

ARTICLES

ENFORCEMENT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

CURTIS REITZ*

1. INTRODUCTION

An important new field of international law, known today as "international economic law," has emerged and taken form. Although the fundamentals of international economic law have existed for at least half a century, the modern international law system stands at a critical juncture. It is always remarkable when new fields of law emerge and take form. Such an event is especially important when the new field becomes part of the body of international law, where there is no supranational government with the power to declare and enforce rules of international law binding upon sovereign nation-states.

The centerpiece of the international economic law system is the General Agreement on Tariffs and Trade ("GATT" or "General Agreement").¹ GATT was originally negotiated in 1947 ("GATT 1947") by the allied nations who had won World War II.² Since 1947, most nations of the world, together with several

* Algernon Sydney Biddle Professor of Law, University of Pennsylvania Law School.

¹ The text of the general agreement, as negotiated in 1947, may be found in the United Nations Treaty Series at 55 U.N.T.S. 1867 and in United States Statutes at Large at 61 Stat. A3 [hereinafter GATT 1947].

² Twenty-three nations participated in drafting the text of the GATT, which contained an Article XXVI for its acceptance and entry into force. *See id.* 61 Stat. A3, at A69, 55 U.N.T.S. 187, at 274. The Article XXVI provisions were never used. Rather, eight nations entered into a truncated version of the General Agreement through the Protocol of Provisional Application ("PPA"). *See id.* 61 Stat. at A8-10, 55 U.N.T.S. at 312. The term "provisional" in the

customs unions have joined, or are attempting to join, the GATT system.³ At the conclusion of the most recent round of GATT negotiations, the Uruguay Round, 117 nations, commonly known as the "contracting parties,"⁴ negotiated the complex new agree-

title of the Protocol signaled that these eight nations initially expected the General Agreement to enter into force soon after 1947 under Article XXVI. Those provisions of GATT have never been used, however. See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 1 (1990) (lamenting that "[a]fter 40 years of 'provisional application,' one might think the world was ready for something more than 'provisional'").

The PPA, by its terms, was open for other nations to sign. Since 1948, more than 100 nations have joined the GATT system in that manner. See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 226 (2d ed. 1990) [hereinafter HUDEC DIPLOMACY] (noting the vast increase in GATT membership).

The PPA did not purport to put the entire draft of the General Agreement into effect. It only provided that Part II (Articles III through XXIII) would apply "to the fullest extent not inconsistent with existing legislation." GATT 1947, *supra* note 1, 61 Stat. at A2051, 55 U.N.T.S. at 308. Legal consequences of that "savings clause" have been considerable. See JACKSON, *supra* at 14 (stating that governments have often asserted the clause to justify "certain national actions regarding international trade").

³ Two blocs of nations historically remained outside the GATT system. During the Cold War, the Soviet Union created an international trade body, COMECON, for trade relations among nations within the Eastern bloc of Soviet satellite nations. With notable exceptions including Czechoslovakia, Hungary, Poland, and Romania, COMECON nations were not members of the GATT system. During the Cold War period East-West trade was conducted outside the GATT regime. The Republic of China, a founder of GATT, left the GATT system. See Jayetta Z. Hecker, *State Trading Enterprises — Compliance with the General Agreement on Tariffs and Trade*, GAO REP., Aug. 30, 1995, at 1, 27. China and Russia are now in the process of seeking to become members of GATT. See *id.* at 27-28; see also Knock, Knock, *ECONOMIST*, Jan. 13, 1996, at 72 (describing Russia and China's desire to join the WTO/GATT system).

Many Islamic countries of the Middle East, including Iran, Iraq, Libya, Saudi Arabia, and Syria, comprise the second large group still outside the GATT system. Thus, international trade in oil from these important OPEC nations is not governed by GATT law. Egypt, Kuwait, and Morocco, however, are GATT nations. See JACKSON, *supra* note 2 app. at 104 (listing the GATT contracting parties). Additionally, several other Middle Eastern nations apply GATT on a *de facto* basis even though they have not formally joined the system. See Alastair Mirst, *Developing IPR in the Gulf: Current Coverage Problems, Post-Uruguay Round Trends*, 17 MID. EAST EXEC. REP., May, 1994, at 9.

⁴ See GATT Secretariat, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, reprinted in 33 I.L.M. 1125, 1131 [hereinafter GATT 1994] (listing 117 contracting parties).

Contracting parties are "those governments which [apply] the provisions of [the GATT] under Article XXVI, or pursuant to the [PPA]." GATT 1947,

ment known as the "Uruguay Round Agreements" or "GATT 1994."⁵ The culmination of the Uruguay Round and the creation of the World Trade Organization ("WTO") in GATT 1994 after seven years of extraordinary effort, is a defining moment in the evolution of international economic law.⁶

GATT 1994 is a remarkable achievement in many respects. While GATT 1947 deals only with trade in goods, GATT 1994 covers, among other matters: trade in services and some aspects of foreign direct investment and intellectual property rights.⁷ With respect to trade in goods, GATT 1994 resolves a number of recurrent problems that caused considerable difficulty under GATT 1947.⁸ Moreover, GATT 1994 also includes major

supra note 1, art. XXXII, para. 1, 61 Stat. at A75, 55 U.N.T.S. at 282. Article XXV uses "CONTRACTING PARTIES," in all capital letters, to mean "the contracting parties acting jointly." *Id.* art. XXV, para. 1, 61 Stat. at A68, 55 U.N.T.S. at 272. This Article preserves the distinction and will utilize all capital letters to indicate those instances where the contracting parties act jointly.

In the GATT 1994 agreement, the 12 European Community ("EC") nations are listed individually and as a collective. *See* GATT 1994, *supra*, 33 I.L.M. at 1131. Most contracting parties are nations, but the GATT system is open to entities not recognized by the international community as sovereign nations. A "government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement may accede to [the GATT system]." GATT 1947, *supra* note 1, art. XXXIII, 61 Stat. at A75, 55 U.N.T.S. at 284. For example, Hong Kong and Macau are listed as contracting parties. *See* GATT 1994, *supra*, 33 I.L.M. at 1131. An additional group of nations are recognized by the CONTRACTING PARTIES as applying GATT on a *de facto* basis. *See* discussion *supra* note 3. Many of these are in the process of becoming a contracting party. *See* discussion *supra* note 3.

⁵ *See* GATT 1994, *supra* note 4.

⁶ *See generally* JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, *THE URUGUAY ROUND: AN ASSESSMENT* (1994) (detailing the efforts that the parties undertook to complete the Uruguay round).

⁷ *See* GATT 1994, *supra* note 4, annexes 1A-1C, 33 I.L.M. at 1154, 1167, and 1197.

⁸ These problems include dumping, subsidies, rules of origin, customs valuation, safeguards, and technical barriers to trade. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Subsidies and Countervailing Measures; Agreement on Rules of Origin; Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; Agreement on Safeguards; Agreement on Technical Barrier to Trade, all *reprinted in* GATT SECRETARIAT, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS*, annex 1A (1994) (reprinting GATT 1947 and the General Agreement as it emerged from the Uruguay Round) [hereinafter *LEGAL*

agreements on agriculture and textiles — two trade sectors that have been the source of severe conflicts among producing nations.⁹

One of the most significant parts of GATT 1994 is the development of a mechanism for authoritative interpretation and enforcement of GATT substantive law. Resolution of disputes within the GATT system has become the preeminent example of litigation in international law. The Understanding on Rules and Procedures Governing the Settlement of Disputes ("1994 Understanding"), a key document contained in the Uruguay Round agreements,¹⁰ builds upon the GATT dispute settlement mechanism which had evolved in a slow and incremental manner under GATT 1947.¹¹

On January 17, 1996, the machinery of the 1994 Understanding produced its first panel ruling in the "gasoline import standards" case.¹² In that case, Brazil and Venezuela successfully challenged U.S. environmental regulations that set higher Clean Air Act standards for imported gasoline than for similar domestically produced fuels.¹³ The United States appealed the decision particularly with regard to the panel's view of the legitimacy

TEXTS].

⁹ See Agreement on Agriculture; Agreement on Textiles and Clothing, both reprinted in LEGAL TEXTS, *supra* note 8, annex 1A.

¹⁰ The process for resolving trade disputes under the WTO is set forth in the Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT 1994, *supra* note 4, Annex 2, 33 I.L.M. at 1226 [hereinafter 1994 Understanding].

¹¹ See JACKSON, *supra* note 2, at 16-17 (noting that "the GATT limped along for forty years").

¹² See Bhushan Bahree, *WTO Panel Rules Against U.S. in Dispute Over Gasoline Norms*, WALL ST. J., Jan. 18, 1996, at A11; Paul Blustein, *WTO Ruling Draws Fierce Criticism*, WASH. POST, Jan. 19, 1996, at F3; David E. Sanger, *World Trade Group Orders U.S. to Alter Clean Air Act*, N.Y. TIMES, Jan. 18, 1996, at D1, D6.

¹³ Acting under the Clean Air Act, the Environmental Protection Agency promulgated a rule that had the effect of setting more stringent standards for imported gasoline than for domestically produced fuel. See Sanger, *supra* note 12, at D6. U.S. producers were permitted to meet standards derived from the quality of their own 1990 gasoline; foreign producers were required to meet a statutory standard, without regard to the quality of their 1990 gasoline. See *id.* Venezuela and Brazil contended that the effect was to impose more stringent standards on gasoline refiners in those nations. See *id.* This unequal treatment by the EPA violated the "national treatment" provision in Article III of GATT 1947, *supra* note 1, art. III, 61 Stat. at A3, 55 U.N.T.S. at 206.

under GATT of environmental protection measures. The Appellate Body found against the United States on April 29, 1996, but did not accept the panel's report on the matter of particular concern to the United States.¹⁴ Although the import of this specific decision is subject to debate,¹⁵ one thing is obvious: the new and improved GATT dispute resolution apparatus is up and running.

This momentous occasion — the rendering of the first WTO panel and appellate decisions — provides an ideal occasion for an historical examination and critical analysis of the GATT legal system. These are formative days for the new GATT dispute resolution system, and it is in the best interest of the international trading system that the infant system take off in the right direction. By looking to “GATT past,” perhaps we can extract useful principles and apply them to the present and future of this field. Toward this end, Section 2 of this Article reviews the development of the international legal system under GATT 1947, with particular attention to the content and quality of decisions that emerged from that system. Section 3 describes the key developments of GATT 1994, the present system as embodied by the WTO. Finally, Section 4 suggests how to improve the future of the GATT legal system by focusing on the institutional participants and processes, aspects that are crucial to the development of any legal system.

2. GATT 1947: “GATT PAST”

2.1. *Development of Dispute Resolution Under GATT 1947: The System*

To understand the important advances in dispute resolution procedure wrought by the Uruguay Round Agreements, it is necessary to consider the history of this field of law.

¹⁴See *WTO: Appellate Body Faults U.S. in Gas Case, But Reverses on Conservation Exception*, 13 Int'l Trade Rep. (BNA) No. 17, at 703 (May 1, 1996).

¹⁵ In a recent essay, one scholar described the WTO finding as a “non-event” because, among other things, by the time the WTO issues a final ruling, the preferential treatment to U.S. producers will likely expire. See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 297-98 n.14 (1996).

2.1.1. *Article XXIII of the General Agreement*

As the GATT system began to function in 1948, it had in its text only the most primitive mechanism for interpreting and enforcing its provisions.¹⁶ Paragraph 2 of Article XXIII contains the following:

If no satisfactory adjustment [of a dispute] is effected between the contracting parties concerned within a reasonable time . . . 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.¹⁷

Slowly and haltingly, the CONTRACTING PARTIES built upon the phrase "make appropriate recommendations . . . or give a ruling"¹⁸ and fashioned from it the power to decide disputes submitted to them for resolution.¹⁹

¹⁶ This insufficiency is explained, in part, by the failure of parallel negotiations attempting to create an International Trade Organization ("ITO"). The ITO would have served a number of functions in connection with the GATT. Without an organization, the contracting parties were compelled to extrapolate the elements of a dispute resolution mechanism from a few phrases in the General Agreement, namely Article XXIII. See JACKSON, *supra* note 2, at 15-17 (describing attempts to provide substitutes for the ITO).

¹⁷ GATT 1947, *supra* note 1, art. XXIII, para. 2, 61 Stat. at A64-65, 55 U.N.T.S. at 268. The use of CONTRACTING PARTIES in all capital letters is explained *supra* note 4.

¹⁸ *Id.*

¹⁹ The adjudicative function is further implied later in Article XXIII:

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 obligations or concessions under this Agreement as they determine to be appropriate in the circumstances.

Id. This sentence is consistent with an adjudicative function, but action by the CONTRACTING PARTIES is not conditioned upon a finding of a violation of a GATT obligation. Although this sentence has generally been employed only where a party violates such an obligation, one could conceive of "circumstances [that] are serious enough to justify such action" even though no breach of the Agreement had occurred.

The essential step in creating a system of adjudication was to distinguish the adjudicative dispute resolution process from the conciliation or adjustment process contemplated by most of Article XXIII. Conciliation and adjustment are methods of bringing disputants to a solution which each party elects to accept. Adjudication, on the other hand, contemplates an institutional process that determines the rights and obligations of the parties.²⁰

The scope of this sentence, including both adjudicative and conciliatory functions, is commensurate with paragraph 1 of Article XXIII, which contemplates conciliation with a view toward satisfactory adjustments of disputes. *See id.* That paragraph provides for efforts at conciliation if benefits accruing to contracting parties are being nullified or impaired or if the attainment of an objective of the General Agreement is being impeded. *See id.* The paragraph contemplates that nullification or impairment of benefits or impeding of GATT objectives may occur in three different ways:

- (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.

Id. Breach of a duty (obligation) and interference with a right (accrued benefit) are sound bases for adjudicative dispute resolution. An example of the latter is the situation in which a tariff binding on a given product has given exporters an expectation of access to the market of that nation and that expectation is subsequently impaired by subsidies to domestic production. Even though the domestic subsidy may not violate GATT, the market effect impairs what may be described as a benefit accruing under the tariff. The 1988 oilseeds controversy between the United States and the EC was of such a nature. *See* ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* app. at 558-61 (1993) [hereinafter HUDEC CASES] (discussing case number 179).

"Existence of any other situation," however, does not give rise to a recognizable ground for an adjudicative proceeding. Nor is it clear what function a dispute resolution mechanism could have if nations' actions, while not in conflict with GATT, nevertheless impede attainment of a General Agreement objective. A claim was made once on the basis of the "existence of any other situation," but the panel that heard the case decided on other grounds and took no notice of this claim. *See id.* app. at 445-47 (discussing case number 54). It appears that a claim of "impairment-of-objective-of-the-Agreement" has never been made. *See* Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in 1 PIERRE PESCATORE, ET AL., *HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT* pt. 2, at 6 (6th ed. 1995) [hereinafter *HANDBOOK*].

²⁰ The first paragraph of Article XXIII lists as its sole objective the achievement of a "satisfactory adjustment of the matter" by the "sympathetic consideration" of the complaint by the other party. GATT 1947, *supra* note 1, art. XXIII, para. 1, 61 Stat. at A64, 55 U.N.T.S. at 268. It provides nothing to support a resolution other than a settlement. The second paragraph continues in the mode of seeking settlements with the guidance of the

The former does not entail authoritative interpretation of a governing text, and resolutions are the results of political choices by the parties. The latter is legal, rather than political, in character. Although slow to develop, the emergence of an adjudicative function within the GATT system was a remarkable achievement. Compared to the legal systems of most nations, the GATT body of law was frail and inadequate by many measures. Nonetheless, despite its weaknesses, dispute resolution in an adjudicative form emerged as a distinct legal system.²¹

2.1.2. *The 1979 Understanding*

The CONTRACTING PARTIES occasionally recorded their understandings as to accepted practices for dispute resolution into formal memoranda. Prior to GATT 1994, the most significant codification of dispute resolution under the General Agreement was the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance ("1979 Agreement").²²

In an annex to the 1979 Understanding, the CONTRACTING

CONTRACTING PARTIES' "appropriate recommendations." See *id.* art. XXIII, para. 2, 61 Stat. at A64-65, 55 U.N.T.S. at 268.

²¹ See generally Philip M. Nichols, *GATT Doctrine*, 36 U. VA. J. INT'L L. (forthcoming May 1996) (discussing the substantive body of GATT law as a separate and distinct legal doctrine).

²² See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT BISD 26th Supp. 210 (1980) [hereinafter 1979 Understanding]. Between 1979 and the Uruguay Round, the CONTRACTING PARTIES took two actions. First, in 1982, the CONTRACTING PARTIES agreed on a Ministerial Declaration on Dispute Settlement Procedures. See Ministerial Declaration, Dispute Settlement Procedures, Nov. 29, 1982, GATT BISD 29th Supp. 9, 13 (1983). Much of this brief Declaration addresses the issue of delays in the panel process. This Declaration also mentions, apparently for the first time, the remedial concept of compensatory adjustment with respect to products not involved in the dispute. See *id.* pt. ix, GATT BISD 29th Supp. at 15. Second, two years later, ostensibly on a trial basis, the CONTRACTING PARTIES adopted a provision for procedures that would result in the establishment of dispute resolution panels with less delay. See Dispute Settlement Procedures, Nov. 30, 1984, GATT BISD 31st Supp. 9 (1985). After the adoption of this provision, persons not affiliated with governments could serve as members of the pool of prospective dispute resolution panelists. See *id.* at 9.

In 1989, as the Uruguay Round negotiations entered their third year, the CONTRACTING PARTIES created an interim agreement that foreshadowed a number of the provisions eventually incorporated into the 1994 Understanding. See Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT BISD 36th Supp. 61 (1990).

PARTIES restated their settled practice by declaring the following: the CONTRACTING PARTIES are obligated to give recommendations or rulings on disputes about the meaning and application of GATT;²³ the GATT Council, which generally meets monthly, "is empowered to act for the CONTRACTING PARTIES," which meets annually in accordance with normal GATT practice;²⁴ the Council has established panels to assist it and these panels have become the "usual procedure" since 1952 for hearing disputes and making findings and conclusions;²⁵ panels are composed of three to five persons as "agreed upon by the parties concerned and approved by the GATT Council;"²⁶ and panelists are "usually selected from permanent delegations"²⁷ and "expected to act impartially without instructions from their governments."²⁸ Finally, at the conclusion of a panel's work, if the parties have not reached a mutually satisfactory resolution, the panel submits a written report to the Council.²⁹

The 1979 Understanding reaffirmed the CONTRACTING PARTIES' commitment that "the customary practice of the GATT in the field of dispute settlement . . . should be continued in the future, with the improvements set out [in the Understand-

²³ See 1979 Understanding, *supra* note 22, Annex 1, para. 1, at 215. The obligation was said to derive from GATT 1947 Art. XXIII:

If no satisfactory adjustment [of a dispute] is effected between the contracting parties concerned within a reasonable time . . . 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.

GATT 1947, *supra* note 1, art. XXIII, para. 2, 61 Stat. at A64-65, 55 U.N.T.S. at 268. For the purpose of definitive dispute resolution, the key concepts are "investigate" and "give a ruling." This paragraph also reflects the idea that the CONTRACTING PARTIES could assist the parties to disputes by giving "appropriate recommendations." The distinction between a non-binding recommendation and a binding ruling, although obvious enough now, was blurred by joining the two in the critical sentence of Article XXIII(2).

²⁴ 1979 Understanding, *supra* note 22, annex, para. 1 n.1, at 215.

²⁵ *Id.* annex, para. 6(ii), at 217.

²⁶ *Id.* annex, para. 6(iii), at 217.

²⁷ *Id.* annex, para. 6(ii), at 217.

²⁸ *Id.* annex, para. 6(iii), at 217.

²⁹ See *id.* annex, para. 6(v), at 218. Panel reports include findings of fact, applicable GATT provisions, and the rationale of the panel's decision. See *id.*

ing]."³⁰ Going beyond settled practice, the Understanding instituted a number of procedural improvements for the establishment and functioning of panels.³¹ The Understanding set specific time periods for various steps in the panel stage of the process.³²

Perhaps the most significant part of the 1979 Understanding, however, was the commitment that the CONTRACTING PARTIES would take formal action on panel reports submitted to the General Council.³³ General GATT practice was that the CONTRACTING PARTIES, or the Council, would take action only if all parties agree; any individual nation could block action.³⁴ Thus, even the losing party to a dispute could block action by the CONTRACTING PARTIES or the Council. Without explicitly addressing the norm that action requires consensus, the 1979 Understanding generally acknowledged the CONTRACTING PARTIES' responsibility to take action on a panel report.³⁵ The agreement was, however, imprecise as to the time of action: "Reports of panels . . . should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels . . . within a reasonable period of time."³⁶

The 1979 Understanding addressed the effect of a ruling by the Council or the CONTRACTING PARTIES. The General Agreement lacked provisions for enforcement of such rulings. The Understanding addressed the post-ruling responsibility of the CONTRACTING PARTIES in these terms:

The CONTRACTING PARTIES shall keep under surveil-

³⁰ *Id.* annex, para. 7, at 211.

³¹ *See id.* annex, paras. 8-23, at 211-14.

³² *See id.* annex, paras. 11, 12, 20, at 212, 214.

³³ *See id.* annex, para. 21, at 214. This provision also sets time guidelines and provides suggestions as to what the CONTRACTING PARTIES should consider. *See id.*

³⁴ *See* G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 363-65 (1996) (discussing the "de facto" veto power that the losing party enjoyed under the previous system).

³⁵ *See* 1979 Understanding, *supra* note 22, para. 21, at 214 (noting that the CONTRACTING PARTIES "should take appropriate action on reports of panels").

³⁶ *Id.*

lance any matter on which they have made recommendations or given rulings. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution.³⁷

2.1.3. *The Tokyo Round Codes*

The 1979 Understanding was a product applicable to all of the nations in the GATT system; it was negotiated without violating the consensus requirement for GATT decisions in the so-called Tokyo Round. During that round, a number of proposals for substantive improvements of GATT law were offered but could not achieve consensus. Supporters of these reforms created a number of codes, including what are known as the Antidumping Code and the Subsidies Code,³⁸ that were open to signature by any GATT nations but that were binding only on nations electing to do so. Signatories included all of the major developed nations, including the United States, the nations of the European Community, Japan, and Canada. However, most other nations in the GATT system did not join.

These codes created dispute settlement mechanisms that became a second tier of such mechanisms within the GATT system. Each code-created mechanism was procedurally the same as the Article XXIII mechanism, but only nations that had joined a code could be a complainant or respondent in a code-based dispute. Each code was administered by a "committee" comprised of the signatory nations. These committees performed the functions of the CONTRACTING PARTIES or the Council in the GATT system. The uncertain relationships between the different tiers of dispute settlement mechanisms and among the

³⁷ *Id.* para. 22, at 214.

³⁸ See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT BISD 26th Supp. 56 (1980) [hereinafter Subsidies Code]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT BISD 26th Supp. 171 (1980) [hereinafter Antidumping Code].

separate code mechanisms eventually became a source of dispute.

2.1.4. *GATT Case Law and Commentaries*

Following the Tokyo Round, activity in the GATT system of dispute resolution increased considerably and reached a level of maturity, but the activity took place mostly in the dark. The primary materials were fully accessible to only a small body of experts. Consequently, writings about the GATT system generally and about panel decisions tended to be relatively shallow.

Fortunately, the accessibility to and thoughtful analysis of GATT law has improved. As the Uruguay Round was drawing to a close, several scholars published a number of important and valuable books and articles dealing with the history of GATT dispute resolution. Outstanding among these is a book by Professor Robert E. Hudec.³⁹ Professor Hudec is one of the most respected authorities of that subject in the United States, or perhaps the world.⁴⁰ Hudec makes accessible a rich store of detailed knowledge about the history of GATT dispute resolution.

Hudec's most important contribution is a comprehensive overview of all of the 207 controversies that had been decided in the GATT system through the early 1990s.⁴¹ Each of the cases is described in summary form, detailing the complaint, legal claim, commercial issue, disposition, and ultimate result in each case.⁴² Hudec also presents an extensive statistical analysis of these cases in terms of both the substance of the disputes, the procedures followed within the GATT system, and the ultimate outcomes.⁴³

³⁹ See HUDEC CASES, *supra* note 19.

⁴⁰ For earlier works published by Professor Hudec, see HUDEC, DIPLOMACY, *supra* note 2; Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980); Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615 (1970); Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443 (1988).

⁴¹ See HUDEC CASES, *supra* note 19 app. at 373-585. Hudec collected and categorized the case law by the date of the filing of a complaint. Using this method of dating the cases, his collection cuts off with cases initiated prior to 1990. Decisions in these cases, which Hudec reports, extend into the decade of the 1990s.

⁴² See *id.*

⁴³ See *id.*

The data, broken down into decades,⁴⁴ reveal trends that occurred within the first half century of GATT experience. These data are accompanied by Hudec's rich narrative account of the history of dispute resolution within the GATT system.⁴⁵ Hudec imparts a sense of the interplay of political and economic forces, the drama of sovereign nations groping for answers to novel international legal problems, and the slow and tortuous movement toward creating a body of governing law.⁴⁶

Two other recent publications complement Professor Hudec's book. *Adjudication of International Trade Disputes in International and National Economic Law*⁴⁷ is a 1992 compilation of studies edited by Professors Ernst-Ulrich Petersmann and Günther Jaenicke. Some of the studies, most notably one by Professor Petersmann himself, address the GATT dispute settlement system broadly. The second work comes from Justice Pierre Pescatore, who published the *Handbook of WTO/GATT Dispute Settlement ("Handbook")*⁴⁸ with assistance from Professors William J. Davey⁴⁹ and Andreas F. Lowenfeld.⁵⁰ The *Handbook*, a loose-leaf book with supplements, has been and hopefully will continue to be updated by Pescatore. The *Handbook* contains Pescatore's summaries of rulings made in the decided cases together with his general comments on the GATT dispute resolution system. A major contribution of the *Handbook* is that it fully reprints the

⁴⁴ Hudec assigns cases to the decade in which the complaint was initiated. For these purposes, Hudec treats the first 12 years of GATT history, 1948-1959, as the decade of the 1950s. The following three decades he examines are 1960-1969, 1970-1979, and 1980-1989. See *id.* at 287.

⁴⁵ See *id.* at 29-57, 129-77, 199-270.

⁴⁶ Hudec also discusses and critiques the quality of some of the GATT case law. See, e.g., *id.* at 130-36 (analyzing the five cases in which the complaint was brought before the Tokyo round but settled afterwards). Hudec's analyses of individual decisions are invariably interesting and worthwhile. See, e.g., *id.* at 59-100 (discussing the details of the DISC case).

⁴⁷ ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW (Ernst-Ulrich Petersmann & Günther Jaenicke eds. 1992) [hereinafter PETERSMANN ADJUDICATION].

⁴⁸ See HANDBOOK, *supra* note 19.

⁴⁹ Professor Davey contributed an overview on the GATT system. See William J. Davey, *The WTO / GATT World Trading System: An Overview*, in 1 HANDBOOK, *supra* note 19, pt. 1, at 7.

⁵⁰ For the brief preface written by Professor Lowenfeld, see Andreas F. Lowenfeld, *First Thoughts on Dispute Settlement in the World Trade Organization*, Preface to 1 HANDBOOK, *supra* note 19, at vii.

findings and conclusions of decisions in the GATT system.⁵¹

In their own ways, Hudec and Petersmann describe the entire corpus of controversies that have been submitted and decided in the GATT system through the early 1990s. Hudec provides a catalogue of all 207 cases initiated before 1990 together with a useful summary of each of the matters.⁵² Petersmann provides a chronological list and brief summary of cases submitted to the CONTRACTING PARTIES or the Council through November, 1990.⁵³ Petersmann describes nine cases, initiated in 1990, that are not in Hudec's profile.⁵⁴ Pescatore's contribution to describing the corpus of GATT case law is confined to the ninety-five cases in which final rulings were made.⁵⁵ He provides a short summary of each decision.⁵⁶

Resolution of these controversies within the GATT system has produced a substantial body of reasoned case decisions. As would be expected in any system of dispute resolution, many of these GATT disputes terminated short of panel decision through settlements or withdrawal of complaints.⁵⁷ Nonetheless panels have issued written reports in a substantial number of disputes.

⁵¹ See, e.g., 2 HANDBOOK, *supra* note 19, at DD71/1 - DD71/5 (reprinting the findings and conclusions of a dispute over Norwegian import restrictions on apples and pears).

⁵² See HUDEC CASES, *supra* note 19 app. at 373-585.

⁵³ See Ernst-Ulrich Petersmann, *GATT Dispute Settlement Proceedings Under Article XXIII 1948-1990: Chronological List of Complaints Submitted under GATT Article XXIII to the GATT CONTRACTING PARTIES or the GATT Council*, in PETERSMANN ADJUDICATION, *supra* note 47, annex.

⁵⁴ See *id.* Petersmann's total list contains only 149 cases. See *id.* The difference between the case lists presented by Petersmann and Hudec results principally from Petersmann's omission of disputes initiated under the dispute resolution mechanisms set up by some of the GATT nations in the GATT codes, notably the Antidumping Code and the Subsidies Code. In disputes under these codes, panel reports do not come before the GATT Council or the CONTRACTING PARTIES. See *supra* note 38 and accompanying text.

See CISG art. 74, *supra* note 1, S. TREATY DOC. NO.

9 at 37, 19 I.L.M. at 688. See CISG art. 74, *supra* note 1, S. TREATY DOC. NO. 9 at 37, 19 I.L.M. at 688.⁵⁵ See 1 HANDBOOK, *supra* note 19, pt. 2, at 3.

⁵⁶ See *id.* at pt. 2 CS1-CS95. The Secretariat of GATT has compiled, from time to time, an Analytical Index of each article of the General Agreement. The Analytical Index has become an important reference tool. The most recent edition is GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE (6th ed. 1995).

⁵⁷ See HUDEC CASES, *supra* note 19 app. at 423 (discussing case number 11).

Overall, Hudec counts eighty panel reports in this corpus of law.⁵⁸ In a further eight cases, a plenary body⁵⁹ acted without the aid of prior consideration by a panel.⁶⁰

Four notable conclusions can be drawn from Hudec's compilation of GATT caselaw: (1) the amount of GATT litigation grew substantially in the 1980s;⁶¹ (2) among the cases that resulted in panel decision, the success rate of complainants has always been high and became even higher in the last decade reported;⁶² (3) complainants whose claims were denied by panels rarely sought to prevail in the plenary body notwithstanding the panels' views;⁶³ and (4) GATT plenary bodies have tended not to act as

⁵⁸ See *id.* at 274. Hudec notes that 88 complaints resulted in rulings, eight of which were not panel rulings. See *id.* n.3.

⁵⁹ Hudec defines the plenary body as the actor that has final authority in administering the trade agreement under which a complaint is filed. The plenary body for GATT is either the CONTRACTING PARTIES or the GATT Council. The plenary body for the GATT Codes are the committees that those documents establish. See *id.* n.2.

⁶⁰ See *id.* n.3.

⁶¹ By Hudec's account, of the 207 proceedings initiated between 1948 and 1989, 115 were complaints filed in the 1980s. See *id.* at 287. Of that number, 47 concluded with actual rulings, representing more than half of the 88 rulings Hudec examines. The remaining 68 were settled (28 cases), or withdrawn (40 cases).

⁶² See *id.* at 289. Overall, panels ruled in favor of the complaining party in 68 cases reported, a success rate of 77%. In cases from the 1980s, panels found violations of GATT in 40 cases, or 85% of the panel rulings. See *id.*

⁶³ No occasion for the plenary body to act would arise if the parties settled the controversy after a panel decision had been rendered. Hudec notes that there were only two cases (his case numbers 91 and 102) in which the complainant sought to have panel rulings of no-violation set aside. See *id.* app. at 479, 489.

The former, a 1979 case by the United States against Spain, involved quantity restraints on imported soybean oil allegedly instituted by the Spanish government to protect the market for domestically produced olive oil. The panel found no violation of Article III. The United States asked the GATT Council to "note" the panel report rather than "adopt" it because of panel error in its interpretation of Article III, but the United States also stated that it was withdrawing its complaint against Spain. See *id.* app. at 479-81.

The latter was a 1981 action by Canada which contended that the United States violated GATT in using 19 U.S.C. § 337 to find that automobile parts made in Canada infringed a U.S. patent. The underlying claim was one of denial of national treatment because domestic United States intellectual property law applied differently than § 337, which applies only to imported goods. The panel found for the United States under an exception in Article XX(d). See GATT 1947, *supra* note 1, art. XX(d), 61 Stat. at A61, 55 U.N.T.S. at 262. Canada and others argued in the GATT Council that the panel's

appellate tribunals — rarely has a plenary body modified or reversed a panel on the ground that the panel erred in its legal analysis or its factual findings.⁶⁴

Final decisions in favor of complainants are not self-enforcing in any legal system, but enforcement is a particular difficulty in GATT litigation. GATT plenary bodies lack power to enforce their rulings. Compliance or noncompliance is the choice of the nations against whom decisions have been rendered. Hudec therefore devotes considerable attention to accounting for the eventual outcomes of cases in which panels found violations of GATT. In doing this, Hudec divided the cases into three groups which he labelled “full satisfaction,” “partial satisfaction,” and “negative outcome.”⁶⁵ Hudec’s assignment of cases to these groups was, necessarily, somewhat subjective, but his judgments were guided by his considerable experience.

The results, somewhat surprisingly, indicate a recent decline in the extent of compliance with panel decisions.⁶⁶ From 1948 until the cases of the 1980s, in cases with known rulings in favor of complainants, Hudec classified twenty-seven (100%) as ending with full satisfaction or partial satisfaction; none had a “negative outcome,” and most (eighty-six percent) were in the “full satisfac-

reading of Article XX was wrong. The Council “adopted” the panel report but added a written understanding that Council action did not foreclose further challenges to the validity of the relevant section. See HUDEC CASES, *supra* note 19 app. at 489-90. In a subsequent case, the panel found § 337 to be violative of Article III. See *id.* app. at 547 (discussing case number 162).

⁶⁴ See HUDEC CASES, *supra* note 19, at 274 n.3. Since GATT practice allows each panel to determine its own procedures, it does not appear that parties challenge panel decisions for procedural irregularity.

⁶⁵ See HUDEC CASES, *supra* note 19, at 276. The category of “negative outcome” includes two subcategories: cases in which violators took no remedial action and cases in which they superficially satisfied the claims but only after the complainants had acceded to certain demands. See *id.* at 276-77.

⁶⁶ For this part of the statistical profile, Hudec did not distinguish between panel decisions adopted by a GATT plenary body and panel reports not adopted by a plenary body. He classified instances of noncompliance with all panel reports finding violations of GATT law, whether or not adopted by a plenary body, as cases with a “negative outcome.” Implicit in that system of classification is Hudec’s judgment about the lack of legal significance in rulings by the CONTRACTING PARTIES, the Council, or Committees. That judgment is not shared by other students of GATT dispute resolution, particularly Pierre Pescatore. He declares: “[P]anel reports which did not meet with the [CONTRACTING PARTIES] approval . . . have no legal authority. Authors who rely on such material are misleading their readers.” 1 *HANDBOOK*, *supra* note 19, pt. 2, at 25.

tion" group.⁶⁷ This picture, however, changed substantially in the decade of the 1980s. During this period, Hudec placed seven cases (eighteen percent) in the category of negative outcomes.⁶⁸

⁶⁷ See HUDEC CASES, *supra* note 19, at 290.

⁶⁸ See *id.* Somewhat surprisingly, Hudec's seven cases of "failure" are not coincident with the seven cases from the 1980s in which the losing party blocked adoption of panel reports. Only two of the "blocked" panel decisions appear in the category of "negative outcomes." The former involved countervailing duties imposed by Canada on boneless beef imported from the European Community; the latter involved the imposition by the United States of antidumping duties on steel pipes and tubes imported from Sweden. See *id.* app. at 533, 572 (discussing case numbers 149 and 191).

In five of Hudec's "negative outcome" cases, the panel reports had been adopted by the plenary body. See *id.* app. at 482, 512, 547, 569, and 575 (discussing case numbers 93, 125, 162, 188, and 195).

There are five cases where adoption of panel reports was blocked, but which Hudec excluded from his group of "negative outcomes." Hudec questioned the soundness of the panel's reasoning in two of these. See *id.* app. at 493, 502 (discussing case numbers 105 and 113). In two others, respondents complied with the panels' rulings even though not adopted by a plenary body. See *id.* app. at 496, 518 (discussing case numbers 107 and 132). The fifth case involved the Airbus subsidy controversy; after blocking adoption of the panel report, the European Nations entered into an agreement with the complainant, the United States, that had the prospect of resolving the broad problem of aircraft subsidies. See *id.* app. at 576 (discussing case number 195).

By Hudec's account, the "negative outcomes" in these seven cases were exacerbated by "negative outcomes" in an additional nine cases (thirteen percent) in which complaints were withdrawn for inadequate reasons. See *id.* at 292. Seven of these were from the 1980s, in which a "probably valid" complaint was withdrawn after impasse or settled by complainants' acceding to violators' arm-twisting. See *id.* In a further eighteen cases, most from the 1980s, Hudec classified the outcome as "negative" because, in his judgment, the reasons for withdrawal were not "adequate." Hudec explained his reasoning this way:

If the complaint has been abandoned in circumstances indicating that the complainant government gave up because it did not believe GATT law would be able to enforce the claim, we have a case of potential legal failure. There are basically two withdrawal situations that fit this description, corresponding to the two kinds of "negative outcome" The first situation is the case that simply ends in impasse, that is, the defendant refuses to change the measure complained of, and after a while the complainant just gives up without seeking to move the procedure forward to a legal ruling. The second situation involves complaints directed at an arm-twisting trade restriction; the potentially negative outcome occurs when, after filing the GATT complaint, the complaining government subsequently gives in to the arm-twisting, accedes to the demand, and then withdraws the GATT complaint because the arm-twisting restriction, having served its purpose, has been terminated by the defendant government.

Id. at 281-82.

Hudec classified five cases (thirteen percent) as complete defiance (no action); in two cases (five percent) the losing party complied but only after the complainant paid a "price" to which the violator was not entitled under the ruling or by GATT law.⁶⁹ This increase in noncompliance and "negative outcomes" provided an impetus to restructure the GATT dispute resolution system.

2.2. *The Substance of Panel-Created GATT Law*

The collected body of decisions rendered by GATT panels and the plenary bodies, added to the text, has become the substantive corpus of GATT law. It is helpful to classify the official texts of the General Agreement and the Codes as "primary" GATT law, and the collected decisions of the dispute resolution mechanisms as "secondary" GATT law. The time has come to give serious attention to the content and quality of this body of secondary GATT law. Fundamental questions arise in two sets: content and quality. The first set of questions explores the contours and dimensions of this new body of case law. What is the relationship between the primary, positive law of the GATT system, the General Agreement and the GATT Codes, and these secondary decisions? And how has the process of dispute resolution contributed to the interpretation of the texts? A second set of questions is quite different. It asks for assessment of the quality of the reasoning and results of the secondary decisions. Are panel rulings "sound"? Are the decisions and the reasons, on their merits, "right"? At this historical juncture, the lessons learned from the answers to these questions provide a unique opportunity to incorporate positive changes into the new system. After reviewing the contours and quality of GATT rulings, this Article suggests some possible structural changes, as well as variations in external attitudes that can give meaningful effect to the lessons learned.

2.2.1. *The Contours of Panel Rulings*

One of the greatest contributions of Hudec's work is its comprehensive picture of the entire corpus of GATT law generated by the dispute resolution system. Hudec includes a useful table in an appendix of the distribution of GATT provi-

⁶⁹ See *id.* at 290.

sions cited in complaints, which illustrates how frequently — or infrequently — complaining parties cite to certain GATT provisions.⁷⁰ From this table of distribution, a reader can also determine the distribution of various GATT provisions in the resulting panel rulings. Pescatore includes a similar table in his *Handbook*.⁷¹

2.2.1.1. *Action Versus Non-Action*

Hudec's table reveals that a few GATT articles have been litigated extensively, while others have received only minimal consideration in this process. Articles I, II, III, XI, and XXIII of the GATT have been cited most frequently.⁷² The numerous references to Article XXIII is because that article is the framework for the GATT 1947 dispute resolution system.⁷³ The other frequently cited articles contain fundamental principles of substantive GATT law. Article I presents the most favored nation principle, which basically precludes discrimination in trade measures;⁷⁴ Article II provides the basic framework for tariff "concessions" made by the contracting parties;⁷⁵ Article III establishes the principle of national treatment: once goods have been imported into the territory of a contracting party, that party may not discriminate between those goods and goods produced domestically;⁷⁶ and finally, Article XI proscribes quantity restraints on imports or exports.⁷⁷

⁷⁰ See HUDEC CASES, *supra* note 19 app. at 407-11. The table lists each GATT provision without distinguishing between references that constitute part of a panel's "holding" and others that describe issues raised by one of the parties but not reviewed by the panel. *See id.* Nonetheless, Hudec's table greatly facilitates the location of GATT provisions for anyone interested in working with this body of law.

⁷¹ See 1 HANDBOOK, *supra* note 19, pt. 2, at index 2/1 - 2/3. Since the *Handbook* includes only actions by plenary bodies, the index of Articles refers only to citations in panel reports. *See id.*

⁷² See HUDEC CASES, *supra* note 19 app. at 407-09.

⁷³ See *supra* note 19 and accompanying discussion.

⁷⁴ See GATT 1947, *supra* note 1, art. I, 61 Stat. at A12-13, 55 U.N.T.S. at 196-200.

⁷⁵ See *id.* art. II, 61 Stat. at A14-17, 55 U.N.T.S. at 196-200. These concessions are specified in schedules attached to the General Agreement. *See id.* 61 Stat. at A91-1362, 56-61 U.N.T.S. *passim*.

⁷⁶ See *id.* art. III, 61 Stat. at A18-19, 55 U.N.T.S. at 204-08.

⁷⁷ See *id.* art. XI, 61 Stat. at A32-34, 55 U.N.T.S. at 224-28.

The case distribution reveals that other important — and controversial — areas of GATT law have not been the subject of significant panel consideration.⁷⁸ The GATT article on antidumping, Article VI,⁷⁹ as well as the GATT Antidumping Code,⁸⁰ have only substantially come before panels five times.⁸¹ This sparsity of antidumping cases within the GATT system is surprising in light of the considerable international ferment about arbitrary and protectionist administration of national antidumping laws.⁸²

The provision in Article XIX regulating nations' resort to emergency action, sometimes called the "escape clause,"⁸³ represents another area mostly neglected by GATT panels. Although commentators have devoted extensive theoretical analysis and political discussion to Article XIX and the economic rationales for emergency action,⁸⁴ only one case from the 1980s

⁷⁸ See HUDEC CASES, *supra* note 19 app. at 407-11.

⁷⁹ See GATT 1947, *supra* note 1, art. VI, 61 Stat. at A23-25, 55 U.N.T.S. at 212-16.

⁸⁰ See Antidumping Code, *supra* note 38.

⁸¹ See HUDEC CASES, *supra* note 19 app. at 407-09 (referring to case numbers 27, 58, 133, 188, and 191). Other cases can be excluded from this pool because the merits of the cases were not reached in the decision. A panel was established but rendered no decision in case number 197. *See id.* at 578. In two other cases, complaints raised issues of antidumping law but panels were not constituted. *See id.* at 515, 579 (referring to case numbers 128 and 199).

Petersmann has published an article describing five panel decisions that have arisen out of antidumping proceedings under Article VI of GATT and the 1979 Agreement on Implementation of Article VI of the General Agreement. *See* Ernst-Ulrich Petersmann, *Settlement of International and National Trade Disputes Through the GATT: The Case of Antidumping Law*, in PETERSMANN ADJUDICATION, *supra* note 47, at 77-138. Petersmann omitted Hudec case number 58, but included another case which began in the 1990s and, therefore, is not one of Hudec's cases. *See id.* at 117-18.

⁸² Petersmann observes that GATT dispute settlement proceedings could have provided a progressive elaboration of the substance of Article VI and the Antidumping Code, but did not do so. *See* PETERSMANN ADJUDICATION, *supra* note 47, at 135. Although he offers no explanation for the relative lack of complaints and rulings in this area, he concludes that, "[i]f the Uruguay Round negotiations should fail to produce more precise and more balanced antidumping rules, it seems likely that exporting countries will have increasing recourse to the dispute settlement procedures in order to prevent protectionist abuses of antidumping rules . . ." *Id.* at 137-38.

⁸³ *See* GATT 1947, *supra* note 1, art. XIX, 61 Stat. at A58-60, 55 U.N.T.S. at 258-62.

⁸⁴ *See, e.g.,* Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI.

involves this article, and it did not result in a panel decision.⁸⁵

The relative infrequency of complaints on these subjects and others merits further inquiry, evaluation, and scholarly analysis. The absence of rulings is attributable, of course, to national governments' electing not to file complaints. This superficial explanation for non-action is insufficient, however, because it fails to ask *why* the governments choose not to act. Hudec did not set out to explore "why the dog didn't bark," but he did, to his merit, frame these questions and provide detailed procedures with which to study and analyze these questions.

2.2.1.2. *General Trends Emerging From GATT 1947 Adjudication*

Hudec subjects panel litigation of GATT provisions to a range of interesting statistical analyses. Most importantly, he categorizes the issues litigated based on the nature of government conduct that is allegedly in violation of the GATT or a GATT Code.⁸⁶ Hudec divides these "trade measures" into six categories: tariffs, nontariff barriers ("NTBs"), trade distorting subsidies, discriminatory tariff measures, discriminatory NTBs, and antidumping or countervailing duties.⁸⁷ Organizing cases around these categories reveals considerable differences in the number and significance of the cases with at least four general trends emerging.

Although tariff controversies were more significant early in the life of GATT, they have become less significant over time. Two kinds of tariff disputes generally arise: (1) levels of tariff duties and (2) classification of goods for tariff purposes. Problems

L. REV. 255 (1991).

⁸⁵ See HUDEC CASES, *supra* note 19 app. at 507 (discussing case number 117). The EC instituted this action against Switzerland, for briefly restricting import of table grapes. The restriction expired before a panel was established. *See id.* The only Article XIX case that went to decision found that the United States had not violated this provision by responding to a sharp surge of imports of ladies' fur hats by raising tariffs on a type of fur hat produced more efficiently abroad. *See id.* app. at 424-25 (discussing case number 13). A "working party," rather than a panel, rendered this decision. The contesting nations had representatives on the working party. *See id.* Three other complaints prior to 1980 stated claims under Article XIX, but no panel decisions resulted. *See id.* at 429, 443, 470-71 (referring to case numbers 21, 49, and 83).

⁸⁶ *See id.* at 337.

⁸⁷ *See id.* at 337-38.

arise concerning levels of tariff duties when, after a tariff rate has been bound, a nation increases the amount it demands from importers. For example, in 1986, the United States imposed a "user fee" in addition to tariff duties. Although this was ostensibly to pay the costs of customs service, the amount of the fee exceeded those costs, thus violating tariff bindings under the GATT.⁸⁸

With regard to the second type of tariff disputes, classification of goods, in all tariff regimes tariff rates vary with goods' classification. Inevitably, this causes controversies about the proper classification of goods. Disputes of this kind have arisen frequently under U.S. law,⁸⁹ but only a few have been litigated in the GATT dispute resolution system. Global adoption of a single "harmonized" system of classification will diminish occasions for disputes of this kind, but new products continually come onto the market and their classification under existing tariff bindings will inevitably give rise to controversies.

Hudec classifies the majority of cases as involving nontariff barriers.⁹⁰ The primary GATT issue raised by these cases concerns the meaning and application of Article XI, which provides for the general elimination of quantity restrictions.⁹¹ In cases initiated since 1979, most of the successful complaints have

⁸⁸ See *id.* app. at 538; see also GATT 1947, *supra* note 1, art. II, para. 2, 61 Stat. at A15, 55 U.N.T.S. at 202 (restricting a contracting party to imposition of "fees or other charges commensurate with the cost of services rendered"). Any fee which exceeds the internal cost of those services is a violation of the principle contained in Article II.

⁸⁹ Much of the judicial work of the Court of International Trade and the Court of Appeals for the Federal Circuit involves issues of this kind.

⁹⁰ See HUDEC CASES, *supra* note 19, at 338. This category accounts for more than half of the complaints, rulings, and rulings finding violations. See *id.*

⁹¹ See GATT 1947, *supra* note 1, art. XI, para. 1, 61 Stat. at A32-33, 55 U.N.T.S. 224-26 ("No prohibitions or restrictions other than duties taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."). Related to this general provision are the articles that permit governments, in limited circumstances, to restrict access to their markets. See, e.g., *id.*, art. XX, 61 Stat. at A60-63, 55 U.N.T.S. at 262-64.

challenged domestic barriers to imports of agricultural products.⁹²

One of the most significant recent NTB cases arose from the 1986 United States-Japan semiconductor agreement, which restricted semiconductor exports from Japan to the United States and improved access in Japan for U.S. exports. Not surprisingly, since the global market for semiconductors has become hotly contested among the most developed nations, the EC challenged this bilateral agreement as an impermissible attempt to manage trade in these products.⁹³ The GATT panel ruled that provisions of the bilateral agreement restricted Japanese exports in violation of Article XI.⁹⁴ The panel further held that provisions opening the Japanese market to U.S. products did not violate the most favored nation principle of Article I or place EC exporters at a competitive disadvantage that would nullify or impair its expectations of access to the Japanese market.⁹⁵

Government subsidies to domestic producers, other than subsidies targeted at exports, may prevent imported goods from effectively competing with the subsidized goods. In that sense, domestic subsidies might be considered nontariff barriers. Other government subsidies have the purpose or effect of stimulating exports. Several GATT articles (Articles VI and XVI) and the GATT Subsidies Code specifically address the matters of domestic and export subsidies.⁹⁶ Although most of these cases arose in the agriculture sector, one of the most significant subsidy cases involved Germany's subsidy of the Airbus enterprise.⁹⁷

The long-running controversy between the United States and the EC over the latter's oilseed subsidies led to two important

⁹² See HUDEC CASES, *supra* note 19, at 333. Twenty of the 45 violation rulings involved products from this sector, notably beef, apples, sugar, and fish. *See id.* at 333. For example, this provision provided the basis for a successful complaint by the United States against Japanese quotas on import of twelve groups of agricultural products. *See id.* app. at 531-33 (discussing case number 148).

⁹³ *See id.* app. at 541 (discussing case number 156).

⁹⁴ *See id.* app. at 542 (discussing the rule in case number 156).

⁹⁵ *See id.*

⁹⁶ *See* GATT 1947, *supra* note 1, arts. VI, XVI, 61 Stat. at A23-25, A51-52, 55 U.N.T.S. at 212-16, 250.

⁹⁷ *See* HUDEC CASES, *supra* note 19 app. at 576-78 (referring to case number 196 in which the panel ruled that the exchange rate guarantee given by the German government to a private buyer of the government's share in Airbus was a violative export subsidy).

panel rulings on the relationship between the subsidy provisions and other provisions of GATT law.⁹⁸ This controversy arose after the EC created a zero-tariff on oilseeds in 1962 and thereafter granted subsidies to European processors for processing oilseeds produced within the Community.⁹⁹ In the initial case, the GATT panel held that the processor subsidies violated the "national treatment" requirement of Article III.¹⁰⁰ After the EC modified its subsidy program to make payments directly to producers, the panel was reconvened to issue a second report. This second report held the subsidy unlawful on the ground that the direct subsidy nullified and impaired U.S. expectations of exporting oilseeds to Europe under the zero-tariff binding.¹⁰¹ Neither panel decision was based on Article VI or XVI of GATT; indeed, in reaching the latter decision the panel assumed that the subsidy in question was lawful under those provisions. The panel found the nontariff barrier effect of the subsidies on imports dispositive on the issue.

As previously mentioned, only five panel decisions since 1948 comprise the thin body of cases and rulings on antidumping law.¹⁰² Only four panels have issued rulings on countervailing duties.

In both antidumping and countervailing duty cases, most findings of a violation arise from the requirement that duties may not be imposed absent finding of material injury to the domestic producers of products like those being imported. One of these cases ruled that the domestic petitioners in an antidumping case

⁹⁸ See *id.* app. at 558-61 (discussing case number 179).

⁹⁹ See *id.* app. at 559.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* app. at 560. The second panel report, referring to a 1955 decision, recalled that:

even if subsidies are permitted under the General Agreement they are nevertheless recognized as being capable of distorting international trade and impairing the benefits accruing to contracting parties under the General Agreement in unacceptable ways. . . . [A] contracting party which has negotiated a concession under Article II is presumed, failing evidence to the contrary, to have a reasonable expectation that the value of the concession will not be nullified or impaired by the subsequent introduction or increase of a domestic subsidy on the product concerned.

2 HANDBOOK, *supra* note 19, at DD77/19.

¹⁰² See discussion, *supra* note 81 and accompanying text.

did not sufficiently represent the domestic industry, thus giving rise to a concern regarding their standing to assert the claims contained in the complaint.¹⁰³ Two of the countervailing duty cases involved a related problem: whether subsidies given to processors can be countervailed because the primary producers suffer an injury. For example, are subsidies on wine countervailable as injurious to grape growers?¹⁰⁴

One of the more difficult questions in current antidumping law arises when, following imposition of an antidumping duty, an exporter physically changes the product in some way. Is the imposing authority required to institute a new set of proceedings to consider whether the goods, as changed, are being dumped? Strategic moves to avoid duties are referred to as circumvention, and the corresponding response is termed anticircumvention. The validity, under GATT law, of various potential anticircumvention measures is unclear.¹⁰⁵

3. GATT 1994: "GATT PRESENT"

In producing GATT 1994, the governments participating in

¹⁰³ See HUDEC CASES *supra* note 19 app. at 572-73 (discussing case number 191). Because of their multinational operations, U.S. firms often refrain from joining antidumping or countervailing duty actions.

¹⁰⁴ See HUDEC CASES, *supra* note 19 app. at 522-23 (discussing case number 137, which held that a U.S. statute defining the wine industry to include the growers of grapes to be a violative subsidy). Another example involved complaint by cattle producers of subsidies on beef. See *id.* at 533-34 (discussing case number 149, which held that cattle producers could not be considered producers of frozen beef).

¹⁰⁵ One instance of this problem was presented in a recent antidumping case in which the EC imposed antidumping duties on a number of manufactured goods from Japan. See HUDEC CASES, *supra* note 19 app. at 569-71 (discussing case number 188). In response, Japanese firms exported only parts and components for assembly within the EC. See *id.* The EC countered this move by imposing an antidumping duty on the value of the imported parts and components incorporated in the assembled products as the final products left the assembly plant. See *id.* app. at 569. The GATT panel ruled that this constituted an internal tax inconsistent with the Article III requirement of nondiscriminatory national treatment. See *id.* app. at 570. The EC continued to collect the duties notwithstanding adoption of the panel report. The EC said it had deferred compliance pending completion of the Uruguay Round negotiations, which sought to frame a GATT position on anticircumvention. See *id.* app. at 570-71. The CONTRACTING PARTIES concluded the Uruguay Round without reaching any agreement on anticircumvention beyond agreeing to consider the issue in the near future. This case demonstrates the significant uncertainty in GATT responses to anticircumvention.

the Uruguay Round negotiations accomplished a great deal. Among other things, they established the WTO, which provides an institutional framework for resolution of all disputed matters within GATT.¹⁰⁶ Governance of the WTO is vested in a Ministerial Conference and a General Council, both composed of representatives of all the Members.¹⁰⁷ Article III of the Agreement provides that the organization shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes ("1994 Understanding") annexed to the Agreement.¹⁰⁸ In the dispute settlement role, the General Council will convene as the Dispute Settlement Body ("DSB") which will have its own chairman and rules of procedure.¹⁰⁹

3.1. *Changes to the Dispute Resolution System*

The 1994 Understanding, to be administered by the DSB, makes profound changes in the GATT dispute resolution system. Most of these changes address the issues and concerns raised by Hudec, Pescatore, Petersmann, and other scholars of dispute settlements under GATT 1947. The 1994 Understanding begins by recognizing that the new system derives from experience: "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."¹¹⁰ Although a full account of the 1994 Understanding cannot be presented here, the following synopsis describes the most important changes.¹¹¹

3.1.1. *Panels*

The essentials of the panel process remain unchanged in

¹⁰⁶ See GATT 1994, *supra* note 4, art. III, 33 I.L.M. at 1144-45.

¹⁰⁷ Nations and other governments that become party to the Agreement Establishing the World Trade Organization are denominated as "Members." See *id.* art. IV, 33 I.L.M. at 1145. The Ministerial Conference is required to meet at least once every two years. The General Council meets more frequently, "as appropriate." *Id.*

¹⁰⁸ See 1994 Understanding, *supra* note 10, art. III, para. 3, 33 I.L.M. at 1226.

¹⁰⁹ See GATT 1994, *supra* note 4, art. IV, para. 3, 33 I.L.M. at 1145.

¹¹⁰ 1994 Understanding, *supra* note 10, art. III, para. 1, 33 I.L.M. at 1227.

¹¹¹ The new system will not apply to ongoing disputes. Its application is expressly prospective. See *id.* art. 3, para. 11, 33 I.L.M. at 1228.

GATT 1994. The principal function of panels continues to be assisting the DSB, successor to the GATT Council or Committees, in discharging its responsibilities.¹¹² Normally, panels will be established with three members.¹¹³ Under the old system, each panel was free to set its own procedures. The 1994 Understanding sets out default working procedures that govern unless a panel specifically determines otherwise.¹¹⁴ The working procedures dictate that: panels meet in closed session; the materials they receive are confidential;¹¹⁵ the public has no access to the panel process;¹¹⁶ and opinions expressed in panel reports by individual panelists are anonymous.¹¹⁷

Although panels receive submissions from the parties to the dispute,¹¹⁸ they are not required to rely exclusively on information and arguments presented by the parties.¹¹⁹ Once a matter has been referred to a panel, it has the right to seek information and technical advice from any individual or body which it deems appropriate.¹²⁰

The contracting parties occasionally attempted to assign timely parameters for the length of panel proceedings under GATT 1947. In 1966, they agreed that a panel should report within 60 days,¹²¹ but the 1979 Understanding noted that the proceedings generally ran from three to nine months.¹²² Under GATT 1994, a six month time frame is generally provided for the panel to process a complaint,¹²³ but extensions of time are permitted,¹²⁴

¹¹² See *id.* arts 6-7, 33 I.L.M. at 1230-31.

¹¹³ See *id.* art. 8, para. 5, 33 I.L.M. at 1231.

¹¹⁴ See *id.* app. 3, 33 I.L.M. at 1245-46.

¹¹⁵ See *id.*

¹¹⁶ See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 333 (1996).

¹¹⁷ See 1994 Understanding, *supra* note 10, art. 14, para. 3, 33 I.L.M. at 1235.

¹¹⁸ See *id.* art. 12, para. 6, 33 I.L.M. at 1233.

¹¹⁹ See *id.* art. 13, para. 2, 33 I.L.M. at 1234 (stating that "[p]anels may seek information from any relevant source").

¹²⁰ See *id.* Provision is made in the Understanding for the establishment of expert review groups on scientific or technical questions. See *id.*

¹²¹ See Conciliation Procedures Under Article XXIII, Apr. 5, 1966, GATT BISD 14th Supp. 18, at 19 (1967).

¹²² See 1979 Understanding, *supra* note 22, at 214.

¹²³ See 1994 Understanding, *supra* note 10, art. 12, para. 8, 33 I.L.M. at 1234.

and a shorter period may be set if matters are urgent.¹²⁵

The qualifications that an individual panel member must possess had not been stated before GATT 1994. The 1994 Understanding defines, in general terms, the expected qualifications of panel members, but significantly it does not specify that all panelists must be lawyers or even that each panel have at least one lawyer.¹²⁶ It may be expected that, as in the past, many government officials will be assigned to duty on panels, although not in matters in which their governments are parties.¹²⁷ The Understanding declares that such panelists serve in their individual capacities, not as government representatives.¹²⁸ It further specifies that a panelist's own government must not determine or even influence the ultimate decision.¹²⁹

All panel reports will be presented to the DSB. The prescribed content of panel reports remains unchanged.¹³⁰ Overall, the 1994 Understanding creates a single composite process for all the dispute resolution mechanisms. This will eliminate the confusion, and potential for impasse, resulting from the sometimes overlapping jurisdictions of the multiple dispute resolution mechanisms that existed after the Tokyo Round codes became part of the GATT system.

3.1.2. *Appellate Body*

The single most dramatic change in the 1994 Understanding

¹²⁴ See *id.* art. 12, para. 9, 33 I.L.M. at 1234.

¹²⁵ See *id.* art. 12, para. 8, 33 I.L.M. at 1234.

¹²⁶ The Understanding provides:

Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to the GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Id. art. 8, para. 1, 33 I.L.M. at 1231.

¹²⁷ Pescatore confirms that as of 1995, the typical panel consists of members of national delegations and outside members. See 1 HANDBOOK, *supra* note 19, pt. 2, at 12.

¹²⁸ See 1994 Understanding, *supra* note 10, art. 8, para. 9, 33 I.L.M. at 1232.

¹²⁹ See *id.*

¹³⁰ See *id.* art. 11, para. 1, 33 I.L.M. at 1233.

is that it establishes an Appellate Body to review panel reports. The Appellate Body is a standing group of seven persons who are "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."¹³¹ The Understanding eschews designating this body as a court, but its organization and functions have many of the essential aspects of a judicial body.

With jurisdiction to entertain appeals from panel decisions on "issues of law covered in the panel report and legal interpretations developed by the panel,"¹³² the Appellate Body may uphold, modify, or reverse the legal findings and conclusions of a panel.¹³³ The Understanding contains a number of provisions regarding the appointment of members to the Appellate Body and their work in that body. The DSB has the power to appoint members for four year terms and an individual may be reappointed once.¹³⁴ The Appellate Body does not sit *en banc*, but rather each case is heard by three members.¹³⁵ Appellate Body proceedings are designated as confidential.¹³⁶ In its reports, the views of individual members of the Appellate Body are not to be attributed to their author; rather, opinions must be given any-

¹³¹ *Id.* art. 17, para. 3, 33 I.L.M. at 1236. After extended conflict over the geographical composition of the group, the initial members of the Appellate Body have been designated. The seven individuals who were appointed are:

James Bacchus, a former U.S. Congressman and former Special Assistant to the United States Trade Representative; Christopher Beeby, a trade diplomat and former Ambassador from New Zealand; Klaus-Dieter Ehlermann, a German trade lawyer and professor of international economic law; Florentino Feliciano, a Filipino Supreme Court Justice and former trade lawyer; Mitsuo Matsushita, a Japanese professor of international economic law with ties to the Japanese Ministry of Finance and Ministry of International Trade and Industry; Julio Lacarte Muro, a Uruguayan trade diplomat and participant in all eight GATT negotiation rounds; and Said el-Naggar, an Egyptian professor of economics.

Biographical Notes on Members of World Trade Organization Appeals Body, [July-Dec.] Daily Rep. for Executives (BNA) No. 230, at M-1 (Nov. 30, 1995).

¹³² 1994 Understanding, *supra* note 10, art. 17, para. 6, 33 I.L.M. at 1236.

¹³³ *See id.* art. 17, para. 13, 33 I.L.M. at 1237.

¹³⁴ *See id.* art. 17, para. 2, 33 I.L.M. at 1236.

¹³⁵ *See id.* art. 17, para. 1, 33 I.L.M. at 1236.

¹³⁶ *See id.* art. 17, para. 10, 33 I.L.M. at 1236.

mously.¹³⁷

Given the Appellate Body's qualifications and stability, its decisions should substantially improve the quality of rulings in individual cases. More fundamentally, however, the Appellate Body should expound on the meaning of the agreements within its jurisdiction and create a corpus of decisions that will assure consistency in GATT law and, hopefully, elevate the professional quality of the GATT dispute resolution mechanism. Growing respect for and confidence in the rulings of this professional body, even though not denominated a court, will advance international trade further into a stable regime that is governed by law and legal process.

As previously noted, the first decision of the Appellate Body was reported on April 29, 1996.¹³⁸ The case, which had been instituted by Venezuela and Brazil against the United States, resulted in a panel decision holding that U.S. implementation of an environmental protection statute, the Clean Air Act, was inconsistent with the General Agreement's "national treatment" in Article III, paragraph 4, and further that the exemptions in Article XX did not apply to the U.S. action. The Appellate Body affirmed the panel decision, but under a different interpretation of Article XX.¹³⁹

3.1.3. *The Dispute Settlement Body*

GATT 1994 assigns the plenary function — previously performed by the GATT Council or the CONTRACTING PARTIES in proceedings under Article XXIII of GATT 1947 — to a single Dispute Resolution Body ("DSB").¹⁴⁰ The composi-

¹³⁷ See *id.* art. 17, para. 11, 33 I.L.M. at 1236. The Understanding does not specifically forbid the expression of dissenting or separate views by members of the Appellate Body, but expression of such opinions would likely run afoul of the requirement of anonymity.

¹³⁸ See *supra* notes 12-15 and accompanying text.

¹³⁹ Acting U.S. Trade Representative Charlene Barshefsky issued the following statement after the Appellate Body's decision had been announced: "While we are disappointed that the practical result of this case remains unchanged, we are gratified that the Appellate Body has reversed an error that, if followed by future panels, would have inappropriately limited this important exemption [for measures relating to the conservation of exhaustible natural resources]." Office of the United States Trade Representative, Press Release 1 (April 29, 1996) (on file with author).

¹⁴⁰ See 1994 Understanding, *supra* note 10, art. 2, para. 1, 33 I.L.M. at 1226.

tion of the DSB mirrors the Council: any government that is a Member of the World Trade Organization is entitled to a seat in the DSB¹⁴¹ and each Member has one vote. A key position within the DSB is the DSB chair.¹⁴² The DSB will have authority in four distinct spheres: "to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."¹⁴³ Each of these functions represents a phase of the dispute resolution process.

The WTO continues generally the practice of decision-making by consensus followed under GATT 1947, but the idea of consensus applies to the DSB in a vastly different manner. The previous consensus rule permitted one nation, or a minority of nations, to block conclusive action.¹⁴⁴ Failure to adopt a report often prevented the dispute resolution process from reaching formal conclusion.

Hudec's account notes that the incidence of blocking Council or Committee action increased considerably in the 1980s.¹⁴⁵ The credibility of the GATT's system of dispute resolution was in jeopardy so long as the losing party could prevent the plenary body from taking action on the rulings and recommendations of panels. Continuing controversy over the blocked reports was inevitable. Moreover, consigning fully considered decisions to legal limbo undermined the integrity of the entire system.¹⁴⁶

The Uruguay Round negotiators devised an ingenious solution that eliminates the possibility of that one government could block

¹⁴¹ See *id.* With respect to the DSB function under one of the so-called Plurilateral Agreements, only WTO Members which have joined in the agreement in question participate in the DSB. See *id.*

¹⁴² The first chairman of the Dispute Settlement Body is Donald Kenyon of Australia. See *WTO Nominates Committee Heads at First Session of Council Meeting*, 12 Int'l Trade Rep. (BNA) No. 5, at 225 (Feb. 1, 1995).

¹⁴³ See 1994 Understanding, *supra* note 10, art. 2, para. 1, 33 I.L.M. at 1226.

¹⁴⁴ See *supra* note 34 and accompanying text.

¹⁴⁵ See *supra* notes 66-69 and accompanying text.

¹⁴⁶ In discussing the substantive corpus of GATT law, Hudec treats blocked panel reports as equivalent to reports that had been adopted. See discussion *supra* note 68 and accompanying text. Pescatore vehemently disagrees and rejects unadopted reports, describing them as legal nullities. See 1 HANDBOOK, *supra* note 19, pt. 2, at 10-11.

action, while ostensibly adhering to the consensus principle. Under GATT 1994, panels and the Appellate Body continue to submit reports to the DSB, but the reports are "deemed" adopted unless the DSB affirmatively refuses to adopt them.¹⁴⁷ The consensus requirement was detached from motions to adopt reports and attached instead to motions to reject reports. The probability is exceedingly high that all reports submitted to the DSB will be adopted. The reports of panels and of the Appellate Body will be "final" as soon as the DSB meets to consider them. The 1994 Understanding ensures this result:

Within [sixty] days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.¹⁴⁸

The Uruguay Round negotiators were not unaware of the lawmaking potential of the GATT dispute resolution mechanism, particularly the ability of the Appellate Body to shape and develop GATT law through the power of precedent. The negotiators not only stated their intention regarding the purposes of the system, but also articulated limitations on the lawmaking through dispute resolution. Two of the general provisions of the 1994 Understanding are pertinent:

The dispute settlement system of the WTO is a central element in providing security and predictability to the

¹⁴⁷ See 1994 Understanding, *supra* note 10, art. 16, para. 4, 33 I.L.M. at 1235.

¹⁴⁸ *Id.* (footnote omitted). The paragraph continues: "If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report." *Id.*

Another significant clause in the provision for DSB adoption of Appellate Body reports adds a term of unconditional acceptance of the report by the parties to the controversy: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within [thirty] days following its circulation to the Members." *Id.* art. 17, para. 14, 33 I.L.M. at 1237.

multilateral trading system. The Members [of the WTO] recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.¹⁴⁹

...
All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.¹⁵⁰

Neither GATT 1947 nor the 1979 Understanding contained comparable provisions as to purpose.¹⁵¹ It remains to be seen how these provisions will affect decision making in future GATT adjudication. Panels, the Appellate Body, and the DSB will give meaning to these bipolar propositions as cases come before them. Although the broad, affirmative, and purposeful declarations should cause little concern, controversy is bound to arise over the opposing concepts involved in interpreting textual provisions. The distinction between clarification and enlargement of a provision will inevitably be a source of disagreement. In submissions to panels or the Appellate Body, advocates will seek to buttress their arguments with minatory warnings that other proposed readings would violate inherent constraints in the interpretive process. The clause that forbids nullification or impairment of benefits or impeding the attainment of any

¹⁴⁹ *Id.* art. 3, para. 2, 33 I.L.M. at 1227.

¹⁵⁰ *Id.* art. 3, para. 5, 33 I.L.M. at 1227.

¹⁵¹ The language derives from a 1989 decision of the CONTRACTING PARTIES, midway through the Uruguay Round negotiations. See GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 36th Supp. 67 (1990).

objective of those agreements is also likely to engender dispute.¹⁵²

3.2. *Changes to the Dispute Resolution System*

When the DSB adopts a report, the dispute is still one important step away from remedial action. GATT 1994 expands on the nature of the remedies available to a complaining parties and the means through which the GATT mechanism can influence compliance.

3.2.1. *Remedies*

The 1994 Understanding addresses at some length the remedies for violations of GATT agreements. Three possible remedies may be invoked: compliance, compensation, or suspension of concessions or obligations.¹⁵³ Compliance is the clearly preferred remedy.¹⁵⁴ The principal remedial objective is cessation of the conduct that violates GATT obligations. In the parlance of ordinary contract law, the remedy is akin to an injunction or decree of specific performance. The Understanding makes this clear with mandatory language:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it *shall*

¹⁵² See GATT 1947, *supra* note 1, art. XXIII, para. 1, 61 Stat. at A64-65, 55 U.N.T.S. at 268.

¹⁵³ See 1994 Understanding, *supra* note 10, art. 3, para. 7, 33 I.L.M. at 1227.

¹⁵⁴ See *id.* The Understanding declares this preference in several paragraphs. For example:

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the of such measures.

Id.; see also *id.* art. 22, para. 1, 33 I.L.M. at 1239 (stating that compensation and suspension are temporary measures of last resort).

recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.¹⁵⁵

There are several obvious reasons for preferring the compliance remedy. It restores the equilibrium of the international economic order under the terms of the prior agreements of the parties concerned. Once the offending measure has been terminated or corrected, a good relationship among the disputants should also be restored. Other remedies may have secondary consequences that cannot be offset easily and that may linger well beyond the appropriate time. One weakness in a pure compliance remedy, however, is that the aggrieved party may have suffered injury during the period of violation for which no restitution or damages are imposed on the offending party. Unfortunately, a compliance-centered remedial system does not deal effectively with such matters.

Following action that a respondent contends is compliance, controversy may arise over whether what the offending party has done is sufficient to meet its obligations under GATT. If such controversy continues, the DSB will refer the matter to the original panel, which is expected to report its decision on the question to the DSB within ninety days.¹⁵⁶

The contracting parties recognized that however strong their preference for the compliance remedy, cases of non compliance are foreseeable and the 1994 Understanding must provide remedial consequences for situations of non compliance. A second and third tier remedies of compensation and suspension of concessions or obligations are provided for this situation. The 1994 Understanding insists, however, that these are temporary measures available only in cases where compliance with recommendations

¹⁵⁵ *Id.* art. 19, para. 1, 33 I.L.M. at 1237 (emphasis added, footnotes omitted); *see also id.* art. 22, para. 1, 33 I.L.M. at 1239 (discussing panel recommendations of compensation and the suspension of concessions).

¹⁵⁶ *See id.* art. 21, para. 5, 33 I.L.M. at 1238. If a panel cannot provide its report within ninety days, it may inform the DSB of the reasons for delay and estimate the date at which it will submit its report. *See id.*

and rulings does not occur within a reasonable time.¹⁵⁷

The 1994 Understanding says little about the nature or measure of compensation beyond emphasizing that the GATT system cannot impose this remedy on unwilling parties. The violating nation may choose to offer compensation.¹⁵⁸ The complaining party need not wait for an offer and may propose terms of the compensation that it would accept. Although not explicitly stated in the Understanding, it is probably true that a complaining party is not required to accept any offer. Thus, the compensation remedy is effectively voluntary on both sides. Negotiations over compensation are likely to take place without formal participation of the panel, the DSB, or any other GATT entity, but the Director-General or others in the WTO Secretariat's office may assist in certain individual controversies. In the end, however, a compensation remedy is not available without the agreement of the Member providing it and of the Member receiving it.¹⁵⁹

The Understanding does impose a limitation on the nature and measure of compensation that the parties may negotiate. The terms of the compensation agreement must be in "conformity with the covered agreements."¹⁶⁰ Parties to a dispute cannot, under the guise of an agreement on compensation, enter into obligations that violate the GATT provisions. Thus, a compensation agreement could not institute a trading regime inconsistent with the most-favored-nation undertaking of Article I.

The 1994 Understanding provides a brief period for negotiation of a compensation remedy that is satisfactory to both parties.¹⁶¹ At the end of that time, the party entitled to a

¹⁵⁷ See *id.* art. 22, para. 1, 33 I.L.M. at 1239

¹⁵⁸ See *id.* art. 22, para. 1, 33 I.L.M. at 1239.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* art. 22, para. 1, 33 I.L.M. at 1239.

¹⁶¹ Although the timetable under the Agreement does not fix a time for negotiations on compensation directly, it can be inferred from the period allowed for compliance and the time when the prevailing party can invoke the remedy of suspension of concessions or obligations. See *id.* art. 21, para. 3, 33 I.L.M. at 1238. The Agreement contemplates that a Member found to be in violation, must inform the DSB within 30 days of its contemplated level of compliance. If the Member declares its intentions to comply, it has a "reasonable period of time" to effect compliance. The agreement actually specifies how that period of time shall be determined. See *id.* If the Member fails to comply, the Member must, if so requested, enter into negotiations with the complaining party on possible acceptable compensation. See *id.* art. 22,

remedy can proceed to the third tier remedy: suspension of concessions or obligations.¹⁶² Unlike the other remedies, this remedy can be implemented by the prevailing party without the cooperation or assent of the other party. In essence, the prevailing party can suspend compliance with GATT obligations that it owes to the violating party.¹⁶³ Members cannot take such actions until they have exhausted the Understanding's procedures that may culminate in DSB authorization to suspend concessions or obligations.¹⁶⁴ The Understanding limits the power of the DSB to authorize a level of suspension that is "equivalent to the level of the nullification or impairment."¹⁶⁵ Furthermore, the DSB may not authorize suspension of concessions or obligations if a covered agreement prohibits such suspension.¹⁶⁶

In seeking DSB authorization for the suspension remedy, the

para. 2, 33 I.L.M. 1239. Those negotiations must begin no later than the expiration of the reasonable period of time fixed for compliance. Twenty days after expiration of the time for compliance, the complaining party may invoke the remedy of suspension of concessions or obligations. *See id.*

¹⁶² Although not explicitly provided for by the text of GATT 1994, these types of remedies can be assumed valid since they are domestic actions which are not violative of any GATT obligation. *See id.* art. 23, para. 2, 33 I.L.M. at 1241-42.

¹⁶³ The best known example of this self-help remedy is found in U.S. law. *See* 19 U.S.C. § 2411 (providing for mandatory or discretionary actions by the President to suspend or withdraw the benefits of trade agreements with foreign countries that violate any trade agreement provision). Reference to this provision as "Section 301" derives from the internal numbering of the sections of the Trade Act of 1974 in which it first appeared.

¹⁶⁴ The Understanding provides: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." 1994 Understanding, *supra* note 10, art. 23, para. 1, 33 I.L.M. at 1241. The Understanding continues:

Members shall . . . (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings

Id. art. 23, para. 2, 33 I.L.M. at 1241-42.

¹⁶⁵ *Id.* art. 22, para. 4, 33 I.L.M. at 1240.

¹⁶⁶ *See id.* art. 22, para. 5, 33 I.L.M. at 1240.

prevailing party proposes the sector of trade¹⁶⁷ and the level of suspension it seeks. After a complaining party submits a suspension proposal to the DSB, the DSB must meet expeditiously, within approximately a month of the proposal.¹⁶⁸ The DSB may take three possible actions: authorization to act as proposed, refusal to authorize action for want of a consensus,¹⁶⁹ or referral of the matter to "arbitration."¹⁷⁰

When the DSB considers authorizing a suspension of concessions or obligations, the GATT 1947 consensus rule applies, not the new GATT 1994 consensus rule that applies to adoption of reports.¹⁷¹ If one Member present at the meeting of the DSB formally objects to the DSB's granting authorization without arbitration, a consensus would be lacking and the DSB could not act beyond noting that it failed to reach a consensus. Since parties to a dispute are not disqualified from participation in DSB deliberations, the losing party can block the suspension proposed by the prevailing party.

Of the possible courses of DSB action, resort to the arbitration procedure is the course most likely to occur.¹⁷² Parties who have lost in the merits phase of cases will face considerable political pressure not to block DSB action on a motion to refer the case to arbitration.¹⁷³

If arbitration is ordered, the DSB refers the question of the appropriate level of suspension back to the original panel if its

¹⁶⁷ Trade "sectors" in GATT 1994 divide trade into three sectors: goods, services, and trade related intellectual property rights. See *id.* art. 22, para. 3(f), 33 I.L.M. at 1240.

¹⁶⁸ See *id.* art. 22, para. 6, 33 I.L.M. at 1240.

¹⁶⁹ The term "consensus" is defined: "The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision." *Id.* art 2, para. 4 n.1, 33 I.L.M. at 1227.

¹⁷⁰ See *id.* art. 22, para. 6, 33 I.L.M. at 1240.

¹⁷¹ See discussion *supra* notes 144-48 and accompanying text.

¹⁷² Immediate acceptance of a proposed suspension, at the level chosen by the prevailing party, without the objective review of an arbitrator, is quite unlikely.

¹⁷³ Article 23 of the 1994 Understanding obligates Members to "follow the procedures set forth in Section 22 of the Understanding to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with these procedure" before taking unilateral action. 1994 Understanding, *supra* note 10, art. 22, para. 2, 33 I.L.M. at 1241-42.

members are still available;¹⁷⁴ otherwise the DSB refers the matter to an arbitrator or group of arbitrators appointed by the Director-General.¹⁷⁵ Thus, although styled as “arbitration,” the process may actually be a second phase of the panel proceeding that led to the finding of a violation in the first instance. The 1994 Understanding allots sixty days as the maximum time for completion of the determination.¹⁷⁶ The arbitrator is not authorized to reconsider the merits of a case. Moreover, with regard to the suspension remedy itself an arbitrator has only a limited function: to “determine whether the level of such suspension is equivalent to the level of nullification or impairment.”¹⁷⁷

Decision of an arbitrator is “final,” in the sense that “the parties concerned shall not seek a second arbitration.”¹⁷⁸ Even if the original panel serves as the arbitrator, a decision in this guise cannot be appealed to the Appellate Body. Arbitrators’ decisions come back to the DSB, but, once again — as with consideration of panel reports and of the Appellate Body — the consensus requirement is inverted. In other words, if a complaining requests that the DSB grant authorization to suspend concessions or other obligations consistent with the decision of the arbitrator, the DSB

¹⁷⁴ See *id.* art. 22, para 6, 33 I.L.M. at 1240.

¹⁷⁵ See *id.* The Understanding does not specify what is meant by members being “available.” The situation of some, but not all members of the original panel being available can be expected to arise. The Director-General might appoint as arbitrator the member or members of the original panel who are available, or replace a missing panel member, or designate a new person or group. The Understanding appears to leave this in the discretion of the Director-General.

¹⁷⁶ See *id.* The Understanding obligates a prevailing party to propose suspensions in the same sector as that in which the violation was found. Thus, if the violation concerned goods, the retaliation remedy should, if practicable and effective, apply to goods. Otherwise, the prevailing party may seek to suspend concessions or obligations in other sectors under the same agreement. If that is not practicable and effective, and if “the circumstances are serious enough,” the suspension may apply to concessions or obligations under another covered agreement. *Id.* art. 22, para. 3(c), 33 I.L.M. at 1239.

¹⁷⁷ *Id.* art. 22, para. 7, 33 I.L.M. at 1240. The 1994 agreement also declares that the DSB may not authorize suspensions if the covered agreements prohibit them. See *id.* art. 22, para. 5, 33 I.L.M. at 1240. Thus, “the arbitrator may also determine if the proposed suspension . . . is allowed under the covered agreements.” *Id.* art. 22, para. 7, 33 I.L.M. at 1240-41. If the proposed suspension involves a different sector of trade from that involved in the underlying dispute, the arbitrator may examine a claim that the prevailing party did not follow the principles and procedures specified for a cross-sector remedy. *Id.*

¹⁷⁸ *Id.*

shall do so "unless the DSB decides by consensus to reject the request."¹⁷⁹

The controversy over oilseeds between the United States and the European Community illustrates the significance of attaching the consensus requirement to rejection, rather than authorization, of a proposal to suspend concessions or obligations.¹⁸⁰ Under GATT 1947, two panels had ruled that the EC's oilseed subsidy regimes nullified and impaired benefit accruing to the United States under the EC's zero tariff bindings on oilseed imports.¹⁸¹ After the EC failed to terminate the subsidies, the United States proposed and sought authorization for the suspension of concessions on certain imports from the EC.¹⁸² The EC was able, under the consensus rule of GATT 1947, to block affirmative Council action.¹⁸³ Under GATT 1994, in a similar controversy, after arbitration has confirmed the appropriate level of suspension, the losing party could not use the consensus principle to prevent the GATT plenary body from authorizing the implementation of the proposed suspensions.¹⁸⁴

3.2.2. *Compliance by Losing Parties: Surveillance*

The GATT dispute resolution system, like any form of adjudication in international law, becomes "soft" at the stage of enforcing judgments. Hudec paid considerable attention to the incidents of non compliance with panel rulings finding violations.¹⁸⁵ He characterized these as cases with "negative outcomes."¹⁸⁶ Hudec found the rising rate of negative outcomes or almost negative outcomes a matter of grave concern for the future

¹⁷⁹ *Id.*

¹⁸⁰ See HUDEC CASES, *supra* note 19 app. at 558-61 (discussing complaint number 179).

¹⁸¹ See *id.* app. at 559.

¹⁸² See *id.*

¹⁸³ See *id.* app. at 560. Council action would have been to approve or disapprove the proposed action of the United States without the aid of an arbitrator's report. The arbitration mechanism introduced by GATT 1994 was not available in the oilseeds subsidy case.

¹⁸⁴ See 1994 Understanding, art. 25, para. 2, 33 I.L.M. at 1242 (providing for arbitration without resort to a consensus rule).

¹⁸⁵ See HUDEC CASES, *supra* note 19, at 200.

¹⁸⁶ See *id.* at 200, 276 (explaining that a "negative outcome describes cases in which the GATT system has failed to enforce a valid claim").

of the GATT system.¹⁸⁷ GATT 1994, as just discussed, provides that compliance with rulings and recommendations is the preferred remedy and, indeed, the only remedy not deemed temporary.¹⁸⁸ The prospect of non compliance was a serious issue addressed by the Uruguay Round negotiators attempting to ameliorate the non compliance problem. The effects of these changes are uncertain.

One dimension of the problem, which has its roots in the text of GATT Article XXIII, is manner by which Article XXIII blurs provisions for conciliation of disputes with provisions for adjudication of disputes. It took some time for the GATT system to evolve a mechanism that issued definitive rulings about which of the contesting parties should prevail.¹⁸⁹ Reports of GATT panels, the heart of the books of Hudec and Pescatore, are rulings that are intended to be obeyed, not suggestions for settlements that each party is free to accept or not. But the idea of conciliation has remained part of, and perhaps central to, the ideal of dispute resolution under GATT. Many disputes that arose were settled, sometimes before the filing of a complaint and sometimes after the adjudicatory process had started. Of the 207 disputes on Hudec's master list, 88 went to decision.¹⁹⁰

Adjudication and conciliation, while recognized means for dispute resolution, are vastly different in their dynamics. Conciliation, in the end, requires that the parties be reconciled, that they arrive at satisfactory solution; conciliation depends upon voluntary agreement. Adjudication, on the other hand, is a method of resolving controversies that cannot be settled amicably by agreement. Disputes are submitted to a tribunal which, after hearing the contestants, issues rulings. Blurring the distinction between conciliation and adjudication is especially harmful if the losing party in adjudication can treat dispositive rulings as akin to proposals for conciliation.

GATT 1994, like GATT 1947, combines conciliation with adjudication in the Understanding but tends to a greater extent than before to differentiate the two. Even so, the conflation of conciliation with adjudication remains. The following provisions

¹⁸⁷ See *id.* at 305-07 (providing relevant statistics).

¹⁸⁸ See discussion *supra* section 3.2.

¹⁸⁹ See *supra* note 19 and accompanying text.

¹⁹⁰ See HUDEC CASES, *supra* note 19 app. at 277.

illustrate the blending of the separate processes:

Recommendations or rulings made by the Dispute Settlement Body shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.¹⁹¹

...
The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.¹⁹²

The subject of the first quoted provision, "recommendations or rulings," is drawn directly from the awkward phrasing of GATT Article XXIII.¹⁹³ This phrase seems paradoxical. In the normal meaning of words, recommendations can be accepted or rejected as the parties see fit while rulings are meant to be definitive. Either conciliation or adjudication can lead to a "satisfactory settlement" if that phrase is construed broadly. Reference to "rights and obligations" is more aligned with rulings than to recommendations. In the second quoted provision, the meaning of "positive solution" is not obvious. The remainder of that paragraph, divided by "in the absence of a mutually agreed solution," deals on one side with conciliation and on the other with adjudication. In succeeding parts of the Understanding, the processes of conciliation and adjudication are addressed separately.¹⁹⁴

¹⁹¹ 1994 Understanding, *supra* note 10, art. 3, para. 4, 33 I.L.M. at 1227.

¹⁹² *Id.* art. 3, para. 7, 33 I.L.M. at 1227. The paragraph further provides for the alternative remedies of compensation or suspension of concessions or obligations. *See id.*

¹⁹³ *See* GATT 1947, *supra* note 1, art. XXIII, 61 Stat. at A64-65, 55 U.N.T.S. at 267-68.

¹⁹⁴ *See* 1994 Understanding, *supra* note 10, arts. 5, 25.

Since the general drafting strategy of GATT 1994 was to preserve GATT 1947 and expand upon it, there was no easy escape from the inherent ambiguities in paragraph 2 of Article XXIII. If negotiators had drawn a sharper line between the two processes, it might have been beneficial in reducing the incidence of negative outcomes in adjudicated cases, but such was not the case.

GATT 1994 does have a number of exhortations and declarations intended to give weight to DSB decisions adopting reports of panels or of the Appellate Body. Thus, the Understanding declares: "Prompt compliance with recommendations or rulings of the DSB is essential to ensure effective resolution of disputes to the benefit of all Members[.]"¹⁹⁵ and as previously noted: "An Appellate Body report shall be . . . unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report" ¹⁹⁶

In addition to these assertions, the Uruguay Round negotiators added procedural steps to the DSB function clearly designed to exert pressure on nations ruled in violation of a GATT agreement. Shortly after the DSB adopts reports of panels or the Appellate Body for the first time, "the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendation and rulings of the DSB."¹⁹⁷ Nations are called upon to declare, forthrightly and formally, whether they will comply or not. Thereafter, and for the indefinite future, the matter of compliance remains a potential issue for the DSB's agenda, a ongoing process that is called "surveillance":

The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings . . . shall remain on the DSB's agenda until the issue is resolved. At least [ten] days prior to each such meeting, the

¹⁹⁵ *Id.* art. 21, para. 1, 33 I.L.M. at 1238.

¹⁹⁶ *Id.* art. 17, para. 14, 33 I.L.M. at 1237.

¹⁹⁷ *Id.* art. 21, para. 3, 33 I.L.M. at 1238.

Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.¹⁹⁸

The level of compliance with decisions in contested cases remains to be seen. Some improvement over the previous system may reasonably be anticipated. Whether GATT 1994 will be effective in this regard will turn, in some measure, on the perceived quality and persuasive force of the reasoning in the reports of panels and the Appellate Body.

4. BEYOND 1994: "GATT FUTURE"

The institutional structure of the World Trade Organization is now in place. Whether — and how well — that structure will serve the international economy is very uncertain. The focus of this Article has been on the dispute resolution system inherited by the WTO and extensively developed by the Uruguay Round Agreement. The success or failure of the dispute settlement system will determine the extent to which the global economy will develop under a regime of law. That success or failure is contingent, in large measure, upon the quality of the decisions made. The legal community has a unique opportunity and responsibility to contribute to whatever the outcome will be.

GATT case law matters. Every decision matters, of course, to the parties to the dispute. The formal parties are the governments of WTO Members. The issues to be resolved are the legality, under GATT, of trade measures taken by governments. The future of national sovereignty is directly at stake. Members of the WTO, mostly national governments, have committed themselves to the substantive norms of GATT 1994 and to an institution one of whose functions is to render judgments on the lawfulness of national laws and practices. Commitments of this kind are without precedent in international law.¹⁹⁹ What remains to be

¹⁹⁸ *Id.* art. 21, para. 6, 33 I.L.M. at 1239.

¹⁹⁹ The United Nations, even at the level of its most potent branch, the Security Council, does not have the power to develop a system of law comparable to that which may emerge from the World Trade Organization.

The commitments of the nations of the European Union ("EU") to bind themselves to that institution do exceed the commitments of the international community to the World Trade Organization, but the scale of the EU does not compare with that of the global community of nations which created the

seen is whether those commitments to norms and structure will hold when international norms, as construed by the Dispute Settlement Body, impinge upon sensitive national choices and national policies.

The WTO, as a governmental institution, lacks significant strength in legislative and executive functions. The Director-General and the Secretariat cannot be expected to take strong initiatives in shaping the law. Further legislative elaboration of the norms of WTO law remains a process of nations negotiating and bargaining.²⁰⁰ The judicial function has been much further developed. It alone is capable of acting without the consent of all affected national governments. The work of that branch, and its reception, matters greatly therefore to the future of international economic law.

Chauvinistic believers in unfettered national sovereignty see the WTO dispute resolution system as a major threat. Views of that kind will be found in all parts of the world, from the most developed to the least developed nations. Their cries of alarm will sound particularly in democracies at election times. There is, of course, another, and better, view. It is in each nation's deepest sovereign interest to be part of a legal order that stimulates and regulates growth of the global economy. National interests will be advanced both economically and politically by an effective international legal order.²⁰¹

GATT case law matters in whether the commitment of 100-plus nations to create a dispute resolution system that can act without their consent ultimately succeeds. Critical will be the quality of the decisions rendered — and the perception of that quality among interested parties — in the formative years.

WTO.

²⁰⁰ This is illustrated in the efforts to negotiate trade rules in the services sector. In April 1996, the Members of the WTO failed to meet the deadline for negotiating a global telecommunications regime. Negotiations in regard to financial services and maritime shipping are also proceeding badly. The "legislation" of new legal standards in these and other sectors of trade requires the acquiescence of national governments. The process resemble contract bargaining more than legislation.

²⁰¹ Enlightened national government leaders see the explosive growth of multinational enterprises ("MNEs") as an important reason for the establishment of a regime of international economic law. As MNEs grow in size and economic power, they have the capacity to take actions that are effectively beyond the control of any national government.

There are profound implications for lawyers, for those who work within the WTO's dispute settlement system and for those who counsel and represent national governments, as well as for lawyers in the larger legal communities. The initial appointees to the WTO Appellate Body have an especially heavy responsibility to give that important body and its decisions stature and credibility; their judgments will become the paramount precedents of the new system. National government counsel, whose advocacy will influence the Appellate Body, should craft submissions to the Appellate Body, and to panels, with a strong sense of institution building as well as arguments directed to the immediate case.

But there are also implications for lawyers not directly involved within the WTO or in disputes being litigated. Any legal system depends upon an informed legal community. Objective outsiders must be enlisted to give serious and sustained attention to the work of the WTO as it evolves. Scholars and law students must be enlisted to study and critique this body of law. Their analysis and commentary can become a vital contribution to the quality of the law. Writings of Hudec, Pescatore, Petersmann, Jaenicke, and others, lay an important foundation. Hopefully, they will continue to contribute, but others must join in the effort. Law students, writing for journals like this one, could institute a practice of case-note commentaries on decisions of the Appellate Body and panels.

The daunting task for both participants and scholars is the establishment of a new jurisprudence. The field requires standards of excellence against which particular decisions can be measured. Undoubtedly, scholars will search for analogous fields of law from which to extrapolate standards for the WTO system of dispute resolution, but the WTO system is already well beyond any other body of international law. Standards drawn from one or another national legal system or even from one of the broad legal traditions — civil or common-law — are probably inapt for this purpose.²⁰²

²⁰² An important question for the interpretive function is the appropriate weight, if any, of what may be called the legislative history of the adopted texts. Pescatore offers an interesting and, no doubt, debatable, point of view regarding recourse to the drafting history of the General Agreement:

At first sight, this method might seem to provide convincing arguments by referring governments to their own intentions. In fact,

The primary sources of law to be applied in disputes are the extensive written texts. Like any written text, these are imperfect and incomplete. They are the compromise formulations that survived long and often difficult multilateral negotiations. Some provisions were carefully, painfully crafted during years of successive bargaining sessions; others were last-minute insertions by weary negotiators racing against deadlines. What standards of interpretation are to be applied to future application of these texts in resolution of disputes?²⁰³ The term of the WTO Agreement permitting "clarifications" but not "expansions" must, itself, be construed.

GATT 1994 is, in many respects, an overlay superimposed on GATT 1947. That, alone, poses a major set of interpretive problems. How much weight should attach to the old and new texts? To what extent is the corpus of GATT law found in panel decisions under GATT 1947 of continuing relevance?²⁰⁴ To

however, the excessive use of these materials is out of place and even counterproductive for several reasons. *First*, it prompts the panels to shift their attention from the analysis of substantive problems and from the consideration of GATT's objectives to textual research of a purely semantic character. *Second*, arguments based on textual history tend to foster a retrospective interpretation of an Agreement which . . . was meant to be a forward-looking instrument aimed at creating a basis for the solution of trade problems of the future, not at perpetuating past ideas about international trade. *Third*, attention must be drawn to the fact that only a small number of GATT's membership were involved in drafting [the text]. The newer members of GATT have accepted the General Agreement at face-value but they cannot be engaged *a posteriori* in the meanderings of preparatory work in which they had no part.

See 1 HANDBOOK, *supra* note 19, at 23-24.

²⁰³ Article XX of the General Agreement has been especially difficult to apply because its terms require considerable interpretation. The subparagraphs of Article XX, which exempt national trade measures that would otherwise be illegal under other articles of the General Agreement, were the source of disputed interpretations before 1994. Interpretation of subparagraph (g), the provision exempting measures "relating to the conservation of exhaustible natural resources," was the central issue in the first decision of the WTO Appellate Body. See *supra* notes 12-15 and accompanying text. The Appellate Body modified the panel report's construction of subparagraph (g). Although the modification did not change the outcome of the case, the Acting United States Trade Representative expressed satisfaction with the Appellate Body's interpretation of this key GATT provision that may shelter environmental protection laws and regulations from other GATT restrictions. See discussion *supra* note 139.

²⁰⁴ The WTO Members explicitly affirmed "adherence to the principles for the management of disputes heretofore applied," 1994 Understanding, *supra*

what extent, if any, are the texts and the interpretations of the Tokyo Round codes of continuing relevance? Only a minority of GATT nations had become signatories of those codes, which are nonetheless precursors of parts of GATT 1994.

As time passes, decisions rendered under the Understanding will accumulate. To what extent should the principle of *stare decisis* apply to panel decisions? Under GATT 1947 and the GATT codes, panels referred extensively to reports of prior panels, but Pescatore noted that "references to precedents . . . tend to be extremely short and cryptic, the sole reference often being the page number where the quoted phrase or words are to be found."²⁰⁵ The common-law tradition gives greater weight to precedent than does civil law. Standards for the appropriate deference to prior panel rulings must be developed.

The decisions of the Appellate Body are of a different order than panel decisions. Panels will certainly defer to the prior rulings of the Appellate Body, but the nature and extent of deference to higher authority within a hierarchical system is never a simple question. That will be especially true in the early period of Appellate Body work as that Body develops its own principles for deference to past decisions of the Body. Normally, only three of the seven members of the Body will sit in a case; stability and coherence of the corpus of law developed by the Body depends greatly on how the views of the entire Body will be ascertained and expressed in the case law.

One final point about dispute resolution under GATT 1994: the system has lacked and continues to lack a satisfactory method for resolving issues of fact that arise in disputes before panels. Some controversies are framed in terms of the facial validity of trade measures in dispute, but inevitably controversies take the form of considering the effects of trade measures in dispute, and sometimes take the form of considering the purposes of the measures. Questions of effect and purpose are issues of fact, for which rules of evidence, burden of proof, and so forth must be created. Panels and the Appellate Body will be forced to develop methods for dealing with disputes that turn on questions of fact.

note 10, art. 3, para. 1, 33 I.L.M. at 1227, but also declared that the Understanding did not apply to ongoing disputes. *Id.* art. 3, para. 11, 33 I.L.M. at 1228.

²⁰⁵ 1 HANDBOOK, *supra* note 19, pt. 1, 23.

They will be aided to some extent by the power, under GATT 1994, to refer some issues to groups of experts, or in the case of remedies, to an arbitrator. However, that will be only a partial solution to the broader problem and, even where referrals are made, the Appellate Body and panels will face questions concerning how the experts or arbitrator determined the facts in controversy.

5. CONCLUSION

International economic law as set forth in GATT 1994 is about to be given form under the new dispute resolution system. The uncertain outcome of that development is a challenge to everyone interested in the shape of the international economy. Responses to this challenge by lawyers, law teachers and scholars, and law students will be the most important force giving shape and meaning to this new field of law.