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Of Substantial Interest: Third Parties Under GATT

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OF SUBSTANTIAL INTEREST: THIRD PARTIES UNDER GATT

*Chi Carmody**

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INTRODUCTION

In February 1996, a group of four Central and South American banana exporting countries, together with the United States, requested consultations with the European Community (EC) over a 1993 EC regulation for the importation, sale and distribution of bananas.¹ The complainants estimated they were losing \$147 million annually because of the regulation, which gives preferential access in the EC market to ba-

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1. 1993 O.J. (L 47) 1.

nanas grown in Lomé Convention countries.² The parties were unable reach an agreement, and three months later the World Trade Organization's (WTO) Dispute Settlement Body formed a panel to resolve the complaint.³

Thereafter, a number of African, Caribbean and Pacific banana-producing countries (ACP countries) that benefit from the EC regulation were allowed to participate in a session of the panel proceedings under the newly created status of "observer." The panel justified its decision to permit so many observers on the basis of the "very large" effect the EC banana regime has on their economies.⁴ To allay fears that widespread intervention would complicate the proceedings, the panel took care to limit the observers' participation. They were only allowed to make brief oral arguments and were not expected to provide written submissions beyond answers to questions posed by the panel.⁵ The panel sessions occurred as scheduled, although the panel chairman has since indicated that the panel's report will be delayed due, in part, to the large number of countries involved in the case.⁶ Delay was a reason why at least one party, the United States, had initially objected to the observers' participation.⁷

GATT decisionmaking has long had a multipartite aspect, but rarely have so many countries actively intervened in one case. It now appears that *Bananas III* will be seen as a model of how WTO adjudication intends to treat the difficult issue of multilateral dispute settlement, in addition to resolving complex points of law and fact. The case merits

2. See Brent Borrell, *Banana Policy Gone Mad*, J. COMMERCE, Aug. 7, 1996, at A7. The Lomé Convention is a collective cooperation agreement between the fifteen EC countries and seventy developing countries in Africa, the Caribbean and the Pacific. Its main features are EC financial aid for these developing countries, including aid in the form of preferential access to the EC for certain developing country products including bananas. The most recent version of the Convention, Lomé IV, also urges respect for human rights. See Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1 (1991).

3. See European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27, May 22, 1997 [hereinafter *Bananas III*] [the World Trade Organization and Dispute Settlement Body are hereinafter referred to as "WTO" and "DSB," respectively]. The complainants in *Bananas III*, Ecuador, Guatemala, Honduras, Mexico and the United States, alleged that the EC's regime for the importation, sale and distribution of bananas was inconsistent with GATT Articles I, II, III, X, XI, XIII as well as provisions of the Import Licencing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS.

4. Canada and Japan were also allowed to intervene under the more traditional status of third party, presumably because their interest was seen as being with the complainants. See *infra* note 55.

5. See *WTO Banana Panel Allows Enhanced Role for ACP, Other Third Parties*, INSIDE U.S. TRADE, Sept. 20, 1996, at 15.

6. See *U.S. WTO Challenges of EU Hormone Ban, Bananas Policy Delayed*, INSIDE U.S. TRADE, Jan. 10, 1997, at 2.

7. See *id.*

attention because its issues and arguments reflect the exceptionally wide range of trade-related interests covered by GATT 1994.⁸ These interests—and the countries raising them—compete with each other for priority. In a very real sense, how well these interests are reconciled in *Bananas III* will be a measure of the new GATT's success.

This article's examination of the status of third parties under GATT is important for several reasons, one of which is the proliferation of third party participation as demonstrated by *Bananas III*. A second reason for its importance is that there has been little written about third parties under GATT.⁹ This neglect stands in sharp contrast to ample literature on the related subject of greater public participation in the WTO.¹⁰ The oversight could be a function of GATT dispute resolution, which did not always enjoy the level of public attention it garners today. Until recently the GATT system handled no more than about a dozen disputes a year.¹¹ Many countries were often content to ignore GATT dispute resolution, either because the system itself was poorly understood or because GATT was

8. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15 1994 LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

9. The writer has not found any monograph on the subject. Standard sources discuss third parties, but only in passing. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) [hereinafter JACKSON, *WORLD TRADE*]; JOHN H. JACKSON ET AL., *LEGAL PROBLEMS IN INTERNATIONAL ECONOMIC RELATIONS* (3d ed. 1995); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989) [hereinafter JACKSON, *WORLD TRADING SYSTEM*], ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990); EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION* (1982). Furthermore, a possible deficiency of this paper is the fact that in its writing there were only panel reports, limited historical material, and a few books and articles to rely upon. These sources may not tell the whole story, particularly on a procedure driven subject like intervention. A vital part of the tale may be embodied in practice known only to those who participate in GATT proceedings. This possibility may make the conclusion reached here fall somewhat wide of its mark.

10. NGO participation in the WTO is contentious because, strictly speaking, it is not provided for under the GATT 1994. But intervention by member countries is. Intervention therefore enjoys a legitimacy and immediacy which NGO involvement does not, although the debate about NGO involvement may influence how third interests, including those now asserted by WTO member countries, will be treated in future GATT dispute resolution. For literature on the subject of NGO involvement see Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); Phillip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996); Daniel Esty, *Why the World Trade Organization Needs Environmental NGOs* (Nov. 9, 1996) (unpublished paper on file with the author).

11. Debra Steger, General Counsel to the WTO Appellate Body, estimated that the GATT workload averaged about three formal complaints per year during the 1970s and eleven complaints per year during the 1980s. See *WTO: Sharp Increase Seen in WTO Disputes Including Many from Developing Countries*, BNA INT'L TRADE DAILY (Oct. 18, 1996).

perceived as irrelevant to national development. That attitude has now changed. The WTO faces increased litigation as countries request panels and seek to intervene in large numbers,¹² and a review of third party practice is therefore appropriate to better understand this form of participation.

A study of third parties under GATT should also help to better comprehend standing under GATT generally. The issue of standing was squarely raised in *Bananas III*.¹³ The panel report will yield important clues as to how standing is to be dealt with in future WTO dispute resolution.

The thesis of this paper is that, while it may be useful to guard against abuse of third party status, what is happening now should be happening. The willingness of the *Bananas III* panel to deal with a spectrum of representative interests is fully consistent with GATT's history and mandate. This thesis is supported by an examination of GATT instruments and panel reports involving third parties. Both reveal that third party participation in GATT proceedings was designed to be, and has been, profound, vigorous and sustained. They repudiate the notion that GATT dispute resolution is ill-equipped to accommodate active intervention. GATT panels are not courts. Although panels and courts exhibit some features in common, it is important to avoid comparing GATT adjudication with municipal courts, where intervention is often restricted in deference to the two-party paradigm, because GATT adjudication has been entrusted with reconciling a range of interdependent concerns and must remain faithful to this purpose.

Part I of this article examines the traditional position of third parties in international law and their status as originally conceived in GATT. The General Agreement established a system of consensual adjudication and a hierarchy of interests in which third parties required a "substantial interest" to intervene in dispute resolution. The definition of "substantial interest" was qualified in some provisions, but never qualified for the purpose of the General Agreement as a whole and only rarely specified in practice. This ambiguity, together with the flexibility of GATT procedure,

12. *Id.*

13. The United States has assumed standing, among other arguments, on the basis that a U.S.-owned multinational company, Chiquita Brands International, is restricted in marketing bananas, a service covered by the *General Agreement on Services* (GATS). The EC tried to exclude the U.S. from the panel proceedings because the U.S. does not trade in bananas with the EC and because services covered under the GATS are distinct marketable products and not services incorporated as value-added in goods sold on the market. See *U.S. Submission to Banana Panel Offers Expansive Services Link*, INSIDE U.S. TRADE, July 19, 1996, at 15; *European Union Presses to Exclude U.S. from WTO Banana Panel*, INSIDE U.S. TRADE, Aug. 16, 1996, at 3.

meant that the term "substantial interest" served as no standard at all. Instead, panels developed restrictions on intervention that were more substantive than procedural, such as the rule precluding the raising of new issues by third parties. The panel reports also identify group representation as a feature of third party practice under GATT, which could allow restricted intervention in the form of consolidated representation.

Part II of this article focuses on changes to third party status brought about by the Uruguay Round of multilateral trade negotiations. The WTO Agreement elaborates upon third party procedure but does not change its liberal character. Rather than criticize the continuing lack of precision, this article argues that the operative sections of the new Agreement, in particular the Dispute Settlement Understanding, (DSU) must be interpreted to be consistent with past practice in order to reconcile the ever widening concerns of the WTO's mandate. This interpretive method is particularly important as WTO dispute resolution becomes ever more multilateral.

Because there is always potential for overuse or abuse of third party status under GATT, however, Part III recognizes a need to limit intervention where necessary and surveys the law of intervention in two other adjudicative bodies, the International and European Courts of Justice. Each has developed an effective method of restricting intervenor participation by relying, to some degree, on the tribunal's purpose, and these methods suggest limitations for the WTO system. Part IV concludes that while multiple third parties may tax WTO dispute resolution, precedent demonstrates that they do so minimally and that active intervention is therefore not a threat to the integrity of the system, but rather is a means of informed decisionmaking.¹⁴

14. Before beginning the substantive discussion, two observations should be made. First, in most systems of law, the concept of intervention is broader than that of third party practice. There are, in fact, several forms of participation in legal proceedings that fall under the general rubric of "intervention," including *amicus curiae*. However, the term "intervention" and "third party" are used interchangeably here, mainly to avoid repetitive usage of key terms.

Second, an important part of the research presented in this article is based on unadopted GATT panel reports, which may not accord with the purist's view that only adopted panel reports are legitimate and worthy of reliance. The view taken here is that adoption of panel reports by the GATT Council in the past was rarely related or predicated upon the procedure used. Therefore, adoption or non-adoption is not an indicator of the legitimacy of third party practice. This position is borne out by the consistency of third party procedure in both adopted and unadopted reports, as well as by recent statements of the WTO Appellate Body. See *infra* note 139.

I. THIRD PARTIES IN INTERNATIONAL TRADE LAW

A. *Third Parties in International Law*

A third party is defined in international law as a "state not party to a treaty."¹⁵ The traditional *pacta tertiis* rule¹⁶ holds that treaties only bind consenting States, leaving a non-party unaffected. This rule, reflecting international law's emphasis on consent and bilateralism, for the most part, continues to apply today.¹⁷

Within multilateral treaties, however, the concept of a third party is somewhat different. On accession to a treaty, a signatory consents to be bound by the treaty regime, but also receives certain benefits in exchange. One such benefit is a heightened interest in the process of resolving differences under the treaty.¹⁸ A dispute over the scope of treaty requirements between two signatories can affect not only the disputants, but also can impact other treaty signatories, either as a direct consequence of the dispute or through the interpretation of a treaty right or obligation. Thus, treaty membership eases the concern common to all adjudication that third party participation may be too speculative.

The point made in the preceding paragraph suggests that all multilateral treaties change bilateral relationships. Another reason for this "multilateralizing influence," mentioned by Chinkin is the steady expansion of international regulation into areas not previously thought to be within the realm of international jurisdiction.¹⁹ As multilateral treaties proliferate, so too do their memberships. It seems more reasonable to take

15. JAMES R. FOX, *DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW* 434 (1992); CLIVE PARRY & JOHN P. GRANT, *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 395 (1986).

16. The maxim "*pacta tertiis nec nocent nec prosunt*" is said to mean that a treaty binds consenting parties only, and strangers to a treaty are legally unaffected by it. A modern restatement of the rule appears in Article 34 of the Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 693 (1969), which provides that "a treaty does not create either obligations or rights for a third [s]tate without its consent."

17. Brownlie notes that there are two modern exceptions to the "*pacta tertiis*" rule. One arises where a norm embodied in a treaty become part of international custom. The second arises where a treaty confers rights on third parties, such as treaties involving major international waterways. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 622-24 (4th ed. 1990).

18. See CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 180 (1993). Chinkin discusses this position with reference to Article 63 of the Statute of the International Court of Justice, 59 Stat. 1031, 3 Bevans 1153 (1946), where "the required nexus between the intervener and the parties is supplied by the common membership of the relevant treaty." For more general commentary on the effect of treaties on third parties, see OPPENHEIM'S *INTERNATIONAL LAW* 1261 (Robert Jennings and Arthur Watts eds., 9th ed. 1992).

19. CHINKIN, *supra* note 18, at 25-27.

account of *all* relevant concerns, be they within or outside a particular bilateral context, in order to best achieve a treaty's purpose.

Nevertheless, there comes a point when intervention can tax the treaty system and threaten its ability to make decisions. There may also be situations where intervention is sought for frivolous or vexatious ends, or for other reasons completely divorced from the dispute itself. Because of these possibilities, it is important to develop means to limit intervention. A problem in international law is that these means of limitation are not readily apparent. In part, this may be due to the continuing notion of sovereign equality. Simply put, limiting participation is difficult when all participants are presumptively equal. But it is also true that procedures for effective multilateral adjudication are not well developed in international law because complex multipartite disputes have been rare and because international decisionmaking has not had to face the pressure of inconsistent obligations, judicial economy, and the promotion of the efficient administration of justice present in municipal legal systems.²⁰

Trying to limit third party intervention in the international trade context raises particularly hard questions. Not only are the challenges of sovereign equality and inexperience present, but because international trade is inherently about economic interdependence, this factor raises an added concern. Any change in the terms of trade is seen as affecting the entire global economy, not just the parties to a dispute. There is great built-in pressure to permit intervention.

In attempting to develop some method of limitation under GATT, it is therefore important to determine what is required to intervene. This exercise will identify current limits to third party participation and suggest what the possibilities might be. The central question is, what level of interest is necessary to intervene? This inquiry can be divided into two categories: one category focuses on the *type* of interest, the other on the *degree* of interest. Regarding the *type* of interest, is third party standing based on a domestic interest alone? Can a "secondary" interest qualify, that is, can a party intervene because its nationals provide secondary factors, such as shipping, insurance or banking, that might be impaired by a change in the terms of trade of the product in issue? Can a WTO Member assume the interest of another Member, or even a non-Member, in a sort of representative or "derivative" capacity? Can the WTO itself intervene? Is a third party bound to support the arguments of one side, or can it act in the manner of *amicus curiae*, advocating different arguments to arrive at one party's conclusion, or even at a different conclusion? Can the

20. See Lori Fisler Damrosch, *Multilateral Disputes*, in *THE INTERNATIONAL COURT OF JUSTICE AT THE CROSSROADS* 376 (Lori Fisler Damrosch ed., 1987).

interest asserted be that of an exporter or an importer? Regarding the *degree* of interest, is a direct legal interest always necessary, or is an abstract one in the progressive interpretation of GATT sufficient? Can a Member's failure to participate in a panel hearing be used against it, either in the case at hand or in another case involving a similar issue? To try to answer these questions, it is useful to examine the history of GATT.

B. *Third Parties under GATT*

GATT is an international treaty aimed at limiting tariffs, controlling the use of non-tariff barriers, and eliminating discriminatory treatment in international commerce. GATT's main substantive feature is the Most Favored Nation Clause (MFN Clause), which requires a series of negotiated tariff reductions between GATT member countries.²¹ Pursuant to the MFN clause, the benefits of tariff reduction extended by one GATT signatory to another are generally extended to all signatories. The converse of the MFN arrangement is that if obligations are suspended between two signatories, then in theory they should be suspended to all signatories as well.²² This possibility recalls the earlier discussion about third party standing under multilateral treaties and demonstrates how MFN treatment can potentially intensify the "downside" of treaty obligations because all signatories face potential injury when a country is retaliated against. This injury may include loss of market share in the retaliating country or the disruption of trade flows to other countries when the country retaliated against redirects its trade.

An adverse impact on global commerce is not the only consequence of the failure of MFN. If the disputing countries decide to take the matter before a GATT panel, all Members run the risk of a textual interpretation unfavorable to at least some national interests. Domestic political pressure to "do something" may also build, particularly if GATT is perceived as the source of domestic problems.

A second feature of GATT is its dispute settlement system, which has evolved over time from a multilateral process involving many parties to a more bilateral process generally involving fewer ones. Modern GATT

21. GATT 1994, *supra* note 8, art. I(1). There are a number of important derogations to the MFN concept within GATT, but these do not detract from GATT's essential goals.

22. The issue of selectivity in the application of escape clause remedies "has been among the most controversial aspects of safeguard policy." The only panel report to address the issue, Norway—Restrictions on Imports of Certain Textile Products, GATT B.I.S.D. (27th Supp.) 119, 125–126 (1981), held that quantitative restrictions should be imposed in an MFN-consistent manner. The Uruguay Round was only partly successful in resolving the issue. GATT 1994 is silent on the question whether Article XIX, the Safeguards Clause, requires MFN application generally, but the Agreement on Safeguards permits quantitative restrictions to counter import surges. See JACKSON ET AL., *supra* note 9, at 651–52.

dispute settlement is characterized by a highly adversarial bilateralism reminiscent of litigation in a municipal court, but retains significant multilateral features. This curious dualism favors small countries and it is therefore attractive for all countries to intervene for many reasons, including the genuine fear that a panel report may affect them.²³

It is not clear if the pro-intervention bias of MFN or the GATT dispute settlement system was perceived in the first attempt to create an international trade law regime following World War II. The Havana Charter of 1948²⁴ envisaged liberal participation by non-governmental organizations in activities of the projected International Trade Organization.²⁵ There was, however, no equivalent vision or formal mechanism for third party status in this arrangement. Chapter VIII of the Havana Charter, entitled "Settlement of Differences," provided that a member country could make a written representation "to such other Member or Members as it considers to be concerned" in commencing a formal trade dispute.²⁶ This language placed the burden on the complainant to identify which parties were respondents or affected by the measure in dispute. After consultations failed, the concerned Members could submit the matter to arbitration, the result of which was binding only on participants in the dispute.

The Charter also allowed a dispute to be referred to an eighteen-member executive board.²⁷ The board was authorized to resolve the matter by various means, including releasing "the Member or Members affected from obligations or the grant of concessions."²⁸ Similar language was used to provide for further review by the conference, the ITO's plenary body.²⁹ Article 96 of the Charter permitted any Member whose interests were

23. It is conceivable, for example, that a GATT Member could threaten to intervene as a third party in order to unnecessarily complicate proceedings, hoping thereby to extract a concession from one of the parties. In GATT 1994, Members have undertaken not to do this. See GATT 1994, *supra* note 8, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(10). This undertaking does not mean that Members have not on occasion used third party status for apparently prospective or ulterior purposes in the past, however. See Part I.B. *supra*.

24. *Havana Charter for an International Trade Organization*, U.S. Department of State Publication 3206 (1948) [hereinafter *Havana Charter*].

25. This point has been made by Charnovitz, *supra* note 10, at 338-39. Charnovitz states that "[t]he fact that the negotiators of the ITO treaty provided for NGO participation, combined with evidence that the Interim ITO was prepared to implement this provision, together demonstrate that NGO participation is consistent with the design and aspirations of the multilateral trading system." He refers to Havana Charter Article 87(2) and to proposed procedures for NGO involvement prepared by the forerunner of the GATT Secretariat in May 1949.

26. *Havana Charter*, *supra* note 24, art. 93(1) (emphasis added).

27. *Id.* art. 94(1).

28. *Id.* art. 94(3) (emphasis added).

29. *Id.* art. 95(3).

prejudiced by a Conference decision to seek an advisory opinion from the International Court of Justice. The request for an opinion was to be accompanied by a question furnished "after consultation with the Members *substantially interested*."³⁰

The striking ambiguity of the Havana Charter made it of little assistance in defining the conditions under which Members could be third parties. In this respect the lack of an explicit intervention provision was a key oversight. In addition, the complainant's burden of determining interested third parties presumed that the complainant would have all the relevant information to make this determination. Even in ideal circumstances this is a questionable assumption. The Charter's language also permitted appeal to the ICJ—a poor choice given the expertise and efficiency of the Court. In sum, third party status seems not to have been carefully conceived by the drafters of the Havana Charter. One possible explanation for the Charter's textual vagueness could be the consensual nature of the postwar trade structure regime. On such a theory, there was no need for well-defined third party status because Members could have reasonably assumed that they would be consulted in decisions affecting their interests.

The ambiguity and failure of the Havana Charter are to be contrasted with the clarity and success of the General Agreement, concluded in October 1947.³¹ Due to the Members' deliberate preference for informality, the General Agreement did not spell out any formal system of conflict resolution. Over time, however, a system of "working parties" came into being to examine particular disputes over the interpretation of GATT. Third parties were a prominent feature of this model as the typical working party included representatives of the principals, one or two countries supporting either side, and some neutrals. Although the neutrals gave advice and their concurrence in the final decision was important, the true aim of a working party was agreement among the principals. Nevertheless, third parties played an important role in helping to generate a consensus that became the basis for many decisions.³²

30. *Id.* art. 96(3).

31. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194. The Havana Charter, creating an International Trade Organization, never came into force because of the failure of the United States Congress to approve it. For a discussion of this point see JACKSON, *WORLD TRADING SYSTEM*, *supra* note 9, at 32-34.

32. Hudec states that the performance of the Brazilian Taxes Working Party of April 1949 was typical of this model. The members of the working party were the principals (Brazil and France), two countries which had supported France's complaint (the United States and the United Kingdom), and three neutral developing countries (China, Cuba, and India). See HUDEC, *supra* note 9, at 78-79.

In October 1952, the working party model was tentatively superseded by a panel system, which was seen as more objective and as "satisfying the legal instincts of the GATT administrators."³³ GATT dispute resolution became more judicialized. Parties were afforded an opportunity to present their case before a panel, which would also hear from any other interested party. The panel would then draft a report, submit an interim version for the parties' consideration, and eventually make recommendations to the collective GATT membership, which had the final authority over disposition of the case.³⁴

In the evolution from working parties to panels, the role of third parties changed. Third parties went from being presumptive equals offering suggestions for the collective good to being parties with their own separate status and distinct interests at stake. A small, but telling, sign of this change was a decision by the GATT Council in 1958 to regulate procedures under which a complainant was required to inform the GATT Director-General about consultations under Article XXII. The decision directed that notice of consultations be given to all Members in case they wanted to join.³⁵ Notice would not have been necessary had non-parties, including interveners, still been considered inherent participants in the dispute resolution process.

The text of the General Agreement may have contributed to the process of individualization of non-parties by identifying specific interests that parties could assert. A hierarchy was established, beginning with a "principal supplying interest," followed by a "substantial interest," and ending with what might be called simply an "interest." GATT Article XXVIII made clear that a "principal supplying interest" is to be distinguished from a "substantial interest." In referring to parties with a "principal supplying interest," Article XXVIII:1 spoke of "negotiations and agreement" with a Contracting Party wanting to modify or withdraw a tariff concession. In referring to parties with a "substantial interest," the same clause spoke only of a duty to consult. Article 4 of the Interpretive Note to Article XXVIII indicated that it would not normally be appropriate for the Contracting Parties to determine that more than one Contracting Party had a "principal supplying interest." The implication of these provisions is evident. A "principal supplying interest" was considered to have more at stake than a "substantial interest," and while there might be only one "principal supplying interest" there could be many more "substantial interests." From this distinction, it is possible to conclude that a "principal supplying interest" would be entitled to invoke

33. *Id.*

34. JACKSON, *WORLD TRADE*, *supra* note 9, at 176.

35. *Id.* at 175.

GATT dispute resolution, whereas a "substantial interest" would have a lesser right, conceivably the right to intervene.

The General Agreement also elaborated on the term "substantial interest," which was tied to a specific trade interest³⁶ as it had often been under the Havana Charter.³⁷ Yet, the repetition and varied usage occurring in the General Agreement made the term clearer. The term's most comprehensive definition occurred in Section 7 of the Interpretive Note to Article XXVIII. This reads:

the expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

The Note suggests that the drafters originally conceived "substantial interest" as being trade-linked, but much of the term's definition remained unclear. For example, was a "substantial interest" to be objectively or subjectively determined? Article XXVIII explicitly states that "substantial interest" was to be "determined by the Contracting Parties," but this is not true for other provisions mentioning a "substantial interest."³⁸ Often there

36. "Substantial interest" appears in the GATT as follows: "all other contracting parties having a substantial interest in supplying the product concerned," "a substantial interest in supplying the product shares," "any other contracting party having a substantial interest in supplying that product" (Art. XIII); "substantial interest as exporters of the product" (Art. XIX); "a substantial interest in the product concerned" (Art. XXVII); "subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession" (Art. XXVIII). General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 (entry into force Jan. 1, 1948).

37. The term appears in the Havana Charter as follows: "to Members having a substantial interest in supplying that product" (Art. 20(2)(b)); "all other Members having a substantial interest in supplying the product concerned" (Art. 22(2)(d)); "shall allot to Member countries having a substantial interest in supplying the product shares" (ibid.); "a substantial interest in supplying that product" (Art. 22(4)); "the request of any other Member or Members having a substantial interest in trade with it in the product concerned" (Art. 31(1)); "those Members having a substantial interest as exporters of the product concerned" (Art. 40(2)).

38. Thus, for example, in Article XIII:2(d) substantial interest is determined by supply of product shares, presumably based on information agreed to by the parties. Similarly, under Article XIX:2 the determination appears to be left to the country concerned. It is interesting to observe that, at least in some instances, this subjectivity has been moderated under the WTO Agreement. For example, the Understanding on the Interpretation of Art. XXVIII of the General Agreement on Tariffs and Trade 1994, Article 5 requires supporting evidence for assertions of "substantial interest." Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 37, 57, 61 (1994).

was no mechanism for identifying a "substantial interest;" thus, in reality, the burden was on each individual country to make its own determination and then intervene. It is entirely possible to imagine that within the consensual atmosphere of GATT countries might also have been reluctant to challenge assertions of such interest, leading to the legitimization of self-assertion through practice.

The term "substantial interest" assumed formal importance in the 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance³⁹ and in associated agreements.⁴⁰ Pursuant to Article 15 of the Understanding, each GATT Member with a substantial interest in a matter before a panel could be heard after giving notice.⁴¹ The conditional language used in the article ("... *should* have an opportunity to be heard . . .") suggested that the right to intervene was not absolute, however. Third parties wanting to intervene in pre-hearing consultations had no free-standing right to do so, entitlement to receive the litigants' submissions before the hearing, and access to settlement information was restricted.⁴²

An Agreed Description of Customary Practice regarding GATT dispute settlement was annexed to the Understanding as a general statement of procedural norms.⁴³ The Agreed Description struck a careful balance between the bilateral and multilateral aspects of the adjudicative process by stating that "a solution *mutually* acceptable to the parties to a dispute is clearly to be preferred," adding that "there is normally a presumption that a breach of the rules has an adverse impact on *other contracting parties*."⁴⁴ It also observed that previous panels had heard views of "any contracting party *having a substantial interest in the matter*, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views."⁴⁵ The Agreed Description's language indicated that,

39. Understanding Regarding Notification Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1979) [hereinafter Tokyo Round Understanding].

40. Agreement on Technical Barriers to Trade, art. 15(2) GATT B.I.S.D. (26th Supp.) at 8 (1979); Agreement on Government Procurement, art. 9 GATT B.I.S.D. (26th Supp.) at 33 (1979); Agreement on Implementation of Art. VII of the General Agreement on Tariffs and Trade art. 3, GATT B.I.S.D. (26th Supp.) at 116 (1979) all contain references to "substantial interest" in the context of intervention. The interpretation of these agreements will not be discussed here.

41. Somewhat inconsistently, where Contracting Parties had settled a matter between them, a Member "with an *interest* in the matter" had the right to receive settlement information "in so far as it relate[d] to trade matters."

42. Tokyo Round Understanding, *supra* note 39 art. 19.

43. *Id.* at 215.

44. *Id.* at 216 (emphasis added).

45. *Id.* at 217.

despite the bilateralizing influence of formal procedures embodied in the Tokyo Round Understanding, there remained a strong orientation toward multipartite dispute settlement within GATT.

Having examined the controlling instruments, it is useful to remember that words only communicate their true meaning in the context of their usage. A more complete picture of third party practice and limits to intervention under GATT can be had by reviewing panel reports and drawing conclusions from the assembled evidence.⁴⁶

The first impression provided by a review of panel reports is the sheer number of potential third parties that were habitually notified about panel proceedings.⁴⁷ This fact demonstrates a willingness on the part of panels to permit active intervention. This record indicates a strong tradition of intervention in GATT dispute resolution, at least since the early 1980s,

46. It is appropriate to observe that the terminology applied to third parties was inconsistent. This could reflect a desire on the part of panels to avoid confusion with more generic usage of the term "third party," but it may also highlight the informality that has attended third party status under the GATT. Parties have been variously referred to as "third parties" (Norway—Restrictions on Imports of Apples and Pears, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 306 (1989); Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear From Brazil, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 128 (1992) [hereinafter *Non-Rubber Footwear*]), "third contracting parties" (United States—Restrictions on Imports of Sugar, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 331 (1989) [hereinafter *Restrictions on Imports of Sugar*]), and "interested third parties" (Japan—Trade in Semi-conductors, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 116 (1988) [hereinafter *Trade in Semi-conductors*]; European Economic Community—Restrictions on Imports of Dessert Apples Complaint by Chile, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 93 (1989) [hereinafter *Restrictions on Imports of Dessert Apples*]). The use of the first two terms, when considered together, seems to suggest that some third parties might *not* be GATT Members. The term "*interested* third parties" seems to imply that there might be two tiers of third party, some with more interest than others. Whether these distinctions mean anything is not clear.

47. See, e.g., GATT Unpublished Panel Report on U.S. Restrictions on Imports of Tuna, 1994 GATTPD LEXIS 7 at 1, DS29/R (June 16, 1994) [hereinafter *Restrictions on Imports of Tuna*] (Australia, Canada, Colombia, Costa Rica, El Salvador, Japan, New Zealand, Thailand and Venezuela reserving their right to intervene; Singapore registering its interest); European Economic Community—Restrictions on Imports of Apples Complaint by United States, June 22, 1989, GATT B.I.S.D. (36 Supp.) at 135 (1989) (Canada intervening as a third party; Chile, Argentina, Australia and New Zealand reserving their right to intervene); *Restrictions on Imports of Dessert Apples*, *supra* note 46 (Argentina and Canada intervened as third parties; the United States, Uruguay, Australia, New Zealand, Romania and Poland reserving their right to intervene); *Trade in Semi-conductors*, *supra* note 46 (Australia, Canada, Hong Kong and Singapore intervening as third parties; Argentina, Australia, Austria, Brazil, Canada, Hong Kong, the Republic of Korea, Malaysia, Mexico, Singapore, Sweden (for the Nordic countries), Switzerland and Thailand reserved the right to intervene); United States—Customs User Fee, Feb. 2, 1988, GATT B.I.S.D. (35th Supp.) at 245 (1988) [hereinafter *Customs User Fee*] (Brazil, Chile, Hong Kong, Mexico, New Zealand, Peru, Sweden on behalf of the Nordic countries, and Switzerland provided with the opportunity to appear; Australia, Hong Kong, India, Japan, New Zealand, Peru and Singapore appearing).

and repudiates any claim that GATT adjudication was somehow handicapped by third party participation.

However, panel reports do not always make clear which countries actually participated as third parties. Although many countries were notified, some took part which were not listed as notified⁴⁸ and others reserved their right to intervene without subsequently appearing. Some countries, more ambiguously, simply "registered an interest."⁴⁹

A number of reports mention third parties out of a persistent concern for fair procedure. Panels demanded precision in the terms of reference circulated among members so that third parties could make a considered decision about intervention. Thus, in *Restrictions on Imports of Sugar*,⁵⁰ the complainant, Australia, claimed that the reallocation of a portion of the U.S.'s sugar quota for Guyana to Belize, Jamaica and Trinidad was inconsistent with the principle of non-discriminatory administration of quantitative restrictions under Article XIII:2 of the General Agreement. The United States, as respondent, argued that the issue was not covered by the panel's terms of reference because the issue had arisen after the establishment of the panel by the GATT Council in September 1988. The panel recognized that it had to interpret its terms of reference not only in the light of the interests of the parties to the dispute, but also with regard to the rights of third parties. It accepted the U.S. argument that because the matter had arisen only after the establishment of the panel, Contracting Parties had no reason to expect that the reallocation of U.S. sugar quotas among Caribbean countries would arise. The panel therefore decided that the reallocation was not part of its mandate. Similar comments appear in other panel reports.⁵¹

Another feature revealed by the panel reports is that the term "substantial interest" was rarely taken literally. The record seldom discloses any careful scrutiny of the *nature* of the substantial interest asserted, nor does it disclose whether such assertions were ever successfully challenged. The relevant procedural rules do not make clear whether parties seeking to intervene were required to state their interest for this

48. For example, in GATT Dispute Settlement Panel Report on the European Economic Community—Import Regime for Bananas, Jan. 18, 1994, 34 I.L.M. 177 (1995), Tanzania was not listed as intervening but its submissions appear in the report.

49. It is unclear what the distinction is between reservation of a right to intervene and registration of an interest; see *Restrictions on Imports of Tuna*, *supra* note 47 (Singapore's registration).

50. *Restrictions on Imports of Sugar*, *supra* note 46.

51. See GATT Unadopted Unpublished Panel Report on U.S.—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, 1992 WL 792950, SCM/153 (Dec. 4, 1992); GATT Unadopted Unpublished Panel Report on U.S.—Trade Measures Affecting Nicaragua, 1986 WL 363154, L/6053 (Oct. 13, 1986).

purpose. Thus, a third party submission could detail the link between the third party and the respondent, as in the following description of Hong Kong's position in a challenge brought by Canada and the EC of a U.S. merchandise import fee:

Hong Kong stated that it had a particular interest in the matter because the United States was the principal market for its exports and that as a result of the imposition of the merchandise processing fee, the total cost of Hong Kong's exports to the United States was estimated to increase by approximately U.S. \$20 million in 1987.⁵²

But more often, the panel treated the information of "substantial interest" provided by the third party ambiguously. This treatment implies either that the information was not supplied by the third party, or that the panel overlooked or ignored it. Thus, manifesting a "substantial interest" was not considered a necessary condition. An example of such a case—one of many⁵³—is the following description of Brazil's position in a challenge brought against U.S. duties imposed on certain types of steel from the EC:

Brazil argued that the DOC had identified subsidization and calculated subsidy margins on the basis of methodological approaches that were unreasonable and devoid of economic rationale. Brazil requested the Panel to find that the United States had rendered final determinations that contravened the United States' basic obligations under the Agreement and the General Agreement, in particular Articles 1 and 4 of the Agreement.⁵⁴

From the panel's description it is impossible to tell whether Brazil's interest was direct because Brazilian steel competed directly with the European products targeted by U.S. countervailing duties, whether the country had a more abstract interest in the case, or whether the panel simply omitted to mention the link in its report. The insignificance of the

52. *Customs User Fee*, *supra* note 47.

53. See GATT Unpublished Panel Report on U.S.—Taxes on Automobiles, 1994 WL 910937, DS31/R (Oct. 11, 1994) (submissions of Sweden); GATT Unadopted Unpublished Panel Report on Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk, 1994 WL 10940, SCM/179 (Jan. 27, 1993) (submissions of the United States); GATT Adopted Unpublished Panel Report on Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States, 1993 WL 840282, ADP/92 (Apr. 2, 1993) (submissions of Canada); GATT Unadopted Unpublished Panel Report on U.S.—Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico, 1992 WL 792944, ADP/82 (Sept. 7, 1992) (submissions of the EC).

54. GATT Unpublished Panel Report on U.S.—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom, 1994 GATTPD LEXIS 9, DRS/1a (1994).

term "substantial interest" was further highlighted by the fact that panels accepted assertions of purely prospective interest as well.⁵⁵

The meaning of "substantial interest" lost all qualification when in certain cases, such as those reviewing subsidies, antidumping and countervailing findings by national authorities, the interest asserted was in ensuring a fair process.⁵⁶ To this extent, the "substantial interest" was one possessed by all GATT Members equally. The possibility that a single GATT Member might be hurt more than any other was hypothetical; a "substantial interest" thus had to be imputed to all Members in order to ensure compliance with the treaty language. In these instances, a "substantial interest" meant nothing and had no use as a term of limitation.

Panel reports also give a clearer idea of the scope of third party representation. GATT rules did not indicate whether GATT Members could act as agents for other Members, but practice suggests this is true.⁵⁷ Whether this practice could be carried one step further to permit Members to advance an interest on behalf of all Members is not known, although there appears to be no reason why, given consent, this could not occur.⁵⁸ At the same time there is curious contrast in the fact that representation of the

55. In GATT Unpublished Panel Report on U.S.—Measures Affecting the Importation, Internal Sale and Use of Tobacco, 199 GATTPD LEXIS 15, DS44/R (Oct. 4, 1994), Australia indicated that while it had negligible export interest in the U.S. market for the product involved, the legislation resulted in clear interference with the importation of tobacco into the United States and, if unchallenged, could encourage the imposition of similar measures on products of direct interest to Australia. This reliance on indirect interests has continued under the WTO Agreement. See *infra*, notes 109–110.

56. See GATT Unpublished Panel Report on EC—Imposition of Antidumping Duties on Imports of Cotton Yarn from Brazil, 1995 GATTPD LEXIS 3, ADP/137 (July 4, 1995); GATT Unadopted Unpublished Panel Report on German Exchange Rate Scheme for Deutsche Airbus, 1992 GATTPD LEXIS 13, SCM/142 (May 4, 1992).

57. At the Council meeting establishing the panel in *Customs User Fee*, *supra* note 47. Indonesia explicitly reserved the right to intervene on behalf of its ASEAN partners and Sweden was offered the opportunity to appear on behalf of the Nordic countries "in light of statements made in previous Council meetings." Neither Indonesia nor Sweden ultimately made use of the possibility. Sweden was notified that it could make a similar appearance on behalf of the Nordic countries in *Trade in Semi-conductors*, *supra* note 46. The issue of representation is also raised by the EC's participation in GATT. See Ernst-Ulrich Petersmann, *The EEC as a GATT Member—Legal Conflicts between GATT Law and European Community Law* in MEINHARD HILF ET AL., *THE EUROPEAN COMMUNITY AND GATT* 23 (1986).

58. For example, Canada and Japan have intervened in *Bananas III* to comment on the case's broader implications for the WTO. Both are importers of bananas but do not have any direct interest in case. Press reports indicate Canada's submissions are with respect to the scope of the GATS and its relationship with the GATT, and the applicability of the dispute settlement rules to trade measures that are covered by a waiver from GATT rules. Japan's submission is with respect to whether the EC's tariff rate quota is covered by the Agreement on Licensing Procedures. See *WTO Panel Allows Enhanced Role for ACP, Other Third Parties*, INSIDE U.S. TRADE, Sept. 20, 1996, at 15.

Contracting Parties as a collective entity would have been impermissible in light of the presumable restriction of intervention to “[individual] contracting parties” in Article 15 of the Tokyo Round Understanding. The same language would also appear to rule out third party participation by the GATT Secretariat or non-GATT Members.

While intervention on the side of the complainant was contemplated, there was no procedure for a Member to intervene as co-respondent. It is not immediately evident why this should cause a problem since the term “third party” was not qualified in GATT instruments. Nevertheless, successive panels interpreted “third party” to mean intervention on the side of the complainant alone. On at least one occasion, however, the GATT Council decided a country could assume a position analogous to that of co-respondent.⁵⁹

Despite the flexibility and even ambiguity, third party participation was not entirely without limits. Panels established a practice of disregarding issues or defenses forwarded solely by third parties. In *Customs User Fee*,⁶⁰ for example, India intervened and requested that the panel consider whether a U.S. duty exemption for goods from least developed countries was consistent with MFN obligations. Two other interveners, Australia and Singapore, also referred to this issue and to the related issue of a duty exemption granted to certain countries under the U.S. Caribbean Basin Economic Recovery Act. The two complainants, Canada and the EC, did not raise either matter but declared that they had no objection to the panel pronouncing upon them. The panel observed that neither exemption was GATT-consistent and concluded that “no answer in opposition to [India, Australia and Singapore’s] legal claims was given, nor was the Panel aware of any that could be given.”⁶¹ Nevertheless, the panel concluded, it would not be appropriate to make a formal finding

59. In *Trade in Semi-conductors*, *supra* note 46, at 116 (1989) the issue was a bilateral trade arrangement between Japan and the United States in semi-conductor products. The EC alleged that the arrangement effectively restricted sales of Japanese semi-conductor products and requested a panel. The Council established a panel and explained that, “given the special nature of the matter to be examined,” the United States would be given “adequate opportunity . . . to participate in the work of the Panel as necessary and appropriate.” The Council’s holding appears to have been influenced by the GATT Unadopted Unpublished Panel Report on European Communities—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean, 1985 GATTPD LEXIS 4, L/5776 (1985). In the course of that case, the panel decided that it would provide “adequate opportunities for [countries enjoying certain preferential trading arrangements with the EC] to participate in the work of the panel as necessary and appropriate.” At least a dozen countries were allowed to intervene and several made submissions in favor of the respondent. It is interesting to observe that this type of mass involvement predated the GATT *Bananas Trilogy* by almost a decade.

60. *Customs User Fee*, *supra* note 47.

61. *Id.* at 290.

because "GATT practice has been for panels to make findings only on those issues raised by the parties to the dispute." Although no authority was cited for this statement, it has been followed by subsequent panels.⁶²

The "new issue" rule was interpreted strictly in other contexts as well. For example, panels declined to consider apparently relevant arguments when the parties that could have invoked them chose not to.⁶³ Even where a respondent admitted "it would not disagree" with an argument posited in third party submissions, the argument was disregarded.⁶⁴

Panels also did not hesitate to invoke the bilateral nature of a dispute as a limit to their remedial jurisdiction. One of the most noted cases of this type was *U.S.—Trade Measures Affecting Nicaragua*.⁶⁵ The case arose from the U.S. embargo in May 1985 on trade and transportation links with Nicaragua. Nicaragua's exports to the U.S., valued at \$162 million in 1980, had fallen to \$20 million in 1985 due to various U.S. measures against the Sandinista regime. Nicaragua's trade with its neighboring states in the Central American Common Market was also severely disrupted. Nicaragua argued before the panel that a recommendation to permit it to withdraw its trade concessions with respect to the U.S. "would be a meaningless step" because the U.S. embargo had already effectively done so. As an alternative, Nicaragua sought a general waiver for other GATT Members to allow them to extend more favorable treatment to Nicaraguan products, notwithstanding these Members' MFN obligations, thus, restoring the competitive relationship that existed for Nicaragua when it joined GATT.

The panel observed that the conditions for granting waivers were restrictive. Because the panel felt it would be acting contrary to GATT practice in recommending a change to third party obligations and because,

62. See also *Non-Rubber Footwear*, *supra* note 46; *Trade in Semi-conductors*, *supra* note 46; *Restrictions on Imports of Sugar*, *supra* note 46 (submission of the EC); European Economic Community—Regulation on Imports of Parts and Components, May 16, 1990, GATT B.I.S.D. (37th Supp.) at 132 (1990) (submission of the United States) [hereinafter *Parts and Components*].

63. See *U.S.—Restrictions on Imports of Sugar from Nicaragua*, Mar. 13, 1984, GATT B.I.S.D. (31st Supp.) at 67 (1985) (United States did not invoke Art. XXI); European Economic Community—Quantitative Restrictions Against Imports of Certain Products from Hong Kong, July 12, 1983, GATT B.I.S.D. (30th Supp.) at 129 (1984) (EC did not invoke Grandfather Clause), as identified in MCGOVERN, *supra* note 9, at 36.

64. See *Parts and Components*, *supra* note 62. The United States, as a third party, had argued that GATT Article VI provided a basis for measures to prevent circumvention of anti-dumping duties. During the proceedings the EC stated that, if the panel were to find that the anti-circumvention duties were justifiable under Article VI, "it would not disagree" with such an approach.

65. GATT Unadopted Unpublished Panel Report on *U.S.—Trade Measures Affecting Nicaragua*, 1986 WL 363154, L/6053 (Oct. 13, 1986).

in any event, no third party could be consulted since none had participated in the hearing, it declined to make such a recommendation "on purely procedural grounds." Bilateralism was also the theory underlying a panel decision not to allow a third party to compel continuing argument in the face of the parties' desire to compromise.⁶⁶

Despite strictness in some circumstances, it is conceivable that countries could intervene in order to make submissions for collateral purposes; that is, for purposes going beyond the precise confines of the case. There was always the possibility of making arguments for a prospective purpose, comparable to the process of "reading in" during the passage of bills in the U.S. Congress. This practice was hinted at in *Restrictions on Imports of Tuna*, where Australia submitted that:

the present dispute concerned solely the selective import prohibitions by the United States on yellowfin tuna according to the country of origin of the product. The dispute did not concern prohibitions related to the fishing practices of certain countries, since the prohibition could apply to those countries even if they met or exceeded the standard for fishing practices for the product of United States origin. Nor did the dispute concern trade in marine mammals, or trade restrictions taken in accordance with any other international treaty or arrangement. The United States had confirmed in its submission that it was not obligated by any other treaty to maintain the trade restrictions against EEC Member States. The Panel's findings would therefore have no implications for the GATT consistency of measures taken under any other existing or future treaty directed to conservation of the environment. . . . The United States measures in force did not require the protection of all dolphin life or health in the eastern tropical Pacific, but were linked to feasible incidental mortality rates associated with particular fishing methods.⁶⁷

Australia's carefully crafted submission, as phrased by the panel, appears concerned with defining what the U.S. measures were *not*, possibly to preclude future GATT challenges to its own legislation or treaties.

An examination of panel reports therefore concludes that while a bilateral model formed the core of GATT dispute resolution and implied a limited role for interveners, GATT's essential multilateralism favored a liberal attitude to third parties in practice. The limits to intervention that developed under GATT were more substantive than procedural. A

66. Japan—Measures on Imports of Leather, Nov. 6, 1979, GATT B.I.S.D. (26th Supp.) at 320 (1980), as cited by MCGOVERN, *supra* note 9, at 36.

67. *Restrictions on Imports of Tuna*, *supra* note 47.

“substantial interest” was ambiguous and frequently not a standard at all, but a third party’s attempt to raise new issues was impermissible. There were, of course, advantages and disadvantages to this posture. Inasmuch as GATT dispute resolution had a strong consensual and collective focus, active intervention permitted a comprehensive appreciation and resolution of cases. But participation of this kind also created potential for overuse, or worse, abuse. More detrimental still, perhaps, was the opportunity for bias towards the perspective and interpretations of Members active in asserting their third party rights, since these were mostly wealthy developed countries.⁶⁸ In light of this historical perspective, current third party law and practice under the WTO are now examined.

II. THIRD PARTIES AFTER THE URUGUAY ROUND

Details of the negotiations and structure of the WTO and GATT 1994 which emerged from the Uruguay Round of multilateral trade negotiations are available elsewhere. It is sufficient here to note that as a result of the Uruguay Round the coverage of GATT was expanded and formalized and the WTO was created to replace what were essentially interim institutional measures dating from the late 1940s. The operative aspect of the WTO was divided into four councils and a separate Dispute Settlement Body (DSB) designed to administer a set of reformulated dispute settlement rules known as the Dispute Settlement Understanding (DSU).⁶⁹ A new “reverse consensus” rule came into being for the adoption of panel reports by the Council, meaning that reports are adopted unless there is a consensus against them. This reversed the previous rule, which had allowed single countries to veto panel reports and caused some contentious reports to remain unadopted.

68. An informal third party interest under GATT is that of developing countries. Various provisions require consideration of developing country interests in decisionmaking. Recently, this consideration has been explicitly endorsed with respect to least developed countries. See Dispute Settlement Understanding Art. 24(1). Nevertheless, it remains unclear how these interests are to be asserted in the abstract in disputes between developed countries. For a discussion of WTO dispute settlement and developing countries see Alice Alexandra Kipel, *Special and Differential Treatment for Developing Countries*, in *THE WORLD TRADE ORGANIZATION: THE MULTINATIONAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION* 617 (Terrence P. Stewart ed., 1996).

69. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31; 33 I.L.M. 1226 (1994) [hereinafter DSU].

The near identity of the third party provision in the Dunkel Draft of 1991⁷⁰ with that of the DSU suggests third party participation was not a controversial issue during the final phase of the Uruguay Round. What is different between the pre- and post-Uruguay Round GATT is the range of subjects covered by the new GATT, particularly services and intellectual property. These extend coverage of the agreement to topics that are inherently harder to quantify and therefore it is more difficult to identify a peculiar "substantial interest." To this extent, standards for third party participation may become even more flexible and indeterminate under the GATT 1994 than they have been in the past.⁷¹

A. *The Dispute Settlement Understanding*

The DSU continues the aim of settling bilateral disputes within a strong multilateral framework. Article 3(4), for example, attempts to recognize a wider duty to provide appropriate outcomes for the parties and other interests by indicating that recommendations and rulings are aimed at achieving "a satisfactory settlement of the matter."⁷² It is rational to assume that silence as to exactly *whom* the settlement is to satisfy implies that panels should, to some extent, take into account the interests of *all* parties to the GATT. This observation is supported by the language of Article 3(5) requiring that solutions to matters formally brought up under the DSU "shall not nullify or impair benefits accruing to *any* Member under th[e contested] agreements."⁷³ Article 3(2) also states that the "recommendations and rulings of the DSB cannot add to or diminish the

70. The "Dunkel Draft" from the GATT Secretariat, Dec. 20, 1991, THE URUGUAY ROUND NEGOTIATIONS COMMITTEE (1992) at S.9. Among the changes between the Dunkel Draft and the Understanding was the title ("*third contracting parties*" versus "*third parties*") and minor clarification of the text. An earlier version of the draft, circulated as a "decision" arising from the Montreal/Geneva Mid-Term Review of 1988-89, conditioned disclosure of written submissions to third parties on the parties' permission. It also did not mention third party access to normal GATT dispute settlement procedures, as was later provided in Article 10(4). See General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-Term Review of the Uruguay Round, 28 I.L.M. 1025, 1033 (1989).

71. It is of interest that the terminology of "substantial interest" has also been used with respect to the qualification of intervention in certain provisions of the North American Free Trade Agreement. See North American Free Trade Agreement, Dec. 17, 1992, arts. 2006(3), 2008(3), H.R. REP. NO. 103-159, vol. 1, at 712 (1993). See also North American Agreement on Environmental Cooperation, Sept. 14, 1993, arts. 22(3), 24(2), 32 I.L.M. 1480 (1993); North American Agreement on Labor Cooperation, Sept. 14, 1993, arts. 22(2), 27(3), 29(2), 32 I.L.M. 1502 (1993).

72. DSU, *supra* note 69, at 1227.

73. *Id.* (emphasis added).

rights and obligations provided in the covered agreements," including, presumably, the rights and obligations of third parties.⁷⁴

Article 10, entitled "Third Parties," is the principal section according Member States the right to intervene. It emphasizes GATT's multilateral focus by explicitly providing that both the interests of parties "and those of other Members . . . shall be fully taken into account during the panel process."⁷⁵ This section does not indicate exactly how these non-party interests are to be taken into account, particularly when no party intervenes, but Article 10(2) identifies any Member possessing "a substantial interest" as having the express right to make written submissions and to be heard by a panel. Although the all-important term "substantial interest" is found at least a dozen times in the GATT 1994 and its accompanying agreements and is often trade-qualified,⁷⁶ in Article 10 the term is not qualified at all. The implication is that "substantial interest" has been given a new, wider definition in DSU Article 10 than in previous GATT usage. Where it is trade-related, the interest asserted must necessarily be so.⁷⁷ However, where it is not so qualified the "substantial interest" can be different. This flexible application accords with the breadth of subject matter now covered by DSU procedures.

From the point of view of potential third parties, the DSU incorporates a number of features improving earlier arrangements. Although Article 10's language does not give third parties a general right to attend hearings, this deficiency is mitigated by the requirement that third party arguments be "fully taken into account" and that third party submissions be "reflected in the panel report." Article 10(4) permits a third party which considers that a matter already the subject of a panel proceeding "nullifies or impairs benefits" to itself to have recourse to the dispute resolution mechanism. If a panel is requested, the Article mandates the matter's referral to the panel hearing the original case, most likely to avoid inconsistent decisions.

74. *Id.*

75. *Id.* at 1232 (emphasis added).

76. "Substantial interest" occurs in the GATT 1994 and associated agreements twice in the Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994, 1 WTO Treaties Binder 23, once in the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 art. 4, 1 WTO Treaties Binder 25, once in the Agreement on Agriculture art. 12, 1 WTO Treaties Binder 27, twice in the Agreement on Safeguards art. 5(2), 1 WTO Treaties Binder 327 and four times in the DSU, *supra* note 69.

77. The Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994, 1 WTO Treaties Binder 23 shows considerable effort by the negotiators to circumscribe use of "substantial interest." Article 5 requires a member which considers it has a substantial interest to communicate its claim in writing with supporting evidence to a member proposing to withdraw or modify a tariff concession.

Two improvements outside Article 10 directly benefit third parties. Article 3(6) provides that when settlements to matters formally raised under the DSU are reached, these must be notified to the DSB where “any Member may raise any point relating thereto.”⁷⁸ Article 4(11) allows a member believing it has a substantial trade interest to join consultations unless the respondent country objects.⁷⁹

The requirements for third party status remain minimal. Interveners must have a substantial interest and notify the DSB in writing. A third condition, that the matter is before a panel, is suggested by the phrase in Article 10(2) that “[a]ny Member having a substantial interest in a matter *before a panel*.”⁸⁰ Additional support for this view is the fact that the term “third party” is first used in Article 10 and not in pre-panel proceedings such as consultation, good offices, conciliation or mediation. However, the interpretation is contradicted by Article 6 of the DSU Appendix 3 Working Procedures, which requires that “[a]ll third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel.”⁸¹ The implication seems to be that, presuming they have the requisite interest, Members attain third party status upon notification to the DSB and then present their views at some subsequent time when a panel is seized of the matter. The phrasing leaves open the possibility of pre-panel third party participation.

Chinkin refers to “unequal intervention” where intervention takes place *after* the original parties have committed themselves to their arguments.⁸² She suggests that parties should not be disadvantaged by such tactics. In the context of GATT, there is no rule on point, but analogous practice with respect to parties is to disregard latecomers unless there is

78. DSU, *supra* note 69, at 1227.

79. In Turkey—Restrictions on Imports of Textile and Clothing Products WT/DS29, *WTO Dispute Settlement “State-of-Play”* (last modified Sept. 29, 1997) <<http://www.org/wto/dispute/bulletin.htm>> [hereinafter *Textile and Clothing Products*], Hong Kong has complained that Turkish quantitative restrictions on imports of textiles and clothing violate GATT Articles XI and XIII. Turkey has replied that the measures were taken in order to adapt Turkish commercial policy to the process of integration in a customs union with the EC. Following Hong Kong’s request for consultations, Turkey asked that Hong Kong accept the EC’s participation in consultations on equal terms with Turkey as “a joint exercise.” Hong Kong has refused, although the wording of DSU Article 4(11) suggests that the choice is that of the member “*to which the request for consultations was addressed*,” which is presumably Turkey. See Gustavo Nogueira, *The First Appellate Body Review: United States—Standards for Reformulated and Conventional Gasoline*, 30 J. WORLD TRADE 5, 7 n. 5 (1996).

80. DSU, *supra* note 69, at 1232 (emphasis added).

81. *Id.* at 1245.

82. See CHINKIN, *supra* note 18, at 183 (citing Malta, 1981 I.C.J. 3, 35).

consent.⁸³ However, one can argue that the dispute resolution system already contemplates a form of unequal intervention by permitting consideration of panel reports by the relevant council.

B. *Third Parties as "Third Participants": WTO Appellate Review*

A new feature of the WTO dispute settlement machinery is appellate review, provided by DSU Article 17 and elaborated upon in the Working Procedures on Appellate Review.⁸⁴ Formal identification as a third party under DSU Article 10 is essential because the Appellate Working Procedures limit third party participation on appeal to those parties having already "notified the DSB of a substantial interest" at the panel stage.⁸⁵ On appeal a third party is termed a "third participant." It is permitted to make written submissions and to be heard by a panel of the Appellate Body, known as a "division."

The Appellate Working Procedures contain a number of important features that help further define the concept of third party under the WTO Agreement. Third participant status is accorded on notification to the Appellate Body alone. There is no provision for reassessment by the Appellate Body of the "substantial interest" asserted before the panel. Furthermore, the Appellate Working Procedures make clear a Member may not intervene for the first time in a case at the appellate stage. Appearance by third participants is optional⁸⁶ and the rules contemplate paper submissions.⁸⁷ However, a non-appearing third participant must remain ready in case it is requested to answer questions by the division and is thus obligated to respond.⁸⁸

83. In GATT Unpublished Panel Report on European Economic Community—Member States' Import Regimes for Bananas, 1993 GATTPD LEXIS 11, DS32/R (June 3, 1993) [hereinafter *Bananas I*], the panel received a letter from the representative of Belize formally requesting that the panel suspend its proceedings two days before hearings began. Belize requested that the parties begin consultations immediately and that it be admitted as a full participant in the panel proceedings. The panel denied the request to suspend consultations because the 60-day consultation period had expired, and also denied the Belizean request to participate because the parties could not agree to it between themselves.

84. World Trade Organization Appellate Body, Working Procedures for Appellate Review, 35 I.L.M. 495 (1996) [hereinafter *Appellate Working Procedures*].

85. Article 17(4) reads, "Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." Intriguing is the fact that a third party apparently has no affirmative duty to make submissions before the panel in order to preserve its right to make them before the Appellate Body. *Id.*

86. Appellate Working Procedures, *supra* note 84, art. 27(3).

87. The text of Appellate Working Procedures Article 27(3) states that any third participant which has filed a submission "may appear," implying that written submissions are sufficient.

88. Appellate Working Procedures, *supra* note 84, art. 28(1).

There are some subtle distinctions between third party practice before panels and divisions of the Appellate Body. Under DSU Article 10(3), a third party can make written submissions but is only allowed to receive the parties' submissions at the first meeting of the panel, which can constrain the ability of third parties to effectively respond to issues. However, under Article 24 of the Appellate Working Procedures, third participants are given twenty-five days following the filing of the Notice of Appeal to make written submissions. Because this is fifteen days longer than the appellants have to make submissions, there is an interim for a third participant to carefully consider and respond to the appellant's position. This advantage disappears if the third participant intervenes on the respondent's behalf because the respondent also has twenty-five days to make submissions.⁸⁹

The Appellate Working Procedures do not indicate the process to be followed if a party has intervened in a non-party capacity before the panel, as the United States did in *Japan—Trade in Semi-conductors*,⁹⁰ and then seeks to participate on appeal. Article 16(1) of the Appellate Working Procedures allows a division to modify its process where a "procedural question arises that is not covered by the rules."⁹¹ Presumably, whatever modified process was agreed upon would apply in such a case.

C. Further Issues

The DSU and Appellate Working Procedures leave a number of unresolved issues that future panels, divisions, and perhaps ultimately the WTO itself, will have to address. Foremost is the prospect that third parties remain procedurally disadvantaged in WTO proceedings. Under the DSU, they are only permitted to attend a single session of a hearing.⁹² This limitation constrains their ability to follow the proceedings and react to developments *in camera*. How strictly it will apply remains to be seen.

89. *Id.* art. 22(1).

90. *Trade in Semi-conductors*, *supra* note 46.

91. Appellate Working Procedures, *supra* note 77, art. 16(1).

92. Article 2 of the DSU Working Procedures requires that panels meet in closed sessions, while Article 6 formally permits third party attendance only at "a session" of a panel meeting, not at the entire meeting itself. The Appellate Working Procedures are more ambiguous on third participant attendance and the secrecy of division hearings. Article 24 refers to third parties participating as third participants "*in the appeal*" and Article 27(3) indicates that third participants "may appear to make oral arguments or presentations *at the oral hearing*" without further qualification. While there is no blanket secrecy provision in the Appellate Working Procedures comparable to that which exists in Art. 2 of the DSU Working Procedures, there are various qualifications of confidentiality in the Appellate Body Rules of Conduct. See Appellate Working Procedures, *supra* note 84, Annex II: Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes art. VI [hereinafter Appellate Body Rules of Conduct]

The issue of an appropriate remedy for third parties under the DSU is also unsatisfactory. Compensation is limited to "any party having invoked the dispute settlement procedures."⁹³ Third parties do not invoke the dispute settlement machinery and therefore are precluded from seeking compensatory awards. The DSU's language thus restricts third parties to seeking declarative relief.

Finally, active third party intervention makes panel selection difficult.⁹⁴ DSU Article 8(3) prohibits the selection of panel members who are citizens of countries involved in a dispute, including third parties. As more third parties participate in cases, therefore, the pool of potential panelists shrinks. Curiously, this same restriction does not apply to division members.⁹⁵

D. Third Party Practice under GATT and the WTO: The Bananas Trilogy

At present, third party and third participant practice under the WTO has not been markedly different from what it was before the Uruguay Round. Only a few issues have arisen under the new system and their treatment suggests a "business as usual" attitude towards intervention. This is in keeping with the identity of the pre- and post-Uruguay Round third party provisions and the WTO Agreement's Continuity Clause.⁹⁶

For example, in its first decision the Appellate Body expressed the familiar concern that respondents' conditional arguments were unfair, in part because these arguments were not raised in the appellant's Notice of Appeal.⁹⁷ This aspect of the decision demonstrates the Appellate Body's appropriate concern for third party rights, even in absence of intervention. In another case before a panel, the United States acted consistently with past practice in reserving its right to submit its views as a third party out

93. DSU, *supra* note 69, art. 22(2). See also *id.* art. 3(7).

94. Active third party intervention can hamper the DSB's ability to find panelists. Debra Steger, Counsel to the Appellate Body, has referred to this problem, saying that "[i]n the WTO's first year of operation, most of the panelists have come from either Switzerland or New Zealand, with Norway also a popular choice because of its position as one of the few remaining European countries that is not an EU member." See *WTO: Sharp Increase seen in WTO Disputes Including Many from Developing Countries*, BNA INT'L TRADE DAILY, at D-4 (Oct. 18, 1996). The Appellate Body itself is not affected by this problem because division members participate "regardless of national origin". See Appellate Working Procedures art. 6(2). Nevertheless, division members do have obligations of independence, impartiality and confidentiality. See Appellate Body Rules of Conduct, *supra* note 92, art. 7(1).

95. Appellate Body Rules of Conduct, *supra* note 87, art. 7(1).

96. "[T]he WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947." WTO Agreement art. XVI(1).

97. See WTO Appellate Body: Report of the Appellate Body in United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603, 615–16 (May 20, 1996).

of mere "concerns of principle," even though the U.S. was not then exporting the product in contention.⁹⁸

The consistent treatment of third parties under old and new GATT dispute settlement has been underlined by a trilogy of cases concerning the regime for bananas in the European Community. The most recent case in the series, *Bananas III*, was canvassed at the beginning of this article. The trilogy itself is the product of a confluence of two changes of law—one in the European Community, the other in GATT. Because of their timing, the changes have generated three decisions: the first, reviewing the old European regulations for consistency with GATT 1947, the second, reviewing the new European regulations for consistency with GATT 1947, and the third, reviewing the new European regulations for consistency with GATT 1994. To better understand the issues of standing that the trilogy raises, it is necessary to review some background.

Since 1988, banana consumption in the EC has accounted for 40% of the world's total, the largest single share. Until 1993, there was no common EC tariff structure for bananas—a legacy of history, different foreign aid policies, and disparate national consumption patterns. Five EC members—France, Italy, Spain, Portugal and the United Kingdom—permitted duty-free entry for bananas grown in the EC and in their former colonies located in Africa, the Caribbean and the Pacific. Six other EC members—the Benelux countries, Denmark, Greece and Ireland—also permitted duty-free entry for bananas from ACP countries, but imposed a 20% *ad valorem* duty on imports from elsewhere. Germany alone permitted duty-free imports irrespective of source.⁹⁹ Most of its bananas originated in Latin America.

In February 1993, five Central and South American banana exporting countries¹⁰⁰ requested the establishment of a GATT panel under the Tokyo Round Understanding to examine all national banana regulations in the EC, with the exception of Germany's, as potentially discriminatory under GATT. A panel was established to hear the case, referred to as *Bananas I*. Seven other countries reserved their rights to make submissions, but only

98. The matter, GATT Unpublished Panel Report on European Community—Trade Description of Scallops, 1996 GATTTPD LEXIS 1, WT/DS7, WT/DS12, WT/DS14, (Aug. 5, 1996) [hereinafter *Trade Description of Scallops*], involved a consolidated dispute brought by Canada, Chile and Peru against a French Government order on the labelling of scallops. The case was settled while the hearing was in progress in July, 1996. See *WTO Panel To Probe Japan's Domestic Liquor Taxation Scheme*, 12 INT'L TRADE REP. 1650 (1995).

99. Germans have a high per capita consumption of bananas and consider the fruit a "cultural icon". See Jack J. Chen, *Going Bananas: How the WTO Can Heal the Split in the Global Banana Trade Dispute*, 63 FORDHAM L. REV. 1283, 1294 (1995).

100. The requesting countries were Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela.

Brazil, Mexico and the Philippines took the opportunity to do so. In addition, the delegations of Cameroon, Cote d'Ivoire, Jamaica, Madagascar and Senegal—all ACP countries—expressed an interest in participating and a special procedure was agreed to for this purpose.¹⁰¹ The panel did not elaborate as to why ACP participation required a special procedure, although presumably this was because the ACP members wanted to intervene on behalf of the respondent EC. It is also unclear whose interests the ACP members purported to represent: those of all seventy Lomé Convention countries, a subgroup thereof, or simply their own national interests.¹⁰² This is an important question because not all Lomé Convention countries are GATT Members. If the five-member group made submissions on behalf of the entire Convention membership, then this resulted in indirect standing in GATT for non-GATT Members.¹⁰³ The panel ultimately concluded that the national banana regulations, specifically tariffs and quantitative restrictions, were inconsistent with GATT. In June 1993, it recommended that these be made to conform.

While *Bananas I* was being considered, Council Regulation 404/93, establishing a tariff rate quota for bananas entering the European Community, became effective in July 1993. The motive behind the new regulation was the drive for a single internal market by 1992.¹⁰⁴ The regulation

101. The decision, *Bananas I*, *supra* note 83, indicates that the Contracting Parties agreed as follows:

- (i) that the representatives of Cameroon, Cote d'Ivoire, Jamaica, Madagascar and Senegal would be invited to all panel meetings at which the parties were present;
- (ii) that [these] parties would have to make a submission if they were to attend Panel meetings and that submissions made by such contracting parties should be made in writing, or if made orally, would also be made available in writing;
- (iii) that [these] representatives . . . would receive all submissions of the parties; and,
- (iv) that these same contracting parties would be invited by the Panel to speak as appropriate.

The panel cautioned, however, that "this procedure should not be considered a precedent for future panels in light of the very special circumstances of the case." *Id.*

102. Cameroon, Cote d'Ivoire, Madagascar and Senegal appear to have made submissions on behalf of the "African ACP Contracting Parties." Jamaica appears to have made similar submissions on its own behalf and those of "its Caribbean counterparts," but confined much of its argument to the continuing validity of colonial preferences it had received from Britain upon independence. *Id.*

103. In 1993, fifty-five of the seventy ACP countries belonging to the Lomé Convention were members of GATT.

104. See KEES JAN KUILWIJK, *THE EUROPEAN COURT AND THE GATT DILEMMA: PUBLIC INTEREST VERSUS INDIVIDUAL RIGHTS?* 187-88 (1996). Though restrictive, Regulation 404/93 was part of an adoption of a policy of free trade in the Community, one benefit of which was supposed to be more efficient mechanisms for providing foreign aid.

permitted up to 2 million tonnes of bananas to enter the market, with 857,700 tonnes being reserved for bananas from traditional ACP sources. These ACP bananas continued to enter duty-free, but those over quota were assessed a duty of 750 ecu per tonne. The balance of the quota, approximately 1.2 million tonnes, was reserved for third country bananas and non-traditional ACP bananas. Third country bananas under quota were assessed a duty of 100 ecu per tonne; over quota, the duty rose to 850 ecu per tonne. The regulation also instituted a contentious system of import licences. These were allocated to traders according to their traditional source of supply, with 66.5% being reserved for third country banana importers, 30% for traditional ACP banana importers, and the balance of 3.5% for non-traditional ACP banana imports. The new scheme was roundly criticized by Latin American banana producers as depriving them of market share.

In June 1993, as Regulation 404/93 was about to go into effect, the same five Central and South American banana exporting countries that had launched *Bananas I* requested the establishment of a GATT panel regarding Regulation 404/93. A panel was created under the Tokyo Round Understanding to hear the case, referred to as *Bananas II*.¹⁰⁵ At least a dozen countries,¹⁰⁶ including many of the ACP producers who had taken part in *Bananas I*, expressed an interest in participating in the panel's work and were allowed to do so. The panel report does not disclose whether any special procedure was agreed to. The panel simply indicated that "in the interest of transparency among contracting parties having a substantial interest in the trade of bananas, it would be reasonable to invite such countries to meetings of the Panel."¹⁰⁷ The report also does not reveal in what capacity the ACP producers participated. The report indicates that several ACP countries made lengthy submissions claiming that elimination of their Lomé Convention banana preference would put into question "the survival of much or most of their economy."¹⁰⁸ Other producers, such as Brazil and Tanzania, contested the indirect¹⁰⁹ or

105. Dispute Settlement Panel Report on the European Economic Community—Import Regime for Bananas, Jan. 18, 1994, 34 I.L.M. 177, 181 (1995) (not adopted) [hereinafter *Bananas II*].

106. The third parties invited by the panel to participate were Belize, Brazil, Cameroon, Cote d'Ivoire, Dominica, the Dominican Republic, Jamaica, Madagascar, the Philippines, St. Lucia, St. Vincent and the Grenadines, and Suriname. However, the panel report discloses that other countries, such as Tanzania, were also represented.

107. *Bananas II*, *supra* note 105, at 182.

108. *Id.* at 212.

109. The panel noted the indirect effect of a change in EC regulations of bananas on Brazil, despite the fact that Brazil was not a substantial supplier to the EC at that time. The panel mentioned trade diversion felt by Brazilian banana exporters, the decrease in Brazil's trade

prospective¹¹⁰ effect of the regulation. The panel considered these submissions, but in finding against the validity of Regulation 404/93 stressed that "it had to take into account that its terms of reference were to examine the EEC measures at issue exclusively in terms of their legal consistency with the General Agreement" and not broader measures of concern.¹¹¹ It went on to observe that the Contracting Parties had at their disposal the possibility of approving the regulation under GATT Articles XXIV:10 or XXV:5. In doing so "economic and social considerations" could be taken into account. The panel concluded that "nothing in its report would prevent the parties to the Lomé Convention from achieving their treaty objectives, including the objective of promoting the production and commercialization of bananas from ACP countries through the use of policy instruments consistent with the General Agreement."¹¹²

Since *Bananas II*, the EC has effectively blocked adoption of both the first and second panel reports, sought and received a waiver from GATT for its Lomé Convention obligations,¹¹³ and concluded a compromise Framework Agreement with some of the *Bananas II* litigants.¹¹⁴ There remains, however, serious discontent with the Community banana regime,

balance and domestic instability, as well as the impact on associated domestic industries such as packaging and transportation. *Id.* at 210.

110. Tanzania, for example, noted that its production of bananas was currently consumed domestically but that there existed a potential to develop production for exports. On this basis Tanzania mentioned its concern that the panel's deliberations could have a negative effect for those ACP countries that benefited from a preferential trading regime with the EC as a result of Lomé IV. *Id.* at 214.

111. *Id.* at 229.

112. *Id.*

113. The text of the waiver, sought and received by the EC in December 1994, states that:

"the terms and conditions set out hereunder . . . shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the *Fourth Lomé Convention*, without being required to extend the same preferential treatment to like products of any other contracting party."

The Fourth ACP-EEC Convention of Lomé, Dec. 19, 1994, GATT Doc. L/7604 at 2 (Dec. 19, 1994).

114. The EC concluded the Framework Agreement in March 1994 with four of the five original *Bananas II* litigants (Colombia, Costa Rica, Nicaragua and Venezuela). Only Guatemala refused to join. The Agreement was an attempt to appease the litigants with a guaranteed share of the EC market and an in-quota rate of 75 ecu per tonne. In return, the litigants agreed not to press for adoption of the *Bananas II* panel report. The Agreement provides that of the global tariff quota of 2 million tonnes, Colombia was to be allotted 21%, Costa Rica 23.4%, Nicaragua 3% and Venezuela 2%. Both Colombia and Costa Rica later defected from this arrangement under U.S. pressure, but not before the Community succeeded in having these respective shares incorporated into its Uruguay Round schedule by virtue of Article 10 of the Agreement, thereby giving them permanence.

stoked, in part, by the deft diplomacy of the United States.¹¹⁵ In May 1993, several dissatisfied countries began *Bananas III* under the DSU, as outlined above. This last challenge involves granting observer status to an undisclosed number of ACP countries, as well as traditional third party status to Canada and Japan.¹¹⁶

Once again, it is not clear on whose behalf the ACP countries appear. They sought "enhanced third party status" but had to settle for standing as "observers." The distinction between the two forms of representation is not evident, nor is it apparent how "enhanced third party status" differs from ordinary "third party status." Again, the difference may be related to the side on which a country seeks to intervene. An alternative explanation is that "enhanced third party status" is a term coined in the trade press.

In its interim decision on the issue of ACP standing, the *Bananas III* panel indicated that two factors motivated its grant of observer status: the important economic interests at stake for the countries concerned and their third party status in *Bananas I* and *II*. As criteria of limitation, economic impact and precedent approximate "substantial interest." Both are substantial to the countries concerned. At the same time, they differ from "substantial interest." This is acceptable if one remembers that the *Bananas Trilogy* does not involve a classic third party intervention under GATT, that is, it involves intervention on behalf of the complainant. Instead, the *Bananas Trilogy* raises the issue of intervention on behalf of the respondent, which is virtually indistinguishable from more conventional third party practice.

At the same time the decision on standing is noteworthy because it went beyond the "letter" of DSU rules in creating a new status whose closest precedent was the ad hoc creation of the GATT Council in *Trade in Semi-conductors*.¹¹⁷ The term "observer" cannot be found in the DSU. Rather, it is a creation of the panel's inherent power to develop its own process, as set out in DSU Article 1(2).

The panel's decision is problematic from the point of view of consistency, however, because it immediately raises the question of when "observer" status is to be accorded. It also leaves the ACP members in limbo with respect to any appeal of *Bananas III*, which many consider likely to occur given the history of contention. This is because observers do not, strictly speaking, fall within the definition of "third party" for the purposes of the Appellate Working Procedures, and, as noted above,

115. See U.S. to Press Costa Rica, Colombia to Kill Banana Framework, *INSIDE U.S. TRADE*, Jan. 5, 1996, at 3; U.S. Presses Ecuador to Join WTO Challenge of EU Banana Rules, *INSIDE U.S. TRADE*, Jan. 26, 1996, at 24.

116. See *supra* note 58.

117. *Trade in Semi-conductors*, *supra* note 46.

meeting this definition is essential for the preservation of any right to participate in the appeal. It remains to be seen whether the Appellate Body will interpret Article 16(1) of the Appellate Working Procedures liberally to make room for observer participation on appeal.

The *Bananas Trilogy* reflects a trend in which a range of interests is being dealt with under GATT in order to achieve a comprehensive resolution of a dispute. In part, this is a sign of GATT's success to date. Liberalized trading norms have fostered global economic interdependence which have, in turn, meant progressively closer ties that can be easily upset. Several cases involving multiple parties are currently either before panels or divisions, or have already been decided.¹¹⁸ Third party standing is only one aspect of their multilateralization.

The question posed at the beginning of this article was how limits on participation are to be imposed in such an interdependent environment. GATT has avoided formal restriction, as embodied in the term "substantial interest," in favor of practice derived restrictions on the raising of new issues. A review of the caselaw also reveals that both group representation and paper submissions are acceptable, meaning that these might be encouraged, or even mandated, among third parties without significant departure from current WTO law or practice. In order to formulate additional ways of limiting intervention in the context of the WTO, it is worthwhile to examine how other international adjudicators have restrained third party intervention.

III. INTERVENTION IN INTERNATIONAL ADJUDICATION

A. *The International and European Courts of Justice*

The original predecessor to the ICJ was established in 1899 and its procedure was heavily influenced by arbitral law.¹¹⁹ The European Court of Justice (ECJ) is a younger creation, having been founded in 1950. Its jurisdiction and mandate approximate more directly the working of a municipal court. The differences between the two models do not obscure

118. See GATT Unpublished Panel Report on Japan—Taxes on Alcoholic Beverages, 1996 GTTWPD LEXIS 2 WT/DS8/R, WT/DS10/R, WT/DS11/R, (July 11, 1996) [hereinafter *Taxes on Alcoholic Beverages*]; *Trade Description of Scallops*, supra note 98; *Textile and Clothing Products*, supra note 79; *Indonesia—Certain Measures Affecting the Automobile Industry*, 1997 WL 442326, (Aug. 5, 1997) (complaints by the European Communities (WT/DS54), Japan (2) (WT/DS55, 64) and the United States (WT/DS59)).

119. SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 14 (1993).

the fact that they share a number of similarities with respect to third party law and practice.

Third party intervention before the ICJ occurs pursuant to Articles 62 and 63 of the Court's Statute.¹²⁰ Each article applies in a distinct situation. Article 62 permits a State which considers that it has "an interest of a legal nature which may be affected" by a case before the ICJ to request intervention, which the Court must allow or deny. Article 63, in contrast, declares in broad language that countries party to a convention, the construction of which is at issue before the Court, have a "right to intervene." The logic behind the statutory distinction is evident; an interest in intervention is presumed in the treaty context by membership.

The function of Article 62 seems to require a stricter standard than Article 63, but in fact both have been interpreted narrowly by the Court. There have been only seven applications for intervention in the history of the ICJ and its predecessors and only two have been successful.¹²¹ This record has led at least one commentator to observe that intervention before the ICJ "seems at present no more than a remote possibility."¹²²

Most relevant for present purposes is Article 63, which has been formally at issue before the Court only three times. In two older cases, Article 63 was interpreted liberally to allow third party participation. Today, however, both of these decisions are of some vintage and do not reflect the recent restrictive tone of the Court. Hardly surprising in light of third party practice under GATT is the ICJ's concern with countries demonstrating adequate "interest." More recently, it has gone beyond mere

120. Statute of the International Court of Justice, 59 Stat. 1031, 3 Bevans 1153 (1946).

121. Before the Permanent Court of International Justice, forerunner of the current Court, there was a successful attempt to intervene in *S.S. Wimbledon* (U.K., France, Italy and Japan v. Germany), 1923 P.C.I.J. (ser. A) No. 1 (Poland intervening). Before the ICJ, there has been one successful intervention under Article 63 in *Haya de la Torre* (Colombia v. Peru), 1951 I.C.J. Rep. 71 (Cuba intervening). Other requests to intervene made under Article 62 were denied, including *Nuclear Tests* (Australia v. France), 1973 I.C.J. Rep. 320 (Fiji requesting intervention); *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1981 I.C.J. Rep. 3 (Malta requesting intervention); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1984 I.C.J. Rep. 3 (Italy requesting intervention) and *Land, Island and Maritime Frontier Dispute (Honduras/El Salvador)*, 1990 I.C.J. Rep. 92 (Nicaragua requesting intervention). A request to intervene was made, and denied, under Article 63 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, 1984 I.C.J. Rep. 215 (El Salvador requesting intervention).

122. Christine Chinkin, *Third-Party Intervention before the International Court of Justice*, 80 AM. J. INT'L L. 495, 531 (1986) [hereinafter *Third-Party Intervention*]. See also Tania Licari, *Intervention under Article 62 of the Statute of the ICJ*, 8 BROOKLYN J. INT'L L. 267 (1982); Natalie S. Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305 (1996).

interest, as reflected by treaty membership, to find that the *purpose* of the intervention was not genuine and to deny the declaration.¹²³

The ICJ has also held that mere preoccupation with principles of law, as reflected in a declaration under Article 63, is insufficient to sustain an intervener's interest.¹²⁴ There is thus no concept of intervention for what could be termed "public rights" or obligations *erga omnes*. This posture has been criticized as a severely constrained view of the Court's mandate, a criticism made compelling in light of the mandatory language of Article 63 and the enforcement machinery of many modern treaties.¹²⁵

Jurisprudence relating to third parties before the ECJ is also helpful in formulating ways of limiting intervention under the WTO. The source of jurisdiction of the ECJ derives from the constituent statutes of the European Community, the European Atomic Energy Agency, and the European Coal and Steel Community. These communities, known collectively since 1994 as the "European Union," together form an integrated whole, with the Court constituting the chief judicial organ. For this reason, appeals from national courts on a broad range of issues are accepted. The ECJ can therefore be regarded as a hybrid between the ICJ, where only States may appear, and a municipal court, where traditional private parties litigate.

Broadly speaking, all three constituent statutes of the Union contain comparable provisions for intervention in contentious proceedings.¹²⁶ Their general framework, however, differs from that of the ICJ in the sense that intervention is more readily available to certain parties in certain types of cases. The EC and Euratom statutes permit Member States and the Community to intervene in all contentious proceedings before the Court. Private parties may intervene in cases between Community institutions and individuals, but must demonstrate that they have an interest in the outcome of the case. Member countries and Community institutions do not need to demonstrate a justification to intervene on the theory that the Community's integrative interest must be asserted in

123. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Jurisdiction and Admissibility, 1984 I.C.J. Rep. 392, 431, El Salvador claimed it wanted to intervene under the Statute of the Court and several inter-American conventions. The ICJ characterized the contents of El Salvador's declaration as relating more properly to the merits phase of the case. The Court therefore rejected the declaration.

124. See *Third-Party Intervention*, *supra* note 122, at 514.

125. For example, treaties under the U.N. system can be enforced by the Security Council under U.N. Charter art. 94, para. 2. By definition all written treaties concluded after 1980 are subject to the Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (1969), which also contains enforcement machinery.

126. K.P.E. LASOK, *THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE* 153 (2d ed. 1994).

litigation and that members and institutions are best able to represent this interest.

As with the ICJ, a principal area of contention is whether a third party can show the requisite interest, which has been interpreted as an interest in the operative part of the final judgment. Once accepted, third parties are allowed wide latitude to fashion their arguments as long as they sustain the result of the case or the success of the arguments. Elaborate jurisprudence has grown up based on extensive precedent. The main trend has been summarized by one authority as follows:

It seems clear from the cases that, to justify intervention, the result of the case must affect the intervener's legal position, his economic position . . . or, possibly, his freedom of action. The effect must flow directly from the precise subject matter of the dispute, which is to be settled in the operative part of the judgment, and not to be collateral to it; it must be concrete, or real, and not abstract or theoretical¹²⁷

The intervener is not allowed to determine the scope of the proceedings by introducing a new claim. The ECJ's Rules of Procedure state that the intervener must accept the case as it is.¹²⁸ The intervener is not, however, required to put forward positive arguments in favor of the total acceptance or rejection of the case as argued by one of the parties. He or she can argue selectively on certain points in the manner of *amicus curiae*, and government parties and EC institutions can make hybrid submissions. There is also authority for the principle that interveners can raise a new ground or exceptions that the Court could consider of its own motion and third parties can make use of any argument to support a party's position even if it conflicts with those advanced by the party in whose support they are intervening.¹²⁹ Lasok notes that the current wording of statutes in the Community suggests that the intervener can raise matters of fact and law that have not previously been raised by the parties virtually without limit, but adds that there is little caselaw on point.¹³⁰

The extensive ECJ caselaw affords opportunities for comparison between the ICJ, ECJ, and WTO. It is notable that in each system state parties predominate and are in a privileged position in seeking third party status. This position no doubt reflects the posture of international law that only States are actors. Yet, it is possible that there are different reasons motivating the rules on intervention in each system. In the ICJ, the Court

127. *Id.* at 167-68.

128. *Id.* at 168.

129. *Id.* at 170.

130. *Id.* at 171.

has struggled to maintain a bilateral focus because of an acute awareness that, as consent is the basis of its jurisdiction, intervention detracts from a state party's reasonable expectation that it will only have one adversary to oppose. Active intervention may make countries less willing either to submit to the court's jurisdiction or to accept its judgment.¹³¹

There is no similar concern under the European or WTO system because of the existence of a uniform treaty providing a structure for dispute settlement. States cannot derogate from the respective system without consequences, but no such repercussion can be expected from withdrawal or failure to attend before the ICJ. Indeed, nonattendance before the ICJ has been the subject of much scholarly commentary.¹³² Strict interpretation of the right to intervene before the ICJ is thus consistent with consensual jurisdiction because it strikes at the heart of the Court's competence. It is also consistent with the Court's origin as an adjudicative body founded on arbitral principles; in traditional arbitration, third parties have no standing.¹³³ Since these attributes are a lesser concern in the ECJ and WTO, they should presumptively be more permissive towards intervener status before them.

The WTO and ECJ are not identical, however. Their aims differ substantially, especially in that the EC seeks to integrate States in a manner that the WTO does not. The WTO's main aim is to increase global prosperity through economic interdependence. A teleologic view of this purpose suggests that in the WTO's final stage country members will probably remain the basis of the WTO system. Consequently, as the WTO's principal actors, countries must be the ones accorded the greatest rights in it. Their intervener status must be recognized if such status is to be accorded to any entity at all. The ECJ can afford greater third party participation because the range of interests it represents is broader than that of the WTO.

B. *Limits to Intervention under GATT*

In sum, the aim of the WTO suggests a more liberal attitude to intervention than the ICJ, but a less generous one than that of the ECJ. This intermediate posture is reinforced by three considerations.

131. *Third Party Intervention*, *supra* note 122, at 530.

132. See Keith Highet, *Nonappearance and Disappearance before the International Court of Justice*, 81 AM. J. INT'L L. 237 (1987) (reviewing JEROME B. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS* (1984) and H.W.A. THIRLWAY, *NONAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (1985)).

133. Chinkin notes that "the concept of party autonomy is strongest where the parties provide for an ad hoc arbitration." See CHINKIN, *supra* note 18, at 249.

The first is the effect of precedent. Intervention is based on the principle that a decision will have an effect beyond the parties directly involved. At the outset of this article, it was observed that a given decision can have two effects: one is immediate as a result of the facts of that particular decision, the other is prospective as a result of the case's effect on other cases. Leaving aside the case of immediate impact, the principle of prospective effect must, in turn, be based on a system of strong precedent because without precedent, present pronouncements do not bind the future. But a feature of international law, as distinct from municipal law, is a lack of strict precedent, with each case decided according to the justice of the circumstances, which may, but need not,¹³⁴ mean recourse to previous decisions. The precedential effect of decisions is therefore much more ambiguous. On one hand, the lack of precedential effect has been cited as a reason for non-participant parties to not be concerned about decisions in international law. In the GATT context, this view has been given expression by DSU Article 3(2), which states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in [GATT]."¹³⁵ On the other hand, it has been forcefully argued that decisions in international law do have an impact, particularly when they contain persuasive reasoning.

The interpretation of GATT has followed a middle course between contending extremes. The Appellate Body visited the question of precedent in *Taxes on Alcoholic Beverages*,¹³⁶ acknowledging that adopted panel reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."¹³⁷ The Appellate Body went on to observe, however, that panel reports are "not binding, except with respect to resolving the particular dispute between the parties to that dispute."¹³⁸ It added that their "character and legal status have not been changed by the coming into force of the WTO Agreement."¹³⁹ Thus, adopted panel reports are not binding, but can create "legitimate expectations." They do not require non-participating parties to act in any way, although they may create "legitimate expectations" that members will behave according to certain norms in future. This

134. *Id.* at 20, 54.

135. DSU, *supra* note 65, at 1227.

136. WTO Report of the Appellate Body in Japan—Taxes on Alcoholic Beverages, WI I.E.L.-I-B-81, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/R (Sept. 25, 1996).

137. *Id.* at 24.

138. *Id.*

139. *Id.* The Appellate Body also observed that *unadopted* reports have "no legal status in the GATT or WTO system" but agreed that "a panel could nevertheless find useful guidance in the reasoning" of such a report. *Id.* at 25 (citing *Taxes on Alcoholic Beverages*, *supra* note 118, at 126).

system of attenuated precedent may promote a liberal attitude toward intervention among WTO members.

Secondly, the intermediate posture on intervention is reinforced by the argument that sovereign consent is, at least in theory, a subsidiary concern under GATT. Nations consent to be members in the GATT, as they do to the Statute of the ICJ. Thereafter, however, they are subject to a scheme which they cannot opt out of.¹⁴⁰ Members have no recourse in non-attendance¹⁴¹ or reservation, as they might have if they were contemplating defending an action in the ICJ.¹⁴² Given the more binding nature of the GATT 1994 and that it is the only regime where certain concerns can be resolved, third party status should be more accessible than it might be otherwise.

The third and final consideration is an inference that arises from the negotiating history of the Uruguay Round. Had the Members of GATT been attracted to the notion of restrictive access for third parties, perhaps they would have allowed appeals of panel decisions to the ICJ. There was every opportunity to do so, and precedent for such a procedure in the Havana Charter. The fact that the Members did not implies that they roundly rejected the Court's model of rigidity and inefficiency, including its ambiguous attitude toward third party participation. But if this intermediate posture is in fact sound, are there means of limiting intervention where it threatens to be unmanageable or is being abused? Chinkin, writing in the context of the ICJ, identifies purpose, consent, and the type of case as determinants of intervention.¹⁴³

The DSU currently says very little about purpose. DSU Article 3(10) mandates good behavior by members and appears to rule out intervention for improper motives, such as delay or prevarication. As seen, however, Members have used third party status imaginatively and panels have shown reluctance to question assertions of "substantial interest." Nevertheless, in extreme cases improper purpose could be a ground for restricting third party participation.

Chinkin's second determinant is consent, which plays a minor role in the DSU. Article 4(11) conditions third party participation in consultations

140. It is possible for Members to obtain waivers under GATT Art. XXV, but under GATT 1994 these are now more difficult to obtain.

141. Notwithstanding the above, the United States has recently threatened not to appear before a panel established to examine U.S. anti-Cuba legislation. See David E. Sanger, *U.S. Won't Offer Trade Testimony on Cuba Embargo*, N.Y. TIMES, Feb. 21, 1997, at A1.

142. One of the key advantages of the WTO Agreement over previous arrangements is its uniformity. Members are no longer able to apply "*GATT a la carte*," except with respect to certain side agreements. Members are also bound by numerous assurances of good faith, as well as the more general obligation of *pacta sunt servanda* in Article 26 of the Vienna Convention.

143. See *Third-Party Intervention*, *supra* note 122, at 522-24.

on the respondent's consent. Article 5 of the Understanding on the Interpretation of Article XXVIII mandates submission of a claim of "substantial interest" to the Member proposing to withdraw the concession; to the extent that this determination is approval-driven, consent will apply. Otherwise, consent is irrelevant, and seems too much at odds with the generally permissive character of intervention under GATT to determine status.

Similarly, the type of intervention may have a bearing on the nature of the intervention permissible, but only in the loosest sense. For example, there might be valid reason to increase the number of interveners in cases involving transnational issues, such as services or the environment, or to limit them where specific trade-linked provisions or developing countries are involved.

Chinkin's proscriptions are thus restrictive only in the most general sense and do not establish bright-line criteria for limitation. Concrete proposals would be more useful. The above review of the ICJ and ECJ models suggests the following methods of restricting intervention:

- 1) panels could scrutinize assertions of "substantial interest" more carefully. In this regard, they could probe the actual reason for intervention, although this exercise would not be without controversy;
- 2) panels could also demand, as does the ECJ, that a third party interest be present and real, as opposed to abstract or prospective;
- 3) a further limit could be imposed by means of a formal interpretation of the term "substantial interest" for certain purposes under WTO Agreement Article IX:2;
- 4) panels could insist that interveners make arguments in support of the positions of the party on whose side they intervene so as to reduce the scope of intervention and diminish its attraction;
- 5) as mentioned, it may be possible for the DSB to encourage or mandate more group representation and paper submissions in order to limit numbers.

Of course, one unwelcome side effect of these suggestions could be to encourage Members to intervene as principal parties. They would still have to claim nullification or impairment, or alternately non-violation, but the current wording and practice of both party and third party status are very broad, meaning that any reasonable restriction will be hard to implement. Ultimately, it may be left to the judgment of each WTO member to exercise restraint in third party practice.

CONCLUSION

To conclude, it is useful to return to the series of questions posed at the beginning of this article in order to review the answers that have been given.

The series began with the central question, namely, what level of interest is necessary to intervene under GATT? The answer is a "substantial interest," although, as seen, this term has a highly indeterminate quality to it. Panel reports both before and after the Uruguay Round suggest an elastic definition. Some level of minimum interest is probably required, but the reports reveal that this interest may be actual or prospective, trade-related or abstract, and not necessarily unique to the Member asserting it. Substantive flexibility has been joined by procedural adaptability, together corresponding to the wide range of interests now covered by the WTO Agreement.

Third parties under GATT are presumed to intervene on behalf of the complainant. However, this has not stopped panels from allowing Members to intervene on behalf of respondents when there is the need. The fact that the rules on this and many other points are wanting has contributed to the tendency for ad hoc interpretation. Whether this flexibility will be exhibited by the Appellate Body is uncertain, but the emerging jurisprudence suggests that divisions have taken a pragmatic approach to issues before them.

Panels have imposed some substantive restraint on third parties. For example, interveners are not allowed to raise new issues or to insist on procedures where there is a desire to settle. Even in this respect, however, panels have not been overly rigid. Panels accord third parties considerable latitude in making submissions, so much so that third parties may have used their status, on occasion, for purposes collateral to the litigation itself.

To curb overuse or abusive behavior when necessary, it may be possible to scrutinize assertions of "substantial interest" more carefully, to require the interest asserted be present and real, to adopt a restricted definition of the term "substantial interest," or to encourage or insist on group representation or paper submissions by third parties. At the same time, there is no guarantee that these proposals will work. Efforts to rein in intervention and to prevent abuse will be difficult as the notion of "substantive interest" becomes more diffuse in the ever-growing ambit of the WTO. It may not be long before these proposals will be matched by the ingenuity of legal minds to circumvent them. Tightening up the criteria for intervention could also have the unwelcomed side effect of forcing Members to assert interests as parties.

Yet, the current vogue for active intervention could be short-lived. It is important to remember that this is a comparatively early time in the history of the WTO. There is at least the reasonable possibility that some of the more innovative and aggressive positions which are being taken under the guise of intervention are being adopted to determine, in a sense, "how much can be gotten away with." Once the ground rules are set, third party status may be used relatively less than it is today.

In addition, it may be wise not to make much of the current "problem" of intervention, if this is indeed an accurate description. As this article demonstrates, active intervention has long been a feature of GATT. For interests content with the existing state-centered system, a reason to keep third party practice as it is currently is that, to the extent national participation is easily achieved and open-ended, the system may diffuse pressure for greater public participation in the WTO.

There are also reasons to suggest that multipartite intervention may not become a problem in future either. One reason is the inability of Members to show "substantial interest," regardless of how illusory a standard that might be. Alternately, Members may not want to intervene, or as it appears from the *Bananas Trilogy*, may be content to allow other Members to appear on their behalf. A further pragmatic reason may be that not all Members have the resources to intervene. Even the redoubtable Office of the United States' Trade Representative has recently stated that it is unable to pursue every trade-related matter in which the U.S. has an interest due to lack of resources.¹⁴⁴

Thus, the argument that the WTO resolution system will collapse as a result of vigorous third party participation must be repudiated. The *Bananas Trilogy* is not the first, nor in all likelihood will it be the last time that multiple intervention will occur. There is every indication that WTO dispute resolution is becoming truly multilateralized, thereby fulfilling its original conception. This development should ensure that future possibilities for third party participation remain of substantial interest.

144. "Terry Stewart, managing partner at the law firm Stewart and Stewart . . . argued that the limited resources of the Office of the U.S. Trade Representative make large-scale use of WTO dispute settlement problematic Senior USTR officials have informally said in recent months that personnel shortages have made it impossible to pursue the WTO cases they want to pursue." See *Official Sees WTO Case Load Leading to Bilateral, Regional Solutions*, INSIDE U.S. TRADE, Jan. 10, 1997, at 8.

POSTSCRIPT

The panel released its report in *Bananas III* on May 22, 1997.¹⁴⁵ The report contained a section specifically devoted to the organizational issue of third party participation in the case, evidence that the issue was important to the panel.

In brief, the panel referred both to the mandatory language of DSU Article 10 ("shall have the opportunity to be heard . . ."), paragraph 6 of Appendix 3 (shall be invited "to present their views . . . [and] may be present during the entirety of the session") and the fact that under GATT practice, more expansive rights were granted to third parties in several disputes, as support for greater third party rights in *Bananas III*.¹⁴⁶ However, it also noted that under previous cases the extension of third party rights had been agreed to between the parties. There was no similar agreement in *Bananas III*.

In reviewing its interim decision to allow fuller third party participation, the panel observed that its initial ruling had been based on considerations of i) the economic effect of the disputed banana regime on third parties, ii) the fact that the economic benefits derived from Lomé IV, an international treaty, iii) past practice, and iv) the failure of the parties to agree on the question.¹⁴⁷ It is interesting that the panel apparently deviated from international law and practice by interpreting the lack of consensus *in favor* of greater participation, rather than against, as a strict interpretation of the will of the parties would imply. This is in sharp distinction to practice in the ICJ, where, as seen, the power of the parties to impose limits on the Court's adjudication is great. Nevertheless, the panel reminded its audience that third party rights are not completely unrestrained by denying the request of several third parties to participate in the interim review process, except to allow them to review a draft of their arguments. In so doing the panel relied on the language of DSU Article 15, which deals with interim review and "refers only to parties as participants in that process."¹⁴⁸

145. This postscript refers to *Bananas III*, *supra* note 3, Complaint by United States. Three other decisions, dealing with the complaints by Ecuador, Guatemala, Honduras, and Mexico, were released simultaneously. However, the most extensive discussion of third party participation is contained in the complaint by the United States.

146. *See id.* para. 7.5.

147. *See id.* para. 7.8.

148. *See id.* para. 7.9.