Prevention and Settlement of International Trade Disputes Between the European Union and the United States*

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This Essay reflects recent international trade disputes between the European Community and the United States and classifies these disputes according to their characteristic elements in order to elaborate more effective strategies for the prevention or settlement of future disputes. The so far twelve GATT and WTO panel, appellate, and arbitration reports on the European Community's import restrictions for bananas could have been avoided if, in the more than forty complaints before the European Community Court of Justice and in the numerous national court proceedings against the same import restrictions on bananas, the judges would have construed and applied European Community law in conformity with the precise and unconditional GATT/WTO obligations of the EC. The settlement of the EC-U.S. disputes over U.S. trade sanctions under the Cuban Liberty and Democratic Solidarity Act, as well as over the discriminatory government procurement practices by the Commonwealth of Massachusetts vis-à-vis persons doing business with Myanmar, illustrate the importance of dispute prevention strategies. WTO panel proceedings are also sub-optimal means for the settlement of disputes over nondiscriminatory health protection measures, such as the EC import restrictions for hormone-fed beef and genetically modified organisms. This Essay concludes with proposals for EC-U.S. initiatives to strengthen dispute prevention strategies.

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* Presented at the International Law Society of America Conference, Tulane Law School (October 8, 1999).

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I. DISPUTE *PREVENTION* OR DISPUTE *SETTLEMENT*? THE NEED FOR CLARIFYING LITIGATION STRATEGIES

Since the entry into force of the 1994 Agreement establishing the World Trade Organization (WTO) on January 1, 1995, and up to October 1999, the European Community (EC) and the United States have been involved as complainants, respondents, or third-party interveners in more than half of the approximately 180 invocations of the WTO's Dispute Settlement Understanding (DSU). In the joint Declaration on Transatlantic Economic Partnership adopted at the May 1998 biannual summit meeting, the European Union (EU) and the United States committed themselves to "the full implementation of WTO commitments and respect for dispute settlement obligations."[1] At the June 1999 summit meeting in Cologne, the European Union and the United States expressed concern over the escalation of their trade disputes over bananas, hormone treated beef, pork, poultry, genetically

1. *See The Transatlantic Economic Partnership* ¶ 8.a (last modified May 1998) <http://europa.eu.int/comm/dg01/0518tep.htm>. Note that apart from the 15 EC member states, only the European Community—and not the European Union—has become a member of the WTO.

modified organisms (GMOs), and food safety and data protection rules. The two parties also agreed to try to prevent future disputes by establishing an "early warning system" to identify and trigger rapid consultations on legislative, regulatory, and policy proposals by one party that threaten to create problems for the other.[2]

This contribution emphasizes the need for distinguishing between dispute *settlement* and dispute *prevention*, although dispute *settlement* also pursues the objective of *preventing* future disputes by clarifying the rules and enforcing compliance with them. In order to choose between dispute *settlement* and dispute *prevention* strategies, it is necessary to distinguish between different *kinds of disputes* according to their characteristic elements: Is the contested measure merely announced or already applied? Does it concern a legislative, executive, or judicial measure? Does the dispute relate to conflicts of interests *among* states or *within* states? Is it about divergent interpretations of rules or about their nonobservance generally due to governmental or private political resistance in the defendant country? Is the dispute targeted against discriminatory trade restrictions or nondiscriminatory domestic measures? To what extent do the governments involved control the subject matter of the dispute? Is the disputed measure justifiable by health, environmental, or other nonprotectionist arguments and scientific evidence? On the basis of these factors and others, disputes among WTO members can be classified into various categories for which optimal "dispute management strategies" could be designed. For instance:

(i) The 1996 U.S. complaint against the EC restrictions on importation, sale, and distribution of bananas (see Section II, below) concerned long-standing, discriminatory restrictions that had, in part, already been found to violate the General Agreement on Tariff and Trade (GATT) in a 1994 GATT panel report.[3] Since the EC regulation was strongly supported by a majority of EC member states and had been upheld in EC court judgments initiated by private importers as well as by an EC member state, it seemed clear that the European Community's "compliance capacity" was politically limited.[4] The U.S. litigation strategy of enforcing its GATT and WTO rights through the quasi-judicial WTO panel, appellate, and arbitration

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2. *See generally* FIN. TIMES, June 22, 1999.

3. EEC Import Regime for Bananas, GATT Doc. DS38/R of Feb., 11, 1994, *reprinted in* INT'L LEGAL MATERIALS 177-234 (1995).

4. For a list and detailed analysis of the more than 40 EC Court decisions on the EC banana market regulations, see J.C. CASCANTE & G.G. SANDER, DER STREIT UM DIE EG-BANANENMARKTORDNUNG (1999).

proceedings was justified by the fact that the illegality of the EC measures was obvious. EC compliance with WTO obligations would require additional WTO panel and appellate findings in order to overcome the protectionist pressures inside the European Community.

(ii) *The 1996 U.S. complaint against the EC measures affecting hormone-fed beef and meat products*, by contrast, concerned *nondiscriminatory sanitary measures* by the European Community which had remained controversial under GATT 1947. Its WTO-inconsistency was less predictable in view of the possibility, under Article 5:7 of the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures, to "provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information" in cases "where relevant scientific evidence is insufficient." Hence, the United States focused on *political* dispute settlement methods as well as the negotiation of additional WTO legal disciplines on process and production methods (PPMs) before, in 1996, it finally initiated *legal* panel proceedings against the European Community.

(iii) The 1996 EC complaint against politically motivated U.S. trade sanctions, refusal of visas, and exclusion of non-U.S. nationals from U.S. territory pursuant to the United States' Cuban Liberty and Democratic Solidarity Act was no longer pursued after bilateral dispute settlement agreements had been reached in the context of the Transatlantic Partnership Cooperation in April 1997 and May 1998.[5] Both the EC and the U.S. governments had a strong interest in avoiding political conflict with the U.S. Congress, as well as a WTO dispute settlement ruling on the legal question of whether such unilateral sanctions were justifiable under the security exceptions in GATT Article XXI and Article XIV of the General Agreement on Trade-related Services (GATS).

(iv) *The 1997 EC complaint against U.S. measures affecting government procurement* concerned alleged inconsistencies between the WTO Agreement on Government Procurement and a law enacted by the Commonwealth of Massachusetts that prohibited public authorities in Massachusetts from procuring goods or services from persons who do business with Myanmar, formerly known as Burma. The European Community contended that because Massachusetts is covered by the U.S. obligations under the WTO Agreement on Government Procurement, this law violated Articles VIII(B), X, and XIII of the Government Procurement Agreement. The WTO panel

5. For a discussion of these agreements, see Stefaan Smis & Kim Van der Borght, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227 (1999).

proceeding was suspended at the request of the European Community following a federal court judgment that such discriminatory state sanctions were inconsistent with U.S. federal law.[6] This dispute illustrates that GATT and WTO disputes are often only "secondary disputes" which may be settled more effectively through *domestic* court proceedings. However, there remain important differences between American federalism and European federalism. Since the treaty-making powers of the U.S. federal government are broader than its domestic regulatory powers (such as in the area of government procurement, taxes and subsidies), disputes between the United States and the European Community arose frequently over alleged violations of U.S. obligations under WTO law by sub-federal governmental institutions.

The above-mentioned examples of recent EC-U.S. disputes illustrate that the political choice among alternative dispute settlement strategies depends on the particular circumstances of each dispute—for example, recourse to quasi-judicial WTO panel and Appellate Body proceedings in the *banana dispute* but a preference for political compromise arrangements in the dispute over U.S. sanctions vis-à-vis Cuba. Recourse to *international* dispute settlement proceedings might no longer be necessary (such as in the above mentioned dispute over Massachusetts' sanctions vis-à-vis Myanmar) if the dispute has been successfully settled through *domestic court proceedings*. By contrast, because the 1993 EC banana regulations had been upheld by the EC Court of Justice, the United States implemented a litigation strategy of exerting a maximum of external pressure on the European Community by resorting to the quasi-judicial WTO panel, Appellate Body, and arbitration procedures. This included the use of trade sanctions authorized by the WTO Dispute Settlement Body following the EC's nonimplementation of the WTO dispute settlement findings within the prescribed "reasonable period of time."

Apart from preventing or settling bilateral disputes over the interpretation or application of international and/or domestic rules, dispute prevention and dispute settlement mechanisms can also assist in the negotiation of new rules. This is illustrated by the more than twelve years' old dispute over the 1985 EC directive prohibiting the use of "growth hormones" in livestock farming, as well as the marketing and importation from third countries of animals and meat treated by the hormones. The United States sought first the

6. *See* Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443-500 (1998).

establishment of a technical expert group pursuant to Article 14:9 of the 1979 GATT Agreement on Technical Barriers to Trade (TBT). When the European Community rejected this request on the ground that the TBT Agreement did not establish any obligations for PPMs, it was the United States' threat of a 100% tariff increase on eight agricultural products imported from the European Community which prompted the European Community to postpone the entry into effect of the directive on January 1, 1988. When the directive became effective on January 1, 1989, the United States resorted to retaliatory trade sanctions, yet without invoking a GATT panel procedure because the EC measures appeared consistent with both GATT Article III (which permits the enforcement of nondiscriminatory internal measures at the border vis-à-vis imports) as well as with the TBT Agreement (whose "anti-circumvention" provision in Article 14:25 offered only a weak legal basis for the U.S. complaint). At the initiative of the United States, new legal disciplines on PPMs were introduced through the 1994 SPS Agreement. After the entry into force of this agreement, the United States introduced and won a WTO panel proceeding. The panel found that the EC import prohibition was inconsistent with Articles 3.3 and 5.5 of the SPS Agreement.[7] The successive use of *political* and *legal* dispute settlement methods reflected the careful choices of the United States in its dispute settlement strategy.[8]

The following Section elaborates on *legal dispute settlement* methods in EC-U.S. relations by focusing on the WTO dispute settlement proceedings against the European Community's *discriminatory* restrictions on the importation, distribution, and sale of bananas. Section III discusses the use of *political dispute prevention* methods in the WTO and the bilateral Transatlantic Partnership by reviewing the ongoing EC-U.S. consultations on EC requirements for mandatory labeling of products, including GMOs. Finally, Section IV draws conclusions on the use of alternative dispute settlement methods.

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7. *See* WTO Panel Report in WT/DS26/R/U.S.A (1997) and the Appellate Body Report in WT/DS26/AB/R (1998) (visited Oct. 27, 1999) <http://www.wto.org/wto/ddf/ep/public.html>.

8. Negotiation and dispute settlement theories emphasize the need for clarifying one's Best Alternative to a Negotiated Agreement (BATNA), *see* ROGER FISHER & WILLIAM URY, GETTING TO YES 101-11 (1983).

II. LEGAL DISPUTE SETTLEMENT PROCEEDINGS IN THE WTO ON ENFORCEMENT AND CLARIFICATION OF WTO RULES: THE BANANA DISPUTE

In February 1993, the EC Council of Ministers for Agriculture adopted EC Council Regulation No. 404/93 on the common organization of the market in bananas. Its apparent inconsistencies with the European Community's GATT obligations were widely criticized within the European Community. The United States requested formal consultations with the European Community pursuant to Article 4 of the WTO's DSU in 1995. In 1996, the United States, together with Ecuador, Guatemala, Honduras, and Mexico, again asked for formal consultations. Given the regulation's obvious inconsistency with WTO law and the persistent violation of WTO rules by the more than 100 EC implementing regulations and decisions,[9] it was clear that *political dispute settlement methods* would not induce the EC Commission and EC Council to comply with WTO law and that the full use of all WTO *legal remedies* would be necessary.

A. Recourse to GATT/WTO Panel, Appellate Body, and Arbitration Proceedings

When the United States requested the establishment of a WTO dispute settlement panel in 1996, two previous panel reports under GATT 1947 had already clarified—at the request of Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela—that the European Community's banana market regulations were in violation of GATT law:

(i) the 1993 GATT panel report on EEC-Member States' Import Regime for Bananas[10] concluded that, apart from the inconsistency of the national import quotas with GATT Article XI, the EC tariff preferences for imports of bananas from African, Caribbean, and Pacific (ACP) countries violated Article I of GATT; and

(ii) the 1994 GATT panel report on "EEC-Import Regime for Bananas" found that the EC tariffs and import licenses for bananas were inconsistent with GATT Articles I, II, and III.[11]

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9. For a list of 97 EC implementing regulations from February 1993 to March 1998, see J.C. CASCANTE & G.G. SANDER, DER STREIT UM DIE EG-BANANENMARKTORDNUNG 188-97 (1999).

10. GATT Dispute Panel Report on Member States' Import Regimes for Bananas, DS 32/R of 3 June 1993, 1993 GATTPD LEXIS 11 (unpublished decision).

11. GATT Dispute Panel Report on Import Regimes for Bananas, DS38/R of Feb. 11, 1994, 1994 GATTPD LEXIS 1.

One legal uncertainty relating to the U.S. complaint regarded the fact that the United States did not export bananas to the European Community and, therefore, according to the European Community, "the United States had no legal right or no legal or material interest in the case that it had brought under the GATT and the other Agreements contained in Annex 1A of the WTO Agreement."[12] However, both the Panel and the Appellate Body found that the United States was a producer and potential exporter of bananas whose fruit companies were strongly involved in trading and distributing Latin American bananas in the European Community. Therefore, the United States had legal standing under GATT 1994 as well as under GATS. In the course of the WTO dispute settlement proceedings initiated by Ecuador, Guatemala, Honduras, Mexico, and the United States:

(i) the four 1997 WTO panel reports on the EC-Regime for the Importation, Sale, and Distribution of Bananas established inconsistencies with GATT Articles I, III, X, and XIII, Article 1 of the Licensing Agreement, and Articles II and XVII of the GATS;[13]

(ii) the 1997 Appellate Body Report generally upheld the panel findings;[14]

(iii) the 1998 WTO arbitration award stated that the "reasonable period of time" for bringing the European Community's import regime for bananas in conformity with the European Community's obligations under WTO law would expire on January 1, 1999;[15]

(iv) the 1999 panel on the EC-Regime for the Importation, Sale, and Distribution of Bananas—Recourse to Article 21.5 by Ecuador concluded that several aspects of the European Community's import regime for bananas continued to be inconsistent with the EC's obligations under Articles I:1 and XIII:1,2 of GATT 1994 and Articles II and XVII of GATS;[16]

(v) the 1999 panel report entitled "EC-Regime for the Importation, Sale, and Distribution of Bananas—Recourse to Article 21.5 by the European Community" declined to make findings on the request by the European Community that its implementing measures "must be presumed to conform to WTO rules unless their conformity

12. *See* WTO Panel Report, *supra* note 7.

13. *See* WTO Panel Report, WT/DS27/R/Ecuador, WT/DS27/R/Guatemala-Honduras, WT/DS27/R/Mexico, WT/DS27/R/U.S.A (May 22, 1997) (visited Oct. 27, 1999) <http://www.wto.org/wto/ddf/ep/public.html>.

14. *See* WTO Appellate Body Report, *supra* note 7.

15. *See* WTO Arbitration Award, WT/DS27/15 (Jan. 7, 1998) (visited Oct. 27, 1999) <http://www.wto.org/wto/ddf/ep/public.html>.

16. *See* WTO Panel Report, WT/DS27/RW/ECU (Apr. 12, 1999) (visited Oct. 27, 1999) <http://www.wto.org/wto/ddf/ep/public.html>.

has been duly challenged under the appropriate DSU procedures"[17]; and

(vi) the 1999 WTO Decision of the Arbitrators on the "EC-Regime for the Importation, Sale, and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU" decided that the suspension by the United States of the application to the European Community of tariff concessions and related obligations under GATT 1994 covering trade with a maximum amount of U.S. $191.4 million per year would be consistent with WTO law.[18]

On April 19, 1999, the WTO Dispute Settlement Body (DSB) authorized the United States to suspend WTO concessions in an amount up to U.S. $191.4 million per year. The arbitrators based this decision on a finding that the EC banana import regime continued to be inconsistent with GATT Article XIII and GATS Articles II and XVII. Notwithstanding the introduction of these U.S. countermeasures, the European Community continues to apply its illegal banana restrictions at the time of this writing.

The political unwillingness of the EC Council of Agricultural Ministers to comply with WTO law was also illustrated in May 1999. On May 13, 1999, the European Community missed the deadline for bringing its import restrictions on hormone-fed beef into conformity with its obligations under WTO law. This deadline was specified in two panel and Appellate Body reports adopted in February 1998 and a subsequent arbitration award of May 29, 1998, on the "reasonable period of time" for implementation. In July 1999, the DSB authorized the United States and Canada to take countermeasures up to a maximum of U.S. $116.8 million and CDN $11.3 million, respectively, as determined in two previous arbitration awards of July 1999.

B. How to Protect the WTO System Against "Persistent Violators": Rule of Law and Dispute Prevention Must Begin at Home

What lessons can be drawn from the fact that during the first five years of the WTO, the organization has already authorized countermeasures more frequently than during the fifty years of GATT practice from 1948 to 1998? Why is it that this unusual recourse to

17. *See* WTO Panel Report, WT/DS27/RW/EEC (Apr. 12, 1999) (visited Oct. 27, 1999) <http://www.wto.org/wto/ddf/ep/public.html>.

18. *See* WTO Arbitration Report, WT/DS27/ARB (Apr. 9, 1999) (visited Oct. 27, 1999) <http://www.wto.org/wto/ddf/ep/public.html>.

economic retaliation in response to blatant violations of WTO law involves the United States and the European Community, two WTO members with long traditions of rule of law and constitutional democracy? Can the 1998 Initiative for a Transatlantic Economic Partnership (TEP) assist in limiting the growing number of additional EC-U.S. trade disputes? Can it defuse the disputes over bananas and hormone beef? Does the WTO require new rules and incentives for rendering WTO law more effective? How can the general citizen interest in liberal trade and rule of law be better protected against the "capture" of trade policy-making by rent-seeking interest groups?

International law and foreign policy cannot be understood without taking into account the national legal and political systems for policy-making. Inside the European Community, it is long since recognized that international agreements concluded by the European Community, such as the WTO Agreement, are an integral part of the EC legal system. These agreements have legal primacy over "secondary EC law" adopted by the EC institutions.[19] Both the EC Treaty and the WTO Agreement were ratified by national parliaments in each of the fifteen European Community member states. Neither the EC Treaty nor the WTO Agreement grant the EC institutions the authority to violate international law. According to the EC Court of Justice, the European Community is a "[c]ommunity based on the rule of law"[20] with limited powers. Furthermore, all EC institutions are constitutionally required to comply with both EC law and international law binding on the European Community. This is particularly necessary where foreign policy powers, like the European Community's discriminatory tariffs and trade restrictions for bananas, operate as a means of taxing and restricting *domestic citizens* and for redistributing income among *domestic groups*. For example:

(i) Restrictions on transnational relations among citizens (such as an import tariff) amount to a tax on *domestic citizens* by which governments can redistribute income ("protection rents") among *domestic groups* in a nontransparent manner and often without having to ask for parliamentary approval. It is usually only by means of *reciprocal international obligations* (such as GATT and WTO market access commitments) that governments are willing to limit their foreign policy powers to tax and restrict the transnational transactions of their own citizens.

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19. *Cf.* D. MCGOLDRICK, INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION 116 (1997).

20. Case 294/83, Parti écologiste 'Les Verts' v. European Parliament, 1986 E.C.R. 1339, 1365, consideration 23 (1986).

(ii) Foreign policy powers introduce the possibility of discriminating among third countries and, thereby, also among domestic citizens trading with these countries. Again, it is only by means of *reciprocal international commitments* to nondiscrimination, such as the WTO requirements of most-favoured-nation treatment and national treatment, that discrimination among domestic citizens can be effectively prevented. For political reasons, no state has thus far been willing to prohibit *unilaterally* discriminatory foreign policy measures because of their discriminatory effects among domestic citizens. All states find it politically easier to overcome this "Janus face problem"[21] of foreign policy by means of *reciprocal international agreements* rather than unilaterally.

The reciprocal WTO guarantees of freedom, nondiscrimination, and rule of law go far beyond the autonomous guarantees in the foreign trade laws of WTO member states. They serve "constitutional functions" for the protection of freedom, nondiscrimination, and rule of law for domestic citizens across frontiers. GATT and WTO dispute settlement proceedings frequently concern "secondary disputes" triggered by the ineffectiveness of domestic legal systems in protecting freedom and nondiscrimination for the benefit of domestic citizens. WTO dispute settlement findings of violations of GATT and WTO rules reflect a "constitutional problem" that needs to be taken into account in the search for strengthening the rule of law in the WTO as well as in the European Community for the benefit of domestic citizens. For example:

(i) In the *banana dispute*, neither the European Community's "treaty constitution" nor the more than forty decisions by the EC Court of Justice on the banana regulations,[22] could prompt the EC Council to comply with WTO law or with the EC Treaty requirement of Article 300:7, which mandates compliance with international treaty obligations.

(ii) The large number of GATT/WTO dispute settlement findings on the illegality of the European Community's banana regime, and the United States' recourse to trade sanctions authorized by the WTO, were "second-best instruments," having limited effectiveness, in inducing the EC Council to protect freedom and

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21. Janus, the ancient Roman god and guardian of doors, was represented with one face on the front and another face on the back of his head so as to illustrate that "border measures" (like foreign policy) produce effects inside and outside the border.

22. For a list of the EC Court decisions, see CASCANTE & SANDER, *supra* note 4, at 180-87. For an analysis of their illegality under both WTO law and EC law, see E.U. Petersmann, *Darf die EG das Völkerrecht ignorieren*?, 11 EUR. J. OF BUS. L. 325 (1997).

nondiscriminatory conditions of competition for the benefit of EC consumers and traders.

(iii) European integration law has clearly demonstrated the most efficient means of rendering international and domestic legal trade and economic rules more effective. This is accomplished by linking international guarantees of freedom of trade to domestic legal remedies and enforcement mechanisms. The EC Treaty enabled self-interested EC citizens to enforce the international customs union and common market rules through the EC Court and national courts against protectionist governmental and private restraints. Yet, both the EC and U.S. legislation on the implementation of the WTO Agreement prevent EC and U.S. citizens from invoking WTO rules before domestic courts vis-à-vis domestic legislation that is inconsistent with WTO law.[23] Both legislatures and executives of the European Community and the United States assert domestic power to adopt "later-in-time-legislation" and domestic implementing measures inconsistent with their self-imposed international WTO obligations.

C. Constitutional Functions of WTO Dispute Settlement Proceedings

Freedom of trade and nondiscrimination inside the European Community and the United States are protected by constitutional rules and their judicial enforcement for the benefit of their domestic citizens.[24] However, in transatlantic trade between the European Community and the United States, freedom of trade and compulsory adjudication are protected only by the international WTO guarantees. In both the European Community and the United States, the guarantees are subject to the political insistence of the EC and U.S. legislatures and executives to adopt "later-in-time legislation" and implementing regulations inconsistent with their self-imposed WTO guarantees of freedom and nondiscrimination. The loose Transatlantic Partnership arrangements offer no alternative dispute settlement mechanisms. As long as freedom and nondiscrimination beneficial to citizens are not effectively protected within the domestic legal system, the international WTO guarantees of freedom and nondiscrimination and their enforcement through WTO dispute settlement proceedings remain

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23. *Cf.* Peter L.H. Van den Bossche, *The European Community and the Uruguay Round Agreements* 92-95, *in* IMPLEMENTING THE URUGUAY ROUND (John H. Jackson & Alan O. Sykes eds., 1997); David W. Leebron, *Implementation of the Uruguay Round Results in the United States* 212-18, *supra*.

24. *See, e.g.*, NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993).

necessary "second-best" remedies. The WTO dispute settlement proceedings serve several complementary functions:

1. Enforcement Functions of the DSU

Domestic policymakers often abuse their trade policy powers so as to tax and restrict domestic citizens and redistribute income among domestic groups. Since domestic courts in both the European Community and United States prefer not to apply and enforce WTO rules, WTO dispute settlement offers the only effective enforcement mechanism for inducing governments to comply with their self-imposed WTO guarantees of freedom and nondiscrimination.

2. Rule-Clarification Functions of the DSU

One of the declared objectives of the WTO's DSU is also "to clarify the existing provisions of . . . agreements in accordance with customary rules of interpretation of public international law" pursuant to Article 3:2 of the DSU. In the *banana dispute*, for example, the panel and arbitration awards of April 1999 revealed divergent views among the European Community, the United States, and other WTO members on the interpretation and application of Articles 21 and 22 of the DSU. These differences included questions such as:

(a) If there is "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" in terms of Article 21:5 of the DSU, then under what conditions can such a dispute be submitted to the special panel procedure provided for in Article 21:5? Can the dispute be submitted to the Panel before the end of the "reasonable period of time" for the implementation of the dispute settlement ruling so as to enable compliance with the rights, obligations, and stringent time limits under Article 22:6 which states that "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within thirty days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request"?

(b) Does the reference in Article 21:5 to "recourse to these dispute settlement procedures" also refer to the DSU provisions on consultations in Article 4, adoption of panel reports in Article 16, and appellate review in Article 17? Or will a literal interpretation yield lengthy procedures which are inconsistent with the expedited nature and objective of the DSU provisions on "prompt compliance" in Article 21 and compensation or authorization of suspension of

concessions within thirty days of the expiration of the reasonable period of time in Article 22?

(c) If failure "to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time" as stated in Article 22:2 has not been determined through prior panel procedures pursuant to Article 21:5, can the complainant directly resort to Article 22:2? Then, can the complainant, "[i]f no satisfactory compensation has been agreed within twenty days after the date of expiry of the reasonable period of time, . . . request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements"?[25] Or are unilateral claims of noncompliance with WTO obligations, also in the context of Article 22:2 of the DSU, inconsistent with the principle that determinations of WTO violations shall not be made except those that are "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding" pursuant to Article 23?

(d) Does arbitration under Article 22, notwithstanding the narrow definition of its objects in paragraphs 6 and 7, permit the arbitrator to further decide on the consistency of implementing measures with WTO law? How can one ensure that such arbitral decisions are consistent with prior or later panel or Appellate Body findings under Article 21:5 on the WTO consistency of implementing measures?

(e) Is there a need for more precise rules to avoid conflicts over the principle stated in Article 22:4 of the DSU that "the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment"?[26] How can the potential trade foregone be calculated in an objective manner?

(f) Does the negative consensus rule of Article 22:6 apply only *within* the time periods specified in Article 22:6?

(g) Article 22:8 states that "[t]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered

25. This literal interpretation of Article 22.2 of the DSU was advanced by the United States when, on 14 January 1999, it requested the DSB to authorize suspension of application to the EC of GATT concessions covering trade in an amount of 520 million dollars (*see* WTO document WT/DS27/43).

26. Article 22:4 of the DSU.

agreement has been removed." Can the defending country self-initiate a panel procedure under Article 21:5 to ensure general compliance with Article 22:8 if countermeasures are maintained notwithstanding the defendant's claim that the offending measure has been brought into conformity with WTO law?

3. Promotion of Agreed Clarification of WTO Rules by WTO Members

During the Uruguay Round negotiations on Articles 21 and 22 of the DSU, the above mentioned questions had been left open in view of the time constraints and uncertainties of the negotiations. The arbitration award of April 1999 responded to some of these questions with interpretations that were convincing in the special context of the *banana dispute*.[27] The arbitrators emphasized "that our task is not to examine the relationship of Articles 21.5 and 22 of the DSU;"[28] yet, they further stated that "in the special circumstances of this case, and in the absence of agreement of WTO Members over the proper interpretation of Article 21 and 22, it is necessary to find a logical way forward that ensures a multilateral decision, subject to DSB scrutiny, of the level of suspension of concessions."[29] The arbitration panel interpreted and applied the DSU in a manner that avoided conflicts among the simultaneous panel proceedings pursuant to Article 21:5 and arbitration proceedings pursuant to Article 22:6, yet did not prejudge the future interpretation and coordination of Article 21:5 panel procedures and Article 22:6 arbitration procedures. Thus, their respective time limits of ninety days under Article 21:5 and thirty to sixty days under Article 22:6, and their specific functions remain reconcilable. This arbitration award contributed to the subsequent negotiation among WTO members, in the context of their "full review" of the DSU, of an agreed understanding on the future interpretation of Articles 21 and 22 of the DSU.

4. Constitutional Functions of DSU for the Protection of Individual Freedom

International trade is carried out by private producers and traders and serves the purpose of satisfying private consumer demand. The

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27. The decision by the Arbitrators of 9 April 1999 (EC-Regime for Bananas, Recourse to Arbitration by the EC under Article 22:6 of the DSU, WT/DS27/ARB) calculated that the impairment suffered by the U.S. was $191.4 million, without explaining its calculation methods in great detail.

28. *See* Decision by the Arbitrators, *supra* note 25, at 1 n.1.

29. *See id.* para. 4.15.

WTO rules on free and nondiscriminatory conditions of competition are likewise designed to protect freedom and nondiscrimination among producers, traders, and consumers. The more than six years of GATT and WTO dispute settlement proceedings regarding the EC import regime for bananas, the over forty judicial proceedings before the EC Court of Justice, and the even larger number of judicial proceedings before national courts regarding the EC restrictions on trade in bananas reflect the enormous economic and political costs of this illegal protectionism. This result could have been avoided if the EC Court of Justice and the national courts in EC member states had protected the rule of law in conformity with the EC's WTO obligations. WTO law already includes guarantees of individual access to domestic courts. Unfortunately, WTO governments refuse to strengthen these rules by allowing adversely affected citizens to invoke and enforce, through domestic courts, precise and unconditional WTO guarantees of freedom and nondiscrimination. As long as this refusal to provide effective legal remedies at home continues, WTO dispute settlement proceedings remain necessary "second-best remedies" for holding governments accountable for ignoring international guarantees of freedom ratified by parliaments for the benefit of their citizens.

The *First Report on Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission*, published by the Committee of Independent Experts instituted by the European Parliament in 1999, emphasized the central constitutional problem underlying the frequent recourse to illegal protectionism by the EC Commission and the EC Council of agricultural ministers: "It is becoming difficult to find anyone who has even the slightest sense of responsibility."[30] For more than twenty-five years, the EC Commission and EC Council have argued against review by national courts and the EC Court of Justice of the European Community's compliance with GATT law. Simultaneously they insist—in infringement proceedings initiated by the EC Commission against individual EC member states—that the EC Court should control and sanction violations of GATT

30. Committee of Independent Experts, First report on allegations regarding fraud, mismanagement, and nepotism in the European Commission para. 9.4.25 (visited Oct. 20, 1999) <http://www.europarl.eu.int/experts/en/9.htm>. This diagnosis is in line with what was emphasized by the French National Assembly at the beginning of its 1789 Declaration of the Rights of Man and the Citizen: "That ignorance, forgetfulness, or contempt of human rights are the sole causes of public misfortune and government depravity. . . ." *Cf.* S.E. FINER ET AL., COMPARING CONSTITUTIONS 208 (1995).

obligations by individual EC states.[31] As long as WTO governments engage in power-oriented trade policies and prevent their own citizens and courts from defending the rule of law at home, the WTO legal and dispute settlement system will continue to be confronted with numerous "secondary conflicts" between governments. These conflicts are "spill-overs" from welfare-reducing government failures and inadequate protection of rule of law *within* domestic legal systems. It is time for WTO governments to use WTO and national law to more effectively protect citizens' democratic right to rule of law and individual access to courts and to thwart obviously illegal abuses of regulatory powers.

III. SHOULD THE TRANSATLANTIC EC-U.S. PARTNERSHIP INTRODUCE DISPUTE-PREVENTION MECHANISMS FOR TRADE DISPUTES?

The Transatlantic Economic Partnership (TEP) program of May 1998 commits the European Union and the United States to work together to reduce impediments such as regulatory barriers and frictions resulting from nonrespect for dispute settlement obligations which hamper bilateral transatlantic trade and investments.[32] In their joint communication of March 11, 1998, entitled "The New Transatlantic Marketplace," EC Commissioners Brittan, Bangemann, and Monti proposed that a "key objective is to deter the American tendency towards unilateralism, which has included the adoption of unacceptable extraterritorial legislation such as the Helms-Burton and D'Amato Acts."[33] A "new transatlantic marketplace" would likewise merit stricter legal disciplines on the EC's unilateral trade measures so as to prevent a further escalation of the large number of EC-U.S. trade disputes. In a June 1999 summit meeting in Cologne, the European Community and the United States also agreed to prevent future disputes by setting up an "early warning system" to identify and trigger rapid consultations on legislative, regulatory, and policy proposals by one side which threaten to create problems for the other.[34]

A. Should the European Community and the United States Agree on a Reciprocal Commitment to Enable Their Citizens to Enforce

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31. *Cf.* Case C-61/94, Commission v. Germany, 1996 E.C.R. I-3989 (confirming that Germany had acted in violation of the GATT International Dairy Arrangement).

32. *See supra* note 1, paras. 9-11.

33. Draft Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee, *The New Transatlantic Marketplace* 3 (visited Oct. 20, 1999) <http://europa.eu.int/comm/dg01/sectiona.htm>.

34. *See supra* note 2.

Certain WTO Obligations Through Domestic Courts to Prevent International WTO Disputes Between the European Community and the United States?

The *banana dispute* was an old-style quarrel about trade discrimination in favor of former colonial countries of EC member states. The dispute revealed an unresolved constitutional problem: How can EC law be adjusted so as to promote a lawful exercise of the European Community's vast trade policy powers in compliance with its self-imposed international obligations under the WTO Agreement and the European Community's "treaty constitution"? This constitutional dimension is illustrated by the fact that the EC Treaty provisions on the common commercial policy, found in Articles 131-134, do not subject the exercise of the common commercial policy powers to parliamentary co-decision and control. Moreover, the EC Court of Justice has so far refused to review and secure compliance of European Community law with GATT/WTO law. Only once during its over forty-five years of jurisprudence has the EC Court found a violation of international law by the European Community,[35] notwithstanding the approximately thirty GATT and WTO dispute settlement findings of violations of GATT and WTO law by the European Community since the 1970s. Without effective parliamentary and judicial "checks and balances," it is no surprise that the trade policy discretion of the EC Council and EC Commission is unduly influenced by rent-seeking producer interests. In the past, this was especially so when the EC Council was composed of EC agricultural ministers.

The U.S. Congress and the U.S. Federal Trade Administration also resort to unilateral departures from GATT/WTO obligations as a means of inducing foreign countries to change their environmental policies, such as on dolphins and sea turtles, and their foreign relations policies, such as those regarding Myanmar and Cuba. The constitutional problem under U.S. law differs from that under EC law: U.S. foreign trade policy is effectively controlled by the U.S. Congress; but Congress itself retains the power to adopt "later-in-time legislation" which may be inconsistent with international law. U.S. courts are prevented by the 1994 Uruguay Round Agreements Act from reviewing the consistency of federal legislation with WTO law.[36] Just as the protectionist abuses of the tariff powers in the 1930 Smoot-

35. *See* Case T-115/94, Opel Austria v. Council, 1997 E.C.R. II-39.

36. *Cf.* ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 18-19 (1997).

Hawley Tariff Act prompted the U.S. Congress to change the tariff-making processes in the 1934 U.S. Reciprocal Trade Agreements Act so as to enable the adoption of reciprocal trade liberalization negotiated under GATT[37] by means of "fast-track legislation," it is time to consider further legal limitations on trade policy powers in U.S. domestic laws.

Compliance with the rule of international law would be in the obvious self-interest of both EC and U.S. citizens, and would in no way hamper rule-oriented policies by the EC and U.S. governments, such as those aimed at helping poor ACP countries to adjust their banana industries or strengthening international environmental policies. One policy question to be examined in the TEP-framework might concern whether the United States and the EC should prepare a joint initiative for limiting unilateral departures from GATT/WTO rules by introducing additional constitutional "checks and balances" in their domestic legal systems, such as stricter judicial and legislative review of the consistency of domestic trade laws with GATT/WTO. Such constitutional reforms would not only be mutually beneficial for both the European Community and the United States, they could also set strong precedents for strengthening the rule of international law and "democratic peace."[38] Yet, while EC law reflects a broad consensus among EC member states on the need for constitutional and international legal limitations of national foreign policy powers in relations among constitutional democracies, no comparable consensus seems to exist in the United States.

Thanks to the unique historical success of more than 200 years of constitutional democracy in the United States, and due to the post-war hegemonic U.S. foreign policy in support of rule of law and democracy abroad, U.S. citizens have never experienced the "constitutional failures" of many European states. In Europe, these failures have made supra-national European integration law necessary for the postwar preservation of "democratic peace." In the United States, however, it seems doubtful that the U.S. Congress and U.S. President will ever agree to a further constitutionalization of their power-oriented foreign policies. This constitutionalization would include accepting stricter judicial protection by domestic courts of reciprocal international guarantees of freedom and nondiscrimination in the transatlantic EC-U.S. relations. A reciprocal EC-U.S.

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37. *Cf.* R.E. HUDEC, ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW 215-25 (1999).

38. *Cf.* Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. OF INT'L L. 1, 30 (1998).

agreement strengthening domestic law effects of WTO law vis-à-vis "later-in-time protection" could initially focus on specific WTO rules and policy areas and then gradually be extended to other trade policy areas and additional WTO members.

B. Prevention of EC-U.S. Trade Disputes over Different Regulatory Approaches: Mutual Recognition Agreements and International Standardization

The increasing number of EC-U.S. disputes over nondiscriminatory Process and Production Methods is often due less to protectionist economic pressures than to different social attitudes and regulatory regimes. Common examples include genetically modified organisms (GMOs), food safety, data privacy, as well as consumer and environmental protection. The political difficulties in the European Community of complying with WTO panel and Appellate Body findings on the inconsistency of the European Community's import restrictions on hormone-fed beef, or the unilateral introduction of EC labeling requirements for products that contain GMOs,[39] have revealed genuine differences between American and European public attitudes on food safety and the scientific basis of regulatory systems. While the U.S. Food and Drug Administration is widely trusted by U.S. consumers, "[t]he European public has lost confidence in both national and European food and drug regulators. They no longer trust their governments or the scientists"[40] following the discovery of health risks from "mad cow disease," beef from "Bovine Spongiform Encephalopathy (BSE) cows," dioxin-contaminated food, and gene-altered maize "killing butterflies."[41]

Widespread consumer concerns of such genetically-altered "Frankenstein foods" have also raised skepticism as to whether the safeguards of the WTO's Sanitary and Phytosanitary Measures (SPS) Agreement, such as the requirement to base risk-assessment procedures on international and scientific standards, are sufficient for dealing with hormone-fed beef and GMOs. These concerns have supported arguments that the European Community should go beyond

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39. *See* Council Regulation 258/97, on Novel Foods and Novel Food Ingredients, art. 8, 1997 O.J. (L 43) 2, 5; *see also* Council Regulation 1139/98 on Compulsory Indication of the Labeling of Certain Foodstuffs Produced from Genetically Modified Organisms arts. 1-2, 1998 O.J. (L 159) 4, 6.

40. *See* Barry James, *Prodi Urges EU to Set Up a U.S.-Style Food Overseer*, INT'L HERALD TRIB., July 22, 1999, at 4.

41. *See* Nigel Hawkes & Nick Nuttall, *Modified Maize 'Killing Butterflies*,' THE TIMES, May 20, 1999, at A19.

a "product approach" in risk assessment procedures and to consider certain processes, such as genetic engineering, as intrinsically risky.

Preventing disputes caused by national regulatory differences may require additional rules on national and international standardization and risk assessment procedures, while taking into account the "precautionary principle."[42] The 1997 Agreement on Mutual Recognition between the European Community and the United States promotes mutual recognition of conformity assessment activities in areas such as telecommunications equipment, electromagnetic compatibility, electrical safety, recreational craft, pharmaceutical goods manufacturing practices, and medical devices.[43] Mutual Recognition Agreements are an important alternative to international standards by enabling testing laboratories in the exporting country to certify products for conformity with standards of the importing country. Mutual recognition of equivalent national laboratory tests and technical regulations offers a less costly, decentralized, and more democratic alternative to international harmonization of standards which is often not subject to transparent and democratically accountable control by national parliaments and the press.

Numerous WTO rules in the TBT Agreement, the SPS Agreement, and in Article VI of the GATS refer to "international standards of relevant international organizations" as a basis for harmonization or mutual recognition of national standards. But the standardizing activities of some international organizations are increasingly criticized for their lack of transparency, democratic accountability, and representativeness in view of the dominance of producer interests in self-regulatory industry associations. Another difficulty in resorting to international standards bodies seems to lie in the U.S. perception that bodies like the International Standards Organization (ISO) and the International Telecommunications Union (ITU) are being dominated by a large number of European countries and their standards bodies.

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42. Article 174 of the EC Treaty has a requirement to base "Community policy on the environment . . . on the precautionary principle and on the principle that preventive action should be taken." *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 3, art. 174, para. 2, O.J. (C 340) 03 (1997) 37 I.L.M. 56 (1998). A communication published by the EC Commission on 2 February 2000 defines the "precautionary principle" in more detail. *See* FIN. TIMES, Feb. 3, 2000.

43. *See* Council Decision of February 4, 1999, on the conclusion of an Agreement on Mutual Recognition between the European Community and United States of America, 1999 O.J. (L 31) 1, 3-81. The Agreement came into force on December 1, 1998.

The informal U.S. complaints over delays in the European Community's approval of genetically modified crops and the EC's compulsory labeling requirements for genetically modified products, such as soybeans and maize, illustrate the potential usefulness of procedures for preventing disputes before they are formally submitted to third-party adjudication in the WTO dispute settlement system. While the *banana dispute* concerned traditional trade discrimination in favor of producers in the EC and African, Caribbean, and Pacific countries, the EC's labeling requirements are motivated by environmental and consumer concerns about GMOs, both as a product characteristic and as a PPM for the creation of products. The labeling requirements apply in a nondiscriminatory manner to all products concerned.

Another difference between the *banana dispute* and the emerging policy conflicts over GMOs relates to the applicable rules. The regulation of international trade in "GMO products" raises fundamental questions about "risk assessment procedures," "available scientific evidence," the "appropriate level of sanitary or phytosanitary protection," relevant "international standards," and the "precautionary principle." Even though these issues are explicitly regulated in the TBT and SPS Agreements, they continue to remain politically controversial in the context of the implementation of the WTO dispute settlement findings on the EC restrictions on hormone-fed beef. Prevention of disputes over GMO products should not therefore be limited to dispute settlement based on existing WTO rules. It should also explore whether adjustments to the existing rules should be made through bilateral agreements in the context of the EC-U.S. Transatlantic Partnership, or through multilaterally agreed upon adjustments of WTO rules in the context of the next Millennium Round of the WTO.

The scope for bilateral dispute prevention measures in the context of the Transatlantic Partnership is, however, limited by the fact that genetic resources and trade in GMO products are already subject to worldwide rules in the SPS, TBT, and TRIPS Agreements of the WTO and the UN Convention on Biodiversity. Several worldwide organizations, such as the World Health Organization, the Codex Alimentarius Commission of the Food and Agriculture Organization (FAO), the World Intellectual Property Organization, and the Organization for Economic Cooperation and Development, have already begun multilateral discussions or negotiations on the need for additional rules; in January 2000, a new "Protocol on Biosafety" was signed by more than 130 countries in order to

supplement the 1992 UN Biodiversity Convention with rules on the safe transfer, handling, and use of GMOs. The goal of dispute prevention is closely related to the need for promoting policy coherence among the various national, regional, and worldwide approaches to the regulation of trade in GMO products. For example, the proposals made in the FAO Codex Alimentarius Commission regarding the adoption of GMO labeling standards on the "substantial equivalence" of GMO products with some non-GMO products could influence the interpretation of the GATT, SPS, TBT, and TRIPS Agreements as well as the outcome of a WTO dispute settlement proceeding on the consistency of the European Community's labeling requirement for GMO products with the WTO. Prevention of future disputes over GMOs requires a reconsideration of risks and the balancing of producer and consumer interests. This reconsideration must come not only from the national perspective of the United States as the most important producer of GMO products, or from the bilateral EC-U.S. perspective, but also from the point of view of less-developed countries. These countries dispose of more than ninety percent of all genetic resources and insist on sharing the benefits from genetic engineering using traditional knowledge and genetic resources from developing countries.[44] A one-sided dispute settlement strategy that focuses on the enforcement of existing WTO rules, or simply on the interests of GMO producers without transparent discussion and regard to consumer interests, could prove counterproductive and hinder the long-term avoidance or agreed upon settlement of GMO-related trade disputes.

IV. CONCLUSION: NEED FOR EC-U.S. INITIATIVES FOR ADDITIONAL DISPUTE PREVENTION AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

The numerous international dispute settlement treaties concluded since the 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes[45] tend to distinguish ten different international dispute settlement methods: (1) bilateral and/or multilateral negotiations; (2) good offices; (3) mediation; (4) inquiries;

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44. *Cf.* T. Cottier, *The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law*, *in* 1 J. INT'L ECON. L. 555-84 (1998).

45. *See generally* KARIN OELLERS-FRAHM & NORBERT WÜHLER, DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW (1984); HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (1992); MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (P. Sands ed., 1999).

(5) conciliation; (6) *ad hoc* or institutionalized arbitration; (7) judicial settlement by permanent courts; (8) "resort to regional agencies or arrangements" or (9) to "other peaceful means of their own choice" pursuant to Article 33 of the UN Charter; and (10) dispute settlement by the UN Security Council pursuant to Articles 34-38 of the UN Charter, by other UN organs, or by other international organizations.[46]

Modern public international law offers a wide choice among complementary political and legal methods for the settlement of international disputes (see Table 1). Negotiations remain the primary and principal means for the prevention or settlement of disputes regarding conflicting claims concerning a matter of fact, law, or policy between states. Bilateral negotiations and third-party-assisted alternative dispute settlement procedures have the advantages of greater flexibility, privacy, and economy; control by the parties over the outcome; relevance of political as well as legal considerations; and possible avoidance of "win-lose" situations. Yet, notwithstanding the increasing number of international treaty provisions on good offices, mediation, inquiry, and conciliation, these diplomatic means of alternative dispute resolution, such as commissions of inquiry and conciliation commissions, are invoked less frequently in inter-governmental economic relations than the alternative legal methods of adjudication, arbitration, or quasi-judicial dispute settlement mechanisms.[47] While legal methods enable rule-oriented, legally binding decisions by independent judges based on "due process of law" and substantive rules that were previously agreed upon as reflecting the long-term interests of the parties to the dispute, the "diplomatic methods" of dispute settlement are often criticized as being "power-oriented" and not sufficiently focused on the merits of each party's case.

GATT and WTO dispute settlement procedures provide for most political and legal methods of dispute settlement, such as bilateral and multilateral consultations, good offices, conciliation, mediation, quasi-judicial panel and appellate review procedures, legally binding rulings or nonbinding recommendations by the Dispute Settlement Body, international arbitration among states or among private parties, and domestic court proceedings (see Table 2). Bilateral consultations are a precondition for recourse to panel procedures. However, good offices, conciliation and mediation are seldom used in GATT and

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46. For explanations of the differences among these procedures, see J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (3d ed. 1998).

47. *See supra* note 44; *see also* C. Chinkin, *Alternative Dispute Resolution Under International Law*, *in* REMEDIES IN INTERNATIONAL LAW 123-24 (M. Evans ed., 1998).

WTO practice. In a few instances, the GATT or WTO Directors-General, or their "Personal Representatives," have given advisory opinions at the request of the parties to a dispute.[48]

In other disputes, such as those involving the European Community's import tariffs on citrus products and the European Community's import restrictions on bananas, the Director-General reported that the good offices had not resulted in a satisfactory solution of the dispute.[49] As a worldwide organization without an independent "guardian of the law," like the EC Commission and the Advocate-Generals in the European Court of Justice, WTO law does not confer powers on the WTO Secretariat to initiate prelitigation procedures (as in the case of the EC Commission's reasoned opinions in infringement proceedings under Articles 226 and 227 of the EC Treaty designed to give member states an opportunity for a resolution of the dispute before the complaint goes to international adjudication).[50]

By way of conclusion, notwithstanding the availability and frequent use of the WTO dispute settlement system in EC-U.S. relations, there is a need for additional dispute prevention mechanisms and for a reciprocal EC-U.S. commitment to allow citizens to invoke and enforce certain precise and unconditional WTO guarantees of freedom and nondiscrimination in domestic courts. Moreover, the large number of EC-U.S. disputes should be distinguished according to their defining characteristics in order to design optimal "dispute management strategies." For instance:

(i) The U.S. complaint against the discriminatory EC banana regulations was described as a dispute where U.S. insistence on quasi-judicial WTO panel, appellate, and arbitration proceedings was justified by the need to enforce existing GATT and GATS rules to remedy clear violations by the EC Council of Agricultural Ministers at the insistence of powerful protectionist pressures inside the European Community.

(ii) The EC complaint against the trade sanctions imposed under the United States Cuban Liberty and Democratic Solidarity Act was identified as a category of dispute where both the European Community and the United States rightly preferred politically agreed dispute settlements over quasi-judicial WTO rulings as to whether

48. *See* 2 GUIDE TO GATT LAW AND PRACTICE 766-67 (1995).

49. *See supra* note 46, at 766; *supra* note 10, para. 1.

50. While complaints by member states pursuant to Article 227 have been very rare, most Article 226 proceedings have prompted the member states concerned to comply with the reasoned opinion of the Commission or otherwise settle the dispute during the prelitigation stage.

such politically motivated trade sanctions are justifiable under the security exceptions in GATT Article XXI and GATS Article XIV.

(iii) The U.S. complaints against nondiscriminatory health and consumer protection regulations of the use of growth hormones and GMOs by the European Community were described as an area where additional dispute prevention mechanisms appear to be mutually beneficial.

(iv) With regard to EC-U.S. disputes triggered by measures inconsistent with the WTO at the local or state level, it was recognized that both EC law and U.S. law enable the federal authorities to invoke and enforce their WTO obligations through domestic courts remedying violations of WTO law by sub-federal governments. Article XX:7 of the 1996 WTO Agreement on Government Procurement provides for the possibility of private "challenge procedures" before domestic courts on "correction of the breach of the Agreement or compensation for the loss or damages suffered." Such recourse to domestic court proceedings enables the prevention of intergovernmental disputes at the WTO level and offers the most effective means for the decentralized and depoliticized enforcement of precise and unconditional WTO rules.

Table 1: **ALTERNATIVE DISPUTE RESOLUTION IN INTERNATIONAL LAW**

Political methods Characteristics: flexibility of procedures, control by the parties, freedom to accept or reject proposed settlements, avoidance of "winner-loser" situations, political and legal considerations	**Legal methods** Characteristics: rule-oriented legally binding decisions by independent judges based on previously agreed procedures and substantive rules of law that reflect the long-term interests of the parties
Consultation/Negotiation: voluntary or obligatory *ad hoc* or institutionalized, bilateral or multilateral principal means of preventing/settling disputes (=conflicting claims) peacefully by agreed solutions among the parties to the dispute (the negotiators retain control over their dispute; success depends on the belief by both parties that the benefits of an agreement outweigh their losses; prior negotiation is not a general prerequisite of adjudication by the ICJ; risk of positional power-oriented rather than principled, rule-oriented bargaining) **Good Offices:** intervention by a third party in a dispute so as to encourage and assist the disputants to negotiate (e.g. by offering them technical facilities and additional channels of communication) **Mediation:** active non-binding proposals by a third party, with the consent of the disputants which retain control of the dispute **Inquiry:** ascertainment of disputed facts by a third party(e.g. a fact-finding commission) so as to provide the disputants with an objective assessment (possibly accepted in advance as binding on the disputants) **Conciliation:** ascertainment of facts and examination of the claims by independent third parties on a formal legal and institutionalized basis (usually a conciliation commission) so as to submit non-binding proposals for a settlement	**International Adjudication:** submission of a dispute to a standing international tribunal for judicial settlement based on the procedures and applicable substantive international law specified in the tribunal's statute **Public International Arbitration:** submission of a dispute to *ad hoc* arbitrators appointed by the parties for judicial settlement based on the procedures and applicable substantive international law agreed among the parties to the dispute **Mixed International Arbitration:** submission of a dispute between a private party (e.g. a foreign investor) and a state-party to international arbitration (e.g. based on the 1965 Convention on the International Center for Investment Disputes) **Private International Arbitration:** submission of a dispute between private parties over their compliance with international treaty rules (e.g. in the 1994 WTO Agreement on Preshipment Inspection) to a private international arbitration procedure provided for in the international treaty **Judicial Settlement by Domestic Courts:** submission of a dispute between a private party and a government over compliance with international law rules to a standing domestic tribunal

Table 2: **THE INTEGRATED WTO DISPUTE SETTLEMENT SYSTEM (ANNEX 2 TO THE 1994 AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION)**

Political methods of dispute settlement	**Legal methods of dispute settlement**
Consultations (Article 4) Good Offices (Articles 5, 24) Conciliation (Articles 5, 24) Mediation (Articles 5, 24) Recommendations by —Panels (Article 19) —Appellate Body (Article 19) —Dispute Settlement Body (Article 16,17) Surveillance of Implementation of Recommendations and Rulings (Article 21) Compensation and Suspension of Concessions (Article 22)	Panel Procedure (Articles 6-16, 18, 19) Appellate Review Procedure (Articles 17-19) Rulings by Dispute Settlement Body on Panel and Appellate Reports (Articles 16, 17) Arbitration among States (Article 25) Private International Arbitration (e.g. Article 4 Agreement on Preshipment Inspection) Domestic Court Proceedings (e.g. Art. X GATT, Article 13 Anti-Dumping Agreement, Article 23 Agreement on Subsidies, Articles 32. 41-50 TRIPS Agreement, Article XX Agreement on Government Procurement)