A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*

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A subsequent version of this article will appear as a chapter in a book about GATT dispute settlement. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: GATT DISPUTE SETTLEMENT IN THE 1980S (forthcoming, Butterworths U.S.A. 1993). The book will contain a full summary of the database and a detailed description of all 207 cases.

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INTRODUCTION

This article provides a detailed statistical analysis of all GATT dispute settlement complaints filed from the beginning of GATT operations in 1948 until the end of 1989. This analysis has two primary objectives: First, it seeks to provide a quantitative description of what happened in the first forty-two years of the GATT dispute settlement process — who the parties were, what they complained about, how the process worked, and what it achieved. Second, it seeks to measure and evaluate the various factors which appear to contribute to the relative success, or failure, of the GATT dispute settlement system in enforcing GATT rules.

The analysis rests on a database prepared by the authors which consists of 207 complaints filed during the forty-two year period that is the subject of this investigation.[1] A "complaint" is defined as any public invocation of GATT procedures for issuing legal rulings in a dispute between governments.[2] For each complaint, the database contains the date of the complaint, the particular GATT agreement invoked, the complainant(s) and defendant(s) involved, the developed or developing country status of the parties, the trade measure involved, the type of product involved, how far the case progressed in the dispute resolution mechanism, what the GATT finally did with the case, and the eventual outcome with regard to the measure complained of. The data entry form used to compile the database is provided in Appendix I, and a list of the 207 cases is provided in Appendix II.

The analysis first presents an overview of the performance of the dispute settlement procedure over the entire forty-two year period. Then it examines and compares outcomes according to the date of the complaint, the parties involved, the product involved, and the type of trade measure involved.

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1. Of these 207 complaints, 172 were brought under the General Agreement itself, 33 were brought under one of the MTN Codes adopted in 1979, and two were brought under both the General Agreement and an MTN Code.

2. The first public invocation of GATT adjudication procedures is usually a public request for consultations. Under the General Agreement, requests for consultations under Article XXIII:1 (the GATT's adjudication provision) would constitute a complaint, whereas requests under Article XXII (the provision which authorizes a separate, non-adjudicatory consulting procedure) would not. The same distinction exists for consultation requests under the adjudication and consultation procedures in the Tokyo Round Codes.

Requests for legal rulings at large are not counted as complaints in this survey.

Two reservations about the study must be noted. First, dispute settlement is only the tip of the GATT legal system. GATT law applies to a very wide range of day-to-day government behavior, very little of which ever comes before a GATT legal proceeding. An analysis of the relative success of formal legal proceedings is manifestly not a description of this larger whole. Such an analysis can tell us how well the legal enforcement mechanism serves those who invoke it. It can identify patterns of behavior — by country, by product, by trade measure, by time period — that have likely been replicated in behavior outside the dispute settlement mechanism. For those seeking a description of the larger picture, however, it is just one of many tools that the legal historian would have to use.

Second, in order to present a coherent picture of the data presented and to offer plausible hypotheses about what they may mean, this study frequently finds it necessary to describe background conditions, supply brief accounts of government goals and policies, and summarize rather complicated events in GATT legal history. To present this supplementary information in proper scholarly fashion, in sufficient detail, and with sufficient documentation would require a long book or two. That is obviously not possible in a work of this length, nor is it our purpose here. Our goal here is to present the data. While the supplementary information we offer is based upon our best judgment, we would ask the reader to treat it as unsupported assertion offered to supply one or more organizing hypotheses that will stimulate further thinking, and hopefully further research, about the data itself.

A. THE ANALYSIS OF RESULTS

1. IDENTIFYING LEGALLY VALID COMPLAINTS

The primary test of a legal system is the extent to which the system can elicit compliance when a valid legal claim is asserted. The first step in measuring such compliance is to identify those complaints that do in fact assert valid legal claims. Legal validity can be identified in three basic ways, depending upon the *procedural outcome* of the complaint proceeding.

• *Rulings.* In eighty-eight of the 207 complaints, a GATT panel and/or the plenary assembly of member countries has ruled on the legal validity of the complaint.[3] Such a ruling is the

3. The term "plenary assembly," or "plenary" for short, refers to the ulti-

most authoritative determination of legal validity, and in this study the highest such ruling in the case is treated as determinative.[4]

Rulings are classified as "Violation" and "No-Violation." The Violation category includes both ordinary legal violations and rulings that a trade measure constitutes "nonviolation nullification and impairment" under GATT Article XXIII:1(b) — the GATT's rather distinctive equitable remedy for situations in which a GATT-consistent measure upsets the balance of reciprocity in an unexpected (and to some degree culpable) manner. The No-Violations category includes cases in which the decision-making body states it is unable to rule — for our purposes, the equivalent of a ruling that the complainant has failed to establish its case.

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mate governing body under any particular agreement. The GATT agreement itself is governed by a plenary assembly called the CONTRACTING PARTIES, consisting of all signatories. The GATT CONTRACTING PARTIES generally act through a somewhat smaller body called the GATT Council; both the Council and the CONTRACTING PARTIES will be treated as GATT's plenary body.

The GATT legal system also contains several side agreements, called MTN Codes, each with its own distinctive membership and its own separate dispute settlement procedure. These agreements are governed by a plenary assembly of all signatories, usually referred to as the Committee of Signatories.

GATT panels (short for panel of experts) are tribunals of three or five GATT experts, appointed by the plenary body with the consent of the parties. Panel rulings are written like judicial opinions. Technically, they are a report to the plenary, which makes the final determination.

4. In 63 of the 88 cases, there is both a panel ruling and a second ruling by the CONTRACTING PARTIES or other plenary body. In 58 of the 63 cases, the panel ruling is affirmed. In three of the remaining cases the plenary body reversed a panel finding of violation and issued a decision essentially ruling no-violation. *France: Income Tax Practices*, BISD 23d Supp. 114 (1977) (GATT panel report) (Case #70) [hereinafter *France: Income Tax Practices*]; *Belgium: Income Tax Practices*, BISD 23d Supp. 127 (1977) (GATT panel report) (Case #71) [hereinafter *Belgium: Income Tax Practices*]; *Netherlands: Income Tax Practices*, BISD 23d Supp. 137 (1977) (GATT panel report) (Case #72) [hereinafter *Netherlands: Income Tax Practices*]. These three reports were "adopted" subject to an Understanding on December 7-8, 1981. BISD 28th Supp. 114 (1982). In two other cases, *Spain: Measures Concerning Domestic Sale of Soybean Oil*, GATT Doc. L/5142 (June 1, 1981) (GATT panel report) (Case #91) [hereinafter *Spain: Soybean Oil*]; *United States: Imports of Certain Automotive Spring Assemblies [Section 337]*, BISD 30th Supp. 107 (1983) (GATT panel report) (Case #102) [hereinafter *United States: Spring Assemblies*], the plenary in effect set aside a panel ruling of no-violation but issued no contrary ruling.

Of the 25 cases in which only one ruling was made, there were eight instances in which the plenary body ruled directly, without the aid of a prior panel ruling and 17 cases where a panel ruling was never acted upon by the plenary body, usually because the case had been settled after the panel report.

• *Settled, or Validity Otherwise Conceded.* In sixty-four of the 207 complaints, the defendant settled or otherwise conceded the validity of the claim against it without any legal ruling having been issued.[5] For the purposes of this study, all cases that fall into this category are deemed to rest on legally valid complaints.

Cases involving an express concession of legal validity by the defendant must obviously be categorized as involving valid claims. They account for only one-fifth of this category, however. The remaining four-fifths involve what might be called an implicit concession of validity. The concession is implied when a party agrees to a settlement in which it will either partially or completely remove the measure complained of. Although it is true that settlements are sometimes brought about as much by practical considerations as by recognition of legal obligation, experience indicates that most settlements rest on an implicit acknowledgement that the complaint has merit — at least the equitable merit recognized in the GATT's equity concept of "nonviolation nullification and impairment."[6]

• *Withdrawn or Abandoned.* In fifty-five of the 207 complaints, complaints were withdrawn or abandoned without any ruling having been made, or without any settlement or concession having been achieved. In nine of these cases, sufficient information exists to permit a dual conclusion: (a) that the complaint was legally valid, and (b) that the complaint was abandoned because the complainant believed that the GATT dispute settlement procedure would not respond effectively to the complaint. These nine cases must be considered legal failures, and they must be counted in order to present a complete picture of GATT's legal effectiveness.

2. CATEGORIES OF SUBSTANTIVE OUTCOMES

Once the cases with legally valid complaints are identified, the next step is to categorize the substantive outcome of those cases — success, failure, or result unknown. The following four main categories are used in describing substantive outcomes:

• *Result Unknown.* "Result unknown" cases are those in

5. Cases in which the parties settle after a panel ruling without taking the ruling to the plenary body are categorized as cases involving a legal ruling and are counted in that category.

6. GATT, art. XXIII:1(b).

which the final results were not recorded in GATT records, and so far have not been discovered through alternative lines of inquiry. Most are older cases where the personnel involved are no longer available. "Result unknown" cases are set aside and not counted in the percentage analysis.

• *Full Satisfaction.* "Full satisfaction" describes cases where the legal claim has been fully (or almost fully) vindicated, usually by removing a measure found to be in violation of GATT.[7] Two types of "full satisfaction" can be distinguished:

  • *Direct Compliance (Data Code 6.2.3).* Cases in which the measure complained of is removed in direct response to the GATT legal claim. This is the clearest sort of legal success.

  • *Indirect Compliance (Data Code 6.2.4).* Cases in which the measure complained of is removed, but for reasons that are more or less independent of the GATT legal claim — either a separate internal legal decision by the defendant government, or because the measure simply expired according to the terms under which it was adopted.

These two types of full satisfaction will be distinguished when dealing with the database as a whole. They will not be distinguished in some of the more detailed analysis that follows.

• *Partial Satisfaction (Data Code 6.2.2).* "Partial satisfaction" cases are those in which some significant remedial action was taken by the defendant — short of complete removal but sufficient to justify treating the legal claim as having been successful.

• *Negative Outcome.* "Negative Outcome" describes cases in which the legal system has failed to enforce a valid claim. There are two types of negative outcome:

  • *Impasse (Date Code 6.2.1).* Cases where the result is im-

7. In cases involving a ruling of nonviolation nullification and impairment (GATT Article XXIII:1(b)), the only legal right established is the complainant's right to withdraw substantially equivalent concessions if the balance of reciprocity is not restored. Vindication can involve restoring the balance through compensation, restoring the balance by an actual withdrawal, or, as in *European Community: Payments and Subsidies on Oilseeds and Animal-Feed Proteins*, GATT Doc. L/6627 (Dec. 14, 1989) (GATT panel report) (Case #179) [hereinafter *European Community: Oilseeds*], restoring the balance by withdrawing the nullified tariff concession under Article XXVIII and thereby assuming the obligation to pay the compensation required by that article.

passe — where no remedial action at all is taken by the defendant in response to the valid legal claim.

- *Surrender to Arm-Twisting (Data Code 6.2.5).* Cases in which the defendant had imposed a GATT-illegal trade restriction to induce compliance with bilateral demands (referred to as "arm-twisting"), and where, despite a GATT complaint, the arm-twisting restriction was removed only after the complainant-victim acceded to the bilateral demands.[8]

These two types of negative outcome will be distinguished when dealing with the database as a whole. They will not be distinguished in some of the more detailed analysis that follows.

B. AN OVERVIEW OF THE RESULTS IN ALL 207 COMPLAINTS

1. PROCEDURAL OUTCOMES

The following table summarizes the breakdown of the 207 GATT legal complaints into the three general types of procedural outcomes described earlier.

TABLE Gen 1

PROCEDURAL OUTCOMES

Total Complaints	Rulings		Settled-Conceded by Def.		Withdrawn or Abandoned	
	Number	% of total	Number	% of total	Number	% of total
207	88	43%	64	31%	55	27%

The breakdown of procedural outcomes suggests two interesting structural points about GATT litigation. First, the percentage of cases that reach the stage of a legal ruling is quite high. Of the 207 complaints during the 1948-1989 period, eighty-eight complaints, or 43%, led to a ruling of some sort.[9] Two possible explanations for this rather high rate of actual litigation suggest themselves. On the one hand, it may be that complaining governments wait longer before taking the public step of filing a GATT complaint, thereby limiting the sample to only the more intractable cases. On the other hand, it may also be that defendant governments find it difficult to settle once the complaint is launched. The political costs of agreeing to modify

8. Typically, the bilateral demands are either demands for export-limiting voluntary export restraints (VERs), demands for market access, or demands on non-trade issues.

9. For a breakdown of the types of rulings, see *supra* note 4.

or remove a trade barrier can be quite high. It may be better to fight and lose a lawsuit definitively, because then the unpleasant corrective action can be blamed squarely on GATT law.

Second, it is worth calling attention to the category of withdrawn-abandoned cases as a possible source of weakness in the process. Granting that the category contains many complaints withdrawn for innocent reasons, it also contains other complaints withdrawn because the dispute settlement procedure appeared unlikely to succeed. In following sections, the study will pay particular attention to withdrawn and abandoned complaints as a potential source of legal failure.

2. SUBSTANTIVE OUTCOMES

• *Cases with Legal Rulings.* The following table reports the distribution of violation and no-violation rulings in the eighty-eight complaints in which rulings were made.

TABLE Gen 2

SUBSTANTIVE OUTCOMES: RULINGS – VIOLATION v. NO-VIOLATION

Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
207	88	43%	20	68	77%	33%

The high percentage of rulings in favor of the complainant is worth noting. In sixty-eight of the eighty-eight rulings, or 77%, the panel concluded that the complaint was well-founded.[10] Governments seem to have been reasonably selective about the complaints they pressed forward to a formal ruling.

Taking the sixty-eight cases where the complaint was ruled valid, the following table reports on how well the rulings were followed.

10. The 20 cases in which no violation was found include a number of cases in which the panel declared itself unable to reach a conclusion, or vaguely suggested as much. Since the complainant has the burden of proof, failure to sustain that burden is tantamount to rejection.

It is very difficult to separate decisions ruling a measure legal from decisions in which a panel is genuinely unable to decide. GATT panels have a tendency to frame negative decisions in vague terms, as if reluctant to issue a clean bill of legal health to any restrictive measure.

TABLE Gen 3

SUBSTANTIVE OUTCOMES: RULINGS – RESULTS OF VIOLATION RULINGS

Total Violation	Result Unknown	Full Satisfaction				Part Satis.		Negative Outcome			
		6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
68	1	37	8	45	67%	15	22%	5	2	7	10%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.
6.2.1: No action taken.
6.2.5: Claim fully satisfied after complainant acceded to bilateral demands.

The most significant datum is that, of the sixty-seven rulings with known results, sixty rulings, or 90%, ended with a positive outcome. Not all of these positive outcomes were total legal victories, of course. Breaking down the sixty positive outcomes, we find three categories of results. We find that thirty-seven complaints, 55% of all those ruled valid, did achieve the best result — full satisfaction of the legal claim as a direct response to the GATT ruling. In another eight complaints, 12% of all complaints ruled valid, the measure was also fully removed, but for reasons independent of the GATT legal ruling. And finally, in fifteen complaints, or 22% of all those ruled valid, the complainant achieved partial satisfaction of the legal claim. Stated differently, just over half of the violation rulings achieved full compliance directly, two-thirds resulted in full compliance somehow, and nine out of ten produced a worthwhile positive result.

Of the seven negative outcomes that occurred after a ruling of violation, we find that five were cases in which the ruling was followed by impasse, and two were cases in which an arm-twisting restriction achieved its intended result, the ruling notwithstanding.[11]

11. The seven cases with negative outcomes after rulings of violation were: *United States: Prohibition on Imports of Tuna and Tuna Products from Canada*, BISD 29th Supp. 91 (1983) (GATT panel report) (Case #93) [hereinafter *United States: Tuna from Canada*]; *United States: Imports of Sugar from Nicaragua*, BISD 31st Supp. 67 (1985) (GATT panel report) (Case #125) [hereinafter *United States: Sugar from Nicaragua*]; *Canada: Countervailing Duty on Boneless Manufacturing Beef*, GATT Doc. SCM/85 (Oct. 13, 1987) (GATT panel report) (Case #149) [hereinafter *Canada: Boneless Beef*]; *United States: Section 337 of the Tariff Act of 1930*, BISD 36th Supp. 345 (1990) (GATT panel report) (Case #162) [hereinafter *United States: Section 337*]; *European Community: Antidumping Regulation on Imports of Parts and Components*, BISD 37th Supp. 132 (1991) (GATT panel report) (Case #188) [hereinafter *Screwdriver Assembly*]; *United States: Antidumping Duties on Stainless Pipes and*

• *Cases in Which Defendant Settles or Otherwise Concedes Legal Validity.* The following table summarizes the outcomes of complaints that were settled by the parties or in which the defendant otherwise conceded the legal validity of the complaint.

TABLE Gen 4

SUBSTANTIVE OUTCOMES: COMPLAINTS SETTLED OR CONCEDED

Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
		6.2.3	6.2.4	Total	%	6.2.2	%
64	1	37	1	38	60%	25	40%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.

In GATT tradition, the positive outcomes achieved through settlement or other kinds of concessions are just as valuable as those achieved through formal ruling. GATT governments have always expressed considerable pride in the GATT's pragmatic approach to disputes, stressing that agreed solutions are always the most durable and also produce the best long-term relations between members. Such pragmatism, they say, has made GATT more effective than other, more legalistic organizations.

The most important datum in connection with this second category is simply the total number of complaints it contains. Subtracting the one case where the result is unknown, another sixty-three cases are added to the success column.

The only other datum bearing on legal effectiveness for cases in this category is the issue of "full" versus "partial" satisfaction of the legal claims involved. The "full-partial" distinction does not have quite the same meaning in relation to settled or conceded cases as it does in relation to cases with rulings. When a defendant government agrees to remove only part of a measure complained of, the only claim of legal obligation it is conceding, usually, is the claim pertaining to that part of the complaint it is agreeing to satisfy.[12] It cannot be assumed, there-

Tubes from Sweden, GATT Doc. ADP/47 (Aug. 20, 1990) (GATT panel report) (Case #191) [hereinafter *United States: Stainless Pipes from Sweden*]; and *Canada: Restriction on Imports of Ice Cream and Yoghurt*, BISD 36th Supp. 68 (1990) (GATT panel report) (Case #195) [hereinafter *Canada: Ice Cream and Yoghurt*]. For a brief description of cases with rulings categorized as negative outcomes, see *infra* Appendix III.

12. Some partial settlements, to be sure, do imply the legal validity of the

fore, that partial satisfaction in these cases involves a partial failure to satisfy an admittedly valid claim.

Despite that qualification, the data on full and partial satisfaction are still informative in a descriptive sense. At a minimum, the "full satisfaction" results still provide an accurate description of that fact alone. We find that thirty-eight of the sixty-three settled or conceded cases with known results, or 60%, ended with full satisfaction of the legal claim. Only one of these thirty-eight cases involved removal of the measure for reasons independent of, or apart from, GATT obligations.

• *Cases in Which the Complaint Was Withdrawn or Abandoned.* The final category of complaints to be considered are those withdrawn or abandoned before any ruling or settlement was made. Many of the cases in this category do not provide a relevant test of GATT's legal effectiveness. This is true whenever the case was terminated for a "neutral" reason which did not indicate any failure of GATT law. Such neutral reasons include the complainant government's conclusion that the measure complained of:

(a) is GATT-legal after all, or
(b) is not causing harm, or
(c) can be dealt with by other means, or
(d) has expired or been terminated for internal legal reasons.[13]

Cases withdrawn for such neutral reasons must be excluded from the statistical analysis.

Conversely, we have a case of potential legal failure if the complaint has been abandoned under circumstances which indicate that the complainant government gave up because it did not believe that GATT law would be able to enforce the claim. Basically, two withdrawal situations fit this description, corresponding to the two kinds of "negative outcome" described in the previous section. The first situation is the case that simply ends in impasse; that is, the defendant refuses to change the measure in question, and after awhile the complainant just gives up without seeking to move the procedure forward to a legal ruling.

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entire complaint. This would usually be true, for example, where a defendant agrees to enlarge an unjustified quota.

13. Characterizing this final type of reason as "neutral" does tend to ignore GATT's problems with the so-called "hit-and-run" trade restriction, typically an end-of-season restriction on agricultural imports after a heavy harvest. The GATT dispute settlement procedure does not act rapidly enough to deal with such measures before they expire.

The second situation involves complaints directed at an arm-twisting trade restriction; the potentially negative outcome occurs when, after filing the GATT complaint, the complaining government subsequently gives in to the arm-twisting, accedes to the demand, and then withdraws the GATT complaint because the arm-twisting restriction, having served its purpose, has been terminated by the defendant government.[14]

The number of complaints withdrawn for such "negative" reasons is a meaningful datum in itself, because it gives a rough measure of the degree of effective resistance that certain types of complaints are encountering. Such withdrawals cannot be equated with "negative outcomes" — that is, failure to enforce a legally valid claim — unless one can also conclude that the original complaint was in fact legally valid. If the legal claim was not valid — if the measure complained of was in fact GATT-legal — then the defendant would have had every right to refuse to change the measure. Although the complainant may not have had its day in court, the outcome could not be called a legal failure. A complete analysis of withdrawn or abandoned complaints must, therefore, include a final step — analysis of the legal validity of complaints withdrawn for negative reasons.

The following table gives the breakdown of the fifty-five withdrawn or abandoned cases according to the "neutral" or "negative" reasons for withdrawal, and further subdivides negative withdrawals to separate out those cases with a valid legal claim.

TABLE Gen 5

SUBSTANTIVE OUTCOMES: COMPLAINTS WITHDRAWN OR ABANDONED

			Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
Total Compl.	Valid Compl.	Total w/d or aband'd	Total Number	Total Number	Total Number	As % of all complaints	Complaint probably valid Number	% of valid complaints
207	139	55	8	20	27	13%	9	6%

Initially, we find a rather high percentage of cases which cannot be evaluated because the result is unknown — eight of fifty-five, or almost 15%. This high percentage is due to the fact that many cases in this category were withdrawn after having made only the barest of records in GATT. Governments seldom

14. Calling such cases a potential legal failure assumes that the complainant government made its decision with no less courage than the legal system can reasonably expect of its members. That assumption should be valid in most cases.

want to say very much about such withdrawn complaints, and many happened so long ago that it is no longer possible to interview participants. Subtracting these eight complaints, we have forty-seven withdrawn or abandoned complaints that can be evaluated.

Next, we examine these forty-seven complaints to eliminate complaints that have been withdrawn or abandoned for neutral reasons. We find that twenty of the remaining forty-seven complaints fall into this category.

This leaves only twenty-seven complaints that have been terminated for negative reasons. As noted above, these twenty-seven complaints are a meaningful datum in themselves, telling us that some 13% of the 207 GATT complaints filed during this period came to an end in this potentially unsatisfactory manner.

The final step is to determine which of these twenty-seven complaints rested on a valid legal claim. There is no authoritative means of doing so. None of the cases has a GATT ruling, nor has there been any direct or indirect concession by the defendant. For many there simply is no basis on which to judge at all, because complaints were withdrawn so early in the process that there is either no factual record, or no coherent legal theory. But there are some cases where the record and the collateral information are reasonably good, and where it is possible to render a reasonably secure judgment about legal validity.[15] Although this *ad hoc* method is obviously subject to error in both directions, the authors are persuaded that a significant number of legal failures of this kind have occurred, and that there is no better way to take account of this important segment of GATT legal experience.

The authors' *ad hoc* analysis has led to the conclusion that nine of the twenty-seven complaints in this "negative" group can be counted as resting on a valid legal claim.[16] The results in all

15. Judgments about legal *in*validity are extremely difficult, because on these incomplete records, it is almost impossible to know what other information might have supported the complaint.

16. The nine cases are *France: Auto Taxes*, GATT Doc. L/520 (Sept. 12, 1956) (U.S. complaint) (Case #40) [hereinafter *France: Auto Taxes*]; *European Community: Article XIX Action on Imports into the UK of Television Sets from Korea*, GATT Doc. C/M/124 (Council meeting of Mar. 14, 1978) (complaint by Korea) (Case #83) [hereinafter *European Community: TVs from Korea*]; *European Community: Import Restrictive Measures on Video Tape Recorders*, GATT Doc. L/5427 (Dec. 21, 1982) (complaint by Japan) (Case #119) [hereinafter *Poitiers Customs House*]; *United States: Ban on Imports of Steel Pipe and Tube from the European Community*, GATT Doc. L/5747 (Dec. 10, 1984) (EC complaint) (Case #138) [hereinafter *United States: Steel Pipe from EC*]; *United*

nine of the valid-claim cases must be classified as negative outcomes. A valid legal complaint was abandoned in circumstances which indicate that the complainant did not believe further prosecution would be worthwhile.[17] Taken as a percentage, these nine cases account for 6% of all valid complaints.

In three of the nine cases with a negative outcome, the legally valid complaint was withdrawn at a point of impasse. The other six involved legally valid complaints withdrawn after acceding to an arm-twisting demand.

3. THE COMBINED RESULTS

In this final part of the overview section, we consider the combined results from all three categories. The data is limited to the 139 dispute settlement complaints which presented a meaningful test for the GATT legal system: (a) the sixty-seven cases with known results in which the complaint was ruled legally valid, (b) the sixty-three cases with known results where the defendant settled or otherwise conceded the legal validity of the complaint, and (c) the nine withdrawn or abandoned cases with known results where a valid claim, identified by the authors, was withdrawn for negative reasons. The following table gives a three-part breakdown of that combined data.

States: Restrictions on Imports of Cotton Pillowcases and Bedsheets, GATT Doc. L/5859 (Sept. 2, 1985) (complaint by Portugal) (Case #144) [hereinafter *United States: Cotton Pillowcases*]; *European Community: Ban on Importation of Skins of Certain Seal Pups and Related Products*, GATT Doc. L/5940 (Dec. 19, 1985) (complaint by Canada) (Case #145) [hereinafter *European Community: Seal Skins*]; *United States: Unilateral Measures on Imports of Certain Japanese Products*, GATT Doc. L/6159 (Apr. 21, 1987) (complaint by Japan) (Case #161) [hereinafter *Semiconductor Retaliation*]; *United States: Import Restrictions on Certain Products from Brazil*, GATT Doc. L/6386 (Aug. 24, 1988) (complaint by Brazil) (Case #189) [hereinafter *Pharmaceutical Retaliation*]; and *United States: Increase in Rates of Duty on Certain Products of the European Community*, GATT Doc. L/6438 (Nov. 28, 1988) (EC complaint) (Case #193) [hereinafter *Hormones Retaliation*]. For a brief description of withdrawn or abandoned of cases categorized as negative outcomes, see Appendix III, *infra*.

In each of the remaining 18 cases, there was at least one missing element of information which precluded finding that the complaint was legally valid. It is reasonable to assume that better information would have yielded some additional valid claims.

No attempt was made to analyze the legal merits of complaints withdrawn for "neutral" reasons. Whatever their merits, the GATT was not at fault for failing to prosecute them.

17. Conclusions about the "worth" of going forward are not limited to expectations about GATT's ability to rule. They also include fears of retaliation by the defendant, for a legal system also fails if it does not offer the complainant of average courage protection against such fears.

TABLE Gen 6

SUBSTANTIVE OUTCOMES: COMBINED DATA
(Includes only cases with known results)

Cases where ruling of violation, settled, or conceded valid						
Total Complaints	Full Satisfaction		Partial Satisfaction		Negative Outcome	
	Number	%	Number	%	Number	%
130	83	64%	40	31%	7	5%

Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
Total Complaints	Full Satisfaction		Partial Satisfaction		Negative Outcome	
	Number	%	Number	%	Number	%
139	83	60%	40	29%	16	12%

Detailed Breakdown of Substantive Outcome by Procedural Outcome								
	Procedural Outcomes							
Substantive Outcomes	Ruling of Violation		Settled or Conceded		W/d, Neg. reason, Prob. valid			
	Number	%	Number	%	Number	%	Total	%
Full Satisfaction	45	67%	38	60%	0	0%	83	60%
6.2.3	*37*	*55%*	*37*	*59%*	*0*	*0%*	*74*	*53%*
6.2.4	*8*	*12%*	*1*	*2%*	*0*	*0%*	*9*	*6%*
Part Satis. (6.2.2)	15	22%	25	40%	0	0%	40	29%
Neg. Outcome	7	10%	0	0%	9	100%	16	12%
6.2.1	*5*	*7%*	*0*	*0%*	*3*	*33%*	*8*	*6%*
6..5 (5.1.6)*	*0*	*0%*	*0*	*0%*	*4*	*44%*	*4*	*3%*
6..5 (5.1.7)*	*2*	*3%*	*0*	*0%*	*2*	*22%*	*4*	*3%*
Total	67		63		9		139	

6.2.3:	Ruling or claim full satisfied.
6.2.4:	Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2:	Ruling or claim partly satisfied.
6.2.1:	No action taken.
6.*.5 (5.1.6):	Measure removed when complainant agreed to VER.
6.*.5 (5.1.7):	Claim fully satisfied after complainant acceded to bilateral demands.

The first part of the table reports on only the 130 cases in which there is some "objective" determination of legal validity — the sixty-seven "ruling" and the sixty-three "conceded" cases. The results for this smaller 130-case sample are quite flattering. Some 123 of the 130 valid complaints in these two categories, or 95%, end with positive outcomes. Approximately two-thirds of the 123 positive results, or eighty-three cases, ended with full satisfaction of the complaint. Of the eighty-three full satisfaction cases, seventy-four involved direct compliance, while nine involved compliance due to independent internal decisions.

The present study does not accept this 130-case sample as an accurate portrayal of the effectiveness of GATT's dispute settlement system. Subjective though the analysis may be, the nine (more or less) legal failures found in the withdrawn-abandoned category are an important datum in assessing how well the system enforces valid claims. Here and in all subsequent tables re-

porting combined data, the third category of withdrawn-abandoned cases will be included.

The combined data for the full 139-complaint sample is presented in the second part of *Table Gen 6* above. Once again, the most significant datum is the rate of positive results. The rate for this larger sample is only 88%. Although any legal system, including GATT's, will want to aim higher than 88%, most governments would be quite encouraged if a relatively new international legal system had managed to produce positive results in almost nine out of ten cases.

The breakdown of positive results according to degrees of satisfaction yields no surprises. From the 88% of all complaints that produced positive results, we find 53% where full satisfaction occurred in response to the GATT claim, 6% where full satisfaction occurred for independent reasons, and 29% where partial satisfaction occurred. Stated more simply, about two-thirds of all positive results involved optimal or almost optimal results.

The breakdown of negative results into specific subcategories shows that the type of legal failure tends to vary according to the procedural setting. In cases disposed of by ruling, the seven legal failures consisted of five cases of impasse and two in which arm-twisting restrictions prevailed. For complaints withdrawn or abandoned, the nine legal failures broke down into three impasse and six arm-twisting. The lesson, it seems, is that successful arm-twisting tends to succeed early in the process, and usually ends up compelling abandonment of the right to adjudicate as well.

The overview just presented is a composite view of events over a forty-two year period. In reality, the legal events during this period were anything but uniform. A more accurate portrait of the GATT dispute settlement system requires, first, breaking this data down into smaller time periods.

C. A DECADE-BY-DECADE ANALYSIS

This section examines the 207 dispute settlement complaints on a decade-by-decade basis. To simplify matters, we treat the first twelve years of GATT history, 1948-1959, as a single "decade." The next three decades will be the ordinary ten-year kind — 1960-1969, 1970-1979, 1980-1989. The four decades will be referred to as the 1950s, 1960s, 1970s, and 1980s.

1. THE VOLUME OF LEGAL ACTIVITY, DECADE BY DECADE

The following table presents a decade-by-decade breakdown of the 207 dispute settlement cases, further subdivided into the three categories of procedural outcome employed in this analysis.

TABLE Dec 1

PROCEDURAL OUTCOMES (By Decade)

	Total Complaints	Rulings		Settled-Conceded by Def.		Withdrawn or Abandoned	
		Number	% of total	Number	% of total	Number	% of total
1950s	53	21	40%	22	42%	10	19%
1960s	7	5	71%	2	29%	0	0%
1970s	32	15	47%	12	38%	5	16%
1980s	115	47	41%	28	24%	40	35%
Total	207	88	43%	64	31%	55	27%

The volume of complaints was reasonably strong in the 1950s (fifty-three complaints), fell to almost nothing in the 1960s (seven complaints), started climbing back a bit in the 1970s (thirty-two complaints), and then exploded in the 1980s (115 complaints). More than half of the GATT's 207 complaints in this four-decade period were brought during the final ten-year period.

These changes in volume correspond with well-known developments in the evolution of GATT as a whole. The fairly high volume of litigation during the first decade was largely due to the activity of individual European states, for whom rule-based adjudication was the most efficient and sensible way of resolving disputes. Legal activity slowed considerably in the 1960s, primarily due to major changes in both the membership and the mission of GATT during that period. The United States led an effort to restart the dispute settlement procedure in the 1970s, achieving a modest level of activity. The explosion of activity in the 1980s grew out of the substantial emphasis on dispute settlement during the 1973-1979 Tokyo Round negotiations.

In later parts of this statistical study, we shall focus on the demarcation between the first three decades and the 1980s. The 1980s not only expanded the volume of legal activity, but it also witnessed the transformation of GATT dispute settlement into a new and more "legal" system, in contrast to the more "diplomatic" system of the first three decades. The 1980s exemplify the present legal situation in GATT, and where numbers permit, the study will report the data for this decade separately.

2. PROCEDURAL OUTCOMES, DECADE-BY-DECADE

In *Table Dec 1* above, the decade-by-decade breakdown of cases into the three procedural outcome categories — "ruling," "settled-conceded" and "withdrawn-abandoned" — calls for two observations. First, the percentage of complaints that end up with legal rulings turns out to be remarkably constant over the years. In the three decades with a large enough volume of complaints to be representative — the 1950s, the 1970s and the 1980s — formal legal rulings occurred in 40%, 47% and 41% of all complaints, respectively. This tends to refute a widely held perception of GATT during the 1950s. According to the accepted view, GATT in the 1950s was an "old boys" club consisting of just a few key countries, where the members settled most disputes by the informal diplomacy of the clubroom. The data suggests that the "old boys" were just as keen to adjudicate violations of their club rules as were their more formal successors.

Second, the percentage of complaints that were withdrawn or abandoned seems to have gone up rather sharply in the 1980s. In the 1950s and 1970s, the frequency of withdrawn or abandoned cases was a bit less than 20%, and was less than half the number of cases in which the defendant settled or otherwise conceded validity. In the 1980s, by contrast, the withdrawn-abandoned rate almost doubled to 35%, a rate that was nearly one and one-half times *higher* than the rate of settled or conceded cases in the 1980s. The pronounced shift in these total numbers signals the possibility that defendant governments were exerting greater efforts to resist legal complaints brought against them and to discourage complainants from moving forward. Subsequent analysis will show that this was the case.

3. SUBSTANTIVE OUTCOMES, DECADE-BY-DECADE

• *Cases with Legal Rulings.* The decade-by-decade breakdown of violation and no-violation rulings in cases with rulings is presented in the following table:

TABLE Dec 2

SUBSTANTIVE OUTCOMES: RULINGS -- VIOLATION v. NO-VIOLATION (By Decade)

	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
1950s	53	21	40%	6	15	71%	28%
1960s	7	5	71%	0	5	100%	71%
1970s	32	15	47%	7	8	53%	25%
1980s	115	47	41%	7	40	85%	35%
Total	207	88	43%	20	68	77%	33%

The most noteworthy datum here is the increase in the percentage of violation rulings in the 1980s. Because the number of cases in the 1960s is too small to make the percentages representative, the clearest picture of the practice prior to the 1980s would be the average percentage in the three prior decades. There were twenty-eight rulings of violation out of forty-one rulings, or a violation rate of 68%. The jump to 85% in the 1980s is striking, particularly given the very large volume of cases in that decade. We shall return to its possible significance below.

The following table presents the outcomes in cases where a ruling of violation was made.

TABLE Dec 3

SUBSTANTIVE OUTCOMES: RULINGS – RESULTS OF VIOLATION RULINGS (By Decade)

	Total Violation	Result Unknown	Full Satisfaction				Part Satis.		Negative Outcome			
			6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
1950s	15	0	12	0	12	80%	3	20%	0	0	0	0%
1960s	5	0	3	0	3	60%	2	40%	0	0	0	0%
1970s	8	1	3	3	6	86%	1	14%	0	0	0	0%
1980s	40	0	19	5	24	60%	9	23%	5	2	7	18%
Total	68	1	37	8	45	67%	15	22%	5	2	7	10%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.
6.2.1: No action taken.
6.2.5: Claim fully satisfied after complainant acceded to bilateral demands.

The best measuring rod of success is the percentage of cases which achieve positive results — the sum of full satisfaction and partial satisfaction outcomes. The most important datum in the decade-by-decade breakdown is the significant decline in the success rate during the 1980s. For the first three decades, the success rate for cases with rulings of violation was 100%. Every ruling of violation produced at least partial correction.[18] In the

18. Readers who know the DISC complaint against the United States, *United States: Income Tax Legislation*, BISD 23d Supp. 98 (1977) (GATT panel report) (adopted by the Council Dec. 7-8, 1981, BISD 28th Supp. 114 (1982)) (Case #69) [hereinafter *United States: DISC Legislation*], might wish to quarrel with the 100% success figure for the 1970s, because the United States blocked adoption of the violation ruling against itself for four years, and then responded with a legislative change that left a good portion of the problem uncorrected. The authors have classified the case as "partial satisfaction" because the offending law itself was largely removed, and the new law did change the formal requirements under which most subsidies were granted.

In the three other cases, the European defendants also blocked adoption for

1980s, however, the rate fell to 83%, as only thirty-three of forty rulings produced positive outcomes.

The dramatic increase in negative outcomes for legal rulings in the 1980s is obviously a major event in GATT legal history. As we will shortly see, it is paralleled by an equally dramatic increase in negative outcomes in the "withdrawn-abandoned" category of complaints.

One hypothesis about the failure rate for legal rulings in particular can be extracted from the data already presented. The huge increase in the number of complaints filed during the 1980s indicates that a major change in government attitudes toward dispute settlement was taking place. The fact that governments were using dispute settlement much more frequently testifies that they had much greater confidence in the legal system. This confidence, in turn, would tend to elicit more ambitious complaints as well — complaints attacking trade measures with powerful domestic political support, measures that might have been left in peace in earlier decades. A higher incidence of such ambitious complaints could well explain, at least in part, a higher incidence of legal failure. It could also explain a higher incidence of resistance to legal complaints in general, the sort of resistance that might show up in a greater percentage of complaints withdrawn or abandoned.

A second possible consequence of increased volume would be increased visibility of the decision-making process, and this increased visibility, in turn, would likely have an effect upon the manner of decision-making. Placed under a spotlight, panels would tend to adopt a more objective, legally sound approach to decision-making, because in the end that is the only basis on which a critical public audience will accept an adjudicatory decision. This more objective technique of decision-making would tend to produce more findings of violations in hard cases, in contrast to the tendency of earlier, more "diplomatic" panels to avoid confrontations by vague decisions that skirt a direct finding.[19]

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four years, but in the end they succeeded in obtaining a GATT Council ruling that overruled the panel ruling. Those three are "no-violation" cases.

19. Examples of that earlier tendency can be found in *United States: Withdrawal of a Tariff Concession Under Article XIX*, GATT Doc. GATT/CP/106 (Mar. 27, 1951) (GATT panel report) (Case #13) [hereinafter *United States: Withdrawal of a Tariff Concession Under Article XIX*]; *European Community: Refunds on Exports of Sugar I*, BISD 26th Supp. 290 (1980) (GATT panel report) (Case #86) [hereinafter *European Community: Refunds on Exports of Sugar I*]; *European Community: Refunds on Exports of Sugar II*, BISD 27th

A slight confirmation of such a change in decision-making techniques is found in the change in percentage of violations reported in *Table Dec 2* above. The 85% rate for rulings of violation in the 1980s is significantly higher than the average rate of 68% for the previous three decades. Among the 85% of violation rulings in the 1980s were several cases where the European Community and the United States suffered adverse legal rulings against some very "sensitive" trade measures, rulings which probably would have been avoided a decade or so earlier.[20]

• *Cases in Which Defendants Settled or Otherwise Conceded Validity.* As noted before, the percentage of total complaints settled or conceded declined in the 1980s, while the percentage of cases withdrawn or abandoned increased. This change suggests that defendant governments exerted greater resistance against dispute settlement complaints. The lower percentage of settled or conceded cases meant a lower percentage of positive results overall, and thus another element of declining performance.

The decade-by-decade breakdown of the actual results in settled or conceded cases appears in the following table. It shows no significant trend in the rate of full satisfaction. In particular, the rate of full satisfaction does not turn downward in the 1980s, as do most other indicators of success. For settled or conceded cases, the percentage of cases achieving full satisfaction of the legal claim was actually higher in the 1980s than the average for the entire forty-two year period.

Supp. 69 (1981) (GATT panel report) (Case #87) [hereinafter *European Community: Refunds on Exports of Sugar II*]; and *United States: Spring Assemblies* (Case #102), *supra* note 4.

20. *See, e.g., United States: Section 337* (Case #162), *supra* note 11; and *European Community: Oilseeds* (Case #179), *supra* note 7. The contrast with earlier techniques can be seen most vividly by comparing the 1982 decision in *United States: Spring Assemblies* (Case #102), *supra* note 4, with the 1989 decision in *United States: Section 337* (Case #162), *supra* note 11, both involving the same U.S. law.

TABLE Dec 4

SUBSTANTIVE OUTCOMES: COMPLAINTS SETTLED OR CONCEDED (By Decade)

	Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
			6.2.3	6.2.4	Total	%	6.2.2	%
1950s	22	0	16	0	16	73%	6	27%
1960s	2	0	0	0	0	0%	2	100%
1970s	12	1	3	0	3	27%	8	73%
1980s	28	0	18	1	19	68%	9	32%
Total	64	1	37	1	38	60%	25	40%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.

• *Cases in Which the Complaint Was Withdrawn or Abandoned.* At the beginning of this section we observed that the decade-by-decade data showed a fairly sharp increase in the relative percentage of complaints withdrawn or abandoned during the 1980s. This change suggested that defendant governments might be resisting dispute settlement proceedings more strongly than before. A more detailed analysis of withdrawn or abandoned cases confirms this hypothesis.

The following table presents the decade-by-decade breakdown of the actual substantive outcomes in cases involving withdrawn or abandoned complaints.

TABLE Dec 5

SUBSTANTIVE OUTCOMES: COMPLAINTS WITHDRAWN OR ABANDONED (By Decade)

				Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total Compl.	Valid Compl.	Total w/d or abend'd	Total Number	Total Number	Total Number	As % of all complaints	Complaint probably valid Number	% of valid complaints
1950s	53	38	10	5	3	2	4%	1	3%
1960s	7	7	0	0	0	0	0%	0	0%
1970s	32	19	5	0	3	2	6%	1	5%
1980s	115	75	40	3	14	23	20%	7	9%
Total	207	139	55	8	20	27	13%	9	6%

The table presents two kinds of data confirming the higher level of resistance by defendant governments during the 1980s. First, when complaints withdrawn or abandoned are broken down into withdrawals for "neutral" reasons and withdrawals for "negative" reasons, we see that there has been a substantial increase in the percentage of negative withdrawals. For the first three decades, only four of ninety-two complaints with known results, or roughly 4%, ended with negative withdrawals. For the 1980s, the percentage was 20%. It would appear that defend-

ant governments were putting more pressure on complainants to not go forward.

Second, the rate of actual legal failures in the withdrawn-abandoned category went up sharply in the 1980s. Of the nine legal failures overall, seven occurred during the last decade. Taken as a percentage of all valid legal claims, the increase in this particular type of legal failure is not quite as sharp as the raw numbers suggest, but it is still quite significant. In the three decades before 1980, there were only sixty-four valid legal complaints in all categories, of which the two legal failures in this category represented 3%. From 1980 to 1989, there were seventy-five valid legal complaints in all categories, of which the seven legal failures in this category represented 9%.

Examination of the seven legal failures during the 1980s tends to confirm that there was an outbreak of what might be called "muscular diplomacy." The seven cases involve three arm-twisting trade restrictions in support of Voluntary Export Restraint (VER) demands,[21] three other arm-twisting trade restrictions in support of bilateral demands for market access,[22] and one other arm-twisting restriction in support of environmental demands on the killing of baby seals.[23]

• *Combined Results of All Cases with Legally Valid Complaints.* The following table presents the combined decade-by-decade breakdown for all three categories of dispute settlement cases discussed above.

TABLE Dec 6

SUBSTANTIVE OUTCOMES: COMBINED DATA (By Decade)
(Includes only cases with known results)

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total	Full Satisfaction		Part Satisfaction		Negative Outcome	
	Complaints	Number	%	Number	%	Number	%
1950s	38	28	74%	9	24%	1	3%
1960s	7	3	43%	4	57%	0	0%
1970s	19	9	47%	9	47%	1	5%
1980s	75	43	57%	18	24%	14	19%
Total	139	83	60%	40	29%	16	12%

21. *Poitiers Customs House* (Case #119), *supra* note 16; *United States: Steel Pipe from EC* (Case #138), *supra* note 16; and *United States: Cotton Pillowcases* (Case #144), *supra* note 16.

22. *Semiconductor Retaliation* (Case #161), *supra* note 16; *Pharmaceutical Retaliation* (Case #189), *supra* note 16; and *Hormones Retaliation* (Case #193), *supra* note 16.

23. *European Community: Seal Skins* (Case #145), *supra* note 16. The celebrated *Tuna* case was filed in 1990, after the cut-off date for this study. *See* GATT Doc. DS21/R (Sept. 3, 1991) (GATT panel report).

Not surprisingly, the combined results present the same pattern of gradual decline found in each of the separate categories presented above. The 1950s begin with a very impressive rate of overall success, with nearly 100% positive results and with about 75% of all complaints being fully satisfied. The 1960s and 1970s show a small amount of slippage. Complaints in general still achieve the same high rates of overall success, but slightly less than 50% of all complaints are fully satisfied. The 1980s then show a marked decline in overall success. The rate of positive results drops from an average of 97% during the first three decades to only 81% during the 1980s. The massive increase in negative outcomes completely overshadows a modest improvement in the percentage of "full satisfaction" results.

While the decline in the success rate during the 1980s was clearly a serious problem for the GATT legal system, it is important not to read too much "decline" into these numbers. Part of the decline was a natural event inherent in the evolution of any legal system. GATT's early success rate, although impressive, was somewhat artificial. Those who managed the system understood that a high rate of success was essential for the infant GATT, and so they walked very carefully and prudently in selecting cases that could produce victories, and in avoiding battles that could not be won. At some point, the safety of that early approach had to be set aside, and the system had to venture into rougher waters if it was to gain and retain credibility.

By 1980, the GATT legal system had succeeded in establishing itself as a serious enterprise. In so doing, it forced itself to move on to the next and more difficult level. Success builds confidence, and confidence stimulates greater demands upon the system. Governments became more aggressive in selecting complaints to bring, and decision-makers, now in the open, began to give direct answers to hard questions. Legal systems must take these risks if they are to become stronger. Governments have to be challenged, and the challenges will almost inevitably cause some failures by demanding too much too soon. The failures themselves are not the problem. The trick is to keep improving the system in order to overcome them.

Unfortunately, what happened in the 1980s was more than simply a painful growing-up process. Just at the time that the legal system started making more demands, domestic political pressures in some leading countries made governments start to move in the opposite direction. The increasing incidence of arm-twisting trade measures testified to a marked increase in the

willingness of certain governments to resort to economic force as an instrument of trade diplomacy.

The next section of this study presents the country-by-country breakdown of outcomes for individual complainants and defendants. As we identify the countries primarily involved in the declining performance of GATT law during the 1980s, we may begin to examine the domestic political changes which caused this decline in law-abiding tendencies.

D. COMPLAINANTS AND DEFENDANTS

In this section, we examine the identity of the complainants and defendants who participated in the 207 GATT complaint proceedings between 1948 and 1990. We begin by examining the frequency with which particular nations were involved in disputes, both as complainants and defendants. Thereafter, we examine outcomes that individual countries achieved, focusing first on their relative level of compliance when charged as defendants, and then, their relative level of success when acting as complainants.

Dealing with individual parties presents a minor methodological issue. Several of the 207 complaints in the 1948-1990 period involve multiple parties — either multiple complainants against a single defendant, or a single complainant against multiple defendants. If one counts each appearance by an individual country as a separate event, there were 229 complainants and 223 defendants in this 207-case database. This section of the study will use two enlarged databases, one for complainants containing separate entries for each of the 229 individual complaints, and another for defendants containing separate entries for each of the 223 appearances as defendant.[24]

The participation of the EC and its various member countries presents another methodological issue. Many complaints were brought by and against EC member countries before they became members of the EC. These pre-membership cases are

24. Thus, for example, in *United States: Customs User Fee*, BISD 35th Supp. 245 (1989) (GATT panel report) (Case #153), which was a consolidated complaint brought against the United States by Canada and the EC, this section of the study will count the United States as one defendant, while Canada and the EC will each be counted as one complainant. Conversely, in *European Community, Canada, Australia: Trade Restrictions Applied for Non-Economic Reasons*, GATT Doc. L/5317 (Apr. 30, 1982) (complaint by Argentina) (Case #112), which was a complaint by Argentina against the EC, Canada and Australia, this section of the study will count Argentina as one complainant, while the EC, Canada and Australia will each be counted as one defendant.

credited to that individual member country separately, and not the EC. On the other hand, in the few cases where an individual EC country was named as a defendant *after* it had become a member of the EC, the EC was primarily responsible for the matter in GATT, and so the "EC" is treated as the defendant.[25] To permit analysis of both the whole and its various parts, the data for all EC members are presented alongside the data for the EC itself, and separate totals are then given for "EC," for individual EC members, and for "EC *and* Members."

1. FREQUENCY OF PARTICIPATION

The following two tables present a complete breakdown of complainants and defendants in the entire body of 207 complaints filed from 1948-1989. The tables provide both a decade-by-decade breakdown and the totals for the entire forty-two year period.

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25. *15 Developed Countries: Uruguayan Recourse to Article XXIII*, BISD 11th Supp. 95 (1963) (GATT panel report) (Case #54) [hereinafter *Uruguayan Recourse to Article XXIII*]; *France: Import Restrictions I*, BISD 11th Supp. 94 (1963) (GATT panel report) (Case #56); *Italy: Import Restrictions*, GATT Doc. L/1830 (Sept. 20, 1962) (U.S. complaint) (Case #57); *Italy: Administrative and Statistical Fees*, GATT Doc. L/3279 (Dec. 1, 1969) (U.S. complaint) (Case #60); *France: Import Restrictions II*, GATT Doc. L/3744 (Sept. 12, 1972) (U.S. complaint) (Case #67); *France: Income Tax Practices* (Case #70), *supra* note 4; *Belgium: Income Tax Practices* (Case #71), *supra* note 4; and *Netherlands: Income Tax Practices* (Case #72), *supra* note 4.

TABLE Comp 1

COMPLAINTS BY INDIVIDUAL GOVERNMENTS (Total and by Decade)

Country	Total Complaints		1950s		1960s		1970s		1980s	
USA	73	32%	13	21%	5	63%	16	50%	39	31%
EC & Members	63	28%	32	52%	1	13%	3	9%	27	21%
EC	*30*	*13%*	*0*	*0%*	*1*	*13%*	*3*	*9%*	*26*	*20%*
Belgium	*3*	*1%*	*3*	*5%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Denmark	*5*	*2%*	*5*	*8%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
France	*2*	*1%*	*2*	*3%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Germany	*3*	*1%*	*3*	*5%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Greece	*2*	*1%*	*2*	*3%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Italy	*4*	*2%*	*4*	*6%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Luxemburg	*1*	*0%*	*1*	*2%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Netherlands	*7*	*3%*	*7*	*11%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Portugal	*1*	*0%*	*0*	*0%*	*0*	*0%*	*0*	*0%*	*1*	*1%*
UK	*5*	*2%*	*5*	*8%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Canada	18	8%	0	0%	0	0%	2	6%	16	13%
Australia	13	6%	3	5%	0	0%	4	13%	6	5%
SubTotalA	167	73%	48	77%	6	75%	25	78%	88	69%
Brazil	9	4%	0	0%	1	13%	1	3%	7	6%
Chile	5	2%	1	2%	0	0%	2	6%	2	2%
India	5	2%	1	2%	0	0%	0	0%	4	3%
Japan	4	2%	0	0%	0	0%	1	3%	3	2%
Argentina	3	1%	0	0%	0	0%	0	0%	3	2%
Cuba	3	1%	2	3%	0	0%	0	0%	1	1%
Czechoslovakia	3	1%	3	5%	0	0%	0	0%	0	0%
Finland	3	1%	0	0%	0	0%	0	0%	3	2%
Hong Kong	3	1%	0	0%	0	0%	1	3%	2	2%
New Zealand	3	1%	0	0%	0	0%	0	0%	3	2%
Nicaragua	3	1%	0	0%	0	0%	0	0%	3	2%
Norway	2	1%	2	3%	0	0%	0	0%	0	0%
Sweden	2	1%	1	2%	0	0%	0	0%	1	1%
Turkey	2	1%	2	3%	0	0%	0	0%	0	0%
Austria	1	0%	1	2%	0	0%	0	0%	0	0%
Colombia	1	0%	0	0%	0	0%	0	0%	1	1%
Dominican Rep.	1	0%	0	0%	0	0%	0	0%	1	1%
Israel	1	0%	0	0%	0	0%	1	3%	0	0%
Korea	1	0%	0	0%	0	0%	1	3%	0	0%
Mexico	1	0%	0	0%	0	0%	0	0%	1	1%
Pakistan	1	0%	1	2%	0	0%	0	0%	0	0%
Peru	1	0%	0	0%	0	0%	0	0%	1	1%
Philippines	1	0%	0	0%	0	0%	0	0%	1	1%
Poland	1	0%	0	0%	0	0%	0	0%	1	1%
S. Africa	1	0%	0	0%	0	0%	0	0%	1	1%
Uruguay	1	0%	0	0%	1	13%	0	0%	0	0%
SubTotalB	62	27%	14	23%	2	25%	7	22%	39	31%
TOTAL	229		62		8		32		127	

Note: Sample consists of 229 complaints, rather than 207, because each complainant in cases with multiple complainants is counted separately. Cases with multiple complainants: See Appendix numbers 5, 14, 15, 21, 22, 25, 34, 49, 59, 110, 152, 153.

TABLE Def 1

COMPLAINTS AGAINST INDIVIDUAL GOVERNMENTS (Total and by Decade)

Country	Total		1950s		1960s		1970s		1980s	
EC & Members	98	44%	32	60%	10	48%	20	63%	36	31%
EC	*57*	*26%*	*0*	*0%*	*8*	*38%*	*15*	*47%*	*34*	*29%*
Belgium	*3*	*1%*	*3*	*6%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
France	*9*	*4%*	*9*	*17%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Germany	*4*	*2%*	*4*	*8%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Italy	*6*	*3%*	*6*	*11%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Netherlands	*1*	*0%*	*1*	*2%*	*0*	*0%*	*0*	*0%*	*0*	*0%*
Denmark	*2*	*1%*	*0*	*0%*	*1*	*5%*	*1*	*3%*	*0*	*0%*
UK	*7*	*3%*	*4*	*8%*	*1*	*5%*	*2*	*6%*	*0*	*0%*
Greece	*6*	*3%*	*5*	*9%*	*0*	*0%*	*1*	*3%*	*0*	*0%*
Spain	*3*	*1%*	*0*	*0%*	*0*	*0%*	*1*	*3%*	*2*	*2%*
USA	52	23%	9	17%	2	10%	3	9%	38	32%
Japan	20	9%	0	0%	1	5%	5	16%	14	12%
Canada	15	7%	0	0%	2	10%	2	6%	11	9%
SubTotalA	185	83%	41	77%	15	71%	30	94%	99	85%
Brazil	4	2%	2	4%	0	0%	0	0%	2	2%
Australia	3	1%	1	2%	0	0%	0	0%	2	2%
Chile	3	1%	1	2%	0	0%	0	0%	2	2%
Cuba	3	1%	3	6%	0	0%	0	0%	0	0%
Finland	3	1%	0	0%	1	5%	0	0%	2	2%
India	3	1%	1	2%	0	0%	0	0%	2	2%
Korea	3	1%	0	0%	0	0%	0	0%	3	3%
Norway	4	2%	0	0%	1	5%	1	3%	2	2%
Sweden	3	1%	1	2%	1	5%	0	0%	1	1%
Austria	1	0%	0	0%	1	5%	0	0%	0	0%
Czechoslovakia	1	0%	0	0%	1	5%	0	0%	0	0%
Jamaica	1	0%	0	0%	0	0%	1	3%	0	0%
New Zealand	1	0%	0	0%	0	0%	0	0%	1	1%
Pakistan	1	0%	1	2%	0	0%	0	0%	0	0%
Peru	1	0%	1	2%	0	0%	0	0%	0	0%
Switzerland	2	1%	0	0%	1	5%	0	0%	1	1%
Turkey	1	0%	1	2%	0	0%	0	0%	0	0%
SubTotalB	38	17%	12	23%	6	29%	2	6%	18	15%
TOTAL	223		53		21		32		117	

Note 1: Sample consists of 223 complaints, rather than 207, because each defendant in cases with multiple defendants is counted as the object of a separate complaint. Cases with multiple defendants: See Appendix numbers 54 and 112.

Note 2: All complaints against individual EC countries after their accession to the community are counted as complaints against the EC. See Appendix numbers 54, 56, 57, 60, 67, 70, 71, 72.

• *The Entire Forty-Two Years.* The GATT's dispute resolution mechanism has been dominated by just a few large countries. For the entire forty-two year period, 73% of all complaints were filed by the United States, the EC and EC members, Canada and Australia. The role of defendant has been even more

heavily concentrated. The United States, the EC and EC members, Canada and Japan accounted for 83% of all appearances as defendants.

Even more striking is the dominant share of participation occupied by just the two largest members — the United States and the European Community. As complainants, the United States and the EC-plus-members group were the initiating parties in 136 of 229 complaint appearances, accounting for almost 60% of all complaints recorded. As defendants, the EC-plus-members and the United States were named defendants on 150 occasions, or 67% of all claims against defendants. The most striking item of all is that, out of the 207 cases in this database, 190 (92%) had either the United States *or* the EC-plus-members as a party. In other words, only seventeen of 207 cases did not involve either the United States or the EC-plus-members.

The opposite side of this coin is that most other GATT members have made little use of the dispute settlement system. The GATT currently has 105 members. Aside from the five dominant participants on the complainants and defendants lists, only twenty-seven "other" countries have ever participated — twenty-five of them as complainants, and sixteen of them as defendants. Nine of these twenty-seven "other" participants made only one appearance. The large majority of GATT contracting parties have never participated in the dispute settlement process.

The developing countries share of overall participation was slight. Developing countries accounted for forty-four of 229 complaints (19%) and twenty-nine of 223 appearances as defendant (13%). (For the purposes of this study, a "developing country" is any country that so described itself at the time of the complaint.)

The fact that most *complaints* were concentrated among just a few of the largest and most powerful countries can be viewed as evidence that the dispute settlement system still has some weaknesses. The correlation between size and frequency of complaints suggests that the system works better for the large countries. Why would this be so? First, the act of complaining is frequently irritating to the defendant, and, assuming GATT law itself is not entirely capable of protecting complainants from threats of retribution, larger complainants have less to fear from retribution than smaller countries. Second, GATT law is not self-executing. Legal victory often needs to be backed up with political and economic pressure in order to achieve results, and

larger countries will tend to have greater confidence in their ability to apply such pressure.

That Japan is *not* among the top four complainants is not necessarily inconsistent with this hypothesis. Japan has always been somewhat isolated in GATT, the target of special restrictions against its exceptionally competitive exports and the target of special suspicions about its "different" economic system. Japan's vulnerability to attack has led it to follow the same course as many smaller countries, who choose not to "rock the boat."

The fact that large countries are also the most frequent *defendants* needs additional explanation. One might expect complainants to prefer lawsuits against smaller countries, who can more easily be pressured into meeting legal claims. The answer, it seems, is that large countries have the largest and most lucrative markets. Large countries also tend to hold each other to higher standards of compliance, in part because they make so many demands on behalf of their own exporters.

One factor which accentuates the concentration of litigation among the leading governments is the GATT tradition of tit-for-tat lawsuits. Defendants rarely enjoy being sued and will often retaliate by filing one or more lawsuits of their own against the complainant. Thus, one appearance as complainant often guarantees at least one other appearance as defendant, and vice-versa. A casual look at the list of GATT lawsuits over the years shows several examples of such tit-for-tat litigation among the larger countries.[26]

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26. The three most frequent participants are the United States (105 appearances), the EC (87 appearances) and Canada (33 appearances). Examples of tit-for-tat filings among these Big Three litigants include the following:

(1)

the United States files *France: Income Tax Practices* (Case #70), *supra* note 4; *Belgium: Income Tax Practices* (Case #71), *supra* note 4; and *Netherlands: Income Tax Practices* (Case #72), *supra* note 4, against EC countries, in response to *United States: DISC Legislation* (Case #69), *supra* note 18;

(2)

the EC files *Canada: Withdrawal of Tariff Concessions Under Article XXVIII:3*, BISD 25th Supp. 42 (1979) (GATT panel report) (Case #79), against Canada in response to *European Community: Adequacy of Compensation in Article XXIV:6 Negotiations*, GATT Doc. C/M/101 (Council meeting of Nov. 8, 1974) (complaint by Canada) (Case #73);

(3)

the EC files *United States: "Manufacturing Clause" in US Copyright Legislation*, BISD 31st Supp. 74 (1985) (GATT panel report) (Case #122); *United States: Export Subsidy on Sales of Wheat Flour to Egypt* (all documents restricted) (Case #123); *United States: Tariff Reclassification of Machine-Threshed Tobacco*, GATT Doc. L/5541 (Sept. 30, 1983) (EC complaint) (Case #127); *United States: Definition*

To the extent that the imperfections of the GATT legal system do in fact discourage smaller countries from using the GATT dispute settlement procedure, the legal system is obviously less successful than one would want it to be. Viewed in developmental terms, however, any newborn legal system is going to begin this way. The hope is that the legal system will become stronger as it develops, and that, as it does so, it will become more and more capable of protecting smaller countries and enforcing their legal victories.

The first signs of such improved protection for smaller countries may be appearing in the decade-by-decade breakdown of participation data, in the two tables above. The percentage of complaints filed by "other" complainants has clearly been growing over the years. For the first three decades, "other" complainants accounted for twenty-three of 102 individual complaints, or 23%. During the decade of the 1980s, complaints by "other" countries accounted for thirty-nine of 127 individual complaints, or 31%.[27] For developing countries, the respective percentages are 16% for the first three decades, and 22% in the 1980s.[28]

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of "Industry" Concerning Wine and Grape Products, GATT Doc. SCM/71 (Mar. 24, 1986) (GATT panel report) (Case #137); and *United States: Steel Pipe from EC* (Case #138), *supra* note 16, against the United States in response to U.S. complaints in *European Community: Subsidies on Export of Wheat Flour*, GATT Doc. SCM/42 (Mar. 21, 1983) (GATT panel report) (Case #103) [hereinafter *European Community: Wheat Flour*]; *European Community: Subsidies on Exports of Pasta Products*, GATT Doc. SCM/43 (May 19, 1983) (GATT panel report) (Case #105) [hereinafter *European Community: Pasta Products*]; *European Community: Subsidies on the Export and Production of Poultry*, BISD 32d Supp. 162 (1985) (conclusion of consultations) (Case #106); *European Community: Production Aids on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*, GATT Doc. L/5778 (Feb. 20, 1985) (GATT panel report) (Case #107) [hereinafter *European Community: Canned Fruit*]; *European Community: Export Subsidies on Sugar* (all documents restricted) (Case #109); *European Community: Tariff Treatment of Citrus Products from Certain Mediterranean Countries*, GATT Doc. C/M/190 (June 5, 1985) (discussion of GATT panel report) (Case #113) [hereinafter *European Community: Citrus Products*]; and *European Community: Value-Added Tax (VAT) and Threshold*, BISD 31st Supp. 247 (1985) (GATT panel report) (Case #114).

27. Interestingly enough, the percentage of appearances by "other" defendants declined during the same period, from an average of 19% in the first three decades to only 15% in the 1980s.

28. These figures are computed from the complainant figures presented in *Table Comp 2*, p.254 infra. To arrive at the figure for the first three decades, subtract the 1980s data from the 42-year data. Sixteen of 102 complaints were made by developing countries.

It is difficult to say what percentage of complaints would be an appropriate share for smaller countries. Larger countries have many more distinct trade interests than smaller ones. While total volume of trade is not a very exact surrogate for the number of possible legal claims, it gives some idea of the proportions between developed and developing countries. The four leading complainants plus Japan accounted for 63.5% of world merchandise exports in 1990.[29] Measured by volume of export trade, the 31% share of GATT complaints by smaller countries during the 1980s, while low, is at least near to their share of world exports.

• *Decade by Decade.* As just noted, the two tables presented above also provide a decade-by-decade breakdown of country participation. The decade-by-decade data tracks some of the major developments that were taking place in GATT dispute settlement over these forty-two years.

In the 1950s, the most interesting datum is the dominant role played by the European countries who are now members of the European Community. By themselves, these European nations accounted for well over half of all appearances as complainant and defendant in the 1950s — 52% as complainant, 60% as defendant. European countries quickly adopted GATT adjudication as a way of resolving trade disputes and they became the major impetus that set GATT dispute settlement in motion and gave it initial respectability. Their reasons for doing so are not hard to understand. These European states were crowded into a small economic space; they were cognizant of the need for orderly settlement of disputes; and they had a strong tradition of respect for international law which made it easy for them to accept law as the most efficient way of settling their disputes.

The advent of the European Community in the late 1950s meant the disappearance of individual European countries as leading participants in GATT dispute settlement. Disputes between EC member countries would now be settled in Brussels. In GATT, meanwhile, the legal system would have to adjust to a more demanding kind of adjudication, one that was dominated by disputes between superpowers and super-blocs.

This new legal order caused the volume of GATT litigation to drop sharply in the 1960s and 1970s. The primary cause of this decline can be seen in the percentage share of legal complaints filed by the Community. Whereas EC members had filed 52% of

29. GATT, INTERNATIONAL TRADE 1990-91, vol. II, table 1.4, at 3 (1992).

all GATT complaints in the 1950s, the EC share was about 10% over the next two decades. This reluctance to litigate reflected the EC's general antipathy toward GATT legal procedures at this time. Despite an impressive degree of compliance with GATT, several important aspects of the Community's structure and policy were open to GATT legal challenge, and the Community worked very hard during this period to direct all legal challenges into non-legal channels.

The fact that the United States accounted for 53% of all legal complaints during the 1960s and 1970s testifies to the comparatively strong U.S. interest in the dispute settlement system at this time. The United States position was in part simply an expression of Anglo-Saxon attachment to legal procedures, but most of the actual U.S. activity was in response to congressional demands for tangible proof that the United States was in fact enforcing its GATT legal rights.

Following these individual country numbers into the 1980s produces some interesting insights about the explosion of GATT litigation during that period. The EC instituted a striking change of legal policy during the 1980s, filing twenty-six complaints, or 20% of all complaints for the decade, as opposed to only four complaints in the previous two decades. This dramatic increase in legal participation suggests that the EC's legal relationship with the GATT had finally begun to stabilize. Interestingly, however, the twenty-six EC complaints in the 1980s only brought the EC back to the number of legal complaints filed by its member states in the 1950s. The increase from sixty-two complaints in the 1950s to 127 complaints in the 1980s was actually due to increases in volume by the United States (thirty-nine complaints as opposed to thirteen), by "Other" (thirty-nine complaints as opposed to fourteen) and by Canada (sixteen complaints as opposed to none). On the other hand, the emergence of the EC as a willing participant undoubtedly played an indirect role in encouraging some of these other countries to become more active.

On the defendants' side, the most dramatic change over time was the change in relative roles of the United States and the EC from the 1960s to the 1980s. During the 1960s and 70s, the EC was far and away the most frequently sued defendant, being named in 43% of all defendant appearances during those twenty years, while accounting for only 10% of the complaints. The United States, by contrast, was named in 9% of the defend-

ant appearances during the 1960s and 1970s, while accounting for 53% of all the legal complaints.

The total number of complaints against the EC increased from twenty-three in the 1960s and 1970s to thirty-four in the 1980s, but due to the enormous increase in the overall volume of complaints, its share of all defendant appearances fell to just 29%, from the 43% share in the 1960s and 1970s. The United States, by contrast, experienced a large increase in its role as defendant. United States appearances as defendant increased from a total of five in the 1960s and 1970s, to thirty-eight in the 1980s alone, in percentage terms from 9% to 32%. In effect, the United States had become the primary victim of its own campaign to strengthen the dispute settlement system.

2. ANALYSIS OF OUTCOMES FOR INDIVIDUAL DEFENDANTS

We turn now to an analysis of the outcomes that individual governments achieved in dispute settlement proceedings. The most important data is a government's compliance record when acting as a defendant. Accordingly, this section begins by examining the data from the defendant's perspective.

The only individual defendants whose participation was frequent enough to provide sufficient data for analysis are the four most frequent defendants: (a) the EC (fifty-seven appearances), (b) the United States (fifty-two appearances), (c) Japan (twenty appearances) and (d) Canada (fifteen appearances). The EC member states, with forty-one total appearances, will be reported alongside the EC. All the remaining countries who made appearances as defendants — seventeen countries who made thirty-eight appearances — will be gathered into one additional group called "Other." A separate table comparing outcomes for developed and developing countries will appear as a supplement to each table.

a. Procedural Outcomes, by Defendant

As usual, the analysis of outcomes begins by dividing the complaints against each defendant into the three categories of procedural outcomes: rulings, settled-conceded and withdrawn-abandoned.

TABLE Def 2

PROCEDURAL OUTCOMES (By Defendant)

42 Years

Defendant	Total Complaints	Rulings Number	Rulings % of total	Settled-Conceded by Def. Number	Settled-Conceded by Def. % of total	Withdrawn or Abandoned Number	Withdrawn or Abandoned % of total
EC & Members	*98*	*43*	*44%*	*32*	*33%*	*23*	*23%*
EC	57	27	47%	13	23%	17	30%
EC Members	41	16	39%	19	46%	6	15%
U.S.	52	23	44%	6	12%	23	44%
Japan	20	6	30%	13	65%	1	5%
Canada	15	11	73%	1	7%	3	20%
Other	38	19	50%	12	32%	7	18%
Total	223	102	46%	64	29%	57	26%

DC	194	89	46%	52	27%	53	27%
LDC	29	13	45%	12	41%	4	14%
Total	223	102	46%	64	29%	57	26%

1980s

Defendant	Total Complaints	Rulings Number	Rulings % of total	Settled-Conceded by Def. Number	Settled-Conceded by Def. % of total	Withdrawn or Abandoned Number	Withdrawn or Abandoned % of total
EC & Members	*36*	*15*	*42%*	*9*	*25%*	*12*	*33%*
EC	34	13	38%	9	26%	12	35%
EC Members	2	2	100%	0	0%	0	0%
U.S.	38	15	39%	3	8%	20	53%
Japan	14	5	36%	8	57%	1	7%
Canada	11	7	64%	1	9%	3	27%
Other	18	5	28%	7	39%	6	33%
Total	117	47	40%	28	24%	42	36%

DC	106	42	40%	24	23%	40	38%
LDC	11	5	45%	4	36%	2	18%
Total	117	47	40%	28	24%	42	36%

The defendants differ quite a bit in the percentages of cases against them that fall into these three procedural outcome categories. The differences between countries conform rather well to *a priori* assumptions about the differences between national policies toward GATT litigation.

Japan has the most distinctive profile. Over the entire forty-two year period, Japan had by far the highest percentage of cases settled or conceded (65%), more than double that of any other single participant. Japan also had the *lowest* percentage of cases in the two other categories — complaints that produce a legal ruling (30%) and complaints withdrawn or abandoned (5%). The 1980s data for Japan is essentially the same. These numbers coincide almost perfectly with the popular perception of Japan's position in GATT — an economic giant, but politically a rather weak player because of its traditional isolation and its relatively closed society and economy. Whether from political

weakness or cultural aversion to litigation, or both, the record is clear that Japan has tried to avoid confrontational extremes in litigation and to settle complaints against it whenever possible.

Canada presents an interesting contrast to Japan. Being smaller than the United States or the European Community, one would expect that Canada would behave similarly to Japan. The two countries are similar in having a low percentage of the complaints against them withdrawn or abandoned, possibly due to both countries' relative lack of "muscle" in resisting complaints. Throughout the entire forty-two year period and in the 1980s, however, Canada clearly preferred to litigate rather than to settle. Canada has the lowest settlement rate, and by far the highest percentage of cases that proceed to a legal ruling, 73% for the full forty-two year period, and 64% for the 1980s alone. In sum, Canada presents the profile of a smaller country that prefers to wage open combat over legal complaints against it. Being relatively small, Canada is usually forced to resist all the way to a legal ruling.[30]

The United States also seems to prefer resistance to settlement, but its power makes its resistance considerably more effective. Except for Canada which has only a narrow edge, the United States had by far the smallest percentage of cases settled or conceded — in the forty-two year period, 12% as opposed to 34% for all other GATT countries, and in the 1980s, 8% as compared with 32%.[31] Instead of proceeding to litigation, however, nearly half or more of the complaints against the United States were withdrawn or abandoned — 44% overall and 53% in the more rough-and-tumble 1980s. In both cases, the percentage of withdrawn or abandoned complaints is about double the average rate for all other defendants combined. The United States emerges as an unruly defendant that is difficult to bring into court.

If one were to hypothesize that a country's ability to resist

30. If one were to speculate on the reasons for the difference in Canadian and Japanese policies toward litigation, the three factors that first come to mind would be (a) national character, (b) the closeness and comfort level of each nation's relationship to the two GATT superpowers, and (c) the relative ability to obtain domestic political acceptance for settlements that reduce the level of trade barriers protecting the home market.

31. The combined average for other countries is calculated by subtracting the U.S. cases from the total. For the 42-year period, for example, 223 cases minus 52 by the United States, leaves 171 non-U.S. cases. Of the 64 settled or conceded cases, six were by the United States, leaving 58 non-U.S. cases. Dividing 58 by 171 yields 34%. The same method yields a non-U.S. percentage for the 1980s of 32%.

GATT lawsuits depends on its power, one would expect to see the European Community next in line after the United States in terms of successful resistance, while both the "Other" and developing country groups would be at the very bottom of the list. That is in fact how the data line up. Among individual defendants both over the forty-two year period and in the 1980s, the Community has the second largest percentage of withdrawn or abandoned cases overall, and, after Canada and the United States, the third lowest percentage of settled or conceded cases. At the other end of the spectrum, the most dramatic data appear in the supplemental table comparing procedural outcomes for developed and developing countries. While 27% of all complaints against developed country defendants are withdrawn or abandoned, only 14% of complaints against developing countries are similarly abandoned. In the 1980s, the gap is even larger — 38% as opposed to 18%. And just the reverse is true with settled cases. Over the last forty-two years developing countries have agreed to settle 41% of the complaints against them whereas developed country defendants settled only 27%. Though narrower, the 1980s gap is still 36% to 23%. Results for "Other" countries are closer to average, but, as predicted, they are second from the bottom. On the whole, therefore, power does seem to play a role in the procedural outcomes achieved by complaints.

b. Substantive Outcomes, by Defendant

• *Cases with Legal Rulings.* The following tables present the breakdown of Violation/No Violation rulings, for the entire forty-two year period and then for the 1980s alone.

TABLE Def 3

SUBSTANTIVE OUTCOMES: RULINGS -- VIOLATION v. NO-VIOLATION (By Defendant)

42 Years

Defendant	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
EC & Members	*98*	*43*	*44%*	*11*	*32*	*74%*	*33%*
EC	57	27	47%	7	20	74%	35%
EC Members	41	16	39%	4	12	75%	29%
U.S.	52	23	44%	9	14	61%	27%
Japan	20	6	30%	2	4	67%	20%
Canada	15	11	73%	2	9	82%	60%
Other	38	19	50%	4	15	79%	39%
Total	223	102	46%	28	74	73%	33%
DC	194	89	46%	25	64	72%	33%
LDC	29	13	45%	3	10	77%	34%
Total	223	102	46%	28	74	73%	33%

1980s

Defendant	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
EC & Members	*36*	*15*	*42%*	*1*	*14*	*93%*	*39%*
EC	34	13	38%	1	12	92%	35%
EC Members	2	2	100%		2	100%	100%
U.S.	38	15	39%	5	10	67%	26%
Japan	14	5	36%	1	4	80%	29%
Canada	11	7	64%	0	7	100%	64%
Other	18	5	28%	0	5	100%	28%
Total	117	47	40%	7	40	85%	34%
DC	106	42	40%	7	35	83%	33%
LDC	11	5	45%	0	5	100%	45%
Total	117	47	40%	7	40	85%	34%

The interesting question with regard to the comparative data on rulings of violation is whether more powerful defendants tend to fare better than smaller ones. For the United States, the rate of violation rulings during the forty-two year period was markedly lower — only 61%, as opposed to an average rate of 76% for all other defendants. In the 1980s, when the average rate for other countries was 94%, the U.S. rate was an even more distant 67%. The relatively low rate for the United States is doubly significant in view of the fact that the United States settled so few cases. One cannot explain these numbers by suggesting that many meritorious complaints against the United States had been siphoned off by settlement. Rather, the data seem to suggest that power, tenacity, or both, may exert some influence on how panels rule.

The data on the other major participants is less clear, but what evidence there is is mildly supportive. The data for the

forty-two year period show developing countries with a slightly higher rate of violation rulings than developed countries. Japan and the European Community have lower rates than Canada and "Other." The same differences are somewhat magnified in the smaller sample for the 1980s.

We now turn to the way individual countries responded to adverse legal rulings against them. The following tables present the substantive outcomes in the cases where rulings of violation were issued.[32]

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32. The breakdown of the data into individual appearances produces one more negative result — Norway's failure to respond to a self-admitted violation ruling in *Uruguayan Recourse to Article XXIII* (Case #54), *supra* note 25. The case as a whole, which had 14 other defendants, is treated as a "partial compliance" outcome in the 207-case database.

TABLE Def 4

SUBSTANTIVE OUTCOMES: RULINGS – RESULTS OF VIOLATION RULINGS (By Defendant)

42 Years

	Total	Result	Full Satisfaction				Part Satis.		Negative Outcome			
Defendant	Violation	Unknown	6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
EC & Members	*32*	*0*	*17*	*4*	*21*	*66%*	*10*	*31%*	*1*	*0*	*1*	*3%*
EC	20	0	8	4	12	60%	7	35%	1	0	1	5%
EC Members	12	0	9	0	9	75%	3	25%	0	0	0	0%
U.S.	14	0	6	3	9	64%	1	7%	2	2	4	29%
Japan	4	0	3	0	3	75%	1	25%	0	0	0	0%
Canada	9	1	3	1	4	50%	2	25%	2	0	2	25%
Other	15	0	11	0	11	73%	3	20%	1	0	1	7%
Total	74	1	40	8	48	66%	17	23%	6	2	8	11%
DC	64	1	33	8	41	65%	14	22%	6	2	8	13%
LDC	10	0	7	0	7	70%	3	30%	0	0	0	0%
Total	74	1	40	8	48	66%	17	23%	6	2	8	11%

1980s

	Total	Result	Full Satisfaction				Part Satis.		Negative Outcome			
Defendant	Violation	Unknown	6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
EC & Members	*14*	*0*	*8*	*2*	*10*	*71%*	*3*	*21%*	*1*	*0*	*1*	*7%*
EC	12	0	6	2	8	67%	3	25%	1	0	1	8%
EC Members	2	0	2	0	2	100%	0	0%	0	0	0	0%
U.S.	10	0	4	2	6	60%	0	0%	2	2	4	40%
Japan	4	0	3	0	3	75%	1	25%	0	0	0	0%
Canada	7	0	2	1	3	43%	2	29%	2	0	2	29%
Other	5	0	2	0	2	40%	3	60%	0	0	0	0%
Total	40	0	19	5	24	60%	9	23%	5	2	7	18%
DC	35	0	16	5	21	60%	7	20%	5	2	7	20%
LDC	5	0	3	0	3	60%	2	40%	0	0	0	0%
Total	40	0	19	5	24	60%	9	23%	5	2	7	18%

Note 1: All percentages are computed using known results.

Note 2: Separate treatment of each defendant produces one more negative outcome in the 42 year section because one of the 15 defendants in case 54 (Norway) did not comply with a ruling of violation. See Appendix number 54.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.
6.2.1: No action taken.
6.2.5: Claim fully satisfied after complainant acceded to bilateral demands.

When dealing with individual countries, the issue of compliance is somehow more tangible if one measures vice instead of virtue. The principal measure of compliance, then, will be the rate of "negative outcomes" for each participant — the percentage of cases in which each failed to observe a ruling of violation.

The data here present a rather strong indictment of the United States' performance. Consistent with the pattern of resistance suggested by the data in previous sections, the United States appears to be the defendant that most frequently resists the legal rulings of the dispute settlement process. Four of the

fourteen rulings of violation made against the United States ended with a negative outcome — two with a failure to comply and two with compliance only after the complainant had acceded to arm-twisting demands. All four negative outcomes occurred in the 1980s, leading to a negative-outcome rate of 29% for the entire forty-two year period, and a 40% rate for the 1980s alone.

Canada, the defendant that litigates a higher percentage of complaints against it than any other, comes in with the second worst compliance record. Canada had only eight rulings of violation with known results. Canada's refusal to follow two rulings, both in the 1980s, leads to an overall negative-outcome rate of 25%, and a rate of 29% for the 1980s alone.

The remaining three groups of defendants have a much lower rate of negative outcomes where rulings of violation are concerned. Both the EC and "Other" have one negative outcome apiece, representing between 5-8% of all rulings against them. Japan has none. Not surprisingly, developing countries have none.

GATT observers may well argue that these data are misleading in suggesting such a wide difference between United States and European Community performance. The difference rests on the contrast between four cases in which the United States did not comply, and just one where the Community did not comply. Observers might note that in the early 1980s, the European Community created a major legal crisis by blocking GATT Council adoption of three major panel rulings against it — the celebrated *Pasta*, *Canned Fruit*, and *Citrus* cases.[33] These cases do not show up as negative outcomes, because the United States and the Community eventually agreed to settle each of the cases by partially correcting the problem complained of. At the time, it seemed that the EC's behavior amounted to a repudiation of the authority of the legal system. On the other hand, it can also be argued that the EC had a plausible legal basis for objecting to each of the three rulings, and that it actually did manage to sustain its main legal objections by achieving settlements that set aside those parts of the legal ruling the EC found particularly objectionable. Moreover, if cases like *Pasta*, *Canned Fruit* and *Citrus* are to be considered, similar data on U.S. legal performance, such as the *DISC* case, would also have to be con-

33. *European Community: Pasta Products* (Case #105), *supra* note 26; *European Community: Canned Fruit* (Case #107), *supra* note 26; and *European Community: Citrus Products* (Case #113), *supra* note 26.

sidered. The additional data on both sides would probably dilute the sharp 4-to-1 difference here, but it would not erase the U.S. performance deficit.

The data on "full" versus "partial" satisfaction offsets the dismal U.S. record to some extent. In the ten cases where the United States did respond positively to an adverse legal ruling over the forty-two year period, the result was full compliance in nine of the ten cases (although in three of those nine cases the offending measure simply expired). Other defendants had a much lower rate of full satisfaction outcomes. Excluding negative outcomes from the sample, the rates of full satisfaction were 57% for Canada, 65% for the EC, 70% for developing countries, 75% for Japan, and 79% for "Other."[34] Except for the United States, these data on full versus partial satisfaction suggest that the stronger countries tend to get away with partial compliance more often than the weak.

• *Cases in Which Defendant Settled or Otherwise Conceded Validity.* The data as to the actual outcomes achieved in settled-conceded complaints is presented in the tables below.

34. The calculations involve subtracting negative outcomes from total violations.

TABLE Def 5

SUBSTANTIVE OUTCOMES: COMPLAINTS SETTLED OR CONCEDED (By Defendant)

42 years

Defendant	Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
			6.2.3	6.2.4	Total	%	6.2.2	%
EC & Members	*32*	*1*	*16*	*1*	*17*	*55%*	*14*	*45%*
EC	13	0	6	1	7	54%	6	46%
EC Members	19	1	10	0	10	56%	8	44%
U.S.	6	0	4	0	4	67%	2	33%
Japan	13	0	6	0	6	46%	7	54%
Canada	1	0	1	0	1	100%	0	0%
Other	12	0	10	0	10	83%	2	17%
Total	64	1	37	1	38	60%	25	40%
DC	52	0	28	1	29	56%	23	44%
LDC	12	1	9	0	9	82%	2	18%
Total	64	1	37	1	38	60%	25	40%

1980s

Defendant	Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
			6.2.3	6.2.4	Total	%	6.2.2	%
EC & Members	*9*	*0*	*5*	*1*	*6*	*67%*	*3*	*33%*
EC	9	0	5	1	6	67%	3	33%
EC Members	0	0	0	0	0	0%	0	0%
U.S.	3	0	1	0	1	33%	2	67%
Japan	8	0	6	0	6	75%	2	25%
Canada	1	0	1	0	1	100%	0	0%
Other	7	0	5	0	5	71%	2	29%
Total	28	0	18	1	19	68%	9	32%
DC	24	0	15	1	16	67%	8	33%
LDC	4	0	3	0	3	75%	1	25%
Total	28	0	18	1	19	68%	9	32%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.

Earlier, it was noted that, except for Japan, the smaller and weaker defendant countries tend to settle more complaints than the larger and stronger ones. The only further data presented by this breakdown of actual outcomes are the distribution of "full" *versus* "partial" satisfaction (subject to the caveat that "partial" settlements may not necessarily mean only partial compliance).[35]

Canada and the United States have settled so few cases that the data about their performance are too small to deserve much weight. The EC, Japan and "Other" have settled the same

35. *See supra* note 12 and accompanying text.

number of cases against them. So have the developing countries as a group. Within this group of defendants, it does appear that the smaller countries have granted the more favorable settlements. During the entire forty-two year period, both developing countries and "Other" countries have settled 82-83% of their cases by granting full satisfaction of the claim. Japan and the EC, on the other hand, have granted full satisfaction in only 46% and 54% of their settlements, respectively. In the 1980s, the EC had a slightly lower rate of full satisfaction, but Japan did not.

• *Cases Withdrawn or Abandoned.* The following table presents a defendant-by-defendant breakdown of the outcomes in those cases where the complaint was withdrawn or abandoned prior to ruling or settlement.

TABLE Def 6

SUBSTANTIVE OUTCOMES: COMPLAINTS WITHDRAWN OR ABANDONED (By Defendant)

42 Years				Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total	Valid	Total w/d	Total	Total	Total	As % of all	Complaint probably valid	
Defendant	Compl.	Compl.	or aband'd	Number	Number	Number	complaints	Number	% of valid complaints
EC & Members	*98*	*67*	*23*	*5*	*8*	*10*	*10%*	*4*	*6%*
EC	57	36	17	1	7	9	16%	3	8%
EC Members	41	31	6	4	1	1	2%	1	3%
U.S.	52	25	23	1	8	14	27%	5	20%
Japan	20	17	1	0	0	1	5%	0	0%
Canada	15	9	3	0	1	2	13%	0	0%
Other	38	27	7	2	3	2	5%	0	0%
Total	223	145	57	8	20	29	13%	9	6%
DC	194	124	53	7	18	28	14%	9	7%
LDC	29	21	4	1	2	1	3%	0	0%
Total	223	145	57	8	20	29	13%	9	6%

1980s				Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total	Valid	Total w/d	Total	Total	Total	As % of all	Complaint probably valid	
Defendant	Compl.	Compl.	or aband'd	Number	Number	Number	complaints	Number	% of valid complaints
EC & Members	*36*	*25*	*12*	*1*	*4*	*7*	*19%*	*2*	*8%*
EC	34	23	12	1	4	7	21%	2	9%
EC Members	2	2	0	0	0	0	0%	0	0%
U.S.	38	18	20	0	7	13	34%	5	28%
Japan	14	12	1	0	0	1	7%	0	0%
Canada	11	8	3	0	1	2	18%	0	0%
Other	18	12	6	2	2	2	11%	0	0%
Total	117	75	42	3	14	25	21%	7	9%
DC	106	66	40	3	13	24	23%	7	11%
LDC	11	9	2	0	1	1	9%	0	0%
Total	117	75	42	3	14	25	21%	7	9%

Earlier in this section, we noted that a higher percentage of complaints against the United States and European Community were withdrawn or abandoned than against other defendants.

Slightly more than 44% of the complaints against the United States were withdrawn or abandoned over the entire forty-two year period, and nearly 53% for the 1980s alone. Nearly 30% of the complaints against the EC were withdrawn or abandoned during the entire forty-two year period, and slightly more than 35% for the 1980s. While the EC figures are not as high as those for the United States, they are nevertheless significantly higher than the rates for the other defendants. We suggested that these higher rates of withdrawal were evidence that more powerful defendants were able to exert their power at an early stage in the process, by discouraging many complainants from proceeding further with their complaints.

As noted earlier, not all withdrawn or abandoned cases actually involve pressure to drop the complaint. A more precise measure of a country's power to discourage dispute settlement proceedings would be to subtract the withdrawals for neutral reasons, and take the percentage of all complaints that were withdrawn for negative reasons. The above table shows that the pattern of negative withdrawals is much the same. The United States managed to induce negative withdrawals in a striking 27% of all complaints against it, and an even more striking 34% of all 1980 complaints. The Community is a distant second at 16% and 21% over the same periods. "Other" countries, Japan, and the developing countries occupy their customary place at the bottom of the chart, having induced negative withdrawals in 3-5% of all complaints, and 7-11% of all complaints in the 1980s.

The critical compliance datum, of course, is the distribution of "negative outcomes" — negative withdrawals in cases where the complaint can be found to be legally valid. The distribution follows the general pattern of compliance described so far. Of the nine legal failures found in this category, the United States is the responsible defendant in five, the European Community in three, and a Community member, France, in one early case.[36] Taken as a percentage of the total number of valid legal claims against the particular defendant, the negative outcomes in this category represent 20% of all valid claims against the United States, 8% of valid claims against the EC and 3% of valid claims against EC members. For the 1980s, the five negative outcomes produced by the United States represented 28% of all valid claims made against it in the decade.

- *Combined Results for All Valid Claims.* We turn now to an

36. *France: Auto Taxes* (Case #40), *supra* note 16.

analysis of combined results from all three categories of cases in which a valid complaint was filed. Due to the enlarged database for individual defendants being used in this section of the study, the total number of valid claims in all three categories is now 145.

TABLE Def 7

SUBSTANTIVE OUTCOMES: COMBINED DATA (By Defendant)
(Includes only cases with known results)

42 Years

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total	Full Satisfaction		Part Satisfaction		Negative Outcome	
Defendant	Complaints	Number	%	Number	%	Number	%
EC & Members	*67*	*38*	*57%*	*24*	*36%*	*5*	*7%*
EC	36	19	53%	13	36%	4	11%
EC Members	31	19	61%	11	35%	1	3%
U.S.	25	13	52%	3	12%	9	36%
Japan	17	9	53%	8	47%	0	0%
Canada	9	5	56%	2	22%	2	22%
Other	27	21	78%	5	19%	1	4%
TOTAL	145	86	59%	42	29%	17	12%
DC	124	70	56%	37	30%	17	14%
LDC	21	16	76%	5	24%	0	0%
Total	145	86	59%	42	29%	17	12%

1980s

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total	Full Satisfaction		Part Satisfaction		Negative Outcome	
Defendant	Complaints	Number	%	Number	%	Number	%
EC & Members	*25*	*16*	*64%*	*6*	*24%*	*3*	*12%*
EC	23	14	61%	6	26%	3	13%
EC Members	2	2	100%	0	0%	0	0%
U.S.	18	7	39%	2	11%	9	50%
Japan	12	9	75%	3	25%	0	0%
Canada	8	4	50%	2	25%	2	25%
Other	12	7	58%	5	42%	0	0%
TOTAL	75	43	57%	18	24%	14	19%
DC	66	37	56%	15	23%	14	21%
LDC	9	6	67%	3	33%	0	0%
Total	75	43	57%	18	24%	14	19%

Note: Separate treatment of each defendant produces one more negative outcome in the 42 year section because one of the 15 defendants in case 54 (Norway) did not comply with a ruling of violation. See Appendix number 54.

The combined results from the enlarged database for defendants yield the same overall percentages of positive results as in the 207-case database. For valid legal claims over the full forty-two year period, positive results occur in 88% of the cases, while in the 1980s the rate is 81%. Again comparing individual countries in terms of vice rather than virtue, the percentages of negative outcomes are 12% for the entire forty-two year period, and 19% for the 1980s alone.

The United States has by far the worst compliance record in any time period. The United States forced negative outcomes in 36% of all valid complaints against it over the entire forty-two year period, and in 50% of the valid complaints filed against it in the 1980s. This is a seriously deficient record. It cannot be dismissed as the product of a statistically inadequate sample. The United States was responsible for nine negative outcomes out of eighteen valid complaints against it in the 1980s, and nine out of twenty-five for the full forty-two years.

Canada's two negative outcomes are enough to retain second place in percentage terms — 22% for the forty-two year period and 25% for the 1980s. The European Community's four negative outcomes make it second worst in absolute terms and third in percentage terms. The Community was responsible for negative outcomes in 11% of the valid complaints against it over the entire forty-two year period, and in 13% during the 1980s alone. Some will view the EC's compliance record as understated because it does not take account of its blockage of Council adoption of three other violation rulings in the early 1980s; others will dispute the significance of those cases, pointing out that the EC did settle all three blocked cases eventually.

The "Other" defendants were responsible for only one negative outcome overall.[37] Neither Japan nor the developing countries were responsible for any negative outcomes.

What can explain these differences in legal performance among leading GATT members? The first thing to note is that all the negative outcomes in complaints against the United States and Canada, and three of the four negative outcomes in complaints against the EC, occurred in the 1980s. Thus, one must look at the situation of these countries during the 1980s for an answer.

As noted in the previous section on decade-by-decade data, one condition common to all GATT countries in the 1980s was a higher level of ambition for GATT dispute settlement. Governments filed more complaints; they filed more demanding complaints; and the dispute resolution system tried to respond more objectively. These conditions were bound to produce a greater number of legal challenges to important trade policy measures, and thus a higher level of resistance — even noncompliance — than before. Because all parties felt similar pressures of more

37. The negative outcome for "Other" is Norway's failure to comply with an admitted violation in *Uruguayan Recourse to Article XXIII* (Case #54), *supra* note 25.

ambitious dispute settlement proceedings, however, they should have all experienced an equal incidence of negative outcomes caused by this factor alone. The absolute number of negative outcomes would, of course, vary with the frequency of participation, but the *rate* of negative outcomes should be the same. The rates of negative outcomes in the 1980s were manifestly not the same — 50% for the United States, 25% for Canada, 13% for the EC, and zero for Japan and "Others." Other factors must be sought to explain important differences in legal compliance.

There is obviously some correlation between size, or power, and the general level of resistance to dispute settlement. The United States and the European Community generally rank in 1-2 order in terms of most categories of resistant behavior — negative withdrawals as well as negative outcomes. Setting aside Japan as a special case, Canada's numbers likewise fit the expected profile for the third most powerful number. Yet power alone cannot explain the large gap between the United States outcomes and the European Community outcomes in the 1980s. Even allowing for some under-reporting of EC resistance to GATT law, the numbers for the two superpowers should be much closer than they are, if power alone were determinative. It would appear, rather, that other factors drove the United States to challenge the GATT's legal system a great deal more vigorously than the EC.

The key change in the United States during the 1980s was the adoption of a more bellicose and demanding trade policy. That policy had evolved slowly during the 1960s and 1970s as the U.S. Congress became more and more concerned about the increase of foreign competition in U.S. markets — partly because of perceived harm to U.S. industries, and partly because of the conviction that other countries were not opening their markets to the same extent. That policy took a more violent turn in the 1980s, due in large part to the occurrence of a massive trade deficit. Congress, blaming the deficit on trade restrictions by others, demanded that the U.S. government take the law into its own hands to obtain true reciprocal market access. Satisfying these demands required the U.S. Administration to impose concrete and highly visible acts of arm-twisting retaliation to prove that it was defending U.S. interests. The prevailing sense of injured rectitude also helped to reduce the sense of obligation when ordinary laws and administrative decisions were found to violate GATT.

The domestic political situation within the European Com-

munity does not display the same characteristics. In the first place, the Community did not face the "get tough" imperatives of U.S. domestic politics. Parliamentary systems of government are generally less prone to the adversarial legislative-executive relationships which generate such high-visibility demands for toughness, and Community politicians are one step further removed from day-to-day electoral politics which tend to produce such grandstanding. While the EC undoubtedly experienced similar impulses toward "get tough" policies, it tended to execute them behind closed doors.[38]

In the second place, the Community's internal political situation actually contained some important restraints against openly GATT-illegal behavior. The Community is a legal rather than a political entity. The law which creates the Community and empowers it to act also serves to constrain it. Even though GATT as a whole is not considered formally binding in Community law, Community officials always fear that clear GATT violations may cause internal legal problems under various provisions that give legal standing to international obligations.[39] This often leads the Community to take extra care to assure that its policy actions will not be subject to any formal rulings of GATT violation.[40] It is no accident that three of the Community's four negative outcomes were by means of inducing the complainants to withdraw. Only one legal ruling was ignored, and it was actually just "postponed" until the end of the Uruguay Round.[41]

It seems clear that the differences between U.S. and EC attitudes toward compliance with GATT law — both in appearance and in the actual numbers they record — are exaggerated by the differences in style imposed by their different political settings. But in the end, style becomes substance. Over time, the need to

38. France's whimsical gambit of requiring all Japanese VCRs to clear customs at the tiny customs office at Poitiers, *Poitiers Customs House* (Case #119), *supra* note 16, is an exception to the rule.

39. Article 228 of the Treaty of Rome provides that international obligations of the Community shall be binding on Community institutions and member states. While GATT as a whole has been found not to be directly applicable under Article 228, individual tariff bindings have been. Joined Cases 21-24/72, *International Fruit Co.* v. *Produktschap voor Groenten en Fruit* 1972 E.C.R. 1219. For a book devoted almost entirely to this subject, see THE EUROPEAN COMMUNITY AND GATT (Meinhard Hilf et al. eds., 1986).

40. For example, the Community is much more careful than most other countries to block adoption of panel rulings that threaten its existing practice, or to reserve its position explicitly.

41. *Screwdriver Assembly* (Case #188), *supra* note 11.

respond to political demands for toughness, coupled with a sense of comparative rectitude, has driven the United States to take greater liberties with GATT law more frequently than the EC.

Canada's relatively poor performance is hard to explain in fundamental terms. Canada does practice a fair amount of protectionism, and with trade being such an important part of the national economy, trade issues do become a subject of electoral politics, making change much more difficult. Canada's 25% rate of negative outcomes in the 1980s, however, rests on only two negative outcomes — two failures in eight valid claims. One legal failure was a countervailing duty case in which a number of other countries, including the United States, joined Canada in expressing the view that the panel's legal ruling was plainly wrong. The other was a recent ruling which would have required changes in the entire structure of Canadian agricultural price support policy. The United States itself did not press very hard, in part because the firm mainly responsible for the complaint decided to invest in Canada instead.[42] Canada's experience in the 1980s may just be the normal reaction of a larger country to the more demanding nature of GATT dispute settlement in that decade.

Turning to other indications of legal compliance reported in the combined data, we find that the distribution of "full" versus "partial" satisfaction outcomes presents an intriguing overlay to the pattern of negative outcomes. If one removes negative outcomes to avoid double counting, one finds that the United States and "Other" have roughly an 81% rate of full satisfaction, with developing countries close behind at 76%. Japan has the lowest rate at 53%, followed closely by the EC at 59%.

It is possible to view the combined patterns of negative outcomes and full-partial outcomes as a further reflection of the policy differences described above. The combined data suggests that Japan will almost always try to negotiate compromise answers, the United States will almost always eschew compromise in favor of yes-no, right-wrong answers, and the Community falls somewhere in the middle. To those who watch the GATT behavior of these three superpowers, the suggested pattern rings true. The inclination of the United States toward yes-no an-

42. These two cases were *Canada: Boneless Beef* (Case #149), *supra* note 11, and *Canada: Ice Cream and Yoghurt* (Case #195) *supra* note 11. Another possible reason for U.S. restraint in the second case was a Canadian counterclaim against a similar U.S. restriction. *United States: Import Prohibition on Imports of Ice Cream from Canada*, GATT Doc. L/6444 (Dec. 9, 1988) (complaint by Canada) (Case #194).

swers does seem to be a logical consequence of the highly public, adversarial relationship between the U.S. Congress and the Executive. Often carried out in the form of a morality play, this relationship seems to leave much less room for international compromise.

In sum, we can suggest three conclusions about the surge of legal failures in GATT dispute settlement during the 1980s. First, the increased rigor of the dispute settlement process created a situation in which some increase in the rate of legal failures was natural, and normal. Second, it seems undeniable that, as a group, the more powerful members of the GATT comply less well with the demands of GATT law and legal process than do the weaker countries as a group. And third, it would appear that the actual level of resistance and legal failure in the 1980s was augmented, and its distribution affected, by important changes in United States domestic policy. The new and more bellicose policy adopted by the United States clearly increased U.S. resistance and noncompliance to a level above all other participants. It is reasonable to hypothesize, moreover, that the U.S. example also encouraged other large powers to resist more than they might have done otherwise, although there is no way to measure this.

A final word is needed about the present susceptibility of GATT law to the influence of power. All primitive legal systems are subject to power differences. Those differences diminish (but never disappear entirely) as the legal system matures. Outwardly, the GATT legal system has matured considerably in the 1980s. One of the reasons legal failures have increased is that legal rulings have become more objective, and less power-sensitive. Another sign of maturation is the increasing share of complaints filed by "Other" countries. At present, to be sure, the process of maturation has yet to win the full support of the superpowers. But the process is in motion.

3. ANALYSIS OF OUTCOMES FOR INDIVIDUAL COMPLAINANTS

The preceding section analyzed the behavior of individual defendants against whom GATT legal complaints had been filed. The present section examines the same cases from the viewpoint of the complainant. It examines the outcomes achieved by each major complainant or group of complainants — first the procedural outcomes, and then the substantive outcomes on valid legal complaints.

As before, the analysis of individual complainants is limited

to the four most frequent complainants, who were the United States (seventy-three complaints), the European Community (thirty complaints), Canada (eighteen complaints) and Australia (thirteen complaints). The list is very similar to the list of most frequent defendants, except that (a) the United States replaces the European Community at the head of the list, (b) Canada moves up from fourth to third and (c) Australia replaces Japan. Once again, the member countries of the European Community, who filed thirty-three early complaints, will be listed alongside the EC itself. As before, the twenty-six other countries that made an appearance as a complainant are gathered together in a single group called "Other"; these twenty-six countries accounted for a total of sixty-two complaints. Each of the tables will also contain a supplementary section comparing the outcomes for developed and developing countries.

a. Procedural Outcomes, by Complainant

The distribution of procedural outcomes obtained by each complainant is presented in the following tables.

TABLE Comp 2

PROCEDURAL OUTCOMES (By Complainant)

42 Years

Complainant	Total Complaints	Rulings Number	Rulings % of total	Settled-Conceded by Def. Number	Settled-Conceded by Def. % of total	Withdrawn or Abandoned Number	Withdrawn or Abandoned % of total
U.S.	73	30	41%	34	47%	9	12%
EC & Members	*63*	*30*	*48%*	*12*	*19%*	*21*	*33%*
EC	30	15	50%	1	3%	14	47%
EC Members	33	15	45%	11	33%	7	21%
Canada	18	8	44%	3	17%	7	39%
Australia	13	4	31%	6	46%	3	23%
Other	62	26	42%	11	18%	25	40%
Total	229	98	43%	66	29%	65	28%

DC	185	83	45%	58	31%	44	24%
LDC	44	15	34%	8	18%	21	48%
Total	229	98	43%	66	29%	65	28%

1980s

Complainant	Total Complaints	Rulings Number	Rulings % of total	Settled-Conceded by Def. Number	Settled-Conceded by Def. % of total	Withdrawn or Abandoned Number	Withdrawn or Abandoned % of total
U.S.	39	16	41%	17	44%	6	15%
EC & Members	*27*	*12*	*44%*	*0*	*0%*	*15*	*56%*
EC	26	12	46%	0	0%	14	54%
EC Members	1	0	0%	0	0%	1	100%
Canada	16	8	50%	2	13%	6	38%
Australia	6	2	33%	3	50%	1	17%
Other	39	12	31%	6	15%	21	54%
Total	127	50	39%	28	22%	49	39%

DC	99	43	43%	24	24%	32	32%
LDC	28	7	25%	4	14%	17	61%
Total	127	50	39%	28	22%	49	39%

When examining procedural outcomes for individual *defendants*, we noted that complaints against the two strongest defendants, the United States and the European Community, were withdrawn or abandoned at a higher rate than were complaints against weaker defendants. We also noted that the stronger defendants were among the least likely to agree to a settlement. We suggested the hypothesis that stronger defendant countries have a greater likelihood of persuading the complainant to quit, and also a greater ability to resist pressures to settle. If that hypothesis were valid, one might expect a mirror image of these results to show up in the data for complainants. That is, the stronger complainants should experience the *lowest* rate of withdrawal or abandonment for their own complaints because the strong should be better able to overcome resistance by defendants and force cases to a conclusion. Stronger complainants

should also obtain the highest percentage of agreements to settle.

The hypothesis is certainly supported by the overall comparison between developed and developing country results. During the forty-two year period, developing country complainants withdrew twice the percentage of complaints that developed country complainants did, 48% to 24%. During the 1980s, when the rate of withdrawals went up, developing country complainants again withdrew approximately twice as many complaints, 61% to 32%. Developing complainants also fared clearly worse in obtaining settlement agreements. During the forty-two year period, they obtained settlement agreements in only 18% of their complaints as compared to 31% for developed country complainants. The ratio for the 1980s was 14% to 24%.

The averages for developed country complainants conceal some surprising differences, however, in the distribution of procedural outcomes for individual defendants. The United States fits the strong-country profile almost perfectly. It withdrew or abandoned a comparatively low 12% of its complaints in the entire forty-two year period and only 15% in the 1980s. It also procured the highest percentage of settlement agreements from defendants during the forty-two year period (47%) and, except for Australia, in the 1980s (44%). Other things being equal, these procedural outcomes would suggest that the United States exerts more force than other complainants in pursuit of some positive corrective action.

This conclusion is certainly consistent with the external appearance of the U.S. policy toward GATT dispute settlement complaints. The other half of the United States' bellicose policy, described in the preceding section, is a policy of vigorously attacking the legal wrongs of others at a fairly high level of public visibility. This has been particularly so since the 1974 enactment of "Section 301" which requires the U.S. executive branch to follow all valid-claim cases to the end, or explain to the Congress why it did not.[43] These pressures often leave the U.S. Administration with no exit from impasse situations except to threaten immediate retaliation if the GATT complaint does not go forward. The United States is large enough, and has retaliated often enough, to make the threat credible.

The European Community, which should be second to the United States if power alone matters, finds itself completely at

43. Trade Act of 1974 § 301, 19 U.S.C.A. § 2411, (as amended 1979, 1984, 1988).

the other end of the scale, with a very high percentage of withdrawn complaints. The EC has withdrawn or abandoned nearly half of its complaints, 47% during the forty-two year period and 54% during the 1980s alone. Likewise, the EC has obtained the very lowest percentage of settlement agreements of any participant — 3% in the forty-two year period, 0% in the 1980s.

The most plausible explanation for the wide differences between the outcomes for United States complaints and European Community complaints is simply that the Community did not try as hard. Upon closer examination, one finds that the Community has actually had a rather pronounced legal policy in this direction. Throughout the 1960s and 1970s, the Community was opposed to extensive use of the GATT dispute settlement procedure, fearing it had more to lose than to gain from a litigation-oriented approach to commercial policy problems. Acting under this policy, the Community occasionally filed GATT lawsuits as a defensive device, a tit-for-tat reminder designed to discourage complaints by others rather than an actual attempt to win legal victories. Once the message was received, withdrawal of the complaint was often a more desirable outcome for the EC than to strengthen GATT law by pursuing the complaint to a ruling. Even after the Community began to relax its opposition to dispute settlement proceedings as such, it was never as totally committed to victory as the United States. The Community did create a tit-for-tat Section 301 look-alike,[44] but it had none of the political urgency to prove toughness in a highly visible manner.

In sum, the United States numbers demonstrate that powerful complainants can accomplish better-than-average procedural outcomes when they apply their power in a determined fashion. The Community's numbers demonstrate that power is not always used to that end.

b. Substantive Outcomes, by Complainant

The following table presents the breakdown of violation and no-violation rulings for each major complainant, for both the entire forty-two year period and for the 1980s.

44. Council Regulation 2641/84, 1984 O.J. (L 252), sometimes referred to as "the Commercial Policy Instrument."

TABLE Comp 3

SUBSTANTIVE OUTCOMES: RULINGS – VIOLATION v. NO-VIOLATION (By Complainant)

42 Years

Complainant	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
U.S.	73	30	41%	7	23	77%	32%
EC & Members	*63*	*30*	*48%*	*4*	*26*	*87%*	*41%*
EC	30	15	50%	2	13	87%	43%
EC Members	33	15	45%	2	13	87%	39%
Canada	18	8	44%	2	6	75%	33%
Australia	13	4	31%	1	3	75%	23%
Other	62	26	42%	7	19	73%	31%
Total	229	98	43%	21	77	79%	34%

DC	185	83	45%	17	66	80%	36%
LDC	44	15	34%	4	11	73%	25%
Total	229	98	43%	21	77	79%	34%

1980s

Complainant	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
U.S.	39	16	41%	1	15	94%	38%
EC & Members	*27*	*12*	*44%*	*2*	*10*	*83%*	*37%*
EC	26	12	46%	2	10	83%	38%
EC Members	1	0	0%	0	0	0%	0%
Canada	16	8	50%	2	6	75%	38%
Australia	6	2	33%	0	2	100%	33%
Other	39	12	31%	2	10	83%	26%
Total	127	50	39%	7	43	86%	34%

DC	99	43	43%	5	38	88%	38%
LDC	28	7	25%	2	5	71%	18%
Total	127	50	39%	7	43	86%	34%

Testing the hypothesis that stronger countries do better, one might look for evidence that stronger complainants have a higher percentage of rulings in which a violation is found — the other side of the hypothesis that stronger defendants should have fewer adverse legal rulings.[45] The data supports such a hypothesis, although the differences are quite small. For the entire forty-two year period, developed country complainants obtained violation rulings in 80% of all rulings, as opposed to 73% for developing countries. Individually, complaints by the European Community and EC Members have measurably higher rates of violation findings (87%) than all the others, and the United States is next at 77%. The United States percentage is actually higher if one adjusts for the fact that two of the seven

45. In the study of violation rates against defendants, see Part 2.b. of this section, it was found that complaints against the United States did have a measurably lower rate of violation rulings than others, but the data for the other countries was inconclusive.

no-violation rulings on the U.S. record were in fact rulings in its favor.[46] The data for the 1980s, however, do not really support the hypothesis that powerful complainants obtain more violation rulings.

TABLE Comp 4

SUBSTANTIVE OUTCOMES: RULINGS -- RESULTS OF VIOLATION RULINGS (By Complainant)

42 Years

	Total	Result	Full Satisfaction				Part Satis.		Negative Outcome			
Complainant	Violation	Unknown	6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
U.S.	23	0	11	3	14	61%	8	35%	1	0	1	4%
EC & Members	*26*	*1*	*16*	*1*	*17*	*68%*	*6*	*24%*	*2*	*0*	*2*	*8%*
EC	13	1	7	1	8	67%	2	17%	2	0	2	17%
EC Members	13	0	9	0	9	69%	4	31%	0	0	0	0%
Canada	6	0	4	1	5	83%	0	0%	0	1	1	17%
Australia	3	0	1	0	1	33%	2	67%	0	0	0	0%
Other	19	0	12	3	15	79%	1	5%	2	1	3	16%
Total	77	1	44	8	52	68%	17	22%	5	2	7	9%
DC	66	1	37	6	43	66%	16	25%	5	1	6	9%
LDC	11	0	7	2	9	82%	1	9%	0	1	1	9%
Total	77	1	44	8	52	68%	17	22%	5	2	7	9%

1980s

	Total	Result	Full Satisfaction				Part Satis.		Negative Outcome			
Complainant	Violation	Unknown	6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
U.S.	15	0	5	2	7	47%	7	47%	1	0	1	7%
EC & Members	*10*	*0*	*6*	*1*	*7*	*70%*	*1*	*10%*	*2*	*0*	*2*	*20%*
EC	10	0	6	1	7	70%	1	10%	2	0	2	20%
EC Members	0	0	0	0	0	0%	0	0%	0	0	0	0%
Canada	6	0	4	1	5	83%	0	0%	0	1	1	17%
Australia	2	0	1	0	1	50%	1	50%	0	0	0	0%
Other	10	0	6	1	7	70%	0	0%	2	1	3	30%
Total	43	0	22	5	27	63%	9	21%	5	2	7	16%
DC	38	0	19	4	23	61%	9	24%	5	1	6	16%
LDC	5	0	3	1	4	80%	0	0%	0	1	1	20%
Total	43	0	22	5	27	63%	9	21%	5	2	7	16%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.
6.2.1: No action taken.
6.2.5: Claim fully satisfied after complainant acceded to bilateral demands.

Table Comp 4 presents the substantive outcomes in cases where the complaint was ruled to be valid. The distribution of substantive outcomes fits the rather odd pattern seen in the pre-

46. *See Cuba: Restrictions on Textile Imports*, GATT Doc. GATT/CP.3/82 (Aug. 10, 1949) (GATT Working Party report) (Case #5); and *Canada: Import Quotas on Eggs*, BISD 23d Supp. 91 (1977) (GATT Working Party report) (Case #75) [hereinafter *Canada: Import Quotas on Eggs*].

vious analysis of procedural outcomes for particular complainants. The United States seems to fit the hypothesis that the strong do better. Except for Australia, the United States suffered the lowest percentage of negative outcomes in both periods (4% and 7% respectively). But the European Community finds itself at the opposite end of the scale, along with Canada and "Other." These three have nearly the same fairly high percentage of negative outcomes — 16-17% in the forty-two year period, and 17-30% during the 1980s alone. All three have a significantly higher negative outcome rate than the 9% rate for developing country complainants as a whole during the forty-two year period. The most likely hypothesis to explain the European Community's position at the opposite end of the scale is the one suggested above — that the Community did not invest wholeheartedly in its GATT legal complaints, while the United States did. More generally, the unsystematic distribution of negative outcomes suggests that a country's selection of complaints may have a more powerful influence than strength or weakness.

The distribution of results between full and partial satisfaction yields a pattern of results almost totally contrary to the strong country hypothesis. Indeed, Canada and "Other" achieved a higher percentage of full satisfaction results than both the United States and the European Community in both periods.

The unusually high rate of "partial satisfaction" results for the United States stands out. Given the intensity of U.S. behavior as complainant, the high rate of these partial satisfaction outcomes leads one to look for some alternative explanation. Case selection appears to be the most plausible explanation. Many of the partial satisfaction results in U.S. complaints involved complaints that attacked important and well-entrenched measures, ones that could probably not have been eliminated with one blow under even the most favorable circumstances.[47] The same Section 301 pressures that forced the United States to pursue GATT complaints with such intensity may also have been responsible for complaints that tried to accomplish too much.

- *Cases Settled or Otherwise Conceded, by Complainant.* The

47. For example, in each of the celebrated U.S.-EC legal battles of the early 1980s — *European Community: Wheat Flour* (Case #103), *supra* note 26; *European Community: Pasta Products* (Case #105), *supra* note 26; *European Community: Canned Fruit* (Case #107), *supra* note 26; and *European Community: Citrus Products* (Case #113), *supra* note 26 — the U.S. complaint included demands that would have destroyed major EC programs.

previous discussion has already covered the relative frequency with which individual complainants managed to achieve settlements or outright concessions, pointing out that the United States was considerably more successful than other complainants. The following table presents the data on the actual results obtained in settled or conceded cases.

TABLE Comp 5

SUBSTANTIVE OUTCOMES: COMPLAINTS SETTLED OR CONCEDED (By Complainant)

42 Years

Complainant	Total Settled or Conceded	Result Unknown	Full Satisfaction 6.2.3	6.2.4	Total	%	Part Satisfaction 6.2.2	%
U.S.	34	1	19	0	19	58%	14	42%
EC & Members	*12*	*0*	*8*	*0*	*8*	*67%*	*4*	*33%*
EC	1	0	1	0	1	100%	0	0%
EC Members	11	0	7	0	7	64%	4	36%
Canada	3	0	1	0	1	33%	2	67%
Australia	6	0	3	0	3	50%	3	50%
Other	11	0	8	1	9	82%	2	18%
Total	66	1	39	1	40	62%	25	38%
DC	58	1	33	1	34	60%	23	40%
LDC	8	0	6	0	6	75%	2	25%
Total	66	1	39	1	40	62%	25	38%

1980s

Complainant	Total Settled or Conceded	Result Unknown	Full Satisfaction 6.2.3	6.2.4	Total	%	Part Satisfaction 6.2.2	%
U.S.	17	0	13	0	13	76%	4	24%
EC & Members	*0*	*0*	*0*	*0*	*0*	*0%*	*0*	*0%*
EC	0	0	0	0	0	0%	0	0%
EC Members	0	0	0	0	0	0%	0	0%
Canada	2	0	1	0	1	50%	1	50%
Australia	3	0	1	0	1	33%	2	67%
Other	6	0	3	1	4	67%	2	33%
Total	28	0	18	1	19	68%	9	32%
DC	24	0	16	1	17	71%	7	29%
LDC	4	0	2	0	2	50%	2	50%
Total	28	0	18	1	19	68%	9	32%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.

The only complainants with sufficient experience to generate meaningful data in this category of cases are the United States and "Other." As between those two complainants, one would expect the more powerful United States to have the higher rate of full satisfaction. The data lean in the other direc-

tion, however. Once again, the United States seems to have asked for more than it could get.

• *Cases Withdrawn or Abandoned, by Complainant.* A breakdown of the actual results in withdrawn or abandoned cases is presented, by complainant, in the following table.

TABLE Comp 6

SUBSTANTIVE OUTCOMES: COMPLAINTS WITHDRAWN OR ABANDONED (By Complainant)

42 Years				Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total	Valid	Total w/d	Total	Total	Total	As % of all	Complaint probably valid	
Complainant	Compl.	Compl.	or aband'd	Number	Number	Number	complaints	Number	% of valid complaints
U.S.	73	57	9	1	4	4	5%	1	2%
EC & Members	*63*	*40*	*21*	*5*	*7*	*9*	*14%*	*3*	*8%*
EC	30	15	14	1	6	7	23%	2	13%
EC Members	33	25	7	4	1	2	6%	1	4%
Canada	18	10	7	0	3	4	22%	1	10%
Australia	13	9	3	0	2	1	8%	0	0%
Other	62	34	25	2	4	19	31%	4	12%
Total	229	150	65	8	20	37	16%	9	6%
DC	185	128	44	6	16	22	12%	6	5%
LDC	44	22	21	2	4	15	34%	3	14%
Total	229	150	65	8	20	37	16%	9	6%

1980s				Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total	Valid	Total w/d	Total	Total	Total	As % of all	Complaint probably valid	
Complainant	Compl.	Compl.	or aband'd	Number	Number	Number	complaints	Number	% of valid complaints
U.S.	39	32	6	0	3	3	8%	0	0%
EC & Members	*27*	*13*	*15*	*1*	*6*	*8*	*30%*	*3*	*23%*
EC	26	12	14	1	6	7	27%	2	17%
EC Members	1	1	1	0	0	1	100%	1	100%
Canada	16	9	6	0	3	3	19%	1	11%
Australia	6	5	1	0	0	1	17%	0	0%
Other	39	19	21	2	2	17	44%	3	16%
Total	127	78	49	3	14	32	25%	7	9%
DC	99	67	32	2	12	18	18%	5	7%
LDC	28	11	17	1	2	14	50%	2	18%
Total	127	78	49	3	14	32	25%	7	9%

Earlier in this section, we noted that in both the entire forty-two year period and in the 1980s, complaints by developing countries were withdrawn or abandoned at twice the rate of complaints by developed countries. Individually, United States complaints had an even lower rate of withdrawal than developed countries as a whole, while EC complaints, contrary to *a priori* expectations, were withdrawn about as often as developing country complaints. The table above permits us to examine the same issue more precisely by looking at rates of negative withdrawals alone — i.e., excluding withdrawals for neutral reasons.

The negative withdrawal percentages show that developing

country complainants are in an even more disadvantaged position. Developing country complainants suffered negative withdrawals in 34% of all complaints during the forty-two year period, and an astounding 50% of all complaints during the 1980s. Negative withdrawals in complaints by developed countries occurred only one-third as frequently, in 12% and 18% of all complaints, respectively. United States complaints retain the same exceptionally favored position, with negative withdrawals in only 5-8% of all U.S. complaints. EC complaints, by contrast, continue to suffer a relatively high level of negative withdrawals, 23-27%, although not as high as the rate for developing country complaints.

The most important datum in this table, of course, is the distribution of "negative outcomes" by complainant — negative withdrawals in cases based on valid legal claims. Taking such legal failures as a percentage of total *valid* complaints, one finds yet another repetition of the previous pattern — complaints by the United States rarely encounter failure while complaints by the EC fare no better than most others. The small number of cases in the sample, however, makes the differences less significant.

The United States is the complainant with the lowest percentage of legal failures, having suffered GATT legal failure in its withdrawn complaints, which amounts to only 2% of the total valid complaints filed by the United States. Moreover, the one failure involved an impasse in a 1950s complaint against French auto tax discrimination, a time long before Section 301 was implemented.[48] The European Community's two legal failures amount to 13% of its fifteen valid complaints. This puts the EC right in the middle of most other complainants. For Canada, "Other" and the developing countries, legal failure occurred in 10% to 14% of all valid complaints. The data for the 1980s are essentially the same.

It is not wise to make too much of differences that turn on the results in one or two cases. Still, even these few results demonstrate rather convincingly the importance of the political determination typical of U.S. participation in GATT litigation. Five of the nine legal failures in withdrawn or abandoned cases occurred in cases where the United States was the defendant, including both the failed EC complaints and two failed Japanese complaints. Three of these five U.S. cases involved arm-twisting retaliation by the United States, and the other two involved U.S.

48. *France: Auto Taxes* (Case #40), *supra* note 16.

strong-arm restrictions supporting a demand for a Voluntary Export Restraint (VER). GATT complaints were duly filed in all five cases, but in each case the illegal U.S. restriction had considerable political pressure behind it, and in the end none of the complainants really seemed to believe a GATT legal victory would change things. The complainants then backed away and cut the best deal they could to secure removal or amelioration of the U.S. restrictions.

The lesson, in short, is that power may have more to do with these results than is at first apparent. Powerful complainants probably *can* be bullied into giving up complaints, provided the bullying is done by an equally powerful and more determined defendant.

• *Combined Results for All Valid Claims, by Complainant.* The following tables present the combined results for all valid claims in all three types of procedural outcome.

TABLE Comp 7

SUBSTANTIVE OUTCOMES: COMBINED DATA (By Complainant)
(Includes only cases with known results)

42 Years

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total	Full Satisfaction		Part Satisfaction		Negative Outcome	
Complainant	Complaints	Number	%	Number	%	Number	%
U.S.	57	33	58%	22	39%	2	4%
EC & Members	*40*	*25*	*63%*	*10*	*25%*	*5*	*13%*
EC	15	9	60%	2	13%	4	27%
EC Members	25	16	64%	8	32%	1	4%
Canada	10	6	60%	2	20%	2	20%
Australia	9	4	44%	5	56%	0	0%
Other	34	24	71%	3	9%	7	21%
Total	150	92	61%	42	28%	16	11%
DC	128	77	60%	39	30%	12	9%
LDC	22	15	68%	3	14%	4	18%
Total	150	92	61%	42	28%	16	11%

1980s

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total	Full Satisfaction		Part Satisfaction		Negative Outcome	
Complainant	Complaints	Number	%	Number	%	Number	%
U.S.	32	20	63%	11	34%	1	3%
EC & Members	*13*	*7*	*54%*	*1*	*8%*	*5*	*38%*
EC	12	7	58%	1	8%	4	33%
EC Members	1	0	0%	0	0%	1	100%
Canada	9	6	67%	1	11%	2	22%
Australia	5	2	40%	3	60%	0	0%
Other	19	11	58%	2	11%	6	32%
Total	78	46	59%	18	23%	14	18%
DC	67	40	60%	16	24%	11	16%
LDC	11	6	55%	2	18%	3	27%
Total	78	46	59%	18	23%	14	18%

The combined data generally portray the same profile that we have seen in the more detailed breakdowns above. The United States complaints appear to enjoy more success than complaints by other parties, whereas EC complaints fare no better, and sometimes much worse, than complaints by the smaller and less powerful members of the GATT community.

Starting with the most successful complainants, we find that the nine valid complaints by Australia had no negative outcomes at all, and that the fifty-seven valid complaints by the United States had only two negative outcomes, a minuscule 3-4% rate of negative outcomes. The relative success of U.S. complaints is no surprise. Australia's record shows that even smaller players can win almost all the time if they choose carefully and do not ask

for too much.[49]

On the other side, one finds that complaints filed by the European Community had the highest percentage of negative outcomes in both periods. The percentage of negative outcomes are quite high — 27% of all EC complaints over the full forty-two year period, and 33% of all EC complaints during the 1980s alone. Slightly below the rate of negative outcomes for EC complaints were complaints filed by "Other" and by Canada; their rates of negative outcomes were significantly above the average for all complaints, ranging from 20% to 32% for both periods. The rate of negative outcomes for developing country complaints, 18% overall and 27% in the 1980s, fell into the same general category.

The explanations suggested in earlier parts of this analysis seem just as valid here. The intensity of the United States' dis-

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49. The nine Australian complaints were *United States: Hawaiian Regulations Affecting Imported Eggs*, GATT Doc. L/411 (Sept. 28, 1955) (complaint by Australia) (Case #36) [hereinafter *United States: Hawaiian Eggs*]; *France: Assistance to Exports of Wheat Flour*, BISD 7th Supp. 22 (1959) (GATT panel report) (Case #50) [hereinafter *France: Assistance to Exports of Wheat Flour*]; *Italy: Assistance to Exports of Flour*, GATT Doc. L/853 (Sept. 12, 1958) (complaint by Australia) (Case #51) [hereinafter *Italy: Assistance to Exports of Flour*]; *Japan: Restrictions on Imports of Beef and Veal*, GATT Doc. L/4117 (Nov. 26, 1974) (complaint by Australia) (Case #74); *European Community: Production Subsidies on Canned Fruit*, GATT Doc. C/M/148 (June 11, 1981) (complaint by Australia) (Case #101) [hereinafter *European Community: Subsidies on Canned Fruit*]; *European Community: Operation of Beef and Veal Regime*, GATT Doc. L/5715 (Oct. 26, 1984) (complaint by Australia) (Case #135); *Korea: Restrictions on Imports of Beef*, BISD, 36th Supp. 202 (1990) (GATT panel report) (Case #174) [hereinafter *Korea: Restrictions on Beef*]; *Japan: Restrictions on Imports of Beef*, GATT Doc. C/M/219 (Apr. 8, 1988) (GATT panel report) (Case #177) [hereinafter *Japan: Restrictions on Beef*]; and *United States: Import Restrictions on Sugar*, GATT Doc. L/6514 (June 9, 1989) (GATT panel report) (Case #187). Three of these cases were "me-too" complaints attached to successful U.S. complaints: *European Community: Subsidies on Canned Fruit* (Case #101), *supra*; *Korea: Restriction on Beef* (Case #174), *supra*; and *Japan: Restrictions on Beef* (Case #177), *supra*. Another case, *United States: Hawaiian Eggs* (Case #36), *supra*, was attached to a successful lawsuit in the U.S. courts. Most of the others involved settlements where Australia was satisfied with protecting its established export markets.

Many observers would argue that the GATT legal system failed Australia in its largest and most important complaint ever, a 1978 complaint charging that the EC's export subsidy on sugar violated GATT Article XVI:3. *See European Community: Refunds on Exports of Sugar I* (Case #86), *supra* note 19. The complaint was widely regarded as having merit. In the face of a vigorous — some might say GATT-threatening — defense by the EC, however, the panel concluded that it could not reach a conclusion. This failure is not recorded as a legal failure in this study, because the study accepts panel rulings as determinative, and so the case must be counted as one *not* involving a valid claim.

pute settlement efforts makes maximum use of its size and power, so with even moderately careful selection of legal claims, the result should be a very high level of success. The Community legal policy has never had this intensity. It began by not even wanting to win — just to counterpunch a little. Later, when the Community was playing to win, Community officials never felt the intense need to win, as did U.S. officials under the scrutiny of the U.S. Congress.

Although the rates of failure for other complainants are mixed and do not line up in order of relative power, the datum that stands out most vividly is that the smaller countries in the "Other" group suffered seven legal failures, the largest absolute number of legal defeats by any group of complainants. That seven out of sixteen failures occurred in complaints by the group of least powerful countries is a very telling datum by itself.

Once again, it is worth mentioning that the influence of power on legal outcomes is not a final assessment of GATT law. It is merely a statement about the GATT's present position on the trajectory of legal development.

E. AGRICULTURE

One of the most common assertions about GATT law is that trade in agricultural products is not really covered by GATT legal obligations. Although the GATT agreement does apply to agricultural trade, special rules for agriculture permit substantial deviations from basic GATT policy, and even these permissive rules have been flouted by most members from the outset. Because of these legal failings, most observers would expect to find agricultural trade problems at the heart of the GATT legal failures described so far. This section of the chapter examines that hypothesis. It asks whether the data reveal any difference in outcomes between complaints involving agricultural trade and complaints about other kinds of trade.

The 207 cases in the database were divided into two parts, "agricultural" and "non-agricultural." Cases were identified as "agricultural" if the main product or products involved in the case were products of farms. Cases involving processed agricultural products were considered agricultural only where the restriction in question was related to an underlying agricultural support program.[50]

50. For example, cases involving processed dairy products were invariably agricultural, because processed dairy products are the principal vehicle of international trade in dairy products, and thus are invariably protected by support

The following analysis examines several aspects of GATT litigation over agricultural trade issues. It begins by tracing the number of agriculture cases over time. It then identifies the extent to which individual countries have acted as complainants or defendants in complaints involving agriculture. Finally, it addresses the main issue: the relative levels of compliance in agriculture and non-agriculture cases involving a valid legal claim. To the authors' surprise, the data reveal that the outcomes in agriculture cases are in no way any less successful than those in non-agriculture cases.

1. THE VOLUME OF AGRICULTURE CASES, DECADE BY DECADE

The following table presents the decade-by-decade breakdown of cases involving agriculture.

TABLE Ag 1

BREAKDOWN OF COMPLAINTS BY PRODUCT (Total and by Decade)

	Total		1950s		1960s		1970s		1980s	
Agriculture	89	43%	12	23%	6	86%	17	53%	54	47%
Non-Ag & Gen.	118	57%	41	77%	1	14%	15	47%	61	53%
Total	207		53		7		32		115	

The percentage of agriculture cases has increased over time. In the 1950s, only 23% of all complaints involved agriculture. After 1959, the percentage more than doubled. For the period 1960-1989, exactly one half of the dispute settlement complaints in GATT involved agricultural trade measures.[51] The most likely reason for the lower percentage in the 1950s was that most GATT countries were employing quotas to deal with their post-war balance-of-payments condition, quotas that also provided effective protection to local farmers. As long as the balance-of-payments justification for quotas lasted, little could be gained from trying to apply GATT rules to agricultural trade measures. For most developed countries in GATT, the balance-of-payments justification ended between the late 1950s and the mid-1960s. After the removal of balance-of-payments legal cover, the absence of legal protection for these still very restrictive agricul-

programs. Cases involving cigarettes, on the other hand, usually turn out to be "non-agricultural" cases, because the barriers in question usually turn out to be instruments of ordinary protection for a domestic manufacturing industry, with little or no connection to tobacco support programs.

51. There were 77 agriculture cases in the period 1960-1989, out of 154 total cases.

tural trade regimes made it more worthwhile to sue when problems arose.

2. INDIVIDUAL COMPLAINANTS AND DEFENDANTS

The following tables present a breakdown of GATT complaints according to the agriculture/non-agriculture nature of the product involved. In the first table, complaints are sorted by complainant government — the leading individual complainants and "Other." The table covers both the entire forty-two year period and the 1980s.

TABLE Ag 2

COMPLAINTS BY INDIVIDUAL GOVERNMENTS (Total and by Product)

42 years

Country	Total Complaints	Agriculture		Non-Ag/General	
U.S.	73	36	49%	37	51%
EC & Members	*63*	*16*	*25%*	*47*	*75%*
EC	30	11	37%	19	63%
EC Members	33	5	15%	28	85%
Canada	18	7	39%	11	61%
Australia	13	13	100%	0	0%
SubTotal	167	72	43%	95	57%
Other	62	26	42%	36	58%
TOTAL	229	98	43%	131	57%

Note: Sample consists of 229 complaints, rather than 207, because each complainant in cases with multiple complainants is counted separately. Cases with multiple complainants: See Appendix numbers 5, 14, 15, 21, 22, 25, 34, 49, 59, 110, 152, 153.

1980s

Country	Total Complaints	Agriculture		Non-Ag/General	
U.S.	39	23	59%	16	41%
EC & Members	*27*	*10*	*37%*	*17*	*63%*
EC	26	10	38%	16	62%
EC Members	1	0	0%	1	100%
Canada	16	6	38%	10	63%
Australia	6	6	100%	0	0%
SubTotal	88	45	51%	43	49%
Other	39	17	44%	22	56%
TOTAL	127	62	49%	65	51%

The data on complainants show, not surprisingly, that 100% of Australia's dispute settlement complaints have been about agriculture. For the other major groups of complainants, the data for the full forty-two year period does not show a concentration of agricultural complaints by a particular country. The United

States is the leading agriculture complainant among the others, with 49% of its complaints directed to agricultural trade barriers. "Other," Canada and the EC follow with 42%, 39% and 37% respectively. For the 1980s alone, the United States did stand a bit further apart, with 59% of its complaints directed to agricultural trade problems, as opposed to 44% for "Other," and 38% for both Canada and the EC.

Next, we turn to the same breakdown of agriculture/non-agriculture complaints by defendant.

TABLE Ag 3

COMPLAINTS AGAINST INDIVIDUAL GOVERNMENTS (Total and by Product)

42 years

Country	Total Complaints	Agriculture		Non-Ag/General	
EC & Members	*98*	*51*	*52%*	*47*	*48%*
EC	57	39	68%	18	32%
EC Members	41	12	29%	29	71%
U.S.	52	20	38%	32	62%
Canada	15	7	47%	8	53%
Japan	20	7	35%	13	65%
SubTotal	185	85	46%	100	54%
Other	38	18	47%	20	53%
TOTAL	223	103	46%	120	54%

Note 1: Sample consists of 223 complaints, rather than 207, because each defendant in cases with multiple defendants is counted as the object of a separate complaint. Complaints with multiple defendants: See Appendix numbers 54 and 112.
Note 2: All complaints against individual EC countries after their accession to the Community are considered as complaints against the EC. See Appendix numbers 56, 57, 60, 67, 70, 71,72.

1980s

Country	Total Complaints	Agriculture		Non-Ag/General	
EC & Members	*36*	*22*	*61%*	*14*	*39%*
EC	34	21	62%	13	38%
EC Members	2	1	50%	1	50%
U.S.	38	13	34%	25	66%
Japan	14	4	29%	10	71%
Canada	11	4	36%	7	64%
SubTotal	99	43	43%	56	57%
Other	18	11	61%	7	39%
TOTAL	117	54	46%	63	54%

Over the forty-two year period, the EC has been the most frequently sued about its agricultural policies, with 68% of the complaints against it involving that sector.[52] For Canada and

52. While it sometimes seems that complaints against the Community's ag-

"Other," 47% of the complaints against them involve their agricultural trade policies, while the percentages for the United States and Japan are 38% and 35% respectively. The reason for the EC's prominence was undoubtedly its Common Agricultural Policy (CAP) which began in the 1960s. The CAP was highly protectionist and because it was new, it caused many exporters to lose existing markets.

In the 1980s, agricultural interests in complaining countries began to broaden their aim. While agriculture still accounted for 62% of the complaints against the EC, 61% of the complaints against the "Other" countries in the 1980s also involved agricultural trade measures. The increase in agricultural complaints against "Other" in the 1980s was largely due to U.S. complaints against Japan, Korea and the Scandinavian countries.

Viewed as a whole, the data on complainants and defendants confirm the widely held perception that the United States has been the chief complainant about agriculture and that the EC Common Agricultural Policy has been its main target. The data indicate, however, that the agriculture problem has really been much broader than the U.S.-EC litigation. Many GATT countries have been sued over their agricultural trade policies, and many countries did the suing.

3. PROCEDURAL OUTCOMES IN AGRICULTURE CASES

The table below presents the procedural outcomes for agriculture and non-agriculture cases, for both the entire forty-two year period and for the 1980s.

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ricultural policy dominate GATT dispute settlement business, the actual shares are 38% of all agriculture complaints, and 18% of all complaints.

TABLE Ag 4

PROCEDURAL OUTCOMES (By Product)

42 Years

	Total Complaints	Rulings		Settled-Conceded by Def.		Withdrawn or Abandoned	
		Number	% of total	Number	% of total	Number	% of total
Agriculture	89	37	42%	30	34%	22	25%
Non-Ag/Gen	118	51	43%	34	29%	33	28%
Total	207	88	43%	64	31%	55	27%

1980s

	Total Complaints	Rulings		Settled-Conceded by Def.		Withdrawn or Abandoned	
		Number	% of total	Number	% of total	Number	% of total
Agriculture	54	22	41%	17	31%	15	28%
Non-Ag/Gen	61	25	41%	11	18%	25	41%
Total	115	47	41%	28	24%	40	35%

For the entire forty-two year period, there is virtually no difference in the procedural outcomes of agriculture complaints as opposed to non-agriculture complaints. Both types of complaints produce almost identical percentages of rulings, settlements or concessions, and withdrawn complaints. For the 1980s, there is a fairly significant difference in the last two categories: non-agriculture complaints were withdrawn or abandoned in 13% more cases, whereas 13% more agriculture complaints resulted in settlements. Thus, it appears to have been marginally easier to achieve positive results in agriculture complaints during the 1980s.

4. SUBSTANTIVE OUTCOMES IN AGRICULTURE CASES

• *Introduction.* One of the most surprising results of this study is that complaints against restrictions on agricultural trade do not, on the whole, produce worse results than complaints against other types of trade restrictions. Most GATT observers would find this result misleading, and would argue that, for whatever reason, the dispute settlement data gathered here simply do not capture the true condition of GATT law on agricultural restrictions. The authors would agree.

The main problem is that most of the key restrictions that distort agricultural trade are either outside the rules altogether, or are not effectively regulated by them. The two main sources on GATT-inconsistent practice are exempted from the rules altogether. The United States has a 1955 waiver for all agriculture restrictions mandated by section 22 of the Agricultural Adjust-

ment Act,[53] and the European Community has found a gap in GATT law which allows it to use the "variable levy" as a highly effective means of quantitative protection. Neither of these two trade-control programs can be attacked directly, and because of that, attacks on other agricultural trade-control programs in countries were also rare until the late 1980s. Most of the actual GATT *litigation* on agriculture, therefore, has involved peripheral restrictions at the edge of the core control programs, measures which *can* be negotiated or litigated. This is certainly true for much of the United States litigation against the EC, where the core variable levy programs of the Common Agricultural Policy have been left all but untouched. Toward the end of the 1980s, the United States had some success attacking agricultural support programs in Japan, Korea and the Scandinavian countries, but these attacks were also addressed mainly to peripheral products, and some were handled by partial settlements that did not alter the underlying program. GATT has scored enough successes — or failure-avoiding settlements — in the peripheral cases to achieve a respectable level of positive outcomes.

A second factor which has helped to protect agricultural trade policy from GATT legal challenge is that GATT law concerning agricultural trade restrictions tends to be vague and ineffective. The main problem here is the set of rules that attempt to regulate export subsidies, the GATT rule of Article XVI:3 and the parallel rules of the GATT Subsidies Code. Both have proved too vague to enforce — too vague, at least, when a superpower defendant like the EC mounts a kill-all-the-prisoners defense.[54] Prior to 1987, GATT panels also had difficulty reaching a sufficiently rigorous interpretation of the Article XI:2(c) exception for agricultural quota restrictions.[55]

As we shall see, the consequence of the vagaries in these key rules has not been an abnormally large number of no-violation rulings; agriculture complaints actually have a higher per-

53. 49 Stat. 773, *amended by* 7 U.S.C. 624 (1988).

54. The three key cases on this issue were the Australian and Brazilian complaints about the EC sugar subsidy, and the U.S. complaint against the EC wheat flour subsidy. *European Community: Refunds on Exports of Sugar I* (Case #86), *supra* note 19; *European Community: Refunds on Exports of Sugar II* (Case #87), *supra* note 19; *European Community: Wheat Flour* (Case #103), *supra* note 26.

55. Examples could be found in the Canadian Egg Quota case, *Canada: Import Quotas on Eggs* (Case #75), *supra* note 46, and in parts of the MIPs case, *European Community: Programme of Minimum Import Prices (MIPS) Licenses Etc. for Certain Processed Fruits and Vegetables*, BISD 25th Supp. 68 (1979) (panel report) (Case #76).

centage of violation rulings than non-agriculture complaints. Rather, the effect has been that a few key no-violation rulings under these rules have discouraged further legal challenges to the type of agriculture restriction in question.

In sum, the GATT's relative success in dispute settlement cases involving agriculture does not mean all is well with GATT's legal regulation of agricultural trade, but quite the contrary. It actually means that the main problems in agriculture are not yet within the reach of the legal system at all.

• *Cases with Rulings.* The following tables present the substantive outcomes in agriculture and non-agriculture cases where the panel made a ruling. The first deals with the distribution of violation and no-violation rulings in agriculture and non-agriculture cases.

TABLE Ag 5

SUBSTANTIVE OUTCOMES: RULINGS -- VIOLATION v. NO-VIOLATION (By Product)

42 Years

	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
Agriculture	89	37	42%	6	31	84%	35%
Non-Ag/Gen	118	51	43%	14	37	73%	31%
Total	207	88	43%	20	68	77%	33%

1980s

	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
Agriculture	54	22	41%	2	20	91%	37%
Non-Ag/Gen	61	25	41%	5	20	80%	33%
Total	115	47	41%	7	40	85%	35%

Table Ag 5 shows that in cases that go all the way to a ruling, agriculture cases yield a higher percentage of guilty verdicts than non-agriculture cases — 84% to 73% over the full forty-two year period, and 91% to 80% in the 1980s alone. This is somewhat contrary to the result that one might expect to see, given the fact mentioned above that the key GATT rules applicable to agricultural trade are generally less precise and harder to apply than the more common GATT rules applicable to most non-agricultural restrictions. To achieve such a high violation rate, the agriculture complainants have obviously learned to select cases carefully in order to avoid the various "black holes" in GATT agriculture law.

Table Ag 6 presents a breakdown of the substantive outcomes in those cases in which a ruling of violation was made.

TABLE Ag 6

SUBSTANTIVE OUTCOMES: RULINGS – RESULTS OF VIOLATION RULINGS (By Product)

42 Years

	Total	Result	Full Satisfaction				Part Satis.		Negative Outcome			
	Violation	Unknown	6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
Agriculture	31	0	12	7	19	61%	9	29%	2	1	3	10%
Non-Ag/Gen	37	1	25	1	25	69%	6	17%	3	1	4	11%
Total	68	1	37	8	45	67%	15	22%	5	2	7	10%

1980s

	Total	Result	Full Satisfaction				Part Satis.		Negative Outcome			
	Violation	Unknown	6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
Agriculture	20	0	6	5	11	55%	6	30%	2	1	3	15%
Non-Ag/Gen	20	0	13	0	13	65%	3	15%	3	1	4	20%
Total	40	0	19	5	24	60%	9	23%	5	2	7	18%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.
6.2.1: No action taken.
6.2.5: Claim fully satisfied after complainant acceded to bilateral demands.

We find only modest differences between the outcomes in agriculture and non-agriculture cases, and the differences tend to cancel each other out. The comparison of negative outcome ratios makes the non-agriculture complaints appear slightly less successful. Comparing the ratios of full satisfaction results leans in the other direction. Closer examination reveals that rates of full satisfaction for agriculture cases are not as positive as they first appear. Over one-third of full satisfaction outcomes in agriculture cases were achieved simply because, for internal reasons, the defendant withdrew the measure which was in violation or the measure expired. This commonly happens in agriculture cases because many restrictions are put in place for just one growing season.

- *Cases Settled or Conceded.* We noted earlier that the overall percentage of cases was about the same for both product sectors, except that agriculture cases had a higher percentage of settlement in the 1980s. The following tables report the actual results in cases that were settled or conceded.

TABLE Ag 7

SUBSTANTIVE OUTCOMES: COMPLAINTS SETTLED OR CONCEDED (By Product)

42 Years

	Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
			6.2.3	6.2.4	Total	%	6.2.2	%
Agriculture	30	0	18	1	19	63%	11	37%
Non-Ag/Gen	34	1	19	0	19	58%	14	42%
Total	64	1	37	1	38	60%	25	40%

1980s

	Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
			6.2.3	6.2.4	Total	%	6.2.2	%
Agriculture	17	0	11	1	12	71%	5	29%
Non-Ag/Gen	11	0	7	0	7	64%	4	36%
Total	28	0	18	1	19	68%	9	32%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.

The differences between actual outcomes in the two types of cases is also negligible. Settled cases produce almost exactly the same percentage of full satisfaction outcomes for agriculture and non-agriculture cases.

• *Cases Withdrawn or Abandoned.* The following table reports the distribution of outcomes for agriculture and non-agriculture cases in those complaints that were withdrawn or abandoned.

TABLE Ag 8

SUBSTANTIVE OUTCOMES: COMPLAINTS WITHDRAWN OR ABANDONED (By Product)

42 Years

				Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total Compl.	Valid Compl.	Total w/d or aband'd	Total Number	Total Number	Total Number	As % of all complaints	Complaint probably valid Number	% of valid complaints
Agriculture	89	62	22	2	12	8	9%	1	2%
Non-Ag/Gen	118	77	33	6	8	19	16%	8	10%
Total	207	139	55	8	20	27	13%	9	6%

1980s

				Result Unknown	Neutral: W/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total Compl.	Valid Compl.	Total w/d or aband'd	Total Number	Total Number	Total Number	As % of all complaints	Complaint probably valid Number	% of valid complaints
Agriculture	54	38	15	0	8	7	13%	1	3%
Non-Ag/Gen	61	37	25	3	6	16	26%	6	16%
Total	115	75	40	3	14	23	20%	7	9%

It is interesting to note that of all withdrawn or abandoned cases where the result is known, 60% of the agriculture cases are

withdrawn or abandoned for neutral reasons, as compared to only 30% of the non-agriculture cases.[56] The reason for the higher incidence of "neutral" withdrawals in agriculture cases is probably the higher incidence of complaints against short-term restrictions imposed for just one harvest season when local production is in excess. GATT complaints against such restrictions are usually withdrawn once the seasonal restriction has expired. The "neutral" classification of these cases can be questioned because the GATT's inability to act quickly on these short-term restrictions is a legal failing of sorts. Thus it is probably misleading to place too much emphasis on relative rates of negative withdrawals.

There would seem to be nothing misleading about the distribution of the nine legal failures that are found in the negative withdrawal category. All but one are non-agricultural cases. However, given that GATT legal discipline over agricultural restrictions is not in fact better than discipline over non-agricultural restrictions, we must again look for explanations as to why this particular element of dispute settlement data contains so many fewer legal failures for agriculture cases.

One relevant factor is that four of the nine legal failures in this category are cases in which the defendant government has imposed arm-twisting trade restrictions to force the complainant to accept a VER.[57] Most governments already have a rather tight network of agricultural trade restrictions in place, and so they do not need to twist arms to obtain VERs or any other kind of added protection for agricultural products.

The other noteworthy fact about these legal failures is that four of the remaining five cases are also arm-twisting restrictions, three demanding market access and one demanding a change in environmental policy.[58] Only one of these four is an agricultural case. While this data might suggest that countries do not use muscular diplomacy as often on agricultural trade matters, that is not so. Several other U.S.-EC disputes over agri-

56. Of the 20 agriculture cases in which the result is known, 12, or 60%, were withdrawn or abandoned for neutral reasons. For non-agriculture cases, 27 had a known result of which eight, or 30%, were withdrawn or abandoned for neutral reasons.

57. *European Community: TVs from Korea* (Cases #83), *supra* note 16; *Poitiers Customs House* (Case #119), *supra* note 16; *United States: Steel Pipe from EC* (Case #138), *supra* note 16; *United States: Cotton Pillowcases* (Case #144), *supra* note 16.

58. *European Community: Seal Skins* (Case #145), *supra* note 16; *Semiconductor Retaliation* (Case #161), *supra* note 16; *Pharmaceutical Retaliation* (Case #189), *supra* note 16; *Hormones Retaliation* (Case #193), *supra* note 16.

culture have produced retaliatory actions. The real difference seems to be that victims of such retaliation do not file complaints against them, possibly because their own actions are equally tainted.[59]

• *Combined Results.* The following tables give the combined results for all agriculture and non-agriculture cases, first over the entire forty-two year period, and then for the 1980s.

TABLE Ag 9

SUBSTANTIVE OUTCOMES: COMBINED DATA (By Product)
(Includes only cases with known results)

42 Years

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total Complaints	Full Satisfaction		Part Satisfaction		Negative Outcome	
		Number	%	Number	%	Number	%
Agriculture	62	38	61%	20	32%	4	6%
Non-Ag/Gen	77	45	58%	20	26%	12	16%
Total	139	83	60%	40	29%	16	12%

1980s

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total Complaints	Full Satisfaction		Part Satisfaction		Negative Outcome	
		Number	%	Number	%	Number	%
Agriculture	38	23	61%	11	29%	4	11%
Non-Ag/Gen	37	20	54%	7	19%	10	27%
Total	75	43	57%	18	24%	14	19%

If one were looking at the data alone, the combined results make complaints against agricultural trade measures appear to succeed much more often than complaints against non-agricultural trade measures. Non-agriculture cases produced approximately three times the number of legal failures over the forty-two year period. The differences in the numbers, however, are in the end not very meaningful. As stated before, dispute settlement data do not give us an accurate picture of the GATT's performance with regard to agricultural trade restrictions. The true significance of the data is in its demonstration that GATT law has not yet been able to engage agricultural trade policy in a significant way.

59. The United States retaliated once following deadlocks in the *Citrus Products* and *Pasta Products* cases, *European Community: Citrus Products* (Case #113), *supra* note 26; *European Community: Pasta Products* (Case #105), *supra* note 26. It also retaliated in a dispute over the agricultural provisions of Spain and Portugal's accession agreements to the EC. Rather than file a complaint, the EC counter-retaliated in each case.

F. TRADE MEASURES

Each of the 207 cases in the database has been classified according to the type of trade measure that the complaint targeted. For this study, the data was broken down into five classifications: tariff, non-tariff barrier (NTB), subsidy, anti-dumping/countervailing duty (AD/CVD) and "cannot classify." The dividing line between one category of measures and another is usually clear. The only one that may require explanation concerns the treatment of money charges under the Tariff/NTB distinction. "Tariffs" include all charges levied at the border, including, for example, things like service fees. Trade barriers involving internal money charges, such as discriminatory internal taxes, are classified as NTBs.

Two of the 207 cases involve complaints that are so diffuse that they are impossible to classify. The data in this chapter concern the other 205 cases. A fair number of these 205 cases involve more than one type of measure, but in all instances it has been possible to identify a single measure at the core.

The following analysis is divided into three parts. First, we examine the relative frequency with which each type of measure has been the subject of GATT litigation, and how that distribution has changed from decade to decade. Second, we examine the experience of individual countries in this regard, looking at which particular measures they have complained about when they sued, and about which measures they have been sued. Finally, we examine whether the procedural or substantive outcomes of GATT litigation differ from one type of measure to another, and if so, why.

1. MEASURE-BY-MEASURE BREAKDOWN OF GATT LITIGATION

The following table presents a breakdown of the measures involved in each of the 207 cases, including the two that cannot be classified. The data are presented both for the full forty-two year period and for each of the four decades.

TABLE Meas 1

BREAKDOWN OF COMPLAINTS BY MEASURE (Total and by Decade)

Measure	Total	% of All	1950s	As % of all 1950	1960s	As % of all 1960	1970s	As % of all 1970	1980s	As % of all 1980
AD/CVD	20	10%	1	2%	1	14%	2	6%	16	14%
All NTBs	108	52%	23	43%	2	29%	18	56%	65	57%
NTBs	*82*	*40%*	*16*	*30%*	*2*	*29%*	*11*	*34%*	*53*	*46%*
D.NTBs	*26*	*13%*	*7*	*13%*	*0*	*0%*	*7*	*22%*	*12*	*10%*
All Tariffs	44	21%	20	38%	3	43%	5	16%	16	14%
Tariffs	*27*	*13%*	*15*	*28%*	*1*	*14%*	*3*	*9%*	*8*	*7%*
D.Tariffs	*17*	*8%*	*5*	*9%*	*2*	*29%*	*2*	*6%*	*8*	*7%*
Subsidies	33	16%	9	17%	0	0%	7	22%	17	15%
N/C	2	1%	0	0%	1	14%	0	0%	1	1%
Total	207		53		7		32		115	

Note: The letter D preceding NTBs and Tariffs indicates discriminatory measures.

Non-tariff barriers (NTBs) are most frequently the subject of complaints. For the entire forty-two year period, NTBs were the subject of 52% of all complaints. The next closest is Tariffs, with 21%, followed by Subsidies with 16% and AD/CVD measures with 10%. Perhaps the most interesting aspect of this distribution is the combined total of Subsidies and AD/CVD measures, at 26%. It is striking that over one-quarter of GATT litigation should concern "unfair" trade practices or the measures taken to offset them.

A number of interesting trends appear when the data is broken down decade-by-decade. Almost every writer observes that tariffs have declined in importance over the four decades of GATT history, as they were negotiated downward. The standard observation continues that as tariffs went down NTBs became more important, just as rocks appear when the tide goes down. Sure enough, the data reveals a steady downward trend of litigation about tariffs, and a corresponding increase in litigation about NTBs. Tariffs and NTBs occupied close to the same shares of GATT legal complaints during the 1950s, with tariffs at 38% and NTBs at 43%. The proportions had changed sharply by the 1970s and 1980s, when complaints about tariffs accounted for only 16% and 14% of GATT's caseload respectively, whereas complaints about NTBs had risen to 56% and 57%.

The second noticeable trend is that the share of complaints concerned with AD/CVDs has risen sharply. For the first three decades of GATT litigation there were only four AD/CVD complaints, 4% of the total number of complaints over the period. In the 1980s, there were sixteen AD/CVD complaints, or 14% of the total caseload in that period. The growing importance of AD/CVD measures is also a logical corollary of lower tariffs, for

as tariff protection disappears, and laws dealing with "unfair" trade tend to flourish.

Somewhat surprisingly, unlike AD/CVDs, the percentage of litigation aimed at subsidies has not grown over the decades. We find that 17% of the complaints filed in the 1950s dealt with subsidies, slightly more than the 14% share in the 1980s. Part of the explanation for this is that subsidies have been a more traditional tool of trade protection than AD/CVDs or NTBs. This is due largely to the agricultural sector, where subsidies have comprised a long-standing part of agricultural price support programs. The experience of the 1950s reflects this fact. Five of the nine subsidies complaints in the 1950s involved agricultural price support programs,[60] even though on the whole, less than 25% of complaints in the 1950s involved agriculture.

2. MEASURE-BY-MEASURE BREAKDOWN OF COMPLAINTS, BY DEFENDANT

The following tables present a breakdown of complaints by defendant, according to the trade measures complained about. The table reports both the entire forty-two year period and the 1980s for the leading individual defendants and "Other."

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60. The five agricultural cases were *Australia: Subsidy on Ammonium Sulfate*, 2 BISD 188 (1952) (GATT Working Party report) (Case #8); *United States: Export Subsidy on Poultry*, GATT Doc. L/586 (Nov. 12, 1956) (complaint by Denmark) (Case #43); *United Kingdom: Export of Subsidized Eggs*, GATT Doc. L/627 (Apr. 24, 1957) (complaint by Denmark) (Case #45); *France: Assistance to Exports of Wheat Flour* (Case #50), *supra* note 49; and *Italy: Assistance to Exports of Flour* (Case #51), *supra* note 49.

TABLE Meas 2

COMPLAINTS AGAINST INDIVIDUAL GOVERNMENTS (Total and by Measure)

42 years

Country	Complaints	AD/CVD		All NTBs		All Tariffs		Subsidy	
EC & Members	*92*	*2*	*2%*	*43*	*47%*	*20*	*22%*	*27*	*29%*
EC	52	2	4%	24	46%	6	12%	20	38%
EC Members	40	0	0%	19	48%	14	35%	7	18%
U.S.	51	10	20%	23	45%	14	27%	4	8%
Canada	14	5	36%	8	57%	1	7%	0	0%
Japan	18	0	0%	17	94%	1	6%	0	0%
SubTotal	175	17	10%	91	52%	36	21%	31	18%
Other	32	3	9%	19	59%	8	25%	2	6%
TOTAL	207	20	10%	110	53%	44	21%	33	16%

Note 1: Sample contains 207 complaints -- the 223 complaints when individual defendants are counted separately, less cases 54 (15 defendants) and 124 (one defendant) because the trade measures involved in those disputes cannot be classified. See Appendix.

Note 2: All complaints against individual EC countries after their accession to the Community are considered as complaints against the EC. See Appendix numbers 56, 57, 60, 67, 70, 71, 72.

1980s

Country	Complaints	AD/CVD		All NTBs		All Tariffs		Subsidy	
EC & Members	*36*	*2*	*6%*	*16*	*44%*	*4*	*11%*	*14*	*39%*
EC	34	2	6%	15	44%	3	9%	14	41%
EC Members	2	0	0%	1	50%	1	50%	0	0%
U.S.	38	8	21%	19	50%	9	24%	2	5%
Japan	13	0	0%	12	92%	1	8%	0	0%
Canada	11	4	36%	7	64%	0	0%	0	0%
SubTotal	98	14	14%	54	55%	14	14%	16	16%
Other	18	2	11%	13	72%	2	11%	1	6%
TOTAL	116	16	14%	67	58%	16	14%	17	15%

Note: Case 124 is excluded from analysis because the trade measures involved in that dispute cannot be classified. See Appendix number 124.

As might be expected, the data for each of the four major defendants presents a profile of that country's commercial policy tendencies — the things it does that cause problems for other governments. These profiles are much the same for the full forty-two year period and for the 1980s alone.

The European Community profile shows an exceptional number of complaints about EC subsidies. Complaints about subsidies account for 38% of all GATT litigation against the Community during the full forty-two year period, as opposed to only 8% for all other GATT defendants. In the 1980s, 41% of all complaints against the EC related to subsidies as opposed to only 4% of complaints against other countries. The EC's agricultural programs were the main cause of these complaints, with agricultural subsidies accounting for fourteen of the twenty subsidy

complaints against the EC.[61]

The United States' preoccupation with "unfair" trade practices shows up very sharply in the unusually high percentage of complaints against the AD/CVD measures. Over the forty-two year period, 20% of the GATT lawsuits filed against the United States involved complaints about AD/CVD actions, as opposed to only 6% for all other GATT defendants. The gap began to close in the 1980s. While the United States suffered the same high percentage of GATT complaints against its AD/CVD actions (21%), complainants also began to target the AD/CVD practices of Canada, the EC and "Other," causing the overall percentage of AD/CVD complaints against all other governments to increase to 10%.

Although fewer in absolute numbers, the five complaints against Canada's AD/CVD measures over the forty-two year period amounted to 36% of the complaints against it, an even higher percentage than that for the United States. Canada was the earliest user of AD/CVD remedies, and has made them an important part of its overall customs administration.

Another distinctive element of U.S. trade policy appears in the higher percentage of complaints concerning tariffs, particularly in the 1980s. The difference is mainly due to the somewhat distinctive U.S. preference for using tariff increases in two types of emergency situations — safeguards and arm-twisting retaliation. Of the fourteen complaints that were brought against U.S. tariff measures over the entire forty-two years, three complaints involved U.S. safeguard measures[62] and six involved actual or threatened retaliatory tariffs.[63]

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61. The six non-agricultural subsidies are the three DISC cases, *France: Income Tax Practices* (Case #70), *supra* note 4; *Belgium: Income Tax Practices* (Case #71), *supra* note 4; and *Netherlands: Income Tax Practices* (Case #72), *supra* note 4, the two Airbus cases, *European Community: Government Financing of Airbus Industries I* (Aircraft Code, all documents restricted) (Case #158); and *European Community: Government Financing of Airbus Industries II*, GATT Doc. SCM/92 (Apr. 3, 1989) (U.S. complaint) (Case #196) [hereinafter *European Community: Airbus II*], and a short-lived complaint against Greek export subsidies, *European Community: Export Subsidies Maintained by Greece* (Subsidies Code, all documents restricted) (Case #99).

62. *United States: Withdrawal of a Tariff Concession Under Article XIX* (Case #13), *supra* note 19; *United States: Article XIX Action on Dried Figs*, GATT Doc. L/40 (Oct. 4, 1952) (complaint by Greece and Turkey) (Case #21); and *United States: Article XIX Action on Spring Clothespins*, GATT Doc. L/758 (Nov. 28, 1957) (complaint by Denmark and Sweden) (Case #49).

63. *United States: Action Under Article XXVIII*, GATT Doc. L/2088 (Nov. 21, 1963) (parties acceptance of GATT panel report) *reprinted in* 3 I.L.M. 116 (1964) (Case #59); *United States: Suspension of Most Favored Nation Treat-*

Japan's profile is perhaps the most interesting of all. The conventional image of Japan's trade policy is one in which trade protection tends to be accomplished through informal, behind-the-scenes arrangements that rely more on cooperation than on formal law. Japan has the lowest tariffs among the major GATT members, it is said, because Japan does not need to rely on anything so crude as a tariff to protect its industries. Nor, of course, would Japan ever rely on anything as adversarial as AD/CVD laws. The GATT lawsuits filed against Japan are quite consistent with this image. No complaints about AD/CVD, no complaints about subsidies, and only one complaint about tariffs (where incidentally, Japan's actions were ruled GATT-legal).[64] The remaining seventeen of the eighteen complaints against Japan were complaints about NTBs. Many of the seventeen NTBs in question were simple quotas, but an equal number were more sophisticated measures involving state monopolies, safety tests, and the like.

3. MEASURE-BY-MEASURE BREAKDOWN OF COMPLAINTS, BY COMPLAINANT

The following tables present a breakdown of complaints, by complainant, according to the trade measures involved. Again, the breakdown is for the leading individual complainants and "Other."

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ment, GATT Doc. C/W/401 (Nov. 1, 1982) (complaint by Poland) (Case #118) [hereinafter *United States: Suspension of Most Favored Nation Treatment*]; *Semiconductor Retaliation* (Case #161), *supra* note 16; *United States: Tariff Increase and Import Prohibition on Brazilian Products*, GATT Doc. L/6274 (Nov. 27, 1987) (complaint by Brazil) (Case #170) [hereinafter *Informatics Retaliation*]; *Pharmaceutical Retaliation* (Case #189), *supra* note 16; and *Hormones Retaliation* (Case #193), *supra* note 16.

64. *Japan: Imports of Spruce-Pine-Fir (SPF) Dimension Lumber*, BISD, 36th Supp. 167 (1990) (GATT panel report).

TABLE Meas 3

COMPLAINTS BY INDIVIDUAL GOVERNMENTS (Total and by Measure)

42 years

Country	Complaints	AD/CVD		All NTBs		All Tariffs		Subsidy	
U.S.	73	2	3%	47	64%	11	15%	13	18%
EC & Members	*62*	*6*	*10%*	*29*	*47%*	*20*	*32%*	*7*	*11%*
EC	29	5	17%	14	48%	8	28%	2	7%
EC Members	33	1	3%	15	45%	12	36%	5	15%
Canada	18	3	17%	9	50%	4	22%	2	11%
Australia	13	0	0%	7	54%	0	0%	6	46%
SubTotal	166	11	7%	92	55%	35	21%	28	17%
Other	61	9	15%	23	38%	15	25%	14	23%
TOTAL	227	20	9%	115	51%	50	22%	42	19%

Note: Sample consists of 227 complaints – the 229 complaints when counting individual complainants, less two cases, 124 and 54, which are excluded from this analysis because the trade measures involved in those disputes cannot be classified.

1980s

Country	Complainant	AD/CVD		All NTBs		All Tariffs		Subsidy	
U.S.	39	1	3%	27	69%	1	3%	10	26%
EC & Members	*26*	*4*	*15%*	*15*	*58%*	*6*	*23%*	*1*	*4%*
EC	25	4	16%	14	56%	6	24%	1	4%
EC Members	1	0	0%	1	100%	0	0%	0	0%
Canada	16	3	19%	8	50%	3	19%	2	13%
Australia	6	0	0%	3	50%	0	0%	3	50%
SubTotal	87	8	9%	53	61%	10	11%	16	18%
Other	39	8	21%	14	36%	7	18%	10	26%
TOTAL	126	16	13%	67	53%	17	13%	26	21%

Note: Case 124 is excluded from analysis because the trade measures involved in that dispute cannot be classified. See Appendix number 124.

For both periods, the trade measures that individual countries complain about to other governments are typically the exact opposites of the trade measures that other governments complain about to them. For example, the United States receives many complaints about its AD/CVD law, but it almost never complains about the AD/CVD laws of others. Conversely, there are almost no complaints about United States subsidies, but the United States is the leading complainant about subsidies in other countries.[65] The obvious explanation is that governments tend to use their own policies as models of right and

65. The table shows that "Other" actually has a higher ratio of subsidy complaints, 23% as compared to 18% for the United States. However, 10 of the 14 subsidy complaints in the "Other" column were from one complaint by 10 smaller countries against the EC's export subsidy on sugar.

wrong. Governments do, it seems, follow the old maxim about not throwing stones at houses like the ones they live in.

The same observation can be made about the trade measures complained about by the European Community. The Community receives an abnormally large number of complaints about its subsidies, but makes almost no complaints about subsidies granted by other governments. Having received few complaints against its own use of AD/CVD measures, the Community has made more complaints than any other GATT member about the AD/CVD measures employed by others.

Oddly enough, the pattern even applies with regard to complaints about tariffs. More complaints are leveled at the United States over tariff measures than at any other single country, yet the United States makes relatively few tariff complaints. The Community and Canada are among the countries with the fewest tariff complaints against themselves, and they are among the most frequent complainers about tariffs in other countries.

Canada provides one exception to this pattern. Canada receives a higher percentage of complaints about its AD/CVD measures than any other major participant, and yet Canada is also tied for the lead in the ratio of AD/CVD complaints against others. Perhaps one of the reasons Canada has such a high rate of negative outcomes, both as complainant and as defendant, is that Canada does *not* follow the old maxim about throwing stones.

4. MEASURE-BY MEASURE BREAKDOWN OF PROCEDURAL OUTCOMES

The following table presents a breakdown of the procedural outcomes for cases involving each of the main types of trade measure. In this table and the ones following, the sample consists of the 205 complaints that can be classified.

TABLE Meas 4

PROCEDURAL OUTCOMES (By Measure)

42 Years

	Total Complaints	Rulings		Settled-Conceded by Def.		Withdrawn or Abandoned	
		Number	% of total	Number	% of total	Number	% of total
AD/CVD	20	11	55%	3	15%	6	30%
NTBs	108	42	39%	42	39%	24	22%
Tariffs	44	20	45%	10	23%	14	32%
Subsidies	33	14	42%	9	27%	10	30%
Total	205	87	42%	64	31%	54	26%

1980s

	Total Complaints	Rulings		Settled-Conceded by Def.		Withdrawn or Abandoned	
		Number	% of total	Number	% of total	Number	% of total
AD/CVD	16	8	50%	2	13%	6	38%
NTBs	65	28	43%	20	31%	17	26%
Tariffs	16	6	38%	1	6%	9	56%
Subsidies	17	5	29%	5	29%	7	41%
Total	114	47	41%	28	25%	39	34%

For the entire forty-two year period, the most significant difference in procedural outcome is the somewhat higher percentage of AD/CVD cases that receive a formal legal ruling as compared to the other measures. For complaints against AD/CVDs, 55% were carried all the way to a legal ruling, as compared to a range of 39% to 45% for the other types of trade measures. Essentially the same pattern occurred in the 1980s, when 50% of all AD/CVD cases proceeded to a legal ruling, as compared to a range of 29% to 43% for other types of trade measures.

The high percentage of rulings in AD/CVD cases appears to be the result of the defendants' unwillingness to settle such cases informally. Over the entire forty-two year period defendants settled or otherwise conceded in only 15% of AD/CVD cases, as compared to a range of 23% to 39% for the three other types of trade measures. The same relationship is present in the 1980s, except for an unusually low ratio of settlements in the tariffs category.

The reason for the apparent tenacity of the defense in AD/CVD cases probably lies in the rigidities of domestic AD/CVD law. In both the United States and Canada, the two defendants against whom 75% of all AD/CVD cases were brought,[66] an AD/CVD measure is the result of a highly judicialized administrative proceeding in which the remedy, once issued, becomes

66. *See* TABLE Meas 2, *supra* p. 281.

legally binding on executive officials as a matter of national law. Consequently, governments usually have little room to negotiate, even when the AD/CVD measure violates GATT obligations.

The one other procedural outcome datum deserving comment is the rather sharp increase in the percentage of tariff complaints withdrawn or abandoned in the 1980s, rising from 32% in the first three decades to 56% in the 1980s. The increase is matched by a corresponding decline in the percentage of tariff complaints settled or conceded. The data seem to suggest that defendants in certain tariff cases began to defend more stubbornly, and possibly more forcefully, in the 1980s. An examination of the actual cases confirms this hypothesis. The 56% withdrawn-abandoned rate is based on the outcome in nine of the sixteen tariff complaints in the 1980s. Of those nine complaints, five are arm-twisting tariff increases or threats of increase by the United States — part of the new and more bellicose policy the United States adopted in the 1980s.[67]

5. MEASURE-BY-MEASURE BREAKDOWN OF SUBSTANTIVE OUTCOMES

• *Cases with Rulings.* The following table presents a breakdown of the violation and no-violation rulings made, according to the type of trade measure involved.

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67. The five cases were *United States: Suspension of Most Favored Nation Treatment* (Case #118), *supra* note 63; *Semiconductor Retaliation* (Case #161), *supra* note 16; *United States: Informatics Retailiation* (Case #170), *supra* note 63; *Pharmaceutical Retaliation* (Case #189), *supra* note 16; and *Hormones Retaliation* (Case #193), *supra* note 16.

TABLE Meas 5

SUBSTANTIVE OUTCOMES: RULINGS – VIOLATION v. NO-VIOLATION (By Measure)

42 Years

	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
AD/CVD	20	11	55%	1	10	91%	50%
NTBs	108	42	39%	7	35	83%	32%
Tariffs	44	20	45%	6	14	70%	32%
Subsidies	33	14	42%	6	8	57%	24%
Total	205	87	42%	20	67	77%	33%

1980s

	Total Complaints	Total Rulings	As % of all complaints	No Violation	Violation	As % of all rulings	As % of all complaints
AD/CVD	16	8	50%	1	7	88%	44%
NTBs	65	28	43%	3	25	89%	38%
Tariffs	16	6	38%	2	4	67%	25%
Subsidies	17	5	29%	1	4	80%	24%
Total	114	47	41%	7	40	85%	35%

For the entire forty-two year period, the percentage of violation rulings seems to vary quite a bit depending on the measure involved. We find 91% of the rulings about AD/CVD measures are rulings of violation. At the other extreme, rulings on subsidies end up as rulings of violation only 57% of the time. The variances even out during the 1980s, chiefly because the percentage of violation rulings in subsidy cases goes up during that decade.

The most plausible reason for a higher-than-average rate of GATT violations in AD/CVD cases is that AD/CVD decisions contain so many opportunities for findings of "error." The legal basis of an AD/CVD proceeding is a meticulous examination of price/cost information or government benefits to determine if there has been "abnormal" business or government conduct. Analysis of "material injury" involves a myriad of similar choices about the relevant industry, market, time period, data and so forth. Each case involves hundreds of these issues. When AD/CVD measures are imposed in a judicialized procedural setting, the answers to all these questions are highly transparent. Given the arbitrary nature of AD/CVD standards and concepts to begin with, there is always something to disagree with in the way that any answer has been derived. This is particularly so where administrators adopt rules-of-thumb to keep from being submerged in detail. Rules of thumb usually err on the side of being too restrictive, and without a standard of review explicitly protecting such rules of thumb, they are particularly difficult to defend internationally. Needless to say, the fact that AD/CVD complaints tend to experience a high rate of adverse legal rul-

ings creates a high probability of legal failure, given the limited ability to revise AD/CVD actions once taken.

At the other extreme, the relatively low rate of violation rulings for subsidy complaints does lend some support to an observation frequently made about GATT law on subsidies, namely, that the law is not very clear and thus is very difficult to apply. Governments do countless things that advantage one group of producers or another, but neither GATT nor any other legal system has succeeded in defining which advantages are "subsidies" and which are just normal functions of government. The cases behind the low violation rate do show a connection to weak subsidy rules. The low violation rate for subsidy complaints is based on six rulings of no-violation. Three rulings involved unsuccessful attempts to apply the GATT rules on export subsidies to primary agricultural products.[68] The other three were the three DISC counterclaims against the territorial tax systems of France, Belgium and the Netherlands,[69] another good example of the inadequacies in GATT subsidy law.

We turn now to the actual substantive outcomes of cases in which legal rulings of violation were made. The following table presents a measure-by-measure breakdown of those substantive outcomes:

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68. *European Community: Refunds on Exports of Sugar I* (Case #86), *supra* note 19; *European Community: Refunds on Exports of Sugar II* (Case #87), *supra* note 19; and *European Community: Subsidies on Export of Wheat Flour* (Case #103), *supra* note 26.

69. *France: Income Tax Practices* (Case #70), *supra* note 4; *Belgium: Income Tax Practices* (Case #71), *supra* note 4; and *Netherlands: Income Tax Practices* (Case #72), *supra* note 4.

TABLE Meas 6

SUBSTANTIVE OUTCOMES: RULINGS – RESULTS OF VIOLATION RULINGS (By Measure)

42 Years

	Total Violation	Result Unknown	Full Satisfaction				Part Satis.		Negative Outcome			
			6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
AD/CVD	10	0	3	4	7	70%	0	0%	3	0	3	30%
NTBs	35	0	20	4	24	69%	7	20%	2	2	4	11%
Tariffs	14	1	10	0	10	77%	3	23%	0	0	0	0%
Subsidies	8	0	4	0	4	50%	4	50%	0	0	0	0%
Total	67	1	37	8	45	68%	15	23%	5	2	7	11%

1980s

	Total Violation	Result Unknown	Full Satisfaction				Part Satis.		Negative Outcome			
			6.2.3	6.2.4	Total	%	6.2.2	%	6.2.1	6.2.5	Total	%
AD/CVD	7	0	1	3	4	57%	0	0%	3	0	3	43%
NTBs	25	0	13	2	15	60%	6	24%	2	2	4	16%
Tariffs	4	0	3	0	3	75%	1	25%	0	0	0	0%
Subsidies	4	0	2	0	2	50%	2	50%	0	0	0	0%
Total	40	0	19	5	24	60%	9	23%	5	2	7	18%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.
6.2.1: No action taken.
6.2.5: Claim fully satisfied after complainant acceded to bilateral demands.

The substantive outcomes vary considerably according to the type of trade measure involved. Over the entire forty-two year period, adverse legal rulings pertaining to AD/CVD measures had by far the greatest percentage of legal failures, with three of ten cases (30%) producing negative outcomes. Adverse rulings pertaining to NTBs were next, with four negative outcomes in thirty-five cases (11%). All seven of the negative outcomes occurred in the 1980s, making the percentage of negative outcomes for that ten-year period even higher — 43% of all AD/CVD rulings in the 1980s, and 16% of all NTB rulings in that decade. Legal rulings involving tariffs and subsidies encountered no negative outcomes at all.

As discussed above, the probable reason for the high failure rate in AD/CVD rulings lies in two factors — the high probability of violation rulings and the difficulty of reversing AD/CVD actions. The three rulings that ended in negative outcomes all involved AD/CVD orders in particular proceedings that the defendant government refused to modify.[70]

70. Two of the violation rulings concerned the issue of whether the complainants were proper parties, while the third involved the mechanics of a new "anti-circumvention" rule. In one case the defendant and others argued that

Interestingly, the defendants in the three AD/CVD cases were the three countries with the worst compliance records — the United States, Canada, and the European Community. It is probably also worth noting that AD/CVD complaints were the one type of complaint to increase significantly in the 1980s, the decade in which most legal failures occurred. One can wonder whether increasing use of AD/CVD measures may not be correlated somehow with an increase in noncompliance, even if not the major cause of it.

The four specific NTB measures involved in the four negative outcomes in the NTB category do not appear to share any characteristic that might attribute the legal failure to the type of measure involved. One case involved the special U.S. procedure for dealing with intellectual property claims against imports, Section 337 of the Tariff Act of 1930.[71] Another involved Canadian agricultural quotas. The two others involved arm-twisting quotas imposed by the United States, both ultimately successful in securing a policy change demanded by the United States, even though ruled GATT-illegal.[72] The critical fact behind the legal failure in each case would appear to be the degree of government "attachment" to the particular measure. Except for garden-variety tariffs with no revenue function, where attachment is commonly very slight, attachment does not have much to do with the type of measure involved.

As we suggested earlier, part of the reason for the absence of negative outcomes in subsidy rulings may be that GATT rules on subsidies are simply not very strong, the result being that many highly distortive subsidies are never ruled in violation to begin with. Even so, there were eight rulings of violation (or nullification), and all of these rulings did produce positive results. Examined more closely, however, these eight cases are found to contain an extraordinary amount of tension, uncertainty and resistance to the dispute settlement process. Five of

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the panel decision was simply wrong, *Canada: Boneless Beef* (Case #149), *supra* note 11, in another the defendant refused to accept a conclusion that the proceeding was void and had to be done all over again, *United States: Stainless Pipes from Sweden* (Case #191), *supra* note 11, and in the third the defendant government did not block adoption of the report but declined to implement the ruling until the Uruguay Round negotiations on antidumping had come to a conclusion, *Screwdriver Assembly* (Case #188), *supra* note 11.

71. Tariff Act of 1930, § 337, 19 U.S.C. § 1337 (1983 & Supp. 1992).

72. The four cases were, respectively, *United States: Section 337* (Case #162), *supra* note 11; *Canada: Ice Cream and Yoghurt* (Case #195), *supra* note 11; *United States: Tuna from Canada* (Case #93), *supra* note 11; and *United States: Sugar from Nicaragua* (Case #125), *supra* note 11.

the eight cases produced major confrontations; their shorthand names — *DISC*, *Pasta*, *Canned Fruit*, *Oilseeds* and *Airbus* — have all become landmarks in GATT legal history.[73] In *Pasta*, *Canned Fruit*, and *Airbus*, the legal rulings themselves were never adopted by the plenary body. The *DISC* case and the *Oilseeds* case dragged on for years before being settled. While GATT did well to accomplish a positive settlement in each of these five cases, the difficult history does not bode well for the future of GATT litigation over subsidies.

The fact that rulings against tariffs have the best record — no negative outcomes, better than 75% full satisfaction — is not unexpected. Tariffs are more amenable to legal regulation than other types of trade barriers. Tariffs usually have the precision of numbers and thus offer very little room to hide non-conforming behavior. In addition, except in very small countries where they are sometimes a revenue source, tariffs are typically the easiest policy instruments to change. This presumes, of course, that one is speaking of ordinary tariffs, used as instruments of ordinary commercial policy. As we shall see, the 1980s produced another kind of GATT-illegal tariff measure — arm-twisting retaliatory tariffs — that are among the least amenable to regulation.

The data on rates of full and partial satisfaction in cases with rulings shows some interesting differences which tend to confirm some of the observations just made. Removing the negative outcome cases, AD/CVD cases achieve 100% full satisfaction, although in four of the seven cases the measure was removed for internal reasons — that is, *not* changed as the result of the GATT ruling. Subsidies, on the other hand, have by far the lowest rate of full satisfaction, only 50%, suggesting that even rulings of violation are not all that firmly grounded when it comes to enforcement. NTBs and tariffs have roughly the same rates of full satisfaction if negative outcome cases are removed.

• *Cases Settled or Validity Otherwise Conceded.* The following table presents a measure-by-measure breakdown of the substantive outcomes in cases settled or otherwise conceded.

73. *United States: DISC Legislation* (Case #69), *supra* note 18; *European Community: Pasta Products* (Case #105), *supra* note 26; *European Community: Canned Fruit* (Case #107), *supra* note 26; *European Community: Oilseeds* (Case #179), *supra* note 7; and *European Community: Airbus II* (Case #196), *supra* note 61.

TABLE Meas 7

SUBSTANTIVE OUTCOMES: COMPLAINTS SETTLED OR CONCEDED (By Measure)

42 Years

	Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
			6.2.3	6.2.4	Total	%	6.2.2	%
AD/CVD	3	0	2	0	2	67%	1	33%
NTBs	42	0	22	1	23	55%	19	45%
Tariffs	10	1	8	0	8	89%	1	11%
Subsidies	9	0	5	0	5	56%	4	44%
Total	64	1	37	1	38	60%	25	40%

1980s

	Total Settled or Conceded	Result Unknown	Full Satisfaction				Partial Satisfaction	
			6.2.3	6.2.4	Total	%	6.2.2	%
AD/CVD	2	0	1	0	1	50%	1	50%
NTBs	20	0	15	1	16	80%	4	20%
Tariffs	1	0	1	0	1	100%	0	0%
Subsidies	5	0	1	0	1	20%	4	80%
Total	28	0	18	1	19	68%	9	32%

Note: All percentages are computed using known results.

6.2.3: Ruling or claim fully satisfied.
6.2.4: Ruling or claim fully satisfied due to internal legal decision or expiration of measure.
6.2.2: Ruling or claim partly satisfied.

We have already observed that the total number of complaints settled or conceded does vary somewhat according to the measure involved. We observed that complaints against AD/CVD measures have an unusually low rate of settlement. We have already intimated that the possible reason for that variation is the legal rigidity of AD/CVD actions.

The low rate for subsidy cases again suggests the possible weakness of legal rules in this area. The high rate for tariffs is consistent with the fact that tariffs are the easiest measures to change. AD/CVD settlements are too few to be representative. So are the 1980s data as a whole.

• *Withdrawn or Abandoned Cases.* The following table presents a measure-by-measure breakdown of the substantive results in cases withdrawn or abandoned before a ruling was made.

TABLE Meas 8

SUBSTANTIVE OUTCOMES: COMPLAINTS WITHDRAWN OR ABANDONED (By Measure)

42 Years

				Result Unknown	Neutral: w/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total Compl.	Valid Compl.	Total w/d or aband'd	Total Number	Total Number	Total Number	As % of all complaints	Complaint probably valid Number	% of valid complaints
AD/CVD	20	13	6	2	2	2	10%	0	0%
NTBs	108	83	24	3	8	13	12%	6	7%
Tariffs	44	25	14	1	5	8	18%	3	12%
Subsidies	33	16	10	2	5	3	9%	0	0%
Total	205	137	54	8	20	26	13%	9	7%

1980s

				Result Unknown	Neutral: w/d for adequate reason	Negative: Withdrawn after impasse or complainant acceded to bilateral demands			
	Total Compl.	Valid Compl.	Total w/d or aband'd	Total Number	Total Number	Total Number	As % of all complaints	Complaint probably valid Number	% of valid complaints
AD/CVD	16	9	6	2	2	2	13%	0	0%
NTBs	65	49	17	1	5	11	17%	4	8%
Tariffs	16	8	9	0	3	6	38%	3	38%
Subsidies	17	9	7	0	4	3	18%	0	0%
Total	114	75	39	3	14	22	19%	7	9%

There are twenty-six cases in the forty-two year period in which the withdrawal of the complaint cannot be explained by some neutral reason. The distribution of these "negative" withdrawals, as a percentage of total complaints, does not reveal any particular propensity toward defendant resistance with respect to different types of trade measures. Complaints against tariffs and NTBs have the highest percentages of negative withdrawals, but about half of the negative withdrawals in each case are complaints against arm-twisting measures. The pressures exerted by defendants would appear to depend more on the purpose of the measure than upon its particular type.

Turning to the nine legal failures that can be identified in the withdrawn-abandoned category, we find that the distribution breaks down to six NTB and three Tariff.[74] Once again, however, the reason for the legal failure involved in these cases does not seem to depend on the type of trade measure involved. In eight of the nine cases — five NTB and three Tariff[75] — the GATT-illegal measure was an arm-twisting trade restriction designed to induce the complainant to make a policy change —

74. The six NTB cases are *France: Auto Taxes* (Case #40), *supra* note 16; *European Community: TVs from Korea* (Case #83), *supra* note 16; *Poitiers Customs House* (Case #119), *supra* note 16; *United States: Steel Pipe from EC* (Case #138), *supra* note 16; *United States: Cotton Pillowcases* (Case #144), *supra* note 16; and *European Community: Seal Skins* (Case #145), *supra* note 16. The three Tariff cases are *Semiconductor Retaliation* (Case #161), *supra* note 16; *Pharmaceutical Retaliation* (Case #189), *supra* note 16; and *Hormones Retaliation* (Case #193), *supra* note 16.

75. The only NTB case that did not involve an arm-twisting measure is *France: Auto Taxes* (Case #40), *supra* note 16.

accepting a VER in four cases,[76] opening a particular market in three cases,[77] and stopping the killing of baby seals in the other.[78] In six of the eight cases the complainant felt compelled to give up the complaint and satisfy the demand in order to escape further economic harm.[79] The other two ended in impasse.[80] In short, the key ingredient here is not the trade measure, but the defendant's power and determination. That five of the GATT-illegal measures were imposed by the United States and three by the EC better explains the legal failure than does the nature of the trade measure employed.[81]

• *Combined Results of All Cases with Legally Valid Complaints.* The following table presents the measure-by-measure breakdown of results for all cases with legally valid complaints. We consider data for the entire forty-two year period and for the 1980s alone.

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76. The four cases in which the complainant accepted a VER are *European Community: TVs from Korea* (Case #83), *supra* note 16; *Poitiers Customs House* (Case #119), *supra* note 16; *United States: Steel Pipe from EC* (Case #138), *supra* note 16; and *United States: Cotton Pillowcases* (Case #144), *supra* note 16.

77. The three cases in which the arm-twisting was designed to gain market access are *Semiconductor Retaliation* (Case #161), *supra* note 16; *Pharmaceutical Retaliation* (Case #189), *supra* note 16; and *Hormones Retaliation* (Case 193), *supra* note 16.

78. The baby seal case is *European Community: Seal Skins* (Case #145), *supra* note 16.

79. The six cases are *European Community: TVs from Korea* (Case #83), *supra* note 16; *Poitiers Customs House* (Case #119), *supra* note 16; *United States: Steel Pipe from EC* (Case #138), *supra* note 16; *United States: Cotton Pillowcases* (Case #144), *supra* note 16; *Semiconductor Retaliation* (Case #161), *supra* note 16; and *Pharmaceutical Retaliation* (Case #189), *supra* note 16.

80. The two cases are *European Community: Seal Skins* (Case #145), *supra* note 16, and *Hormones Retaliation* (Case #193), *supra* note 16.

81. *See supra* note 74.

TABLE Meas 9

SUBSTANTIVE OUTCOMES: COMBINED DATA (By Measure)
(Includes only cases with known results)

42 Years

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total Complaints	Full Satisfaction		Part Satisfaction		Negative Outcome	
		Number	%	Number	%	Number	%
AD/CVD	13	9	69%	1	8%	3	23%
NTBs	83	47	57%	26	31%	10	12%
Tariffs	25	18	72%	4	16%	3	12%
Subsidies	16	8	50%	8	50%	0	0%
Total	137	82	60%	39	28%	16	12%

1980s

	Cases where ruling of violation, settled, conceded valid, or withdrawn and probably valid						
	Total Complaints	Full Satisfaction		Part Satisfaction		Negative Outcome	
		Number	%	Number	%	Number	%
AD/CVD	9	5	56%	1	11%	3	33%
NTBs	49	31	63%	10	20%	8	16%
Tariffs	8	4	50%	1	13%	3	38%
Subsidies	9	3	33%	6	67%	0	0%
Total	75	43	57%	18	24%	14	19%

When negative outcomes in all categories are added together, negative outcomes in AD/CVD cases are still the most frequent, at 23%. Valid complaints against both NTBs and tariffs experience the same 12% rate of negative outcomes. Again no subsidy cases end in legal failure, but they have by far the highest rate of partial satisfaction. The data for the 1980s yields a somewhat different order, due to the emergence of arm-twisting tariff increases as a policy instrument in the 1980s.

In the end, we must conclude that each type of trade measure poses some kind of enforcement problem for GATT law. The problems are not the same for each type, however. The main difficulty in enforcing legal claims against AD/CVD measures is their susceptibility to findings of error, coupled with their rigidity in domestic law. The main problem in enforcing claims against subsidy measures is the inadequacy of GATT legal norms in this area. Between tariffs and NTBs, tariffs are probably more amenable to legal regulation as an initial matter because they are both easier to identify and easier to change. Both tariffs and NTBs, however, can become intractable when they are used as instruments of arm-twisting commercial diplomacy.

The enforcement problems with AD/CVD measures and subsidies could be addressed by specific legal reforms.[82] The

82. To improve enforcement in the AD/CVD sector, for example, one

problems with tariffs and NTBs can be addressed only by improving the overall climate of legal compliance enough to discourage governments from taking the law into their own hands.

G. CONCLUDING OBSERVATIONS

The data presented in this study provide a quantitative outline of the main chapters in the history of GATT dispute settlement. The GATT dispute settlement process came into operation rather quickly, was reasonably successful during the first decade, fell into disuse and then recovered, and finally blossomed in the 1980s with a substantial increase in activity and ambition. Greater ambitions in the 1980s produced many impressive successes, but they were accompanied by a growing number of quite troubling legal failures.

By providing a quantitative measure of these developments, this study has helped to clarify the following important points:

1. Problems notwithstanding, the GATT dispute settlement procedure has been a successful international legal institution. The overall success rate of slightly more than 88%, or even the 1980s success rate of slightly more than 81%, means that at least four out of five valid complaints are being dealt with successfully. There is legal substance to this enterprise. Its accomplishments to this point, if not unique, are at least rare in the history of international legal institutions. Those accomplishments have laid down a strong base upon which to build.

2. The quantitative analysis of individual country performance makes it quite clear that the GATT dispute settlement system is somewhat more responsive to the interests of the strong than to the interests of the weak. The evidence for this hypothesis occurs in all phases of performance — in the rates of success as complainants, in the rates of noncompliance as defendants, in the quality of outcomes achieved, and in the extent to which complainants are able to carry complaints forward to a decision.

Perhaps the most important finding in this regard is the substantial difference in rates of withdrawal before a ruling is made, suggesting that the weaker countries tend to encounter significantly greater barriers at the outset of the process. An important part of making the dispute settlement process stronger

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might consider adopting the sort of international appellate review found in Chapter 19 of the U.S.-Canada Free Trade Agreement, which is made binding as a matter of domestic law. On the subsidy side, the main area of potential reform is the writing of clearer rules defining subsidies.

in the future will be to ease the burdens that weaker countries face in moving complaints forward.

3. The findings that the strong do better than the weak in GATT dispute settlement is neither unexpected, nor disabling. Every legal system ever created has begun with formative years in which the strong do better than the weak. While it is true that legal systems are created for the purpose of reducing power inequalities, they never accomplish this goal overnight (nor, alas, completely). Greater equality of treatment only comes as the legal system matures and strengthens over time. The GATT legal system is still relatively young, and it operates in a society of nations which is still very primitive. It is stronger today than it was in the 1950s, and if the positive developments in the 1980s prevail over the negative, it will be yet stronger in the future.

4. The data do not tell us definitively which factors make GATT law work better or worse, but they do provide some very useful directions about where to look for answers. The decade-by-decade data tell us *when* a dramatic increase in noncompliance occurred (the 1980s), and the study of individual country records tells us *who* made the noncompliance happen (the United States, the European Community and Canada). We know that one of the most striking changes to occur during the 1980s was the sharp increase in the volume of GATT legal complaints; it seems reasonable to hypothesize from that fact that the GATT had entered a new and more ambitious period of legal activity when more demanding complaints would be filed, more objective answers given, and thus more failure-producing confrontations would occur. But even if greater ambitions made legal failures more likely, that fact would not explain the concentration of legal failures among three of the most powerful members, nor the preponderance of legal failures caused by the United States.

It seems reasonable to hypothesize that power had something to do with the concentrations of problems in cases against the United States, the European Community and Canada — that when a legal system starts pressing harder, the first to resist will be those who are most accustomed to having their own way. As for the distinctive noncompliance record of the United States in the 1980s, anyone familiar with trade policy developments in that decade cannot avoid zeroing in on the major change in the domestic politics of U.S foreign trade policy that occurred during that decade. In the 1980s, the U.S. Congress demanded and received a decidedly more bellicose trade policy, based on a claim

that foreign governments were not providing fair *quid pro quo* for the relative openness of the U.S. market.

5. As for the significance of other factors in determining the success or failure of the GATT dispute settlement procedure, the most surprising conclusion of the entire study is that complaints involving agricultural trade were in no way less successful than complaints involving non-agricultural trade. As we hasten to point out, this does not mean that GATT is successfully regulating agricultural trade. To the contrary, it means that GATT law regulates the more serious trade barriers in agricultural trade policy so poorly that agricultural trade barriers have been mostly outside the reach of the GATT dispute settlement process altogether.

6. The final section of the study asked whether the nature of the trade policy measure involved made a difference. That data revealed several variations that suggested an affirmative answer, albeit of modest dimensions. The high percentage of legal failures in AD/CVD cases, their low rate of settlement, and their sharp increase in volume during the 1980s all invite inquiry as to whether AD/CVD measures might not have a greater propensity for legal failure than other trade measures. We suggested that the typical arbitrariness of AD/CVD criteria and the legal rigidity of the measures once taken might indeed have given them a greater than average chance of failure. We also wondered, somewhat timidly, whether the ascension of AD/CVD measures to a place of importance in national trade policy might not somehow be a sign of other, deeper tendencies toward noncompliant behavior.

The data also gave slight confirmation to a few other modest observations about other types of trade measures: (1) Ordinary tariffs are the most easy to regulate because violations are usually clear and they are usually easier to change; (2) effective regulation of subsidies is difficult because the GATT rules on subsidies are inadequate; and (3) there are many NTBs, and it is hard to generalize about them.

7. Stepping back from the individual findings, it is clear that the most important finding in this study is the disproportionate level of noncompliant behavior by the United States. If there is one moving force in the evolution of GATT dispute settlement law today, it is this fact. Just as the United States played the leading role in building the GATT dispute settlement procedure to its present state of effectiveness, so the United States has played the leading role in placing those accomplish-

ments in jeopardy today. Even though there are, as always, problems in the behavior of the EC, Japan and other countries, it seems clear that no resolution of the current malaise in GATT legal affairs will be possible without a change in basic U.S. legal policy — some kind of reconciliation between the current U.S. preoccupation with obtaining a fair deal and the recognition of an obligation to use legal means to secure one.

The Uruguay Round trade negotiations are, in one dimension, an effort to effect such a reconciliation. The package defined in December 1991[83] would satisfy the major public justifications that the U.S. government has given for the legal violence it has practiced in the recent past. That is, it provides significant new economic opportunities for the United States — in services trade, intellectual property protection, investment protection and possibly agriculture — that would meet U.S. complaints that the balance of economic advantage in the present GATT agreement is tilted strongly against it. The package also addresses U.S. complaints that GATT law is too slow and too easily blocked; its dispute settlement reforms define a process almost as rapid as that required by U.S. Section 301 law, and which cannot be blocked. If the public justification for noncomplying behavior is the real justification, the Uruguay Round package could well do the trick. If not — if the public justifications are just window-dressing for a simple refusal to submit to international legal discipline — GATT law is in for a long winter.

83. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (20 December 1991) (the so-called "Dunkel text," prepared by the GATT Secretariat as its evaluation of what a final package would have to look like).

Appendices

APPENDIX I
DATA ENTRY FORM

No.	Complainant	Defendant	Case Title

Date	D/S Provision	Developing Co. Code

1. MEASURE:
   1. Tariff
   2. Discriminatory Tariff
   3. NTB
   4. Discriminatory NTB
   5. Subsidy
   6. AD/CVD
   7. Cannot Classify

2. IMPORT/EXPORT:
   1. Import
   2. Export
   3. Both

3. PRODUCTS INVOLVED:
   1. Agricultural
   2. Non-Agricultural
   3. General

4. PROCEDURE:
   1. Proceedings involved only circulation of document and/or plenary meetings (includes direct rulings by plenary bodies).
   2. Panel/3PWP requested, but not established.
   3. Panel/3PWP established, but settled, withdrawn, or abandoned w/o public decision (includes ruling issued to parties only).
   4. Panel/3PWP established and issued public decision on the merits:

Positive Ruling:	*Negative Ruling:*	*Unable to Rule:*
0. None	0. None	0. None
1. Violation	1. Violation	1. Violation
2. Violation & NV N&I	2. Violation & NV N&I	2. Violation & NV N&I
3. Nonviolation N&I	3. Nonviolation N&I	3. Nonviolation N&I

   5. Alternative procedures for resolving legal issues underlying claim:
      1. Invoked mediation/good offices phase under 1966 LDC procedure.
      2. Intervened in another panel proceeding involving a similar claim.
      3. Other.

5. PLENARY ACTION:
   1. No Decision on Merits by Plenary Body, Complaint Withdrawn or Abandoned After:
      1. Complainant conceded legal validity of measure complained of, or acquiesced in related ruling to that effect
      2. Complaint ruled legally invalid by panel, where complainant blocked adoption of panel report
      3. Complainant determined measure was not causing harm, or could be corrected under national law
      4. Measure removed (or never imposed) due to internal legal decision not involving GATT obligations
      5. Temporary measure expired as scheduled
      6. Measure removed when complainant agreed to "voluntary" restriction on exports
      7. Measure removed when complainant acceded to bilateral demand on other issues
      8. Impasse (includes blocked positive panel ruling, with no actual or *de facto* settlement)
      9. Reason unknown (may include, e.g., impasse, unreported settlement, complaint meant as warning only)
   2. No Decision on Merits by Plenary Body, but Legal Claim Otherwise Recognized
      1. Legal claim conceded *ab initio*, but not formalized in plenary ruling
      2. Legal claim conceded, after claim validated by ruling of panel in same or related case
      3. Complaint settled by agreement removing all or part of problem (includes actual or *de facto* settlement after blocked panel ruling)
   3. Decision on Merits by Plenary Body:

Positive Ruling:	*Negative Ruling:*	*Unable to Rule:*
0. None	0. None	0. None
1. Violation	1. Violation	1. Violation
2. Violation & NV N&I	2. Violation & NV N&I	2. Violation & NV N&I
3. Nonviolation N&I	3. Nonviolation N&I	3. Nonviolation N&I
		4. Panel ruling set aside

6. RESULT:
   1. No Positive Ruling by Plenary Body, and Claim Not Otherwise Recognized:
      1. Problem not removed
      2. Problem partly removed
      3. Problem fully removed
      4. Problem fully removed; internal legal decision, or measure expired
      5. Problem fully removed; complainant acceded to bilateral demands
      6. Outcome not known
      7. No action required or requested
   2. Positive Ruling by Plenary Body or Claim Otherwise Recognized:
      1. Ruling or Claim not satisfied
      2. Ruling or Claim partly satisfied
      3. Ruling or Claim fully satisfied
      4. Ruling or Claim fully satisfied; internal legal decision, or measure expired
      5. Ruling or Claim fully satisfied; complainant acceded to bilateral demands
      6. Outcome not known

7. LEGAL PROVISIONS INVOLVED:
   1. _____
   2. _____
   3. _____
   4. _____
   5. _____
   6. _____
   7. _____
   8. _____
   9. _____
   10. _____

APPENDIX II

TABLE OF GATT LEGAL COMPLAINTS

The following is a complete chronological list of GATT complaints invoked between 1948 and 1989. A double asterisk indicates a complaint in which a legal ruling was issued by a GATT adjudicatory body, regardless of whether the ruling was adopted. A single asterisk indicates a complaint in which a panel or other third-party tribunal was appointed, but the complaint was withdrawn or settled before a public ruling was made.

1948:

001** Netherlands v. Cuba: Consular Taxes
002** Pakistan v. India: Tax Rebates on Exports
003 United States v. Cuba: Restrictions on Textile Imports [I]

1949:

004** France v. Brazil: Internal Taxes
005* United States v. Cuba: Restrictions on Textile Imports [II]
006** Czechoslovakia v. United States: Export Restrictions
007** Cuba v. United States: Margins of Tariff Preferences to Cuba
008** Chile v. Australia: Subsidy on Ammonium Sulfate

1950:

009 United States v. France: Export Restrictions on Hides and Skins
010 Belgium v. France: Quantitative Restrictions
011 Belgium v. United Kingdom: Quantitative Restrictions
012 Netherlands v. United Kingdom: Purchase Tax Exemptions
013** Czechoslovakia v. United States: Withdrawal of a Tariff Concession Under Article XIX ["Fur Felt Hat Bodies"]

1951:

014** Norway & Denmark v. Belgium: Family Allowances
015** Netherlands & Denmark v. United States: Import Restrictions on Dairy Products
016 United States v. Belgium: Restrictions on Dollar Imports

1952:

017* United Kingdom v. Greece: Increase of Import Duties
018** Norway v. Germany: Treatment of Imports of Sardines
019** France v. Greece: Special Import Taxes
020 India v. Pakistan: Export Fees on Jute
021 Greece & Turkey v. United States: Article XIX Action on Dried Figs
022** United States v. Netherlands: Action Under Article XXIII:2
023 United States v. France: Statistical Tax on Imports and Exports

1953:

024 Turkey v. United States: Import Restrictions on Filberts
025 United States & United Kingdom v. Brazil: Compensatory Concessions

1954:

026** Italy v. France: Special Temporary Compensation Tax on Imports
027** Italy v. Sweden: Anti-Dumping Duties
028* Italy v. Turkey: Import Taxes and Export Bonuses
029 Czechoslovakia v. Peru: Embargo on Imports from Czechoslovakia
030 Italy v. Greece: Luxury Tax on Imports
031 United States v. Germany: Import Restrictions on Coal

032 United States v. France: Customs Stamp on Imports, Increase to 2 Percent
033 United States v. Belgium: Import Restrictions on Coal
034** Benelux v. Germany: Import Duties on Starch and Potato Flour

1955:

035** United States v. France: Customs Stamp Tax on Imports, Increase to 3 Percent
036 Australia v. United States: Hawaiian Regulations Affecting Imported Eggs
037 United Kingdom v. Italy: Turnover Tax on Pharmaceutical Products
038 Denmark v. Italy: Import Duties on Cheese
039 Greece v. Italy: Duties on Cotton

1956:

040 United States v. France: Auto Taxes
041 Netherlands v. Germany: Turnover Tax on Printing
042** Germany v. Greece: Increase in Bound Duties on LP Phonograph Records
043 Denmark v. United States: Export Subsidy on Poultry
044 United States v. Chile: Auto Taxes

1957:

045* Denmark v. United Kingdom: Export of Subsidized Eggs
046** United Kingdom v. Italy: Discrimination Against Imported Agricultural Machinery
047 Germany v. Greece: Discrimination in Credit Facilities for Imported Goods
048 United Kingdom v. France: Discrimination Against Imported Agricultural Machinery
049 Denmark & Sweden v. United States: Article XIX Action on Spring Clothespins

1958:

050** Australia v. France: Assistance to Exports of Wheat and Wheat Flour
051* Australia v. Italy: Assistance to Exports of Flour
052 Austria v. Italy: Measures in Favor of Domestic Production of Ships Plates

1959:

053** Germany v. United Kingdom: Increase in Margin of Preference of Ornamental Pottery

1961:

054** Uruguay v. 15 Developed Countries: Uruguayan Recourse to Article XXIII
055** Brazil v. United Kingdom: Increase in Margin of Preferences on Bananas

1962:

056** United States v. France: Import Restrictions [I]
057 United States v. Italy: Import Restrictions
058** United States v. Canada: "Value for Duty" on Imports of Potatoes

1963:

059** EC v. United States: Action Under Article XXVIII ["Chicken War"]

1969:

060 United States v. Italy: Administrative and Statistical Fees

1970:

061 United States v. Greece: Preferential Tariff Quotas to the USSR
062 Australia v. EC: Emergency Action on Table Apples
063 United States v. Denmark: Import Restrictions on Grains
064** United States v. Jamaica: Margins of Preference

1972:

065 United States v. EC: Compensatory Taxes on Imports
066* Israel v. United Kingdom: Import Restrictions on Cotton Textiles
067 United States v. France: Import Restrictions [II]
068* United States v. United Kingdom: Dollar Area Quotas

1973:

069** EC v. United States: Income Tax Legislation [DISC]
070** United States v. France: Income Tax Practices
071** United States v. Belgium: Income Tax Practices
072** United States v. Netherlands: Income Tax Practices

1974:

073* Canada v. EC: Adequacy of Compensation in Article XXIV:6 Negotiations
074 Australia v. Japan: Restrictions on Imports of Beef and Veal

1975:

075** United States v. Canada: Import Quotas on Eggs

1976:

076** United States v. EC: Programme of Minimum Import Prices (*MIPS*), Licenses Etc. for Certain Processed Fruits and Vegetables
077 Australia v. EC: Licenses and Surety Deposits on Canned Peaches and Pears
078** United States v. EC: Measures on Animal Feed Proteins
079** EC v. Canada: Withdrawal of Tariff Concessions Under Article XXVIII:3

1977:

080** Japan v. United States: Suspension of Customs Liquidation [*Zenith* Case]
081** United States v. Japan: Measures on Imports of Thrown Silk Yarn
082 Chile v. EC: Export Refunds on Malted Barley

1978:

083 Korea v. EC: Article XIX Action on Imports into the UK of Television Sets from Korea
084** Hong Kong v. Norway: Restrictions on Imports of Certain Textile Products
085* United States v. Japan: Measures on Imports of Leather [I]
086** Australia v. EC: Refunds on Exports of Sugar
087** Brazil v. EC: Refunds on Exports of Sugar
088 EC v. United States: Application of Countervailing Duties

1979:

089** Chile v. EC: Restriction on Imports of Apples From Chile
090* Canada v. Japan: Measures on Imports of Leather
091** United States v. Spain: Measures Concerning Domestic Sale of Soyabean Oil
092* United States v. Japan: Restraints on Imports of Manufactured Tobacco

1980:

093** Canada v. United States: Prohibition on Imports of Tuna and Tuna Products from Canada
094** Brazil v. Spain: Tariff Treatment of Unroasted Coffee
095** Canada v. EC: Imports of Beef from Canada
096 India v. Japan: Measures on Imports of Leather
097* United States v. EC: "Spin-Chill" Requirements on Imports of Poultry
098* India v. United States: Imposition of Countervailing Duty Without Injury Criterion

1981:

099 United States v. EC: Export Subsidies Maintained by Greece
100** EC v. United States: Import Duty on Vitamin B12
101 Australia v. EC: Production Subsidies on Canned Fruit
102** Canada v. United States: Imports of Certain Automotive Spring Assemblies [Section 337]
103** United States v. EC: Subsidies on Export of Wheat Flour
104** Hong Kong v. EC: Quantitative Restrictions on Imports of Certain Products from Hong Kong

1982:

105** United States v. EC: Subsidies on Exports of Pasta Products
106 United States v. EC: Subsidies on the Export and Production of Poultry
107** United States v. EC: Production Aids on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes
108** United States v. Canada: Administration of the Foreign Investment Review Act [FIRA]
109 United States v. EC: Export Subsidies on Sugar
110 10 Sugar-Producing Countries v. EC: Sugar Regime
111 India v. United States: Countervailing Duty Procedures
112 Argentina v. EC, Canada, Australia: Trade Restrictions Applied for Non-Economic Reasons ["Falklands War" Embargo]
113** United States v. EC: Tariff Treatment of Citrus Products from Certain Mediterranean Countries
114** United States v. EC: Value-Added Tax (VAT) and Threshold
115 United States v. Japan: Certification Procedures for Metal Softball Bats
116* EC v. Finland: Internal Regulations Having an Effect on Imports of Certain Parts of Footwear
117 EC v. Switzerland: Imports of Table Grapes
118 Poland v. United States: Suspension of Most-Favored Nation Treatment
119 Japan v. EC: Import Restrictive Measures on Video Tape Recorders [Poitiers Customs House]

1983:

120** United States v. Japan: Measures on Imports of Leather [II]
121 Canada v. United States: Countervailing Duty Investigation on Softwood Lumber [I]
122** EC v. United States: "Manufacturing Clause" in US Copyright Legislation
123* EC v. United States: Export Subsidy on Sales of Wheat Flour to Egypt
124 EC v. Japan: Nullification and Impairment of Benefits
125** Nicaragua v. United States: Imports of Sugar from Nicaragua

126 United States v. Brazil: Subsidies on the Export and Production of Poultry
127 EC v. United States: Tariff Reclassification of Machine-Threshed Tobacco
128 EC v. Canada: Antidumping Investigation Concerning Hydro-Electric Generators from Italy

1984:

129** Canada v. EC: Imports of Newsprint from Canada
130** EC v. Spain: Homologation Requirements for Heating Radiators and Electrical Medical Equipment
131 EC v. Chile: Import Measures on Certain Dairy Products
132** South Africa v. Canada: Discriminatory Application of Retail Sales Tax on Gold Coins
133** Finland v. New Zealand: Imports of Electrical Transformers from Finland
134 Canada v. EC: Export Subsidy on Boneless Manufacturing Beef
135 Australia v. EC: Operation of Beef and Veal Regime
136 United States v. Japan: Single Tendering Procedures
137** EC v. United States: Definition of "Industry" Concerning Wine and Grape Products
138 EC v. United States: Ban on Imports of Steel Pipe and Tube from the European Community

1985:

139** EC v. Canada: Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Authorities
140* Canada v. United States: Restrictions on Imports of Certain Sugar-Containing Products
141* United States v. Japan: Quantitative Restrictions on Imports of Leather Footwear
142 United States v. EC: Purchase of Computers Under French "Computer Literacy Program"
143** Nicaragua v. United States: Trade Measures Affecting Nicaragua
144 Portugal v. United States: Restrictions on Imports of Cotton Pillowcases and Bedsheets
145 Canada v. EC: Ban on Importation of Skins of Certain Seal Pups and Related Products
146 Brazil v. United States: Measures on Imports of Non-Beverage Ethyl Alcohol

1986:

147* Canada v. United States: Countervailing Duty on Imports of Softwood Lumber from Canada [II]
148** United States v. Japan: Restrictions on Certain Agricultural Products
149** EC v. Canada: Countervailing Duty on Boneless Manufacturing Beef
150 United States v. Japan: Restrictions on Imports of Herring, Pollock and Surimi
151 EC v. Canada: Countervailing Duty on Pasta
152** Mexico, Canada & EC v. United States: Taxes on Petroleum and Certain Imported Substances ["Superfund" Taxes]
153** EC & Canada v. United States: Customs User Fee
154** EC v. Japan: Restrictions on Alcoholic Beverages
155 United States v. Canada: Restrictions on Exports of Uranium

1987:

156** EC v. Japan: Restrictions on Semiconductors

157** United States v. Canada: Restrictions on Exports of Unprocessed Salmon and Herring
158 United States v. European Community: Government Financing of Airbus Industries
159 United States v. European Community: Animal Hormones Directive
160 EC v. United States: Tax Reform Legislation for Passenger Aircraft
161 Japan v. United States: Unilateral Measures on Imports of Certain Japanese Products ["Semiconductor" Retaliation]
162** EC v. United States: Section 337 of the Tariff Act of 1930 ["Aramid Fibres" Case]
163* United States v. India: Import Restrictions on Almonds
164* United States v. India: Import Licenses on Almonds
165 EC v. United States: Procurement of Machine tools by the Department of Defense
166 Argentina v. EC: Enlargement of EEC — Accession of Spain and Portugal
167 Canada v. United States: Section 337 Action on Cellular Mobile Telephones
168* United States v. EC: Directive on Third-County Meat Imports
169** Canada v. Japan: Imports of Spruce-Pine-Fir (SPF) Dimension Lumber
170 Brazil v. United States: Tariff Increase and Import Prohibition on Brazilian Products [Informatics Retaliation]

1988:

171** United States v. Norway: Restrictions on Imports of Apples and Pears
172 United States v. Sweden: Restrictions on Imports of Apples and Pears
173** United States v. Korea: Restrictions on Imports of Beef
174** Australia v. Korea: Restrictions on Imports of Beef
175 United States v. EC: Greek Import Restrictions on Almonds
176* United States v. Japan: Restrictions on Imports of Beef and Citrus Products
177* Australia v. Japan: Restrictions on Imports of Beef
178 Chile v. United States: Quality Standards for Grapes
179** United States v. EC: Payments and Subsidies on Oilseeds and Animal-Feed Proteins
180** Chile v. EC: Restrictions on Imports of Dessert Apples
181** New Zealand v. Korea: Restrictions on Imports of Beef
182 New Zealand v. EC: Restrictions on Imports of Apples
183 New Zealand v. Japan: Import Restrictions on Beef
184** United States v. EC: Restrictions on Imports of Apples
185** Brazil v. United States: Collection of Countervailing Duty on Non-Rubber Footwear
186** EC v. United States: Restrictions Under 1955 U.S. Waiver and Under Headnote to U.S. Schedule XX
187** Australia v. United States: Import Restrictions on Sugar
188** Japan v. EC: Antidumping Regulation on Imports of Parts and Components ["Screwdriver Assembly" Case]
189* Brazil v. United States: Import Restrictions on Certain Products from Brazil ["Pharmaceuticals" Retaliation]
190 Brazil v. United States: Export Enhancement Program (EEP) Subsidy

191** Sweden v. United States: Antidumping Duties on Stainless Pipes and Tubes from Sweden
192 Finland v. United States: Procurement of Antarctic Research Vessel
193 EC v. United States: Increase in Rates of Duty on Certain Products of the EC ["Hormones" Retaliation]
194 Canada v. United States: Import Prohibition on Ice Cream from Canada
195** United States v. Canada: Restriction on Imports of Ice Cream and Yoghurt

1989:

196** United States v. EC: Government Financing of Airbus Industries
197* Finland v. Australia: Antidumping Duties on Power Transformers
198* United States v. EC: Restraints on Exports of Copper Scrap
199 Hong Kong v. EC: Antidumping Duty on Video Cassettes
200 EC v. United States: Determination Under Sections 304 and 305 of the Trade Act of 1974 Relating to EC Oilseed Subsidies
201 Canada v. EC: Subsidies for Producers and Processors of Oilseeds
202 United States v. Finland: Restriction on Imports of Apples and Pears
203** Canada v. United States: CVD on Pork from Canada
204 United States v. Norway: Oslo Toll Ring Project
205** United States v. Canada: Injury Determination on Grain Corn from the United States
206 United States v. Brazil: Restrictions on Imports of Certain Agricultural and Manufactured Products
207 EC v. Chile: Internal Taxes on Spirits

APPENDIX III

LEGAL FAILURES

The following is a brief description of the cases categorized as legal failures ("negative outcomes") in the present study.

As is always true when establishing a category like this one, sharp lines must be drawn between outcomes that are not that sharply different from each other. Nonetheless, some line is necessary for a statistical study like this one, and all other lines tested (there were many) proved less satisfactory.

It should be noted that some of the legal failures in more recent cases might eventually be reversed if compliance were to occur after a Uruguay Round agreement is reached. In the authors' judgment, however, excluding such cases from the study would have presented a distorted picture of the present state of GATT's record on legal compliance

A. Cases with Rulings

093 *United States: Prohibition on Imports of Tuna and Tuna Products from Canada.* The United States imposed a GATT-illegal import prohibition in response to the seizure of U.S. fishing vessels by Canada. The prohibition was removed only after Canada had acceded to U.S. demands for a new agreement defining the disputed fishing rights. The import prohibition was subsequently ruled GATT-illegal; the U.S. legislation mandating the prohibition remains in force.

125 *United States: Imports of Sugar from Nicaragua.* The United States imposed a GATT-illegal discriminatory quota, and refused to change it after a ruling of violation. The discrimination was eventually removed after Nicaragua met U.S. political demands by holding democratic elections.

149 *Canada: Countervailing Duty on Boneless Manufacturing Beef.* Canada's CVD was ruled GATT-illegal by the panel. Canada blocked adoption of the panel ruling, and continued to maintain the CVD.

162 *United States: Section 337 of the Tariff Act of 1930.* A January 1989 panel report ruled many aspects of the Section 337 procedure GATT-illegal; the ruling was adopted by the GATT Council. The United States undertook to correct the procedure only if and when a satisfactory agreement on intellectual property was agreed to in the Uruguay Round.

188 *European Community: Antidumping Regulation on Imports of Parts and Components.* A March 1990 panel report ruled a new EC antidumping regulation GATT-illegal; the ruling was approved by the GATT Council. The EC undertook to correct the regulation if, when, and to the extent that it would be prohibited by the revision of the MTN Antidumping Code then under negotiation in the Uruguay Round. Meanwhile it continued to apply the regulation.

191 *United States: Antidumping Duties on Stainless Pipes and Tubes from Sweden.* A September 1990 panel report ruled that a U.S. antidumping duty had not been legally imposed, and recommended a refund. The United States objected to the refund order and blocked adoption of report on that ground.

195 *Canada: Restriction on Imports of Ice Cream and Yoghurt.* A September 1989 panel report ruled Canadian restrictions GATT-illegal; the ruling was adopted by Council. Canada postponed corrective action until the Uruguay Round agreement on agriculture was completed.

A SPECIAL CASE: In tables recording each appearance by an individual defendant as a separate event, an eighth legal failure following a legal ruling is counted. Norway, one of the fifteen defendants in complaint # 54: *15 Developed Countries: Uruguayan Recourse to Article XXIII*, admitted to a legal violation and did not correct it during the proceedings following a panel ruling to that effect.

B. Cases Withdrawn or Abandoned

048 *France: Discrimination Against Imported Agricultural Machinery.* France had an internal tax for automobiles based on an administrative criterion called "fiscal horsepower" which was constructed to impose substantially higher taxes on most foreign autos. France refused to recognize the U.S. complaint. The measure was subsequently ruled illegal under the provisions of the Treaty of Rome.

083 *European Community: Article XIX Action on Imports into the UK of Television Sets from Korea.* United Kingdom imposed a discriminatory Quantitative Restriction (QR) in violation of GATT. The QR was withdrawn after Korea agreed to a VER.

119 *European Community: Import Restrictive Measures on Video Tape Recorders.* France required all VCRs from Japan to clear customs through the tiny customs house at Poitiers, a discriminatory border requirement in violation of Article I. The restriction was removed when Japan agreed to a VER.

138 *United States: Ban on Imports of Steel Pipe and Tube from the European Community.* The United States imposed a discriminatory QR on EC steel; no Article XIX or other justification was claimed. The QR was removed when EC agreed to a VER.

144 *United States: Restrictions on Imports of Cotton Pillowcases and Bedsheets.* The United States imposed a discriminatory QR, claiming the textile imports were causing disturbance of the U.S. industry, but the United States had no MFA relationship with Portugal and did not comply with Article XIX. Restrictions were removed when Portugal agreed to a VER.

145 *European Community: Ban on Importation of Skins of Certain Seal Pups and Related Products.* The EC ban was admittedly for the purpose of deterring commercial seal hunting practices of Canada and Norway; the legal violation was the same as in the 1991 *Tuna* decision. The ban is still in force.

161 *United States: Unilateral Measures on Imports of Certain Japanese Products.* The United States imposed a GATT-illegal discriminatory tariff increase in retaliation for breach of a bilateral agreement on semiconductor trade practices. The breach gave no excuse for GATT-illegal measures. The measure was partially withdrawn when Japan partially complied with U.S. demands; the remainder remained in force until a new bilateral agreement five years later.

189 *United States: Import Restrictions on Certain Products from Brazil.* The United States imposed a GATT-illegal discriminatory tariff increase in retaliation for Brazil's failure to provide adequate intellectual property protection for U.S. pharmaceuticals. Intellectual property treatment cannot justify GATT-illegal measures. The tariff increase was removed when Brazil agreed to U.S. demands.

193 *United States: Increase In Rates of Duty on Certain Products of the EC.* The United States imposed a GATT-illegal discriminatory tariff increase in retaliation against an EC regulation barring sale of hormone-fed beef. The legality of the EC measure was never tested in GATT; the United States rejected EC offer to litigate GATT jurisdiction over the hormone ban. The measure was partially removed after partial limitation of the EC ban, but the remainder is still in force.