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Robert E. Hudec

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"Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments

Robert E. Hudec**

"The anthropologist is not likely to harbor the naive assumption that the law, or any other institution, serves only a single function—say, that of social control . . . . The concept of ambivalence is part of his equipment; he tends to search for latent functions, transcending the ostensible."

The subject of this lecture is litigation between governments. It is generally assumed, at least among Western countries, that institutions of international cooperation should include effective machinery for litigation of legal claims. A working litigation procedure signifies a working legal order in which conflicting interests are resolved by agreed rules rather than by the rule of power.

The effectiveness of the litigation machinery in most international legal institutions usually falls short of comparable domestic litigation procedures. The right to initiate litigation is not as certain, the procedure does not move forward as rapidly, decisions are not made with the same degree of objectivity, and legal rulings are not enforced as well.

The weaknesses of international litigation tend to be a constant source of concern. These weaknesses have political as well as practical significance, for they can have a fairly substan-

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** Melvin C. Steen Professor of Law, University of Minnesota. Professor Hudec delivered this inaugural lecture of the Melvin C. Steen Professorship at the University of Minnesota Law School on April 6, 1987.

tial impact on public confidence in the international institution in question and thus on the political support that will exist for a government’s policy of working through that institution.

The result of this concern over effectiveness is a more or less continual effort to strengthen international litigation procedures. Most legal scholarship in the area is devoted to this end, and proposals for improving litigation procedures can usually be found on the agenda of international organizations. In times of institutional crisis, legal reform often rises to the top of the agenda as one way to restore public confidence.

As in any other area of endeavor, the key to improving international litigation machinery is to understand what the problems are and why they have occurred. One persistent impediment to such understanding, common to all international legal institutions, is the observer’s natural tendency to treat international legal institutions as though they were the same as domestic legal institutions. This tendency is especially pronounced in international litigation, because international litigation resembles its domestic law counterpart so closely. There is a plaintiff and a defendant, a legal claim, a tribunal, and a legal ruling at the end.

To say that international litigation is not necessarily the same as litigation within domestic legal systems is almost too obvious to need saying. And yet, it does need saying. Governments simply are not private litigants; they are governments—complex institutions known the world over for their inability to behave like rational beings. Actually, government behavior usually is rational in its own way, but it is the rationality of bureaucracies, of political coalitions, and of democratic electorates. Why governments litigate, and how they respond to litigation, are questions that cannot be answered without taking account of these very special characteristics of government behavior.

In addition, international litigation is not domestic litigation. The fact that the decision of an international tribunal can be telecopied around the world in thirty seconds does not make the tribunal a modern legal institution. To the contrary, international legal arrangements have relatively more in common with the law of primitive societies studied by anthropologists, in which litigation is still emerging as a rather tenuous alternative to dispute resolution by force. International litigation is an institution of indeterminate character. It is not an inevitable re-
response to legal disputes, nor does it supply a conclusive outcome.

Given, then, that international litigation involves distinctively different actors using a distinctively different institution, we should, like the anthropologist, be prepared to find that it serves distinctively different functions—functions that transcend our expectation of the ostensible. This lecture is intended to probe those differences by examining a current crisis that has arisen over the effectiveness of the litigation procedure in one particular international organization. In response to this crisis, governments have tended to adopt conventional explanations of the litigation failure which caused it and have endorsed a set of rather conventional reform proposals to bring about the necessary improvements. I hope to demonstrate that the litigation giving rise to the crisis was not the conventional sort of litigation it was assumed to be, that the litigation failures were likewise not the conventional sort of failures they were assumed to be, and that not even the government proposals for dealing with the crisis are the solutions they seem to be. In the course of explaining the distinctive characteristics of this particular litigation, I will try to identify some of the underlying structural factors that cause litigation between governments to differ so markedly from its domestic counterpart and will try to show how these factors affect the prospects for making this type of litigation work better.

The litigation crisis I shall describe concerns the law of international trade—the law that governs what governments may and may not do to regulate the purchase and sale of goods across their borders. International trade law is built mainly around the 1947 General Agreement on Tariffs and Trade, known as the General Agreement or the GATT. The General Agreement itself contains a large body of rules. In the forty years since 1947, those rules have been expanded by an even larger collection of amendments, side agreements, interpretations, and precedents. To administer this system, the General Agreement has produced a large, international organization, also known as the GATT.

The GATT has a litigation procedure for enforcing its rules. The procedure is based on a brief provision in the General Agreement that authorizes the member countries of the GATT, acting collectively, to rule on legal issues in dispute, to issue recommendations calling for compliance, and to authorize retaliation for serious violations. Over the years the GATT
membership has gradually developed the practice of referring legal complaints to a small panel of experts. Normally, panels consist of three or five experienced GATT delegates from countries not involved in the legal dispute. Delegates act in their personal capacity, not under instruction from their governments.

GATT panels function like appellate tribunals. The parties to the dispute present written and oral legal arguments, usually at two meetings about a month apart. The panel then meets in closed session, where, assisted by the staff of the GATT Secretariat, it prepares a written report stating and explaining its ruling. The report is referred to the GATT membership, which alone has the power to rule.

The GATT has the tradition of decision making by consensus, which means that any GATT member country, including the parties to the dispute, has the power to block the initiation of the panel procedure or the adoption of a ruling. Notwithstanding this veto power, GATT litigants have developed a strong tradition that parties will not block litigation against themselves. It is established practice that complaining parties are entitled to a panel adjudication if they want one. Until recently, established practice also dictated that while the losing party could grumble and groan, it would not actually block adoption of an adverse legal ruling.

It is the general practice of international organizations to call things by names other than what they really are. That practice is also followed in the GATT. The GATT’s litigation procedure is called dispute settlement—a nice sort of nonadversarial, nonthreatening, look-at-the-positive-side phrase for what most people would call a lawsuit.

During the first thirty years of the GATT’s existence, from 1948 to 1977, its litigation procedures achieved what is generally considered to be an exceptional success. Member governments filed eighty-two legal complaints. Of these, thirty-seven were carried forward to either a legal ruling or some other kind of formal report. Most of the rest were settled by negotiation. In about eighty percent of these eighty-two cases, the country bringing the complaint reported a satisfactory solution to the problem. The basic force of the procedure came from the normative force of the decisions themselves and from community pressure to observe them. Although retaliation was threatened fairly often, until recently it was rarely used.

The results in the GATT’s fourth decade have not been as
There has been a dramatic increase in the volume of litigation, with almost as many complaints and adjudications in the past nine years as in the first thirty. Unfortunately, the level of resistance to GATT rulings has also risen, rather dramatically. The main problem area has been litigation between the United States and the European Community. The stage was set by a protracted lawsuit over tax policy in which both the United States and the European Community blocked adoption of adverse rulings by a 1976 panel for over six years. Then, in each of four hard-fought cases brought by the United States during a nine-month period in 1981-1982, the losing party once again blocked acceptance of the adverse panel ruling. The malaise has continued to spread. In retaliation for the impasse in the 1981-1982 cases, the United States is currently blocking adoption of a 1986 panel ruling, and one other government has recently followed suit in a totally unrelated case. The performance of panels has begun to falter under the pressure. Three other panel decisions have been set aside as incorrect during the past decade, and several more have encountered conspicuous dissatisfaction with the panel's inability to rule on what were thought to be clear violations.

In September 1986 the GATT opened a new round of trade negotiations, the Uruguay Round, designed to deal with the entire spectrum of problems currently troubling the world trading system. Fourteen negotiating groups were created. One of these fourteen was devoted entirely to making dispute settlement more effective. Almost every country represented in the negotiations has included improvements in GATT dispute settlement on its short list of priorities. To listen to United States diplomats and members of Congress, reform of GATT dispute settlement is not only a priority, but a sine qua non for continued United States participation in the GATT system.

On the surface the current problem in the GATT litigation procedures appears to be a conventional legal impasse. The critical conflict at the center of this problem concerns the agricultural trade policy of the European Community, the so-called Common Agricultural Policy (CAP). As is true with most other farm programs, the political forces behind the CAP have been very strong, causing CAP to guarantee very high prices to producers, who in turn generate substantial overproduction of farm products. The overproduction causes trade frictions, not only in European markets, where imports must be excluded, but also in world markets, where surplus European production
must be disposed of by means of heavily subsidized export sales. Against such very powerful political forces, the explanation goes, the GATT's law was simply not strong enough to compel any changes. GATT substantive rules were not clear enough, and dispute settlement procedures were not rigorous enough.

The solutions being proposed to deal with this legal failure are based on that perception of its causes. Everyone agrees that better substantive rules are needed. Rules must spell out more clearly what cannot be done and must have the support of a fresh consensus behind their commands. A good deal of the energy is also being directed toward reform of the dispute settlement procedure itself.

The targets of procedural reform are obvious. The main villain is the practice of consensual decision making. The GATT has already given serious consideration to a proposal, called consensus minus two, designed to cure this problem. Under the proposal, the GATT would retain the general practice of consensual decision making, but when litigation proceedings are involved, consensus would be defined as everyone but the two parties to the lawsuit—consensus minus two. In late 1982 the consensus minus two proposal came within a whisker of being adopted; it was defeated only by a delayed objection from the European Community.

A variety of other procedural reforms are also on the table. There are proposals to change the membership of panels, either by creating just one permanent tribunal of legal experts, or by creating a small permanent roster of such experts from which panel members must be drawn. Another proposal would increase the role of the GATT Secretariat, asking it to function as an advocate general to assure proper representation of GATT policy. Still another set of proposals calls for automatic access to panels and time limits for the various stages of the proceeding. Finally, there is a long-standing demand for better follow-up procedures to ensure that the GATT maintains continual pressure for compliance.

Unfortunately, while all of the proposals are quite useful, they do not really come to grips with the underlying problem. This was not ordinary litigation and did not fail for ordinary reasons of legal weakness. To find out what really happened, we must retrace our steps and go back over the story of the litigation crisis in more detail.

Recall that the central actor in this drama was the Euro-
pean Community's Common Agricultural Policy. The CAP posed a threat to agricultural exporters in the United States. That threat grew throughout the 1960s and early 1970s as the production induced by Community price supports increased and as one after another agricultural interest in the United States found its trade affected. The United States interests threatened by the CAP were politically important, and they wanted action.

As is usually the case, however, there were also several conflicting interests at play. Initially, the United States had a broad foreign policy goal of making sure that the European Community survived as an institution. This meant minimizing difficult economic demands that might cause it to fracture. As the Community became more solidly established, this foreign policy consideration diminished. It was replaced, however, by another, stronger economic interest. In 1961, as part of the deal to secure United States acceptance of the CAP, the Community had agreed to abolish all import restraints on two key commodities, soybeans and feed grains. Led by these two sectors, United States exports of agricultural products to the Community grew with unexpected rapidity from about $1 billion in the early 1960s to about $9 billion in the early 1980s. These trade gains were far larger than the trade losses caused by the CAP. The gainers were definitely not interested in having a trade war with the Community.

These conflicting interests presented a problem for the United States government when the Community thought it necessary to take action that harmed the losers. The losers could not simply be ignored. In addition to the political power of their own representatives, the losers also had the power to persuade others that the international trading system was operating unfairly, and that the United States ought not to follow liberal trade policies under such conditions. But if the United States government acted too vigorously, it would jeopardize the much larger trade interests of the gainers.

Politicians who deal with such conflicting interests on a regular basis know that one of the most valuable techniques for dealing with them is to temporize. Government officials buy time by promising the losers that they too will be taken care of, and then hope that by the time the promise becomes due, the losers will have adjusted their sights low enough to be satisfied with what little can actually be done for them.

Temporizing has a bad name that is not really deserved. Something like this has to happen whenever large collective
entities like nation-states seek to accommodate differing interests. To reach accommodation each of the collectivities must be willing to abandon some of the interests of some of its participants—interests which, in the abstract, it would be expected to defend. To use the jargon of the union hall, someone will have to be "sold out." Given that these sellouts have to occur, it is only common sense to try to make them occur as peacefully as possible. It is not in anyone's interest to have domestic conflict over them. Thus, any device which helps to smooth the process by which the losers learn to accept their losses actually makes a valuable contribution to the cohesion, and thus the well-being, of the entire collective entity. It also keeps politicians in office, of course.

International law and litigation happen to provide useful instruments for carrying out such temporizing. Their key attribute is their indeterminate character. Because the definition and enforcement of international legal norms often tend to be uncertain, international obligations and other legal actions can supply just the kind of temporizing solutions governments look for in these situations—vigorou##s action which appears to promise protection, but which may turn out to be less than fully effective when the time comes.

When a government is unable to secure true protection for certain interests, the first form of temporizing will usually be the imperfect international legal commitment—a vague or highly qualified engagement from the other government that suggests a great deal more than it actually promises or means to deliver. Negotiators usually refer to this process as "getting something" for the losing interest. No matter how weak the something is, experience teaches that it is always better than nothing.

International litigation can provide second-stage temporizing. When the ineffective legal obligation does not protect the loser's interest, government is expected to do something. A punch in the nose would do nicely, but of course there are all those other interests being held hostage. What is needed is a punch that will not hit anyone. International litigation is the perfect answer. It is action, or at least something that looks like action. And it takes time, usually lots and lots of time.

Time, of course, is the objective. Generally speaking, both politicians and diplomats regard tomorrow as the preferred time for dealing with unanswerable problems. Some tomorrows are especially propitious, such as the one that occurs the
day after the trade problem has subsided and the offending measure has been withdrawn. Another favorable tomorrow is the one that occurs the day after major trade legislation is voted on. It is interesting to note that almost all the United States GATT litigation from 1960-1975 was bunched around congressional consideration of the two major trade acts in 1962 and 1974.

The United States government made repeated promises to those who were to be injured by the evolution of the Common Agricultural Policy. The promises included all manner of government efforts, diplomatic and political as well as legal. Time does not permit dealing with each promise or with every case that used GATT litigation. I shall concentrate on the one example that is most directly related to the 1981-1982 litigation crisis—the story of the United States's effort to impose GATT legal control over export subsidies.

The first chapter of the story takes place in an earlier round of GATT trade negotiations, the Tokyo Round, held from 1973 to 1979. Like the current Uruguay Round, the Tokyo Round was an attempt to deal with trade problems across the board. One of the problems the United States government had to solve was political unrest at home over its policy toward the Common Agricultural Policy. One of the main sources of unrest was the apparent inability of the United States to limit the Community's ever-increasing use of export subsidies. United States exporters whose foreign markets were threatened by the heavily subsidized European exports wanted the United States to take some action, retaliation if necessary, to stop them. The United States government sought to deflect these pressures for warlike action by promising to negotiate more effective GATT rules—a new Subsidies Code that would provide for effective legal control of export subsidies.

The Subsidies Code was also meant to deal with another urgent problem in United States trade policy. The United States was saddled with a very restrictive countervailing duty law, passed by Congress in 1890, which provided for the imposition of special duties on imports subsidized by exporting countries. The criteria of the law were inconsistent with GATT rules, but the law itself was technically GATT-legal under a grandfather clause permitting continuation of certain pre-1947 legislation. Congress was willing to limit the law's criteria as the GATT required, but only, it said, if other GATT governments paid something for the surrender of this rather tenuous
legal right. A new Subsidies Code was the logical quid pro quo to satisfy this demand for payment.

The Subsidies Code negotiations ran into difficulties from the outset. Early in the Tokyo Round, it was learned that the Community's mandate did not permit it to accept any new obligations limiting the use of subsidies. Community negotiators were authorized only to affirm and restate those subsidy obligations already contained in existing GATT texts. In addition to taking this rigid position, and actually one of the major reasons for it, the Community made it clear that it was not prepared to make any fundamental changes in its Common Agricultural Policy. This latter position appeared to mean that overproduction and the infusion of heavily subsidized exports into world markets would continue.

Notwithstanding this very discouraging prospectus, both sides agreed to go forward with the Subsidies Code negotiations. This decision is a significant bit of evidence about how governments tend to use international legal norms in a situation like this. Both sides wanted what the Subsidies Code could buy, but neither was able to come up with the payment. So they decided to negotiate something that would look like payment.

It is worth underlining "both sides." The United States government wanted to correct the countervailing duty law as much as any other government did because the United States knew that its own producers would suffer as much as anyone else from an outbreak of trade hostilities. While the United States undoubtedly would have preferred to obtain a strong Subsidies Code in the bargain, it realized that changing the law without a quid pro quo would be better than not changing it at all. By the same token, the United States government also wanted to avoid being forced to retaliate over the issue of export subsidies. The United States was therefore willing to oversell the legal value of a weak Subsidies Code if that would buy some time.

If the United States was willing to pretend, so were the other governments. The other governments knew that the United States would have to present "something" if it intended to sell the Subsidies Code as a quid pro quo. Thus, although they may have been instructed to create no new legal engagements, they too had to finesse their instructions and create a little something—as little as possible, to be sure, but enough to make the Code look like "something."
At the end of the Tokyo Round in 1979, the negotiators announced that the Subsidies Code negotiations had been a success. The Code's thirty-three pages of new GATT text contained much that merely papered over disagreements that could not be resolved, but there were a few useful clarifications of old obligations, and even a few small obligations and remedies that were new. The Code also contained a new and quite rigorous dispute settlement procedure, complete with automatic access, time limits, and follow-up procedures. This was perhaps the European Community's largest concession. It was as though, being barred from making any substantive concessions, the Community negotiators had turned to dispute settlement as the only thing left to give. (It would not be the last time that governments would turn to strengthened dispute settlement as a substitute for failed substantive negotiations.)

The temporizing was not yet over. Although the Community's negotiators were satisfied with this text, the European Community itself started having difficulties internally with its own mandate to accept this agreement. Some member governments became concerned that, little as it said, the new Code could still lead to legal actions seeking to undermine the Common Agricultural Policy. They asked for some assurance that the new Code would not be used in this manner. To resolve this last minute crisis, the chief United States negotiator wrote a secret and confidential letter to the chief Community negotiator. The existence of the letter has since been acknowledged, but its exact contents have never been made public. According to second-hand reports, the letter was one of those artfully drafted diplomatic documents that permitted each side to claim that it had won its point.

The main significance of the letter is its demonstration of how little actual consensus there was behind the Subsidies Code. The Community had agreed to little more than a new dispute settlement procedure, and even that concession now appeared to have only qualified support at home. Of course, the secret letter did not amount to a complete pullback by the Community because both the secrecy of the letter and its presumably vague wording made it worth relatively little. Indeed, the function of the letter within the Community was almost certainly to facilitate the same sort of temporizing that was going on in the United States. The letter was a little something the Community negotiators could give to mollify the losers who
had wanted no Subsidies Code at all. The Community too was postponing its hard choices until tomorrow.

In the United States, meanwhile, the Subsidies Code was being presented as a major accomplishment. The presentation worked. The promise of greater legal discipline over export subsidies succeeded in deflecting pressure for more aggressive action against the CAP—for a while. The United States Congress accepted the Code as a sufficient quid pro quo for amending the restrictive countervailing duty law.

United States acceptance of the Subsidies Code tells us a good deal about the temporizing function of international legal arrangements. The quid pro quo episode is particularly interesting. Who was fooling whom about the value of the Subsidies Code? Was the Administration fooling Congress? Was Congress fooling its constituents by pretending to believe in the value of the Code when it knew better? Come to think of it, was anybody fooling anybody?

As far as I have been able to determine, the existence of the letter was known to key congressional staff members and thus was certainly known to the members of Congress on the key committees. One executive branch official described it as "the worst kept secret in Washington." To my knowledge, however, the congressional hearings and committee reports for this legislation contain absolutely no reference to the letter. The reason for this, assumedly, was that Congress wanted to vote for the measures in question whether or not there was a quid pro quo but believed that having the Subsidies Code as an apparent quid pro quo made it easier to do so. That Congress wanted to vote for these measures is not difficult to believe. Judging from its behavior over the past thirty years, Congress basically is not a protectionist institution, and the countervailing duty law in question really was pretty bad as it stood. All Congress really needed, then, was a good justification—someone else to blame if things turned sour. The representation that the United States was gaining an effective Subsidies Code met that need perfectly. The last thing any legislator wanted, therefore, was to be told about the secret letter.

It was not necessary that the Code actually fool the affected constituency. The agricultural interests being hurt by Community subsidies almost certainly knew enough to know that Jack was trading the family cow for a bag of magic beans. It was only necessary that the Code be plausible to voters in general, so that legislators could say, in defense of their vote,
"The Code is a better approach; it should be given a chance to work." The possibility of being able to take such a stance, even if it is not believed by everyone, is a great advantage.

If the story of the Subsidies Code teaches any lesson, it is to underline just how useful and inviting the overselling of international legal institutions can be. It solves problems for any number of participants in the political process. Consequently, one should be ready to find, in almost any particular structure of international obligations, a significant number of what might be called paper obligations—apparent engagements which do not in fact reflect any real consensus or commitment. And when one finds the tendency to create paper obligations coupled with the tendency to write more rigorous litigation rules, one can expect to find dramatic legal failures.

The dramatic failures that occurred in this case were the four legal complaints filed by the United States in 1981-1982. By mid-1981, it had become clear that the European Community was not responding any better to legal complaints about the CAP than it had before. Accordingly, the new Reagan administration came under pressure to demonstrate the new legal weapons that had been presented as the fruits of the Tokyo Round. After all that had been promised, the Reagan administration had no alternative but to litigate.

Of the four United States complaints against European agricultural policy, two were based on the new Subsidies Code rules against export subsidies, one was based on an earlier GATT rule limiting the use of internal subsidies, and one concerned discriminatory tariffs. Each complaint asked for a legal ruling that would have forced a major change in the operation of the CAP. In each case the Community argued strongly that the issues were not suitable for adjudication, mentioning among other things the secret letter, which it represented as a promise not to bring lawsuits seeking such politically impossible results. The Community resisted each step of the procedure and then fought each case on the merits with an exceptional vigor that frequently turned into bitterness.

The United States lost the first Subsidies Code decision despite a fairly good case on the numbers. Choosing to believe that the panel had been cowed by the Community's intransigent position, the United States refused to accept the panel decision and tried, unsuccessfully, to persuade the other government signatories of the Subsidies Code to overturn it. The second Subsidies Code case resulted in a rare split vote on
the panel, a three-to-one decision in favor of the United States's complaint. The Community refused to regard the majority ruling as more authoritative than the minority ruling. The two other cases resulted in unanimous decisions sustaining at least part of the United States's claim, but the Community also refused to accept either of these decisions.

The three cases lost by the Community were eventually settled in 1986-1987. In two of the cases the Community practices complained of were partially modified, and in the other case, the challenged practice was altered as part of a larger deal involving numerous concessions on both sides. The case lost by the United States also produced a slight modification of the Community practice for a brief period, but the issue was subsequently overtaken by what amounts to a much broader subsidy war among the United States, the Community, and others. As of this date, none of the decisions has been adopted.

At the outset of this lecture, I said that neither the litigation crisis nor the reforms proposed to solve it were what they appeared to be. The meaning of that statement should now be clear.

The crisis itself had nothing to do with the strength or weakness of the GATT litigation procedures. These procedures failed because they were asked to enforce a promise that the European Community had never made—or, more accurately, a promise at which the European Community had only hinted. Calling this outcome a failure of the litigation procedure is actually a sort of cover-up, an attempt to shift the blame to the GATT's litigation procedures when in fact responsibility lies in the earlier negotiating failures of the Tokyo Round.

It has to be admitted, however, that the cover-up is a rather nice one because it defines the current weakness of the GATT in terms of something that can probably be done. Even if governments remain unwilling in the Uruguay Round to accept more rigorous substantive rules, they should at least be able to reach agreement on some new procedural rules that can be held out as improvements of the litigation machinery. The outcome is already foreseeable: adoption of consensus minus two, more time limits, more automaticity, and probably one or two efforts to improve the legal quality of the decisions and of the decision makers. This done, negotiators and their governments will be able to declare that substantial progress has been made and that the new legal remedies will better protect the interests not so well protected before. This will buy some time.
Eventually, of course, there will have to be another cycle of litigation to test the new promises. What happens then will depend, once again, not so much on the new procedures, but on what has been accomplished in the interim on matters of substance. And so the cycle will go on, one supposes, into the next century.

There probably is no alternative to this process of staggering from one inadequate form of temporizing to another. The underlying conflicts between various interests are real and unending. Ordinary mortals, working through imperfect institutions, have only a limited capacity to fashion long-term solutions. Long ago, a diplomat advised me, "There are no real solutions to problems in this business; the best that can be hoped for are short-term expedients that keep things together until the next crisis."

There must be something about a legal education, however, that makes one believe in the invisible hand, or in the inchoate wisdom of common law development. It is possible, I think, to identify some kinds of halting progress amid all this wreckage. Consider two examples from the story told today.

First, consider what happened to the European Community. The Community wanted no new pressures on the CAP, but it could not have both complete satisfaction of that goal and the changes of United States policy offered for a Subsidies Code. So the Community agreed to a slight compromise in its position, accepting a Subsidies Code that just hinted at new obligations but more than just hinted at a new dispute settlement procedure. The Community paid dearly for these concessions with several years of bitter litigation and with the lion's share of the diplomatic blame for wrecking GATT law. The Community eventually had to make some partial corrections in its policy to get out of the mess. Moreover, the mere creation of a Subsidies Code has added new pressures to the next round of demands, because the subsidies issue has now become not only a matter of economic policy, but also a matter of the GATT's legal credibility. This is movement—halting, inadequate, and unstable, but it does seem to be going somewhere.

Second, despite all the battering it has taken over the past decade, the GATT litigation procedure still has a good chance of emerging as a stronger legal institution than it was when the decade began. Even though procedural reforms do not address the main problem underlying the hard cases, they do affect what happens in the more ordinary cases. In cases of minor sig-
nificance, the GATT's current procedure has already demonstrated a capacity for crisp and professional decision making that it simply did not have ten years ago. The extraordinary attention being given to dispute settlement reform in the current negotiations will create additional pressure to show that dispute settlement works. This pressure, together with the specific reforms that are adopted, is going to make it even more difficult to avoid or reject legal rulings in ordinary cases.

GATT dispute settlement will probably always teeter on the edge of crisis, for there will always be a tendency to use it to cover up substantive failures. I like to believe, however, that if GATT dispute settlement keeps its balance for another forty years, governments may end up creating an effective litigation procedure in spite of themselves.