

**A Review of
Considerations
Relating to Dispute
Resolution Mechanisms
and Trade in Services**

by

W.C. Graham

March 1988

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Trade in Services**

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A REVIEW OF
CONSIDERATIONS RELATING
TO DISPUTE
RESOLUTION
MECHANISMS AND
TRADE IN SERVICES

by

W.C. Graham *

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Dispute Resolution Mechanisms in International Law Generally.

A complete description of dispute resolution mechanisms ("DRM") in international law, their history and characteristics, would obviously be beyond the scope of any paper of this length. At the risk of superficiality, however, a few generalizations about DRM in international law may help the reader bear in mind some very important distinctions between the international and national legal systems.

Most national legal systems are characterized by a court system (or DRM) which has compulsory civil and criminal jurisdiction; that is to say it has courts which can compel attendance before them either to punish offenses or to settle civil disputes and these courts may award sanctions to ensure compliance with their orders. The efficacy of the sanctions is ensured by the police power of the state which enforces them.

The international legal order is quite different in this respect. While there is a "Court", the International Court of Justice, which is a part of the UN system, and while disputes under various international agreements are settled by a variety of mechanisms, bilateral and multilateral, varying from conciliation and mediation to arbitration, all these mechanisms generally lack that aspect of the municipal system which gives its courts their efficacy: compulsory jurisdiction and effective sanctions.

The International Court of Justice's jurisdiction depends upon the acquiescence of states which may limit their acceptance of jurisdiction in various ways.¹ In some cases Canada, for example, has expressly limited the type of case for which it has accepted the Court's jurisdiction as it did in the case of arctic waters and fisheries when it initially extended its

jurisdiction in those domains in the 1970s.² In other cases countries have refused to recognize the jurisdiction of the Court even after a case has begun, as Iran did over the Iranian hostages, and the U.S. did over Nicaragua.³ In other cases countries have simply refused to adhere to the Court's ruling, thereby underlining the lack of an adequate sanction mechanism to ensure its orders.⁴

This is not to say that the Court is useless, it is to say that it has its limitations. It functions rather like an arbitral system which depends on the will of the parties both to participate and to accept awards. It has distinct uses as were illustrated in the Canada U.S. dispute over the Gulf of Maine.⁵ In the end result it may influence the conduct of states, it cannot compel.

There exists a variety of other mechanisms available in international experience. They vary from the "effectiveness" of the EEC legal system or the system under the European Convention on Human Rights, where international tribunals hand down binding decisions which are followed by the member states,⁶ to mere discussions which may or may not lead to conciliation as may be found in a series of agreements.⁷

Nowhere is the lack of an effective DRM system in the international field more evident than in relations between Canada and the U.S. These two countries share common legal traditions, a common border, common environment (water and air), common defence, and the list may go on notably in the area of trade and investment. There exists some two hundred bilateral treaties between Canada and the United States (and innumerable letter agreements and understandings between officials of various levels of government) yet only a few of them contain a specific DRM.⁸ Both governments are members of

various general agreements for the settlement of disputes between them⁹ and also certain multilateral treaties providing for the judicial settlement or arbitration of disputes relating to the interpretation or application of those treaties.¹⁰

Perhaps the most illustrative agreement between the parties, for the purpose of illuminating attitudes towards DRM, is the 1909 Boundary Waters Treaty.¹¹ That treaty established a permanent International Joint Commission to deal with applications for the use, obstruction or diversion of boundary waters. That Commission was also charged with making reports and recommendations with respect to differences between the two countries, involving their rights or those of their inhabitants along the boundary, that were referred to the Commission jointly by the two Governments. Over the years, the Commission has considered more than two hundred applications and references, and its recommendations, based on careful technical studies and consultations with all the interested parties, have usually been accepted by the two Governments. In recent years, the Commission has been asked by the two countries for recommendations concerning not only water levels and use but also water and air pollution. However, no case has ever been submitted to the Commission for "decision" under Article 10 of the treaty, in other words for binding determination. Submission under that provision depended on a special agreement of both countries requiring, as far as the United States is concerned, prior advice and consent of the Senate.¹²

At a recent speech given at the meeting of the Canadian Council of International Law, Thomas Franck, a leading U.S. professor of International Law, reviewed United States practice with regard to acceptance of third

party binding dispute resolution mechanisms and concluded that, even at times when the U.S. most forcefully espouses a view in favour of arbitration, it rarely in practice is willing to submit to this form of dispute resolution, given the loss of sovereignty which it, of necessity, entails.¹³ The hesitation to accept this form of international discipline comes often from the legislative branch.

A review of international practice in general, and U.S./Canada practice in particular, reveals then that the judicial resolution of disputes, by which I mean a binding decision made by an independent third party arbitrator or "court", is a technique which is seldom accepted by states. There are a host of reasons why negotiation is preferred to judicial means; basically states do not want to lose control over the process or accept the risk of the consequences which a politically unpalatable decision will entail. This appears to be the case even for the "weaker" members of the international community which, one would assume, have a greater stake in the assurance of "rule diplomacy" rather than "power diplomacy".¹⁴ Canada, for example, (and the United States, perhaps even done so) has shown little interest in the proposal put forward by the CBA and the ABA for a joint tribunal or a special chamber of the International Court of Justice to be established between the two countries with the very limited, but compulsory, jurisdiction to determine the interpretation, application or operation of any treaty in force between the two countries.¹⁵

In the end the most that most states will accept as a means of resolving their international conflicts is some form of the arbitration. Any arbitration system is first and foremost consensual in nature and its strengths and weaknesses flow from that principal characteristic. Success

of such a system depends upon the confidence which the parties have in the system. This confidence is strongly influenced by a variety of factors, the principal ones being, in my opinion; in the first place a willingness by the parties to be bound by the rules established in their compact, rules which they believe are clear and precise enough to indicate a just resolution to the differences in their relationship; secondly, a confidence in both the neutrality of the arbitrators and their ability to comprehend the particular nature of any dispute; thirdly the procedural efficiency of the system and, finally the likeliness of the losing party complying with the arbitral award.

The GATT

The DRM of the GATT, as it has evolved, generally reflects the tension that exists between the jurist's desire for the certainty of third party binding arbitration of disputes between the parties to the agreement and the diplomat's view that only a negotiation framework will allow the give and take required by an economic arrangement like the GATT. There is obviously something to be said for both of these schools of thought. While I come at this subject as a jurist and therefore with a bias in favour of the certainty and protection that a "tight" DRM brings, I also recognize that this is not either reasonable, or even desirable to expect in all international agreements. Where the rules are unsatisfactory the parties will not accept the results of an "inequitable" decision and this in turn leads the whole system into disrepute. Indeed one wonders whether states would enter into agreements if they thought that they seriously risked being

bound to the letter of their undertakings, whatever future developments might hold.

The GATT has existed for some forty years and its DRM has gone through considerable evolution in that time. Today, in the course of the Uruguay round the DRM is an important issue for consideration and it is significant, in my view, that the United States has been one of the principal partisans of a revision of the procedures in favour of a tighter, more effective DRM¹⁶, a view which may reflect the decline in its relative power within the system and which corresponds to its perception of itself as being a "fair trader" which is a victim of others, particularly the EEC and Japan, who do not play by the rules.¹⁷

The GATT DRM has been described in detail in various recent articles and reports, particularly the USITC report to the Senate of 1985.¹⁸ There is no need therefore to describe it in detail, but a review of its basic elements as background to the services issue is in order.

In the first place it is appropriate to repeat that there has been at different times throughout its history, pressure for a more effective DRM and at other times pressure more for "consultation style diplomacy".¹⁹

The "legalistic view" has always argued that the GATT will only function given tighter rules. This requires both a refinement of the language of the obligations themselves and the enforcement of the rules through the policing of inconsistent bilateral practices such as VERs and OMAs and the use of an effective DRM.

The alternative view is one that sees the GATT as a trading compact somewhat analogous to the social compact described in John Locke's Second Treaties on Civil Government whereby the sovereign entities are still in the

state of nature. Professor Hudec has pointed out that governments are very reluctant to restrict their own freedom of action and will resist limitations on their sovereign freedom. Any realistic agreement must recognize that these "decision makers represent nation states with complex and dynamic political systems whose future behaviour cannot be predicted with absolute certainty."²⁰ A recognition of this feature suggests that any attempt at creating obligations which are too clearly defined and which leave little room to renegotiate obligations accompanied by a binding third party adjudication of disputes would create more problems than it would resolve.

In this context one must always bear in mind the relationship between the rules and the success of the DRM chosen. An example cited by the USITC report is that of agriculture where it has been clear that the dispute resolution mechanism has failed to resolve the issues of subsidies and other problems that bedevil this area.²¹ This may be attributed more to inadequate rules to which the parties will not adhere than an inadequate DRM.

It must be observed that the present GATT DRM is more analogous to a diplomatic negotiating framework than an adjudicatory framework. As such it may fall more into the "anti-legalistic" viewpoint whereby "rules may have some value as guidelines, but resort to adjudication is discouraged, favouring more loosely structured consultation procedures in which governments seek to resolve conflicts through negotiation".²² The process under the present GATT is more akin to conciliation and mediation than adjudication and, as shall be seen, as the ultimate sanction is the resort to self help or retaliation, the system is not analogous to the adjudicatory

process in a normal civil litigation sense except in some limited procedural ways.

Finally, it has been said by Professor Jackson that "the dispute settlement provisions made in GATT are weak, sketchy and rather ambiguous"²³, a view which inspired attempts made in the Tokyo Round to tighten up the system.

It should be noted that the General Agreement provides many different mechanisms for dispute resolution. In fact, 19 separate clauses of GATT obligate Contracting Parties to hold bilateral and multilateral consultations on restrictive trade measures.²⁴ For example, article VII (para.1) on the value for custom purposes provides that contracting parties shall "upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles". Similarly, in article XIX a contracting party, before taking any action pursuant to the provisions of that article, "shall afford the Contracting Parties having a substantial interest as exporters of products concerned an opportunity to consult with them in respect of the proposed action". In many cases where a compensatory withdrawal or suspension of concessions is permitted usually consultation is required. (see articles II, XII, XVIII, XIX).

Jackson has observed that article XXV also may be considered as a form of dispute settlement procedure whereby the Contracting Parties are collectively authorized to waive an obligation imposed upon a contracting party.

The basic technique of dispute resolution is contained in articles XXII

and XXIII providing basically for consultation and conciliation. The provisions of article XXIII are worth repeating:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
 - (a) the failure of another contracting party to carry out its obligations under this Agreement, or
 - (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
 - (c) the existence of any other situation,the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The Contracting Parties may

consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

Note that a complaint may be based, not only on a breach of the agreement but arising out of any other situation, if a party is of the view that their rights under the agreement have been nullified and impaired as a result of that situation. Jackson has described this latter element as constituting an extremely vague set of rights, with considerable potential for problems.²⁵

While the General Agreement speaks of the "Contracting Parties", over a period of time a system of DRM has evolved which constitutes the naming of panels to examine complaints. The primary object of the panels is to get the parties to agree to the ultimate solution to their problem through

consensus. This left as well the alternative of resolving disputes through the use of Working Parties of the Members, a technique that was used regularly at various times, at least into the 1960s.²⁶

Ultimately if the defaulting party does not adhere to the panel's decision or the dispute is not otherwise resolved by agreement between the parties the aggrieved party has a right to request the authorization of the Contracting Parties to take an action to retaliate. This form of enforcement by the sanction of retaliation measure clearly has been ineffective. In fact, in only one case have the Contracting Parties authorized a retaliatory measure.²⁷ In other cases parties have hesitated even to seek such redress because it would be more harmful to them than the defaulting party. This is particularly true where the defaulting party is an important market for the injured weaker party.²⁸

The panel procedures employed at one time may have been adequate but during the 60's and leading up to the Tokyo Round they became less and less adequate to deal with the new political reality created by the economic super powers that came to dominate the GATT.²⁹ While some observers such as Petersmann assert that the dispute settlement provisions in the GATT "constitute one of the most effective and original dispute settlement systems existing in any international economic organization",³⁰ the view, which prevails amongst the "legalistic school", has been the opposite. The primary complainant has been the United States and many of the complaints have been between the United States and the EEC.³¹

In some cases the lack of success may be traced to the inadequacy of the rules laid down in the GATT and an unwillingness by the parties to be bound by them. A good example is that of agriculture. The USITC Report points out that since 1948 a total of 33 cases have addressed measures

involving agricultural trade, usually involving questions of subsidies and quotas. These often were cases brought by the United States against the EEC. It is conceded that these cases have usually been unsuccessful and on occasion have been met a refusal by the participating parties to implement the results of the reports.³²

In other cases problems have arisen because of panel procedures and the ability of parties to frustrate the process. An example that is often cited is that of the DISC case. In that case, which involved allegations by the EEC against the United States and cross-allegations by the United States against the majority of the EEC countries, composition of the panels alone took nearly three years.³³ In all the DISC case took from 1973 until 1981 when a brief understanding resolved the dispute. In fact the United States only replaced the DISC in 1984 and there is some question about the extent to which the new measures conform to the GATT.

The majority of GATT disputes are resolved at the consultation phase. Only if consultation's fail do the contracting parties appoint a panel which is an ad hoc body with its members (usually drawn from government representatives associated with GATT) acting in their individual capacity. The panel acts rather like an arbitral tribunal in hearing both sides and may consult experts on technical matters. Other states with an interest in the dispute may intervene. The panel's report, consisting of its factual findings and legal conclusions, is submitted to the Council for consideration. It may adopt or reject it. If the report is adopted the Council may recommend that the defaulting party discontinue its illicit action or authorize retaliation.

The primary aim of this system is to promote conciliation between the parties. The panel report is not legally binding and does not end the matter. Negotiations continue between the parties during the process even after the report has been made, and during the council's consideration of the matter.³⁴ One consequence of this is that the parties to the dispute may resolve it in a manner which, in itself represents a departure GATT rules (the use of VERs, for example).

The positive features of such a system are that it has often promoted conciliation and the resolution of disputes, usually leading to the removal of the offending measure.³⁵ In this sense it may be said that the system is quite effective. The choice of panelists, or their integrity, has, for example, been rarely challenged.

The negative aspects of such a negotiating framework surface however where one of the parties is unwilling to accept the process. This usually arises, as has been noted above, when the parties are unwilling to accept the substantive rules. In these cases strategies may be used to delay the procedures and ultimately, on occasion, to avoid the consequences of an unfavorable report. The participation by all contracting parties in the ultimate decision leaves a great deal of room for the political process to replace the judicial, including the introduction of considerations that may be important to countries which have no direct interest in the dispute in question but which foresee consequences which are relevant to their other relationships within the GATT.

These factors led to a re-examination of the GATT DRM at the time of the Tokyo Round and certain reforms were adopted which addressed both the operating procedures, with a view to making them more efficient, and the

overall efficacy of the system. As a result we now have a somewhat more sophisticated system, particularly in respect of procedures; it is also more complex as reforms were introduced into the general DRM under article XXIII while individual procedures were developed for the various codes that were adopted to deal with certain Nabs.

A complete description of the GATT system as revised by the Tokyo Round would clearly be beyond the scope of this paper. This has been thoroughly done by professor Hudec in his extensive study of the Tokyo Round.³⁶ Some observations concerning the nature of those changes are relevant however to our conclusions about any system which would be appropriate for trade in services and a brief review of the principal features is in order.

New procedures for article XXIII are found in two documents; the Agreed Description of Customary Practice and the Understanding on Dispute Settlement.³⁷ The developing countries, building on the special procedures which had been agreed upon for them in 1966, sought a tighter, more legally binding system of DRM.³⁸ Any such "judicial" system was rejected by the other Contracting Parties; what was achieved was a document which addresses some of the technical barriers to access and refines the operating procedures of the panels. The linkage, by respondents, of the dispute to issues not directly related to it is rejected. Standing rosters of potential panelists are established which include qualified persons outside the member from government's bureaucracies. The appointment procedure is refined in favour of expeditiousness, and panels are to be established within 30 days of Council authorization. The establishment of a panel still requires the agreement of the parties, prior Council approval and review by

it. The overall system, according to Hudec, represents a "call for restraint in the use of the panel procedure".

In addition to the general disputes under article XXIII each code contains its own DRM. These vary in some particulars; on the overall they may be said to provide for more open and effective access. In Hudec's view, the more effective "legalistic" procedures that are found in the codes are a direct consequence of the fact that the codes "represented a current consensus about what could and should be done in the narrow subject areas to which they applied."³⁹

The general rules of the GATT continue to contain provisions which are much more contentions (agriculture or emergency relief (safeguards) under article XIX, for example); use of the general DRM had, in consequence, to be approached with a great deal more restraint. The example of the Textiles Surveillance Body, was also clearly rejected as that important experiment in an international body acting as "policeman" for the enforcement of the MFA rules had been less successful than had been originally hoped for.⁴⁰

In spite of this hesitation to move too far, from the pre-1975 model, the developing countries were able to retain in the Understanding, the special procedures facilitating access which had been granted them in 1966. In this sense their rights under article XXIII are more analogous to the rights of access provided for in the various codes. Hudec attributes this to the fact that these rights had been granted in 1966 when the GATT was trying for the support of the developing countries against UNCTAD in the north-south debate and they could not later be retracted.⁴¹ Their very existence illustrates, however, the importance which weaker states attach to

"legalistic" rules, seeing in them a greater security than the negotiating framework favoured by stronger states able to assert their economic power.

Most of the codes address specific concerns about non-tariff barriers ("NTBs") which had been identified and had become of increasing concern after the Kennedy Round tariff reductions.

While based upon the general concept of conciliation as found in the general provisions of Articles XXII and XXIII and the Understanding, their specificity requires a DRM which responds to both their particular situation and the more general requirement for a tighter system. Not all codes are the same and the rigour of each system established varies from code to code.

The DRM selected in two of the codes illustrate some general principles which will have to be considered when it comes to services.

The Subsidies Code is the code with the tightest or most rigorous system as is illustrated by the fact that access to a panel is not subject to prior approval of the Committee the complaint by party alone triggers the process.⁴² The parties recognized that the disagreement and distrust that had grown up over the use of subsidies and counter measures to them required an efficient DRM which would inspire confidence in the application of the rules.⁴³ In this sense we may see a direct parallel with article 19 of the Free Trade Agreement, where special procedures had to respond to the mistrust which had grown up between the parties; largely in the area of subsidies as well. (The Softwood Lumber Case).

When it comes to the issue of services in the Uruguay round a balance will no doubt have to be struck between by the desire to have a loose conciliation system of the article XXIII type because of lack of experience with the rules and their potential vagueness on the one hand, and the

desire for a more legally binding form DRM on the other. Sensitive concerns of "sovereignty" (transportation, banking, trans border data flow) will add to the reluctance for the adoption of a "binding" system of DRM. A review of the Subsidy Code experience suggests that there is a direct correlation between an effective DRM and the presence clear rules; these may be difficult to obtain in various service sectors.

Another code which provides an example that may well bear on the services sector is the "Standards" Code.⁴⁴ The Standards Code contains an element of DRM which is prevalent in all arbitral systems but which is here developed to a degree which is only paralleled in the Customs Valuation Code.⁴⁵ That is the provision, in article 14.9, for panels of experts who may first review a matter on the request of a Party "who considers the issues to relate to questions of a technical nature". Annex two of the Code establishes the procedures to be followed by technical expert groups, including the exclusion of citizens of a country party to a dispute. In the event that the use of the expert group does not resolve the dispute a Panel is constituted in the normal manner which then reports back to the Committee, normally within four months from the date of its formation (article 14.18).

This procedure is a direct response to the need for expertise in an area where general knowledge or legal expertise would not provide the technical background which in many cases is necessary to comprehend a dispute. It responds to one of the important characteristics of arbitration as differentiated from judicial resolution of disputes; the use of experts as arbitrators. In public law an analogy might be made to the use of fact finding investigations and reports by the International Joint Commission,

referred to above. It is different from the general DRM under which panels may consult experts; here the experts have first crack at resolving the dispute itself and may contribute to its resolution by the accurate identification of the technical issues in question prior to a consideration of the dispute in its more juridical context.

In the Standards Code flexibility is built into the system. If the experts do not draw the parties to conciliate their dispute by clarifying the issues a subsequent and more traditional panel may be appointed which with review the dispute within the legal context of the rules. We thus find a combination of sector expertise and "judicial" knowledge, both may be brought to bear although at different stages of the dispute.

Of course many examples may be cited of cases requiring both legal and technical expertise in GATT practice.

The Article XXIII panel report in wheat flour is a good example of why both legal expertise, or perhaps at least an approach recognizing the legal niceties of the General Agreement, may have to be combined with a knowledge of the industry. In that case the panel ruled on the American complaint that the EEC subsidies on wheat flour constituted a subsidy which violated general GATT rules and the provisions of the Subsidies Code without directly addressing the question as to whether the product in question constituted a primary or a non-primary product. A determination of whether to apply the provisions of article XVI or the interpretive articles of the Code required a finding on this point as it was impossible for the panel to resolve the dispute without addressing this issue. It did so only in an oblique way, however, by determining that flour would be treated as a primary product in applying the "equitable share of world export trade" test in article XVI.3

as defined by code article 10.2. This, in spite of the fact that it had rejected, at a preliminary stage in its procedure, an American request that it rule on the primary, non-primary, product aspect of the case. It's failure to do so, while applying the provisions of the General Agreement and the code which could only relate to primary products, may have been politically astute but it does not contribute to the clarity of the agreement or recognize the need for one important element in any DRM: the use of the decision as a precedent which will aid in avoiding future disputes.⁴⁶ A more "legalistic" approach might have avoided this problem.

On the other hand, the role of non-legal experts is equally important as is illustrated by the problem of establishing both the question of what constitutes an equitable share of world markets and the causal link between any increase in such a share and the decrease suffered by the complainant. The "sugar cases"⁴⁷ are a good example of the failure to do the latter and this too leads to serious questions about the efficacy of the system. The only conclusion can be that both experts and jurists must be involved in panels, a conclusion which was specifically recognized in the certain of procedures established by the Free Trade Agreement.⁴⁸

That the codes, and the refined procedures under article XXIII, have not resolved the problems of dispute resolution in the GATT is clear from the priority which the parties have placed on this issue in the Uruguay Round Agenda. Experience gained under the present codes however will certainly have an effect on the type, or types, of DRM chosen for services. The experience gained in the Canada - U.S. negotiations for the Free Trade Agreement ("FTA") will also have some bearing on those negotiations. A short review of the FTA's provisions on services is therefore in order to

cast some light on future considerations for Uruguay. Before turning to its provisions however, it is worth reviewing certain considerations that must be borne in mind when considering the question of services generally.

Specific Considerations Relating to Trade in Services.

Various aspects of trade in services have already been examined by papers written in this series.⁴⁹ It is clear, from those papers and other literature in this area, that trade in services does present problems of an order of magnitude, complexity and political sensitivity that differ from those which arise in respect of trade in goods. It is also clear that the types of NTBS which are often regulatory in nature and which impede the free movement of services, and their degree of complexity, vary from sector to sector and country to country.

The importance of services to world trade cannot be ignored. Sims & Rivers write in their paper that at present one quarter of the \$2 trillion volume of world trade is in services; much of this trade falls outside the framework of the international rules governing trade⁵⁰ although certain GATT articles and codes do address issues of trade in services⁵¹ and other multilateral⁵² and bilateral agreements⁵³ also establish rules that apply to it.

In addition, it is clear that the United States has made the elaboration of rules liberalizing trade in services a priority in the present Uruguay Round. This is because of the importance of services to the American economy and the number of barriers to trade in services that exist.

The United States is the world's most important exporter of services although its proportion of world total service trade has diminished since

the 1970's.⁵⁴ As a result we have seen U.S. initiatives in this area on various fronts. In the first place Congress has placed trade in services on a par with trade in goods in the Trade and Tariff Act of 1984, particularly enabling the President to take remedial action (S.301) against "unfair" trade practices in the services area. The U.S. has moved aggressively internationally to ensure that trade in services becomes governed by liberalizing trade rules. The present Uruguay Round negotiations and the inclusion of provisions governing the trade in services in the recently concluded Canada - U.S. FTA reflect that preoccupation. It is logical to conclude that attitudes to trade in services will have considerable impact both on the rules which will govern future trade in services and on any dispute resolution mechanisms which become specifically applicable thereto. In this context, the most recent DRM adopted by the United States (and Canada) is that contained in the FTA which will therefore be considered in some detail later in this paper.

In considering any appropriate dispute settlement regime certain issues which distinguish trade in services from trade in goods and certain characteristics of various national regimes which govern the furnishings of services nationally must be borne in mind.

In the first place, as has been noted by Siegel, it is often difficult to discuss trade in services, at least in certain sectors, without addressing the issue of the foreign direct investment ("FDI") which often accompany the furnishing of such services.⁵⁵ This raises the related questions, then, of the right of establishment and, to some extent, the mobility of individuals associated with the furnishing of such services (i.e. immigration). It also raises problems of trade related investment

measures, an area which has been selected in the Uruguay Round as requiring further study⁵⁶ and is one which raises difficult concerns about long established practices in many countries.

While problems raised by FDI must be addressed, it must also be acknowledged that modern communications have now made it possible to speak of the export and import of certain services absent the need for an establishment in the place of import. Thus in the case of certain services (simple banking services, legal advice, etc.) it is possible to conceive of a true "export" of the service with only a minimal presence in the place of import (such as a telecommunications link to a banking machine, a visit by the lawyer or a telephone conversation).⁵⁷ Concerns are therefore, in certain sectors, moving away from the traditional issues of FDI and right of establishment to that of a right of access to communications facilities within the country of import.⁵⁸ In other cases, telecommunications equipment for example, the furnishing of the service often accompanying the sale of goods must be regarded as an integral part of that transaction.

Within the national regulatory framework which governs services, different sectors raise different concerns which in turn reflect different national priorities. Financial services relate to fiscal policy and the need to protect local depositors; telecommunications and transportation concern national security; transborder data flow raises issues of privacy and the free flow of information; the media impacts on culture.

These concerns have given rise to a complex web of regulatory measures which may, in the case of federal states, emanate from different jurisdictions within the same nation. In some cases the extraterritorial application of such measures may also arise, thereby leading to conflicts

between states.⁵⁹ Encouragement of research and development and exports often form an important part of government policy in this area. This in turn brings into question the role of venture capital markets, tax measures and related issues.

In responding to the need for regulation of any given service sector different political systems adapt a variety of divergent measures (some of which also apply to the trade in goods). These include fiscal incentives, government monopolies, import restraints, government procurement policies, licensing and various ways of supervisory control, limits on foreign ownership, etc.⁶⁰

Most of these measures are by nature protectionist.

The literature in respect of trade in services distinguishes between "legitimate" NTBS which are designed to protect appropriate domestic interests (cultural identity, national security, for example) and "illegitimate" NTBS which have as their object the protection of local industry from foreign competition. One author distinguishes "pure" NTBS which are installed exclusively for their restrictive effects on foreign competition and are merely a means of protecting the home industry without resorting to tariffs, from "accidental" NTBS which arise from regulations with a legitimate object but which have some unintended or incidental effect on international trade and "quasi" NTBS which have as their object and effect both legitimate domestic concerns and which are also designed to protect local interests.⁶¹

Establishing the distinction between "legitimate" and "illegitimate" NTBS in any agreement will be very difficult both in trying to achieve agreement on what limits would be put on measures which are perceived as

being in the national interest and also in trying to foresee what type of regulations may arise in the future. Terminology relating to types of controls which may be resorted to may, however be found in various existing international instruments. The notions of "national treatment," "non discrimination", " the right of establishment" and "transparency" are familiar to us.⁶² To this list may be added concepts employed in the Canada -U.S. FTA, "access to and use of domestic distribution systems" the "establishment of a commercial presence",⁶³ and the concepts of "increasing international competition", and "progressive liberalization" referred to in the Uruguay Round documentation.⁶⁴

A review of different international instruments illustrates the very complicated and sensitive issues which arise in this area. In the case of the EEC, for example, where we find a high degree of economic integration, only the most general concepts were spelled out in the Treaty of Rome,⁶⁵ leaving the various issues to be worked out over the years through the use of secondary legislation relating to the free movement of persons and capital and the harmonization of national legislation.⁶⁶ This has been a slow process and one that requires considerable further work even after some thirty years of experience of the Community. To give only one example, that of banking, there will not exist a truly common market in this area until 1992 and only just now French banks are taking measures to be in a position to face competition from their better capitalized and somewhat more sophisticated British and German competitors.⁶⁷ This is in spite of the great progress made in many fields, medicine and others referred to in Ivan Bernier's paper. Lawyers are not yet free to offer their services

throughout the community although there appears to be a higher degree of integration in that respect than in parts of Canada.⁶⁸

When considering the EEC one must also bear in mind that the European Court has been aggressive in pushing the cause of integration.⁶⁹ In developing the notion of the direct applicability of European legal norms, the court has created a unique legal system whereby international norms have become virtually domestic ones, enabling private citizens to rely on them in their own courts in order to challenge the validity of contradictory national measures, both in challenges to such measures vis-a-vis the state and also conferring legal rights and creating legal obligations as between individuals.⁷⁰ This notion has been applied not only to Treaty norms⁷¹ but also to secondary community legislation (both regulations and directives) with considerable effect.⁷² As noted by Ivan Bernier, it is difficult to imagine how one could transfer such notions to a looser form of international arrangement as the loss of "sovereignty" involved is considerable. From the point of view of this paper however, several lessons arise:

- 1) In the case of free movement of services it may not be possible to deal with all issues in one document. Some framework may be required to enable the resolution of unforeseen and unresolved issues. This may involve a quasi - legislative function which is difficult to imagine in the GATT context.
- 2) An effective DRM can have an important impact on the evolution of the system. In the case of the EEC the court has been the most important single unifying EEC institution. (unlikely to be replicated in any other system).

- 3) In addition, under this system as it has now evolved, the national courts are a part of the DRM and apply the "law" of the EEC, and recognize its supremacy over that of local law in cases when it is within the European sphere created by the Treaties. Individuals have rights which they can enforce both before the EEC court and within their national systems both vis-a-vis the state and each other. It is clear that such a system has characteristics which begin to resemble that of a federal state. It is unlikely that any other international system apart from a common market type arrangement, would have anything approaching the degree of legal integration created by such a system.⁷³

In circumstances where the degree of economic integration achieved by the EEC is absent, the success of measures aimed at insuring the free furnishing of services has been much more limited. Everard's review of the OECD codes, for example, shows how very undeveloped the degree of consensus has been even amongst members of the OECD. Yet these states may be said to have generally similar political and economic outlooks favouring free markets. The lack of serious consideration of certain basic issues (see Everard's discussion of the TBDF code) and the degree and scope of reservations to the codes illustrate effectively the difficulty of getting consensus in this area.⁷⁴

In view of these considerations it seems clear to that there will be some difficulty in the Uruguay Round drafting provisions which will be generally acceptable to all the members of GATT. As a result, various techniques which have now become an accepted GATT practice since the Tokyo

Round Codes will probably be followed and we may be certain that any agreement achieved will have certain features:

- 1) No one general agreement containing general principles acceptable to all Contracting Parties is likely to be adopted in the form of an amendment to the General Agreement or otherwise. As a result, the technique of a code, or codes, open to the signature only of those Contracting Parties wishing to subscribe to it (or to them) will be adopted.
- 2) In addition, in view of the different issues which arise in different economic sectors, it is likely that different codes for different sectors (banking, telecommunications, etc.) will be drafted. (The Canada-U.S. FTA, which will be considered below, has combined the technique of establishing general principles applicable to the trade in services with the use of "sectoral annexes" respecting architecture, tourism, enhanced telecommunications, computer services and transportation. It also recognizes the need for future specific Codes.) Different Contracting Parties may choose to adhere to different codes, as in the case of the Tokyo codes.
- 3) As supplementary refinement, the technique used in the government procurement code, of identifying those specific entities to which it applies, may be used in certain appropriate sectors, thus enabling states to know the limits on the application of the code in their economy and also to have a clearer idea of the benefits which it entails in respect of other signatories.

- 4) We may also conclude that, following the Tokyo round precedent, the various codes may have their discrete DRM which will correspond to the needs of that sector. One aspect will be universal to all codes; the resort to the use of experts on any panel as the complexities of the issues presented will require specific knowledge of the sector in question if a satisfactory solution to their dispute is to be obtained.

These issues will be considered further in the conclusion to this paper.

The Free Trade Agreement and the Treatment of Services⁷⁵

While the Free Trade Agreement does not break each and every service into a separate code it does recognize that different services require significantly different rules. To this end the services are broken down into a general chapter (chapter 14) and Financial Services which are treated differently in a separate chapter (chapter 17). Within chapter fourteen general rules are developed for certain broad categories of covered services (agriculture and forestry services, mining services, construction services, and so on) while sectoral annexes develop rules which apply to Architecture, Tourism, Computer Services and Telecommunications-Network-Based Enhanced Services.⁷⁶ The need for certain sectors to have their own rules and indeed the need for clear definitions for the purpose of coverage in these sectors, particularly in relation to computer technology and telecommunications, is clearly recognized. Article 1405.1(b) foresees the need for future sectoral annexes. For dispute resolution purposes, however, all of the services covered by chapter 14 fall within the general DRM of the agreement as

provided for in article 18. Although Annex 1404.A (Architecture) provides for a committee to review compliance by the provincial and state licencing authorities in the preparation of mutually acceptable professional standards and criteria and Annex 1404.B (Tourism) forseees an obligation to consult between the parties at least once a year respecting the implementation of those provisions.

Financial services are treated differently both in respect of the principles which apply to them and the DRM, and they will be considered separately below.

The definition of covered services is important to article 14 (and ultimately the DRM of article 18) because not all services are covered by the agreement. Several key sectors, including transportation, basic telecommunications and services in the cultural domain, are not covered along with certain specific groups such as lawyers, doctors, and customs brokers.

While it is not possible to go into the complexity of the issues of coverage in this paper in detail it is worth making a few points about coverage that may well bear on the process of dispute resolution as it evolves.⁷⁷ In the schedule to annex 1408 there are two lists of the standard industrial classification codes, one for Canada and one for the United States (made necessary because, while these are supposed to be standardized in the international system to which both countries have subscribed there are variations from time to time on both sides of the border). In addition there are the three special definitions of architecture, tourism, and computer services and telecommunications-Network-based enhanced services which are contained in annex 1404.

When we look at the lists in the schedule drawn from the SIC we note that certain categories are accompanied by the reservations: "packing & crating only", "management services only", "commercial services only". For example gasoline service stations (SIC code 6331), are covered for management services only while motor vehicle repair shops (SIC code 635) are not so qualified.

Presumably the investment provisions of chapter 16 would cover the question of operating a gasoline service station and so this chapter only addresses the issue of transborder trade in related services but there are some complex questions of coverage here. Similarly, in respect of Business Service Industries (group 77) chartered accountants and bookkeepers are covered generally while the offices of physicians, surgeons and dentists are covered in respect of management services only and lawyers and notaries are entirely excluded.⁷⁸

When we turn to Annex 1404.C we see that complex questions could arise as to what constitutes an enhanced telecommunications service (covered) as opposed to the basic service. Annex 1404.C.7 leaves to the respective national regulators the task of defining these services and so it is to be expected that different definitions will apply on either side of the border. Initially this may well result in protecting the same restrictive policies which presently prevail in Canada but over the long run the agreement will have to be interpreted in the light of the stated objective of this sectoral annex which is "to maintain and support the further development of an open and competitive market ...".⁷⁹ The question of coverage is, throughout this Chapter, somewhat complex and specialized.

Even a brief analysis of these provisions suggests two conclusions. From the perspective of the way in which the overall agreement works one cannot lose sight of the fact that there is an intimate relationship between the three chapters in Part Four on services, investment (chapter 16) and the temporary entry for business purposes (chapter 15).⁸⁰ From the perspective of dispute resolution it is clear that some familiarity with the individual sectors will be required of the panelists if they are going to sort out the parameters of the operation of the agreement and handle the interrelationship between the various provisions. Some legal training would also appear to be essential, particularly when one considers the framework of regulatory measures, both federal, state and provincial, that prevails in this area on both sides of the border.

The duty of the parties in respect of covered services is to provide "national treatment" to the persons of the other party (art 1402.1). This obligation is qualified in four respects: where "prudential, fiduciary, health and safety or consumer protection reasons "require it, different treatment may be accorded, provided that such treatment is equivalent in effect and any restrictions are no greater than is necessary to afford such protection, (art. 1402.3); licensing to ensure the competence of the providers of services is recognized as necessary but is not to operate in a discriminatory way (art. 1403); arbitrary or unjustifiable discriminatory measures or disguised restrictions, particularly any requirement that a commercial presence be established in the territory as a prerequisite to providing the service, are prohibited (art. 1402.8);⁸¹ and, the concept of national treatment is to operate only prospectively so that existing rules affecting services are grandfathered.

The DRM Applicable to Trade in Services

The DRM which will apply to these provisions is found in chapter 18. A review of its salient features is worthwhile.

Central to the functioning of the DRM is the commission.⁸² The Commission has two roles. It is the manager of the agreement in the sense that it has, pursuant to article 1802, the duty to supervise the proper implementation of the agreement, its future elaboration and to consider any matters which affect its operation. It also has a pivotal role in the DRM. The Commission is by nature a political body, its principal members are the cabinet level officers in the two federal governments responsible for international trade. In that sense it is clear that it does not have an independent third party role. It operates by consensus.⁸³

The Agreement provides for two very different types of DRMs which respond to different preoccupations. The first governs antidumping and countervailing duties, both in respect of new legislation and administrative determinations (Chapter Nineteen). The Commission has little or no direct role in this process unless, in the case of new legislation, the parties choose to make the Commission the forum where they will consult in the event that a binational panel rules that the new legislation is inconsistent with one of the GATT Codes, the Agreement's purpose and intent or overrules a previous binational panel. These provisions are, temporary, lasting only until a special North American regime for subsidies and dumping is worked out; ultimately it is the general dispute resolution mechanism that will apply over-all.

In the case of the "institutional provisions" dealing with general dispute resolution (Chapter Eighteen) the Commission has a significant part

in the process, both at the beginning and toward the end of the procedure. It may act in some cases as a "traffic director" to indicate what forum will be used to consider the issue and, in the case where binding arbitration is not resorted to, it will determine what will be done about a panel's recommendation. It selects the arbitrators or panelists and may establish the procedure in some cases.

Briefly, the system is as follows:

1. If a dispute arises the parties have a duty to consult. (Article 1804)
2. If a dispute arises that falls both under the agreement and the GATT the complaining party may chose either forum. The forum chosen is exclusive. (Article 1801)
3. If the dispute falls both within the GATT and the FTA and complaining party does not avail itself of the GATT procedures, and consultations are not successful, either party may call upon the Commission to meet within 10 days and endeavour to resolve the dispute promptly. The Commission may call in technical advisors or for the assistance of a mediator if it deems it appropriate. (Article 1805)
4. If this procedure produces no satisfactory result then:
 - a) in the case of safeguard disputes ("Emergency Action") the Commission shall refer the matter to compulsory binding arbitration in accordance with the procedures established for that purpose. (Article 1806)
 - b) in all other cases, the Commission may either

- i) refer the matter to binding arbitration (Article 1806),
or
 - ii) if not referred to arbitration then upon the request of
either party refer the matter to a panel of experts
which is established in accordance with the procedures
agreed upon. (Article 1807)
5. In the case where binding arbitration is used (either in respect of safeguards or otherwise) the arbitrators' ruling disposes of the issue and the offending party is legally obligated to comply, failing which, and in the absence of any agreement by the parties as to appropriate compensation, the aggrieved party may suspend corresponding benefits of the other party who is not allowed to take any retaliatory measures. (There is no particular role for the Commission in the later stages of this process.)
6. In the case where the matter is referred to a panel of experts the Commission may appoint the fifth panelist and fix the procedure for the panels. The panelists are to be chosen on the basis of objectivity and, "where appropriate" are to have "expertise in the particular matter under consideration". (Art. 1807.1) Upon receiving the Panel's recommendation the Commission "shall agree on the resolution of the dispute, which normally shall conform with the findings of the panel". The solution is, "whenever possible" to consist of the elimination of the offending measure or compensation. (Article 1807.8)
7. Where the Commission does not agree on a resolution of the dispute as above, the party which considers that its fundamental rights

or anticipated benefits under the agreement have been impaired may suspend benefits of equivalent effect to the other party until a resolution of the dispute. (Article 1807.9)

In two minor ways the Commission may also affect procedures. It may decide not to publish a panel's finding (article 1807.7). And, in the case where a party objects to a panel's recommendation, the Commission (along with the Parties) may request the panel to reconsider its decision in the light of such objections (article 1807.6). From a more substantive view point, it is clear that the procedures specified under the FTA are superior to those under the GATT in several respects. The establishment of rosters for of permanent potential panelists and the cutting down of time delays represent real steps forward in a procedural way that will contribute towards the overall efficacy of the process.⁸⁴

When one looks at the Commission's role in this procedure one's first point of departure, for comparison purposes, is naturally the DRM's contained in the GATT and its various Codes as discussed above. A second consideration which also strikes one about the Commission's role in the case of this Agreement is those areas where it has been given a role and those where it has not.

To take the latter point first, the Commission has no role in respect of AD/CVD disputes where special procedures have been elaborated (Chapter Nineteen). It may have the limited role of a mediator in the case of "Emergency Action" disputes as where the parties cannot agree on a resolution to such a dispute the question must proceed to binding arbitration (article 1103). These two areas, where special procedures have

been provided for, are those where the parties (more particularly Canada) are especially sensitive because of recent trade frictions. In both cases the guiding, and ultimately determinative role of the Commission has been either excluded entirely or limited to that of a mediator prior to arbitration. One can only presume that this is because the parties were not prepared to concede that these types of disputes could be fairly or effectively be determined if their ultimate disposition was to depend upon the consensus decision of the parties themselves sitting as the Commission. One might also assume that some of the more unfortunate experiences gained with the GATT procedures, in particular problems which have arisen because of the political process which occurs at the time of the Contracting Parties' approval of panel decisions as discussed above influenced the very different procedures selected for the resolution of these particular disputes. These two limited areas, when compared with the general DRM provided for in article 18, effectively illustrate the proposition that the less trust there is between the parties the greater the need there is for a "tight" or more court-like model of DRM.

All other disputes, general disputes about the interpretation and application of the agreement and services governed by chapter 14, are governed by the general provisions which emphasize the consensus role of the commission both at the initiating and concluding phase of the procedures. In this sense it may be said that the DRM of article 18 the Agreement replicates the GATT model.

In addition, Article 2011 introduces the notion of nullification and impairment, as giving rise to the right to resort to the DRM provided for in Chapter Eighteen. This general concept, borrowed from article XXIII of the

General Agreement, could give rise to some interesting questions particularly where anticipated benefits are conceived.⁸⁵

One feature of the general DRM that one must bear in mind is that the ultimate sanction provided for by the Agreement is retaliation by the injured party, or notice of withdrawal from the Agreement. In this sense the GATT Model has prevailed over the Canadian position which clearly favoured a binding dispute resolution mechanism which would avoid both the procedural problems of the GATT and the retaliation or "tit for tat" nature of its sanction mechanism (which in the end, results in the erection of additional trade barriers rather than the elimination of the affending measure).

In one important procedural respect, however, the Agreement has introduced an element that is significantly different from the GATT model, and that is the provision for a resort to binding arbitration in article 1806. In view of the importance which "binding" arbitration may acquire because of this article it is worth noting the distinction between this concept and that of the use of a panel in article 1807.

The concept of "binding" in arbitration is found from the meaning of the verb to bind: "to obligate; to bring or place under definite duties or legal obligations, particularly by a bond or covenant. To affect one in a constraining a compulsory manner with a contract or a judgment".⁸⁶

In commercial arbitration an acceptance of the arbitral process is an acceptance by the parties that they will be bound by the arbitrator's decision, provided that it is rendered in accordance with the law. In arbitration practice this situation may most easily be distinguished from that of conciliation or mediation wherein it is clear that the parties do not become "bound" by the recommendations of the conciliator or mediator,

theirs are recommendations only. To that end the New York Convention,⁸⁷ article v(1)(e) specifically provides that an award must have "become binding upon the parties" before it is enforceable under the terms of the convention. A determination of this issue may then require a reference to the law governing the arbitral process to ascertain whether certain delays or other procedural issues (a right to move for rectification of the award or a right to appeal, for example) may intervene before the award becomes final and binding.⁸⁸

The binding character of the award goes to the question of its enforceability but does not determine it; from a practical point of view enforceability will ultimately depend upon recognition of the award by a court of competent jurisdiction where the defendant has assets to satisfy, thus bringing into play the coercive powers of the state to execute it. In this sense there is a practical difference between the binding nature of an arbitral award and that of a judgment; the former may require being made the object of a judgment before it may be enforced in the same manner.

In public international law similar considerations obtain. Conciliation or mediation do not by their nature, create any binding obligations on states; resort to arbitration does. In the practice of the International Court of Justice it is clear, for example, that the parties to a case are bound in law to observe the judgment of the Court when it is exercising its contentious jurisdiction.⁸⁹ In the case of an advisory opinion, however, it is clear that the opinion has no binding force as there are no parties to it. In the case of judgments of the International Court of Justice and arbitral tribunals the issue of enforcement of the award against a reluctant state is of course a much more difficult issue and one

which depends upon the relative power of the states involved and their willingness to accept the award.

When we turn to the DRM of the GATT it is clear that it is closer to the conciliation model than arbitration. Panels recommend solutions to the dispute to the Council of the Contracting Parties or to the members of the Committee of a given Code, the panel recommendations do not, in themselves, create legally binding obligations on the parties to the dispute.

This nature of the GATT DRM has been analyzed in various judgments by courts in other jurisdictions. In the International Fruit Case⁹⁰, for example, the European Court of Justice concluded that the nature of the obligations created by the GATT, and in particular the process of negotiation, consultation (and in some cases unilateral action without consultation) whereby they are enforced, is such that they can not have direct legal effect in community law, they do not give rise to rights which nationals of a member state can rely upon in a proceeding before a national court.

In the context of the enforcement of Agreement, the use of arbitration may have important consequences if it becomes extensively relied upon by the parties. The binding nature of the arbitrators' findings means that there is no need to report back to the Commission, the Award itself will be legally binding upon the parties. This does not however eliminate the problem of enforcement and the Agreement foresees that the offending party is obliged to furnish appropriate compensation. Where the parties are unable to agree upon appropriate compensation the other party may take remedial action in the form of a suspension of equivalent benefits.

It should also be noted that Article 1807.8 provides that, in the case of a dispute which goes to a panel, the Commission's ultimate disposition of the matter shall "normally conform with the findings of the panel" and the solution is, whenever possible, "to consist of the elimination of the offending measure or compensation". This provision gives such panel decisions a "morally binding" quality that does not exist in the GATT procedure and which moves the general DRM provisions somewhat closer to the arbitration model. The same may be said for the enforcement provisions relating to the panel process.

As a result of these provisions some authors have concluded that the FTA provides "more effective sanctions than the vast majority of international agreements".⁹¹

This paper has emphasised the clear relationship between the substantive rules of any international agreement and the procedures established to enforce them and the Agreement certainly confirms that position. When we examine the case of emergency action, for example, we see that it was possible to agree to binding arbitration because the rules are fairly clear in Chapter Eleven as to the conditions under which emergency action may be resorted to, whether under the bilateral or global track. Disputes might arise as to the meaning of "substantial" imports which contribute "importantly" to "serious" injury, for example (article 1102.1). The GATT has been the scene of debates over the appropriate threshold justifying the resort to internal protective remedies practically since its inception and there is no guarantee that the parties will agree, in any future case, whether the threshold criteria have been passed. But this is surely the type of issue which can be left to a binational panel of experts

for a judicial-type resolution. Furthermore, the ultimate consequences of an "unfavourable" (in the political sense) judgment to either party, are fairly limited. The same observations might be made about the provision for binding arbitration in the case of government support programs for wheat and barley (Annex 705.4, para. 16). The same can not be said of the general rules which will apply to services and where no one can foresee the nature or scope of all types of future disagreements or their ultimate consequences. In cases where there is a degree of uncertainty there is a corresponding reluctance on the part of nations to accept any binding dispute resolution mechanism. In the case of services then, the Commission, in its political role, remains in control of the procedure and the result. In the end, while either party can have a panel constituted the losing party retains the power to frustrate the Commission's ability to come to a decision which will adversely affect its interests. In this sense the FTA retains the basic features of the GATT DRM, although it should also be said that the provision of article 1807.8 to the effect that the "resolution shall be non-implementation or removal" of the objectionable measure or compensation does certainly address a weakness in the GATT system where even this consequence that should flow from the breach of an international obligation, is not the guaranteed result of a panel ruling.

Another aspect of the DRM/or services as conceived in this Agreement that is worthy of note is the fact that the parties (i.e. the federal governments) have exclusive access to it. There is no institutionally conceived role for private sector, or provincial or state participation in the process. This may well affect the acceptability of the system as a whole, particularly where such parties' rights and interests may be

determined by the dispute resolution process. The American and Canadian Chambers of Commerce made active representation concerning the need for private sector participation in the dispute resolution process during the elaboration of the agreement,⁹² and the government of Ontario has criticized this element of the agreement since its publication. It certainly contrasts with the EEC system which envisages access to the Court of Justice by parties directly affected by Community measures and the appearance before the Commission of parties whose rights are being determined by it.⁹³ This may represent a serious gap in the institutional system worked out in this agreement. In trade matters, perhaps more than other categories of international disputes, private parties regularly seek the aid of their government because of violations by other governments. Access to the appropriate domestic courts or administrative tribunals are only a part of the solution to this problem; access to some international machinery is also important. The Parties seem to have recognized this problem by providing, subsequent to the Preliminary Transcript, for a right of access by interested parties in the case of AD/CDV disputes (Chapter 19, Arts. 1904.5 and .7) but such participation is excluded elsewhere in the Treaty.

Because the Commission is not a tribunal and the agreement does not provide for any similar institution there is also no possibility of references from domestic tribunals along the lines provided by article 177 of the Treaty of Rome. This type of reference served as the basis for the recommendation of the Canadian and American Bar Associations to the two governments that it would be desirable to include in any agreement an appropriate arrangement for access by private persons, preferably to a permanent joint Canada-U.S. Free Trade Tribunal which would have had

jurisdiction to interpret the agreement and decide disputes arising thereunder.⁹⁴

If such a body had been established by the Agreement provision might have been made for any person whose rights or interests under the agreement are affected by the actions of a domestic tribunal to be able to have an issue of the interpretation of the agreement referred to the Joint Tribunal.⁹⁵ No such reference to the type of Commission constituted under this agreement would be inappropriate and the parties did not see fit to establish any special panel procedures for this purpose. The Agreement envisages, instead, a much more limited procedure for the giving of standing to the Parties to intervene, either jointly or individually, before national tribunals when issues involving the interpretation of the agreement are involved.⁹⁶

Trade in Financial Services⁹⁷

The problems relating to Financial services are of a different order than those relating to other services and they therefore required discrete treatment in a special chapter. (chapter 17) These specific considerations in turn required a different approach to the issue of dispute resolution; as a result the general dispute resolution provisions of article 18 are not applicable to the Financial Services chapter.

The financial service sector plays a very special role in a nation's economy. It determines the allocation of financial resources which in turn enables the rest of the economy to operate effectively. Any regulatory framework must both ensure the financial soundness of the system to protect the providers of capital (the factor of "trust") and also seek to encourage

the efficient allocation of that capital within the economy. In addition the central bank's ability to conduct monetary policy is influenced by the financial sector's operations. As a result of these factors this sector is more closely regulated than most and very susceptible to concerns about actions by foreigners who may not so easily be made the object of effective regulation. In the federal systems of Canada and the United States its regulation also gives rise to complex and sensitive jurisdictional issues between different levels of government.⁹⁸

Because of these considerations there is a fundamental difference between the approach of the Financial Services chapter and the trade in services chapter. The latter focused on "trade in services", the ability to provide a given service without the necessity of providing a permanent establishment in the other state; only by providing for cross-border service would trade in such services be made more liberal. Such an approach was impossible in the case of financial services. While it was recognized that in some cases such as investment advice or underwritings on the part of securities firms or the provision of insurance by insurers or electronic funds transfers in the case of banks (to name a few examples) one may speak of an "export" of the service. Thus insurance falls within chapter 14 rather than chapter 17. In general, however, it was recognized that banking, trust company and other financial operations do require a long-term equity investment in the place where the service is provided. This establishment is subject to close regulatory control, often by different levels of government. Changes in this regulatory framework, particularly those involving a different attitude towards "non-residents", cannot be realized quickly or easily. There are several consequences of the specific

nature of financial services. The concept of "national" treatment in chapter 17 (equality of competitive opportunity) differs from that in chapter 14. As chapter 17 stands alone the Investment Review restrictions do not apply, nor do the government procurement articles. The actions of states (banking) and provinces (securities, trusts) are not specifically dealt with. Finally there is the express recognition that there is much more work to be done on both sides of the border to complete the process, that the chapter does not represent "the mutual satisfaction of the parties concerning the treatment of their financial institutions".⁹⁹

These considerations had a definite effect upon the dispute resolution system which would be appropriate for this chapter. The U.S. negotiators were of the view that, given the relatively few disputes in this area, there was no need for any such mechanism. They were also concerned about the lack of expertise in the complex laws and practices in financial matters that might prevail amongst persons normally called upon to sit in panels that would rule in such issues. Appeals from decisions made by the Federal Reserve to the Commission could scarcely be tolerated in such circumstances. Ultimately any system taking control over such crucial decisions out of the hands of the financial establishment might create instability and uncertainty in the financial markets.¹⁰⁰

As a result the only DRM governing this chapter is a provision for consultations between the U.S. Treasury and the Canadian Department of Finance. In the event that these consultations fail there is no back-up provision in the form of arbitration or panel recommendations or even a reference to the Commission.

This may be an unfortunate lacuna in the agreement but the reasons why the parties were unable to arrive at any more sophisticated form of dispute resolution in these circumstances are, if we return to these elements which must underly any successful resort to the arbitral process, fairly evident. In the first place it is clear that the rules in this area are fairly embryonic. The very notion of equality of competitive opportunity was a recognition of the complex and often very different regimes which prevail on both sides of the border (particularly the role of Glass-Steigel on banking operations in the United States). The complexities of the situation is compounded by the authority which can be exercised by various levels of government and very powerful administrative organs of government in this highly sensitive and crucial sector. The confidence necessary to entrust matters to a panel of experts to review local decisions or provide recommendation could not be found in these circumstances. Too many unforeseeable political consequences could arise should powerful forces, the Federal Reserve in the United States, the Securities Commissions in the provinces, to name only two elements in the host of state and federal regulatory agencies that have a role to play in this area, be unwilling to accept the result of an imposed third party arbitration. In the final analysis one is also left with a suspicion that the fact that the disputes were to pass through the hands of "trade" officials sitting as the Commission, to some extent determined the attitude of the finance officials negotiating this part of the agreement; in the pecking order of government, it is said, trade officials are not at the same level as finance.

The essential conditions necessary for confidence in an arbitral system were therefore lacking in these circumstances and the best the parties

could agree to was the traditional international solution to such a situation: the recognition of a duty to consult. There could be no better illustration of the limits of the use of an arbitral system in any international arrangement. There could be no better illustration of the sensitivities that are central to this type of problem, all of which will have to be addressed in the more complex forum of the Uruguay Round.

Conclusion

It would be beyond the scope of this paper and probably foolhardy in any event, to predict the precise form of DRM for services that will evolve from the Uruguay Round. Some general conclusions may be drawn, however, from the above analysis about the type of DRM that is most likely to be suited to services and their treatment in the Uruguay Round.

The trade in services gives rise to complex issues which probably may best be dealt with by sector and it is therefore likely that we will see different codes developed for the different service sectors along the lines of the experience of the Tokyo Round and the F.T.A. We may see a general code elaborating principles of general application to trade in services equivalent to chapter 14 but it is likely to be expressed in such generalities that it will provide little concrete guidance in any specific sector. It should be borne in mind, for example, that the coverage provisions of chapter 14, coupled with the grandfathering of existing non-conforming existing measures (article 1402.5) ensure that the general provisions will only have a modest impact on the trade in services at this time. The "meat" lies in present and future section annexes. The technique use of distinct codes would allow the elaboration of rules suited to the sectors in question and will also allow those states willing to collaborate

in that specific sector to do so without committing themselves to other broad general obligations.

As these sectoral codes will involve complex issues which sometimes, particularly in financial and communications matters, will involve considerable national sensibilities general language is likely to be employed which will allow some flexibility and room to manoeuvre in the future. In these circumstances the parties will be unlikely to accept a "court-like" DRM, rather they will seek to retain the diplomatic framework which is familiar in the present GATT structure while building on the experience of improved procedures both within the GATT and the FTA.

Individual codes will permit the adoption of individual DRMs for each sector. Different sectors will have more or less "binding" or tight DRMs depending largely on how sensitive the issues are to national sovereignty concerns and to what degree to parties are able to draft language which creates clear obligations.

The nature of the service sector is such that the use of experts familiar with the industry in question will certainly be necessary for an effective system. On the other hand, complex issues relating to the way in which the dispute relates to the overall GATT structure will also have to be addressed and this will require the participation of jurists familiar with the international system for the regulation of the legal and economic relations between states. This element will become all the more apparent with the addition of China, and possibly the Soviet Union, to a system that was conceived with free market economy states in mind. It is further complicated by considerations for developing countries.

In these circumstances I can foresee that there may be cases (financial services, for example) where, in the case of a dispute, the obligation of the parties will be little more than a duty to consult. In such a case the dispute management will remain entirely within the hands of the parties themselves as in the case of chapter 17 of the FTA.

In less sensitive cases, the example of the standards code, enabling a first consideration by experts followed by a review by persons experienced in the operation of the GATT would probably satisfy the requirement for both expertise and a knowledge of the working of the GATT system. If a two tier system is thought to be too awkward a requirement could be built into the panel selection process that a certain percentage of the panels be composed of recognized experts in the field whose names would be available on rosters.

As the use of panels seems to be a fixture of the GATT system it is likely that this technique will continue and benefit from the experience gained by the FTA. The following features should be considered:

- 1) Parties should be enabled to opt for binding arbitration should they indicate a willingness to accept this form of DRM in which case the panel selection procedures could apply as in the normal case;
- 2) The right to a panel should be at the request of a party and not depend upon a prior authorization of the committee of members of the code (as in the case of the subsidies code);
- 3) Rosters should be established for the selection of panelists;
- 4) Reasonable time limits should be set for the formation and reporting of panels.

- 5) When the panel reports back to the committee the resolution of the dispute should focus on the removal of the "illicit" measure and avoid the introduction into the disposition of the matter the extraneous concerns of committee member states not party to the dispute.
- 6) States should be able to take measures of compensation (but not retaliation) without awaiting committee sanction (along the lines provided for in the FTA).
- 7) Consideration should be given to the advisability of granting a right of participation to private interested parties although it is conceded that this is unlikely to find favour in the eyes of government participants. It would add time and complexity to the proceeding.
- 8) The use of working parties, committees of experts, or other groups should be provided for as an alternative to panels or arbitration. These other bodies should have a mandate to review difficult areas of the operation of the code and forestall future disputes.

The above analysis of DRM in international law generally and the GATT and the FTA in particular suggests that it is unlikely that we will see the Uruguay Round produce significant move away from a fairly loose and diplomatic framework and in the direction of a judicial or court-like resolution of disputes. This is even less likely in this new and sensitive area of services. Reforms in the measures themselves, however, both in

ensuring access and a more "binding" result from expert persons who have the confidence of the parties will go a long way towards ensuring the viability of the system as a whole.

ENDNOTES

1. See, generally, I. Brownlie, Principles of Public International Law (Oxford: Clarendon, 1979), pp. 716-719; D. Harris, Cases and Materials on International Law (London: Sweet & Maxwell, 1983), ch. 12; S. Rosenne, The Law and Practice of the International Court, V. 1 (Leyden: A.W. Sijthoff, 1963), pp. 313 et seq.
2. See R. Macdonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice" (1970), 8 C.Y.I.L. 3.
3. The United States withdrawal from ICJ jurisdiction under Art. 36(2) of the Statute of the ICJ was deposited by U.S. Secretary of State George Shultz on Oct. 7, 1985, following U.S. refusal on Jan. 18, 1985 to participate in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) DEP'T ST. BULL., No. 2096, March 1985, at 64; Iran in the Case of United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) reported at 1980 I.C.J. Rep.3.
4. Again, Iran, Ibid. In the Corfu Channel case, Albania never paid the damages to the U.K. that were awarded: Corfu Channel (UK v. Alb.) [Assessment of Amount of Compensation], 1949 I.C.J. Rep. 244 (Judgement of Dec. 15).
5. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.), 1984 I.C.J. Rep. 246 (Judgement of Oct. 12), reprinted in 23 I.L.M. 1197; Schneider, "The Gulf of Maine Case: The Nature of an Equitable Result" (1985), 79 A.J.I.L. 539.
6. Treaty of Rome, arts. 170, 182. For a description of the jurisdiction of the Court of Justice see D. Iasok and J. Bridge, Introduction to the Law and Institutions of the European Communities, (London: Butterworths, 4th ed., 1987), at 166 ff; The European Convention on Human Rights 1950 and Protocols. For a description of the operation of the Convention see Harris, supra note 1, at 471 ff.
7. See, for example, Convention on Long-Range Transboundary Air Pollution, Geneva, 13 November 1979, Article 13, reprinted in (1979), 18 I.L.M., p. 1148.
8. Settlement of Disputes Under the Proposed Free Trade Area Agreement, report of the American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes, July 23, 1987, at 8-9.
9. See, for instance, the 1924 Convention for the Prevention of Smuggling of Intoxicating Liquors, 43 Stat. 1761, U.S. Treaty Series No. 685, 12 Bevans 414, 17 INTS 182 (the I'm Alone Case was submitted to a Joint Commission under this convention); the 1977 Agreement Concerning Transit Pipelines, 28 UST 7449, TIAS No. 8720.

10. Among these treaties are: The 1944 Convention on International Civil Aviation, 61 Stat. 1180, TIAS No. 1591, 3 Bevans 944, 15 UNTS 295; the 1919 Constitution of the International Labor Organization, as amended in 1946, 62 Stat. 3485, TIAS No. 1868, 4 Bevans 188, 15 UNTS 35; 1953 Convention on the Political Rights of Women, 27 UST 1909, TIAS No. 8289, 193 UNTS 133; the 1961 Convention on Diplomatic Relations, 23 UST 3227, TIAS No. 7502, 500 UNTS 95; the 1973 International Telecommunications Convention, 28 UST 2495, TIAS No. 8572.
11. Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, 1909, T.S. No. 548; III Redmond Treaties (1923) 2607-08; Waterways Treaty Act, S.C. 1911, c. 28.
12. ABA/CBA Joint Working Group, supra note 8, at 9.
13. Thomas Franck, "Messianism and Chauvinism in America's Commitment to Peace Through Law", International Law and Development, proceedings of the 1986 conference of the Canadian Council on International Law (Ottawa: C.C.I.L., 1986), p. 101.
14. J. Jackson, "GATT Machinery and the Tokyo Round Agreements", in W. Cline, (ed.), Trade Policy in the 1980s (Washington: Institute for International Economics, 1983), p. 159, at 162 et seq. See generally, R. Hudec The GATT Legal System and World Trade Diplomacy (New York: Praeger, 1975).
15. Report and recommendation of the Canadian and American Bar Associations Joint Working Group on the Settlement of International Disputes, March 20, 1979, in Settlement of International Disputes Between Canada and the U.S.A., (ABA/CBA, September 20, 1979), pp. 60 et seq.
16. See remarks of Ambassador Clayton Yeutter reproduced in G. Horlick, et al., "GATT Dispute Resolution Procedures", paper prepared for the Practicing Law Institute Program on U.S. Trade Law and Policy, Washington, D.C., January 1987, at 1-2.
17. See, for example, Ibid., at 4-5.
18. U.S. International Trade Commission, Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements, Publication 1793 (Dec. 1985); M. Coccia, "Settlement of Disputes in GATT under the subsidies Code: Two Panel Reports on E.E.C. Export Subsidies" (1986), 16 Ga. J. Int'l & Comp. L. 1; Hudec, supra note 14; R. Hudec, "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business" (1980), 13 Cornell Int'l L. J. 145; Jackson, supra note 14.
19. Hudec, "Tokyo Round", supra note 18, at 151.
20. Ibid., at 149-50.

21. See USITC, supra note 18, at 53; Trade Policies for a Better Future, GATT Report of Eminent Persons on Problems Facing the International Trading System (Geneva: GATT, March 1985), reprinted in (1985), 24 I.L.M. 716, at 733.
22. Hudec, "Tokyo Round", supra note 18, at 150-51.
23. Jackson, supra note 14, at 180.
24. J. Jackson, World Trade and the Law of GATT (New York: Bobbs-Merrill, 1969), at 164.
25. Jackson, supra note 14, at 180, 182.
26. See Canada-U.S. potato dispute, Decision of Nov. 16, 1962, GATT BISD 115/55 (1963). In the 1970s a Working Party contributed to the resolution of a Canada-U.S. dispute over Canadian import restrictions on eggs.
27. U.S. dairy quotas case brought by the Netherlands discussed in Jackson, supra note 14, at 181; USITC, supra note 18, at 16-17.
28. For example, in a recent case in which the Panel concluded that United States action in respect of its import quota for sugar from Nicaragua breached its GATT obligations, it was not in Nicaragua's interest to undertake retaliatory measures due to the danger of further U.S. countermeasures: See GATT, GATT Activities, 1984, at 39 (1985); Coccia, supra note 18, p. 5-6 (fn.13).
29. Hudec, "Tokyo Round", supra note 18, at 151-153; Jackson, supra note 14, at 181.
30. E. Petersmann, "International and European Foreign Trade Law: GATT Dispute Settlement Proceedings Against the EEC" (1985), 22 Com. Mkt. L. Rev., 441 at 467.
31. USITC Report, supra note 18 at 49.
32. Ibid., at xi, 53, 58-64; Hudec, supra note 18 at 161.
33. Ibid., at x.
34. Witness the discussion between Canada and Europe over the wine discussions.
35. Coccia, supra note 18, at 5-6.
36. Hudec, "Tokyo Round", supra note 18; see also Coccia, supra note 18; USITC Report, supra note 18.

37. See Group "Framework" Point 3: Draft Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT Doc. MTN/FR1W1201 Rev.2, reprinted in H.R. Doc. No. 153, at 634; Group "Framework" Point 3, Annex. Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2), ibid., reprinted in H.R. Doc. No. 153, at 641.
38. Hudec, "Tokyo Round", supra note 18, at 179.
39. Ibid., at 183.
40. Ibid., at 168; Perlow, G., The Multilateral Supervision of International Trade: Has the Textiles Experiment Worked?, 75 A.J.I.L. 93 (1981).
41. Ibid., at 179.
42. Other Codes also provide for the constitution of a panel at the request of one party only: Government Procurement Code, Article VII.7 (GATT, B.I.S.D., 26th Supp. 48 (1978-79)); the Customs Valuation Code. Art. 20.5 (GATT, B.I.S.D., 26th Supp. 128).
43. Ibid., at 174; Coccia, supra note 18, at 3-5.
44. Agreement on Technical Barriers to Trade, GATT, B.I.S.D., 8, (1978-79).
45. Customs Valuation Code, supra note 42, arts. 18.2, 20.2 In this code a reference to the Technical Committee may only be triggered by the Committee, not a party as in the Standards Code.
46. See Coccia, supra note 18, at 24, fn. 98 regarding the need to clarify vague code provisions.
47. European Communities - Refunds on Exports of Sugar, GATT, B.I.S.D. 290 (26th Supp. 1978-79); European Communities - Refunds on Exports of Sugar - Complaint by Brazil, GATT, B.I.S.D. 69 (27th Supp. 1979-80).
48. Viz. Annex 1901.2.2.
49. I. Bernier, "Trade in Services and the Experience of the European Economic Community"; J. Everard, "The OECD Codes and Declarations and Trade in Services"; B. Siegel, "The Internationalization of Service Transactions: The Role of Foreign Direct Investment in International Trade in Services"; M. Sims and R. Rivers, "The International Trade in Services Agenda: Origins, Evolution and Agenda", all papers in Series on Trade Services (Victoria: The Institute for Research on Public Policy, 1987).
50. Sims and Rivers, supra note 47, at 24.
51. Ibid., at 32.

52. See, for example, the EEC Treaty, Part 2, Title III, ch. 3, articles 59-66 inclusive referred to in Bernier, supra note 49, at 1.
53. The United States-Israel Free Trade Area Agreement reproduced in (1985), 79 Am.Jo.Int.Law 728.
54. Sims and Rivers, supra note 49, at 10, 17.
55. Siegel, supra note 49, at 1.
56. See GATT, News of the Uruguay Round, 003, April 16, 1987, p. 2-3; GATT, News of the Uruguay Round, 005, July 3, 1987, p. 4.
57. J. Dunning, "Transnationals and the Growth of Service Sectors: Some Conceptual and Theoretical Issues", draft of a paper prepared for TNCs In Service (N.Y.: UN Centre on Transnational Corporations,), at 45, 46, 61.
58. Siegel, supra note 49, at 7.
59. Siegel, supra note 1, at 28; see for example, United States v. Bank of Nova Scotia, 740 F. 2d 817 (11th Cir., 1984) described in W. Graham, "The Foreign Extraterritorial Measures Act" (1986), 11 Cdn. Bus. L. J. 410, at 414-15.
60. See, for example, Wills, et al., Software Policies for Growth and Export (Montreal: Institute for Research on Public Policy, 1986).
61. P.M. Gray, "A Negotiation Strategy for Trade in Services" (1983), 17 J. of Wld. Trade L. 337. Other authors share a similar view: A. Brock, "A Simple Plan for Negotiating Trade in Services" (1985), 5 World Economy 229, at 253; Schott & Mazza, "Trade in Services in Developing Countries" (1983), 20:3 J. of Wld. Trade L. 253, at 261, 263; Marks and Malgrem, "Negotiating on Tariff Distortions to Trade" (1975), 7:1-2 Law and Policy in Int'l Bus. 327, at 327.
62. Sims, supra note 49; Everard, supra note 49, at 5 et seq.
63. Article 1401.2.
64. GATT, NUR 003, supra note 56, at 5.
65. E.E.C. Treaty, supra note 4, Art. 59-66.
66. Bernier, supra note 49, at 6 et seq.
67. International Herald Tribune, October 19, 1987.
68. Black v. Law Society of Alberta (1984), 33 Alta. L.R. (2d) 214, reversed 44 Alta. L.R. (2d) 1 (C.C.A.) - leave to appeal to S.C.C. granted 12th June, 1986.

69. See E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981), 75:1 A.J.I.L. 1.
70. A. Easson, "Article 177 of the EEC Treaty and the Concept of 'Direct Effect'" in M. Irish and E. Carasco (eds.), The Legal Framework for Canada - United States Trade (Toronto: Carswell, 1987), p. 59 at 75-79.
71. See, for example, case 43175, Defrenne, [1976] E.C.R. 455, dealing with Article 119 of the EEC Treaty requiring members states to ensure the application of "equal pay for equal work" amongst men and women.
72. Case 36174, Walgrave, [1974] E.C.R. 1405; case 106177, Sirmenthal, [1978] E.C.R. 629.
73. In Canada, for example, there are constitutional limitations on the direct applicability of international norms: see R. Macdonald, "The Relationship between International Law and Domestic Law in Canada", in R. Macdonald, et al. (eds.), Canadian Perspectives on International Law and Organization (Toronto: U. of T. Press, 1974), p. 88; Re Alberta Union of Provincial Employees, et al. and the Crown in Right of Alberta (1980), 120 D.L.R. (3d) 590 (Alta. Q.B.).
74. Everard, supra note 49, at 14.
75. See generally R.B. Potter, "U.S.-Canada Free Trade Agreement and Trade in Services: A Timorous First Step or a Bold New Stroke", and Hon. M. Lalonde, "Trade in Financial Services Under the Canada-U.S. Free Trade Agreement: A Canadian Perspective" in Am. Bar. Assoc., National Institute, United States/Canada Free Trade Agreement: The Economics & Legal Implications, (Conference materials) (Washington: January, 1988) at 143, 161; Graham, W., "The Canada-U.S. Free Trade Agreement and Trade in Services; A Canadian Perspective", in the Continuing Legal Education Society of British Columbia, United States Canada Free Trade Conference, The Economic & Legal Implications, (Conference materials, Vancouver, March 1988).
76. Annex 1404.
77. For a more extensive treatment of the text of the Agreement see Potter, and Graham supra note 75.
78. Potter, supra note 75, at 151.
79. Annex 1404.C.1.
80. On investment and its relation to services see C. Thomas, "The National Treatment Rule vs. Discriminating Policies, An Analysis of Chapter 16: Investment" in Faculty of Law, University of Ottawa, The Canada-U.S. Free Trade Agreement: Analysis of the Text, (Conference materials), Ottawa, January 1988.

81. The analogy to the Treaty of Rome, particularly Art. 7 (non-discrimination on basis of nationality) and arts. 30-36, it striking.
82. See W. Graham, "The Role of the Commission in the Canada-U.S. Free Trade Agreement: A Canadian Perspective", in Am. Bar Assoc. National Institute, supra note 75, p. 233.
83. Speech, Frank Iacobucci, Deputy Minister of Justice of Canada, Fifth Annual Trade Law Seminar, Ottawa, October 15, 1987.
84. See Horlick G. and Stager, D., "Dispute Resolution Mechanisms under the United States-Canada Free Trade Agreement, a paper prepared for the IRPP dated January 11, 1988.
85. Jackson, supra note 14, at 182 refers to the notion of nullification and impairment in the GATT as "exceedingly ambiguous".
86. Black's Law Dictionary, 5th ed., West Publishing Co. 1979.
87. Convention on the Recognition and Enforcement of Foreign Arbitral Awards; see Graham, W., "The New York Convention of 1958, A Canadian Perspective", in Antaki and Prajner (eds.) International Commercial Arbitration, Wilson and Lafleur, Montreal, 1986.
88. The Uncitral Model Law, for example, provides in article 33, for a delay of 30 days to allow for rectification of "clerical" or similar errors in the award; on the sense of "binding" as used in the N.Y. Convention, see Gaja, G. (ed.) International Commercial Arbitration, Oceana, at 1.C.4.
89. Rosenne, S., The International Court of Justice, supra note 1 at 82.
90. Ibid., at 492, 493. This does not mean that states are free to ignore the legal consequences of such a judgment.
91. Horlick, G. and Stager, D. supra, note 84 at 26.
92. See Summary Report of the Committee on Canada-United States Relations of the Canadian and U.S. Chambers of Commerce, Scottsdale, Arizona, April 1-3, 1987, at 5.
93. Treaty of Rome, Art. 173.
94. ABA/CBA Report, supra note 8, at 22.
95. Ibid., at 26.
96. Art. 1808. It is interesting to note the title to Art. 1808 "Referrals of Matters from Judicial or Administrative Proceedings" which would suggest that the drafters originally had the idea of an article 177 type reference from domestic tribunals and then drew back from it once the limitations of the Commission as an appropriate forum for such

references were appreciated.

97. See generally, Lalonde, supra note 75, at 161; C. Lohmann and W. Murden, "Policies for the Treatment of Foreign Participation in Financial Markets and their Application in the U.S.-Canada Free Trade Agreement", in Univ. of Ottawa, The Canada-U.S. Free Trade Agreement: Analysis of the Text, (Conference materials), Ottawa, January 22, 1988.
98. On the role of the Provinces see speech by Ian Scott, Attorney General of Ontario, December 15, 1987, reproduced in University of Ottawa, "Conference Materials", supra note 75, p. 1.
99. Articles 1702.4, 1703.4.
100. Lohmann & Murden, supra note 97, at 15.

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