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The Establishment of New Law through Subsequent Practice in GATT

Cover Page Footnote

International Law; Commercial Law; Law

The Establishment of New Law Through Subsequent Practice in GATT

Georg M. Berrisch*

I. Introduction

A. Pragmatism, flexibility, and the role of law in the GATT legal system

There is perhaps no international organization in which law is viewed as such a hindrance to progress as in the GATT.¹

One of the characteristics of public international law is the fact that it is created to meet social, economic, and political realities.² Its primary actors, the states, are sovereign actors. In exercising their sovereignty they create rules - treaties as well as rules of customary law - which they believe are most appropriate to meet their needs and interests.³ This characteristic of international law is especially relevant to international economic law, of which the GATT⁴ legal system is the single most important part.⁵

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¹ K. DAM, *THE GATT, LAW AND INTERNATIONAL ORGANIZATION* xiii-xiv (1970).

² A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT - THEORIE UND PRAXIS* 51 (3d ed. 1984).

³ Of course, these interests are generally conflicting. However, the rules laid down in treaties or by customary international law reflect an agreement or common understanding between states on what the states believe should govern their relationship as a rule of law. For treaties, this follows directly from the conclusion of the treaty, and for customary law, it can be concluded from the requirements for its creation, which are a common practice and *opinio juris* of the states participating. See *infra* notes 47-63 and accompanying text.

By introducing this notion of international law, I do not want to suggest a strict positivist understanding of international law by saying that international law can only be created by an act of a sovereign state. But without engaging in a discussion on the foundations of international law in general, or international economic law in particular, it is safe to say that treaties and international customary law are generally accepted as international law and constitute the main sources of international law. For a discussion on the legal theory of international economic law, see Petersmann, *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 227 (1983).

⁴ 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 or General Agreement).

⁵ For a definition of international economic law, see D. CARREAU, P. JULIARD, & T. FLORY, *DRIT INTERNATIONAL ECONOMIQUE* 7-14 (2d ed. 1980) (hereinafter CARREAU); P. VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* 13

The GATT legal system is often seen as a flexible one with a very pragmatic approach to the treatment of conflicts between its contracting parties.⁶ It is also described as a political legal system dealing with the mediation of conflicting international economic interests which generally have an enormous impact on political decisions.⁷ The mediation of these conflicting interests is not always based on a pure legal strategy,⁸ but is often approached pragmatically with a goal of achieving consensus between the parties. This may even include tolerance of deviation from certain provisions of the GATT. Flexibility and pragmatism are, therefore, characteristic elements of the GATT legal order.

The element of flexibility is set forth in the General Agreement itself, which contains a great variety of exemptions from its provisions.⁹ These exemptions enable the contracting parties to deviate from almost every obligation under the General Agreement if a superior national interest exists. This interest may be an economic interest, as indicated in article XIX¹⁰ (Emergency Action for Imports of Particular Goods), and in article XII:2 (Restrictions to Safeguard the Balance-of-Payments), or a non-economic interest, as indicated in article XX (General Exceptions) and article XXI (Security Exceptions). In addition to this the CONTRACTING PARTIES¹¹ may grant, according to article XXV:5, any contracting party a waiver from any provision of the General Agreement.¹²

Pragmatism in the GATT legal system means the resolution of conflicts by concentrating on the concrete problems at the time they occur and using the flexible instruments the GATT provides.¹³ One of the first and most prominent examples of this kind of GATT prag-

(1981). For a brief survey, see Jackson, *Economic Law, International*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 149 (Bernhardt ed. 1985).

⁶ See generally J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 755-63, 147, 213 (1969); R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* vi (1975); O. LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 19 (1985).

⁷ W. BENEDEK, *DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT* [The GATT Legal Order from a Public International Law Perspective] 394 (1989); JACKSON, *supra* note 6, at 756.

⁸ See HUDEC, *supra* note 6, at vi; Hudec, *GATT or GATT?*, 80 YALE L.J. 1299 (1971).

⁹ BENEDEK, *supra* note 7, at 393.

¹⁰ All articles are articles of the General Agreement on Tariffs and Trade unless otherwise indicated.

¹¹ For the use of the term "CONTRACTING PARTIES" written in capital letters, see GATT, *supra* note 4, art. XXV ("Wherever reference is made in this agreement to the contracting parties acting jointly, they are designated as CONTRACTING PARTIES.").

¹² The most important waiver currently in force is the indefinite waiver for the United States Agriculture policy. GATT, 3d Supp. B.I.S.D. 32 (1955) (discussing a waiver granted to the United States in connection with the import restrictions imposed by the United States Agricultural Adjustment Act). An updated list of all waivers currently in force can be found in the index of every supplement of the B.I.S.D. Because of its far reaching effects, a waiver can be viewed as an amendment of the General Agreement. JACKSON, *supra* note 6, at 137; LONG, *supra* note 6, at 18.

¹³ JACKSON, *supra* note 6, at 755.

matism may be found in the examination of the European Economic Community (EEC) Treaty¹⁴ under article XXIV.¹⁵ The 1957 Working Party¹⁶ which examined the EEC Treaty did not reach a definite conclusion, and, therefore, the issue was referred to the Intersessional Committee.¹⁷ This committee, which also could not achieve a consensus on the problem, came to the following conclusion:

In the light of these statements and reports, the Committee felt that it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with Article XXIV of the General Agreement. The Committee noted that the normal procedure of the General Agreement and the techniques and traditions of the CONTRACTING PARTIES in applying them, were well adapted to the handling of such problems and suggested that in the first instance the procedures of Article XXII would be the most appropriate for this purpose.¹⁸

Most of the questions left undecided by the Working Party were solved in the following GATT rounds, were subjects of subsequent dispute settlement proceedings against the EEC, or simply never occurred in practice.

A second element of the GATT pragmatism is the solution of each case on its own merits, also described as the case-law approach of the GATT.¹⁹ A third element of the GATT pragmatism is the allowance of departures from GATT provisions beyond flexibility and pragmatism, which is known as tolerance.²⁰ One example of tolerance, which will be discussed in detail below, is the imposition of surcharges in the case of balance-of-payments difficulties, although article XII:1 allows only quantitative restrictions.

The three mentioned principles of the GATT legal order, flexibility, pragmatism, and tolerance can be explained to a great extent by the historical development²¹ of the GATT legal system.²² The GATT was framed to become part of the International Trade Organ-

¹⁴ Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1, pt. II (Cmd. 5179 II), 298 U.N.T.S. 11.

¹⁵ Petersmann, *The EEC as a GATT Member - Legal Conflicts Between GATT Law and European Community Law*, in *THE EUROPEAN COMMUNITY AND GATT* 23-71 (1986).

¹⁶ A Working Party is a temporary GATT body. Working Parties are established with regard to specific problems, for example the examination of an application for a waiver or for membership, and also the examination as to whether a customs union or free trade area fulfills the requirements of article XXIV.

¹⁷ GATT, *THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY AND THE EUROPEAN ATOMIC ENERGY COMMUNITY, REPORT OF THE WORKING PARTY*, 6th Supp. B.I.S.D. 69 (1958). On the Intersessional Committee, see GATT, *INTERSESSIONAL PROCEDURES*, 7th Supp. B.I.S.D. 7-11 (1959).

¹⁸ GATT, *REPORT BY THE INTERSESSIONAL COMMITTEE*, 7th Supp. B.I.S.D. 70 (1959).

¹⁹ BENEDEK, *supra* note 7, at 396.

²⁰ *Id.* at 394; JACKSON, *supra* note 6, at 757. For a definition of tolerance, see Gold, *The "Dispensing" and "Suspending" Powers of International Organizations*, 19 *NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT* 181 (1972).

²¹ JACKSON, *supra* note 6, at 756.

ization (ITO).²³ However, the establishment of the ITO fell through after United States President Harry S. Truman failed to submit the Havana Charter²⁴ to Congress for ratification. The GATT was left alone and somewhat unprepared for its tasks. Its "indirect way of doing things"²⁵ and its "blend of legal and diplomatic strategies"²⁶ have contributed substantially to the success of the GATT.

These elements of the GATT legal system may also be seen from a critical point of view as dangerous and as a source of potential erosion of the GATT legal order. They contradict basic elements inherent in every legal system: predictability and stability.²⁷ While the GATT continues to develop into an "established" institution, predictability and stability of the GATT law become more important. During the current Uruguay Round, the CONTRACTING PARTIES are attempting to strengthen the GATT legal system and the rule of law in GATT through, for example, an improvement of the dispute settlements procedures.²⁸

The concept of the GATT system as a system governed by the rule of law has particular importance with regard to the constitutional function of the GATT and its status in the national law of the contracting parties. For example, the Court of Justice of the European Community, in its famous opinion in *Third International Fruit Company v. Produktshap voor Groenten en Fruit*,²⁹ denied the General Agreement the status of a self-executing treaty because of the general structure and the flexibility of the GATT legal system.³⁰

²² For a detailed description of the history of GATT, see DAM, *supra* note 1, at 10-16; HUDEC, *supra* note 6, at 3-18.

²³ International Trade Organization of the United Nations.

²⁴ The full name of the Charter is The Havana Charter for an International Trade Organization. The text of the Charter is reprinted in C. WILCOX, A CHARTER FOR WORLD TRADE app. 231-327 (1949) (hereinafter Havana Charter).

²⁵ JACKSON, *supra* note 6, at 147.

²⁶ HUDEC, *supra* note 6, at vi.

²⁷ JACKSON, *supra* note 6, at 756.

²⁸ See GATT, IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES, Doc. MTN.TNC/11, at 24 (adopted by the CONTRACTING PARTIES during the mid-term review conference of the Uruguay Round).

²⁹ 1972 E. Comm. Ct. J. Rep. 1219, 1228. Also see the pleading of General Advocate Hayra. *Id.*, at 1241. The court last reaffirmed this decision in three judgments of March 16, 1983: *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze, Ministero della Marina Mercantile, Circoscrizione doganale di Trieste and Ente Anonimo del Porto di Trieste*, 1983 E. Comm. Ct. J. Rep. 731; *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana S.p.A. (SPI) and S.p.A. Michelin Italiana (SAMI)* 1983 E. Comm. Ct. J. Rep. 801; *Compagnia Singer S.p.A. and Geigy S.p.A. v. Amministrazione delle Finanze dello Stato*, 1983 E. Comm. Ct. J. Rep. 847.

³⁰ However, two recent judgments of the court suggest that the court might change its position. *Fediol v. Commission*, 1989 E. Comm. Ct. J. Rep. 1781; *Nakjima v. Council*, 1991 E. Comm. Ct. J. Rep. — (not yet reported).

*B. The law-creative effect of subsequent GATT practice*³¹

The purpose of this Article is to examine whether subsequent practice in the GATT, the pragmatic approach of the GATT, and its frequent tolerance of deviation from its provisions have caused the derogation of GATT provisions and led to the establishment of new GATT law. These possible effects of subsequent GATT practice were examined by Jackson³² and Dam³³ almost twenty years ago and have recently become more important and relevant to the discussion about the status of the EEC in the GATT.³⁴

This Article will first discuss the general possibility that subsequent practice to international treaties, with a special emphasis on international organizations, can result in the creation of law. It will then evaluate the premises for the establishment of law through subsequent practice in GATT and examine some examples in the GATT practice.

II. International treaties and subsequent practice

*A. The different forms of law-creating force of subsequent practice to international treaties*³⁵

The absence of any formal requirements is a significant element of public international law.³⁶ Formal requirements are actually considered an obstacle to the development of new international rules.³⁷ Therefore, an international treaty which is formally concluded can be derogated not only through the establishment of a later treaty, but also through rules which emerge from other sources of international law. The theory of *acte contraire* has no validity in international law.³⁸

Three different interpretations of subsequent practice to an international treaty could lead to the conclusion that new law has been created.³⁹ The subsequent practice might be interpreted as the establishment of special customary law, an informal silent amendment to the treaty, or a result of estoppel.⁴⁰ However, these interpreta-

³¹ For the purpose of this Article, subsequent practice to an international treaty is understood as the open deviation from an international treaty in its application by the contracting parties or the entities established by the treaty.

³² JACKSON, *supra* note 6, at 757.

³³ DAM, *supra* note 1, at 166.

³⁴ See Petersmann, *supra* note 15, at 37-53.

³⁵ The effects of subsequent practice to international treaties have been studied extensively in a recent treatise by W. KARL, VERTRAG UND SPÄTERE PRAXIS IM VÖLKERRECHT (1983) (includes English summary at 377-93). See also J. MÜLLER, VERTRAUENSCHUTZ IM VÖLKERRECHT (1971).

³⁶ KARL, *supra* note 35, at 380.

³⁷ Pescatore, *Introduction*, in THE EUROPEAN COMMUNITY AND GATT xvi (1986).

³⁸ KARL, *supra* note 35, at 380.

³⁹ *Id.* at 246. Forms of subsequent practice other than open deviation can also be considered as a factor of interpretation. *Id.* at 214.

⁴⁰ *Id.* at 246.

tions are not mutually exclusive; rather, the distinction between the three is blurred, and sometimes the establishment of new law can be explained by referring to more than one of them.⁴¹

These different interpretations of the effects of subsequent practice have been examined in several opinions of the Permanent Court of International Justice (PCIJ)⁴² and the International Court of Justice (ICJ),⁴³ as well as in judgments of other tribunals.⁴⁴ In the *USA-France Air Arbitration*⁴⁵ case, the law-creating force of subsequent practice has perhaps been developed most clearly. The arbitration tribunal stated:

This course of conduct may, in fact, be taken into account not merely as a means of use for interpreting the Agreement, but also as something more: that is a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the judicial situation of the Parties and on the rights that each of them could properly claim.⁴⁶

1. Customary international law

Article 38:1(b) of the Statute of the ICJ mentions customary international law as a source of international law, but does not define customary international law. The dominant doctrine on the establishment of customary international law, however, requires an ongoing practice based on *opinio juris*, which means that the participants had the subjective intention to establish such law.⁴⁷

In its classical form this doctrine requires a prolonged practice, but some authors have developed theories of "instant customary law," or "coutume sauvage."⁴⁸ According to them, the most important element of customary law is the clear establishment of *opinio juris*, and ongoing practice is not necessary: "Where there is *opinio*

⁴¹ *Id.*

⁴² *Serbian Loans (Fr. v. Kingdom of Serbs, Croats and Slovenes)* 1929 P.C.I.J. (ser. A) No. 20, at 38 (July 12).

⁴³ *Temple of Preah Vihear (Cambodia v. Thailand)* 1962 I.C.J. 6, 23 (hereinafter *Temple Case*); *Fisheries Case (U.K. v. Nor.)* 1951 I.C.J. 116, 139 (hereinafter *Fishery Case*); *North Sea Continental Shelf (W. Ger. v. Den. / W. Germany v. Neth.)* 1969 I.C.J. 3, 26 (hereinafter *North Sea Continental Shelf Case*); *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)* 1964 I.C.J. 6, 24 (preliminary objections).

⁴⁴ See, e.g., *Air Transp. Serv. Agreement Arbitration (USA v. France)* 38 I.L.R. 182, 249 (1969) (award of 22 January 1963) (hereinafter *USA-France Air Arbitration*).

⁴⁵ *Id.* For a discussion of the case, see KARL, *supra* note 35, at 232-40; Böckstiegel, *France-United States Air Transport Arbitration (1963)*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Vol. 2, at 101 (1981).

⁴⁶ *USA-France Air Arbitration*, *supra* note 44, at 249.

⁴⁷ See Cheng, *Custom: The Future of the General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 513 (1983); VERDROSS & SIMMA, *supra* note 2, at 345-59; I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (4th ed. 1990).

⁴⁸ Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 *INDIAN J. INT'L L.* 23, 35-40 (1965).

juris, there is a rule of customary international law."⁴⁹ However, the notion of customary law without custom seems to be contradictory,⁵⁰ and, therefore, it might be more appropriate to interpret the existence of *opinio juris* without custom as an informal agreement through implied consent.⁵¹

In addition to customary law which is effective generally, there can be customary law which is effective among a limited number of states or other subjects of international law. These states or subjects can be specified by region,⁵² or by their status as parties to an international agreement. The opinion of the ICJ in the *Right of Passage* case⁵³ even suggests the possibility of bilateral customary law.⁵⁴

International customary law can lead to the derogation of an international treaty, as well as to the establishment of new rules. Because customary law and formal treaty law are of equal rank, the general conclusion is that the *lex posterior* rule applies; the later-enacted law would have precedent.⁵⁵

The derogation of a treaty through the development of customary law is called desuetude,⁵⁶ which can be described as the breakdown of a treaty or treaty provision because of continued, open non-application. Also, in some cases the effect of desuetude can be the creation of a new rule replacing the treaty provision.⁵⁷

The basic element of desuetude is the non-application of the treaty by the parties to, or organs of, the treaty.⁵⁸ It may be, but does not have to be, accompanied and supported by an explicit claim. Non-application of a treaty can also occur in the form of non-exercise of treaty rights by a party.⁵⁹ However, this alone can never lead to the loss of a right of a party.⁶⁰ A loss of a right is only possible if it has been waived, or if the elements of estoppel are present.⁶¹

Another element of desuetude is *opinio juris* of the parties; the parties must have the opinion that the treaty or its relevant provi-

⁴⁹ *Id.* at 36.

⁵⁰ VERDROSS & SIMMA, *supra* note 2, at 361-62, 358-59.

⁵¹ *See infra* notes 64-72 and accompanying text.

⁵² *Asylum* (Colum. v. Peru) 1950 I.C.J. 266, 276-78 (discussing possibility of customary law arising among Latin-American states).

⁵³ *Concerning Right of Passage over Indian Territory* (Port. v. India) 1960 I.C.J. 6, 39 ("The Court sees no reason why long continued practice between two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states.").

⁵⁴ KARL, *supra* note 35, at 266; VERDROSS & SIMMA, *supra* note 2, at 569.

⁵⁵ KARL, *supra* note 35, at 380, 386.

⁵⁶ *Id.*

⁵⁷ *Id.* at 257-60, 386.

⁵⁸ *Id.* at 266.

⁵⁹ *Id.* at 264. *See also* Giraud, *Modification et Terminaison des Traités Collectifs*, 49 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 52 (1961).

⁶⁰ KARL, *supra* note 35, at 264.

⁶¹ *Id.* *See also* Giraud, *supra* note 59, at 60.

sions should no longer be applied.⁶² A third element of desuetude is the time period involved,⁶³ although desuetude can lead to the undermining of a treaty even in a relatively short period of time.

2. *Informal treaty amendment through silent consent*

The absence of formal requirements in international treaty law allows the conclusion, modification, and termination of a treaty through informal agreement. However, an agreement of the parties to an international treaty to amend the treaty requires an expression of their intent.⁶⁴ This can be accomplished explicitly, or silently through non-reaction to an action or claim of another party.

The term "acquiescence" is used to describe the situation in which the silence of one party is interpreted as an indication of consent, thus leading to the establishment of a rule of law.⁶⁵ Silence of the party is perceived to be an agreement with the actions and the claims of another party and their legal implications. The notion of acquiescence is generally accepted in international law.⁶⁶

The establishment of law through acquiescence rests on two premises. First, the silent state must have had knowledge of the actions and claims of the other state. It is not necessary that this be positive knowledge. Rather, it is sufficient that the party have had constructive knowledge of the actions of the other state; that is, it could not have ignored such actions if it had been properly caring for its affairs.⁶⁷ Second, the silent state's interest must be such that the other state would expect a reaction to its claims.⁶⁸ The time factor is not of significant importance. Nevertheless, a longer period of silence can support the inference of acquiescence.⁶⁹

It is important to note that a result of acquiescence can be the

⁶² KARL, *supra* note 35, at 262.

⁶³ *Id.* at 262-63, 387. See also A. MCNAIR, *THE LAW OF TREATIES* 516 (1961) ("[b]y desuetude is meant not only mere lapse of time, however long, but discontinuance of the use of, and resort to, a treaty or acquiescence in such discontinuance.").

⁶⁴ KARL, *supra* note 35, at 368.

⁶⁵ Acquiescence was developed in the Anglo-American legal system as a particular form of estoppel called estoppel by conduct, but has taken its own development as an institute of international law. See MÜLLER, *supra* note 35, at 38.

⁶⁶ *Id.* at 35-37; McGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 142, 182-86 (1954); Müller & Cottier, *Acquiescence*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Vol. 7, at 5 (1984). See also *Temple Case*, *supra* note 43, at 23; *Fishery Case*, *supra* note 43, at 139.

⁶⁷ *Fishery Case*, *supra* note 43, at 139 ("As a coastal State on the North Sea . . . the United Kingdom could not have been ignored of the Decree of 1869 . . ."); KARL, *supra* note 35, at 279; MÜLLER, *supra* note 35, at 41; McGibbon, *supra* note 66, at 182-83; Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 35-42 (1953).

⁶⁸ *Fishery Case*, *supra* note 43, at 139; MÜLLER, *supra* note 35, at 40-41; KARL, *supra* note 35, at 279.

⁶⁹ McGibbon, *supra* note 66, at 143 ("[T]he presumption of consent which may be raised by silence is strengthened in proportion to the length of period during which the silence is maintained.").

derogation of a formal treaty. This can be deduced from the intent of the parties to derogate the treaty, or with the use of the *lex posterior* rule, which applies to the relation of formal and informal sources of international law.⁷⁰

Acquiescence can occur between two subjects of international law, and also among a group, such as the parties to an international treaty or the member states of an international organization. However, the derogation of a multilateral treaty through informal consent, whether explicitly or by acquiescence, requires an agreement of all parties.⁷¹ In some cases, it is possible to have an *inter se* amendment to a treaty among those contracting parties which have expressed an intention to comply. However, this sort of amendment may not infringe upon the rights of other contracting parties.⁷²

3. Estoppel

The principle of estoppel, which originated in the English common law system,⁷³ is accepted as a basic principle of international law.⁷⁴ However, there is not yet agreement on the precise concept or source of estoppel in international law.⁷⁵

Estoppel consists of two elements. First, it requires a clear, unambiguous⁷⁶ explicit or implicit statement or specific action by one party.⁷⁷ Second, the other party must then have relied in good faith on this statement and have risked some sort of damage or disadvantage if the first party were to change its position.⁷⁸

The effect of estoppel is that the first party is precluded from changing its position; it is bound to its former statement.⁷⁹ With regard to subsequent treaty practice, it is worth noting that a party which has given its opinion on the interpretation of a treaty provision can be bound to this interpretation through estoppel, whether or not the interpretation is correct.⁸⁰

⁷⁰ KARL, *supra* note 35, at 279.

⁷¹ *Id.*

⁷² *Id.* at 282.

⁷³ Müller & Cottier, *Estoppel*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Vol. 7, at 79 (1984); see also KARL, *supra* note 35, at 324.

⁷⁴ McNAIR, *supra* note 63, at 485; Müller & Cottier, *supra* note 73, at 78; KARL *supra* note 35, at 324-37, 390. See also *North Sea Continental Shelf Case*, *supra* note 43, at 26 ("it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention. . ."); *Temple Case*, *supra* note 43, at 39-46 (individual opinion of Alfaro, J.).

⁷⁵ For a brief discussion, see Müller & Cottier, *supra* note 73, at 79.

⁷⁶ KARL, *supra* note 35, at 329, 390.

⁷⁷ *Id.* at 326, 390.

⁷⁸ *Id.* at 328-37, 390; Müller & Cottier, *supra* note 73, at 78.

⁷⁹ KARL, *supra* note 35, at 326, 390.

⁸⁰ *Id.* at 326.

4. *Subsequent practice and special amendment and termination clauses*

Subsequent practice can lead to the derogation of a treaty or some of its provisions. One of the reasons for this is the absence of formal requirements in international law. However, some treaties contain provisions which set forth specific formal rules for amendment and termination, as found in article XXX of the GATT. The question is whether such a provision would affect the possibility of derogation through subsequent practice.

For the answer to this question it is helpful to look at the reasons behind such provisions. Generally, their purpose is to facilitate an amendment to a treaty by providing alternatives to and suggesting possibilities other than amendment by consent of the parties.⁸¹ They do not intend, however, to exclude the latter alternative; an amendment through consent remains possible.⁸² However, even in a situation in which such provisions are meant to exclude any other form of amendment, the parties to the treaty still could derogate the treaty through subsequent practice. This is because there is nothing in such provisions to prevent the parties to the treaty from changing their former position.⁸³

5. *Opinio juris as the common element of the interpretation of subsequent practice as a law-creating force*

All of the above interpretations of subsequent practice have in common the requirement of some sort of *opinio juris* for the derogation of a treaty or the establishment of a new rule. Thus, the parties must intend to create a new rule with binding character. As will be shown, this element of any interpretation of subsequent practice in GATT is the most crucial one. There is a general tendency in international law to develop non-binding rules rather than legally binding rules.⁸⁴ Roessler calls these non-binding rules *de facto* agreements, which are distinct from *de jure* agreements, and defines them as "declarations intended to give ground to expect performance or forbearance of actions without creating legal rights and obligations."⁸⁵

⁸¹ For a detailed analysis, see *id.* at 340-52, 390-91.

⁸² *Id.* at 344.

⁸³ *Id.* at 345. The only exemptions are cases in which this could affect rights of third parties under the treaty.

⁸⁴ Roessler, *Law, De Facto Agreements and Declarations of Principle in International Economic Relations*, 21 GER. Y.B. INT'L L. 27, 40-56 (1978).

⁸⁵ *Id.* at 28, 41.

B. *Subsequent practice and constitutional treaties of international organizations*

1. *General Observations*

Treaties establishing public⁸⁶ international organizations are special forms of multilateral international treaties.⁸⁷ Therefore, it is generally acceptable to transfer the principles of subsequent practice mentioned above to international organizations. However, agreements establishing international organizations differ from other multilateral treaties due to their constitutional character.⁸⁸ One of the most important distinguishing characteristics in this regard is that they can create a new entity which is a subject of international law.⁸⁹ It is more or less generally accepted that an international organization can be a subject of international law if the member states have expressly or implicitly provided it with legal personality.⁹⁰ An example of an explicit provision granting international legal personality can be found in article 210 of the EEC Treaty.⁹¹ International organizations therefore derive their international legal personality from the member states exercising their national sovereignty.⁹²

International legal personality gives the international organization the ability to act under international law to the extent necessary to achieve its aims and to pursue its objectives.⁹³ This legal personality is effective only between the international organization and its member states, because an international treaty as a *res inter alios acta* does not create rights and duties for third states.⁹⁴ Therefore, the legal personality can become effective in relation to third states only if they recognize the international organization.⁹⁵ The important

⁸⁶ Besides public international organizations, there are international organizations established under private law. This Article, however, only deals with public international organizations.

⁸⁷ See H. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* § 1003 (1980).

⁸⁸ *Id.* at §§ 1002-51.

⁸⁹ *Id.* at § 1004.

⁹⁰ SEIDL-HOHENFELDERN, *DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIESSLICH DER SUPRANATIONALEN GEMEINSCHAFTEN* 34-50 (4th ed. 1984); SCHERMERS, *supra* note 87, at § 1386; BROWNLIE, *supra* note 47, at 680-83.

⁹¹ See *supra* note 14, art. 210-11. By comparison to article 211 of the EEC Treaty, it is clear that the term "legal personality" in article 210 means legal personality under international law.

⁹² SEIDL-HOHENFELDERN, *supra* note 90, at 35-37. For a different notion of the nature of the legal personality of international organizations, see Seyersted, *International Personality of Intergovernmental Organizations*, 4 *INDIAN J. INT'L L.* 1 (1964).

⁹³ But because the international organization derives this ability from the member states, the member states can limit the ability of the international organization to act under international law. SEIDL-HOHENFELDERN, *supra* note 90, at 49-50.

⁹⁴ *Id.* at 43-44. See also BROWNLIE, *supra* note 47, at 622-24 (*pacta tertiis nec nocent nec prosunt*).

⁹⁵ The United Nations is the only international organization for which an *erga omnes* legal personality, or objective legal personality, is accepted. See *Advisory Opinion (reparation for injuries suffered in the service of the United Nations)* 1949 I.C.J. 174, 178-79 (finding that the U.N. has a legal personality).

concept to keep in mind when examining the law-creating effects of subsequent practice in international organizations is that constitutional treaties of international organizations do not only create legal relationships among the member states, but also between the member states and the international organization itself. These two relations must be distinguished if the law-creating effect of subsequent practice is to be examined.

In addition, constitutional treaties of international organizations differ from other multilateral treaties because they provide the international organization, in one way or another, with the ability to set secondary law. Secondary law is the law of the international organization which is set up by bodies of the international organization itself, whereas primary law is the law set up by the member states.⁹⁶ Most international organizations have power to set up secondary law only in the field of internal procedural rules.

2. *General acceptance of the law-creating force of subsequent practice in international organizations*

It is generally accepted that it is possible for law to be created through subsequent practice in international organizations.⁹⁷ However, the discussion of this phenomenon focuses almost entirely on the possibility of the creation of customary international law, leaving aside the other possibilities mentioned above.

There are two forms of customary law in international organizations: general customary law, which is applicable to every international organization, and particular special customary law, which is applicable only within one particular international organization. An example of the latter is the right of a body of an international organization to decide for itself the scope of its competences⁹⁸ if the treaty does not contain any special applicable provisions.⁹⁹

Almost every example of the establishment of particular customary law within an international organization is based on deviation from provisions of the treaty by member states or bodies of the international organization and the fact that no possible action has been taken against them. The establishment of this form of customary law often happens much more rapidly than the establishment of a rule of general customary international law.¹⁰⁰ One explanation for this re-

⁹⁶ See generally SEIDL-HOHENFELDERN, *supra* note 90, at 217-72; SCHERMERS, *supra* note 87, at § 936 (use of the terms "contractual law making" and "legislative law making").

⁹⁷ See SCHERMERS, *supra* note 87, at § 1192, and the examples in §§ 211, 324, 722, 1235; SEIDL-HOHENFELDERN, *supra* note 90, at 222-25; KARL, *supra* note 35, at 96; with regard to the specialized agencies of the United Nations, see C.H. ALEXANDROVICZ, *THE LAW-MAKING FUNCTIONS OF THE SPECIALIZED AGENCIES OF THE UNITED NATIONS* 98 (1973).

⁹⁸ SCHERMERS, *supra* note 87, § 324.

⁹⁹ For another example, see *id.* § 211.

¹⁰⁰ *Id.* § 1192; ALEXANDROVICZ, *supra* note 97, at 98.

sult is the limited number of participants.

An example of this kind of internal customary international law can be found in the International Monetary Fund (IMF),¹⁰¹ which goes beyond the creation of internal procedural rules. In 1971, a fundamental change in the international exchange system occurred when exchange rates between the major currencies became floating. This practice was clearly inconsistent with the provisions of the IMF Statute in force at the time,¹⁰² which contemplated a system of fixed exchange rates. However, it was supported by all participants, and included a decision of the IMF Executive Directors.¹⁰³ The new system was not formally incorporated into the IMF Statute until 1976.¹⁰⁴ It can be argued that the old provisions had already diminished in force before this formal incorporation because of continuing non-application.¹⁰⁵ Another possibility is that the new practice had become binding as customary law.¹⁰⁶

III. The GATT

A. *Some particularities about the establishment of law in the GATT*

The CONTRACTING PARTIES are the GATT body with the principal power to set up new GATT rules by adopting secondary GATT law.¹⁰⁷ They derive their power from article XXV:1, which allows them to take any action with the aim of facilitating the operation or furthering the objectives of the GATT.

The CONTRACTING PARTIES have made use of their power to set secondary law, especially in the field of internal procedural law. The most important decision in this regard was certainly the establishment of the Council in 1960.¹⁰⁸ The fact that most of the secondary law consists of procedural rules is due to the drafting of the GATT as "merely a trade agreement with a few procedural provisions,"¹⁰⁹ so that the United States administration could adopt the

¹⁰¹ For a detailed analysis of this internal customary international law, see Petersmann, *Völkerrechtliche Fragen der Weltwährungsreform-Wirtschaftliche Dynamik als Völkerrechtsproblem in der Praxis des Internationalen Währungsfonds*, 34 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 452 (1974); Gold, *supra* note 20, at 181.

¹⁰² 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, as amended July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 266 (formally incorporated into the IMF Statute in 1976) (hereinafter IMF Statute).

¹⁰³ Central Rates and Wider Margins: A Temporary Regime, 1972 IMF Ann. Rep. 85, Doc. No. 3463 (December 18, 1971).

¹⁰⁴ See IMF Statute, *supra* note 102.

¹⁰⁵ KARL, *supra* note 35, at 232; Gold, *supra* note 20, at 182-84.

¹⁰⁶ Petersmann, *supra* note 101, at 496.

¹⁰⁷ See generally Roessler, *The Competence of GATT*, 21 J. WORLD TRADE L. 73 (1987) (hereinafter Roessler, Competence).

¹⁰⁸ GATT, 9th Supp. B.I.S.D. 8-9 (1961).

¹⁰⁹ Roessler, *supra* note 84, at 47.

GATT without seeking the approval of Congress.¹¹⁰

The last time the CONTRACTING PARTIES extensively used their power to set up secondary law was the adoption of four important decisions at the end of the Tokyo Round.¹¹¹ These decisions dealt not only with internal procedural rules, but also with general GATT law. With regard to the "enabling clause," some contracting parties argued that this decision had such far reaching effects that it should have been implemented through a formal amendment to the General Agreement according to article XXX.¹¹²

Unfortunately, the GATT does not set up any specific formal requirements for the adoption of secondary law¹¹³ other than, for example, the EEC Treaty.¹¹⁴ Therefore, it is often difficult to distinguish clearly between what is merely general practice of a GATT body and what is the setting of secondary law.

However, the GATT bodies, especially the Council and the CONTRACTING PARTIES, are not only setting GATT law; they are also interpreting GATT law.¹¹⁵ This unification of the legislature and judiciary in one body has an important impact on the perception of the quality of secondary law. It is within the power of the GATT bodies to deviate from every formerly set rule simply by agreeing on and setting up a new rule. This is particularly important with regard to internal procedural rules.

The particularities of the GATT legal order discussed above influence the analysis of the question of under which premises subsequent practice in GATT can lead to the establishment of new law. First, the question of whether activities, statements, and decisions of GATT bodies are subsequent practice or the setting of secondary law must be carefully examined. Second, if the establishment of law through subsequent practice can be proved, the quality of this law must be examined. For example, could the CONTRACTING PARTIES, or any other GATT body, derogate this law with a simple decision? This must not always be the case, because subsequent practice

¹¹⁰ *Id.* at 48; JACKSON, *supra* note 6, at 120-22; Jackson, *The General Agreement of Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 254-55 (1968).

¹¹¹ GATT, 26th Supp. B.I.S.D. 201-15 (1980). The four decisions adopted in November 1979 are: "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries" ("enabling clause"); "Declaration on Trade Measures Taken for Balance-of-Payments Purposes" (hereinafter B-O-P Declaration); "Safeguard Action for Development Purposes"; and "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (hereinafter Understanding).

¹¹² E. MCGOVERN, *INTERNATIONAL TRADE REGULATION, GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY* 29 (2d ed. 1986).

¹¹³ BENEDEK, *supra* note 7, at 125.

¹¹⁴ *See supra* note 14, arts. 189-90.

¹¹⁵ Their power to interpret GATT law follows from the fact that the CONTRACTING PARTIES, or in actuality the Council acting for the CONTRACTING PARTIES, adopt the Panel reports as well as the reports of the Working Parties. Hence, they have the final decision on any interpretation of GATT law.

could lead to a derogation of the General Agreement itself, that is, primary GATT law, and would therefore rank higher than secondary law.¹¹⁶

B. *Examples of possible creation of law through subsequent practice in GATT*

1. *The dispute settlement procedure*

The General Agreement regulates the settlement of disputes fragmentarily,¹¹⁷ in articles XXII and XXIII. However, the GATT has subsequently developed a dispute settlement mechanism under which most of the disputes are settled through a panel procedure.¹¹⁸ This method of dispute settlement is not provided for in the relevant GATT articles; it has developed through custom. After more than fifty panel procedures, this system was finally codified in the Understanding¹¹⁹ adopted by the CONTRACTING PARTIES at the end of the Tokyo Round. Therefore, the Understanding is a codification of a system which developed out of custom and was established as customary law.¹²⁰

However, it is doubtful that this later codified procedure established as customary law gives a contracting party the right to a panel in every case. It has been the usual practice that decisions in the GATT, including Council decisions concerning the establishment of a panel, are adopted through consensus.¹²¹ Although a contracting party, therefore, could prevent the establishment of a panel against it by opposing a Council decision, it has been ongoing practice that the repeated request for a panel leads, finally, to its establishment.¹²² This ongoing practice could suggest the possibility of a rule of customary law: a party has a right to a panel if repeatedly requested. But the wording of paragraph 10 of the Understanding suggests that the CONTRACTING PARTIES did not consider this custom to be a rule of law.¹²³ Thus, because of this lack of *opinio juris* among the contracting parties, there is no rule of customary law in the GATT giving a party the right to a panel upon request.

¹¹⁶ GATT, *supra* note 4, arts. XXII, XXIII.

¹¹⁷ This might be due to the fact that the GATT was drafted as a trade agreement and not as an international organization.

¹¹⁸ For an analysis of the GATT dispute settlement mechanism, see DAM, *supra* note 1, at 351-56; Lacharriere, *Case for a Tribunal to Assist in Settling Disputes*, 8 *WORLD ECONOMY* 339 (1985).

¹¹⁹ See MCGOVERN, *supra* note 112, at 29.

¹²⁰ Lacharriere, *supra* note 118, at 339; Carreau, *supra* note 5, at 285; Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 *AM. J. INT'L L.* 747, 755 (1978).

¹²¹ See *infra* notes 124-35 and accompanying text for additional detail.

¹²² Understanding, *supra* note 111, at 212.

¹²³ See B-O-P Declaration, *supra* note 111, at 212. Paragraph ten reads: "the CONTRACTING PARTIES would decide . . ." *Id.* (emphasis added).

2. *Decision-making by consensus*

The GATT considers the possibility of decision-making by majority voting. In fact, according to the wording of the GATT, majority voting is the generally applicable form of decision-making.¹²⁴ However, the CONTRACTING PARTIES follow this rule only in those cases where voting is mandatory.¹²⁵ In practice decisions are made by consensus, and in cases of mandatory voting, the CONTRACTING PARTIES generally have reached consensus on the matter in question before-hand.

The principle of consensus gains particular importance with regard to the dispute settlement procedure in the GATT. It has already been mentioned that a panel is only established if consensus is reached in the Council.¹²⁶ It has also been ongoing practice that the Council adopts the panel report by consensus, which includes the two parties of the dispute.¹²⁷ The same is true for the adoption of the reports of working parties.¹²⁸ This ongoing practice of decision-making through consensus, rather than by majority decision, could have led to the derogation of article XXV. However, there are two arguments against this assumption.

First, the practice of decision-making through consensus was once interrupted without the objection of any contracting party.¹²⁹ In the preparatory phase of the launching of the Uruguay Round, some developing countries tried to block the discussion in the Council in order to achieve favorable results. The United States, which was unsatisfied with this development, requested the calling of a special session of the CONTRACTING PARTIES. The formal provisions for the calling of a special session of the CONTRACTING PARTIES require a written ballot.¹³⁰ The CONTRACTING PARTIES followed this procedure and the session was called after a simple majority was reached.

The second argument is the stronger one. As mentioned above, the important element of any explanation of law established by subsequent practice is the fact that the participating states must consider that, or have the *opinio juris* that, the deviation of the treaty is law. This is true for desuetude as well as for acquiescence. It is doubtful

¹²⁴ LONG, *supra* note 6, at 54.

¹²⁵ For these situations, see GATT, *supra* note 4, art. XXX:1 (Amendments); art. XXV:5 (Joint Action by the Contracting Parties; waiver decisions); and art. XXXIII (Accession of new contracting parties).

¹²⁶ See *supra* notes 117-23 and accompanying text.

¹²⁷ LONG, *supra* note 6, at 77.

¹²⁸ *Id.*

¹²⁹ See BENEDEK, *supra* note 7, at 234; Annual Report of the Council to the CONTRACTING PARTIES, GATT Doc. L/5909 (1985).

¹³⁰ GATT, 12th Supp. B.I.S.D. 10 (1964).

that *opinio juris* can be proved with regard to the principle of consensus in the GATT.

In a footnote to the Understanding, the CONTRACTING PARTIES made clear that, despite their ongoing practice to adopt decisions concerning dispute settlements by consensus, they still consider the possibility of recourse to article XXV and the use of majority voting.¹³¹ An even clearer statement can be found in the provisions concerning dispute settlements adopted at the midterm review of the Uruguay Round: "The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable."¹³² These two statements strongly suggest that there is no *opinio juris* among the contracting parties concerning the principle of decision-making by consensus. It seems to be that the contracting parties have agreed on this form of decision-making simply because they consider it to be the most effective one. The advantage of the consensus principle is that it forces the contracting parties to achieve solutions which are acceptable to all parties.¹³³ Although such a solution might not always be the best one and will almost certainly take more time to achieve, the fact that is acceptable to every party makes its implementation more likely. The consensus principle also offers the developing countries an opportunity to achieve more recognition of their interests. However, this principle depends to a great extent on the will of the contracting parties to reach a mutually satisfying solution.¹³⁴ Therefore, it does not give the contracting parties a de facto or de jure veto right.¹³⁵ The lack of *opinio juris* permits the conclusion that the ongoing practice of adopting decisions by consensus has not derogated the GATT provisions for decision-making by majority voting.

3. *Surcharges as a trade measure in balance-of-payment difficulties*

The GATT contemplates the possibility that contracting parties will need to adopt restrictive trade measures because of balance-of-payments difficulties. Article XII:1 provides that a contracting party is entitled to impose quantitative restrictions "in order to safeguard its external financial position and its balance-of-payments."¹³⁶

¹³¹ The footnote to the Understanding reads as follows: "It is noted that Art. XXV may . . . also afford an appropriate avenue for consultation and dispute settlement in certain circumstances."

¹³² See *supra* note 28, at 30.

¹³³ For the advantages and disadvantages of the consensus principle in GATT, see generally LONG, *supra* note 6, at 55-56; BENEDEK, *supra* note 7, at 187.

¹³⁴ For a description of the methods used by the contracting parties to achieve consensus, see LONG, *supra* note 6, at 55-56.

¹³⁵ *Id.* at 55.

¹³⁶ GATT, *supra* note 4, art. XII:1.

Measures other than quantitative restrictions are not foreseen.

However, during the 1960s contracting parties had frequently imposed surcharges or import deposits instead of quantitative restrictions to solve their balance-of-payment problems.¹³⁷ Surcharges as well as import deposits imposed by a contracting party relating to items bound by a GATT schedule of concessions of this party are a violation of article II:1(b) unless they are sanctioned by a waiver.¹³⁸

There is no single case in which the CONTRACTING PARTIES or one single contracting party has taken any action against surcharges or import deposit requirements as such. The imposition of these measures instead of quantitative restrictions has simply been tolerated.¹³⁹ This might be due to the fact that there is a general consensus among economists that they have a less disturbing effect than quantitative restrictions.¹⁴⁰

This raises the question whether the toleration of surcharges and import deposits has led to their legalization. As Dam has pointed out with regard to the general abuse of quantitative restrictions, "[w]hen violations can be listed, one after the other, for more than a hundred pages, the concept of illegality loses whatever normal connotations it might ever have had."¹⁴¹ Jackson agrees when he states that "surcharges have almost de facto become part of the General Agreement."¹⁴² Therefore the relevant provision of article XXII:1 could have been derogated through desuetude, the establishment of a new rule of customary law. That is, under the premises set up in article XXII:1 a contracting party is not limited to the imposition of quantitative restrictions as a measure to solve its balance-of-payment problems; it can also impose surcharges and import deposits. Alternatively, this conclusion can be explained through acquiescence as the result of the assumption of an informal agreement.

It is safe to say that the ongoing practice element of desuetude has been fulfilled. However, there is some doubt about the existence

¹³⁷ See Roessler, *The GATT Declaration on Trade Measures Taken for Balance-of-Payment Purposes: A Commentary*, 12 CASE. W. RES. J. INT'L L. 383 (1980) (hereinafter *B-O-P Commentary*); Petersmann, *Trade Restrictions for Balance-of-Payment Purposes and GATT: Strengthening the Soft International Law of Balance-of-Payment Adjustment Measures*, in FOREIGN DEBTS IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 181, 200-01 (Dicke ed. 1986) (hereinafter *B-O-P*).

¹³⁸ Roessler, *B-O-P Commentary*, *supra* note 137, at 387; Petersmann, *B-O-P*, *supra* note 137, at 200; JACKSON, *supra* note 6, at 714. This has always been clear for surcharges. Concerning import deposits it was questionable whether they are a "charge" until a panel in 1978 decided that they are to be regarded as one type of surcharge. See Roessler, *B-O-P Commentary*, *supra* note 137, at 387.

¹³⁹ Roessler, *B-O-P Commentary*, *supra* note 137, at 388; JACKSON, *supra* note 6, at 711-14.

¹⁴⁰ Roessler, *B-O-P Commentary*, *supra* note 137, at 388; Petersmann, *B-O-P*, *supra* note 137, at 200; JACKSON, *supra* note 6, at 711.

¹⁴¹ DAM, *supra* note 1, at 166.

¹⁴² JACKSON, *supra* note 6, at 714.

of the element of *opinio juris* among the contracting parties on this issue. Likewise, it is doubtful whether acquiescence can be established, because it also requires a clear indication of the intent of the contracting parties.

These doubts arise out of the drafting history and the wording of the B-O-P Declaration¹⁴³ adopted at the end of the Tokyo Round.¹⁴⁴ During the negotiations of the B-O-P Declaration there was no consensus among the contracting parties on the issue of whether surcharges and import deposits should be formally legalized.¹⁴⁵ The B-O-P Declaration itself does not address these measures directly, but rather indirectly and ambiguously.¹⁴⁶ On the one hand, it mentions in the preamble "that restrictive import measures other than quantitative restrictions have been used for balance-of-payment purposes,"¹⁴⁷ and it gives preference to the least disruptive measures.¹⁴⁸ On the other hand, the B-O-P Declaration expresses the intent not to modify the relevant GATT provisions.¹⁴⁹ In other words, measures other than quantitative restrictions are still considered to be illegal.¹⁵⁰ This might lead to the conclusion that the B-O-P Declaration "both reaffirms their illegality and recognizes them as the lesser evil."¹⁵¹

These relatively vague expressions displayed during the negotiation of the B-O-P Declaration, and especially in the B-O-P Declaration itself, are in contradiction to the clear practice of the contracting parties. This practice undoubtedly indicates that the contracting parties want to use surcharges and import deposits as balance-of-payment adjustment measures, and this practice has continued subsequent to the adoption of the B-O-P Declaration.¹⁵² Also, in every case before and after the adoption of the B-O-P Declaration, these measures have been tolerated as possible balance-of-payment adjustment measures by the relevant GATT bodies as well as by the other contracting parties. Not a single case exists where they have been attacked as such.

Therefore, it can be concluded that a GATT body could not take the position that a contracting party has violated its obligations under the General Agreement because it has imposed surcharges or

¹⁴³ B-O-P Declaration, *supra* note 111.

¹⁴⁴ Roessler, *B-O-P Commentary*, *supra* note 137, at 389-91; Petersmann, *B-O-P*, *supra* note 137, at 201.

¹⁴⁵ For the different arguments on this question, see Roessler, *B-O-P Commentary*, *supra* note 137, at 389-91.

¹⁴⁶ *Id.* at 390-91; Petersmann, *B-O-P*, *supra* note 137, at 201.

¹⁴⁷ B-O-P Declaration, *supra* note 111, at 205.

¹⁴⁸ *Id.* at 206.

¹⁴⁹ *Id.*

¹⁵⁰ Roessler, *B-O-P Commentary*, *supra* note 137, at 390.

¹⁵¹ *Id.* at 391.

¹⁵² See GATT Doc. BOP/R/160; GATT Doc. BOP/W/99.

import deposits as balance-of-payments adjustment measures under the premises set out in article XII:1, instead of quantitative restrictions. Surcharges and import deposits have become legalized as balance-of-payments adjustment measures. This is true at least until the CONTRACTING PARTIES clearly indicate the opposite.

4. *Open violations of GATT obligations*

Sometimes contracting parties do openly violate their GATT obligations, and the contracting party whose rights are affected does not take any action, such as requesting a dispute settlement procedure. This non-exercise of possible rights under GATT could lead to a loss of those rights, especially under the doctrine of estoppel.

The Panel examined this question in a 1982 dispute settlement procedure between Hong Kong and the EEC.¹⁵³ In this case Hong Kong complained about quantitative import restrictions imposed by France. The restrictions had been in force *de jure* since 1944, and Hong Kong had, until recently, never taken any action against them. The EEC therefore argued that one could not ignore "the law-creating force derived from circumstances" as an important institute of international law.¹⁵⁴ The fact that the contracting parties had never taken any action against the French measures indicated, in the view of the EEC, that the contracting parties had silently accepted these measures.¹⁵⁵ However, the Panel did not accept these arguments and stated:

It would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years as tantamount to its tacit acceptance by contracting parties [T]he principle referred to as 'the law-creating force derived from circumstances' could be relevant in the absence of law.¹⁵⁶

This panel decision is supported by the fact that the GATT does not contain any provision which specifies a period of time in which contracting parties have to exercise their rights. Therefore, a limitation of the right of Hong Kong to request a panel cannot be construed. There is also no indication that the behavior of Hong Kong or the contracting parties could raise the notion of estoppel, because estoppel would have required a clear and unambiguous statement by Hong Kong that it would not take any action with regard to the French measures. A mere non-exercise of treaty rights cannot be interpreted in this way.

A panel decision following the arguments brought forward by the EEC would have been in some way contradictory to one of the

¹⁵³ GATT, EEC-QUANTITATIVE RESTRICTIONS AGAINST IMPORTS FROM HONG KONG, 30th Supp. B.I.S.D. 129 (1983).

¹⁵⁴ *Id.* ¶ 15.

¹⁵⁵ *Id.* ¶¶ 15, 17, 23.

¹⁵⁶ *Id.* ¶¶ 28, 29. The Panel therefore decided in favor of Hong Kong.

basic principles of the GATT, which is the intent to look for solutions supported by a broad consensus. It would have necessarily forced contracting parties into dispute settlement procedures in order not to lose their rights, even if they had not intended to enter this process. Although, the outcome of such an interpretation of the GATT might be the strengthening of the rule of law in GATT, which is probably preferable, it must be noted that this interpretation is not in accordance with either the current GATT law or the current GATT practice. It might also lead to a rougher climate in the GATT.

5. *Non-approval of custom unions and free-trade areas under article XXIV:7*

Article XXIV contemplates the creation of custom unions and free-trade areas among contracting parties. If contracting parties intend to establish a custom union or free-trade area they have to notify the CONTRACTING PARTIES and submit a detailed plan, which will then be examined by the CONTRACTING PARTIES under the relevant GATT provisions. Article XXIV:7(b) sets forth the possible actions of the CONTRACTING PARTIES if they find that the plan is not in accordance with the GATT as follows:

If . . . the CONTRACTING PARTIES find that such an agreement is not likely to result in the formation of a customs union or a free-trade area within the period contemplated by the parties to the agreement or such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement.¹⁵⁷

Although over fifty customs unions or free-trade areas have been examined under the GATT, only two have been found to fulfill the requirements set up in article XXIV:4-8.¹⁵⁸ None of the other agreements has been approved, but there has never been an explicit disapproval.

The most prominent example is certainly the examination of the EEC Treaty.¹⁵⁹ In this case neither the Working Party¹⁶⁰ which had to examine the treaty nor the Intersessional Committee¹⁶¹ to which the matter was referred could agree on the issue. Therefore the question was simply left open.¹⁶² The working parties which had to examine the enlargements of the EEC in 1973, 1981, and 1986 were

¹⁵⁷ GATT, *supra* note 4, art. XXIV, § 7(b).

¹⁵⁸ GATT, CARIBBEAN COMMUNITY AND COMMON MARKET, 24th Supp. B.I.S.D. 68, 72 (1978); GATT, FREE TRADE AGREEMENT BETWEEN THE UNITED KINGDOM AND IRELAND, 14th Supp. B.I.S.D. 122, 123, 127 (1966).

¹⁵⁹ See *supra* note 14.

¹⁶⁰ See REPORT OF THE WORKING PARTY, *supra* note 17.

¹⁶¹ GATT, TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 7th Supp. B.I.S.D. 70 (1959).

¹⁶² *Id.*

also unable to reach definite conclusions.¹⁶³

This leads to the question of whether the CONTRACTING PARTIES could still conclude that the EEC Treaty is incompatible with the GATT and make recommendations to the member states of the EEC pursuant to article XXIV:7(b); or, did they lose this right?¹⁶⁴ The problem was raised during the examination of the 1981 enlargement through the accession of Greece to the EEC. One member of the Working Party stated: "However, the compatibility of the Treaty of Rome itself with the provisions of the General Agreement remained an open question since the Working Party which had examined the Treaty had not reached any final conclusions in this regard."¹⁶⁵ The representative of the EEC had a different opinion on this question: "The EC did not share the view that these earlier treaties constituted an open question or that their legal status was unresolved in GATT since the CONTRACTING PARTIES had formulated no recommendations under Article XXIV:7(b) for any modifications to those arrangements."¹⁶⁶

The fact that the CONTRACTING PARTIES did not make recommendations with regard to the examination of a customs union or a free-trade agreement pursuant to article XXIV:7(b) was the subject of a 1982 dispute settlement procedure. This case concerned the EEC tariff treatment on imports of citrus products from certain Mediterranean countries.¹⁶⁷ The EEC had concluded preferential agreements with several Mediterranean countries granting special tariff concessions for the import of citrus products. These agreements had been presented to the GATT as interim agreements leading to the establishment of a free-trade area. The Working Party which had examined them in light of the provisions of article XXIV:4-8 had not reached a consensus on this matter, and therefore had not made any recommendation pursuant to article XXIV:7(b). The Panel had to decide, among other questions, whether the issue of the compatibility of these agreements with the GATT is still an open question. The Panel concluded: "[t]he agreements had not been disapproved, nor

¹⁶³ The 1973 Working Party could not even agree on a final report. GATT Doc. C/M/107, at 4. For reports of the other working parties, see GATT, *ACCESSION OF GREECE TO THE EUROPEAN COMMUNITIES*, 30th Supp. B.I.S.D. 168 (1983) (hereinafter *ACCESSION OF GREECE*).

¹⁶⁴ This question has been raised by E. U. Petersmann. See E. Petersmann, *Participation of the European Communities in GATT: International Law and Community Law Aspects*, in *MIXED AGREEMENTS* 185 (1983).

¹⁶⁵ See *ACCESSION OF GREECE*, *supra* note 163, at 174 (1983). A similar statement was made by Japan in an earlier Council meeting: "The fact that the CONTRACTING PARTIES did not pursue the legal issue concerning the community's status with regard to the requirements of Article XXIV did not prejudice any contracting party's rights and obligations under the General Agreement." GATT Doc. C/M/61, at 6.

¹⁶⁶ See *ACCESSION OF GREECE*, *supra* note 163, at 175.

¹⁶⁷ GATT Doc. L/5778. The Panel report has not yet been adopted.

had they been approved."¹⁶⁸ The Panel found, therefore, that the question of the conformity of the agreements with the requirements of article XXIV and their legal status remained open.¹⁶⁹

Therefore, it is possible that the CONTRACTING PARTIES do not lose their rights if they do not take actions pursuant to article XXIV:7(b). This leads to the conclusion that the question of the compatibility of the EEC treaty is still open, and the CONTRACTING PARTIES, if they desire, could take actions against the EEC member states.¹⁷⁰

Any other result would, in fact, be incompatible with the GATT practice of making decisions in the working parties and adopting their reports by consensus. The contracting parties who intend to establish a customs union or a free-trade area can avoid any report not in their favor, because they are always members of the Working Party. For example, the EEC had such a strong position that it could withstand the political pressure of other contracting parties.¹⁷¹

6. *Rectification of schedules*¹⁷²

According to article II:7, the schedules of concessions of the contracting parties form an integral part of the GATT.¹⁷³ Therefore, their rectification,¹⁷⁴ according to article XXVII, is an amendment of the GATT. Because article II is a provision of part I of the GATT, this amendment to the GATT requires the approval of all contracting parties according to article XXX:1.¹⁷⁵ In order to modify the schedules of concessions, the GATT issued nine protocols through 1959.¹⁷⁶ These protocols took several years to come into effect due to the requirement of approval by every contracting party and the growing number of contracting parties: for example, the 7th protocol of November 30, 1957, did not come into force until twelve years later.¹⁷⁷

This delay was incompatible with the requirements of the praxis. Therefore, even if rectifications have not been formally in force, the contracting parties have applied them by means of fiction.¹⁷⁸ In 1968 the CONTRACTING PARTIES finally adopted a decision, stating that from then on a simple certification should be sufficient for

¹⁶⁸ *Id.* ¶ 4.10.

¹⁶⁹ *Id.*

¹⁷⁰ This seems more than unlikely.

¹⁷¹ JACKSON, *supra* note 6, at 579.

¹⁷² See Benedek, *supra* note 7, at 390-94.

¹⁷³ GATT, *supra* note 4, art. II.

¹⁷⁴ For a description of this process, see JACKSON, *supra* note 6, at 236.

¹⁷⁵ *Id.* at 237.

¹⁷⁶ GATT Doc. GATT/LEG/1, Status of Legal Instruments, at 7-3.7.1 (1973).

¹⁷⁷ *Id.*

¹⁷⁸ JACKSON, *supra* note 6, at 237; Roessler, *supra* note 84, at 50.

rectification.¹⁷⁹ Altogether, five of those certifications have been issued,¹⁸⁰ and they all have been registered at the United Nations (UN) according to article 102 of the UN Charter.¹⁸¹

In the beginning of the 1980s, the GATT introduced a looseleaf form to list the concessions of the parties, which once again changed the procedure.¹⁸² Since then, only the publication of the rectifications of the schedule in the looseleaf edition is necessary.

The extent to which this change in the procedure for rectification of schedules has derogated the relevant GATT provisions is questionable. The change could be regarded merely as the emergence of a *de facto* agreement with no legal binding character;¹⁸³ or, it could be viewed as the setting of secondary law. It could also be interpreted as an informal amendment to the relevant GATT provisions. The two latter interpretations are more appropriate, because they take into account the fact that the contracting parties apparently intended to derogate the relevant GATT provisions because they considered them incompatible with the needs of the praxis. This argument is supported by the fact that the CONTRACTING PARTIES originally intended to amend formally the General Agreement in accordance with article XXX.¹⁸⁴

7. *The EEC as a de jure contracting party sui generis*

Recently, the problem of the law-creating force of subsequent practice has been discussed in the Council with regard to the legal status of the EEC in GATT.¹⁸⁵ It is not possible to address in detail in this Article the problem of the legal status of the EEC. Briefly summarized, one can say that most authors interpret the decision of the Court of Justice of the EEC in the *Third International Fruit Company*

¹⁷⁹ GATT, PROCEDURES FOR MODIFICATION AND RECTIFICATION, 16th Supp. B.I.S.D. 17-9 (1969).

¹⁸⁰ GATT, FIRST CERTIFICATION OF CHANGES TO SCHEDULES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 17th Supp. B.I.S.D. 12 (1970); GATT, SECOND CERTIFICATION OF CHANGES TO SCHEDULES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 21st Supp. B.I.S.D. 19 (1975); GATT, THIRD CERTIFICATION OF CHANGES TO SCHEDULES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 21st Supp. B.I.S.D. 20 (1975); GATT, FOURTH CERTIFICATION OF CHANGES TO SCHEDULES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 26th Supp. B.I.S.D. 190 (1980); GATT, FIFTH CERTIFICATION OF CHANGES TO SCHEDULES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 8th Supp. B.I.S.D. 10 (1988).

¹⁸¹ BENEDEK, *supra* note 7, at 134-35; U.N. CHARTER art. 102.

¹⁸² GATT, PROCEDURES FOR MODIFICATION AND RECTIFICATION OF TARIFF CONCESSIONS, 27th Supp. B.I.S.D. 25-6 (1981). *See also* GATT, INTRODUCTION OF A LOOSE-LEAF SYSTEM FOR THE SCHEDULES OF TARIFF CONCESSIONS, 27th Supp. B.I.S.D. 22-4 (1981) (proposal by the Director-General to implement a loose-leaf system of indexing tariff concessions, rectifications, modifications, and withdrawals).

¹⁸³ This seems to be the interpretation of Roessler, *supra* note 84, at 134.

¹⁸⁴ JACKSON, *supra* note 6, at 237.

¹⁸⁵ *See infra* note 187 for sources discussing this topic.

case¹⁸⁶ as holding that the EEC is a de facto member of the GATT.¹⁸⁷ Only Petersmann has suggested the idea that the EEC has acquired de jure the status as a contracting party *sui generis*, because the EEC has in practice taken over the role of the member states in the GATT almost entirely,¹⁸⁸ and was accepted by the other contracting parties and the GATT itself.¹⁸⁹ Thus, he concludes that this subsequent practice had a law-creative effect in that it granted the EEC de jure status.¹⁹⁰

In a GATT Council meeting in June 1988,¹⁹¹ the EEC agreed to commit itself to a panel procedure requested by the United States. France, however, declared, that it was not prepared to go into the panel procedure¹⁹² and that therefore the Council has not reached consensus on this issue. After a discussion of this matter the Director General finally concluded "that according to practice established a number of years earlier, and not just in the council, the representative of the Community had the authority to commit the Community to a council decision."¹⁹³ He thus stated that there was consensus in the Council on this matter. None of the other contracting parties opposed this interpretation of the Director General. This event clearly supports the assumption that the participation of the EEC in the GATT, that is, the succession of the member states in practice, has created legal relationships between the EEC and the GATT, and between the EEC and the other contracting parties, although the EEC has never formally acceded to the GATT. This result could be reached through either the notion of desuetude or the notion of acquiescence. Another possibility is estoppel, as seen in reference to the interpretation of the Director General.

8. Other examples

A possible law-creating effect has also been discussed in other situations. One of these is the function of the GATT Director General.¹⁹⁴ Further examples are the de facto waivers for developing

¹⁸⁶ See *supra* note 29.

¹⁸⁷ For a detailed evaluation of the subject, see G. BERRISCH, *DER VÖLKERRECHTLICHE STATUS DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT IM GATT* (1991). For a brief survey on the discussion, see Petersmann, *supra* note 15, at 37-39.

¹⁸⁸ According to art. 113 of the EEC Treaty, the Community has exclusive power in the field of the commercial policy.

¹⁸⁹ Since 1973, dispute settlement procedures have no longer been initiated against the member states but against the EEC, even if they concerned measures of member states. Also, the EEC, and not the member states, has pursued dispute settlement procedures against other contracting parties.

¹⁹⁰ Petersmann, *supra* note 15, at 37-39. See also, BERRISCH, *supra* note 187, at 227-33.

¹⁹¹ See GATT Doc. C/M/222, at 7-17 (1988) (Minutes of Meeting June 16, 1988).

¹⁹² Note that under Community law, France had no power to give this declaration.

¹⁹³ GATT Doc. C/M/222, at 16 (1988).

¹⁹⁴ LONG, *supra* note 6, at 52.

countries,¹⁹⁵ and the possibility of a de facto membership for new independent countries.¹⁹⁶

Finally, it is general opinion that the GATT, which was not drafted as nor intended to be an international organization, has achieved through customary law the status of an international organization.¹⁹⁷ That is, it has developed in subsequent practice all the characteristics of an international organization.

IV. Conclusions

Subsequent practice to international treaties in general, and to constitutional treaties establishing international organizations in particular, can have a law-creative effect. This occurs in cases where the subsequent practice raises the notions of desuetude, acquiescence, or estoppel. The common element of these interpretations of subsequent practice is the requirement of some sort of intent or *opinio juris* of the parties to create a binding rule.

Some of the discussed examples of subsequent practice in the GATT raised the possibility of a law-creative effect. Nevertheless, in several cases in which a prolonged, ongoing practice of deviation from provisions of the General Agreement could be proved, a derogation of the relevant GATT provisions could not be concluded. In these cases, the contracting parties have made clear that they do not wish to create a new binding rule or give up rights under the General Agreement, as seen in the example involving the practice to adopt decisions by consensus and the toleration of custom unions or free-trade areas.

This result shows that the question of a possible law-creative effect of the subsequent practice in GATT has to be approached carefully. It also supports the assumption that the contracting parties tend to develop pragmatic rules of non-binding character, defined above as de facto rules.

¹⁹⁵ Frank, *The "Graduation" Issue for LDCs*, 13 J. WORLD TRADE L. 289, 299-300 (1979).

¹⁹⁶ BENEDEK, *supra* note 7, at 196-202.

¹⁹⁷ JACKSON, *supra* note 6, at 120; Roessler, *supra* note 107, at 81; LONG, *supra* note 6, at 45; CARREAU, *supra* note 5, at 258; SEIDL-HOHENVELDERN, *supra* note 90, at 345; BENEDEK, *supra* note 7, at 250 (with a survey on the literature on this issue).