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PERSPECTIVE

GATT Dispute Settlement: An Agenda for Evaluation and Reform

Jeffrey M. Waincymer*

I. Introduction

In the field of international relations, the General Agreement on Tariffs and Trade (GATT)¹ ranks as a unique phenomenon.² Surviving now for forty years, the GATT has withstood extreme pressures from changing economic circumstances, diversified membership, and criticism of its conceptual foundations. It is also unique among international agreements in its form and manner of operation.³ Thus, the GATT has created a fertile field of study for political scientists, economists, and international legal scholars.

To the lawyer the GATT provides a framework for analysis and debate over the nature of international law itself, the relevance of rules that seek to govern international relations, and the ability of a

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¹ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

² The GATT represents an organization as well as an agreement, although the former was not originally intended. As contemplated by a resolution of the United Nations Economic and Social Council in February, 1946, the GATT was originally intended to be merely an interim document in support of future tariff negotiations while a more permanent organization, the International Trade Organization, was established. See R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 9-10, 45-46 (1975). Although the United States was the primary force behind the move toward establishing the proposed International Trade Organization, it soon became apparent that the U.S. Congress would not approve it. See *id.* at 53-55. The GATT, however, did not need Congressional approval to be effective. See *id.* at 60-65. Thus, already in place, the GATT filled the void in tariff negotiations and quickly developed an institutional structure to deal with trade issues on an on-going basis. For excellent synopses of the GATT's history, see Rogoff & Gauditz, *The Provisional Application of International Agreements*, 39 ME. L. REV. 29, 64 (1987); Ehrenhaft, *A U.S. View of the GATT*, 14 INT'L BUS. LAW. 146, 146-47 (1986).

³ Although the GATT was not intended to establish a permanent organization, see *supra* note 2, it nonetheless contains some institutional elements. One of the GATT's purposes was to provide rules and procedures to ensure that immediate tariff-reducing agreements were not undermined through nontariff barriers created prior to the establishment of the International Trade Organization. Hence the GATT contains various dispute resolution procedures. See generally Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 61 PROC. AM. SOC'Y INT'L L. 144 (1967) (outlining the various dispute resolution mechanisms of the GATT).

legalistic⁴ or rule-based system to prevent and resolve disputes as they inevitably arise in today's complex and multifaceted international trading relationships. Unlike politicians or economists, lawyers have no incontrovertible intellectual jurisdiction in the field of international economic relations between governments. The central debate for lawyers in any sphere of international relations is whether, and to what extent, legalistic attitudes may assist in furthering common goals. Law, however, is necessary in any domestic market-based economic system to create and protect property rights, to support agreements, and to prevent and resolve disputes. As a result, the question arises whether these features of a legal system can readily be transferred to an international context. Dispute resolution is a major aspect of this question.

A dispute settlement mechanism such as the one contained in the GATT⁵ is found typically in any agreement between parties that

⁴ In the remainder of this Perspective, the terms "legalism" and "pragmatism," and their respective derivatives, are used to denote the competing views on the issue of the appropriate role of dispute resolution processes. These terms are not intended to connote any meanings in any particular sense. They are merely short-hand labels and contain their own ambiguities and scope for pejorative application. To illustrate the differences in the competing views, a pragmatist appears to a legalist to be nonidealistic and unprincipled; conversely, a legalist appears to a pragmatist to be narrow-minded, having tunnel-vision, and concerned only with the ordinary or technical meaning of words.

⁵ The central dispute settlement mechanism of the GATT is as follows:

Consultation

(1) Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

(2) The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

GATT, *supra* note 1, art. XXII, as amended by Protocol, Mar. 10, 1955, 8 U.S.T. 1787, T.I.A.S. No. 3930, 278 U.N.T.S. 200.

Nullification or Impairment

(1) If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

(2) If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter as appropriate. The CONTRACTING PARTIES may consult with contracting parties with the Eco-

possess diverse interests and attitudes. The GATT's dispute settlement processes have produced mixed success. During the current Uruguay Round some adjustments to the GATT will be necessary. Unfortunately, past debates over reform of the GATT's dispute resolution mechanisms were consumed by the belief that various signatories have irreconcilable views about the GATT's dispute resolution functions. This Perspective critically examines these purported differences and argues that most are inaccurate and misleading.⁶ In addition, this Perspective argues that to concentrate negotiations solely on recent procedural problems is wrong; the debate's focus should be prospective and seek to prevent such future problems. But the primary concern of this Perspective is to address the debate over the appropriate function of the GATT's dispute resolution mechanism.

The optimum role for the GATT's dispute settlement mechanisms involves many issues. Feasibility has become a problem under the current political and economic climate and the attitudes of the GATT's key participants. This Perspective does not attempt to predict the type of dispute settlement agreement that may ultimately emerge from the Uruguay Round. Rather, this Perspective provides a format for sovereign states to escape from the circularity of past debates and force the intellectual evaluation to advance. Specifically, this Perspective identifies and evaluates the traditional concerns about a legalistic approach to dispute settlement. It also determines whether such a role is an essential element in international economic law, and identifies the factors that demand such a role for a dispute settlement process or that militate against or limit the potential for

conomic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than 60 days after such action is taken to give written notice to the Executive Secretary to the CONTRACTING PARTIES, of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

Id., art. XXIII, as amended by Protocol, Mar. 10, 1955, 8 U.S.T. 1787, T.I.A.S. No. 3930, 278 U.N.T.S. 200. The term "contracting party" denotes the individual signatories of the GATT. Its capitalized plural, "CONTRACTING PARTIES," refers to the collective body of decisionmakers. *Id.*, art. XXV.

⁶ While an economist may feel that substantive agreement on questions such as the reduction of distortive trade subsidies, the proper limits for government interference in trade, or reasonable parameters for domestic safeguard measures are more important for the future of the GATT, improvements to the on-going procedural processes of the system are vitally necessary to protect whatever substantive agreements that the GATT may affect. Economics is a result-oriented discipline; it rarely identifies the processes necessary to achieve and support results.

such a role.⁷

II. The Definition of Dispute Settlement

It is difficult to define "dispute settlement" and other key terminology. Like so many of the GATT issues, any individual debate can encompass fundamental constitutional and jurisprudential issues that often overarch all other questions within the debate. It is difficult to discuss the appropriate role of dispute settlement in the GATT system without gravitating towards progressively more ethereal problems such as the true nature of that system, what we mean by international economic law, and what the potential for law is in any international system. One necessary precondition to any empirical evaluation or serious analytical discussion is terminological refinement and resolution of key taxonomic questions.

What do we mean by a "dispute"? If we seek to examine actual cases to determine the ability of the GATT's structure to handle disputes, should we limit ourselves to Article XXIII complaints,⁸ to panel reports generally,⁹ to matters formally raised at Council meetings,¹⁰ to matters formally discussed between diplomatic missions,

⁷ At this stage, the author's own biases should be articulated. In the prescriptive sense, the international legal scholar sees more than minimal potential for a legalist system and invariably advocates development and improvement of the rules and processes. Thus the task of the author is to identify an agenda for debate that may ultimately lead to processes that better assist in the pacific resolution of international trade disputes within the GATT context. This Perspective suggests that basic analysis can show why many of the traditional criticisms of a dispute resolution model are not intellectually defensible. Because of the consensual nature of the GATT negotiations, however, bad arguments need to be dealt with just as much as good arguments. Once this has occurred, it will be easier to embark upon the practical task of analyzing and devising appropriate procedures to maximize the efficiency and equity of the dispute settlement system. Even here, the need for a sophisticated conceptual analysis exists. It is important to be more than merely responsive to existing problems. Unless a more rigorous analysis is undertaken, a tremendous risk exists that when more obvious problems are solved, new ones will simply arise. Should this occur, it could be quite harmful as new expectations would be misplaced during the currency of future proceedings.

⁸ A number of the codes developed during the Tokyo Round also contain dispute settlement procedures. While there may be long-term problems in having a number of alternative dispute settlement processes, for the purposes of this Perspective it is fair to say that these procedures build on the general format of Articles XXII and XXIII of the GATT. This Perspective limits its scope to these two articles in order to examine the general principles that relate to a dispute settlement process in an international economic forum.

⁹ The GATT organization has developed a practice of submitting disputes to a panel of experts, the members of which act in their individual capacities and not as representatives of member nations. After the initiation of a complaint under Article XXIII, see *supra* note 5 (quoting art. XXIII of the GATT), the matter is referred to panels, which investigate the matter and attempt to reconcile the dispute. The panel reports its conclusions and recommendations to the entire body of Contracting Parties, who then rule in the manner set forth in Article XXIII:2. See *supra* note 5 (illustrating art. XXIII of the GATT). The Contracting Parties generally adopt the panels' recommendations. See R. HUDEC, *supra* note 2, at 74-96 (discussing the processes involved in panel reports).

¹⁰ The Council was established in 1960 to act as a standing supervisory body between

or to any other disagreement known to the researcher? What do we mean when we speak of a dispute as being "resolved" or "settled"? Does this occur when a decision has been given or when the losing party has taken all necessary action in response to the decision? If the decision leads to the removal of only part of a protective measure, do we speak of this as a "settlement"? The answers to these questions are likely to affect our results.

Value judgments on which rights the system should uphold color our conclusions about the success of the dispute settlement system. Are we concerned primarily with the rights of the complaining party, the defending party, both equally, other contracting parties interested in the particular issue, all the contracting parties, or the system in its totality? When examining the results of various dispute settlement processes, what do we see as the aim of the process? It is often suggested that the main aim of the GATT dispute settlement system is to restore the balance of advantages between the parties. Does this mean that a settlement must be within GATT norms? Is it meaningful to consider disputes in bilateral terms within a multilateral trading system that seeks to effect an overall balance between a large number of contracting parties? These are obviously difficult questions and explain why most of the serious writings on GATT issues tend to be broader than their working titles suggest.

Another difficulty, one that is often ignored or given insufficient treatment, is the extent to which our answers to the above questions are affected by our particular legal training and normative postulates about our domestic legal systems. The most widely cited GATT commentators come from Anglo-American legal jurisdictions, although almost all of the commentators collaborate extensively with commentators from other jurisdictions and legal systems.¹¹ When preparing material designed to persuade a diverse group of readers to shift their respective positions, it is necessary to ensure that the readers are not alienated by the author's express, or more often implicit, assumptions that normative prescriptions accepted within the author's own domestic system are similarly valued by others.

III. Identifying the Arguments Against a Rule-Based System

The first step in refining the debate on dispute settlement within the GATT system is to identify the main arguments that have been raised against a legalist or rule-based dispute settlement system. The aim at this stage is to identify the arguments in order to discredit the more extreme positions. The competing views are the pragma-

sessions of the Contracting Parties. The Council has broad jurisdiction without any express treaty authority. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, 154-57 (1969).

¹¹ See, e.g., Jackson, Louis & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267 (1982).

tist position that law plays no part in international trade relations and the legalist position that a rule-based methodology solves all international trade disputes. Although no serious commentators subscribe to either of these views, disputants and negotiators in diplomatic forums make these arguments to enhance their positions in a particular discussion. The more desirable plane of debate is one in which the parties assess the proper role of law in an international economic system, without seeking an exact formulation. The international rules are one of a number of relevant factors that govern behavior in international economic relations. Their importance and effect varies. The more important question is whether it is worth maintaining the effort to formulate and improve a rule-based dispute settlement system.

A. *Trade Policy or Trade Law?*

An argument often raised against a rule-based system is that trade policy is not the province of law. Typically, this argument is heard from politicians defending a protectionist measure and is not likely to be heard from the same country's GATT representatives. This argument comes from the belief that governments do not want to constrain the power of industrial policy. Pejorative terminology is an important part of the GATT debates. What constitutes industrial policy to one contracting party is perceived as protectionism by others.

Is government regulation of international trade discretionary behavior? Discretions are viewed by some as positive tools of economic management rather than the means to respond to protectionist pressures. Sometimes this argument is redefined in terms of sovereignty and suggests that the determination of macroeconomic policy is part of each country's inalienable rights. This simplistic argument purports to negate the role of law in international economic relations. But commentators have pointed out that true sovereignty means effective sovereignty or the ability to achieve desired ends.¹² The argument also fails to recognize the difference between sovereignty of a sovereign and the sovereignty of the people, which French and U.S. philosophers pointed out centuries ago.

While governments should consider macroeconomic variables when trying to increase the welfare of their constituents, the actions of one government can adversely affect the attainment of such goals by other governments. Political scientists have shown that it is a suboptimal strategy for individual governments to use protectionist measures in order to obtain an advantage for the domestic economy

¹² See, e.g., Tumir, *GATT Rules and Community Law—A Comparison of Economic and Legal Functions*, in 4 *THE EUROPEAN COMMUNITY AND GATT—STUDIES IN TRANSNATIONAL ECONOMIC LAW* 1-2 (1986).

at the expense of foreign countries.¹³ When this strategy is adopted by all the countries in the system, overall trade is affected to the detriment of each society's consumers. A system of proscriptive rules such as the GATT aims to dissuade governments from following trade policies that are disadvantageous to consumers. The issue is not one of an organization usurping the sovereignty of a member state. Rather, each party employs a cost/benefit analysis of the gains to be made by contractually limiting its discretionary powers when reciprocal promises are made.

The best example is international taxation. In every import/export transaction there is more than one sovereign state that usually has the right to tax the profits. Double taxation, however, deters further trade. Most governments acknowledge this impediment and negotiate double tax treaties that set out rules to determine which of the two parties has the sole right to tax each type of transaction. In one respect this is more far reaching than dispute settlement under the GATT because the tax courts of each contracting party interpret the Treaty in the case of a dispute. Under tax treaties there may be no delegation to an independent arbiter and there is the possibility that the other country's court can decide the matter.

Even if one concedes a substantial role for government discretion in industrial policy, there are clear cases when government intervention is not defensible under any economic theory. In Western democratic economies, where internal pressure groups are often able to influence government actions, an international rule system acts as a constraint on governments choosing inappropriate economic policies for reasons of short-term political expediency. Often governments like to be "protected" from those pressures through some binding system of rules. The serious question is whether provisions can be drafted that identify and distinguish between acceptable and unacceptable industrial policies. For example, the potential of the GATT dispute settlement system would be greatly enhanced if the contracting parties agreed on improved safeguard provisions, the proper operation of the rules on developing countries, and improved rules in the problem sectors such as agriculture, steel, and textiles.

There are a number of benefits thought to flow from a legalist approach. Supporters of a rule-based system invariably point out that such systems significantly enhance certainty.¹⁴ In any commercial context certainty is a highly desirable goal for planning and decision making purposes. Long-term commercial relationships are

¹³ See generally Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306 (1981); Conybeare, *Public Goods, Prisoners' Dilemmas and the International Political Economy*, 28 INT'L STUD. Q. 5 (1984); Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985).

¹⁴ See, e.g., Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW AND POL'Y INT'L BUS. 21, 26 (1980).

unlikely if parties behave unpredictably. In addition, when the contracting parties are of vastly diverse sizes a rule-based system potentially protects the weak against abuses of the system by major trading nations.

These purported benefits, however, raise further questions. For example, how important is certainty and by what other criteria should we judge our system? The question of certainty as a goal of a rule-based system should not be considered in isolation. Certainty without equity is achieved through bilateral deals, which is what the GATT seeks to end. It can be too easy to shift attention from the certainty of legal norms to the attainment of certainty of trade patterns. Increased liberalization of trade means greater reliance on market forces, which in turn leads to shifts in comparative advantage. As a result, future trade patterns are uncertain. Rather, we are concerned with the certainty of a rule-based system and the certainty that promises will be kept. Such a system in the international context aims at achieving stability and standardization as the two key elements of the concept of certainty. Stability means that rules are not changed without proper notice and that interpretations are not changed arbitrarily. Standardization ensures that public goods are available and rules are created and applied with as much consistency between nation states as possible.

In supporting rules as a means of protecting weaker countries, we must examine the power content of rules because rules and power are not mutually exclusive. Rules are negotiated and drafted in an environment where power can be and is exercised. International economic rules, like many domestic legal systems, are designed or operable in a way that best protects the powerful. This is achieved through drafting,¹⁵ escape procedures,¹⁶ or operation.¹⁷ The present situation demands that more attention be directed to this issue. Any changes to the rules within the GATT must be accepted by the major trading nations and blocs. It is not difficult to conceive of agreements between the major trading nations¹⁸ that sat-

¹⁵ The drafting of "soft" agricultural laws is one such example. Difficulties have arisen, however, in applying the tests contained in Article XVI to agricultural subsidies. One such difficulty concerns the meaning of Article XVI's phrase "more than an equitable share of world export trade." See GATT, REPORT OF PANEL ON EC REFUNDS ON EXPORTS OF SUGAR, 26th Supp. B.I.S.D. 290 (1980); GATT, REPORT OF PANEL ON EC REFUNDS ON EXPORTS OF SUGAR, COMPLAINT BY BRAZIL, 27th Supp. B.I.S.D. 69 (1981).

¹⁶ See, e.g., GATT, *supra* note 1, art. XXV:5.

¹⁷ The effective veto power provided by a census model is one such example. Although Article XXV:3 & 4 stipulate that decisions are to be taken by majority vote, the reality has been for both the Contracting Parties and the Council to make decisions by consensus only. This approach was affirmed in 1982. See GATT, 29th Supp. B.I.S.D. 16 (1983).

¹⁸ The major trading nations include the United States, the members of European Economic Community, and Japan. These nations comprise the major spheres of economic decision-making. A considerable amount of bilateral discussion, tension, and compromise

isfy each of their governments' short-term goals. But this may be done at the expense of rules that fully protect all members of the GATT. In the GATT context there is no history of arguments of duress or undue influence in forcing agreements. These arguments should not be raised within GATT disputes, but should serve only as a reminder of the potential for overlap between rules and power positions. Additional considerations include how rules contain a power content, to what extent this has occurred in the past, and whether there are any negotiating procedures that could minimize this phenomenon. These questions are appropriate for each country's policy makers to consider when defining positions on various proposals. For example, the so called "new reciprocity"¹⁹ advocated by some sectors is a gross misinterpretation of a fundamental GATT principle, which means in practice that negotiated rules are unlikely to be based on free and fair agreement and should be shunned by offerees. Similar criticisms have been levied at voluntary export restraints,²⁰ which have proliferated in recent years.

Another problem is the appropriate constitutional approach to constraining internal pressure groups. Is an international treaty the best method or should attention be turned to domestic constitutional reform?²¹ This question raises more central questions regarding the nature and role of nation states. Domestic executive and administrative structures, and principles of judicial review provide a framework to test the hypothesis that domestic reforms are a more effective method of constraining internal pressure groups than international treaties. There is also the argument that if free trade is meant to facilitate peace, governments may want to maintain flexibility so they can vary their responses in international relations and not be constrained by legislation.

exists among these nations, some of which is seen as being contrary to GATT norms. *See, e.g., Arrangement Between the Government of Japan and the United States of America Concerning Trade in Semiconductor Products*, Sept. 2, 1986, 25 I.L.M. 1409 (Nov. 4, 1986). That raises the issue of the relationship between rules and power.

¹⁹ The concept of the "new reciprocity" is intended to achieve bilateral parity in market access for classes of goods. It provides more protection to domestic markets from goods that come from countries that do not allow U.S. products comparable access to their markets. Cline, "Reciprocity": *A New Approach to World Trade Policy?*, in 2 POLICY ANALYSES IN INTERNATIONAL ECONOMICS 7 (1982). The former approach to "reciprocity" referred to a negotiated matching of particular changes in protection. *Id.*

²⁰ Voluntary export restraints (VERs), a mechanism by which a foreign trading partner limits its exports to the United States, and orderly marketing arrangements (OMAs), a mechanism by which the United States regulates restraints on imports, are examples of what are called "grey area measures." They may involve bilateral agreements to limit exports between governments or industries and at times are said to be unilateral decisions by exporting interests. Because they rarely result from the visible actions of the importing country, some may argue that such agreements do not violate the GATT. However, no serious scholar supports this argument.

²¹ The writings of constitutional economists such as James Buchanan have become influential on these questions of political economy. *See generally* J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1968); J. BUCHANAN, *THE LIMITS OF LIBERTY* (1975).

An evaluation of any area of GATT operations soon becomes a debate embracing much of international law and economics.

Some of the above arguments suggest limitations on the potential for a rule-based system. Nevertheless, an assertion that trade policy should not be the province of international law is a questionable statement. To the extent that law plays a part in the regulation of international trade, a dispute settlement mechanism becomes a necessary element. A legal system must be more than mere words on paper, but the mechanism does not need to be an elaborate adversarial model under the present or any other format. It is merely a means of supporting the argument that there must be some dispute settlement system in the organization.

B. Is There "Law" in International Economic Law?

The second category of criticisms often leveled at a rule-based international system consists of the perceived defects of international economic law. Some argue that international law is not "law" in the true sense. Others argue that the rules are invariably "soft" and do not afford a mechanism for objective dispute settlement.²² This Perspective is not the appropriate forum to debate the issue of whether international law is law. The other questions are subsets of that issue. These questions are heard in the context of GATT debates and are addressed here.

When discussing the role of sanctions, it is necessary to clarify the nature of GATT rules. Are they merely contractual or do they have a quasi-penal character? When we speak of sanctions in a legal system we usually think of a criminal system. In a contractual sense we think more of damages or other remedies. Sanctions in the criminal law, at least in Anglo-American systems, are aimed at deterrence rather than compensation of the victim. The remedies available in a civil system also have a deterrent element, but are not punishment oriented. They fix the harm occasioned, or declare that the harm stop. Civil-type remedies are more realistic aims for the GATT.

An international system does not have the enforcement, coercive, and deterrent effects commonly found in domestic systems. Nevertheless, an international system can affect behavior by making breach perceptually a less beneficial course of action. This is an uncertain effect because it operates differently on each contracting party. The motives behind reactions also vary. Some contracting parties comply because their domestic legal systems require it. The authority and sanctions of the domestic legal structure can encourage adherence to the international rules. Other contracting parties value their status as perceived adherents to international rules.

²² See, e.g., Seidl-Hohenveldern, *International Economic "Soft Law"*, 163 RECUEIL DES COURS 165-246 (1979).

Others are sensitive to an adverse explicit finding. Some are concerned about the remedies the GATT dispute settlement process can ultimately sanction.²³ Some comply because they always wanted to, but needed an excuse for opposing lobby groups to explain why the government has ignored their pleas. Others comply because of the adverse publicity associated with breach.

On analytical grounds, the absence of an effective sanction does not preclude a dispute settlement system from working in the international arena. A system with effective adjudicatory and enforcement mechanisms is more likely to minimize the number of disputes. Nevertheless, the absence of adequate mechanisms does not mean that international law has no effect. The twin statements that the GATT has no coercive powers and that the dispute settlement mechanism relies on the will of the parties are both true and misleading. They are true in the sense that the matter ends if the disputants decide not to accept panel findings. They are misleading because they suggest that the level of will is independent of the operation of the dispute settlement system.

The relevance of law should not be judged by the actions of a losing contracting party in one case. In addition, it should not be judged solely by the percentage of acceptance of adverse verdicts over a forty year period, although such a figure is relevant. The relevance of law must be judged by analyzing what happened and what is likely to have occurred in the absence of such systems. These judgments combine elements of empirical, analytical, and impressionistic analysis. Politicians, delegates, secretariat members, and academics have different perspectives. Each should realize that their perceptions are colored by their backgrounds.²⁴ In this context, we must acknowledge another constraint that operates on most modern commentators. It is difficult to rely solely on documentation in international organizations to determine what actually occurred. As time advances, however, it becomes extremely difficult to corroborate explicit material by reference to actual participants.

In furthering this aspect of the debate it is appropriate to critically examine all GATT disputes to test the hypothesis of whether

²³ This possible perception, however, is less likely to occur because of the rarity of sanctions. Although the 1979 Understanding contemplates compensation as a possible element in a settlement, see GATT, 26th Supp. B.I.S.D. 210 (1980), and although the Contracting Parties may ultimately authorize the complainant to suspend concessions or other obligations in retaliation, see GATT, *supra* note 1, art. XXIII, only one instance of authorized retaliation has occurred and some doubt exists as to whether or not the right was fully utilized. See GATT, REPORT OF WORKING PARTY ON NETHERLANDS ACTION UNDER ARTICLE XXIII:2 TO SUSPEND OBLIGATIONS TO THE UNITED STATES, 1st Supp. B.I.S.D. 62-64 (1953).

²⁴ The problem of perspective is exacerbated in an organization such as the GATT, where considerable reliance has to be placed on secondary sources authored by key personnel.

the system has been effective in the past. An examination of the history of the GATT shows that many disputes have been resolved notwithstanding that there are neither elaborate sanctions or remedies commensurate with those in domestic criminal and civil systems. Some disputes have not been resolved by the system. Other fundamental ones have not led to formal panel proceedings, probably because the parties acknowledge the inadequacy of the system for certain types of disputes.²⁵ Successes have occurred, but the more difficult question is whether the areas of success are sufficiently important to justify the effort involved.

Commentators have argued that the dispute settlement process works because in almost all instances when a complainant has pushed the issue, a panel has proceeded to make a determination that is invariably in favor of that complainant. Others disagree and argue that the panel process has worked only for less significant disputes. These are the real issues as opposed to the simplistic view that international economic law never has any real effect. These factors suggest that the appropriate debate is about trying to identify a minimum level of effectiveness of a GATT dispute settlement procedure and to determine whether increased endeavours are worthwhile on a cost/benefit basis. This occurs only after a rigorous examination of the recent trends along the lines of Professor Hudec's seminal work.²⁶

There are many so called "agreements" in the international sphere that do not represent a consensus among the contracting parties. Too often agreements are constructed to hide the lack of consensus among the negotiating parties in order to allow the negotiators to be seen as reaching some explicit mutual position. Even when real agreement occurs, an international system is less likely to be built on consistent policy foundations than a domestic system. The fundamental principles make the rules open to interpretation and make clear and explicit drafting a difficult if not impossible task.

The "cornerstones" of the GATT include nondiscrimination,²⁷ unconditional most-favored-nation (MFN) treatment,²⁸ the directive

²⁵ Trade problems can be dealt with in other ways than through the dispute settlement system. For example, the waiver power or renegotiation of schedules could be used. At least two disputes, however, have seen the dispute settlement system used to address "wider" issues. The first was the Uruguay recourse to Article XXIII. See GATT, 11th Supp. B.I.S.D. 95-102 (1963). The second saw a proposal by the European Community (EC) in April 1983 to establish a working party under Article XXIII:2 to examine features of the Japanese economy which had allegedly impaired EC benefits. The complaint was not pursued. GATT, GATT ACTIVITIES IN 1983 49 (1983).

²⁶ See generally, R. HUDEC, *supra* note 2.

²⁷ The desirability of nondiscrimination in international trade has led to the most-favored-nation clause. See *infra* note 28.

²⁸ The GATT's most-favored-nation clause applies only to products upon which: custom duties [or] charges of any kind [have been] imposed on, or in connec-

that tariffs should be the preferred protective device, the promotion of transparency, the concept of national treatment,²⁹ and the utilization of reciprocity as a means of promoting compliance and development of freer trade.³⁰ At times these concepts conflict with the express terminology of some of the substantive rules. They may even conflict with each other. If this occurs, their relative ranking is important. This is complicated because there is some inherent vagueness in describing all as cornerstones. Some are ends in themselves and others are the preferred means of attaining those ends in the field of international relations. This adds to the problem facing the legalist. The pragmatist argues that if the rules merely embody the means, and if the ends are obtainable in another way, there is no need to adhere to the rules.

The sanctity of the specific rules are also undermined by demonstrating the inconsistent attitudes about end goals. For example, if unconditional MFN treatment is seen as a cornerstone of the GATT, the development of free trade areas, special treatment for developing countries, the growing use of nontariff barriers, grey area measures, "free riders," and the conditional MFN practices during the Tokyo Round render the concept largely irrelevant.

When there are trade-offs between equity and efficiency or when *realpolitik* has precluded the first best solution, participants change their attitude towards the role of law. Some take this further and argue that in the absence of unambiguous explicit drafting, international law cannot be effective. This is a further example of a real problem being misrepresented in a way that engenders an all or nothing debate. The effectiveness of law is measured in no small part by compliance. In a system such as the GATT and when enforcement powers are nonexistent, compliance is in part a product of the will of the parties.

The issue then is to what extent the law and a dispute settlement mechanism can fortify that will and protect it against sectoral inter-

tion with importation or exportation, . . . any advantage, favor, privilege, or immunity [has been] granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the products originating in or destined for its territories of all other contracting parties.

J. JACKSON, *supra* note 10, at 249-50 (citing GATT, *supra* note 1, art. I, para. 1).

²⁹ The concept of "national treatment" is primarily embodied in GATT, art. III. This concept means that imported goods will be accorded the same treatment as goods having local origin with respect to matters under governmental control, such as taxation and regulation. By way of contrast, the most-favored-nation clause only requires a government to treat all foreign goods equally, although domestic products might be favored. J. JACKSON, *supra* note 10, at 273. For a complete discussion of the concept of "national treatment," see *id.* at 273-303.

³⁰ Article XXVII requires GATT trade negotiations to be conducted on a "reciprocal and mutually advantageous basis." GATT, *supra* note 1, art. XXVII. Thus, tariff concessions by one country will be met by a reciprocal concession of equal value from the other country. For a full discussion of this occurrence, see J. JACKSON, *supra* note 10, at 240-45.

ests and pressure groups. On a practical level the issue is whether it is better to take a questionable consensus and try to make it work through adjudication and, if necessary, expansive interpretation by the adjudicators, or wait until there is pure consensus expressed in clear terms. It is difficult to get sovereign states, anxious to protect their autonomy, to agree to subjugate themselves to expansive interpretation. On the other hand, clear unambiguous consensus is rare in international economic matters.

There is, however, an important factor that supports a rule-based system. A legal system is not a static model. A legal system has a role to play even when a clear consensus has been achieved. A policy adopted by any single contracting party is rarely a product of domestic consensus. Rather, policies are often the result of trade-offs between interests or from the party choosing to benefit some at the expense of others. In the trade arena freer trade measures come at the expense of domestic manufacturing and producing interests, which are unlikely to cease demands for protection because the GATT or a GATT-inspired agreement has been negotiated by the central government. To argue that there can be no law without consensus and that once there is consensus there is no longer a need for law overlooks the importance of law in protecting consensus. In a system such as the GATT when consensus frequently results from trade-offs of polarized positions, such consensus needs protection from casuistic arguments regarding drafting ambiguities or changed circumstances.

The system is also needed when it appears that the parties are in agreement, but the drafting is unclear or ambiguous, or the parties fail to turn their minds to the specific ways that disputes arise. The drafting of international agreements should be as tight as possible, but some degree of "softness" is not an excuse for failure to adjudicate. In particular, macroeconomic principles and "fairness" requirements cannot easily be converted into rule formulations that have mathematical precision. Systemic elements are necessary to support the agreed upon rules. Dispute settlement rules and mechanisms are elements that properly support a legal system.

Even when a "watered down" rule is developed to gloss over a fundamental difference in attitudes between parties, there is a problem in dismissing it as "soft" and of limited normative effect. To the party that tries to minimize its content this is an admirable result. On the other hand, for the country that grudgingly accepts a soft proscriptive formula this negates the presence of even a minimally binding commitment. Agricultural producers who signed the Subsidies Code in the Tokyo Round were not happy at the ultimate drafting, but they would have been less happy to learn that the document has no normative effect.

Again, there are terminological questions that are likely to give rise to practical problems. A legal system should normally be distinguished from the legal rules that are a subset of that system. In the case of the GATT these two are not easy to differentiate because there is no separate structure or constitution. The entity, procedures, and substantive provisions are all derived from the Agreement itself. The GATT is a legal system without the constitutional and functional stability of domestic systems; therefore, its semantic, contextual, and syntactical ambiguities cannot be resolved by reference to higher constitutional documents. Nevertheless, much effort has been expended to determine the core concepts of the GATT.

This raises issues about the appropriate legal principles for resolving GATT disputes and the hierarchy of such principles. There are tensions due to other factors such as the inclusion of a substantive concept, namely "nullification and impairment," in Article XXIII.³¹ Such a provision broadens the ambit of the dispute settlement function of the GATT and takes it well outside the ambit of activity of domestic dispute resolution processes. Against this background, questions about procedure and the appropriate timing and methodology for negotiating improvements become more difficult. While these questions are important, they relate to the appropriate design of a dispute settlement system rather than the merits of such a system.

C. *Trade Law Versus Trade Diplomacy*

An additional argument suggests that law is inappropriate in an international sphere because an undue concern with rules leads to rigidity and tension between independent sovereign states. In a legal system rigidity is a pejorative term used as a replacement for "stability" or "certainty." Laws that are certain and become less appropriate as circumstances change are described as unduly rigid.

The rigidity of law is dependent, in part, on the presence or absence of mechanisms for dealing with changed circumstances. The amendment powers of the GATT are difficult to invoke, but this does not prove rigidity. Because the GATT has generous exceptions such as an escape clause³² and a waiver provision,³³ it is not an unduly rigid legal system. Increased rules do not lead to increased tensions.

³¹ The central concept that underlies Article XXIII is that of "nullification or impairment." This can encompass complaints based on breach of GATT rules and in addition, nonviolation actions which still could not have been reasonably anticipated by the complaining country and which in turn can be said to "nullify or impair" benefits that it has under the Agreement. See *supra* note 5 (quoting art. XXIII of the GATT).

³² Article XIX allows emergency action where as a result of unforeseen developments, increased imports "cause or threaten serious injury to domestic producers." GATT, *supra* note 1, art. XIX.

³³ The GATT allows Contracting Parties, in "exceptional circumstances," to waive obligations otherwise imposed upon a member. Thus, waivers can have an "amending

The GATT is a system without any effective sanctions and operates on a fully consensual basis. Thus, law is unlikely to increase international tension to an undesirable level. There is real tension in some disputes, but this is more likely to be a product of the precipitating actions themselves and not the law.

The rules of the GATT can be blamed if they do not reflect the intent of the parties, or if they encourage intransigent positions that militate against resolution, or if they allow minor disputes to escalate out of proportion. Examination of past disputes suggests that there are only two tenable arguments that may support this view. First, it is said that it is undesirable for different parties to have different attitudes about the role of law and the normative effect of the rules. All parties should be discouraged from inflating or deflating the importance of the dispute settlement system. This Perspective addresses that concern.

Second, it is argued that the particular form of the dispute settlement procedure, designed on the model of Western democratic legal systems, unduly upsets those members whose philosophy is to avoid labelling a culprit in a litigious environment. The membership of the GATT is far less homogeneous than at its inception.³⁴ The political and sociological differences among present contracting parties are addressed later in this Perspective because such arguments relate to the attitudes to and the form of dispute settlement, and not necessarily to the desirability of a dispute settlement mechanism. In addition, as a research methodology the domestic system of any state propounding this second argument should be examined carefully. Some countries that argue against adversarial processes employ features of them in their domestic systems.³⁵

D. Legalism Versus Pragmatism

The next general group of arguments against a rule-based system is that a pragmatic approach is better than a legalist approach. This overlaps with a number of other arguments. The overlap with the previous headings results from the claim that a pragmatic approach deals with policy issues better and is preferable because of the general defects of an international economic regulatory system. Others argue that the GATT is effective only as a forum and that within that forum states can negotiate anything. Others seek support

effect." Jackson, *supra* note 14, at 33. See also J. JACKSON, *supra* note 10, at 541-52 (for a fuller discussion of the waiver clause and its effects).

³⁴ See Appendix A for a list of the members of GATT as of June 30, 1988.

³⁵ While pragmatists are often embarrassed by their own domestic legal systems, it is also important to identify the historic influences. It may be wrong to presume that there is the same attitude toward law as in the country of influence. Countries forced to adopt particular legal systems or who developed rapidly simply to facilitate trade, may not accept the objective need for legalism.

in the sociological and jurisprudential differences and argue that dispute settlement, as perceived by its supporters, is an Anglo-American inspired concept whereas effective commerce is better facilitated by conciliatory mechanisms.

The preliminary response to these arguments returns to questions of certainty. The presence of some binding rules means that negotiations cannot be reopened whenever it suits one party's particular position. Commercial relations are more certain because there can be greater reliance on the fact that promises are likely to be kept. Not all disputes are a result of balanced and tenable competing attitudes. More often than not, disputes arise from a clear unilateral breach. This raises questions of equity, certainty, and the fundamental rights of contracting parties. If a party has been wronged, regardless of whether it is commercially prudent to take some of the loss in order to return to profitable trade, should the law prohibit that party from seeking full redress if that is what is sought? In response to suggestions that a conciliatory model is always better, the question is whether those countries that support a conciliatory model follow that model to the *exclusion* of the legal process or as a preferred first option. If the latter is the case, this goes to the question of the appropriate procedures of a dispute settlement system and not to the necessity for such a system at all.

E. GATT-Specific Issues

The criticisms discussed above apply generally to all areas of interaction between rules and international economic relations. The next group of arguments address specific problems in the GATT context. Some argue that the Article XXIII approach is unfair because GATT rights and obligations are now unbalanced and the dispute settlement system does not treat all "victims" equally. Such imbalances are due to several differences between countries. GATT rules do not operate equally for developing countries and industrialized countries, for minor traders and major traders, or for certain sectors such as agriculture compared to manufacturing.

There is also the view that the GATT has not dealt with certain issues such as the formation of the European Economic Community (EEC)³⁶ and the treatment of nonmarket economies. Others have argued that there are imbalances between different industrialized countries, particularly where the EEC is concerned. When comparing the performance of the United States and the EEC, tenable arguments are raised that show balances in either direction. The United

³⁶ The EEC consists of: Belgium, France, Federal Republic of Germany, Italy, Luxembourg, the Netherlands, the United Kingdom, Ireland, Denmark, Greece, Spain, and Portugal. M. KELLY, N. KIRMANI, M. XAFI, C. BOONEKAMP & P. WINGLEE, *ISSUES AND DEVELOPMENTS IN WORLD TRADE POLICY* 88 (1988).

States argues it has given more because it made all the early tariff concessions, while the EEC members hid behind balance-of-payments exemptions. Some commentators argue that the EEC is at a disadvantage because it does not have grandfather rights or an agriculture waiver, and because the rules were written in a way that was biased towards U.S. interests.

GATT dispute resolution mechanisms deal with certain types of disputes better than others. The corollary of this is that certain countries are better served by the GATT if their paramount interests are in those areas. The system should maximize equality of treatment, but differences do not obviate the desirability of a dispute settlement mechanism. Notwithstanding the fact that certain classes of disputes are inadequately served by the rules and processes and no matter which member you are dealing with, there are some things member states do which are indefensible breaches deserving the approbation of laws. This suggests why a dispute settlement system is desirable.

In responding to a member who argues that the GATT rules are imbalanced, it is worthwhile to examine whether that country always utilizes this argument or does so only when it is "defending" a complaint. Many of the GATT members have been complainants under Article XXIII and rarely articulate such a view in that context. Furthermore, even if some differences in rights and obligations are only identifiable, these are unfair if unintended and unbalanced. For example, if GATT members intend that certain GATT rules should not apply to developing countries, it is fair to make it harder to bring complaints against developing countries. Most industrialized countries hotly contest this position. It does raise the more general issue, however, that if there is no consensus between two categories of contracting parties over the operation of the dispute settlement system in a particular sector, there is no unintended imbalance. In the GATT context "balance" refers to a global balance of rights and obligations and does not occur within every permutation of disputants and sectors.

Because the neo-classical economic position is that unilateral compliance with sensible trade regulations is of itself beneficial, any increased compliance is efficient. The argument is at best one of equity versus efficiency. Questions of equity become complex when we deal with states and their citizens. Increased and imbalanced compliance is equitable if it helps that particular country's citizens.

Some of the specific arguments voiced regarding the GATT are aspects of the more general questions discussed above. For example, commentators have suggested that whatever the true status of international "law," the GATT is not a true legal system. The argument that the GATT is not law is that there is no permanency about

the GATT agreements. Contracting parties agree only to be bound by rules that they continue to agree apply to them. As a result, a party to a dispute may argue that the interpretation suggested by the other party is unacceptable because the first party would never have agreed to it at the time of initial negotiation and does not agree to it now. This argument is unduly static. Even if a contracting party cannot achieve pure consensual positions in a system when parties only reach agreement after they effect trade-offs, and even if all real agreements occur only when parties are already at the "to be agreed" position, law and dispute settlement are still necessary to protect that consensus.

In the real world any static consensus is a product of a myriad of competing factors. As circumstances change either the factors change or their relative weight changes. Just as international law emanating from custom becomes law with a prescriptive effect in its own right, the GATT and the Codes should also become law, regardless of whether they are merely codifications of custom. To argue that the GATT is essentially a contractual organization does not imply that it is inappropriate to apply any legalist norms to the behavior of individuals. A contract, by itself, is a legalist creation. Parties to a contract are not normally allowed to unilaterally determine the ambit of their contractual obligations.

The third GATT-specific argument against a rule-based system is that in the absence of true and meaningful consensus there is no role for a dispute settlement procedure. This argument equates with the argument that there is no effective law without consensus and when there is consensus there is no need for law. This is the static argument criticized above. On a narrower level this argument relates to timing. Its proponents have argued that contracting parties should not worry about dealing with dispute settlement issues until there is a real underlying consensus on the substantive aspects of the GATT. An allied argument is that legalism is rarely contained within appropriate boundaries, and rampant legalism precludes consensus. Some see lawyers and the legal system as encouraging an industry based on finding loopholes in explicit rules in order to make gains at the expense of others.

In the GATT system protectionism is the clearest example of lawyers finding loopholes in explicit rules to make gains at the expense of others. Protectionism is accomplished in a way that provides no real gain to the perpetrator of the measure. Before the GATT there was not a system where participants behaved appropriately until rules enticed them to behave differently. The GATT was created in response to damaging behavior in the years between the two World Wars. The rules, therefore, are a means of addressing real problems and directing behavior accordingly. The presence of

laws and a dispute settlement process does not stop parties from expending energy to make gains through manipulation of the rules. This is not an argument against the legal model, however. It is a limitation of a legal model and one that needs to be guarded against.

In domestic legal systems the most effective means of discouraging such casuistic practices is for the judiciary to employ expansive purposive interpretation techniques. Otherwise, the limitations of language are manipulated by skilled lawyers who undermine even the most explicit and well-drafted agreements. In an organization such as the GATT when the adjudicatory body is not fully independent and when independent sovereign states feel uneasy about delegating any decision-making function, there is the real possibility that a methodology of dispute settlement that is feasible is inadequate to dissuade parties from following such practices.

Whether now is the appropriate time to negotiate major changes in the dispute settlement system is unclear. Questions regarding the timing of the GATT negotiations are usually not dealt with on an academic level and invariably reflect trade-off agreements between major parties. For example, it is conceivable that the United States would be willing to make certain "concessions" in return for a "fast-track" agreement on at least some services issues. The fact that dispute settlement is nonsubstantive is a good issue to "get the ball rolling." On the other hand, many negotiators worry about agreeing to major changes in this area without having an idea of the other substantive changes made. If they agree, they are subject to binding agreements at a time when they are unable to advise their superiors on the ramifications of such agreements.

The timing of the debate on the dispute settlement function of the GATT could be resolved under the above scenario. Assuming that at least some contracting parties determine their response to the timing issue on more direct or purist grounds, there is a tenable argument that it is preferable to deal with dispute settlement questions before substantive issues. If this debate is carried out in an abstract setting so that negotiation does not occur at a time when parties automatically identify themselves as substantive "winners" or "losers," a more effective mechanism is possible. Contracting parties who think they have fared badly in the negotiations on substantive issues may hold back on any advances on the dispute settlement front to counterbalance their new and undesired obligations.

The contrary hypothesis is also possible and while considering it, it is important to question what is meant by "consensus." A dispute settlement system does not operate in a vacuum. It operates on substantive laws. The merit of the dispute settlement system is proportional to the equity and consensual nature of those laws, but invariably it is a question of degree. As stated above, real consensus in

the GATT context is a contractual consensus usually based on give and take. It is rarely, if ever, a result of identical attitudes to a particular issue by all contracting parties. A dispute settlement system has the function of protecting and developing, regardless of the present consensus and equity. If one defines consensus to mean identical attitudes at the time of the dispute, one has an unattainable concept upon which to base a legal system.

In the GATT context, the fact that panel reports are adopted if accepted unanimously shows that the reality of consensus encompasses both the formal rules themselves and the effect of the dispute settlement procedure on those rules. The necessary consensus is as much about realizing the costs of autarkic or anarchistic practices and the need to limit sovereignty to protect public goods as it is about constructing specific agreements on substantive issues. The approach to taxation of international transactions provides a good example. Most nations have understood the need for contractual limitations on their powers to tax to further international commerce.

The fact that a Round is under way obviously makes such issues less important. All key questions need to be considered during the Uruguay Round including dispute settlement. Like other issues, dispute settlement should be debated as soon as possible so there is adequate time to research, evaluate, and negotiate. In fact the parties are trying to complete a "fast track" or "early harvest" dispute settlement negotiation. This has been held up by concurrent negotiations on substantive issues such as agricultural subsidies.

If the GATT is to have any real place in an effective international order, some key agreements need to come out of the Uruguay Round. Too much of modern trade relations is perceived as being in response to the U.S. deficit and the Government's view of the economic responsibilities of Japan, the EEC, and the Federal Republic of Germany. The discussions and most of the suggested solutions are largely bilateral. The dispute settlement process is one feature of the multilateral nature of the GATT organization. An agreement to improve dispute settlement would be an important act of faith in that process. An early agreement in a key substantive area such as subsidies or safeguards would be an even better act of faith. Such substantive changes would be hard fought, would require give and take on all sides, and are likely to come, if at all, towards the end of the Round. Because of the contractual nature of change, it is desirable to have an effective legal system to support such a contract if it comes.

If the contracting parties pay their "price" for a particular substantive agreement and attention is given to supportive rules such as the dispute settlement issue, one party may find that the results of the latter negotiation will unbalance the initial bargain. The Tokyo

Round, with its piecemeal approach to dispute settlement, revealed additional problems of dealing with procedural matters after substantive issues. The whole history of the GATT, the circumstances of its creation and its eventual status as an organization with a less than optimal organizational structure, provides persuasive arguments against seeking to effect substantive changes without ensuring that there are prior or concurrent systemic developments to support those changes.

F. Philosophical Perspectives of Various Parties

Perceived political, jurisprudential, and sociological differences between contracting parties also precludes consensus on the dispute resolution issue. These factors are a key reason why some of the debates in the past have been repetitive and unproductive. Different contracting parties mean different things when they speak of sovereignty, equity, the nature of the GATT, and the role of law. Furthermore, constitutional and structural issues mean that a GATT agreement affects each contracting party's domestic activities differently. The ultimate effect of GATT rules depends on the constitution of each country, the sophistication of the administrative law system, the availability of domestic judicial review, and the attitude of the judiciary towards the domestic application of GATT rules.

Different contracting parties have different constitutional structures and different attitudes toward international law, treaties, panel reports, and the operation of domestic laws that emanate from the GATT agreements.³⁷ Antidumping laws are a good example. Countries with advanced administrative law systems find stronger limitations placed on government antidumping activities.³⁸ Other countries do not have any internal mechanism for challenging administrative discretions. To further the debate in this area each contracting party must examine, with greater respect, the legal systems of other parties to determine if there is some common ground internally or in the attitude of the role and status of an international legal order.

Recently, commentators have examined the domestic effect of international obligations in important jurisdictions such as the

³⁷ See generally Petersmann, *International and European Foreign Trade Law: GATT Dispute Settlement Proceedings Against the EEC*, 22 C.M.L. REV. 441 (1985) [hereinafter Petersmann, *GATT Dispute Settlement Proceedings Against the EEC*]; Bourgeois, *Effects of International Agreements in European Community Law: Are the Dice Cast?*, 82 MICH. L. REV. 1250 (1984); Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 C.M.L. REV. 397 (1983); Steenbergen, *The Status of GATT in Community Law*, 15 J. WORLD TRADE L. 337 (1981); Jackson, *The General Agreement on Tariffs and Trade in U.S. Domestic Law*, 66 MICH. L. REV. 249 (1967).

³⁸ This may explain, in part, why the United States, Canada, Australia, and the EEC have utilized the GATT's approach in developing much of their domestic antidumping legislation.

United States, Japan, and the EEC.³⁹ These commentators have concentrated on the preliminary stage of identifying and clarifying the various rules and explaining the resistance to substantive agreement by those members who have a complex decision-making structure or who perceive that their internal legal system forces them to comply with their obligations more than their trading partners. These factors help explain why a number of members are reluctant to agree on a formalized dispute settlement function. At the same time, members support the argument that it is better to obtain consensus on the procedural matters before addressing substantive issues. In any event, common positions must be sought. These positions are more likely when the parties are better informed about each others' real attitudes to law.

Nevertheless, philosophical differences should not be overvalued. Relationships between parties with diverse ideologies and who protect their sovereign autonomy are based on the binding contract and the need for predictability to support on-going commercial relationships. Bargains are necessary to create surplus value. For this to occur, however, the bargains must be kept. Rules facilitate bargains by promoting the certainty that those bargains will be kept. They also help create and protect surplus value.

In private trading relationships, the pragmatist argues that bargains are kept whenever they are struck because they are only struck when each party sees a benefit in them being properly conducted. A pragmatist acknowledges that disputes occur, but presumes that they arise from external circumstances and each party should be prepared to compromise to some extent to compensate for this change in the external circumstances. The appropriate response to dishonest breaches is to sever future trading relationships.

In the context of government actions the pressures and perceptions are quite different from a private contract. The individual liberty of a private trader to bargain or not cannot be compared to the liberty of sovereign states. Trade regulations by such states benefit some citizens to the detriment of others. Even in capitalist societies, mercantilist policies are a product of domestic political systems when sectoral interests capture a disproportionate level of influence. Such government actions are alarming if they interfere with the expected actions of individual traders to enter into mutually beneficial bargains. Mercantilism generally favors the rights of sectoral interests over consumers.⁴⁰ Nevertheless, such economic philosophies cannot be used to justify rules in an international system because they are

³⁹ See generally Jackson, Louis & Matsushita, *supra* note 11.

⁴⁰ The earliest phase of mercantilism, usually called *bullionism*, originated in the period . . . during which Europe experienced an acute shortage of gold and silver bullion and hence did not have enough money to service [its] rapidly expanding volume of trade. Bullionist policies were designed to attract a

not accepted by all contracting parties. History is a better lesson. If countries try to regulate to ensure a positive balance of trade, trade diminishes. At the very least, there is a consensus among the contracting parties that trade should occur.

IV. Legislation and Adjudication Methodologies

Perhaps the most neglected aspect of the debate about dispute resolution in the past has been the consideration of minimum requirements for a system aimed at effective legal decision making. While this Perspective shows that many of the more extreme arguments against a rule-based system can be undermined, it is just as important to understand the limitations of law. This is necessary so that safeguards can be built in when possible and too much reliance is not placed on the prescriptive effect of the rules. Attention now turns to identifying some of the methodological limitations. Some of these arguments do not necessarily undermine the desirability of a rule-based system, but merely qualify its real nature and the feasibility of its aims.

A reform exercise must be more than responsive to past problems. The academic is one of the few that can afford to talk about changes that are both desirable and impossible. GATT solutions should have a substantial practical element. Nevertheless, the intellectual process should not address practical limitations prematurely. The aim of the academic should be to draw up an abstract agenda that contains all the theoretical issues that are important. Next, theoretical impediments to such suggestions should be identified. Only then should the academic consider impediments in practice. The reformer should try, if possible, to determine the minimum abstract requirements of an effective rule-based system and compare those requirements with what is feasible and ultimately what is proposed. If that minimum standard goes beyond what is proposed, we must be prepared to provide reasoned criticism of the proposal and arguments that encourage shifts in perceptions.

flow of gold and silver into a country and keep them there by prohibiting their export.

.....

After the bullionist period, the merchantilists' desire to maximize the gold and silver within a country took the form of attempts by the government to create a favorable balance of trade. To them a *favorable balance of trade* meant that money payments into the country would be greater than money flowing out of the country. Thus exports of goods as well as such things as shipping and insuring when they were performed by compatriots and paid for by foreigners were encouraged, and imports of goods and shipping and insurance charges paid to foreigners were discouraged. A favorable balance of trade would ensure augmentation of the country's treasury. Even though some gold and silver would be paid out in the process, more would come in than leave.

E. HUNT & H. SHERMAN, *ECONOMICS—AN INTRODUCTION TO TRADITIONAL AND RADICAL VIEWS* 21 (5th ed. 1986) (emphasis in original).

The first issue is the approach to lawmaking within the GATT. The domestic analogy to this issue is the role of statute law versus common or judge-made law. Whether panels themselves can make law is a preliminary question. The strict answer is no.⁴¹ What then is the status of panel reports? In a normative sense, should the panels be able to make definitive rulings that bind the contracting parties both in the instant dispute and in future actions? Many argue that judge-made or panel-made law is inappropriate in an international forum such as the GATT. The GATT is based on consensus and it would offend sovereignty if a panel interprets an agreement in a way that goes beyond the initial consensus. These arguments, however, misrepresent the nature of law and ignore the limitations of language.

When contracting parties negotiate a rule which says that subsidies can be countervailed if they cause injury, they delegate to the adjudicator the task of articulating and comparing appropriate criteria. It is better if the criteria can be included in a Code, but it is often not possible to identify an exhaustive list in advance without the aid of a concentrated examination of real situations. When this is possible, the adjudicator still must weigh and rank the factors and assess the competing evidentiary arguments. Nevertheless, adjudicators in a delicate organization like the GATT cannot be too dynamic. There is always a need for a happy medium, although such a position is difficult to circumscribe in explicit legal terminology. In a practical sense, it depends on the qualities of the adjudicators.

The role of the adjudicator is of legitimate concern to many contracting parties. The conservative response is that we should write better laws and not rely on the adjudicators to be more "active" in their interpretation. This response is too simplistic. A diplomatic forum such as the GATT is not likely to be the optimum environment for drafting complex and comprehensive trade laws. Any dispute settlement system occasionally operates on drafting that is less than optimal quality.

In addition to the "soft" law arguments dealt with above, there is the practical problem of trying to utilize laws built on defective or impractical economic principles. Commentators have suggested that the GATT's agricultural rules that contain concepts such as "equitable share of world trade"⁴² and causation concepts, like the an-

⁴¹ The concept of a panel is not even mentioned in Article XXIII. Panel reports are advisory in nature until acted upon by the GATT Council. GATT Council decisions, pursuant to Article XXIII:2, give legal force to the panel reports. Panel reports, rulings, and recommendations "have been adopted by the GATT Council almost invariably without amendment or extensive discussion." Petersmann, *GATT Dispute Settlement Proceedings Against the EEC*, *supra* note 37, at 470.

⁴² See *supra* note 15 (discussing the problems with the concept in drafting "soft" agricultural laws).

tidumping and countervailing provisions, are too difficult to interpret. Some economists have suggested that the antidumping laws are not justified. Others have suggested that many of the central concepts are indeterminate. Too often a legal system and its key players are blamed when controversial results are unavoidable because of initial design or drafting defects.

Because of the different perspectives and aspirations of the participants, the GATT was never drafted to give effect to a single policy aim. While it is loosely based on the principles of comparative advantage and free trade, it does not demand total unregulated trade. The GATT, in initial design, recent amendments, and practices, has sought to accommodate a number of competing aims. In addition to free trade, these aims include the development aims of less developed countries, the political aspirations in free trade areas, foreign exchange issues, and the desire of most governments for full employment. For reasons of political necessity, the GATT contains safety valves and exclusions that remove certainty. As a result, in any interpretation process there is no single purpose that can be identified and employed as a yardstick. Even if there was an identifiable purpose, the adjudicator would still face difficult interpretation questions associated with that single identifiable purpose. For example, an agreement with a stated purpose of "absolutely free trade" as the only purpose would still be difficult to interpret. Because interpretation is both difficult and necessary it is desirable to consider the role of interpretation in more detail.

In any sophisticated adjudicatory system, decision makers must determine what interpretation techniques to follow. In a domestic context, the choice is often stated as between narrow or literal approaches, and expansive or purposive approaches. The Vienna Convention on the Law of Treaties,⁴³ which was arrived at after extensive deliberation on such issues, chose an amalgam that made the literal approach predominant. While this Convention does not directly apply to the GATT, some commentators have pointed out that the Convention's approach is now part of customary international law.

There are problems with such an approach. From a policy point of view in the domestic sphere, the choice of a narrow approach has been justified on the basis of libertarian ideology. For example, common law jurisdictions have evolved rules to the effect that criminal and revenue laws should be read against the state and in favor of the individual. But the GATT dispute settlement is not between the state and an individual. It is between one contracting party and another. As a result, there is not the same policy justification for a literal approach. Many of those same domestic systems also have

⁴³ *Opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

experienced a shift to purposive interpretation. After all, the state is not a visible entity separate from the citizens within it. To many commentators the libertarian philosophy is too narrow a principle on which to base a complete social compact.

The issue in the GATT is not a question of libertarianism, but a question of sovereignty and the contractual limitations on the autonomy of a sovereign. The approach to interpretation is examined in the general context of adjudicatory resolution of contract disputes. Even here we must further examine what we mean by a contract. The GATT contractual arrangement is not like a domestic contract, at least in relation to dispute resolution. With the latter, the courts readily look for implied terms to fill in any perceived gaps. Contract law in most systems contains clearly defined interpretational maxims and techniques that are known by the parties before the agreement.

These would not translate readily to a GATT context. The values that have determined the methodology of domestic contract dispute resolution are very different from those that would be accepted within an international organization. In the domestic sphere, the rules value the certainty of some result over the importance of restricting contractual obligations to voluntary manifest intentions. Domestic rules look to the reasonable expectations of the promisee when it is difficult to identify a clear meeting of the minds. Domestic contract interpretation also concentrates solely on the intent at the time of forming the contract. This is not as appropriate in an international organization, although it is expected to be the proper starting point. This in turn raises questions regarding the sensibility of the teleological approach.

Although there have been a substantial number of disputes within the GATT context without contracting parties or panels debating these questions openly, these questions cannot be ignored indefinitely. Agreements such as the GATT are necessary because countries feel the desire to behave in ways that do not give effect to mutual benefits. If contracting parties were content to behave mutually, there would be no need for trade agreements. Agreements restrain inappropriate mutual behavior. They do not affect the underlying desires, but only impose barriers to the consummation of those desires. In this environment it is becoming more evident that contracting parties frequently consider the nature of their obligations and interpret them narrowly or avoid them through creative artifice. Some of these devices are probably legal in the strict sense. They are viewed by some as entirely proper, while others regard them as similar to unchallengeable and unmeritorious tax avoidance techniques.

Some of these avoidance techniques are illegal. In most cases the devices are unlikely to be consistent with the trade liberalization

purposes behind the GATT. Examples include tariff specialization, tariff escalation, upstream subsidies, voluntary export restraints and other "grey area" measures, variable levies, and tariff quotas. Most devices have the commercial effect of discriminating between exporters, or restricting imports, and are drafted to look like something other than an illegal quantitative restriction or a discriminatory rule in breach of Article I.

Voluntary export restraints rely on the absence of a traditional complainant, while the variable levy and the tariff quota take on the formalistic visage of tariffs or duties. Many argue that the variable levy operates in the absence of meaningful bound tariffs and that there is no avoidance purpose associated with it. They argue that it is simply a case by case optimal tariff rather than a specified tariff level of general application. In an economic sense, however, there is a contrary argument that a true tariff leaves the domestic manufacturer subject to some real price competition. If the duty rate always gives the manufacturer an advantage, it is an abuse of that term to describe it as a tariff.

Tariff specialization and tariff escalation show that reciprocity and MFN treatment cannot guarantee fundamental equality of treatment when there is no desire for this to occur. Tariff specialization occurs when the tariff categories are described so narrowly that an effective preference is given to certain producers. Tariff escalation is the phenomenon of tariff rates being low on primary producers, rising gradually because there is more labor intensive value added to those products and falling again in relation to high technology goods. This demonstrates how tariff reductions serve the mercantilist interests of industrialized countries. These are examples of a trend that is likely to continue.

As tariff barriers are removed through progressive Rounds, attention has turned to nontariff barriers. Attention is likely to turn to identifying loopholes in Codes negotiated to limit nontariff barriers. A legal system that regulates commercial activity needs to consider how to react to such avoidance techniques. It is desirable to dissuade participants from spending time on such endeavors because the cost to the system cannot be overestimated. The most effective means is to encourage anti-avoidance methodology by adjudicators. The GATT legislative process is too slow and easily frustrated to deal with each and every technique as it comes to light. Once such techniques are widely practiced norms of behavior, it is too much to ask of a dispute settlement system to restrict them through expansive interpretation. An early adjudication could preclude the spread of such techniques. That task is not easy.

While it is demonstrable that a commercial regulation system needs to deal with avoidance, how is the term defined? How are ac-

tions categorized into acceptable and unacceptable techniques? These are formidable questions facing panelists. If avoidance techniques are likely to be a problem, thought may be given to the drafting or strengthening of anti-avoidance devices. Nondiscriminatory principles are aimed at ensuring that reciprocal bargains are not subsequently undermined by more favorable agreements with third parties. The ability to complain about nullification and impairment in the absence of breach is also an anti-avoidance mechanism because it concerns itself with the substance of international practices. In addition, the role of the secretariat, surveillance and transparency mechanisms, and the desirability of a code of interpretation or some other explicit directives need to be considered.

While there are many complex variables in these recommendations, it is better to begin an assessment of the issues at this stage, rather than wait until a critical mass of actual disputes supports the predictions made. Such sensitive issues are unlikely to be resolved in the context of actual disputes between major traders.

The final issue and the one that goes to the heart of the dispute settlement question is the role of precedent within the GATT system. The strict legal position is that contracting parties cannot be bound by any panel report whether in the instant dispute or a previous one. This assumes that the correct position is the position evidenced by the terms of the GATT itself and unaffected by accepted practices. It also begs the question faced by most final courts of appeal. Invariably they also have the right to ignore past decisions. Nevertheless, most courts choose to follow precedent except in unusual circumstances.

Examination of the GATT panel reports shows that past approaches are often followed and they are cited. It is interesting that in a pluralistic body such as the GATT, precedent in dispute settlement is so highly prized. Many contracting parties do not afford anywhere near the role to precedent in their domestic judicial systems. This is explicable because precedent acts as a constraint on judicial activism and a stimulus to certainty. Comparative lawyers also show that much of the stated difference is illusory. Civil law judges find themselves able to follow past decisions with the same ease with which common law judges can distinguish them.

In the GATT context, there are additional reasons why panels often follow past decisions. Panels often would not wish to be viewed as making new decisions that favor one contracting party over another. Following "precedent" looks as if the panel had not made any such choice. In reality, however, choosing to follow a nonbinding precedent is as activist as the contrary approach. Panelists may prefer to follow past decisions because their reasoning is more criti-

cally evaluated when failing to follow a precedent than when following it.

V. The Process of Dispute Resolution

The one area of GATT dispute settlement that has been discussed at some length is procedure, particularly in relation to the constitution of panels and the adoption of reports.⁴⁴ In spite of the amount of discussion over the adequacy of the present panel procedures and structures there are a number of issues that have not been considered. These should be addressed to determine the full extent of desirable reforms. The debate so far has been limited to reacting to the most serious of the present defects. Commentators have identified in great detail the major defects that have emerged recently. At the mid-term review of the Uruguay Round held in Montreal in December 1988, a text on dispute settlement was prepared with a view towards being adopted. It was not formally adopted because of the breakdown of negotiations on other issues, particularly agricul-

⁴⁴ While Article XXIII implies an adjudicative dispute settlement process because it enables the contracting parties to give a ruling when appropriate, and in certain circumstances to authorize retaliation, it did not establish a separate or independent adjudicatory body. The present panel procedure was established by some degree of slight of hand. R. HUDEC, *supra* note 2, at 80.

During the Tokyo Round, the Contracting Parties adopted an Understanding regarding Notification, Consultation, Dispute, Settlement and Surveillance (hereinafter the "Understanding") with an Annex, being an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement. See GATT, 26th Supp. B.I.S.D. 210 (1980).

The actual conduct and procedure depends in part on the terms of Article XXIII and in part on customary practice as outlined in the Understanding. While Article XXIII requires a preliminary consultation phase, the consultation procedure in Article XXII:1 has been accepted as satisfying this precondition. See GATT, 9th Supp. B.I.S.D. 20 (1961). On November 10, 1958, procedures were adopted in relation to Article XXII consultations. See GATT, 7th Supp. B.I.S.D. 24 (1959). On April 5, 1966, procedures were adopted in relation to Article XXIII. See GATT, 14th Supp. B.I.S.D. 139-40 (1966). In 1966, the Contracting Parties determined that with disputes between industrialized and developing countries the latter may ask the Director-General to use his good offices to seek a resolution of the dispute. See *id.* at 18.

Further attention was given to dispute settlement procedures in the 1982 Ministerial Declaration. See 29th Supp. B.I.S.D. 13 (1983). The 1979 Understanding and the 1982 Ministerial Declaration both envisioned a voluntary conciliation phase being more generally applied. The 1982 Ministerial Declaration indicated that no major change was required in the framework of procedures for the settlement of disputes but rather there was scope for more effective use of the existing mechanisms and supported the procedures in the Understanding. *Id.* In July 1985, a note was prepared by the Office of Legal Affairs of the Secretariat setting out the internal working procedures customarily adopted by panels established under Article XXII:2. These procedures have been regularly adopted since the publication of that note.

If the consultative processes do not effect a solution, the complainant may ask the contracting parties to establish a Panel. Because the practice of GATT Council meetings is that decisions must be unanimous, there can be considerable delay in agreeing to the establishment of a Panel and agreeing on the actual persons who are to serve on it. Notwithstanding that the procedure has now been used for many years, there is still no express right to the appointment of a Panel although establishment has been delayed but never denied.

tural subsidies. All matters were left in abeyance until the forthcoming April meeting of the contracting parties in Geneva. The perceived defects and current proposals include the following.

(1) *Selecting panelists.* Delays occur because most parties must agree on the members. The text allows the Director-General to select panelists if the parties cannot agree within twenty days.

(2) *Limited pool of panelists.* Disputants are reluctant to agree on panelists that appear to be "related" to a party or who have insufficient experience. This puts a great strain on certain members such as the Nordic group, whose representatives are invariably the first approached.

(3) *External panelists.* The contracting parties have approved and started to employ "outside" experts on panels to relieve the strain on certain members. The text recommends that this be further developed.

(4) *The right to a panel.* Debate has occurred over when and whether a party can unilaterally demand that a panel be established and what terms of reference are appropriate. The text makes this right to a panel clear.

(5) *Time periods.* There is some tension resulting from the fact that there is no clear time frame for establishing panels, for panel deliberations and reports, and for ultimate adoption of reports. The text proposes a nine month maximum for the panel process and provides recommended goals of six months and three months respectively for ordinary and urgent matters.

(6) *Drafting of terms of reference.* In most domestic legal systems, it is not up to the parties to determine the appropriate terms of reference and no one party has a veto over such matters. It is open to the complainant to make allegations as broad as wished. The adjudicator determines which allegations are reasonable. Recent disputes have shown an unfortunate tendency to use the negotiation of draft terms of reference both to delay the procedure and to limit the ambit of the potential panel decision. The text proposes standard terms of reference to be employed in each dispute unless the parties agree to the contrary within twenty days.

(7) *Follow up.* Various parties disagree over the proper follow up action when identified breaches are not immediately rectified. The text asks the Council to follow up panel decisions.

(8) *Veto powers.* In recent disputes the contracting parties have frustrated the system by abusing the effective veto that a consensual approach gives to the losing party. The text did not contain any proposal to alter the consensual approach to the adoption of reports.

These are real and fundamental problems that must be addressed if a dispute settlement system is to have any chance of providing any benefits to the international economic order. They have

been known for some time and preoccupied the negotiating group on dispute resolution in its early deliberations. This is as it should be. Nevertheless, there are other issues that are vulnerable to improper manipulation, or that could unnecessarily restrict the effectiveness of a dispute settlement system. The existing defects bring no credit to the contracting parties and are almost entirely without intellectual justification. These defects can be remedied. The important question is to identify other desirable reforms, if any.

Successful research begins with an examination of procedural issues both in international fora and in domestic legal systems. This is because such systems are typically more sophisticated and contain a broader array of possible devices. It is appropriate to consider the policy basis for each procedural device to determine if such policy goal is desirable and feasible in an international context. It is necessary to consider comparative attitudes to procedure and determine if such devices are considered desirable by various contracting parties. There are many more potential areas for dispute settlement that must be addressed at some point by any sophisticated legal system. In addition to the above issues, other procedural questions worthy of consideration, or worthy of reconsideration if they were dealt with in some way under the GATT Understandings or Agreements, include the following.

(1) *Locus standi*. The rules regarding standing for GATT complaints depend on the terminology of Article XXIII and on the concepts of "nullification and impairment." Consideration should be given to whether this is a sufficient and appropriate criterion. Possibly an independent person such as the Director General should be allowed to bring complaints before the relevant body.

(2) *Representative actions*. Allied to the question of standing is the problem of outside interested parties. In a system such as the GATT, the subject matter of a particular dispute is invariably of interest to parties other than the two disputants. Although interested parties are normally given rights to appear before panels, it is not clear what the full extent of these rights are. In particular, if a complaint is made by one contracting party about the export practices of another member in relation to a particular commodity, should the particular complainant be allowed to utilize the panel report or should all other relevant exporters be able to demand satisfaction without further procedure? If this is not possible because of the present strict interpretation of the Agreement, what would be the attitude of the contracting parties to some form of class action?

(3) *Third party rights*. A further related issue is the duty of a contracting party "breached" against to bring a complaint when the breach is of no concern, or is even perceived to benefit the breached party. Third country dumping and subsidization highlight the

problems with thinking of disputes in two party terms. Limited third party rights were suggested in the text discussed at the mid-term review in Montreal.

(4) *Individual rights.* Some leading commentators have questioned whether individuals should be given the right to present complaints when their own state is unable or unwilling to do so effectively.

(5) *Aid to weaker parties.* As in domestic legal systems, the various parties are not of similar size, economic development, and experience in preparing and presenting legal arguments. The question is to what extent assistance should be provided to counteract these imbalances. The mid-term review text suggested that the Secretariat should provide assistance, particularly to developing countries.

(6) *Interlocutory procedures.* While few desire to see GATT dispute resolution take on the formalistic trappings of many Western democratic legal systems, there are instances when a party is unable to pursue adequately a legitimate claim because key evidence is within the sole possession of the defendant party. What obligations are there to provide information to the other party and to the panel, and should the present practice be changed?

(7) *The appropriate burden and onus of proof.* Another problem is the attitude of past panels towards the proposition that the presence of breach is prima facie evidence of nullification and impairment. Many of the concerns about the dispute settlement system have resulted from dissatisfaction with particular panel findings. At times this dissatisfaction stems from a misunderstanding of the nature of law and the legal process. Adjudication in the legal system works by presumption and assumption. Legal reasoning relies on induction and deduction, and rarely on incontrovertible proof. The adjudicator rarely knows with certainty what the correct answer is, but identifies the best answer in the given dispute within the confines of the appropriate probability required by the accepted burden of proof.

An important issue related to the question of burden and onus of proof is the determination of the appropriate minimum requirements before a panel can come to firm conclusions. A particular example involves causation questions. Commentators have argued that panels should not require a connection tending towards mathematical certainty before finding certain causal criteria satisfied. This approach is unacceptable in most legal systems.

(8) *The role of expert witnesses.* This category includes the appropriate role of panelists who are experts in a particular area and what quasi-judicial notice they should take. In addition, this category includes the role of expert secretariat members who assist in the conduct of panel procedures, and the approach to testing the evidence of particular experts called by the relevant parties.

(9) *Evidence rules.* Consideration should be given to "best evidence" stipulations if this is thought to be an appropriate means to ensure that a decision is reached.

(10) *Confidentiality.* Questions regarding how open panel proceedings should be have troubled domestic courts, particularly in antidumping and countervailing duty proceedings. In addition, courts have also considered the extent to which evidentiary materials should be restricted either with regard to third parties or the complainant.

(11) *The relevance of principles of natural justice or equity to panel procedures.* The issues to consider include deciding what attitude should be taken towards allegations of bias and affording full rights to be heard. Consideration should also be given to whether there is anything to learn from principles of equity such as the old maxim which requires that one who comes to equity must come with "clean hands."

(12) *Abuse of process.* This relates to unduly delaying proceedings or even inundating a fellow contracting party with complaints to force particular responses.

(13) *Dealing with more than one dispute at a time.* There are instances when a number of disputes are interrelated in practical terms and it is desirable to assess the whole relationship globally. The mid-term review text proposed that panels be empowered to hear more than one dispute on the same matter.

(14) *Costs.* Again, although it is undesirable to follow a strict adversarial legal model, many contracting parties find it extremely difficult to present comprehensive cases because of the cost factor.

(15) *Remedies.* Although it is unlikely that parties would agree to major changes in the remedies area, this is an area for further research. At the very least, a greater understanding of the nature and scope of the existing remedies would lead to a better understanding of the present dispute settlement process. While an unlikely reform, interim measures are useful in protecting claimants in certain disputes.

(16) *Settlements.* Considerations with respect to settlements include the appropriate attitude of other contracting parties when disputants seek to settle a matter either before or after a panel has made its report. An additional question is whether settlement must be consistent with GATT norms and, if so, who has the right to evaluate the terms of the settlement to ensure that this is the case. Whether there is an obligation on the disputants to notify other contracting parties of the terms of the settlement is also unclear. The mid-term review text suggested that notification of the Council of settlement be required and that the settlements be within the GATT rules.

(17) *Adoption of panel reports by a methodology less than full consensus.*

As indicated above, full consensus grants to each party, including the disputants, an effective right of veto of any panel report. Other methodologies have been discussed and these are being considered as part of the current negotiations.

(18) *Review of decisions.* In the domestic sphere many states use a three-tier adjudicatory system because it is considered more accurate. Questions regarding whether the Council or some higher body can conduct a formal appeal and whether cases can be remitted for further consideration must be addressed.

(19) *Review of compliance.* This is a question of follow-up by the panel or Council or is a subset of the more general surveillance issue in the GATT context.

VI. Evaluating the Effectiveness of Dispute Resolution

Identifying and analyzing these questions is not the end of the matter. This Perspective has sought to identify the general intellectual issues that should be addressed in any meaningful review of the GATT dispute settlement system. They should not be discussed in a vacuum. Rather, the first stage should be a critical evaluation of the strengths and weaknesses of the treatment of past disputes under the GATT. This is currently being done as part of the Uruguay Round negotiations. The potential defects in any empirical methodology and the effect this may have on the correctness of the conclusions should not be underestimated.

This again raises fundamental questions of what is meant by dispute settlement, when has it been used, and how effective has it been? These questions are difficult to answer when limited to completed panel reports as the sample for critical evaluation. While there are good practical reasons for limiting research and evaluation to such visible forms of data, there are serious and unanswerable questions regarding the real effect of a dispute settlement system. These include: Who was deterred from breaching the rules and why; how many disputes were dropped or resolved before the Article XXIII stage and why; and whether the Article XXIII approach has been consistently followed throughout the history of the GATT. There are many procedures under other Articles and there are a number of other matters dealt with by Working Parties that come within most standard definitions of a "dispute."

In addition, there are a number of ways to categorize the known disputes or potential disputes. Disputes are categorized according to the measure used, the type of parties involved, the product or sector, the drafting difficulty, the remedy sought, the economic concept involved, or by the creativity of the ruling. These categories can be used for empirical analysis of past disputes and analytical consideration of the effectiveness of dispute settlement in various areas. An-

other method of categorization involves identifying how panels have behaved on questions of precedent, fact finding, witnesses, and more general issues such as the choice between equity and efficiency.

In addition to the need to be prepared to justify the categorizations chosen, the temptation to compile and rely on percentage statistics from which to postulate conclusions should be avoided. There are scientific limitations to such an exercise due to the limited data pool and the many value judgments in the choice of categories for such statistical analysis. As a result, the worth of any hypothesis is easily undermined by such methodological issues. For example, if the dispute settlement process was perceived to have "succeeded" in thirty-seven out of forty cases, does this mean it was successful overall? What if two out of the three "problem" cases were the only cases brought by a particular contracting party? What if they constituted the majority of cases in a difficult product sector? What if the three problem cases were the last three panel decisions? What if there were fifty similar disputes that were resolved outside of the GATT and in ways inconsistent with its provisions?

The veracity of dispute settlement statistics under the GATT is questionable even when the researcher has the best intentions. The categories are by no means mutually exclusive. For these reasons the myriad of factors present make the question of what caused failure beyond the capabilities of purely empirical testing in the GATT setting.

VII. Conclusion

The above jurisprudential, procedural, and methodological issues are far too complex to encourage even tentative conclusions at this stage about the desired makeup of the GATT dispute settlement process. They do suggest, however, that there are enough important issues emanating from this increasingly complex agreement that need to be addressed instead of the more extreme arguments. In the above discussion I have sought to identify those issues I believe to be important in a meaningful debate about the GATT dispute resolution system. While my preliminary responses to many of the key arguments show a bias in favor of a rule-based system, I have sought to highlight the more significant factors that both support and restrict the potential effect of a dispute settlement mechanism. The simplistic polarized arguments of the past should be recognized as such and discarded, and attention should be shifted to the more difficult questions.

In view of the highlighted defects in the traditional pragmatist argument, it should be clear that there is some meaningful role for law and dispute resolution to play in the GATT multilateral trading system. The exact role of law that is likely and proper is more diffi-

cult to define, but this should not concern us unduly. Law is one of a number of stimuli. The fact that it does not guarantee anything implies that its potential for compliance is easily underestimated. It is a waste of effort to determine precisely how important law is compared to other factors because the mix changes over time. As long as the role of law is more than minimal, the effort to create an effective rule-based system should be made. That effort includes consideration of general questions such as deciding how extensive the dispute settlement system should be, by whom and under what methodology should it be conducted, how the contracting parties should review and override the mechanism, and how to select and negotiate appropriate models for change.

This debate should be conducted with the knowledge that international economic law is neither a panacea nor a snake oil cure. The realities of the negotiating table demand that some of these issues be left alone. Progress is not facilitated by rushing headlong into a far-reaching debate. Nevertheless, the abstract intellectual agenda remains the same—ignoring it only ensures future problems and complex negotiations.

Appendix A*A. Contracting Parties to the GATT¹*

Antigua and Barbuda	Germany, Federal Republic of	Niger
Argentina	Ghana	Nigeria
Australia	Greece	Norway
Austria	Guyana	Pakistan
Bangladesh	Haiti	Peru
Barbados	Hong Kong	Philippines
Belgium	Hungary	Poland
Belize	Iceland	Portugal
Benin	India	Romania
Botswana	Indonesia	Rwanda
Brazil	Ireland	Senegal
Burkina Faso	Israel	Sierra Leone
Burma	Italy	Singapore
Burundi	Jamaica	South Africa
Cameroon	Japan	Spain
Canada	Kenya	Sri Lanka
Central African Republic	Korea	Suriname
Chad	Kuwait	Sweden
Chile	Lesotho	Switzerland
Colombia	Luxembourg	Tanzania
Congo	Madagascar	Thailand
Côte d'Ivoire	Malawi	Togo
Cuba	Malaysia	Trinidad and Tobago
Cyprus	Maldives	Turkey
Czechoslovakia	Malta	Uganda
Denmark	Mauritania	United Kingdom
Dominican Republic	Mauritius	United States
Egypt	Mexico	Uruguay
Finland	Morocco	Yugoslavia
France	Netherlands	Zaire
Gabon	New Zealand	Zambia
Gambia, The	Nicaragua	Zimbabwe

B. *Acceded Provisionally*
TunisiaC. *De Facto Application*²

Algeria	Guinea-Bissau	Sao Tome and Principe
Angola	Kampuchea, Demoratic	Seychelles
Bahamas, The	Kiribati	Solomon Islands
Bahrain	Mali	Swaziland
Brunei	Mozambique	Tonga
Cape Verde	Papua New Guinea	Tuvalu
Dominica	Qatar	United Arab Emirates
Equatorial Guinea	St. Kitts and Nevis	Yemen, People's Democratic Republic of
Fiji	St. Lucia	
Grenada	St. Vincent	

Source: M. KELLY, N. KIRMANI, M. XAFA, C. BOONE KAMP & P. WINGLER, ISSUES AND DEVELOPMENTS IN WORLD TRADE POLICY 134, table A27 (1988).

¹ As of June 30, 1988

² Countries to whose territories the GATT has been applied and which now, as independent states, maintain a de facto application of the GATT pending final decisions as to their future commercial policy.

