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Citation: 8 Minn. J. Global Trade 1 1999



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Articles

The New WTO Dispute Settlement Procedure: An Overview of the First Three Years

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The editors have asked me to explain my view that meaningful documentation does not exist for many of the assertions and judgments in this essay. Much of what is said here is based on the author's experience with, and off-the-record conversations about, the GATT and WTO dispute settlement systems in the course of serving as a panel member in five GATT, WTO, NAFTA, and Canada-U.S. FTA panels, and as a formal and informal consultant to both governments and the GATT/WTO Secretariats on dispute settlement matters over the past thirty-five years.

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INTRODUCTION

In 1994, the member governments of the General Agreement on Tariffs and Trade (GATT) set aside the loosely-structured organization that had administered the GATT since it began operations in 1948, and in its place they created a formal international organization called the World Trade Organization (WTO).¹ One of the most important features of the new WTO was a new procedure for adjudicating legal disputes — in GATT/WTO parlance, a “dispute settlement” procedure. Unlike the relatively informal GATT dispute settlement procedure that preceded it, the new WTO² procedure was set out in a detailed agreement known as the “Understanding on Rules and Procedures Governing the Settlement of Disputes” (DSU). Although

1. The agreement establishing the WTO is the Marrakesh Agreement Establishing the World Trade Organization, contained in the official text of the package of agreements concluded at the end of the 1994 Uruguay Round. GATT SECRETARIAT, *THE RESULTS OF THE URUGUAY ROUND TRADE NEGOTIATIONS, THE LEGAL TEXTS* 5, 5-18 (1994); 33 I.L.M. 1140, 1140-52 (1994).

2. To date, many legal commentators, including the author, have used the clumsy term “GATT/WTO” to describe the new dispute settlement procedure created by the Uruguay Round agreements, in recognition of the fact that WTO is merely an organizational shell wrapped around the legal obligations of the GATT and its “Codes” (side agreements), and that new dispute settlement procedures themselves are based on Article XXIII of the GATT agreement. In the long run, however, it is inevitable that simplicity and economy will prevail, and that the procedure will become known as the “WTO procedure.” The usage in this article bows to the inevitable, saving the term “GATT/WTO” for phenomena that span the two institutions in time.

the DSU followed the basic elements of the earlier GATT procedure, it significantly expanded the procedure's legal powers. The DSU gave governments an automatic right to bring their legal complaints before a dispute settlement tribunal, it made legal rulings by tribunals automatically binding upon the parties, it introduced appellate review, and it gave complaining parties an automatic right to impose retaliatory trade sanctions in cases where the defendant government failed to comply with legal rulings.

The creation of the new WTO dispute settlement procedure was viewed as a signal event in international legal affairs — the birth of an important new legal institution that seemed to have unusually effective powers to regulate an important area of government economic policy. Because of the potential surrender of sovereignty involved, the new adjudication procedure was understandably controversial. In recognition of that fact, governments were careful to limit their commitment by scheduling a review of the entire procedure after just the first four years of its operation.³ It was a bold initiative. The world then stepped back and waited to learn whether it would work.

This Article seeks to evaluate the operation of the new WTO disputes procedure during its first three years of operation. The essay is divided into three parts. Part I begins by describing the foundations that had been laid for this new procedure by the GATT dispute settlement procedure that came before it — foundations that were critical to its adoption and that will be an essential part of whatever success it has. Part II then presents a quantitative analysis of the 98 “cases” that were brought during the first 3.3 years of operation, seeking to measure the changes in the nature of WTO litigation brought about by the new procedure. Part III concludes by examining a number of proposals for change, both large and small, that governments are likely to consider either in the formal “review” that the WTO began conducting in late 1998 or in the more distant future.

I. THE BACKGROUND: FROM GATT TO THE DSU

There has been an explosion of scholarly writing about the WTO's new dispute settlement system, much of which has given

3. Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Ministerial Decision adopted by the Trade Negotiations Committee of the Uruguay Round of Multilateral Trade Negotiations, *reprinted in* RESULTS OF THE URUGUAY ROUND, *supra* note 1, at 465.

a misleading impression about the foundations of this new legal instrument. In seeking to call attention to the significant legal advances made by the new WTO procedure, writers have tended to overstate the difference between the new procedure and its GATT predecessor. To accentuate the legal rigor of the new procedure, they have tended to portray the earlier GATT procedure as an essentially *diplomatic* instrument directed toward promoting negotiated settlements of legal conflicts.⁴ This is a natural mistake, because during the first thirty years of GATT history, roughly 1948-1978, the GATT disputes procedure did exhibit a distinctly diplomatic character. Its operating procedures were quite ill-defined, its legal rulings were written in vague language that suggested more than it said, and both its procedures and its rulings left plenty of room for negotiation. In 1970, the artful ambiguity of this early GATT procedure led this author to christen its methods "A Diplomat's Jurisprudence."⁵ Unfortunately, the tendency to describe the GATT procedure solely in terms of these early characteristics completely ignores a major change that occurred in the last fifteen years of GATT's existence. After 1980, the GATT dispute settlement procedure transformed itself into an institution based primarily on the authority of legal obligation. The GATT procedure's transformation into a more "judicial" or "juridical" instrument was not only remarkable in its own right, but more important to our present subject, the development of these legal powers and their general acceptance by GATT governments laid the essential foundation for even stronger legal powers that followed under the WTO.

The GATT agreement rose from the ashes of the failed 1946-1948 negotiations to create an International Trade Organization (ITO).⁶ GATT was a temporary trade agreement that was meant to be absorbed into the ITO. When the ITO was abandoned in 1950 after the United States failed to ratify it, the GATT found itself standing alone, forced to administer its code of legal obligations with only a very primitive organizational structure. During the first decade of GATT operations, GATT

4. In order to indicate the explosion of scholarly writing about the new WTO dispute settlement system, the Appendix to this article contains an extended bibliography of writings about WTO dispute settlement during the past four and a half years or so. The view of GATT dispute settlement as a procedure more diplomatic than legal is reflected, in varying degrees, in many of them.

5. See Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615, 615-16 (1970).

6. See generally WILLIAM DIEBOLD, JR., *THE END OF THE ITO* (1952) (a classic description of the demise of the ITO).

member governments slowly and quietly developed a procedure of third-party adjudication, based on the very skeletal provisions of GATT Article XXIII.⁷ Known as the “panel procedure,” it called for legal disputes to be submitted to panels of three to seven GATT delegates from neutral countries who would issue legal rulings on the merits of the complaint.

Due in large part to a hostile political climate in many leading GATT countries at this time, the GATT’s early adjudication process was wrapped in layers of diplomatic vagueness and indirection. But despite its lack of precision, the procedure worked rather well. Governments understood the legal rulings implicit in its vaguely-worded decisions, and once these rulings were approved by the GATT Contracting Parties, defendant governments almost always felt it necessary to comply.⁸ The reason these impressionistic half-decisions were successful was that the

7. GATT Article XXIII provides:

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of this Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them, and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. . . . If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in circumstances. . . .

8. Article XXIII:2 did give the Contracting Parties the power to authorize the complaining party to impose trade sanctions against legal violations, but this power was employed only once in GATT history, and even then the sanctions were not actually imposed. See *THE CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, Netherlands Measures of Suspension of Obligations to the United States*, GATT B.I.S.D. (1st Supp.) at 32-33 (1953).

early GATT of the 1950s was essentially a small "club" of like-minded trade policy officials who had been working together since the 1946-1948 ITO negotiations. They all knew what they had meant to say in the General Agreement (even if they hadn't always said it clearly). Thus they did not need a very elaborate decision-making procedure to generate an effective consensus about what particular governments were expected to do. Ultimately, of course, this rather delicate procedure worked because GATT's member governments wanted it to work. No matter how hostile the political climate back home, the key government leaders nonetheless wanted to be able to resolve conflicts in this more-or-less objective, rule-based manner rather than having to negotiate political solutions to every difference that arose.⁹

After posting an impressive record in the 1950s, the GATT dispute settlement procedure suddenly ceased being used in the decade of the 1960s. This legal "time out" was caused primarily by radical changes in the GATT's membership during these years, chiefly the replacement of small European states by the European Community and the dramatic increase in the number of developing country members. The European Community needed legal breathing space for some of the special trade arrangements that had been necessary to its formation. At the same time, both the Community and GATT's other developed-country members were even less eager to adjudicate the long agenda of legal claims being put forward by an increasingly aggressive Group of 77. Suddenly, the conventional wisdom of GATT was that lawsuits were a nonproductive way to approach any problem.

During the decade of the 1970s, GATT governments began a rather slow return to the dispute settlement practices of the past. The primary reason was an increased concern about the proliferation of non-tariff trade barriers. The only way to regulate most non-tariff barriers was to write general rules defining the kinds of regulatory measures governments were and were not permitted to employ, and then develop adjudication procedures to enforce those rules. Under prodding by the United States, the panel procedure was dusted off and made to operate again. In 1979, its "established" operating practices were rediscovered and written down in an agreed text, and litigation activity began to increase again.

9. See generally ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990).

At first, the GATT panels appointed in the 1970s tried to follow the nuanced diplomatic style of adjudication practiced in the 1950s. But the conditions of the 1970s were no longer receptive to that approach. The “club” of the 1950s was gone, and in its place was a much more contentious membership of over eighty nations, represented by a new generation of trade policy officials for whom the GATT/ITO negotiations were ancient history. Meanwhile, political leaders in national capitals had begun to pay greater attention to GATT legal affairs, on the one hand questioning its assertion of legal authority over their trade policies, and at the very same time demanding more aggressive prosecution of GATT legal claims against others. The more these often contentious GATT legal proceedings fell under the political spotlight, the more difficult it became for panels of GATT diplomats to “finesse” their way to an acceptable conclusion in important legal disputes.

The inadequacy of the diplomatic approach was demonstrated rather vividly in a few embarrassingly poor decisions rendered in the late 1970s and early 1980s.¹⁰ In contrast, a few well-reasoned legal rulings at this time received a favorable reception from governments.¹¹ The GATT Secretariat recognized that, in this new and more difficult setting, the dispute settlement procedure would need to rely more heavily on the authority of “law” itself. Accordingly, over the next several years the Secretariat persuaded governments to accept the addition of a legal staff to the Secretariat. And over the next decade, the new legal resources enabled the panel procedure to produce a string of quite sophisticated legal decisions resolving a number of very

10. See generally Robert E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in THE URUGUAY ROUND AND BEYOND 101, 101-20 (Jagdish Bhagwati and Mathias Hirsch, eds.) (describing the problems of the old diplomatic methods and the development of the Secretariat’s legal capacity during this period). Among the several cases criticized during this period, the chief targets were the following: *United States: Income Tax Legislation (DISC)*, GATT B.I.S.D. (23rd Supp.) at 98-114 (1977); *European Community: Program of Minimum Import Prices (MIPS), Licenses, Etc. for Certain Processed Fruits and Vegetables*, GATT B.I.S.D. (25th Supp.) at 68-107 (1979); *Spain: Measures Concerning Domestic Sale of Soybean Oil*, GATT Docs. L/5142 and L/5142/Corr.1 (June 22, 1981), not reprinted in B.I.S.D.; *United States: Imports of Certain Automotive Spring Assemblies*, GATT B.I.S.D. (30th Supp.) at 107-28 (1983).

11. Among the decisions that received particular commendation were: *Canada: Administration of the Foreign Investment Review Act (FIRA)*, GATT, B.I.S.D. (30th Supp.) at 140-68 (1984), and *United States: “Manufacturing Clause” in U.S. Copyright Legislation*, GATT B.I.S.D. (31st Supp.) at 74-94 (1985).

sensitive trade policy disputes. These successes stimulated governments to bring more legal conflicts to the GATT, with an ever-increasing degree of difficulty and political sensitivity. As it dealt with this growing caseload, the dispute settlement system also began to develop the substantive content of GATT law in a series of forward-looking legal precedents.¹²

By the end of the 1980s, GATT had developed its dispute settlement procedure into a quite powerful legal instrument. In the decade as a whole the GATT procedure disposed of some 115 legal disputes, and by the end of the decade the annual volume of complaints was almost double that level. As the cases became more and more difficult, the number of failures increased, but at the end of the decade over 80% of the cases were still being successfully disposed of.¹³ To be sure, that rate of failure would certainly have been unacceptable for most advanced domestic legal systems. For an international legal institution, however, it was remarkably successful. Most important, it was successful in the view of the governments which participated in it. Indeed, the best measure of the success of the GATT disputes procedure by 1990 was the increasing number of complaints governments chose to bring before it and the increasing political sensitivity of the trade practices it was being asked to rule upon. (Although the success rate did drop rather sharply once the new WTO procedure had been agreed to in the early 1990s, that proved to be mainly a transitional phenomenon.¹⁴)

12. See generally ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993) (discussing the rapidly improving fortunes of GATT dispute settlement during the 1980s).

13. The data supporting the calculation of the GATT's success rate during the period 1948-89, with particular emphasis on the period 1980-89, can be found in Chapter 11 and the Appendices of HUDEC, *id.* For the somewhat surprising decline in the success rate after GATT governments had drafted, but not yet adopted, the new WTO procedure, see *infra* note 14.

14. By the end of 1990, governments had already reached agreement to adopt the stronger WTO dispute settlement procedure. The author's provisional data for the period 1990-1995 show that in the last 29 GATT panel rulings issued during this period, 12 were not adopted, including 6 of the last 9 rulings. It was as though, having committed themselves to a procedure with no veto escapes, governments felt entitled to enjoy one last orgy of veto indulgence, like one last pack of cigarettes. Students of why governments comply with international legal norms will note that, in this situation, the certain arrival of a new and better legal system in a few years had deprived vetoes (noncompliances) of their usual harmful consequence — impairing or destroying the utility of the legal system in the future. These were “free” vetoes. Once the WTO system started operations, the vetoes stopped.

Notwithstanding the relative success of the GATT disputes procedure during the 1980s, its formal structure remained almost as flimsy as it had been in the 1950s. To be sure, the basic outline of the procedure had been written down in 1979, and a few procedural roadblocks, like selecting panelists, had been overcome (at least in theory).¹⁵ But the procedure was still entirely voluntary. Every decision from beginning to end had to be made by consensus. This meant that the defendant had a virtual right to veto every step of the process, from the appointment of a panel to the adoption of the panel's legal ruling and the authorization of trade sanctions for noncompliance. (Without adoption the ruling was not legally binding.) For most observers, this veto power was a glaring weakness in the GATT disputes procedure. Today, most writings about the new WTO procedure lay heavy stress upon these shortcomings when comparing the new procedure to the old GATT dispute settlement procedure.

There is another side to this procedural flimsiness, however, and it is that side that I wish to stress in this Article. The point is that, at least up through 1990, the procedural weaknesses of the GATT procedure did *not* really have all that much impact on its overall success. Although the procedure was not compulsory, defendant governments almost always decided to cooperate with it. They did so under the pressure of a strong community consensus that every GATT member should have a right to have its legal claims heard by an impartial third-party decision-maker. Likewise, just as in the 1950s, the pressure to comply with legal rulings seemed to be felt for all legal rulings, whether or not the defendant had vetoed formal adoption of the ruling. Although compliance was not always forthcoming, the pressure to comply was almost always there once the community arrived at a consensus that the ruling was correct. As for the power to veto the

15. The 1973-79 Tokyo Round negotiations produced two documents outlining the panel procedure. See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT B.I.S.D (26th Supp.) at 210-29 (1980). In addition, most of the "codes" (side agreements) negotiated in the Tokyo Round had their own dispute settlement procedures, each modeled closely on GATT Article XXII, but usually with a few added details and in some cases minor improvements.

In 1984, the problem of an impasse over the selection of persons to serve as panelists was addressed by a decision authorizing the Secretariat to create a roster of approved panelists (seldom used) and authorizing the Director General to appoint panelists on his own authority, at the request of one panelist, if the parties could not agree on the composition of the panel. See *Dispute Settlement Procedures*, GATT B.I.S.D. (31st Supp.) at 9-10 (1985).

authorization of trade sanctions, that hardly mattered at all, because there were almost no requests for permission to employ trade sanctions.¹⁶ As in the 1950s, the ruling seemed to be enough.

The natural question at this point is to ask how the GATT disputes procedure could have accomplished so much when it had no legally binding enforcement powers. The short answer is that these successes occurred because of the political will of governments which wanted to have a working legal order in this area. Governments wanted to have effective restraints on every government's behavior, including their own. They wanted a system of restraint based on rules agreed to in advance and then applied to individual problems by neutral and objective adjudication. We expect such views from smaller countries, which usually believe they will fare much better under a rule-based system than they will in a world of ad hoc negotiations where power dictates outcomes. But the GATT's two largest superpowers — the United States and the European Community¹⁷ — also wanted this kind of regulatory system. The perspective that leads large countries to want rule-based regulatory systems is quite complex, but for present purposes it will suffice to cite four advantages. A rule-based system is the most resource-efficient way to resolve conflicts with other countries. A rule-based system is also the most effective way to negotiate and capture desired policy changes in achievable incremental steps. A rule-based system creates the most predictable conditions for business decisions. Finally, a rule-based system helps to cement one's own liberal trade policies against the internal political pressures of protectionism.¹⁸

The first lesson to be drawn from this story is that, contrary to the impression being given by much of the writing on the subject, the impressive new WTO procedure is not a new departure. In the last fifteen years of its existence, the GATT dispute settlement system had become an adjudication procedure built solidly

16. To be sure, trade sanctions were threatened with some frequency. Such threats, as well as inflated warnings about the possibility of trade sanctions, have always been a useful argument in domestic political debate.

17. Until sometime in the early-to-mid 1980s, the European Community could have been described as resisting the development of an effective dispute settlement system, but with its decision to become an active participant, the old GATT system entered its most successful period.

18. See Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 *YALE L.J.* 1299, 1309-36 (1971) (discussing the last point, sometimes referred to as a policy of "lashing oneself to the mast").

on the authority of legally binding obligations. Much of new procedure laid down in the WTO's Dispute Settlement Understanding is merely a repetition of operating practices already established less formally by the GATT procedure. And far from repudiating that earlier GATT procedure, the new WTO procedure used the former's legal success as a foundation on which it could build an even more "legal" institution.

This first lesson is most important in defining the way one looks at the new WTO procedure. Rather than focusing entirely on the new departures, one should also be looking for the continuities with the past. Many things, perhaps most, are being done the way they were done before. Even if some of those old ways will have to change over time, one will not be able to understand the present and future shape of the WTO procedure without a good working knowledge of the system that went before it.

A second lesson that can be drawn from the relative legal success of the mature GATT disputes procedure is that an international legal system does not require rigorously binding procedures to be generally effective. Given the requisite political will to conduct affairs under a rule-based system, governments can achieve reasonable levels of compliance without such formal rigor. The GATT dispute settlement of the 1980s is solid proof of that proposition.

A third lesson suggested by the GATT's experience is that political will is really more important than rigorously binding procedures — that strong procedures by themselves are not likely to make a legal system very effective if they do not have sufficient political will behind them. More specifically, it may be suggested that the new WTO procedure is not likely to be significantly more successful than its GATT predecessor unless the adoption of this reform is supported by significantly stronger political will on the part of leading WTO governments. When we ask whether or not the new system will work, therefore, we have to begin by asking what kind of political will stands behind it. The current fascination with the novel WTO procedures tends to obscure the importance of this first and most important condition of success.

What can be said today about the political will behind the new WTO system? Based on first impressions, the answer should begin on a note of skepticism. Today's WTO governments are the same governments, more or less, as the ones that stood behind the old GATT disputes system. While those gov-

ernments did achieve a level of compliance that was exceptional by international standards, their commitment was not strong enough to deter occasional outbreaks of noncompliant behavior, particularly among its leading citizens. The new WTO system asks for a stronger political commitment because it sets the bar higher. Yet it is difficult to identify any major changes in national political life in the major WTO countries that will make their political systems more receptive to WTO legal discipline than they were in the decade or two before the WTO came into being.¹⁹

Are these first impressions too pessimistic? Can it not be argued that the willingness of governments to sign these stronger new procedures is evidence of the fact that they are now more willing than before to accept the discipline of a stronger legal system? The governments surely knew that the new WTO disputes procedure would be imposing a much stronger discipline upon them, and governments do not normally sign such commitments unless they believe that they are able to perform them.

Alas, the story of how the Uruguay Round dispute settlement reforms came to be adopted does not support these more optimistic expectations. At the beginning of the 1986-1994 Uruguay Round negotiations, GATT governments initially decided to settle for some minor procedural improvements in the GATT disputes procedure. The decision was made in December 1988, as part of an "early harvest" of negotiating results.²⁰ The "early harvest" decision on dispute settlement did seek to improve the system by providing that the steps to formation of a panel would be essentially automatic (codifying what was already all-but-established practice). But on the key issue of the veto power, governments once again declined to abridge the consensus principle that gave the losing party the opportunity to veto adverse rulings. The sentiment at the time was that dispute settlement worked better on the whole if defendant governments participated on a voluntary basis, and that it would not be productive to try to force governments into adjudicatory rulings they were not prepared to accept voluntarily. At this point in December

19. Viewing political developments in the United States from this perspective, the author would say that the most visible change in U.S. political conditions since the Uruguay Round has been movement in the opposite direction — an apparent strengthening of the opposition to international economic institutions on the part of the political Left in the United States.

20. See *Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT B.I.S.D. (36th Supp.) at 61-67 (1990).

1988, one could say that it was the considered opinion of leading GATT governments that there had been no significant change in the political will of most GATT member governments.

Less than twelve months later, however, GATT governments had changed their minds. The immediate precipitating event was the considerable intensification of a United States law calling for the imposition of unilateral trade sanctions against other GATT members whenever the United States determined they were in violation of their GATT obligations or, at least, were behaving in an unreasonable manner toward U.S. trade. This type of vigilante justice, associated with Section 301²¹ of the basic U.S. trade law, was dramatically expanded by major trade legislation enacted in 1988.²² The 1988 trade law created a new "Super 301" and several other "Special 301s" for a new and larger list of wrongs against U.S. trade. The other members of GATT viewed the new legislation as extremely threatening and called a special session of the GATT Council to demand a change of U.S. policy.²³ In reply, the United States sought to justify its actions by complaining that GATT dispute settlement was too slow and too weak to offer adequate protection of United States trade interests. The U.S. argument laid particular stress on the veto power created by the rule of consensus decision-making.

This United States counter-attack against the procedural weaknesses of the existing dispute settlement system led other governments to propose a deal. In exchange for a U.S. commitment not to employ its Section 301-type trade restrictions, the other GATT governments would agree to create a new and procedurally tighter dispute settlement system that would meet U.S. complaints. Although the United States was unable to guarantee it would never-ever use 301-type sanctions, it was willing to accept a legal obligation prohibiting such sanctions, and with that caveat accepted the deal.²⁴ Within a year of the

21. Section 301, Trade Act of 1974, 88 Stat. 2041 (1975), as amended, 19 U.S.C. § 2411.

22. Section 1302, Trade and Competitiveness Act of 1988, 102 Stat. 1176 (1988), 19 U.S.C. § 2402. The law expired in 1992, but the Executive Branch still follows its procedures in form.

23. See GATT Doc. C/163 (1989).

24. The U.S. commitment is recorded in DSU Article 23, which requires that government action based on legal complaints against other WTO members must abide by the rules of the DSU. The United States made clear that it was not promising to dismantle the first half of the Section 301 procedure, under which private citizens are given a right to have their complaints heard and evaluated publicly by the government, because that is merely an internal proce-

“early harvest” decision, negotiators had reached agreement on the basic elements of the new WTO disputes procedure.

The significant element in this story, of course, is the suddenness with which GATT governments abandoned the well-considered position stated in their “early harvest” decision — the position that governments were not ready for a dispute settlement system that went beyond the voluntary GATT model. Was it because they suddenly discovered that their fellow governments were ready, after all, to comply with a more rigorous procedure? The events precipitating this change of view suggest to the contrary. Rather, the change of position seems to have been a choice between two evils — between an almost certain legal meltdown if the United States were to carry out its new Section 301 instructions, and a very serious risk of legal failure, in the somewhat more distant future, if GATT adopted a dispute settlement procedure that was more demanding than governments could obey. In these circumstances, the fact that GATT governments chose the latter option does not mean that they were confident it would work. There is a general rule in diplomacy (and probably in all human affairs) that when choosing between evils, the evil in the more distant future is to be preferred. The choice in such cases is similar to the choice made by the condemned prisoner who promised to teach the King’s favorite horse to talk in exchange for a six-month reprieve. In the words of that prisoner, “Who knows? The horse may learn to talk.”

The suggested conclusion, then, is this: If it is true that the key ingredient of international legal systems is the political will of member governments to comply with them, and if it is also true that the WTO legal reforms do not signal a sudden improvement in the less-than-perfect political will that caused the GATT legal system to suffer occasional failures, it follows that the new WTO legal system cannot expect to have one hundred percent compliance, even with its new and more rigorous procedures. To the contrary, it must be anticipated that there will be defeats when governments cannot, or will not, comply with some legal rulings — just as they did under GATT.

What this means is that, after celebrating its considerable initial success during its first three years or so, the new WTO legal system will have to learn to cope with legal failure. Just as

ture for making decisions about what claims to pursue. As for the Article 23 pledge not to employ unilateral trade retaliation, the U.S. has suggested an understanding that its obligation is in the nature of a pledge to concede the GATT/WTO illegality of such behavior.

GATT did, it will have to learn how to get up off the floor, brush off its soiled authority, and move on to the next piece of business with the same high expectation of achieving compliance. In the meanwhile, it will have to learn to treat the failed legal ruling with persistence, patience and practicality — the *persistence* of keeping the matter on its agenda, the *patience* of doing so for what may be a long period of time, and the *practicality* of fashioning eventual accommodations that produce a result that can be said to be consistent with long-term respect for GATT/WTO law.²⁵

II. A STATISTICAL OVERVIEW OF WTO OPERATIONS

It is evident that the volume of dispute settlement proceedings has increased dramatically under the WTO. The most conservative method of counting the number of legal proceedings initiated during a particular period is to count the number of government measures that have been made the target of one or more legal complaints. In this Article, we shall refer to each such proceeding as a “case.” (The WTO Secretariat calls them “matters.”) Based on the records kept by the WTO Secretariat, we find in the 3.3 years from January 1, 1995 to May 8, 1998 that 98 government measures have been the subject of one or more dispute settlement complaints, for an average of 29.7 such “cases” per year.²⁶

25. The paradigm example of “hanging on” to a case until it can be resolved is the celebrated *DISC* case that lasted from 1972 to 1984. For a detailed description of the case, see Hudec, *supra* note 10. A footnote to that long story is the fact that, after fourteen years, the European Community has filed a WTO legal complaint against the U.S. statute that was passed in order to “comply” with the GATT ruling in that case, and a panel has been established to hear the case. See WTO Secretariat, *United States — Tax Treatment of “Foreign Sales Corporations,”* WT/DS108/1 (Nov. 28, 1997) (complaint dated November 18, 1997).

Another example might be the 1991 and 1994 *Tuna/Dolphin* rulings where, after seven years, the governments involved were finally able to negotiate a viable program of dolphin protection that resulted in removal of the GATT-illegal U.S. trade restrictions. See Deidre McGrath, Note, *Writing Different Lyrics to the Same Old Tune: The New (and Improved) 1997 Amendments to the Marine Mammal Protection Act*, 7 MINN. J. GLOBAL TRADE 431, 431-68 (1998).

26. All the quantitative data for WTO dispute settlement operations from 1995 to 1998 are based on the data contained in the WTO Secretariat’s *Overview of the State-of-Play of WTO Disputes* (May 8, 1995) <<http://www.wto.org>> [hereinafter “Overview”].

The “Overview” for 8 May 1998 counts only 95 “matters” or “cases.” My analysis of the complaints listed by the Secretariat yields the number 98, and

In the last 14 full years of the GATT dispute settlement system (1980-1993), the volume of cases was increasing at a steady rate, but at a much lower level of volume. According to the author's own statistics,²⁷ for the five years 1980-84, the rate was 9.2 cases per year. For the five years 1985-89, the rate was 12.8 cases per year. For the four years 1990-93, the rate was 15.8 cases per year.²⁸ Projecting the rate of increase that occurred during the 1980-93 period, the normal volume of GATT cases for the years 1995-1998 should have been about 19 complaints per year.²⁹

In sum, the volume of cases during the first three years of the WTO disputes procedure is almost 90 percent greater than the highest volume ever achieved by the GATT disputes procedure — the volume achieved during the last four full years of normal GATT operations. The volume of WTO complaints is about 60 percent higher than the old GATT procedure *would have achieved* if its caseload had continued to increase at the rate of the past 14 years. Measured either way, the increase in volume has certainly been large enough to be considered a significant event.³⁰

that is the number used in this Article. Because of the way the Secretariat's data is organized, it has not been possible to reconcile the discrepancy.

The "Overview" is updated regularly. At the time that final revisions of this essay were being made, the Overview of 23 September 1998 showed 107 separate "matters," and 143 individual "complaints," instead of the 95 and 131 in the 8 May 1998 "Overview." The volume figures for the May-to-September period are consistent with the data used in this essay.

27. The statistics for the complaints filed in the years 1980-89 are published in ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 273-355, 367-608 (1993). To adjust for the slightly different criteria used by the WTO Secretariat in defining a "matter" or "case," I have reduced my count of GATT "cases" in the 1980's from 115 to 110. The case count from 1990-93 is based on my as yet unpublished research extending my earlier data study to this period, adjusted to the Secretariat criteria.

28. The count for this final GATT period is based on only the first four years, because in the year 1994 dispute settlement activity almost ceased entirely once it became clear that the WTO would come into force in January 1995. Only 7 complaints were filed in 1994.

29. The rate of increase from 1980-84 to 1985-89 was 39%. The rate of increase from 1985-89 to 1990-93 was 23%. To make the projection as conservative as possible, I have projected the rate of increase for 1995-98 at 20%, or an increase from 15.8 cases per year to 19 cases per year.

30. Measured by workload, the increased caseload in the first three years of the WTO procedure was considerably more dramatic. According to WTO Secretariat calculations made with the aid of the "word count" function of the WordPerfect word-processing program, the number of words in the "Findings and Conclusions" sections (the legal analysis) in the panel reports produced by all WTO panels during the *two and one half years* from 1 January 1996 to 2

The explanation for this increase in volume that most readily comes to mind is that governments have more confidence in the new procedure because it promises to be more effective in removing trade restrictions, and thus governments are more inclined to use it.

Another, parallel explanation that also seems fairly obvious is that the WTO agreements concluded in 1994 at the end of the Uruguay Round contain many more legal obligations than the 1947 GATT and its "Codes" (side agreements) — not only many new legal obligations regarding trade in goods, such as the TRIMS, SPS, Agriculture and Textiles agreements,³¹ but also legal obligations in two very large "new areas" that were not covered at all by GATT 1947, namely the GATS agreement³² covering trade in services and the TRIPS agreement³³ covering intellectual property rights.

The following two sections test these two possible explanations for the increase in the WTO's volume of dispute settlement business. A third section examines the data on the number of WTO cases that result in the appointment of panels and panel rulings.

A. THE IMPACT OF THE NEW OBLIGATIONS

As a base for analyzing the increase in the volume of WTO dispute settlement cases, we have tried to express the increase in dispute settlement activity as a finite number of cases — the number of cases by which the cases brought under the new WTO disputes procedure during the first 3.3 years (98 cases) exceeded

July 1998 (the first WTO panel reports appeared in 1996) were *equal* to the number of words produced in the Findings and Conclusions sections of all GATT panel reports in the *ten years* from 1986 to 1995. The staggering increase in the number of words is due partly to the greater complexity of WTO cases, but also to the tendency to write more elaborate and comprehensive analyses due to the binding nature of panel decisions and the prospect of appellate review. Actually, confining the comparison to Findings and Conclusions sections *understates* the increase in pages, because the "Descriptive" part of panel reports (detailed summaries of the facts and arguments-of-the-parties) have expanded at an even faster rate. Participants and observers who groan under the weight of 400-to-500 page reports will need no further proof that this is true.

31. Respectively, Agreement on Trade-Related Investment Measures, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Agriculture, and Agreement on Textiles and Clothing. All are reprinted in RESULTS OF THE URUGUAY ROUND, *supra* note 1.

32. General Agreement on Trade in Services, reprinted in RESULTS OF THE URUGUAY ROUND, *supra* note 1.

33. Agreement on Trade-Related Aspects of Intellectual Property Rights, reprinted in RESULTS OF THE URUGUAY ROUND, *supra* note 1.

the number of GATT cases that *would have been brought* during those 3.3 years if the annual volume of GATT cases during 1990-1993 had simply been maintained, without allowing for any increase (52 cases). The result (98 minus 52, or an increase of 46 cases) is a conservative estimate of the number of additional cases generated under the new WTO disputes procedure. The question to be examined in this section, then, is how many of these 46 additional cases can be attributed to the new obligations added in the Uruguay Round.

In the 98 WTO cases brought during the first 3.3 years, one can identify 20 cases based on new legal obligations that could not have been brought under the 1947 GATT:

- 10 cases brought under the TRIPS agreement,³⁴
- 3 cases brought entirely under GATS,³⁵
- 4 cases involving agricultural export subsidies or tariffication commitments under the Agreement on Agriculture,³⁶

34.

1. *Japan — Measures Concerning Sound Recordings*, WT/DS28 and 41 (by US).
2. *Pakistan — Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS36 (by US).
3. *Portugal — Patent Protection under the Industrial Property Act*, WT/DS37 (by US).
4. *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50 (by US).
5. *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS 79 (by EC) (classified as a separate case due to separation in time).
6. *EC (Ireland) — Measures Affecting the Grant to Copyright and Neighboring Rights*, WT/DS82 and 115 (by US).
7. *Denmark — Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83 (by US).
8. *Sweden — Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86 (by US).
9. *Canada — Patent Protection of Pharmaceutical Products*, WT/DS114 (by EC).
10. *EC (Greece) — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124 (by US).

35.

1. *Japan — Measures Affecting Distribution Services*, WT/DS45 (by US).
2. *Belgium — Measures Affecting Commercial Telephone Directory Services*, WT/DS80 (by US).
3. *Canada — Measures Affecting Film Distribution Services*, WT/DS/117 (by EC).

36.

1. *EC — Duties on Imports of Cereals (Grains, Rice)*, WT/DS9, 13, 17 and 25 (by Canada, US, Thailand and Uruguay).
2. *Hungary — Export Subsidies in Respect of Agricultural Products*, WT/DS35 (by Argentina, Australia, Canada, New Zealand, Thailand and US).

3 cases involving dispute-settlement review of obligations under the Textiles agreement.³⁷

There are also 10 other cases brought under the new SPS and TRIMS agreements (8 under the SPS and 2 under TRIMS),³⁸ but these cases, although made easier to win by the new agreements, could have been brought under GATT.

Taken as a percentage of the 46 additional cases generated under the WTO procedure, the 20 cases clearly attributable to new obligations account for 43% of the increase. If only 3 of the 10 other cases brought under the SPS and TRIMS agreements were in fact generated by those new obligations, we could conclude that *half* the increase was due to the effect of new or expanded obligations.

An interesting datum in this collection of 30 "new obligation" cases is that almost all of them were brought by the United States. Subtracting the four cases brought against the United States (all three Textiles cases and one SPS case), the United

3. *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103 and 113 (by US and New Zealand).

4. *EC — Measures Affecting the Exportation of Processed Cheese*, WT/DS104 (by US).

37.

1. *United States — Restrictions on Imports of Cotton and Man-Made-Fibre Underwear*, WT/DS24 (by Costa Rica).

2. *United States — Measures Affecting Imports of Women's and Girls' Wool Coats*, WT/DS32 (by India).

3. *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33 (by India).

38. SPS Cases:

1. *Korea — Measures Concerning the Testing and Inspection of Agricultural Products*, WT/DS3 and 41 (by US).

2. *Korea — Measures Concerning the Shelf-Life of Products*, WT/DS5 (by US).

3. *Australia — Measures Affecting the Importation of Salmon*, WT/DS18 (by Canada).

4. *Korea — Measures Concerning Bottled Water*, WT/DS20 (by Canada).

5. *Australia — Measures Affecting the Importation of Salmonids*, WT/DS21 (by US).

6. *EC — Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 and 48 (by US and Canada).

7. *Japan — Measures Affecting Agricultural Products*, WT/DS76 (by US).

8. *United States - Measures Affecting Imports of Poultry Products*, WT/DS100 (by EC).

TRIMS Cases:

1. *Indonesia — Certain Measures Affecting the Automobile Industry*, WT/DS54, 55, 59 and 64 (by EC, Japan and US).

2. *Brazil — Certain Automotive Investment Measures*, WT/DS51, 52, 56, and 81 (by Japan, US and EC).

States was the complainant or co-complainant in 22 of the remaining 26.³⁹ On reflection, this concentration of complaints is not too surprising. The United States had expended by far the most effort to broaden GATT to include these new categories of legal obligations, so it is only logical that the United States would have been first in line to harvest the investment.

There is one other kind of "new obligation" that appears to have been a significant cause of the 46-case increase. Under the "Single Undertaking" principle adopted in the Uruguay Round negotiations, developing countries were required to sign almost every agreement included in the WTO package of agreements.⁴⁰ In addition, developing countries were asked to bind most of their tariff schedules, even if at relatively high "ceiling bindings." Both the volume of these new obligations and the interest in stronger discipline that lay behind them promised that the volume of WTO enforcement activity against developing countries would increase.

In a later section of this Article,⁴¹ we examine the percentage of WTO cases brought against developing country defendants, compared with the percentage of earlier GATT cases brought against developing countries. The data tend to confirm the hypothesis that tightening developing country legal obligations was another significant source of the increase in WTO litigation. The data suggest that as many as 25 of the 46 additional cases brought in the WTO from 1995 to 1998 were due to an increase in the number of cases being brought against developing countries. Indeed, if the figure of 25 additional cases is correct, the increase in cases brought against developing countries would be a slightly larger cause of increased litigation than were the many new WTO obligations.

Added together, the cases based on new obligations (at least 20 cases) and the increase in the number of cases brought against developing countries (25 cases) would almost equal the overall increase experienced by the WTO disputes procedure in

39. See cases cited *supra* notes 34-38.

40. There were only two major exceptions for most developing countries. First, developing countries were not required to join the four "Plurilateral Agreements," found in Annex 4 of the Marrakesh Agreement Establishing the World Trade Organization — those involving trade in civil aircraft, government procurement, trade in dairy products and trade in bovine meat. Second, full implementation of certain obligations were postponed for periods of up to ten years, under the heading of Special and Differential Treatment. There was another more generous set of exceptions and special advantages for Least-Developed Developing Countries (LDDCs).

41. See *infra* section II.B.2.

its first 3.3 years (46 cases). Since there is very little overlap between the two categories of cases —only three of the 20 “new agreements” cases were against developing countries⁴² — there is a strong case for saying that *substantially all* the increase in WTO litigation can be traced to the new or intensified obligations of the Uruguay Round.

B. THE IMPACT OF STRONGER PROCEDURES

The hypothesis that stronger procedures will elicit more dispute settlement complaints is intuitively persuasive, and in the absence of other explanations would seem a plausible explanation for a general, across-the-board increase in complaints activity by all parties. To find more probative evidence that stronger procedures have influenced the volume of complaints, one would look for a demonstration that the stronger procedures have induced governments to bring certain cases that *would not have been brought* under the weaker old procedure. Unfortunately, there is no easy way to make that judgment about individual cases.

The one general measure that would appear to have some probative value is the relative economic and political power of the countries that are responsible for this growing number of complaints. It is generally assumed that smaller and weaker countries are reluctant to bring legal complaints against larger countries, and that weak procedures accentuate this reluctance because they allow larger countries to apply “muscle” in response to unwelcome complaints. Accordingly, weak procedures should generate a lower-than-normal share of complaints by small countries. Without pausing to debate what volume would be “normal,” one can postulate that an increase in the percentage of complaints filed by smaller countries — and particularly by developing countries — would be fairly persuasive evidence that stronger procedures have made a difference.

The following sub-section tests this hypothesis by examining the identity of *the complainants* responsible for the large volume of WTO complaints in 1995-1998. It then compares them with the group of complainants that were responsible for GATT complaints during the last fifteen years of the GATT's existence, 1980-1994. After that, for what it may be worth, the next sub-

42. Two of the TRIPS cases were against India and one other TRIPS case was against Pakistan. Of the 10 other SPS and TRIMS cases, 3 of the 8 SPS cases and both of the TRIMS cases were against developing countries. See cases cited *supra* note 38.

section identifies the countries who were the *defendants* in the WTO cases and compares them to the group of defendants in the earlier GATT cases.

1. *The Identity of the Complainants.*

In order to count the distribution of legal complaints filed by different groups of countries, each complaint filed by each individual country has to be counted as a single event, even when one or more other complaints have been filed against the same government measure. In this sub-section, therefore, we shall be dealing with a body of 134 individual WTO complaints filed from 1995 to 1998, and a body of 216 GATT complaints filed from 1980 to 1994.⁴³

Which countries were responsible for the large increase in the number of WTO complaints as compared to the volume of earlier GATT complaints? The overall answer is that both developed and developing countries seem to have increased their complaints activity more or less equally. The four major groups of complainants are (1) the United States, (2) the European Community and its member states, (3) the "other" developed countries including Japan and smaller developed countries like Canada and Switzerland, and (4) the developing countries. The following comparisons can be made between the shares of complaints during the last 15 years of GATT dispute settlement (1980-1994)⁴⁴ and the shares under the first 3.3 years of WTO dispute settlement.

COMPLAINANTS

	GATT 1980-1994	WTO 1995-1998
United States	26%	32%
European Communities	19%	22%
Other Developed Countries	25%	16%
Developing Countries	31%	31%

These gross numbers show the combined U.S. and EC share of complaints increasing by 9 percentage points, the share of "other" developed countries declining by about 10 percentage

43. The sources for the following data are: For GATT 1948-1989, *see supra* note 27; for GATT 1990-1994, the author's unpublished research extending his previous study, and for the WTO 1995-1998, *see supra* note 26.

44. The seven GATT cases for the year 1994 have been included in the complainant-defendant data.

points, and the share of developing countries staying exactly the same.

It could be argued that the data for developing country participation in the last 15 years of GATT dispute settlement is misleading because there was an atypical bulge in the volume of developing country complaints during the 1990-1994 period, when developing country complaints accounted for 44 percent of all complaints (39 of 89), as opposed to a 22 percent share during the decade of the 1980s. Upon closer investigation, however, the increase in developing country complaints during the early 1990s does seem to have reflected a more or less permanent surge in developing country legal activity. In order to adjust for the possible overstatement of the level of dispute settlement activity by developing countries, due to the occasional tendency of developing countries to file multiple-party complaints with five to ten complainants, I have recalculated the data by counting only the "cases" brought by one or more developing countries, instead of counting each complaint by an individual government as a separate unit. Using this alternative measure of cases filed, one sees a sharp upturn in the developing country share of cases in the early 1990s, followed by an almost equal share of cases brought under the WTO procedure. One finds that developing countries were responsible for 17 percent of the GATT cases filed from 1980-89, 32 percent of the GATT cases filed in 1990-94, and 33 percent of the WTO cases filed from 1995-98.⁴⁵ Whatever it was that stimulated this near doubling of developing country legal complaints since 1990, it was something that happened before the DSU came into force.

Thus, although it seems quite probable stronger dispute settlement procedures did induce a somewhat greater volume of complaints activity by all kinds of countries, that incentive does not seem to have had a significantly greater effect on smaller countries than it did upon the larger and more powerful countries. The most one can say is that the stronger procedures probably helped to induce developing countries to keep pace

45. The numbers are: 19 of the 110 "cases" filed in 1980-89, 23 of the 71 "cases" filed in 1990-94, and 32 of the 98 "cases" filed from 1995-98 ("case" being defined according to WTO Secretariat criteria). The data on individual complaints for the 1980s is distorted by one case in which 10 developing countries were plaintiffs. The data for the early 1990s was distorted by three cases in which 19 developing countries complained. Interestingly, the data for the WTO cases from 1995-98 is distorted slightly in the other direction, due to the fact that developed countries started filing many more multiple complaints during this period, slightly more than were filed by developing countries.

with the expanding complaints activity in developed countries. Compared to the pronounced influence of the new and expanded obligations created by the Uruguay Round — an influence primarily upon developed country complainants⁴⁶ — the stronger disputes procedures appear to have played a less prominent role.

2. *The Identity of the Defendants.*

Since there is usually only one defendant for each “case,” the distribution of defendants has been calculated on a per-case basis. This makes it possible to ask which defendants account for the 46-case increase in the volume of WTO litigation.

Against which countries were this very large number of WTO cases brought? So far, dispersion of defendants under the WTO disputes procedure has been significantly different than it had been under the GATT disputes procedure in the 15 years from 1980 to 1994. The following comparison can be made:

DEFENDANTS

	GATT 1980-1994	WTO 1995-1998
United States	36%	21%
European Communities	28%	20%
Other Developed Countries	22%	20%
Developing Countries	13%	39%

The significant datum, of course, is the three-fold increase in the percentage of cases brought against the developing countries. This represents a significant part of the 46-case increase in the number of WTO complaints. If the developing country share of GATT cases filed (13%) had remained constant during the first 3.3 years of the WTO disputes procedure, only 13 of the first 98 WTO cases would have been filed against developing countries. The actual number of WTO cases against developing countries was 38. The increase of 25 cases is more than half of the total increase of 46 cases. The increased number of cases against developing countries, therefore, has to be viewed as a cause at least as important as the new obligations contained in the Uruguay Round agreements, both accounting for about half of the increase in WTO cases.

To repeat, the apparent reason for this very large increase in cases brought against developing countries was the major effort, launched in the Uruguay Round, to bring about a signifi-

46. See *supra* text accompanying note 40.

cant increase in legal discipline against developing countries. This explanation is not contradicted by the fact that more than a quarter of the WTO cases brought against developing countries during this period were filed by other developing countries (10 of 38). To be sure, it was the developed countries which led the Uruguay Round effort to strengthen the legal discipline against developing countries, and thus the developed countries would logically have been first in line to enforce this new discipline. But unlike the case of the specific new obligations like GATS and TRIPS that were mainly of interest to developed country complainants, the general legal disciplines undertaken by developing countries were general trade obligations of interest to all countries. Thus, once developing countries had actually undertaken the new legal obligations pushed upon them in the Uruguay Round, the existence of those obligations would naturally act as an inducement to all potential complainants, developing countries as well as others.

The parallel decrease in the percentage of complaints against the developed countries is less significant than it might appear. It actually represents an almost 50 percent gain in the absolute number of complaints brought against developed countries each year — from about 13 complaints per year during the 1990-94 GATT period to about 18 per year under the 1995-1998 WTO. Neither the United States nor the European Community has lost its attractiveness as a potential defendant.

C. THE FREQUENCY OF PANELS AND PANEL RULINGS

1. *What percentage of WTO cases have been submitted to panels?*

In the last period for which good data is available — the years 1980-89 — about 53% of all GATT cases proceeded to the stage of appointing a panel.⁴⁷ To arrive at a comparable figure for the WTO cases, we have examined only the 84 cases filed up to January 1, 1998 — excluding all more recent complaints because most would not have had enough time to reach the point

47. Here, as in earlier parts of this Article, to adjust for the slightly different criteria used by the WTO Secretariat in defining a “case,” I have reduced my count of GATT “cases” in the 1980s from 115 to 110, with a corresponding reduction in the number of panels from 62 to 58 and the number of panel rulings from 47 to 43.

in the process when panels are typically appointed.⁴⁸ Of these 84 cases, only 37 — about 44 % — have resulted in the appointment of a panel. It is possible that one or two slowly developing cases might add additional panels to this sample, raising the total to about 45-46%. In sum, so far a somewhat smaller percentage of WTO cases have been carried to the stage of appointing a panel.

At first, this datum is somewhat surprising. One might have anticipated that, with the greater automaticity of the new WTO procedure, it would be easier for complaining governments to obtain the appointment of panels, and thus one would see more rather than fewer panels being appointed.

Two different hypotheses can be offered to explain the lower rate of panel formation in WTO cases. First, it may be that the binding quality of the new procedure has persuaded more governments to remove illegal practices voluntarily. If so, one would have to conclude that the new procedure is working better than its predecessor. To test this hypothesis, one would have to study carefully the actual results in those cases that do not proceed to a panel, because not all withdrawn complaints have happy endings. Tracking down results in these cases is a very difficult and time-consuming kind of research. It is, however, critical to measuring the success or failure of the dispute settlement procedure, since it involves the outcome of at least half the complaints filed. That work has not yet been done.

The second hypothesis to explain the lower rate of panel formation is that a greater number of governments are using legal complaints as a negotiating instrument — a device to increase pressure without really intending to carry the litigation any further. This tends to happen whenever a large number of dispute settlement proceedings have been filed. The existence of many legal proceedings tends to render the ordinary language of diplomacy somewhat less forceful by comparison, with the result that governments need to raise the level of their voice (i.e., file a legal complaint) in order to be heard and listened to in the other country's capital. This phenomenon can be viewed as a sort of multiplier effect, a process by which a larger volume of lawsuits tends to generate yet an additional number of false lawsuits that makes the increase in legal activity look larger than it is. Once again, only a detailed study of results in non-panel cases can

48. The excluded cases are the cases after WT/DS115. The 84 cases included in the sample have been tracked to the most recent data available in the September 23, 1998 "Overview."

explain what is happening in this potentially important half of dispute settlement proceedings.

2. *What percentage of WTO cases have led to a panel ruling?*

Going back to the data for the 1980s, we find that 39% of the GATT cases filed during that decade resulted in a panel ruling. Based on data available at the time of writing, so far the 84 WTO cases filed up to January 1, 1998 have produced only 19 panel rulings, or only 23%.

This datum is misleading, however, because there are still 14 panels outstanding, and a substantial number of these are almost certain to produce rulings. Also, one or two of the cases from this sample that are still in consultation may yet produce panels and rulings. The final number of rulings is likely to be between 27 and 30 — in other words, 33-36%. The comparison between this projected number and earlier GATT practice reveals about the same degree of difference, the percentage of rulings in WTO cases being slightly lower. The difference is equally surprising. Its explanation would involve testing the same two hypotheses.

III. THE OPERATION OF THE NEW PROCEDURE: PROBLEMS AND PROSPECTS

A. THE APPELLATE BODY

Evaluation of the new GATT/WTO dispute settlement procedure invariably begins with the work of the Appellate Body. The idea of creating an Appellate Body emerged rather late in the Uruguay Round negotiations on dispute settlement, after governments had outlined the main elements which made panel rulings automatically binding. Having decided to accord this much power to panel rulings, governments then felt the need to provide a stronger safeguard against the possibility of erroneous rulings. The Appellate Body was created primarily to provide this added assurance of legal correctness. Whether intended or not, however, the decision to create an Appellate Body has also caused a pronounced shift in the center of power in the GATT/WTO legal machinery. In the previous GATT panel proceedings, the decisive influence had generally rested with the legal analysis performed by the GATT Secretariat's Office of Legal Affairs.⁴⁹ Under the present GATT/WTO procedure, the Appellate Body now has the final word on all issues of law. In its first

49. See Hudec, *supra* note 10, at 114-20.

three years, the Appellate Body has made full use of these powers.

As most observers expected, all but a handful of adverse panel rulings have been appealed to the Appellate Body. The Appellate Body has affirmed the result in all but one of its first twelve appellate rulings,⁵⁰ but it has wielded a sharp knife when reviewing the supporting legal analysis by which panels have justified those results. Although the parties disadvantaged by Appellate Body rulings can be heard grumbling in private about the substance (and sometimes the style) of the rulings against them, so far governments have observed what seems to be a collective cease-fire against all public criticism of Appellate Body decisions during its start-up years.

The Appellate Body has constructed a well-functioning institution in a very short period of time. Contrary to the informal, *ad hoc* procedures often followed by GATT panels, the Appellate Body set out fairly detailed rules of procedure right at the outset. It also made clear that it expected a fairly high standard of practice, as compared with the more easy-going standard of practice common to party-controlled panel proceedings. It insisted on thorough written submissions from the parties appearing before it, as well as representation by counsel able to answer extensive questioning by the three-member panel assigned to the case.

The Appellate Body also acted rather decisively in solving a problem that had been created by the DSU rule that calls for the seven-member Body to sit in rotating panels of three to hear and decide appeals. Given that membership on the Appellate Body was supposed to be a part-time position, with only part-time residence in Geneva, this rotating pattern of decision-making looked as though it would create obstacles to the development of unified answers to legal questions. In response, the Appellate Body adopted a "collegiality" policy requiring that all seven members assemble in Geneva after the hearing in each case to

50. Two cases did not really count because they involved only an appeal by the winning party as to collateral legal issues. Of the other ten, nine affirmed the main substantive conclusions that were challenged on appeal. The only decision to reverse the panel decision entirely was the so-called *LAN* (Local Area Networks) case in which the Appellate Body reversed a panel finding that an EC tariff concession covered certain computer equipment, finding that the panel's analysis had mistakenly focused on only the exporter's expectations as to the meaning of the concession, and had improperly allocated the burden of proof on the importing country. *European Communities, United Kingdom and Ireland — Customs Classification of Certain Computer Equipment*, WT/DS62, 67 and 68/AB/R (June 5, 1998) (appealed by EC).

discuss the case with the three-member panel deciding it. Thus far, all three-member Appellate Body opinions have been unanimous, and the "collegiality" policy at least gives the impression that all seven members were in agreement with the general outlines of each decision.

Appellate Body opinions have called for more detailed and more rigorous legal analysis than GATT panels had been accustomed to performing. Although its own appellate opinions are obviously much shorter and more narrowly focused, the Appellate Body opinions do appear to apply the same standards to themselves. It is too early to offer any judgment about the substantive quality of these first dozen Appellate Body decisions. That judgment will require a collection of careful, candid analyses of particular decisions by qualified professionals, a process that will take a few more years to attain the necessary volume. There should be no trouble in finding willing critics; a small army of academic lawyers and well-published practicing lawyers are already gathering around the Appellate Body's work product, with sharpened pencils in hand.

In the meanwhile, one must be content with a few observations about the general direction of the Appellate Body's first dozen decisions. As noted above, in most cases the Appellate Body has identified some legal errors in the panel's supporting analysis, often fairly extensive errors, but it has rarely reversed the ultimate result reached by the panel. A tentative hypothesis would be that the Appellate Body is inclined to respect the practical judgment of the trade policy officials who serve as panelists, and in particular their overall judgment about whether the particular conduct being complained of deserves community sanction. As time goes on, it will be interesting to observe whether this hypothesis proves to be an accurate predictor. The normal expectation, one would suppose, is that the Appellate Body will become more assertive over time, as its members acquire stronger convictions as to both WTO law and policy.

From the beginning, the Appellate Body has made a point of insisting that interpretation of WTO agreements be made in conformity with the relevant provisions of the Vienna Convention on the Law of Treaties (VCLT).⁵¹ The care and attention given to the VCLT (now dutifully echoed and amplified in most panel reports) could be viewed as a bit excessive, given the rather open-ended drafting of VCLT Articles 31 and 32 and the

51. *Vienna Convention on the Law of Treaties*, May 23, 1969 in 8 I.L.M. 679 (The American Society of International Law, 1969).

differences among scholars as to what they mean.⁵² In defense of this practice, however, it must be remembered that the WTO dispute settlement procedure is facing a difficult task of obtaining government compliance with its new and more demanding rules — a task which is more difficult than it appears because, as noted in Part I, the rigor of this new procedure has reached a bit beyond the legal discipline WTO governments actually thought they were ready for. In this situation, a normal measure of prudence would dictate giving legal rulings the greatest possible appearance of objective legal authority. Claiming that results are called for by the VCLT's carefully codified principles of customary international law is the first thing any rational tribunal would do in these circumstances.

One of the most widely noticed statements by the Appellate Body in this first round of decisions was its citing with approval the principle of *in dubio mitius* in the *Hormones* case.⁵³ In reversing the panel's conclusion that Article 3.1 of the SPS Agreement created a *prima facie* obligation to comply with certain international sanitary standards, the Appellate Body said,

We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such [international] standards, guidelines and recommendations.

A footnote to this sentence cited the following passage from *Oppenheim's International Law*:

The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.

The principle of *in dubio mitius* is a well respected canon of treaty interpretation, but like most canons (and counter-canons) its role in treaty interpretation is a matter of how forcefully it is

52. For a discussion of the various views of the VCLT and the larger debate over the proper principles of interpretation generally, see SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 114-19 (2nd ed. 1984). Commenting on O'Connell's criticism that the VCLT is too general, Sinclair replies,

The criticism directed towards the generality of the rules is no doubt well founded if (but only if) the intention had been to formulate a comprehensive code of the canons of interpretation available to international tribunals or other decision-makers. But the [International Law] Commission specifically disavowed any such intent

53. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS 26/AB/R, WT/DS 48/AN/R at 41-42 (Jan. 16, 1998).

applied. Given the expected difficulty in securing government compliance with the new WTO disputes procedure, one might expect that the Appellate Body would give considerable emphasis to this canon, in an effort to assure governments that the WTO's new and stronger enforcement powers would be limited to obligations that governments have clearly and knowingly adopted. Until the *Hormones* case, however, the Appellate Body decisions had not gone out of their way to give this assurance. The earlier decisions did not seem to have been significantly narrowed by explicit application of *in dubio mitius* reasoning. Observers will be watching to see whether the *Hormones* decision and the more recent *LAN* decision⁵⁴ may be signs of a move in this direction. Given the prospect of some difficult compliance problems on the horizon, some further movement in this direction would not be unlikely.

On the whole, the substance of the first dozen Appellate Body decisions rendered during the first three years has been viewed by governments as competent, conservative, and "responsible." The net effect has been that the Appellate Body has secured, in practice, the authority it was given on paper in the Uruguay Round reforms. WTO legal practice now has its eyes firmly focused on what the Appellate Body has said and on what the Appellate Body is likely to do in the future. Although the next few years will undoubtedly produce a substantial body of literature criticizing some of these early rulings, that criticism will almost certainly not threaten the central role that the Appellate Body has succeeded in defining for itself. In all the discussions of future reform that the author has heard or read to date, the existence of the Appellate Body is simply taken for granted.

What changes could be proposed in order to improve the working of the Appellate Body? From the viewpoint of the Appellate Body itself, the two most useful changes would probably be the obvious ones — more resources (more staff) and more time than the 60 days it is currently given to decide appeals. The major structural issue likely to be raised is the question whether the Appellate Body should be given the power to remand incorrect decisions to panels for further proceedings, rather than following its present practice of trying to resolve such cases itself on the basis of the existing record.

54. *European Communities, United Kingdom and Ireland — Customs Classification of Certain Computer Equipment*, WT/DS62, 67 and 68/AB/R (June 5, 1998).

Given the present level of satisfaction with the work of the Appellate Body, the author would not expect that the formal WTO review scheduled for late 1998 would consider more than a few incremental changes in the present structure and practice of the Appellate Body. Any change involving an extension of the total time allowed for dispute settlement proceedings is likely to meet strong resistance from those who feel that the procedure must continue to meet the original U.S. demand that WTO procedures be as rapid as its own Section 301 proceedings. If and when the new WTO dispute settlement procedure becomes more firmly rooted, however, both the remand power and some additional time would deserve serious consideration.

B. THE PANEL PROCEDURE

The changes made by new WTO dispute settlement procedure have had a great impact on the work of the three-member panels that hear and decide legal complaints at the first level. Even without appellate review, the automatically binding nature of WTO panel reports means that panels must take greater care to produce demonstrably competent, well-reasoned, and well-supported decisions. The fact of review by the Appellate Body intensifies these demands, giving panels the further task of complying with all of the guidelines set down by previous Appellate Body decisions. The burden of meeting these increased quality standards has been still further increased by the tendency of governments to submit increasingly more complex cases to the new disputes procedure — cases requiring analysis of both more facts and more legal issues than the typical GATT panel ruling of a decade ago. One very visible sign of these new demands has been a staggering increase in the length of panel reports under the WTO procedure in comparison to the panel reports of the GATT procedure it replaced.⁵⁵ The pressure of all this added work is then further compounded because, unlike previous GATT panel proceedings, the new WTO proceedings must be completed within rigorous time limits (although more complex cases still manage to take considerable extra time).

All of these new elements place the participants under considerably more pressure than was previously the case under the rather relaxed work habits and procedures of GATT panels. Secretariat officials, who are responsible for assembling “the record” of facts and arguments as well as providing legal research

55. See *supra* note 30 discussing increase in word count.

and drafting services, must carry much of the increased load, leaving the Secretariat feeling continually short-handed despite a substantial increase in staff at the beginning of WTO operations. The increased demands of the new WTO procedure also require more of panel members, both in terms of the quality of decisions being made and the amount of time and involvement that must be invested in the task.

All these new demands on panels have generated concern about whether the panel procedure, as presently designed and operated, is the most suitable vehicle for performing its present responsibilities.

1. Is a first-tier panel procedure still necessary?

Logically, the first question is whether the panel procedure is even needed now that there is a body of essentially full-time professional judges sitting in the Appellate Body. Most international adjudication takes place at one level. The fact that the Uruguay Round negotiators chose a two-tier model does not mean that the negotiators seriously considered and rejected a one-tier model. Rather, it was simply that governments had learned to accept the existing GATT panel procedure, and the best way to build a stronger system was to build on what governments had already accepted. So, taking the existing system for granted, the negotiators confined their task to making those changes in the existing procedure that would achieve the specific goals they had in mind. Creating the Appellate Body was the easiest and least disruptive way, in those particular circumstances, to meet the need for a greater assurance of legal correctness.

Logically, now that the Appellate Body is securely established and functioning well, the WTO governments should probably ask themselves whether they really want a two-tier adjudication system at all. The obvious alternative is to increase the Appellate Body from seven to nine members, make membership a full-time job, and simply send all cases to the Appellate Body for decision within the 12-16 month time limit of DSU Article 20.

As far as the author has been able to tell, at the present time there is little or no interest in abolishing the first-tier panel procedure. The Appellate Body itself gives no sign of wanting to expand its role and, if asked, would probably say that it prefers dealing with cases after another institution has cleaned out the underbrush and narrowed the dispute to the main legal issues.

Most other WTO participants and observers seem to take the two-tier system for granted, focusing on how to improve the panel procedure rather than questioning the advisability of a two-tier procedure in the first place. Although the time is clearly not right for such a proposal, it should be kept in mind particularly if, as is quite possible, the present panel procedure is deemed unsatisfactory, and it proves impossible to make enough changes in the panel procedure itself to meet the problem.⁵⁶

2. *The Selection of Panel Members.*

Most of the concerns about the operation of the present panel procedure stem from the perception that the WTO procedure needs greater legal rigor than before — so that it can deal with the increased complexity of the cases being filed, so that it can satisfy the more rigorous standards that are being applied to its decisions by the Appellate Body, and so that its decisions will have the legitimacy needed to justify their automatically binding character. The first issue usually mentioned in connection with these concerns is the *ad hoc*, part-time nature of the panel itself, particularly as it relates to (a) the professional qualifications of the panel members and (b) the time, effort, and control that can be expected from panel members serving in that capacity.

Traditionally, panels have consisted of three diplomats from the GATT delegations of countries perceived to be neutrals in the dispute. Panel members were usually described as experts in GATT law. That was once true in the early days of GATT, when Geneva delegations were staffed with the veterans of the GATT/ITO negotiations who had actually written the General Agreement. Today's panel members are usually well-versed in WTO policy and procedures, and are generally persons who have a reputation for good judgment among their fellow diplomats. But most lack the legal training or experience to render professionally competent judgments on complex legal issues. Since the early 1980s, the majority of panel members have tended to rely on the advice of the Secretariat's legal staff on such legal issues. While most panel members have insisted on exercising their

56. For example, it is quite conceivable that the notoriously parsimonious WTO governments would resist creating a new corps of professional judges, with their own staff and institutional structure (a first-tier Appellate Body, one might say), but would be willing to add two or more judges and some additional staff to the Appellate Body itself, and then ask them all to work harder.

own judgment at the end of the day, Secretariat legal advisors have clearly exercised considerable influence.

Some critics have attacked the role of the Secretariat in this arrangement, charging that Secretariat officials have no mandate to perform this quasi-decision-making role and are not accountable to the government community because they take no visible responsibility for what is decided. The criticism is well-founded, albeit the consequences are somewhat less troublesome now that the Appellate Body has the final responsibility for the outcome in most cases. But the criticism is also somewhat misdirected. However awkward the arrangement may be, in most panel proceedings the Secretariat has been, and will remain, the only available source of legal expertise as long as the panel members are selected as they have been in the past. The only alternative to legal rulings based on Secretariat legal advice (or on the advice of some other equally unanointed advisors) is a panel procedure in which the panel members themselves have enough legal expertise to employ their own legal judgment. If panels were composed of members with such legal expertise, one would no longer need to worry about the undue decision-making power of the panel's legal staff.⁵⁷

In recent years, the WTO Secretariat has sought to strengthen the corps of panel members by repeatedly proposing a number of veteran panelists when suggesting possible panelists to the parties. Some of these veterans can be called legal experts, others are simply very well-respected diplomats who understand the dispute settlement process and have demonstrated good judgment in previous cases. The effort to increase the participation of this particular group of panel members has met with some success, but the limitations of this strategy have already become visible. Well-regarded veteran panelists are limited in number. There are severe limits on the number of cases they can handle consistent with their primary professional occupations. And party litigants sometimes find reasons for objecting to these eminent persons as well.

Whatever the limited gain achieved by more frequent selection of well-respected veterans, many participants feel that the problem of finding an adequate overall supply of qualified panel-

57. A separate concern about using Secretariat legal officers as the legal staff for panel members is a conflict-of-interest, or a conflict-of-function problem that occurs when Secretariat staff who have given legal advice to governments about a particular matter find themselves, a year later, advising a panel asked to rule upon the same or a similar issue.

ists is actually getting worse. The demand for panel members has increased very substantially. Even with a slower rate of panel formation than in the past, the considerable increase in the absolute number of WTO cases has led to an overall increase in panel formation each year — from about seven panels per year at the end of the 1980s to about twelve per year at present. This means the WTO must staff thirty-six panels every three years, which in turn means 108 panel members have to be found every three years.

Meanwhile, the supply of panel members acceptable to governments is decreasing. About a third of the needed panel members will be able to be drawn from veteran panelists serving two or three times every three years. A major limitation on the supply of new panelists is the general rule against appointing nationals of a disputing party or nationals of other interested parties. To begin with, this rule excludes the rather large supply of qualified European Community and United States citizens from a very large percentage of panels. The recent expansion of the European Community has further reduced the remaining list of recognized neutrals, and the accession of Switzerland to the Community could decrease even further the small number of recognized neutrals that are left.⁵⁸ These serious supply limitations have recently been exacerbated by the growing tendency of governments to object to proposed panelists on the slightest grounds. The more important WTO litigation becomes, the more sensitive government officials seem to be about potential allegations of careless panel selection or, perhaps, the more they try to improve a losing hand by manipulating panel selection. In the words of one observer, “the process doesn’t even warm up these days until a dozen or more panelists have been rejected.” It is hard to find anyone who is satisfied with the current panel selection process, and most share the sense that it is getting worse every year.

Beyond all these quantitative limitations, there is a larger question of whether panel members of whatever qualifications can ever be fully effective as long as their participation is limited to *ad hoc*, part-time service. If greater legal expertise is desired, it will not be obtained by drawing upon the available pool of *ad hoc* panelists. Moreover, the entire *ad hoc*, part-time

58. In the first 30 panels appointed by the WTO, 12 of the 90 panelists were Swiss. Under present neutrality rules excluding nationals of parties and interested parties, as “Europeans” these Swiss panelists would probably not have been selected in 10 of those 12 cases.

structure of panel membership works against the desire for more effective participation. Under the present design, panel members serve only from time to time. Unless they are fully retired, they spend the majority of their time performing their other, primary professional duties — whether as WTO diplomats, government officials, practicing lawyers, or academics. For the most part they work with new and different colleagues and staff each time around. Even though there are many reasons for wanting fresh perspectives from fresh faces, these limitations exact a heavy price for that quality.

In recognition of these problems staffing panels, some critics have proposed a more radical change, altering the basic character of panel members. The idea is to make panel members more like members of the Appellate Body — that is, essentially permanent, well-paid professionals who will devote the major part of their time, if not all of their time, to WTO adjudication.

Little work seems to have been done on the mechanics of such a proposal. Few legal systems employ three professional judges to decide cases in their first-level tribunals, and it would seem extravagant to do so here. One professional jurist should suffice. Based on their past behavior, governments can be expected to prefer jurists with government experience as well. Governments might even want the somewhat greater comfort that would come from seating the professional jurist as chair of a three-member panel with two senior WTO diplomats. Since the two diplomats would have two of the three votes, however, that design would open up all the selection battles that are currently threatening to paralyze the system.

Either way, a design calling for one professional jurist per panel would need to define a reasonable workload in order to determine the number to be employed. The volume of panel business tends to be uneven, with variations in the number of active panels at one time, in the complexity of individual cases, and in the time demands of each case, with alternating periods of dead time and intensive work to meet deadlines. Estimating that there can be around fifteen panels in operation at peak times, and guessing that three panels a year would be a fair workload, one might estimate a minimum need for about five professional jurists. Another one or two would not be wasted, particularly if only a few very time-consuming “blockbuster” cases continue to appear on the WTO docket.

Expense and the supply of candidates should not be a problem. The selection process will almost certainly be a problem.

Indeed, if one listens to those who went through the extremely contentious battle that was waged in selecting the first Appellate Body in 1995, there is a good chance that distaste for the prospect of another such battle would render a professional-jurist proposal "dead-on-arrival." To be sure, this time around governments will already have worked out the geographical and political distribution formula they settled upon for the Appellate Body — American, European, and Japanese seats, another seat for smaller developed countries, and three developing country seats for Asia, Africa, and Latin America, with the "owners" of each seat exercising some degree of control over nominations and thus, indirectly, selection. One problem with following the Appellate Body model is that it requires at least seven seats to satisfy the major players, and more likely eight or nine. A more serious problem with using that model is that professional jurists at the panel level will not be making decisions in quite the same collective manner as the Appellate Body. Consequently, the questions of national bias raised by such a nationally-oriented selection procedure would be a good deal more acute than they are with the Appellate Body.⁵⁹ The proposal might not work at all unless governments can figure out a way to nominate and select candidates on a basis that would inspire more confidence in the neutrality of the persons chosen.

At the moment, most observers are predicting that governments will not be ready to consider a professional-jurist proposal in the current 1998 review being carried out in the WTO. There is a general sense that the first priority at the present time must be to build political acceptance of the new disputes procedure. Therefore the best line to follow at this early time in its history is to keep declaring the system a success rather than opening it up to major change just a few years after adopting it. Governments no doubt see the problems in the selection process, but as long as cases processed through panels and the Appellate Body are generally seen as successfully resolved, the pressure to act will not yet be there.

In the author's view, the professional-jurist reform warrants serious consideration. The more one studies the various

59. One of the more interesting elements of the success of the Appellate Body so far has been the fairly low level of concern about national bias, notwithstanding the national orientation and control of the selection process. It would have been too much to expect no whisper of suspected bias, for losing parties will always search for other reasons. But the collective nature of the enterprise, coupled with the reputations of the individual members, does seem to have kept such neutrality concerns at an acceptably low level.

other problems with the present panel process, the more one sees that they come back to problems centering on the panel members — their professional qualifications and part-time participation. Although immediate action may be politically unwise, it is not too early to begin serious discussion of the alternatives.

3. *The Standard of Practice.*

WTO panel proceedings usually involve a struggle to develop the necessary information and legal understanding to decide the case properly. Each of the parties to a dispute settlement proceeding is quite content to present the panel with all the information favorable to its side, and will want to avoid presenting any information that can help the other side. In ordinary civil litigation the adverse party usually manages to present the contrary side of the case. The same is true in WTO litigation, but the panel process has certain limitations in that regard. Governments do not have powers of discovery to obtain information from opposing parties, and so often they can only offer undocumented surmise. Likewise, panels themselves do not have the time or the procedural expertise to conduct long hearings with witnesses. The best way to develop the facts is to obtain the parties' agreement to them. This usually requires questioning by the panel to fill in the gaps, with questions focusing on just those facts and issues that the party being questioned would often prefer not to answer fairly and fully. Full development of the legal side of the case often requires similar questioning, just as judges in civil litigation find it valuable to sharpen their understanding of legal issues by probing apparent weak points in each party's legal arguments. To be effective, such factual and legal questioning requires a good foundation in the submissions of the parties, careful preparation of those materials, and above all a certain degree of tenacity. The sooner this is done, the more time the panel will have to refine its understanding, and the more opportunity it will have to cover missing ground. In a time-limited proceeding, time is quality.

The present panel procedure is not structured in a way that allows panels to develop cases in a very aggressive manner. The Secretariat officials have an outline of a schedule and a process they lay before the parties, but the process, which is based on traditional practice, is not very efficient.

The complainant and defendant take about 60 days to write and exchange first submissions, after which they participate in a

hearing before the panel. Traditionally, the parties at the first hearing do little more than restate their first written submissions. Little if any further elaboration is expected in oral exchanges or in questioning by the panel or by each other. The low expectations for the first hearing tend to become self-fulfilling; both parties and panelists tend to limit their preparations to an introductory level. The low level of accomplishment at the first hearing reduces the effectiveness of the second hearing a month or so later. Cases tend to develop in ragged fashion, governed by whatever the parties submit and when they submit it.

The lower level of expectation throughout the proceeding tends to reduce the value of questioning by the panel. The panel does have the possibility of questioning the parties on factual and legal issues, but representatives of the parties are often not prepared to answer without further instruction. Oral questioning tends to be limited to less complex subjects, with limitations on the extent of follow-up questions. For these reasons, and also because of a desire to make a better record, primary reliance tends to be placed on written questions, and written questions, of course, are easier to avoid unless they are written with great care, and sometimes even then. In such an atmosphere, tenacity is discouraged.

In part, this somewhat passive and slow-moving state of affairs is caused by the way that power is structured in the model panel that the WTO inherited from GATT. The traditional view of GATT panels centered on the idea that the panel was a body created by the parties to help them resolve a legal dispute. In the beginning, panels were created by agreement of the parties. Panel members were selected by agreement of the parties. Panels were assisted by GATT Secretariat officials, and the Secretariat always presented itself as a servant of the governments rather than an independent body. Even though the new WTO procedure makes the panel process compulsory, panelists are still approved by the parties, Secretariat officials are still servants of the governments, and the governments still have the traditional expectation of party control.

Needless to say, with this perception of the roles and relationships in a panel proceeding, it is difficult for panelists or Secretariat officials to force a higher standard of practice on the parties. The Secretariat legal staff is perhaps best qualified to initiate a more rigorous standard of practice, having the greatest experience in how panels operate and what they need to accomplish. Yet the Secretariat is not only the servant of

governments, but it is also the servant of the panel, and in that latter capacity finds it difficult to persuade the panel to do things that may precipitate conflict with the parties. The panel members themselves — even the veteran members — are still only occasional, *ad hoc* participants, invited to participate with the consent of the parties. Thus they usually find it more comfortable to follow whatever advice they are given about the usual way of doing things. As a consequence, neither panel members nor Secretariat advisors exert much force in guiding the development of the case.

So long as the roles and relationships of WTO panels follow these traditional patterns, it will be difficult to impose a more rigorous standard of practice on the panel process. It might be possible to have the Dispute Settlement Body — the plenary council of WTO governments acting as directors of the dispute settlement process — set higher objectives for particular phases of the procedure, but the success of such an initiative would still depend on having someone in charge of the proceedings willing and able to assert the authority to make it happen. That rather aggressive role is not one that many senior members of the Geneva diplomatic community would seek.

It is worth pausing here to note that the Appellate Body has been constructed in a way that escapes the “party control” model one sees in present WTO panels. Because its members are permanent, they are free from the pressures that restrain *ad hoc* panelists chosen by the parties. The staff of the Appellate Body is their servant, but not the servant of governments. The result of this structure is what might be called “judicial independence.” If governments want the panel process to have the control that flows from a similar kind of judicial independence, the elements of that model are already before them.⁶⁰

4. *The Interim Report.*

A specific change in the panel procedure that has enlisted considerable support is a proposal to delete the “interim report” stage of the panel process. The “interim report” is the stage in which the panel releases to the parties a draft of its findings and

60. If one were to look at the present situation of the WTO panel process through a more theoretical lens, many of the tensions currently pulling upon the WTO panel process could well be described as tensions caused by trying to use a judicial institution built on a “party control” model to meet the demands of a judicial institution built on an “independent control” model.

conclusions on the merits of the dispute.⁶¹ The interim report procedure was adopted in the Uruguay Round reform negotiations. It was borrowed from the dispute settlement provisions of the Canada-United States Free Trade Agreement (CUSTA), and the North American Free Trade Agreement (NAFTA) after it. The purpose of the practice is to give the panel an opportunity to receive the parties' objections to its legal ruling, so that it can discover and correct unintended errors before releasing its report to the public. Such a procedure is particularly useful in dispute settlement procedures where one has reason to be concerned that the proceedings before the panel may not necessarily illuminate the problem sufficiently to permit the panel to perceive all its dimensions the first time around. In both CUSTA and NAFTA, for example, panel members are all non-governmental lawyers and academics who have no formal connection to the international institutions in question, the permanent Secretariat of these institutions does not offer panels any substantive legal advice, and the panel has only one oral hearing.

Although the interim report phase of the process has contributed to some improvement in the clarity and scope of panel legal rulings during the three years it has been in use, a strong argument has developed for removing it from the current procedure. Many aspects of the CUSTA/NAFTA dispute settlement procedure that made this correction phase particularly useful do not exist in the WTO process. First, the limitations of the CUSTA/NAFTA panel procedure just described do not exist in the WTO. In WTO panels, most panel members have had rather extensive experience with WTO operations, they are assisted by a skillful legal staff in the Secretariat, and they do go through two rounds of hearings, and sometimes a third. Second, while decisions by NAFTA panels are the final decisions in the process, with no further opportunity for correction, decisions of WTO panels can always be appealed to the Appellate Body.⁶²

61. For a detailed argument in favor of this proposal, see Andrew W. Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT'L ECON. L. 277, 293-296 (1998). Article 15 of the Dispute Settlement Understanding, *supra* note 3, provides that panels shall submit an interim report to the parties, that the parties may request review of the report and also a further hearing before the panel, and that the panel shall address the parties' comments in its final report.

62. Logically, the presence of appellate review could well remove another reason for the interim report, by discouraging the losing party from transmitting its complaints about the panel decision to the panel in the interim review process, in the fear that the panel may find a way to correct the error without

And third, NAFTA governments have generally been able to keep interim reports confidential, which increases a panel's ability to make significant changes, whereas the WTO seems powerless to prevent interim reports from being transmitted immediately to the press of the winning party.

In addition, the time consumed by the interim report phase is costlier in the WTO procedures than it is in NAFTA. In practice, the time limits of the NAFTA procedures have been quite flexible. WTO procedures, on the other hand, operate under relatively more strict time limits that seek to conform to the timing provisions of U.S. Section 301. The deadlines for both the panel process and the Appellate Body's proceedings are tighter than they should be for effective decision-making. If the interim review procedure were abandoned, the time saved could be used to give panels more time to prepare their final decisions, or to give the Appellate Body more time to decide appeals, or possibly a bit of both.

On balance, the gain in working time for WTO panels should be worth more, in terms of improving the report, than the opportunity provided by the interim review process. The change should not be controversial, nor should it be threatening to public confidence in the dispute settlement procedure.

C. TRANSPARENCY AND PUBLIC PARTICIPATION

To date, the most forceful proposal for changing the present dispute settlement procedure has been a proposal by the United States to open the disputes procedure to public scrutiny and to some degree of public participation.⁶³ At present, the documents generated by panel and Appellate Body proceedings are largely confidential. The proceedings themselves are closed to the public, and private parties are not permitted to submit views or information directly to panels or the Appellate Body. The proposals being advanced would do away with most confidentiality restrictions on documents, open hearings to the public, and allow private parties to submit briefs to panels and to the Appellate Body.

changing the adverse result, thereby removing a weapon on appeal. Thus far, however, governments do not seem to have saved their arrows in this fashion.

63. The main points of the U.S. position were set forth by President Clinton in his address to the WTO Ministerial Meeting of May 18, 1998. See Gary G. Yerkey, *Clinton Steers Clear of New Round of Talks, Asks WTO Ministers to Explore New Methods*, 15 INT'L TRADE REP. (BNA) No. 20, at 889 (May 5, 1998).

The United States proposals appear to have been generated by pressure from two private sector sources. The most important comes from non-governmental organizations (NGOs), primarily those concerned with environmental issues, labor rights, and human rights. These groups have been successful in persuading the U.S. government to employ trade sanctions to encourage foreign governments to comply with international norms in these areas (as viewed by the U.S.), and they wish to dissuade the WTO from ruling such unilateral trade sanctions GATT-illegal. In their view, greater public attention will create pressures against such rulings, as will the opportunity to present information and legal arguments to the decision-making tribunals. At a deeper level, NGOs no doubt believe that the recognition of their right to participate will amount to political recognition of the relevance of the values they represent, and thus will be another step toward greater recognition of those values in GATT/WTO legal norms.

The second source of the U.S. “transparency” and “participation” demands is the private lawyers who specialize in international trade matters. Speaking on behalf of the international businesses they represent (although with some independent interest of their own in the new legal business that would be generated), the trade lawyers look ultimately to a time when affected business interests will be allowed to become full parties to dispute settlement proceedings, as they already are in NAFTA’s Chapter 19 dispute settlement review of antidumping and countervailing duty actions. While the goal of private party participation as litigants may not be within reach at the present time, the “transparency” and “participation” proposals will prepare the ground for that goal. (Interestingly, these private business interests could well end up opposing the positions taken by the NGOs who are supporting the same proposals— a situation that would probably stimulate greater activity, and a need for more legal representation, on both sides.)

Aggressive United States sponsorship will no doubt put these “transparency” and “participation” proposals on the agenda of the current WTO “review.” Their consideration will involve a debate over whether they are appropriate as a matter of WTO policy.

With regard to the “transparency” proposals — public access to documents and hearings — the primary argument in favor of public access involves the perceived legitimacy of the WTO’s legal process. WTO critics have charged that WTO confi-

dentality and secrecy constitute a “Star Chamber” decision-making process. To date, these charges have given WTO critics a powerful public relations advantage. In truth, the NGOs and private lawyers who bring these charges usually have no difficulty in finding out what is happening behind the closed doors, for few if any litigation documents can be kept away from a really serious investigator. The charges nonetheless have carried some weight because the public at large simply does not trust the honesty and legitimacy of secret proceedings. This loss of public support could have serious consequences, especially at the present time when the WTO’s new and more demanding WTO disputes procedure must win acceptance in national capitals.

In the past, the principal GATT/WTO policy argument in opposition to greater transparency in dispute settlement proceedings has been that instant public exposure will lead government representatives to engage in various kinds of “grandstanding” behavior to satisfy public demands for vigorous advocacy. This warning conjures up visions of government lawyers, particularly those for the defendant, making every technical objection to the proceedings they can think of, trying to delay or derail the proceedings by following “scorched earth” legal tactics. Such tactics could create serious obstacles to a panel’s ability to adjudicate the dispute. They would turn the parties away from the cooperative behavior that is often needed to compensate for the limited fact-finding power of panels, and they would lay down a legal minefield through which panel members, being untrained in legal warfare, would not be able to navigate without committing errors.

These concerns were not fanciful and have been considered weighty enough to justify the preservation of confidentiality up to the present time. The question now is whether they are still as weighty today as they were five or ten years ago. The “Star Chamber” accusations have put a new counterweight on the balance, one that was not there in the days when GATT legal proceedings drew considerably less public attention and much less vigorous criticism from NGOs and others. Moreover, present circumstances may have rendered the premise of this objection to transparency invalid — the premise that WTO dispute settlement can continue to operate in the same friendly and cooperative manner as it did before, if only it is allowed to operate in private. Although many panel proceedings still maintain a relatively cooperative atmosphere, in many other cases the pressure

of increased public scrutiny has already made government legal practice a great deal more tenacious, and tendentious, than it was in the golden days of GATT dispute settlement. The public attention that causes this behavior is not going to diminish. The more the WTO accomplishes, the brighter that spotlight will become, with or without confidentiality restrictions. Therefore, instead of thinking about how to run away from the unpleasant legal behavior caused by this public attention, the WTO should think about how to manage it.

From what one hears of Appellate Body proceedings, the Appellate Body may have already asserted the kind of control over its proceedings that is needed to deal effectively with over-aggressive representation. Protecting panel proceedings against such behavior is more difficult, because panel proceedings have more investigative work to accomplish, and because *ad hoc* panels cannot be as easily focused on this task. But the comparison is still relevant. The solution lies in more rigorous control of the proceedings.

In sum, while the proposal to allow public access to documents and hearings could well have a negative impact on party behavior, such public access would help to deflect serious attacks on the legitimacy of WTO legal rulings. Rather than suffering continued criticism for a progressively less effective confidentiality policy, WTO governments should accept the inevitability of less cooperative legal practice, and should deal with the negative effects of this changed behavior by strengthening control and management of the panel procedure.

There should be no insuperable practical problems in meeting these "transparency" demands. Protection of confidential business information will have to be arranged, but this would not be the first public process that needed to devise solutions to that issue.⁶⁴ Offering public access to hearings will create some logistical problems of finding rooms with sufficient space, which present WTO hearing rooms do not have. At some point, the WTO will have to follow the practice of most domestic courts by adopting a first-come-first-served policy toward public seating.

The "participation" demand will probably focus, in the immediate future, on the proposal to allow private parties to sub-

64. The cases where confidential business information is most likely to assume an important part of written submissions will be those involving "contingent protection" — antidumping, countervailing duty, and safeguard cases — where confidential business information about both importers and the domestic industry is often critical to the necessary findings.

mit *amicus curiae* briefs containing legal arguments and other kinds of information directly to panels and the Appellate Body. These proposals will present a number of political and practical policy issues.

It must be recognized that a demand for a right to appear before an international tribunal is a partial repudiation of the role being performed by national governments in those proceedings. Everything the private groups would say to the international tribunal can be, and usually is, communicated to their national governments. Governments are supposed to digest that information, choose the goals that best serve the national interest, and pursue those goals in the international litigation. By asking for direct access, private groups are saying that something is wrong, or at least lacking, in the way governments are performing that function. Sometimes the complaint is simply that governments lack the resources of time and information to do the best job of pursuing goals that are agreed. Frequently, however, there is an underlying charge that the government is choosing goals that do not represent the national interest. The claim most often made by business interests is that the government's pursuit of the nation's economic interests is being unduly restrained by concerns about more ephemeral political interests. The case made by NGOs is often that national pursuit of environmental, labor, or human rights goals are being deflected by economic considerations. Whatever the criticism, the claimants will seek to characterize acceptance of their participation demand as an acknowledgment that the government policies in question are either wrong or at least inadequate.

The demand for direct participation also says something about the operation of the international tribunal in question. A demand to participate in a political body is simply a demand for representation of one's views and interests in a political process. A demand to participate in the operations of a juridical institution implies some shortcomings in the way that it is currently reaching decisions. The demand usually implies the same problems — either the tribunal is not receiving enough information, or the tribunal is viewing the law incorrectly. Either way, the premise is that current decisions are wrong and need to be changed. And, once again, the private groups will want to characterize agreement to their demands as an acknowledgment that the decisions complained of need to be changed.

The standard response to this sort of political claim, of course, is that an agreement to allow participation means noth-

ing of the kind. Especially when participation is opened to all parties on all sides of an issue, the institution will claim that it is merely trying to improve the general quality of its decision-making process by encouraging a sufficient flow of information and argument on both sides. This is a political conversation, however, and so logic will not necessarily determine the conclusions drawn from it. The claimants' goal is to win, not clarity of understanding. In all probability, therefore, there is no way that governments will be able to say "yes" without to some degree validating the claims of the proponents.

In short, the participation issue is an issue of normative politics and not just a question of process. For governments supporting the normative goals being sought by some or all of the private interests advancing these proposals, the attainment of these political gains is all the more reason to support these proposals. For governments that oppose some or all of these political goals, the question is not so much whether to oppose, but how. These proposals raise all the classic questions of whether to reduce opposition by giving something now, and perhaps suffering more pressure later, or precipitating the conflict now. The only thing that is certain is that this will not be the last installment, whatever is decided in this debate.

The main practical issue raised by acceptance of an *amicus* brief proposal is the problem of flow control. Some proposals have suggested that the WTO should control the volume of submissions by requiring would-be participants to obtain advance approval by demonstrating a legitimate interest in the proceeding or an ability to contribute something distinctive to the elucidation of the issues. Most WTO officials, including members of panels and the Appellate Body, will almost certainly recoil at the prospect of having to make such decisions, especially if they share the concern about the implicit messages that such decisions would send to participants. In the author's view, the only practicable procedure would be a "free-market" solution that allows anyone to file a brief and allows panel or Appellate Body members to read as many or as few as they judge appropriate. Parties and third parties will, of course, need to see everything that is submitted, as will the general public. This will require lots of copies and a central distribution organ to make sure that proper distribution is carried out.

Certain private parties will probably object to a free-market approach precisely because it would deprive them of a WTO endorsement that would come from receiving a specific authoriza-

tion to file. But the main objection will probably come from governments themselves. Governments that are parties to the litigation will object that, not knowing what briefs will be read by the panel or Appellate Body, they cannot properly defend their interests without responding to every such submission adverse to their position, and that the burden of reading and responding to all that material will be too great. That may prove to be a fatal objection to the whole idea. The only way to answer this objection is to persuade governments to accept the procedure for a short trial period, and hope that private groups will have enough sense to coordinate their activities enough to reduce the volume to a manageable number.⁶⁵

Proposals for more active forms of participation, either making oral presentations to the panel or Appellate Body or, still better, being treated as a party to the proceeding, will almost certainly not be approved in the near future. The first hurdle to acceptance would be the need to control volume by selecting among would-be participants, and that alone should be enough to stop such proposals at the present time. In addition, governments are likely to want to see what happens with the first steps toward participation before thinking about going further.

65. There will, of course, be certain commercial pressures working to *increase* the number of petitions, principally the efforts of businesses that supply representation services to persuade clients that their interests require the protection of a formal submission.

APPENDIX

WTO DISPUTE RESOLUTION BIBLIOGRAPHY

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BOOKS:

JOSÉ MARÍA BENEYTO, *THE EU AND THE WTO: DIRECT EFFECT OF THE NEW DISPUTE SETTLEMENT SYSTEM?* (1996).

DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION (James Cameron & Karen Campbell eds., 1998).

INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed., 1997).

JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION, DISPUTE SETTLEMENT, AND CODES OF CONDUCT* (1994).

JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998).

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *DISPUTE SETTLEMENT IN THE WTO* (1995).

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

FRANK WARREN SWACKER ET AL., *WORLD TRADE WITHOUT BARRIERS: THE WORLD TRADE ORGANIZATION (WTO) AND DISPUTE RESOLUTION* (1995).

ARTICLES:

Thomas J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT'L & COMP. L.Q. 647-658 (1998).

Layla Hughes, *Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision*, 10 GEO. INT'L ENVTL. L. REV. 915-942 (1998).

Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275-2311 (1997)

A Test Case for the New World Trade Organization's Dispute Settlement Understanding: the Japan-United States Auto Parts Dispute, 45 U. KAN. L. REV. 591-618 (1997).

C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209-348 (1997)

John H. Jackson, *The WTO Dispute Settlement Understanding - Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60-64 (1997).

Trevor Lawson, *WTO Dispute Resolution: The Promotion of Diplomacy Within an Adjudicative Model*, 6 DALHOUSIE J. LEGAL STUD. 321-346 (1997)

William J. Davey, *Issues of WTO Dispute Settlement*, 91 AM. SOC'Y INT'L L. PROC. 279-282 (1997).

Anna Beth Snoderly, *Clearing the Air: Environmental Regulation, Dispute Resolution, and Domestic Sovereignty under the World Trade Organization*, 22 N.C. J. INT'L L. & COM. REG. 241-306 (1996).

Azar M. Khansari, *Searching for the Perfect Solution: International Dispute Resolution and the New World Trade Organization*, 20 HASTINGS INT'L & COMP. L. REV. 183-203 (1996).

Maury D. Shenk, *WTO Dispute Settlement Body - Article XX Environmental Exceptions to GATT - National Treatment - Consistency with GATT of U.S. Rules Regarding Imports of Reformulated Gasoline*, 90 AM. J. INT'L L. 669-674 (1996).

D.P. Steger, *WTO Dispute Settlement: Revitalization of Multilateralism after the Uruguay Round*, 9 LEIDEN J. INT'L L. 319-335 (1996).

Jeffrey Waincymer, *Reformulated Gasoline under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?*, 18 MICH. J. INT'L L. 141-181 (1996).

Andrew D. Herman, *The WTO Dispute Settlement Review Commission: An Unwise Extension of Extrajudicial Roles*, 47 HASTINGS L.J. 1635-1667 (1996).

Curtis R. Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555-603 (1996).

Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193-213 (1996).

Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Nongovernment Third Parties*, 17 U. PA. J. INT'L ECON. L. 295-329 (1996).

Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?*, 11 ST. JOHN'S J. LEGAL COMMENT. 307-350 (1996).

Zsolt K. Bessko, *Going Bananas over EEC Preferences? A Look at the Banana Trade War and the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT'L L. 265-312 (1996).

Aubry D. Smith, *Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation*, 94 MICH. L. REV. 1267-1293 (1996).

Gary N. Horlick, *WTO Dispute Settlement and the Dole Commission*, 29 J. WORLD TRADE 45-48 (1995).

Pieter Jan Kujiper, *The New WTO Dispute Settlement System; the Impact on the European Community*, 29 J. WORLD TRADE 49-71 (1995).

Martin Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round*, 29 J. WORLD TRADE 181-206 (1995).

David A. Daul, *A Picture Worth far More than a Thousand Words: A Unique Cause of Action at the World Trade Organization to Enforce American Trade Rights Against Japan*, 17 HAMLINE J. PUB. L. & POL'Y 121-150 (1995).

Norio Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, 12 J. INT'L. ARB. 81-171 (1995).

Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389-409 (1995).

Uri Litvak, *Regional Integration and the Dispute Resolution System of the World Trade Organization after the Uruguay Round: A Proposal for the Future*, 26 U. MIAMI INTER-AM. L. REV. 561-610 (1995).

Grant D. Aldonas, *Revolution in International Trade Dispute Settlements*, 50 DISP. RESOL. J. 73 (7) (1995).

W. Michael Reisman & Mark Wiedman, *Contextual Imperatives of Dispute Resolution Mechanisms; Some Hypotheses and Their Applications in the Uruguay Round and NAFTA*, 29 J. WORLD TRADE 5-38 (1995).

John Weeks, *Procedures for Dispute Settlement under the World Trade Organization - GATT 1994 and under Chapter 19 of the North American Free Trade Agreement*, 18 HAMLINE L. REV. 343-346 (1995).

Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633-672 (1995).

Edwin A. Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements*, 29 J. WORLD TRADE 131-161 (1995).

Gary N. Horlick, *Dispute Resolution Mechanism: Will the United States Play by the Rules?*, 29 J. WORLD TRADE 163-171 (1995).

Wang Lei, *Some Observations on the Dispute Settlement System in the World Trade Organization*, 29 J. WORLD TRADE 173-178 (1995).

Ruchard G. Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829-927 (1995).

Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948*, 31 COMMON MKT. L. REV. 1157-1244 (1994).

Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477-488 (1994).

Judith Hippler Bello & Alan F. Homer, *The Post-Uruguay Round Future of Section 301*, 25 LAW & POL'Y INT'L BUS. 1297-1308 (1994).

Taunya L. McLarty, *GATT 1994 Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System?*, 9 FLA. J. INT'L L. 241-275 (1994).

Judith Hippler Bello & Alan F. Homer, *Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095-1104 (1994).

