee is an institutionalized aspect of the Code's dispute resolution framework and plays a very important role in the settlement of disputes. The Committee reviews all Panel reports and decides whether to make recommendations to the parties or to authorize the harmed party to take countermeasures in accordance with article 18 of the Subsidies Code. See generally Jackson, *GATT Machinery and the Tokyo Round Agreements*, in *Trade Policy in the 1980's* 159, 176-80 (W.R. Cline ed. 1983).


21 The Panel, composed of the Chairman, Ambassador Fumihiko Suzuki, and members Mr. Hobson and Mr. Lempen, met with the disputing parties on February 24, March 11, and April 6, 1982. The individuals who serve on GATT dispute panels are usually national representatives to GATT, easily available because of their Geneva residences. Although they are not necessarily trained in law, they are "knowledgeable in the mysteries and folkways of 'GATT lore'," and more inclined than outside experts to give weight to "political and pragmatic considerations." Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 756 (1978).

violation of article XVI of the GATT and articles 8 and 9 of the Subsidies Code. On November 30, 1981, the United States Trade Representative initiated an investigation into these allegations, and consultations followed between the United States and the E.E.C. The parties failed to reach an agreement, however, and the United States requested that a Panel be established in accordance with the procedure provided for by the Subsidies Code. The Subsidies Committee established a Panel on June 14, 1982 with the following Terms of Reference:

To examine, in the light of the relevant provisions of the [Subsidies Code] and of the discussion in the Committee, the United States' contention that the export subsidies on pasta products manufactured from Durum Wheat are being granted by the European Community in a manner inconsistent with Article 9 of the [Code], and to present to the Committee its findings concerning the rights and obligations of the Signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by this [Code].

The five-member Panel ultimately ruled in favor of the United States complaint, releasing its final report on May 19, 1983.

III. THE PANEL REPORTS

A. Premise: The Disputed E.E.C. Practice

Both the pasta and the wheat flour subsidies challenged by the United States complaints are part of the same E.E.C. practice concerning cereals. The E.E.C. has established numerous regulations

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24 Report by Committee on Subsidies and Countervailing Measures, supra note 20, at 47.
25 The Panel was composed of H.E. Ambassador E. Nettel (Chairman until March 9, 1983) and Mr. D.M. McPhail (Chairman after March 15, 1983), Mr. F. Laschinger, Mr. M. Pullinen, and Mr. H.S. Puri. The Panel met with the disputing parties on July 12 and October 8, 1982, and on March 29 and April 19, 1983.
27 This practice has been a part of the basic E.E.C. provisions that established the Common Agricultural Policy (C.A.P.) since June 19, 1967. On this date, the fundamental Council Regulation 120/67 was enacted. See 10 O.J. EUR. COMM. (No. L 117) 2269 (1967). For a general discussion of the Common Agricultural Policy,
in the cereals industry to stabilize markets and to ensure a fair standard of living for the agricultural community concerned.28 These regulations establish a single price system in the Community by annually fixing a "target price,"29 an "intervention price,"30 and at the borders, a "threshold price"31 for every kind of cereal. The price of imported products is adjusted to the Community price through a "variable levy," which is calculated by subtracting the most favorable world market price from the threshold price.32 Upon export of a product the Community may grant an "export refund" representing the difference between the Community price and the world market price.33

Both United States complaints concern the "export side" of the E.E.C. mechanism, although each differs in certain respects. In the wheat flour case, the E.E.C. producers receive the refund on the basis of the world price and the domestic price of wheat flour itself, and thus benefit from a direct subsidy.34 Conversely, in the pasta case, "the amount of the refund [is] determined on the basis of the quantities of [durum wheat] actually used in the manufacture of exported [pasta]."35 The refund on pasta, therefore, appears designed merely to promote the "equality of competition between the industries which use Community [durum wheat] and those which use third country [durum wheat] under inward processing arrangements."36 The


28 Council Regulation 2727/75, preamble, 18 O.J. EUR. COMM. (No. L 281) 1 (1975) [hereinafter cited as Council Regulation No. 2727/75].


30 Id.

31 See Council Regulation 2727/75, supra note 28, art. 5, at 4.

32 Id. art. 13, at 6, 7.

33 See id. art. 16, at 8.


35 Council Regulation 3035/80, preamble, 23 O.J. EUR. COMM. (No. L 323) 27 (1980).

36 Id. art. 4, at 31. See generally E. McGOVERN, supra note 1, at 95-97 (discussion of "inward processing arrangements").
implications of the basic difference between the subsidies on wheat flour and the subsidies on pasta will become apparent upon analysis of the two Panel reports.

B. The Panel Report on Wheat Flour

The wheat flour Panel report raises three main issues: (1) whether wheat flour should be classified as a primary product; (2) whether the E.E.C. subsidy enabled the Community to acquire more than an equitable share of the world export trade in wheat flour; and (3) whether E.E.C. producers exported subsidized wheat flour to particular markets at prices materially below those of other exporters.\(^{37}\)

1. Wheat Flour as a Primary Product

Although different Code regulations apply depending upon whether the disputed product is primary or non-primary,\(^{38}\) the Panel did not directly address the issue of whether wheat flour was a primary or processed product. The United States did not assert in its initial complaint to the Subsidies Committee that wheat flour should be regarded as a processed product.\(^{39}\) Only upon oral argument before the Panel did the United States contend that wheat flour was a non-primary product and that the E.E.C. export subsidies therefore constituted a \textit{prima facie} violation of article 9 of the Subsidies Code.\(^{40}\)

\(^{37}\) Another controversial issue that this dispute raises concerns the role of non-commercial exports in relation to the notion of world export trade. Since the Panel did not give much attention to this issue it is not discussed here in great detail. For a general analysis of the wheat flour case, see Boger, \textit{The United States-European Community Agricultural Export Subsidies Dispute}, 16 L. & Pol'y Int'l Bus. 173, 208-15 (1984).

\(^{38}\) The Subsidies Code defines a primary product as "any product of farm, forest or fishery . . . in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." GATT, Note article XVI, \textit{as amended} by Subsidies Code, footnote 29 to article 9, \textit{supra} note 2; \textit{see supra} note 6. The GATT legal distinction between primary and other products is a consequence of the particular problems of international trade in agricultural commodities. The international regulations concerning such trade derive not only from the GATT, but also from the Food and Agriculture Organization (FAO), the Economic and Social Council of the United Nations (ECOSOC), the International Monetary Fund (IMF), the United Nations Conference on Trade and Development (UNCTAD), and the UNCTAD-sponsored international commodity agreements. \textit{See generally} E. McGovern, \textit{supra} note 1, at 333-77; J. Jackson, \textit{supra} note 1, at 717-40. \textit{See also infra} note 55.


\(^{40}\) \textit{See GATT Dispute Panel Report, supra} note 22, para. 2.3, at 900.
Citing the fact that the United States had not raised this issue in its initial complaint to the Subsidies Committee, the Panel report stated that "this question did not constitute part of the matter referred to the Panel by the Committee and therefore the Panel did not consider the substantive issue involved."\(^4^1\)

The Panel’s justification for not addressing the primary/non-primary product issue is unconvincing in that the report implies the existence of a procedural rule that precludes parties to a GATT dispute from raising new legal issues arising out of the same facts once the dispute is submitted to the Panel.\(^4^2\)

The dispute settlement provisions of the Subsidies Code, however, do not embody any norm of this sort. Moreover, neither the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance"\(^4^3\) nor the related Contracting Parties’ Decision of 29 November 1982\(^4^4\) provide any support for such a restrictive rule. On the contrary, the entire GATT system of dispute settlement is characterized by flexible procedural requirements.\(^4^5\) It is well-established that the main duty of a Panel is "to find out the facts of a case and the applicability of GATT provisions."\(^4^6\) When a Panel determines that a particular GATT rule ought to apply to a dispute, it should arguably apply the regulation even if both parties have overlooked it.\(^4^7\) Finally, the Terms of Reference established by the

\(^{4^1}\) See Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.2, at 1047.

\(^{4^2}\) See id.

\(^{4^3}\) Adopted November 28, 1975, L/4907, GATT, BISD 210 (26th Supp. 1978-79) [hereinafter cited as Understanding on Dispute Settlement].


\(^{4^5}\) But cf. Jackson, supra note 19, at 185 (author suggests that Panel decisions could gradually establish more rigid procedural rules on a case-by-case basis). In this event, the wheat flour Panel’s handling of the primary/non-primary product procedural issue could serve as a precedent for the establishment of a sort of "preclusion rule;" once the Committee has appointed a Panel, the legal issues must be framed as they were during the previous consultations.

\(^{4^6}\) Understanding on Dispute Settlement, supra note 43, at 215.

\(^{4^7}\) Under the procedural principle of *jura novit curia* a judge has the duty to familiarize himself with the applicable law of a case without relying on the disputing parties. Only the facts of a case are the direct responsibility of the parties. For examples of the application of this procedural doctrine in international law, see the *S.S. Lotus* case (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 31 (judgment of Sept. 7), and the dissenting opinion of Judge Anzilotti in the *Electricity Company of Sofia and Bulgaria* case (Belg. v. Bulg.), 1939 P.C.I.J., ser. A/B, No. 77, at 89 (judgment of Apr. 4); see also Witenberg, *La théorie des preuves devant les juridictions internationales*, 56 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTER-
Subsidies Committee required the wheat flour Panel to examine the facts "in the light of the relevant provisions" of the Subsidies Code. Consequently, the Panel could have applied any relevant Code provision.

One might argue, however, that the Panel did address this issue, albeit indirectly. The report consistently interprets and applies provisions that regulate subsidies of primary products in reaching its conclusions on the propriety of the E.E.C.'s actions. The interpretation and application of these provisions would make no sense if the product at issue were considered a non-primary one.

Nevertheless, the point is that the primary/non-primary product distinction is a fundamental issue that should be definitively resolved in every subsidies case before applying any GATT provision, regardless of whether a party to the dispute raises it. Obviously, the answer is sometimes so clear that the issue need not be seriously discussed. No one would dispute, for example, that footwear is a processed product while grapes are a primary product. On the other hand, if the product in dispute was wine, the question could be more complex. Only after having addressed this issue initially is it possible to interpret and apply the appropriate provisions. As a matter of course, articles XVI:3 of GATT and 10 of the Code, and articles XVI:4 of GATT and 9 of the Code are mutually exclusive; either pair of provisions may apply, depending on the answer to the primary/non-primary question, but both never apply to the same product. The Panel seemingly failed to appreciate this point, and consequently gave an indirect, albeit clear, answer to a question it perhaps had attempted to avoid. The report implicitly concludes that, for purposes of GATT law, wheat flour is a primary product.

NATIONAL 1, 33-34 (1936); Barile, *La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice*, 5 COMMUNICAZIONI E STUDI 141, 190 (1953). But see A. CasseSE, *IL CONTROLLO INTERNAZIONALE* 244 (1971). Perhaps the doctrine of *jura novit curia* might be more accurately characterized as a "general principle of law recognized by civilized nations" (one of the sources of international law recognized by article 38 of the Statute of the International Court of Justice), rather than as a norm of customary international law. Obviously, this differentiation is meaningless for scholars who recognize no distinction between the two sources, and who deny the existence of "general principles" as an autonomous source of international law.

48 See supra text accompanying note 20.

49 Throughout the report, the Panel refers to articles XVI:3 of the GATT and 10 of the Subsidies Code, clearly assuming the "primary" status of wheat flour. See, e.g., *Final Draft of GATT Dispute Panel Findings*, supra note 22, paras. 4.1-4.36, at 1047-53.
Regardless of how the report conveys the resolution of the primary/non-primary issue, the result is consistent with previous GATT disputes regarding wheat flour. The Panel's implicit determination also makes sense from a practical point of view. Since wheat flour is essentially crushed wheat, the crushing process could justifiably be considered as a "processing customarily required" in accordance with the GATT definition of primary product. Several other products that undergo similar processing are generally deemed to be primary products in GATT practice.

In the final analysis, the Panel report on wheat flour seems to support the view that a relatively simple intervening stage in the production process does not exclude a product from "primary product" categorization. This conclusion perhaps assimilates GATT's primary product classification to the E.E.C.'s concept of "agricultural product" as "the product of soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products." As will be discussed, the Panel on pasta also contributed to the possible settlement of the controversial primary product issue in a similar sense.

2. Equitable Share of World Export Trade

The concept of "equitable share of world export trade" first appeared in article 28 of the Havana Charter for the International Trade Organization (ITO), and was later incorporated into article XVI of GATT. This standard currently represents the principal legal limit to the application of export subsidies to primary products. The well-known Australian complaint against French subsidies on wheat flour, which in the late 1950's reached the stage of a Panel report. The Panel indicated that wheat flour was a primary product. Report adopted November 21, 1958, L/924, GATT, BISD 46 (7th Supp. 1959). For a general discussion of this dispute, see J. Jackson, supra note 1, at 380; R. HuDEC, supra note 1, at 89, 289; Boger, supra note 37, at 201. A parallel complaint brought by Australia against Italy, and settled before the Panel issued its report, also indicated that wheat flour was a primary product according to article XVI:3 of the GATT. The dispute was settled on the basis of a revised subsidy program. GATT Docs. SR. 13/17 (November 17, 1958).

See supra notes 6, 38.


See infra text accompanying notes 100-08.

For a general account of the drafting history of GATT and ITO, see J. Jackson, supra note 1, at 35-57.

For a discussion of the concept of equitable share of world export trade, see...
"equitable share" concept is inherently obscure, but the Subsidies Code reflects a desire to eliminate ambiguity.

Article 10:1 of the Code basically reproduces article XVI:3 of the GATT by providing that one should consider "a previous representative period" and any "special factor" affecting that product's trade in ascertaining what an equitable market share is for a particular product and for a particular exporting country. Article 10:2 represents the Code's attempt to clarify the equitable share standard:

For purposes of Article XVI:3 of the General Agreement and paragraph 1 above:

(a) 'more than equitable share of world export trade' shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;

(b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining 'equitable share of world export trade';

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Phegan, *GATT Article XVI(3): Export Subsidies and "Equitable Shares,"* 16 J. WORLD TRADE L. 251 (1982); J. JACKSON, supra note 1, at 392-96. The concept of equitable share has sometimes been criticized for resting "on a static view of world trade." Dodds, *United States/Common Market Agricultural Trade and the GATT Framework,* 5 NW. J. INT'L L. & BUS. 326, 334 (1983). The less developed countries in particular sharply criticize the "equitable share" rule as an example of the persistent GATT bias in favor of the status quo and against any increase of world market shares by their infant economies. The developed and developing countries have traditionally been at odds on the issue of subsidies. One reason for this dichotomy is that GATT's differentiation between primary and non-primary products and its clear prohibition of subsidies only for non-primary products has only put developing countries at a serious disadvantage, since their main potential exports (agricultural commodities) must compete with the subsidized agricultural exports of the developed countries. In addition, the GATT's diversified treatment of production subsidies (allowed under article XVI, but subject to countervailing duties by importing countries under article VI:3) and export subsidies (limited under article XVI) is a clear handicap for developing countries. Significant production subsidies require the subsidizing government to expend considerable wealth, while export subsidies can sometimes be provided without huge expenses by the subsidizing government. Given the small fiscal base of developing countries, the production subsidies that their governments are permitted to provide under GATT are not feasible. Export subsidies, which are feasible, are strictly limited, *See Kelkar, GATT Export Subsidies and Developing Countries,* 14 J. WORLD TRADE L. 368 (1980). The Subsidies Code has slightly improved the situation from the developing countries' perspective, but the controversy persists.
(c) 'a previous representative period' shall normally be the three most recent calendar years in which normal market conditions existed.\textsuperscript{56}

Three previous GATT disputes concerning the issue of "equitable share" have reached the stage of a Panel report. One of these disputes involved an Australian complaint regarding French wheat flour exports.\textsuperscript{57} The other two disputes were parallel cases that Australia and Brazil brought against the E.E.C. concerning refunds on sugar exports.\textsuperscript{58}

In the case involving Australia's complaint against France, the Panel concluded that French exports had displaced Australian trade in various wheat flour markets through a system of refunds which essentially acted as export subsidies. The Panel stated that although "there is no statistical definition of an 'equitable' share in world exports, subsidy arrangements have contributed to a large extent to the increase in France's exports of wheat and wheat flour," and, as a result, "the present French share of world export trade, particularly in wheat flour, is more than equitable."\textsuperscript{59} The French wheat flour case is so far the only instance in which a Panel found a market share to be inequitable. By contrast, the Panel\textsuperscript{60} in the sugar cases decided that "it was not in a position to reach a definite conclusion"\textsuperscript{61} as to whether the E.E.C. had obtained a more than equitable share of world sugar trade, citing the difficulty in establishing a causal link between the increase in the E.E.C.'s market share of sugar and the decrease in the complainants' shares.\textsuperscript{62}

\textsuperscript{56} Subsidies Code, article 10:2, supra note 2.

\textsuperscript{57} See French Assistance to Exports of Wheat and Wheat Flour, GATT, BISD 46 (7th Supp. 1959). See generally the authors cited in supra note 50.

\textsuperscript{58} See European Communities - Refunds on Exports of Sugar, GATT, BISD 290 (26th Supp. 1978-79) [hereinafter cited as Australian Complaint]; European Communities - Refunds on Exports of Sugar-Complaint by Brazil, GATT, BISD 69 (27th Supp. 1979-80) [hereinafter cited as Brazilian Complaint]. See generally, Boger, supra note 37, at 203; Note, European Community Resistance to the Enforcement of GATT Panel Decisions on Sugar Export Subsidies, 15 Cornell Int'l L.J. 397 (1982).

\textsuperscript{59} French Assistance to Exports of Wheat and Wheat Flour, supra note 57, at 53.

\textsuperscript{60} Although there were officially two Panels, they were composed of the same individuals. This identity of membership is clear upon a reading of the two reports, which are very similar. Compare Australian Complaint supra note 58, with Brazilian Complaint, supra note 58.

\textsuperscript{61} Australian Complaint, supra note 58, item f, at 319.

\textsuperscript{62} Id. In sitting for the Brazilian Case, the Panel also determined that, for the same reasons, "it was not able to conclude" that the E.E.C. had captured a more
Unfortunately, the 1983 wheat flour Panel adopted the more passive posture taken in the sugar cases in addressing the equitable share issue rather than the more dynamic attitude of the earlier GATT wheat flour Panel. The report reveals a clear inconsistency between the factual findings, which appear to favor the United States in light of previous cases, and the legal conclusions, in which the Panel appeared even more reluctant to take a clear position than its predecessor Panel in the sugar cases.\textsuperscript{63}

Factually, the Panel determined that “the E.E.C. share of world exports of wheat flour has become larger over a time period when payment by the E.E.C. of export subsidies was the general practice.”\textsuperscript{64} In addition, the Panel concluded that the E.E.C. mechanism provides “the E.E.C. trader with a certain advantage vis-à-vis other suppliers, in that it subsidizes the export to the extent necessary to meet lower price levels of wheat flour.”\textsuperscript{65}

Although the E.E.C. asserted several “special factors” in defense of its subsidization, the Panel assigned minimal weight to these arguments in reaching its conclusions. Some of the special factors that the E.E.C. submitted were rejected outright, such as the quality of E.E.C. wheat flour,\textsuperscript{66} the transportation costs,\textsuperscript{67} and the historical links with member states or alimentary habits of some mar-

\textsuperscript{63} Former United States Trade Representative William Brock quickly pointed out the inconsistencies of the Panel report. See 18 U.S. EXPORT WEEKLY (BNA) 872 (1983); see also Boger, supra note 37, at 214.

\textsuperscript{64} Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.15, at 1049.

\textsuperscript{65} Id. para. 4.27, at 1052.

\textsuperscript{66} The E.E.C. argued that certain characteristics of European flours enabled E.E.C. millers to produce at lower costs; moreover, international demand for the high-protein flour that the United States supplied had recently declined. See GATT Dispute Panel Report, supra note 22, para. 2.27, at 911. The Panel found that E.E.C. flours could not be cheaper, without the export subsidy, than United States flours, in spite of quality differences. See Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.25, at 1052.

\textsuperscript{67} The E.E.C. pointed out that the most important and expanding markets for wheat flour were located in the Mediterranean and Middle Eastern areas, obviously very close to Europe, enabling the E.E.C. to have lower transportation costs. The Panel noted, however, that other important markets were closer to the United States, such as those in South and Central America. The Panel concluded, therefore, that transportation costs “should be considered of minor importance in the overall assessment of market share developments.” Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.24, at 1052.
On the other hand, the Panel cited several factors as having a possible effect on the decrease of the United States market share, such as political changes in diplomatic relations, United States non-commercial sales under the Agricultural Trade Development and Assistance Act, and an absence of regular United States shipping lines to certain markets. The Panel’s discussion of these factors, however,

68 The E.E.C. observed that several markets were traditionally supplied by its member states because of their historical ties. See GATT Dispute Panel Report, supra note 22, para. 2.20, at 910. Furthermore, the European flours were better suited for the specific kinds of bread traditionally baked in some countries. Id. para. 2.27, at 911. The Panel determined that these factors were difficult to establish with any certainty. See Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.23, at 1051.

69 The Panel recognized that United States foreign policy could have played a relevant role in hindering United States exports and in affecting market shares. E.E.C. exports of flour undoubtedly benefited from specific political developments involving the United States, such as embargoes or changes in diplomatic relations with such nations as Angola, Cuba, Libya, North Korea, Sri Lanka, Syria, USSR, and Vietnam. See Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.18, at 1051.

70 Id. para. 4.20, at 1051. The Agricultural Trade Development and Assistance Act, more commonly known as the “Food for Peace Program,” is codified at 7 U.S.C. § 1691 et seq. (1982). The controversial point raised by “concessional exports” (non-commercial deliveries in favor of less developed countries at very advantageous conditions) with regard to both the product at issue and other commodities is whether these kinds of exports ought to be included in the GATT concept of “world export trade.” The E.E.C. argues that concessional sales should be included in the overall world-trade figure because there are no uniform and internationally recognized criteria for distinguishing between commercial and concessional deliveries. The E.E.C. also observes that, given the large share of wheat flour exports for which concessional sales account, it would be counterintuitive to disregard them when assessing world market shares. Reportedly, the United States and the E.E.C. exports under non-commercial transactions account for approximately 70%, and 10.8% respectively, of their total exports of wheat flour. Consequently, the E.E.C. is understandably interested in aggregating commercial and concessional figures. The United States, by contrast, argues that only commercial sales should be taken into account for GATT purposes and has presented figures to the Panel relating only to the commercial markets. See GATT Dispute Panel Report, supra note 22, paras. 2.10-2.21, at 901-10. The Panel took the position that, given the volume of non-commercial transactions and their relevance in overall market developments, concessional exports “could not be ignored.” Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.7 n.1, at 1047. Nevertheless, the Panel determined that inclusion of concessional exports in the case at issue would not be “a critical determinant as regards changing market shares.” Id. See generally Boger, supra note 37, at 188-90.

71 The Panel remarked that E.E.C. member states had regular shipping lines to most of the markets located in Africa and in the Middle East. This fact enabled E.E.C. exporters to fill even irregular and unpredictable orders for relatively small amounts of wheat flour at reasonable costs. By contrast, the United States did not benefit from regular shipping lines and had to resort to charters, thus being often
did not seem to indicate that they were considered to have been a significant contribution to the shift in world market shares of wheat flour.

Nor did the Panel assign much weight to statistics which the United States presented with regard to changes in both E.E.C. and United States world market and selected individual market shares in wheat flour, although the Panel acknowledged the reliability of these records. Interestingly, the Panel did not address the old interpretative problem raised by the "world markets" language of articles XVI:3 of GATT and 10:2(a) of the Code. The problem is whether the language refers to "world market," "individual markets," or both.\(^2\) The GATT Panel on the French exports of wheat flour specifically stated that "the concept of 'equitable share' was meant to refer to share in 'world' export trade of a particular product and not to trade in that product in individual markets."\(^3\) The GATT Panel on sugar confirmed this interpretation.\(^4\) Both Panels, however, gave substantial consideration to individual markets to determine whether there was a displacement of complainants' exports.\(^5\) The 1983 Panel on wheat flour did not explicitly address this issue, but nevertheless considered both world and individual market shares to determine whether E.E.C. subsidization had displaced United States wheat flour.

With regard to the "previous representative period" issue, the Panel observed that since virtually every period had been affected by agricultural subsidies granted by various governments, the "three most recent years in which normal conditions existed"\(^6\) should be the three years preceding the United States complaint.\(^7\) The Panel determined unable to deliver small quantities of flour at reasonable prices. The Panel acknowledged that the United States could "suffer some disadvantages vis-a-vis E.E.C. exporters in these markets." \(^7\) See generally J. JACKSON, supra note 1, at 394-95; K. DAM, supra note 1, at 145.

\(^2\) French Assistance to Exports of Wheat and Wheat Flour, supra note 57, at 52.

\(^3\) See generally J. JACKSON, supra note 1, at 394-95; K. DAM, supra note 1, at 145.

\(^4\) "[T]he Panel did not consider it necessary for the purpose of determining whether a market share was a 'more than equitable share of world export trade' to establish market shares in relation to concepts other than those of total world exports . . ." (emphasis added), Australian Complaint, supra note 58, at 307.

\(^5\) See French Assistance to Exports of Wheat and Wheat Flour, supra note 57, at 54-55; Brazilian Complaint, supra note 58, at 90.

\(^6\) Subsidies Code, supra note 2, art. 10(2)(c).

\(^7\) See Final Draft of GATT Dispute Panel Findings, supra note 22, paras. 4.8 - 4.12, at 1047-48.
that the basic pattern of market developments in other periods would be analogous in any event.

During this three-year period, the United States enjoyed an annual world market share of 27%, 25%, and 22%, respectively, representing an annual average of approximately 25%. In 1980-81, the first year after this period, the United States world market share was 21%, a 4% decrease from the preceding three years and a 16% decrease in absolute terms.\(^7\) On the other hand, the E.E.C. held a world market share of 54%, 57%, and 62% during the same three-year period, representing an average of 58%. In 1980-81, the E.E.C. enjoyed a 66% world market share,\(^8\) which constituted an 8% increase (14% in absolute terms) in market share over the three previous years. This increase would appear to bear a close inverse relationship to the 4% decrease in the United States world market share.

Curiously, the Panel did not employ the same method for examining changes in the United States and the E.E.C. individual market shares, but instead compared a three-year period prior to the adoption of the E.E.C. subsidies system (years 1959-60 through 1961-62) to the most recent three-year period (years 1978-79 through 1980-81). Twelve of the seventeen markets evaluated revealed a palpable decrease in United States imports and an evident increase in E.E.C. imports. Moreover, nine of these twelve markets revealed a clear proportionality between United States decreases and E.E.C. increases.\(^8\)

Both the records concerning total world market shares and individual market shares seem to evidence existence of a causal link between United States losses and E.E.C. gains in the world wheat flour trade. Nevertheless, the Panel found that "despite considerable increase in E.E.C. exports, market displacement in the sense of Article \(^7\) GATT Dispute Panel Report, supra note 22, para. 2.11, Table III, at 904-05.

\(^8\) Id.

10:2(a) was not evident in the seventeen markets presented by the USA and examined by the Panel." The Panel vacillated on this point, however, since it conceded that "it could not rule out the possibility that the application of E.E.C. export subsidies had resulted in reduced sales opportunities for the United States." The Panel's fence-sitting does little to promote efficiency in world trade law. Obviously, one can appreciate the Panel's observation that there are "difficulties inherent in the concept of 'more than equitable share'," but a Panel should try to attenuate those difficulties instead of using them as an excuse for not making a decision. The Panel perhaps would have provided a greater service by deciding one way or the other whether the E.E.C. had acquired a more than equitable share in the world market. Even incorrect decisions may help to refine legal standards by establishing a degree of predictability.

A more imaginative approach to the equitable share issue might have consisted, for example, of shifting the burden of proof from the complaining party to the accused party once the complainant had proven certain increases and corresponding decreases of market shares. Under this approach, the complaining state would have to make a *prima facie* case showing: (1) existence of an export subsidy, and (2) a significant change in market shares. Such a showing would create the presumption of a causal link between the accused state's subsidies and the complaining state's market displacement. An accused state would then be required to rebut this presumption by proving the nonexistence of a causal link. Failure to rebut the presumption of the causal link adequately would result in judgment for the complainant.

This analytical framework would relieve the complainant of the onerous burden of conclusively establishing a causal link between another state's subsidies and its own market displacement. Conversely, the accused state would face the more rigorous burden of affirmatively showing that its subsidies did not effect an inequitable imbalance.

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82 Id. para. 4.29.
84 But see Hudc, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business, supra* note 11, at 189-92. This author argues that the use of the no-decision technique by Panels can be a positive development that may discourage the pronouncement of harmful legal rulings in "wrong cases."
between its own market share and the complainant's market share. Had the Panel adopted this approach, the E.E.C. could have had difficulty legitimizing its subsidized exports, and the Panel itself could have clarified the concept of equitable share.

3. Material Price Undercutting

In addition to the equitable share rule, the Subsidies Code contains another standard designed to discourage export subsidies on primary products — the "material price undercutting" restriction. Article 10:3 of the Code prohibits signatories from granting "export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market." The Tokyo Round drafters adopted the price undercutting concept from the 1958 Panel report on French wheat flour, regarding it as a viable alternative to the equitable share standard. Unlike the latter concept, which requires a somewhat subjective determination of "world export" and "world markets," the price undercutting standard is based upon sales in specific third-country markets. Thus, a complaining state could find it easier to demonstrate the material undercutting of its prices in a particular market rather than the inequitable reduction of its world market shares. In the first dispute concerning an allegation of material price undercutting, however, article 10:3 of the Subsidies Code proved difficult to apply.

In the 1983 wheat flour case, the United States claimed that the E.E.C. underpriced its competitors by granting its exporters whatever amount of subsidy needed to obtain such a result. The United States cited ten cases in which both United States and E.E.C. exporters of

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85 A similar line of reasoning was employed by the 1985 GATT Panel on French exports of wheat flour, see supra notes 50, 57-59 and accompanying text, which placed the burden of justifying subsidization on France and gave the benefit of the doubt to Australia. See Boger, supra note 37, at 203; Phegan, supra note 55, at 263.

86 Subsidies Code, supra note 2, art. 10:3.

87 See French Assistance to Exports of Wheat Flour, supra note 57, at 53. Interestingly, the Panel in the 1958 case used the price undercutting concept merely as one factor in concluding that France's share of world export trade was more than equitable. Id. By contrast, the price undercutting concept emerged in the Subsidies Code as an additional standard, definitionally unrelated to the equitable share rule.

88 See generally Rivers & Greenwald, supra note 5, at 1478-79.

89 GATT Dispute Panel Report, supra note 22, para. 2.22, at 910.
wheat flour had made offers in response to specific tenders. In each case, E.E.C. prices were substantially lower. The United States argued that these ten cases "were not isolated instances but part of a systematic pattern," and that "over the 1976-1981 period ... E.E.C. prices had constantly been below those of the United States."

The E.E.C. countered by arguing that in some of these cases, a valid comparison between E.E.C. and United States offers could not be made since European and North American flours were of different qualities. The E.E.C. also pointed out that the United States had quoted C. & F. prices (i.e., including freight charges), lower for shipments from Europe, whereas an objective comparison would have been based on prices F.O.B. at the place of destination (i.e., with delivery at seller's expense). Moreover, the E.E.C. contended that the absence of relevant details such as qualities and quantities of wheat flour actually traded, or conversion rates at the time of the offers, made the United States allegations unreliable.

The Panel basically accepted the E.E.C.'s objections and determined that not enough information was available "to reach a definite conclusion as to whether price undercutting in the sense of article 10:3 had occurred." In all likelihood, the available data were neither detailed nor accurate enough to support the United States complaint. Consequently, the Panel did not go out of its way to address the material price undercutting issue. The Panel's conclusion thus leaves all of the basic questions about this issue unresolved. For example, by how much does a supplier have to underprice its competitors to meet this standard? How long must price undercutting persist to

90 Id. paras. 2.23-2.25, at 910-11.
91 Id. para. 2.24, at 911.
92 Id. para. 2.27, at 911.
93 Id.
94 Id. para. 2.30, at 912.
95 Final Draft of GATT Dispute Panel Findings, supra note 22, para. 4.34, at 1053. The Panel remarked that of the ten cases that the United States presented, five could not be examined because they either predated the entry into force of the Subsidies Code or contained "estimated" or "reported" figures. Id. para. 4.31 n.1, at 1053. As for the remaining five cases, which concerned tenders made in Sri Lanka, Yemen, Jamaica, and Nigeria, the Panel observed that "for three particular markets only one specific transaction was presented in each case, and that while two cases were reported for Yemen, only one U.S. price was quoted in each case." Id. para. 4.34, at 1053. The Panel also determined that the differences in qualities and quantities of wheat flour shipments and the instability of prices in the wheat flour markets made it difficult to arrive at a definite conclusion. Id. para. 4.35, at 1053.
establish its "material" character? Should the purpose, or lack thereof, to drive competitors out of the market be taken into account? What analogy might be drawn with the antitrust violation of "predatory pricing?" Should a mere price shaving be sufficient to create a violation, if it substantially affects the allocation of sales among exporters? Should a causal connection between a subsidy and a demonstrated price undercutting practice be generally presumed?

Unfortunately, the Panel did not address these questions. Although a comparison with the Panel's treatment of the equitable share issue does not reveal a similar inconsistency between factual findings and legal conclusions, its passive treatment of the price undercutting issue is far from satisfactory.

The wheat flour case raised several controversial issues concerning the GATT set of rules on export subsidies on primary products. The Panel, however, appeared to have missed the opportunity to provide an authoritative interpretation of articles XVI:3 of the General Agreement and 10 of the Subsidies Code. As one observer has noted, "the GATT Subsidies Code . . . is not as detailed as necessary to cope with the increasing use of domestic aids, but this drawback could be offset by a series of imaginative panel decisions that begin to delineate important areas of trade distortions in this area." Unfortunately, the first Panel report under the Subsidies Code appears to be neither imaginative nor very accurate.

* Cf. Rivers & Greenwald, supra note 5, at 1479 (reporting that the United States would maintain that the price undercutting rule forbids price shaving practices).
* But see the "Leutwiler Report," which has implicitly justified the disappointing ruling of this Panel because of the vagueness and inappropriateness of the "more than an equitable share of world export trade" concept: "We believe this concept is economically misconceived, since it implicitly endorses market-sharing. It is also too vague and subjective to permit clear judgement on whether a subsidy is acceptable or not — as was shown by the result of a U.S. complaint to GATT about European exports of subsidized flour. . . . A better test of legitimacy than that of 'equitable shares' is needed for subsidies on primary products: it is not evident to us why such subsidies should be legitimate at all, when those on manufactures are banned." GATT, Trade Policies for a Better Future 40 (1985), reprinted in 24 I.L.M. 716, 735 (1985). The "Leutwiler Report," drafted by a group of trade experts appointed in 1983 by the Director-General of GATT to make an independent study of problems facing the international trade system, consists of fifteen recommendations with commentaries in the area of international trade law. The report became public in March 1985. See 19 J. WORLD TRADE L. 301 (1985).
C. The Panel Report on Pasta

The pasta case presents four main issues: (1) whether pasta is a primary product; (2) whether the E.E.C. subsidy was actually applied to pasta exports to benefit pasta manufacturers; (3) whether the so-called refund or restitution is a true export subsidy; and (4) whether the United States is entitled to contest the legality of the E.E.C. practice under international law.

1. Pasta as Non-Primary Product

As discussed earlier, the primary/non-primary product issue should be a preliminary question in every GATT case concerning subsidies, since there is a significant difference in legal treatment between subsidies applied to "certain primary products" and subsidies applied to "products other than certain primary products." Only after classification as primary or non-primary is it possible to determine whether a particular product subsidy is consistent with GATT regulations. As a matter of course, it is always in the interest of a subsidizing state to establish that a product is a primary one since the rules governing subsidies on non-primary products are much more restrictive.

In the pasta case, this issue produced little controversy; neither party to the dispute actually contended that pasta was a primary product within the meaning of article 9 of the Subsidies Code. Pasta does not seem to be a borderline case between primary and non-primary products because it requires two intervening stages in its production process. First, durum wheat is converted into semolina flour, which is then processed into pasta. Statistics reveal that the pasta production process involves approximately a 44% value-added labor to semolina flour.

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100 See supra text accompanying notes 49-51.
101 The prominence of the primary product issue in the pasta case has perhaps been overemphasized by some reports. See GATT Panel Decides in Favor of U.S. Complaint on Imports of Pasta from EC, 8 U.S. IMPORT WEEKLY (BNA) No. 4, at 141 (Apr. 27, 1983); GATT Panel Decides in Favor of U.S. in 301 Pasta Subsidies Complaint, 19 U.S. EXPORT WEEKLY (BNA) No. 4, at 112 (Apr. 26, 1983).
102 Compare the United States arguments, Pasta Report, supra note 26, paras. 3.1 - 3.6, at 471-72, with the E.E.C. arguments, id. paras. 3.7 - 3.14, at 472-74.
104 Id. at 59,678.
The Panel stated that "pasta was not a primary product but was a processed agricultural product." A comparison of this statement with the wheat flour Panel's treatment of that product's classification reveals a basis for distinguishing between primary and non-primary products under the Subsidies Code. Since pasta is a product of second-stage processing and has been classified as a non-primary product, while wheat flour is a product of first-stage processing and has been classified as a primary product, the distinction between a primary and a non-primary product must lie somewhere between a first-stage and a second-stage processed product. Since the Panel hearing the pasta dispute "had no hesitation in concluding that pasta was not a primary product," and the Panel hearing the wheat flour dispute essentially dodged the issue, the dividing line would seem to exist very close to a first-stage processed product. Specifically, the primary/non-primary product distinction might be made on the basis of the complexity of the product's processing. Whenever the first-stage processing that a purely primary product undergoes is basic and the derived product is directly related to the primary one, such a product could be classified as primary. Whenever the first-stage processing, however, is more complex, more costly, and the resulting product is less directly related to the original product, such a product might more likely be considered a non-primary one. Obviously, some uncertainties still persist in borderline cases, and future disputes will serve to refine the primary/non-primary distinction.

2. Product Benefiting from the Subsidy

In the wheat flour case, the wheat flour producers undoubtedly directly benefited from the E.E.C. subsidy. In the pasta case, however, the crucial issue was whether the E.E.C. subsidy benefits producers of pasta or producers of durum wheat. If the subsidy benefits pasta producers, articles XVI:4 of GATT and 9 of the Subsidies Code should apply since pasta is a non-primary product. If, on the other hand, the subsidy benefits durum wheat producers, articles XVI:3 of GATT and 10 of the Code should govern since wheat is a primary product.

105 Pasta Report, supra note 26, para. 4.2, at 374.
106 See supra text accompanying notes 38-53.
107 E. McGOVERN, supra note 1, § 11.323 (Supp. 1983).
108 See supra text accompanying notes 38-53.
That the refund is materially delivered to the pasta producers is undisputed.\(^{109}\) The amount of the refund, however, equals the difference between the price the pasta producers paid for the durum wheat and the price they would have paid if they could have purchased the wheat on the world market.\(^{110}\) If the E.E.C. had not established a system of variable levies for imports, guaranteed minimum prices for domestic products, and connected refunds for exports, the European pasta manufacturers would have bought durum wheat at the lowest price available on the world market and would ultimately have exported pasta at the same price at which they are now exporting. Without a refund, the exporters of pasta would bear the cost of the mechanism protecting the Community wheat market and would face a negative export subsidy.\(^{111}\) With a refund, they are able to offset the negative subsidy and export at the same price they would have absent the E.E.C. mechanism.

The E.E.C. producers of durum wheat enjoy the real advantage of this system. They can either export the wheat and receive the subsidy directly, or sell it to manufacturers of pasta or other durum wheat-based products at artificially high prices, benefiting from the subsidy indirectly. While the producers benefit under either option, the manufacturers of pasta lose — as do the European consumers — if they sell within the E.E.C., and break even if they export. As a result, one could logically argue that the producers of durum wheat are the principal beneficiaries of the subsidy, and that article XVI:3 of GATT as interpreted by article 10 of the Subsidies Code should apply in this case.

This argument has been presented in response to similar subsidization arrangements. For instance, the International Trade Administration (I.T.A.) of the United States Department of Commerce has taken such a position in a countervailing duty case on steel.\(^{112}\) In this dispute, the United States steel producers contested German coal subsidies which were being used by European steel producers. The I.T.A. observed that:

[B]enefits bestowed upon the manufacture of an input do not flow down to the purchaser of that input if the sale is transacted

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110 See supra notes 33-36 and accompanying text.
at arm's length. In an arm's length transaction, the seller generally attempts to maximize its total revenue by charging as high a price and selling as large a volume as the market will bear.\textsuperscript{113}

This observation is equally descriptive of what has occurred in the E.E.C.'s subsidization of durum wheat. The pasta producers do not share the benefit of the E.E.C. subsidy with the durum wheat producers because they deal with the latter at arm's length, and buy durum wheat without enjoying any special privileges.

This situation should be carefully distinguished from the "upstream subsidy" practice. An "upstream subsidy" is generally defined as a subsidy which: (a) is applied to product \( x \) (the input product), which is used to manufacture or produce final product \( y \) in the same country; (b) creates a competitive benefit, i.e., a price on input product \( x \) which is lower for the manufacturers of final product \( y \) than for any other buyer; and (c) has a significant effect on the price of final product \( y \). Since the subsidy promotes the production of final product \( y \), the subsidizing government has effectively aided the producers of \( y \) without granting them a direct subsidy.\textsuperscript{114}

In the pasta case, the price of durum wheat for the E.E.C. producers of pasta is the wheat's generally available price in the E.E.C. markets. This does not present a case of an "upstream subsidy," since condition (b) above is not met. In the pasta case, as well as in the previously mentioned steel case, the benefit of the subsidy is not ultimately transferred to the final product, but is restricted to the manufacture of the input product. As the I.T.A. observed in the steel case, "the real economic effect of German subsidies is to penalize, not assist, German steel companies. As a result of the German coal policy, German steel companies are required to pay a slight premium above the world market price for their coal purchases."\textsuperscript{115}

\textsuperscript{113} Id. at 39,319.


\textsuperscript{115} See supra note 112 at 39,322.
The pasta case represents a parallel cause-and-effect relationship. Pasta producers are penalized, not benefited, by the durum wheat purchased above the world market price. Consequently, the disputed E.E.C. practice adversely affected the United States exporters of durum wheat, not the United States manufacturers of pasta. The majority of the Panel, however, was of the opinion that "durum wheat incorporated in pasta products could not be considered as a separate 'primary product' and the E.E.C. export refunds paid to the exporters of pasta products could not be considered to be paid on the export of durum wheat." The basis for this finding seems to be that the refunds are in fact paid to the exporters of pasta, but, as the preceding analysis suggests, this observation fails to consider who has truly benefited from the subsidy. As a dissenting member of the Panel observed, "the refund ... improved the competitive position of the E.E.C. durum wheat producers rather than the processing industry and should consequently be considered as a subsidy on durum wheat."

The Panel's majority also cited the need to give "ordinary meaning" to article XVI of GATT and articles 9 and 10 of the Code as a whole by considering these provisions together "in their context and in the light of their object and purpose." This observation is merely a restatement of article 31:1 of the Vienna Convention on the Law of Treaties, however, and the legal reasoning underlying the Panel's conclusion is not very clear. Hopefully, future Panels will consider the true beneficiary of a subsidy before rejecting that subsidy as incompatible with GATT rules.

3. The Refund as an Export Subsidy

The Panel Report on pasta perfunctorily concluded that the disputed refund was an export subsidy, since it found that the E.E.C.'s subsidization automatically operated to increase exports and that the E.E.C. had issued notice of its practice consistent with article XVI:1 of the GATT. This conclusion, however, might be challenged on several grounds. First, the Panel did not explain adequately why it

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116 Pasta Report, supra note 26, para. 4.4, at 474.
117 Id. para. 5.1, at 476.
118 Id. para. 4.4, at 474.
119 "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." U.N. Doc. A/CONF.39/27 (1969).
120 Pasta Report, supra note 26, para. 4.3, at 474.
classified the disputed subsidy as an export and not a domestic subsidy. The Panel seemed to conclude that since the E.E.C. issued notice of its subsidization, the subsidy must have been an export subsidy. However, since article XVI:1 of GATT requires notification of any subsidy which operates even indirectly to increase exports or to reduce imports, both domestic and export subsidies would seem to fall within the scope of this clause.

Consequently, article XVI:1 should not be used as a decisive criterion in characterizing a particular subsidy. Otherwise, the notification provision of article XVI:1 acts as an "estoppel" against any defense of a notified practice and discourages states from complying with this provision with regard to questionable practices.

The Panel's position concerning notifications of subsidies is also inconsistent with the Subsidies Code Committee's position on this issue. The Committee has emphasized the importance of notifications in promoting international consistency in the area of subsidization, and has downplayed any fear of a possible "self-incriminating" effect of such notifications.

Another reason for challenging the Panel's characterization of the refund as an export subsidy is the possibility that the E.E.C. practice could be seen as an admissible "remission" or "drawback" of import charges levied on imported goods incorporated into the exported product. Paragraph (i) of the Illustrative List of Export Subsidies, which has been incorporated into the Subsidies Code, permits this practice on the condition that the remission not exceed the import levy on the input product. This scheme would seem to apply to

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121 "Estoppel" is essentially a legal bar or restriction which precludes assertion or denial of a given state of facts because of previous conduct or acquiescence. See generally Bowett, Estoppel before International Tribunals and Its Relation to Acquiescence, 33 Brit. Y.B. Int'l L. 176 (1957); Mac Gibbon, Estoppel in International Law, 7 Int'l & Comp. L.Q. 468 (1958); A. Martin, L'Estoppel en Droit International Public (1979).

122 "Although some delegations had misgivings about the incriminating effect of notifications, the Committee considered that such misgivings were not justified and consequently they should not prevent Signatories from fulfilling their obligations." Report by Committee on Subsidies and Countervailing Measures, supra note 20, at 45 (emphasis added).

123 The Illustrative List of Export Subsidies has updated a former list based on a 1960 GATT Working Party Report. GATT, BISD 185-88 (9th Supp. 1961). This is a non-exhaustive list which enumerates the most common governmental practices characterized as subsidies. The practice that paragraph (i) of the List explicitly bans is the following:

The remission or drawback of import charges in excess of those levied
the exported pasta which incorporates imported durum wheat, since the E.E.C. remission is equal to or less than the import levy. The same might not be said for the exported pasta which incorporates domestic durum wheat, although one observer has suggested an argument for treating domestically-produced tradeable inputs incorporated into exports as dutiable imports on which the duty is refundable. This refund, or "substitution drawback," would be determined by computing the difference between the domestic input price and the equivalent c.i.f. import price.

Paragraph (i) of the Illustrative List seemingly allows such substitution drawback in "particular cases" for domestic goods of quality and characteristics comparable to imported goods. In addition, paragraph (i) establishes a double limit in that a firm must actually import the equivalent goods and complete the corresponding export operations within two years. Not enough facts exist to determine conclusively whether the substitution drawback on pasta could meet these requirements. In any event, the reference to "particular cases" and the provision for time limits would appear to indicate that paragraph (i) permits substitution drawbacks only on a contingent and irregular basis. Accordingly, if E.E.C. pasta producers commonly used equivalent domestic goods regardless of particular circumstances (such as transport difficulties or risk of not complying with delivery obligations), paragraph (i) would not justify E.E.C. substitution drawbacks.

A final possible argument in opposition to the Panel's conclusion that the disputed E.E.C. refund is an export subsidy concerns paragraph (d) of the Illustrative List of Export Subsidies. Paragraph on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.

Subsidies Code, supra note 2, article 19, Annex. The key language here is "in excess," meaning that, a contrario, all remissions which are not in excess are not true subsidies.

Cf. Low, supra note 111, at 381.

Id. at 381 (defining "substitution drawback" as any measure taken "to reduce the price of a domestically produced tradeable input into an exporting activity to the duty-free price of an imported equivalent").

See supra note 123.

Paragraph (d) of the Illustrative List states that a subsidy is:
(d) suggests that governments can deliver products used in the production of goods for export to exporters at world market prices, even if these prices are lower than those of like products used in production for local consumption. It is unclear whether the term "delivery" requires that governments be involved in producing or supplying goods, or whether any input at world prices into an exported product is allowed by means of governmental compensatory payments. Under the latter construction, the contested refund on pasta would be permissible because it would not qualify as an export subsidy. The Panel, however, opted for the former, more literal, interpretation of paragraph (d). This interpretation seems to be consistent with the customary meaning of the term "delivery," and the restrictive purpose of the Illustrative List. As one author has noted, however, paragraph (d) would probably not prohibit a scheme in which Community agencies buy the wheat at a high domestic price and deliver it at a lower world market price to pasta manufacturers for export, if E.E.C. manufacturers had access to durum wheat on the world market at the world market price.

4. Admissibility of the United States Claim

Although the Panel arguably reached the wrong decision in finding that the subsidy was applied to pasta and not to durum wheat, a strong argument can be made that the United States claim was inadmissible under general international law. Once the Panel determined that the disputed subsidy applied to a non-primary product, pasta, it properly concluded that articles XVI:4 of GATT and 9 of the Code governed the dispute. Article XVI:4, however, has limited applicability; it binds only those GATT members which have

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The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

Subsidies Code, supra note 2, art. 19, Annex.

128 See Low, supra note 111, at 382.

129 See Pasta Report, supra note 26, para. 4.12, at 476 (stating that paragraph (d) does not relate to governmental compensatory payments, but only to actual delivery of inputs by governments).

130 E. McGOVERN, supra note 1, § 11.322 (Supp. 1983).

131 See supra text and accompanying notes 101-105.

ratified an *ad hoc* multilateral agreement called "Declaration Giving Effect to the Provisions of Article XVI:4 of the General Agreement on Tariffs and Trade." The United States ratified the Declaration, subject to an "understanding" which appears to contemplate subsidy practices analogous to the one in dispute in the pasta case:

[T]his Declaration shall not prevent the U.S., as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not itself a primary product), which has been produced from such primary product, if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary product, if exported in primary form, consumed in the production of the processed product.

Despite its nomenclature, it appears clear that the United States "understanding" is actually a reservation. The difference is critical because a reservation fundamentally modifies treaty rights and obligations between the reserving state and all non-objecting states, while an understanding does not.

The Vienna Convention on the Law of Treaties defines a reservation as a "unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of

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133 445 U.N.T.S. 294 (1962); GATT, BISD 32 (9th Supp. 1971). This Declaration was concluded on November 19, 1960 and entered into force on November 14, 1962. For a list of those states bound by the Declaration, see GATT, Status of Legal Instruments (GATT/LEG/1) 11 - 4.1 (1971). For a discussion of the special status of article XVI:4 of the General Agreement and how it evolved, see J. Jackson, supra note 1, at 371-76.


certain provisions of the treaty in their application to that state.'"\textsuperscript{137} Thus the substance of the governmental pronouncement, not its label, determines its nature.

Admittedly, the Vienna Convention, which entered into force in 1980, applies to the United States Declaration of 1960 only as a restatement of customary international law because the Convention itself "applies only to treaties which are concluded by states after the entry into force of the . . . Convention with regard to such states."\textsuperscript{138} Moreover, the United States is not a party to the Convention. It is quite proper, however, to regard the Vienna Convention's provisions on reservations as a restatement or codification of customary international law because they "generally reflect the dominant modern view of the effect of reservations, as it has developed in the practice of States and of the United Nations."\textsuperscript{139} Furthermore, the United States government has explicitly and implicitly acknowledged the customary status of many provisions of the Vienna Convention on many occasions,\textsuperscript{140} including the Convention's rules on reservations.\textsuperscript{141}

The problem of discerning the actual intent of statements that states issue upon ratification of or accession to a multilateral treaty is resolved by applying ordinary rules of interpretation. International jurisprudence has developed two basic criteria to distinguish reser-


\textsuperscript{138} Id. art. 4. This is the "non-retroactivity" provision of the Vienna Convention.


\textsuperscript{140} For example, in submitting the Convention for consideration by the Senate, President Nixon declared that the Vienna Convention was "already generally reorganized as the authoritative guide to current treaty law and practice." S. Exec. Doc., 92d Cong., 1st Sess. 1 (1971). The International Court of Justice has placed high value on such unilateral declarations by a state's Chief Executive. See Nuclear Test Cases (Austl. v. Fr.), 1974 ICJ Reports 253, 267-71. In daily diplomatic correspondence, the Vienna Convention on the Law of Treaties is often referred to by United States officials. See, e.g., 1973 Dig. U.S. Prac. Int'l L. 360, 307; 1977 Dig. U.S. Prac. Int'l L. 107; 1978 Dig. U.S. Prac. Int'l L. 701, 767, 771, 775.

\textsuperscript{141} See 1976 Dig. U.S. Prac. Int'l L. 216; 1975 Dig. U.S. Prac. Int'l L. 263-67. Since it is widely recognized that a large part of the Vienna Convention on the Law of Treaties codifies general international law, further references to the Vienna Convention are references to the related customary rules codified therein.
vations from understandings. A statement has been found to qualify as a reservation if: (a) it purports to exclude or modify the legal effect of certain provisions, which is more than the mere exclusion or modification of the actual terms of certain provisions, and (b) it purports to expressly qualify the state’s acceptance of the treaty. The United States “understanding” clearly seems to meet both of these requirements. The Panel stated as much by observing that “the U.S. understanding . . . had to be recognized as a reservation rather than an interpretation.”

Since only one state formally objected to the United States reservation, article XVI:4 of GATT as modified applies to govern the relationships between the United States and all other parties to the Declaration. As a result, the E.E.C.’s subsidy on pasta is arguably quite legal, at least vis-a-vis the United States, because the United States reservation allows the E.E.C. to engage in practices covered by the reservation itself.

The United States did not, however, reiterate this reservation with respect to article 9 of the Subsidies Code, and the Panel concluded that “the U.S. was not estopped from

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143 Pasta Report, supra note 26, para. 4.6, at 475.

144 Southern Rhodesia; GATT, Status of Legal Instruments (GATT/LEG/1) 11-4.2 (1971).


146 The E.E.C. as such did not sign the Declaration, although all of its member states did sign individually. Formally, this might appear to be a difficult legal problem, but the E.E.C.’s participation in GATT must be viewed from a broader perspective. In accordance with article 113 of the E.E.C. treaty, which establishes a common commercial policy, the Community has taken over the powers of its member states in this area, effectively substituting for them. Once this substitution has been accepted by the other contracting parties in reference to the General Agreement, it must also be accepted as applying to the related side agreements such as the Declaration at issue. This has been acknowledged by regular GATT practice, as well as several decisions of the Court of Justice of the European Communities. See, e.g., International Fruit Cases, 20-24/72, 18 RECUEIL 1219 (1972), COMMON MKT. REP. (CCH) ¶ 8194.
challenging the E.E.C. practice in question." The Panel also concluded that "the United States had recognized in its submission to the Panel that the United States gave up the legal right to engage in this practice." The determination that the United States Government waived its reservation by arguing its case should have no bearing on this dispute, however, because of its obvious ex post facto nature.

Moreover, another argument contradicts the Panel’s finding that the United States did not intend to assert the same reservation with respect to the Subsidies Code. When confronting incompatible provisions of international agreements on the same subject matter, it is well-established that the latter in time prevails. Are article XVI:4 of GATT, as modified with respect to the United States by its reservation, and article 9 of the Code incompatible? It does not seem so for several reasons. First, the Code contains no express language concerning the subject matter of the United States reservation. As one Panel member noted in his dissenting opinion, "Article 9 . . . did not address the issue of the incorporation of subsidized primary products components, and could thus not be used as a decisive guidance for the conclusion to be drawn on the present case."

In addition, as the Panel acknowledged, "there was no record of any discussion or understanding as to the interpretation of Article 9" during the Tokyo Round negotiations. In the absence of travaux préparatoires on this issue, and considering that as many as fifteen states which adopted the Code were simultaneously bound by the reservation vis-a-vis the United States, the Panel should not have presumed that the parties intended to alter the current system of rights and obligations under article XVI:4, without explicit evidence

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147 Pasta Report, supra note 26, para. 4.7, at 475.
148 Id. (emphasis added).
150 Pasta Report, supra note 26, para. 5.2, at 476.
151 Id. para. 4.5, at 475.
152 The background and events, such as records of conference proceedings, treaty drafts and the like, leading up to stipulation of a treaty are traditionally called travaux préparatoires, or preparatory works. "The importance of travaux préparatoires [as a means of treaty interpretation] is not to be underestimated and their relevance is difficult to deny, since the question whether a text can be said to be clear is in some degree subjective." De Arechaga, International Law in the Past Third of a Century, 159 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 1, 48 (1978); see Vienna Convention on the Law of Treaties, supra note 137, art. 32.
of this in the text of the Code. The more sensible presumption would be that the parties would have articulated a desire to alter a twenty-year-old legal practice.

Finally, the Code is not an independent international agreement, but an "Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade." This fact makes it difficult to contend that article 9 of the Code can be applied without considering article XVI:4 of the GATT. In sum, the legal system of rights and obligations established by article XVI:4 of the GATT, as interpreted and applied by article 9 of the Subsidies Code, seemingly prohibits the United States from challenging the subsidies at issue, since they fall within the boundaries of the United States own reservation.

In conclusion, although the Panel report on the pasta case may be subject to criticism for its treatment of some of the legal issues involved, the Panel deserves credit for taking several clear positions, unlike its counterpart in the wheat flour case. Another positive aspect of this report is the presence of a dissenting opinion by one member of the Panel, a rarity in previous GATT cases. The use of dissenting opinions is an invaluable feature of the common law tradition, and has been adopted by major international law tribunals such as the International Court of Justice. The Panel's adoption of this practice perhaps constitutes a small step toward a more "juridical" model of dispute settlement.

IV. SOME REMARKS ON GATT DISPUTES SETTLEMENT PROCEDURES

The Panel reports on the wheat flour and pasta cases became public in March and May of 1983, respectively. To date, neither the Subsidies Code Committee, which received the reports in accordance with article 18:8 of the Code, nor any other GATT body has formally responded to them. Article 18:9 of the Code provides that:

The Committee shall consider the panel report as soon as possible and, taking into account the findings contained therein, may make recommendations to the parties with a view to resolving the dispute.

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153 The function that the Subsidies Code is intended to serve in the GATT system is evident in the Code's Preamble: "Desiring to apply fully and to interpret the provisions of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade . . . .", Subsidies Code, supra note 2, preamble.

154 See R. HUDEC, supra note 11, at 52.
If the Committee’s recommendations are not followed within a reasonable period, the Committee may authorize appropriate countermeasures (including withdrawal of GATT concessions or obligations) taking into account the nature and degree of the adverse effect found to exist. Committee recommendations should be presented to the parties within thirty days of the receipt of the panel report.\textsuperscript{155}

Obviously, the Committee has completely disregarded its obligation to present recommendations to the parties within thirty days of the receipt of the Panel report. Neither the United States, nor the E.E.C., have received any recommendation from the Subsidies Committee or any other appropriate GATT body with regard to the Panel reports on wheat flour and pasta.

Curiously, the Subsidies Code does not provide for any voting procedure,\textsuperscript{156} but the Code Committee’s practice has adopted the traditional GATT practice of making decisions by consensus,\textsuperscript{157} a methodology followed by nearly every international institution.\textsuperscript{158} At the thirty-eighth Session of GATT, the Contracting Parties reaffirmed the use of consensus for the settlement of GATT disputes, and “agreed that obstruction in the process of dispute settlement shall be avoided.”\textsuperscript{159} In light of the formal expression of the contracting parties on this question, one can hardly justify the resistance of the E.E.C. and, to even a lesser extent, that of the United States in adopting and implementing the two Panel reports.\textsuperscript{160}

\textsuperscript{155} Subsidies Code, \textit{supra} note 2, article 18:9.

\textsuperscript{156} The lack of a voting procedure, as one author has remarked, is “a striking omission.” Jackson, \textit{The Birth of the GATT-MTN System: A Constitutional Appraisal}, \textit{supra} note 11, at 50; see also Jackson, \textit{GATT Machinery and the Tokyo Round Agreements}, \textit{supra} note 19, at 177.

\textsuperscript{157} \textit{Cf.} R. HUDEC, \textit{supra} note 1, at 261-62.


\textsuperscript{159} \textit{See supra} note 44, at 16.

\textsuperscript{160} One should not automatically assume that things would have been smoother if a majority-vote procedure had been adopted. In fact, other member states of the Subsidies Committee have sided either with the E.E.C. (\textit{e.g.}, Switzerland, Sweden, and Norway) or with the United States (\textit{e.g.}, Australia, New Zealand, Chile, and
While the wheat flour and pasta cases were deadlocked, another agricultural dispute arose between the United States and the E.E.C. in which the United States accused the E.E.C. of discriminating against its citrus exports. A Panel concluded in late 1984 that the E.E.C. practice had adversely affected United States citrus producers, and recommended that the E.E.C. reduce the most-favored-nation rate of duty on citrus. Once again, the E.E.C. resisted adoption of the Panel report, and the United States and the E.E.C. were unable to reach a negotiated solution. Consequently, President Reagan, relying upon his authority under Section 301, announced on June 20, 1985 that the United States would increase duties on pasta imported from the E.E.C. in retaliation for the E.E.C.'s discriminatory practices against United States citrus exports. Specifically, the Administration resolved to raise import duties from 0.25% to 25% on pasta products containing egg and from 0.5% to 40% on pasta products without egg. In response, the E.E.C. announced on June 27 that it would retaliate upon United States imports of lemons and walnuts by raising duties from 8% to 20% and from 8% to 30%, respectively.

After several days of negotiations between United States and E.E.C. trade representatives, the two sides announced a compromise on July 19. Under this agreement, the United States pledged to suspend the established duty increase on pasta until October 31, 1985. In Canada) over these disputes, thus making the achievement of any type of decision politically very difficult, regardless of whatever voting system might be adopted. See U.S. - E.C. Wrangling over Pasta: Wheat Subsidies Reports Continue at GATT, 8 U.S. IMPORT WEEKLY (BNA) No. 11, at 412-13 (Jn. 15, 1983).


See generally supra note 15.


Presidential Proclamation No. 5363 of August 15, 1985, Modification of the
return, the E.E.C. refrained from increasing duties on lemons and walnuts, pledged to make its market more accessible for United States citrus exports by October 31, and reduced the refunds on durum wheat used in pasta exported to the United States by 46%. Since the E.E.C. failed on its pledge to improve accessibility for United States citrus exports by October 31, the United States has not delayed implementation of its cited tariff increase on E.E.C. pasta imports. Consequently, the E.E.C. has raised duties on United States lemons and walnuts, and has cancelled the cited reduction of export refunds on durum wheat.

The use of Section 301 presidential authority to effect unilateral action outside of the GATT framework has led to a bitter state in the long-standing dispute over pasta. Although both parties' unilateral actions are probably inconsistent with the Subsidies Code, the parties have opted for the tempting short-run gains of protectionism instead of the long-run economic benefits which result from coop-

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Effective Date for Increased Rates of Duty for Certain Pasta Articles From the European Economic Community, 50 Fed. Reg. 33,711 (1985).

167 Commission Regulation (EEC) No. 2010085 of 19 July 1985, Annex, 28 O. J. EUR. COMM. (No. L 188) 30 (1985). This Regulation was based on, and authorized by, Council Regulation (EEC) No. 1982/85 of 16 July 1985, 28 O.J. EUR. COMM. (No. L 186) 8 (1985). The Italian Government, supported by the French Government, has strongly disapproved of the agreement reached by E.E.C. Commissioner de Clercq, and voted against its adoption (without, however, resorting to the veto power). The Italian Government has criticized the terms of the settlement for yielding too much to the United States at the expense of a single member state. Italy asserts that it is harmed twice by the agreement because it is both the E.E.C.'s largest citrus producer and pasta exporter. La Repubblica, July 17, 1985, at 42, col. 5; Il Messaggero, July 27, 1985, at 17, col. 1.


169 Article 19 of the Subsidies Code provides that "[n]o specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement." Subsidies Code, supra note 2, art. 19. The United States President has historically been reluctant to use § 301 authority to act unilaterally in response to foreign trade practices because of the questionable legality of unilateral retaliation and other reasons. Former United States Trade Representative William Brock publicly declared that "retaliation is not a preferred result in any 301 case. Rather, our goal is to eliminate or modify a foreign practice which is adversely affecting U.S. interests. The authority to retaliate conferred by Section 301 is intended to provide the necessary leverage to obtain this result." European Communities' Common Agricultural Policy, the Subsidies Code, and Enforcement of U.S. Rights under Trade Agreements: Hearings before the Subcommittee on International Trade of the Senate Committee on Finance, 97th Cong., 2d Sess. 30 (1982).
Although future negotiations may produce solutions more consistent with free trade principles, the failure of the GATT framework to implement effectively the recommendations of the Panel report on pasta and the subsequent increase in tensions between the United States and the E.E.C. raise serious questions about the future of GATT's dispute settlement system. After the Tokyo Round, there was widespread hope that the dispute settlement procedures of the new codes would be effective. The Subsidies Code procedure, although only a slight variation of established GATT procedures for dispute settlement, was regarded by many as the most potentially effective code procedure. The first two disputes litigated under the Subsidies Code have fallen far short of expectations in this regard.

The failure to fashion more effective GATT dispute settlement procedures, both during and after the Tokyo Round, is largely attributable to the E.E.C.'s firm opposition to such reform. Whether the E.E.C. will now change its attitude is difficult to predict. For the moment, the E.E.C.'s actions have undoubtedly contributed to a considerable loss of credibility for the GATT system of dispute settlement.

One way to strengthen the Subsidies Code's dispute resolution system would be to make Panel reports legally binding upon disputing parties, instead of requiring, as is now the case, that the Subsidies

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170 For discussion of the dilemma governments face in deciding whether to opt for protectionism or free trade, see Abbott, *the Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARVARD INT'L L.J. 501 (1985) (author uses a game theory framework to organize analysis of the functions of international trade law, and shows long-run costs of protectionism and retaliatory measures).


172 For a detailed comparison between dispute settlement provisions of the Tokyo Round codes and the procedures developed under article XXIII of the General Agreement, see Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, supra note 11, at 174-77.


Committee adopt the reports. Parties would probably only agree to this reform, however, on the condition that the automatic right to the establishment of a Panel currently provided for by article 18:1 of the Code be abolished.\textsuperscript{175} Panels would thus be created in accordance with the previous agreement of the concerned parties, as is the usual practice in international arbitration proceedings.\textsuperscript{176} This system would perhaps reduce the number of disputes resolved by Panels, and would probably discourage litigation of the most controversial issues. Such a system would nonetheless be more effective in implementing the decisions made, and precedents on the interpretation of the Subsidies Code, or of any other GATT rule, could gradually be established.

Another alternative could be to encourage states to recognize as compulsory the jurisdiction of Panels through previous unilateral declarations, but allowing them, however, to make reservations to exclude certain categories of disputes.\textsuperscript{177} The obvious model for this scheme would be that found in article 36(2) of the Statute of the International Court of Justice.\textsuperscript{178} Since the number of states that are parties to the Subsidies Code is relatively restricted, such a system might be more effective for GATT than it has been for the I.C.J.

There are other interesting possibilities,\textsuperscript{179} but the paramount goal of any reform ought to be to make Panel decisions binding on disputing parties. Perhaps a simple amendment to article 18:9 of the Subsidies Code, requiring the Committee to adopt automatically the Panel report it receives unless it makes recommendations by a given deadline, would suffice. Obviously, if the Subsidies Code was amended in this way, Panel reports would have to provide concrete recom-

\textsuperscript{175} "The Committee \textit{shall} establish a panel upon request. . . ." Subsidies Code, \textit{supra} note 2, article 18:1 (emphasis added).

\textsuperscript{176} \textit{See generally} I. Brownlie, \textit{Principles of Public International Law} 706 (3d ed. 1979).

\textsuperscript{177} For example, the E.E.C. could accept jurisdiction in such a manner and exclude any dispute related to the "variable levy," for which an express acceptance would be necessary.

\textsuperscript{178} \textit{June 26, 1945, 59 Stat. 1055, T.S. No. 993.}

mendations to the parties so as not to require any further action by another GATT body.

The Panel structure itself could be improved by requiring that Panels be composed exclusively of independent trade experts instead of governmental representatives to GATT, as is the case today.\(^\text{180}\) One possible shortcoming of this reform, however, would lie in the difficulty of securing truly independent experts who are both familiar with the intricacies of GATT and willing to judge controversial trade cases.\(^\text{181}\)

Perhaps a system could be created analogous to that of the Permanent Court of Arbitration.\(^\text{182}\) Under such a scheme the Contracting Parties would maintain a permanent list of independent arbitrators. When a dispute arises, each party would appoint two arbitrators from the list, and the four arbitrators would together select an umpire. Therefore, a "tribunal" would arise only to hear a particular case, although the judicial body itself would be a permanent institution. The growing prestige of such an institution could attract eminent lawyers and experts who would lend authority to the rulings given.\(^\text{183}\)

In any event, the GATT dispute settlement procedures clearly need to be strengthened in light of the lengthy deadlock resulting from the first two cases litigated under the Subsidies Code.\(^\text{184}\) Perhaps a reformation of the Subsidies Code dispute settlement mechanism would ultimately improve the general GATT procedures of article XXIII. It is unrealistic to anticipate significant reforms in the short term, but even minor reforms will be a welcome first step. The major

\(^{180}\) See Jackson, \textit{supra} note 21.

\(^{181}\) Past experiences with outside experts have arguably been less than satisfactory. \textit{Cf.} GATT, BISD 98, 114, 127 (23d Supp. 1977) (the "DISC" case and related countercomplaints). \textit{See generally} Jackson, \textit{supra} note 21.

\(^{182}\) \textit{See generally} Brownlie, \textit{supra} note 176, at 707-08.

\(^{183}\) \textit{Cf.} the 12th recommendation of the Leutwiler Report: "In support of improved and strengthened rules, GATT's dispute settlement procedures should be reinforced by building up a permanent roster of non-governmental experts to examine disputes, and by improving the implementation of panel recommendations. Third parties should use their rights to complain when bilateral agreements break the rules." GATT, \textit{supra} note 99, at 46. For a general explanation of the Leutwiler Report, see \textit{supra} note 99.

\(^{184}\) As a point of interest, the United States International Trade Commission (I.T.C.) has recently instituted an investigation under § 332(b) of the Tariff Act of 1930 (19 U.S.C. § 1332(b)), concerning the effectiveness of dispute settlement procedures under the General Agreement and the Tokyo Round codes. The I.T.C. final report was expected to be released by December 31, 1985. 50 Fed. Reg. 24,716 (1985).
trade powers, especially the United States and the E.E.C., should negotiate in good faith to reach a specific agreement on the basic procedural issues. Otherwise, any improvement realized on substantive law issues is bound to have little practical meaning.

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185 The dispute settlement issue will probably be a major topic at the next round of multilateral trade negotiations. In his nomination hearing before the Senate Finance Committee on June 25, 1985, United States Trade Representative Clayton Yeutter included dispute settlement among the main issues which needed to be addressed in a new round of trade negotiations. He particularly emphasized the importance of improving timeliness and decisiveness in the dispute settlement process. United States Information Agency, Wireless File, Europe File no. 207, June 26, 1985; E.E.C. views, however, seem to differ. See supra note 174.