

INTERNATIONAL DISPUTE SETTLEMENT SYSTEM DESIGN: ANALYSIS OF THE WORLD
TRADE ORGANIZATION

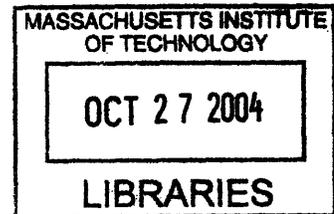
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Submitted to the Department of Urban Studies and Planning
In partial fulfillment of the requirements for the degree of

Doctorate in Philosophy

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

September 2004

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**International Dispute Settlement System Design:
Analysis of the World Trade Organization**

By

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Submitted to the Department of Urban Studies and Planning on September 10, 2004
in partial fulfillment of the requirements for the degree of Doctorate in Philosophy

Abstract

The dispute settlement process established by the World Trade Organization (WTO) in 1994, (the "DSU"), has drawn widespread attention. While the DSU is the most used international dispute settlement process, it is geared to resolving complaints by one country against another concerning enforcement of the WTO rules and obligations. This research has examined the WTO in two dimensions: first, how does the DSU fit within a larger system of processes for resolving policy making and implementation, as well as enforcement disputes. Secondly, how do those processes measure up to the characteristics of effective dispute resolution.

In answer to the first question, I have categorized policy disputes into three orders: first-order disputes in policymaking, second-order disputes in policy implementation, and third-order disputes in policy enforcement. The same issues, e.g., agricultural subsidies or intellectual property, emerge in all three dispute orders. First-order disputes are resolved by all WTO members through consensus-based negotiation. The negotiation experience of the last four multilateral trade negotiations -- the Kennedy Round, the Tokyo Round, the Uruguay Round and the pending Doha Round -- are assessed. Second-order disputes are considered by all WTO members through operating committees and the Trade Policy Review Mechanism. Third-order disputes are resolved through the DSU; 304 cases were submitted from January 1, 1995 to December 31, 2003.

More effective dispute resolution processes tend to exhibit a number of characteristics: they involve lower transactions costs in terms of economics, time, bureaucracy, diplomacy and opportunity; parties are satisfied with the outcome and the process; relationships among the affected parties are not damaged; and recurrence of the problem among the same and other parties is minimized.

This research suggests that the three dispute orders be considered as an integrated system of dispute settlement. In doing so, the WTO -- and other international institutions -- can achieve more effective resolution of policy problems by taking advantage of the relative strengths available through each dispute order settlement process.

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Biographical Note

Janet Martinez has presented this dissertation in partial fulfillment of the requirements for a Ph.D. from the Department of Urban Studies and Planning at MIT. She received her B.S. Bacteriology and Public Health from Washington State University (1971-73), J.D. from Golden Gate University (1977-80), M.P.A. from the Kennedy School of Government at Harvard University (1991-92).

Ms. Martinez' research was supported as an Ida Green Fellow, Graduate Fellow in Sustainability, MacArthur Research Fellow, and Program on Negotiation Graduate Research Fellow. Her publications include: Susskind, Chayes and Martinez, "Parallel Informal Negotiation: A New Kind of International Dialogue," *Negotiation Journal* (1996) and Martinez and Susskind, "Parallel Informal Negotiation: An Alternative to Second Track Diplomacy," *International Negotiation* (2000).

A corporate lawyer for ten years (1980-90), she was Senior Associate at the Consensus Building Institute (1994-2002) managing policy dialogues on climate change, international trade and environment. Ms. Martinez has taught graduate and executive courses in negotiation, mediation and international dispute settlement at the Kennedy School of Government, Graduate School of Business and Law School at Harvard University; the University of California, Hastings College of Law; and currently at Stanford Law School.

Acknowledgements

Delving into the deep thinking space that a dissertation requires was a luxury of time and effort made possible by my scholar-teachers, academic colleagues, family and friends. This research continues to interest me as a compelling confluence of law, public policy and dispute resolution. For that, I owe my committee and mentors who comprise the finest teachers and thinkers that I encountered in my graduate study. This undertaking started with Abe and Toni Chayes during the writing of *The New Sovereignty*, and my negotiation colleagues at the Kennedy School and Business School: Jim Sebenius, Howard Raiffa, Mike Wheeler, Ted Parson, Nancy Buck, Michael Watkins and Mehrdad Baghai. Larry Susskind at MIT provided the institutional support and intellectual insight to chair my committee, joined by Ken Oye Abe Chayes, then Joseph Weiler, whose expertise in political economy and international trade law disciplined my thesis. I am very honored and grateful to all of them for their scholarship, high expectations, stimulation, creative critiques, and patience. My work with the Consensus Building Institute enabled me to make the acquaintance of many officials at the WTO who generously shared their knowledge and experience, especially Amb. Tran Van-Thinh, Hector Torres, Gary Sampson and Gabrielle Marceau. I gratefully acknowledge the grants that underwrote my Ida Green, MacArthur and Program on Negotiation fellowships.

Every day, it was my family's confidence that stoked my perseverance. My husband, Jesse, was my partner throughout in our mid-life transition into academia. He worked with me on the literature and date compilation, managed the household and with our daughters, Serena and Noelle, deferred countless times to my travel, research and writing. My parents, Lee and Cynthia Griffin, and sisters, Heidi, Kimberly Ann and Cynthia, ever encouraged me to continue with concrete and moral support. My new colleagues at Hastings and Stanford offered both enthusiasm and opportunities to present my research. Michele Ferez, Sossi Aroyan, Maude Pervere (on sabbatical) and Jennifer Thomas-Larmer (through two hurricanes) edited my work and helped me stay the course. To my friends and colleagues in San Francisco and Cambridge, my deepest gratitude.

CHAPTER 1: INTRODUCTION

Agriculture forms the heart of the economic policies of many nations—developed and developing alike. The value of global agricultural trade now exceeds \$583 billion per year.¹ Differences in countries' development stages, geography, and cultural norms influence trade in agricultural goods, and conflicts among countries over agricultural trade practices are inevitable. The United States, Europe, and the G-20 group of developing countries, for example, have struggled for years over acceptable levels of agricultural protection.² Their negotiators wrestle with whether and how to reduce trade barriers on agricultural products and what transitional accommodations are appropriate for differently situated countries.

But while agriculture dominates current international trade negotiations, it is only one of many issues facing nations in the global trade arena. Each issue challenges countries to negotiate a framework of rules, integrate those rules into domestic policy, and enforce those policies in practice. Diverse cultures, resources, levels of access to information, norms, and priorities generate conflicts among nations at every stage of negotiations. The global nature of trade demands a coherent and time-efficient means to resolve these conflicts. This research examines one international institution—the World Trade Organization (WTO)—and the processes it has developed to address trade-related conflicts.

The WTO is a community of 146 nations that have come together in an effort to jointly regulate international trade. Of the myriad disputes that arise among and between these nations, three types bear close analysis. I have designated these types as *first-order*, *second-order*, and *third-order disputes*, based on a narrowing scope of parties and targeted action.

- **First-order disputes**, or “policy disputes,” are disagreements among the universe of WTO nations concerning what the international rules of the trade “game” should be. In these disputes,

¹ WTO, *Annual Report 2002*, International Trade Statistics, Table IV-01 (Geneva: WTO, 2002).

members of the WTO decide, through multilateral negotiation, whether international trade rules should apply to a particular situation, and, if so, what those rules should be. These disputes are about whether countries should retain sovereignty on a given level or mode of protection, or should support an international rule that binds all WTO members for the common benefit of the trading community. For example, negotiators at WTO meetings in Doha, Qatar, and Cancun, Mexico, engaged in first-order disputes when they disagreed over the substance of WTO rules governing national agriculture subsidies to farmers.³

- **Second-order disputes**, or “policy implementation disputes,” are disputes among member countries over how international policy is translated into national law. A second-order dispute often takes the form of a review of an individual country’s trade policies. Such a review takes place in a multilateral forum in which any and all members of the WTO may participate, depending on the issue’s relevance to their own trade relations. The outcome is a concluding report with comments and recommendations to guide the subsequent behavior of the targeted country. For example, the WTO recently reviewed the United States’ trade policies and raised concerns that the United States’ continuing subsidy of its agriculture sector (under the 2002 Farm Security and Rural Investment Act) did not comply with the Agreement on Subsidies and Countervailing Measures.⁴ Here, the dispute is between one WTO member country and the others, due to an alleged failure to incorporate the internationally agreed-upon rules into domestic

² “Protection” refers to the practice of protecting, or advantaging, one’s domestic industry against competition from foreign countries. Protection can take several forms, the most direct being to tax (or set a tariff on) competing imports.

³ Scott Miller and Christopher Rhoads, “WTO Chief Sets Goals on Farm Issues,” *Wall Street Journal*, January 16, 2004.

⁴ Minutes of the Trade Policy Review of the United States on January 14-16, 2004, WTO Doc. WT/TPRM/126, March 15, 2004, p. 31. The Agreement on Subsidies and Countervailing Measures is part of the Marrakesh Agreement Establishing the World Trade Organization, Annex IA: Multilateral Agreements on Trade in Goods, January 1, 1995. The Marrakesh Agreement Establishing the World Trade Organization is generally known as the “WTO Agreement” and will be referred to as such in the remainder of this paper. The term includes the agreements and associated legal instruments of Annexes 1, 2 and 3 comprising the Multilateral Trade Agreements made by the signing member countries at Marrakesh, and the Plurilateral Trade Agreements signed by certain countries. The full text of the WTO Agreement can be found at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement.

trade policy. Second-order disputes can provide an early warning of problems that could develop into third-order disputes.

- **Third-order disputes**, or “policy enforcement disputes,” are bilateral disputes between individual countries over specific actions that allegedly violate WTO rules and cause harm to a trading partner. These disputes, which involve a complaining country and a responding country, are handled through a formal dispute resolution mechanism at the WTO. A three-person panel of experts serves as arbitrator between the two sides and decides whether the responding country has violated the WTO’s rules, and, if so, the appropriate level of compensation if the violating country does not agree to “cure” its violation. For example, Brazil filed a formal complaint against the United States for violation of the WTO’s subsidy rules, for giving American cotton growers and agribusinesses \$1.54 billion in annual subsidies. Brazil argued that the overproduction of cotton caused by U.S. subsidies is destroying export markets and undermining the livelihoods of Brazilian farmers. (Ironically, their complaint was based on data from the U.S. Department of Agriculture.)⁵

While the participants and resolution processes for each order of dispute vary, the issues are similar. A single issue may be considered sequentially, or even simultaneously, as a first-order, second-order, and third-order dispute. As mentioned above, for example, the general disagreement and debate among all WTO nations over provisions of the WTO Agreement on Agriculture is a good example of a first-order dispute. The criticism of the United States’ farm subsidy policy during the WTO’s trade policy review of the United States is an example of a second-order dispute. And Brazil’s official complaint against the United States, which argued that U.S. cotton production subsidies caused significant economic harm to Brazilian producers, is a third-order dispute.

I have analyzed the legal and administrative processes the WTO uses to resolve these three distinct types of disputes. Collectively, these processes can be studied as an international system for

⁵ Elizabeth Becker, “Battle is Looming over Cotton Subsidies,” *New York Times*, January 24, 2004. A WTO panel issued a final ruling to the parties on June 18, 2004, that the subsidies granted to U.S. cotton farmers from 1999 to 2002 depressed world market prices and injured Brazil’s trade interests. The United States has until July 1, 2005, to withdraw the measures. Report of the Panel, WTO Doc. WT/DS267/R, forthcoming.

dispute settlement. Dispute resolution theory offers guidance about how to characterize and evaluate such systems. My research applies dispute resolution theory to the WTO's dispute-handling processes and suggests how those processes might be improved.

The WTO's system is appealing as a topic of study for several reasons. First, since international trade is of significant importance to the international community, it is reasonable to assume that countries care a great deal about how the trading system works and how it applies to them. Second, the WTO's large and diverse membership mirrors that of almost all other international regimes, including, for example, the United Nations and the Framework Convention on Climate Change.⁶ Third, the WTO system grew out of the General Agreement on Tariffs and Trade (GATT), which was in existence for four decades and from which much was learned. Fourth, much of the WTO's experience since its inception in 1995 is documented and accessible. And lastly, the WTO's formal dispute settlement process (used for third-order disputes) is employed more frequently than any other multilateral dispute settlement procedure.⁷

This introduction has four sections. First, I offer a brief overview of the WTO's institutional history and operation. Second, I present three stories to illustrate further the three types of disputes that arise at the WTO. Third, I analyze the WTO's system from the standpoint of dispute resolution theory and introduce ideas about how it might be strengthened. And fourth, I outline the topics covered in the five chapters that follow.

OVERVIEW OF THE WTO

The predecessor to the World Trade Organization was the General Agreement on Tariffs and Trade, which was enacted in 1947 (the "GATT 1947"), contemporaneously with the formation of the World

⁶ As of 2003, 146 nations were members of the WTO. In this paper, the terms "members," "countries," "contracting parties," and "trading partners" will be used interchangeably to refer to WTO member nations.

⁷ Ernst-Ulrich Petersmann, "Dispute Settlement Procedures of International Organizations at Geneva," *Journal of International Economic Law* 2, no. 2 (1999): 186.

Bank and the International Monetary Fund. The contracting parties under the GATT 1947 undertook eight negotiating “rounds” between 1950 and 1994, each of which took one to eight years.⁸ The last, the Uruguay Round (1986-1994), was documented in 30,000 pages and resulted in the formation of the WTO on January 1, 1995.

The World Trade Organization was formed to deal with the rules governing trade among nations. Its objective is to help producers, exporters, and importers of goods and services by eliminating trade barriers that might impede the free flow of international commerce. Trade barriers include tariffs placed on imports, subsidies for producers and exporters, and nontariff barriers such as regulatory restrictions that function as “zero quotas,” or bans, on certain imports.

The WTO’s membership stands at 146 countries, and the body is headquartered in Geneva, Switzerland. Each member country is entitled to have its exports treated “fairly and consistently” by other member countries and commits to do the same for imports into its own market. The umbrella agreement for the WTO—the Marrakesh Agreement Establishing the World Trade Organization, which subsumed the GATT 1947—sets forth a complex set of negotiated trade concessions on thousands of products, together with other agreements that govern trade in various goods, services, and intellectual property rights. These agreements are all premised on fundamental trading principles, namely, an obligation to: (1) avoid discrimination among countries (through the application of “most favored nation” (MFN) treatment among all members)⁹; (2) limit tariffs¹⁰; (3) avoid discrimination against goods imported from other member countries;¹¹ and (4) avoid the use of quotas and other nontariff restrictions on imports.¹²

The explicit functions of the WTO are to:

⁸ A “round” designates a particular period of time devoted to negotiating a pre-negotiated agenda of issues. Neither the duration nor frequency of a round is predetermined. Many years may pass before countries decide that a new negotiating round should be launched. While the WTO Agreement provides that the member countries will meet in Ministerial Conference at least every two years, there is no obligation to initiate new negotiating rounds until the contracting parties so decide.

⁹ General Agreement on Tariffs and Trade, Article I. (The full text of the General Agreement on Tariffs and Trade can be found at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement.)

¹⁰ A tariff is a duty usually imposed on imports to protect a country’s domestic products from price competition from products produced outside the country.

¹¹ General Agreement on Tariffs and Trade, Article III.

- Administer the WTO trade agreements and decisions (of which there are nearly 60);
- Provide a forum for trade negotiations;
- Handle trade disputes between countries;
- Monitor national trade policies;
- Provide technical assistance and training for developing countries; and
- Cooperate with other international organizations.¹³

The WTO's decisions are made by the entire 146-country membership, typically by consensus.¹⁴ The WTO's top decision-making body is its Ministerial Conference, which meets at least every two years. At the next level down is the General Council, whose representatives (usually ambassadors and heads of delegation in Geneva, but sometimes officials sent from member capitals) meet several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body to conduct trade policy reviews and as the Dispute Settlement Body to address and manage the settlement of disputes. Subsidiary to the General Council are a number of councils and numerous committees responsible for specific agreements.

THE THREE ORDERS OF DISPUTES

Each of the three orders of disputes involves different procedures for dispute diagnosis and dispute resolution. *Diagnosis* is the procedure by which a dispute is acknowledged and assessed. *Resolution* is the procedure by which a dispute is solved. Resolution can take place either through direct negotiation by the relevant parties or via a decision by a professional neutral or arbitration panel. Table 1.1 summarizes the diagnosis and resolution procedures used in conjunction with the three orders of disputes at the WTO.

¹² General Agreement on Tariffs and Trade, Article XI.

¹³ WTO Agreement, Article III.

¹⁴ Article IX of the WTO Agreement provides that consensus is achieved if no member present at the meeting formally objects to the proposed decision.

Table 1.1: Dispute Diagnosis and Resolution Procedures

Dispute Type	Dispute Diagnosis Process	Dispute Resolution Process
First Order	All member nations must decide by consensus to consider or reconsider WTO policy.	All member nations must agree by consensus to adopt or amend a policy rule.
Second Order	A nation (or nations) raises concerns about another nation's trade policies within relevant WTO councils and committee meetings, most notably in the Council for Trade Policy Reviews. The issue may also be raised by the WTO Secretariat.	Resolution takes the form of comments and recommendations—either informally in discussions or formally in Trade Policy Review minutes and summaries—but does not involve any binding action.
Third Order	A nation makes a specific claim of violation against a trading partner.	The complaint is resolved through bilateral consultations (direct or assisted by the Director-General); a decision by a three-expert panel; or legal review by an appellate body.

The diagnosis and resolution procedures for each order of dispute are described more fully in the following sections. Detailed illustrations of actual cases are also included.

First-Order Disputes: Policy Disputes

First-order disputes among WTO member nations arise in the context of pre-negotiations (i.e., debates over what the agenda should be for each round of negotiations) and then in the negotiation of each issue on the agenda. WTO members make decisions by consensus in both pre-negotiations and negotiations. The 146 government delegations meet in multiple, simultaneous working groups with professional staff support from the WTO Secretariat.¹⁵ Conflict arises at several levels: Countries dispute what issues, with what scope, should be included on the agenda. These disputes emerge over some period, formally and informally, as countries explore whether a new negotiating round should be launched, and if so, what problems warrant address. Hundreds of proposals may be floated among the members, each seeking to frame a problem and a policy response and attract the support of a winning coalition. To establish an agenda for negotiation and authorize the formation of negotiating

groups, members much reach consensus about the agenda at a Ministerial Conference (held once every two years).

Once a preliminary agenda is established for a given negotiating round, the parties proceed to negotiate trading rules. The rules are generally of two different types: agreements on specific concessions for specific products (e.g., a 10 percent tariff reduction on manufactured computer chips) and rules on how trade will be conducted (e.g., what dispute settlement procedures will be used or what topical areas, such as services and intellectual property rights, will be covered). It is understood that the agenda, and ultimately the agreement, must represent a package of tradeoffs that allows each member to satisfy some of its interests.

Table 1.2 shows the negotiating rounds, the number of negotiating countries, and the issues that have been addressed since the GATT was formed in 1947. Each negotiating round concluded with agreement(s) among all the contracting parties on further reduced tariffs on traded products and the terms by which the parties would conduct international trade. Select agreements at the conclusion of the Tokyo and Uruguay Rounds were “plurilateral,”—that is, not all contracting parties agreed to be bound by them.

Table 1.2: History of Trade Negotiating Rounds

Negotiating Round	Time Period	Number of Countries	Issues Negotiated
GATT 1: Geneva	1947	23	Tariffs
GATT 2: Annecy	1949	19	Tariffs
GATT 3: Torquay	1950	28	Tariffs
GATT 4: Geneva	1956	34	Tariffs
GATT 5: Dillon	1960-61	39	Tariffs
GATT 6: Kennedy	1962-67	74	Tariffs, agriculture, and nontariff measures
GATT 7: Tokyo	1973-79	84	Tariffs and 9 new agreements
GATT 8: Uruguay	1986-94	128	Tariffs, 18 agreements, and 30 understandings
WTO 1: Doha	2001-	146	21 issues

¹⁵ Countries vary greatly in the size of their Geneva-based missions to the WTO. Some have no staff in Geneva at all; others have staffs numbering more than 100.

Figure 1.1
Overview of GATT/WTO Members and Multilateral Trading Rounds

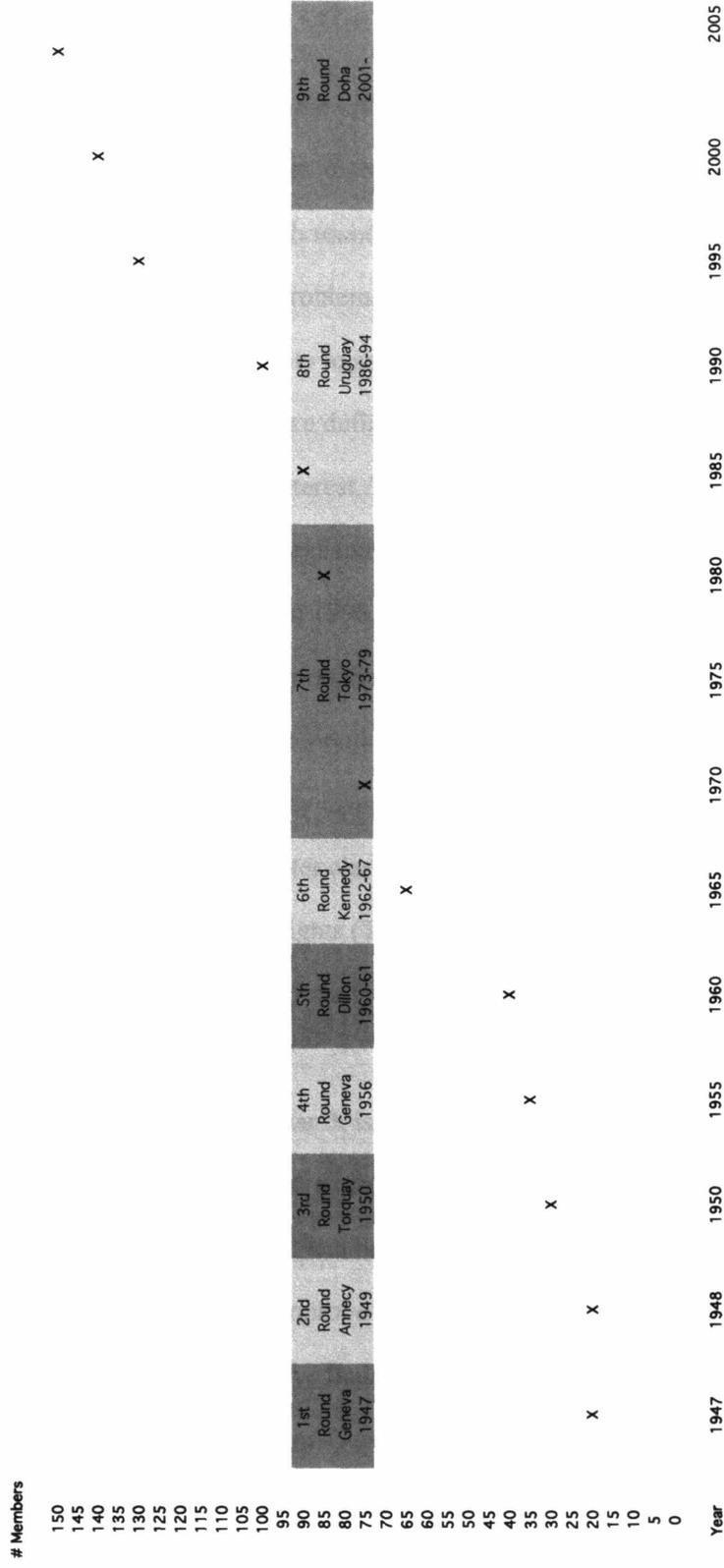


Table 1.2 and Figure 1.1 illustrate the dramatic increase over time in both the number of contracting parties and the number of issues negotiated. This increasing complexity has extended the time and expertise needed to complete each round of negotiation.

In resolving first-order disputes, problems of asymmetric participation and information access are rampant. Countries with limited capacity to analyze and understand their own interests suffer a knowledge deficit that ultimately results in a deficit of democracy, as they are unable to negotiate fully in their individual or the collective interest. These problems are exacerbated by the number of parties and the scope and complexity of the disputes. From 1947 to 1995, for example, international trade rules governed only trade in goods. In 1995, the rules were extended to cover trade in services as well. Many countries opposed the inclusion of services on the negotiating agenda because they lacked sufficient information, as well as economic and political interest.

Political pressure to conclude policy disputes results in many disagreements being papered over or ambiguously drafted and left for later clarification. For example, the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted in 1995, contemplated legal capacity and infrastructure that was beyond many countries' understanding and means, thus frustrating policymakers' intent and effect.

My hypothesis, described in Chapter 3, is that “enhanced management” of the consensus-building process by which policy disputes are resolved—including the participation of a mediator, structured and representative consultations, and better access to information—will increase the likelihood that resulting agreements will improve the predictability of the trading system, and therefore the willingness of parties to resolve their disputes more efficiently. A consultative board of eminent persons set up by the WTO Director-General is considering such ideas.¹⁶

The following story describes the WTO's 1999 effort to resolve first-order disputes over an appropriate agenda for a new round of trade negotiations.

¹⁶ Laurence Tubiana, “Post-Cancun WTO: Focus on Objectives, Not the Means,” *Bridges Between Trade and Sustainable Development*, no. 7 (September-October 2003): 9.

Seattle: The Dilemma of Agenda-Setting

To the international public, “Seattle” evokes a vivid image of confrontation between international trade diplomats and the opponents of globalization. One news headline blazed that the Seattle ministerial meeting was “A Chaotic Intersection of Tear Gas and Trade Talks.”¹⁷ Another writer gushed: “Battle in Seattle: Third Ministerial Meeting in Seattle collapsed in spectacular fashion, in the face of unprecedented protest from people and governments around the world.”¹⁸ The reality of the Seattle ministerial was significantly more complex than the headlines indicated, however, and the failure of the WTO countries to agree to an agenda for a new round of trade talks was due to far more than anti-globalization activists’ protests.

From 1996 to 1999, WTO parties exchanged information in anticipation of launching a new round of trade negotiations. Two topics—agriculture and services—were specifically scheduled for new negotiations by the beginning of 2000. The Agreement on Agriculture, adopted in 1994 as part of the final Uruguay Round, provided a framework for the long-term reform of agricultural trade and domestic policies through commitments in the areas of market access, domestic support, and export competition.¹⁹ The General Agreement on Services, also adopted in 1994, is a parallel counterpart to the GATT’s Multilateral Agreements on Goods. The services agreement essentially doubled the economic value of trade covered by the WTO to include not only trade in products, but also trade in services (e.g., banking, tourism, telecommunications, and transportation). The agreement established a commitment to reduce the barriers to trade in such services over the successive rounds of negotiations. Whether, and how many, additional issues would be placed on the agenda of a

¹⁷ David Sanger and Joseph Kahn, “A Chaotic Intersection of Tear Gas and Trade Talks,” *New York Times*, December 1, 1999.

¹⁸ Lori Wallach of Public Citizen posted online news coverage of the Seattle Ministerial on Public Citizen’s web site (www.citizen.org/trade/wto/seattle). Although the site is no longer active, the author has a print copy on file.

¹⁹ “Market access” refers to the ability of agricultural producers to export to other countries. Some countries discourage imports by imposing certain quality standards that may not be based on legitimate health and safety measures and are protectionist in intent. “Domestic support” refers to a national policy to subsidize the production of certain products, thus granting a production cost advantage to domestic producers over producers

“Millennium Round” (slated to potentially begin at the Seattle meeting in 1999) was open for discussion.

From March to November 1999, more than 800 proposals for items to be negotiated by member nations were submitted by member countries and coalitions to the WTO. The General Council worked to put the various ideas together in a draft declaration, to be debated and then issued in Seattle, that would constitute an agenda for subsequent negotiation. The topics identified for consideration included not only the agriculture and services agenda agreed upon in 1994, but tariffs, antidumping, subsidies, safeguards, investment measures, trade facilitation, electronic commerce, competition policy, fisheries, transparency in government procurement, technical assistance, capacity building and other development issues, and intellectual property protection. Ultimately, the 800 proposals were categorized into a potential agenda that spanned nearly 20 topical areas.

Three main strategic camps emerged with regard to the proposed negotiating agenda. The first was made up of those who felt that negotiations should focus solely on a comprehensive review of *existing* WTO agreements. These parties wanted to “catch up” and stabilize the almost overwhelming range of new obligations agreed to in the Uruguay Round. As the Chair of the Group of 77 expressed it, “The next stage of the WTO negotiations should be about the three Rs, to review, repair, and reform the WTO agreements and system.”²⁰ Developing countries generally fell into this camp.²¹ Their demand was a deferred reaction to the requirement that the Uruguay Round be executed as a “single undertaking.” (The term *single undertaking* refers to the fact that, in the Uruguay Round, the contracting parties had to consent to all 20 agreements as a package, rather than pick and choose specific agreements to adopt.) Many smaller countries did not fully understand the

in other countries. Conversely, a country might subsidize the costs associated with the export of certain products, to make them more competitive in the world market.

²⁰ The Honourable William Harrington, Minister of Commerce, Trade, and Industry, Zambia, statement made at the Third Session (Ministerial Conference, Seattle, December 2, 1999), WTO Doc. WT/MIN(99)/ST/117. The Group of 77 is actually a group of 134 developing countries that often negotiate as a block to represent the developing countries’ interests.

²¹ Of these, developing countries particularly wanted to examine how the Uruguay Round agreements adopted in 1995 (e.g., agreements on antidumping measures, subsidies, textiles and clothing, intellectual property, investments, sanitary and phytosanitary measures, and technical barriers to trade) had been implemented over the previous five years.

legal or practical ramifications of some of the agreements, but felt unable to oppose their adoption. Their recourse was to defer compliance and demand re-negotiation in Seattle.

The second strategic camp was made up of those who believed that negotiations should be limited to the “built-in agenda”—the agriculture and services issues already scheduled for negotiation. The third and final camp included those who wanted to expand the WTO’s purview to include all 20 topical areas, including seeking specific agreements on investments, competition policy, transparency in government procurement, and trade and environment.

The Seattle Ministerial was scheduled for November 30–December 3, 1999. At the opening session, U.S. Trade Representative Charlene Barshefsky, host Chair for the meeting, exhorted delegations to meet in working groups (each open to all member countries) to reach agreement on text for consideration by the Committee of the Whole, the plenary body that was equivalent to the General Council. While she stated a preference for this inclusive approach, she reserved the right to hold “green room” discussions—informal meetings with smaller numbers of delegations selected at her discretion.²²

Traditionally, the most important talks take place in green room discussions. Green room deliberations typically involve a relatively small number of representatives from developed and developing countries. A “full” green room can have up to 30 participants, typically including: “the Quad” (the United States, European Union, Canada, and Japan), Australia, New Zealand, Switzerland, Norway, possibly one or two transitional economies, and a number of developing countries, often Argentina, Brazil, Chile, Colombia, Egypt, Hong Kong, China, India, South Korea, Mexico, Pakistan, South Africa, and a country from the Association of Southeast Asian Nations (ASEAN) bloc. Most smaller developing countries stay on the sidelines for lack of adequate resources and capacity.²³

In Seattle, after informal working group discussions through the night of December 2 and into December 3, the main discussions were in green room meetings in which some 20-40 ministers took

²² The “green room” reference comes from a particular green conference room at the WTO offices in Geneva.

part. At the same time, the working group chairpersons did “their utmost to ensure that participants represented a cross-section of the members’ positions on the relevant subjects.”²⁴ Nevertheless, an agreed-upon text was elusive, and the negotiations over a new negotiating agenda ultimately failed.

Ambassador Barshefsky explained:

The issues before us are diverse, complex, and often novel. And together with this, we found that the WTO has outgrown the processes appropriate to an earlier time. An increasing and necessary view, generally shared among the members, was that we needed a process which had a greater degree of internal transparency and inclusion to accommodate a larger and more diverse membership.²⁵

Jeffrey Schott, in his retrospective, *WTO After Seattle*, commented:

Tens of thousands of people, concerned about environmental protection, human rights, labor standards, and other more parochial concerns, demanded that WTO members give greater priority to their causes and restructure trade policies to promote their objectives....

Ultimately, [however,] the WTO meeting fell victim not to protests outside in the streets, but rather to serious substantive disagreements inside the convention center among both developed and developing countries over the prospective agenda for new trade talks.²⁶

Two themes from the Seattle experience bear mentioning. The first is the importance of a balanced, participatory process during pre-negotiations—negotiations over an appropriate agenda of policy questions. As Schott notes, the desired “agreement on the agenda for a new WTO Round is an agreement on the *problems* that negotiators will try to resolve in new trade talks; it is not a commitment to particular *solutions* to those problems.”²⁷ Effective pre-negotiation of the agenda itself is critical. It must include the participation of all parties—including developed and developing countries—to ensure that the agenda for negotiations captures issues of importance to all participants. While all member countries were formally present in Seattle, the informal green room process failed.

²³ Jeffrey Schott, *The WTO After Seattle* (Washington, DC: Institute for International Economics, 2000) p. 285.

²⁴ *WTO Briefing Note*, December 3, 1999. This briefing note was posted on the WTO website to help journalists and the public understand developments at the Seattle Ministerial Conference. It was not archived nor preserved as a document; however, the author retains a print copy in her files.

²⁵ Ambassador Charlene Barshefsky, remarks at the Closing Plenary (Ministerial Conference, Seattle, December 3, 1999).

²⁶ Schott, *WTO After Seattle*, p. 5.

²⁷ *Ibid.*, p. 18.

Many countries did not view the green room negotiations as representative or transparent enough. The result of the distrust of members in the process was the ultimate failure of the Seattle Ministerial to reach agreement on a negotiating agenda.

A second theme relates to the disagreement between developed and developing countries over the agenda items themselves. Many developing countries took the view that they had been coerced into some of the 1994 agreements from the Uruguay Round and that they were unable to implement those agreements. Their incapacity blurs the distinction between first-order and second- and third-order disputes: diminished capacity to resolve first-order (policymaking) disputes can contribute to the occurrence of second-order (policy implementation) and third-order (policy enforcement) disputes. The consequences that flow from omitting implementation discussions from first-order disputing processes (as was done in the Uruguay Round) are threefold: (1) countries may demand to renegotiate the terms of previously adopted agreements, (2) countries with insufficient national capacity (institutional, economic, or political) may simply not implement the agreements domestically, and (3) countries may file specific, formal performance complaints for lack of any alternative resolution process. Part of my thesis is that meaningful discussion of both first- and second-order issues in meetings of the WTO member countries is necessary, but having meaningful discussions would require much more education, facilitation, and structuring than is currently contemplated by the WTO.

Second-Order Disputes: Policy Implementation Disputes

Once a trade agreement is signed and ratified, each country needs to interpret the new rules in domestic law and regulations, to make its domestic trade policies consistent with the new requirements. Problems with policy implementation can be addressed in a number of ways in the WTO, including via informal discussions among members during WTO committee and council meetings and through the WTO's formal, periodic trade policy review process known as the Trade Policy Review Mechanism (TPRM).

WTO committees and councils are open to all member countries and meet periodically to discuss particular issues. For example, the Committee on Trade-Related Intellectual Property Rights discusses intellectual property issues, and the Committee on Subsidies and Countervailing Measures addresses subsidies issues. In committee and council meetings, any country's experience may be raised within the relevant, specific topical context.

The Trade Policy Review Mechanism, by contrast, is a formal process through which WTO Secretariat staff members periodically examine each country's trade policies on the full range of issues covered by the WTO agreements and, with the input of all WTO members, make recommendations on what adjustments that country should pursue. The TPRM's origins date back to 1985, when the GATT's Wisemen's Report called for regular monitoring of its members' trade activities and recommended that, "Governments should be required regularly to explain and defend their overall trade policies."²⁸ In 1988, a special working group proposed a blueprint for the TPRM on a trial basis.²⁹ The TPRM was then formally adopted as part of the Uruguay Round in 1995. Its purpose was described as follows:

The objectives of the TPRM are to contribute to improved adherence by all WTO Members to rules, disciplines, and commitments...by achieving greater transparency in, and understanding of, the trade policies and practices of Members.... It is not intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members."³⁰

While the trade policy review process is explicitly not to be used to "enforce" particular behaviors, the problems it surfaces are second-order disputes, as defined in this paper, which have the potential to become the third-order disputes subject to the WTO's more formal dispute-settlement

²⁸ F. Leutwiler et al., *Trade Policies for a Better Future* (Geneva: General Agreement on Tariffs and Trade, 1985) p. 42.

²⁹ The Functioning of the GATT System group, or "FOGS," was organized in 1987-88 to examine the GATT operation.

³⁰ WTO Agreement, Annex 3.

process. In his 1998 assessment of the TPRM, economist Donald Keesing describes the TPRM's essential function as that of an "external audit."³¹

The WTO Secretariat has 17 professional staff who manage TPRM country reviews, a process that takes about 10 months for each country and occurs every two to six years. (Larger trading economies are reviewed more frequently.) As part of a TPRM review, a country completes an extensive written questionnaire about its economy and trade policies, presents a policy statement by its government (the "country report"), and is subject to an independent assessment prepared by the Secretariat (the "Secretariat report"). The Secretariat report highlights successes as well as deficiencies in a country's trade policies relative to WTO obligations, and includes recommendations for rectifying the deficiencies. The General Council of the WTO then meets for two days as the Trade Policy Review Body to review and discuss these reports with the country under review. All WTO member countries form the Trade Policy Review Body and can attend all reviews.³² Approximately 16 reviews are conducted each year.

While TPRM reviews are explicitly prohibited from functioning as enforcement mechanisms, the issues raised in them foreshadow the kinds of third-order disputes likely to arise, as they reveal actions that could provoke one trading partner to file a formal complaint against another. Thus, a second-order dispute in the TPRM context is expressed as a concern by a particular trading partner or by the WTO as a collective body about a country's failure to properly interpret the WTO's international rules in its national policy.

While many countries commend the TPRM for providing an opportunity to engage trading partners in a highly productive interchange, the nature of the forum is not geared to problem-solving, but rather to diplomatic consciousness-raising. Also, while all WTO countries are members of the TPRM Council, a country's participation in a given TPRM review depends on that country's other obligations and the importance of the target country to its trade volume. And, most notably, the value

³¹ Donald Keesing, *Improving Trade Policy Reviews in the World Trade Organization* (Washington, DC: Institute for International Economics, 1998).

³² As noted earlier, actual participation varies with the WTO schedule of meetings and the importance of the reviewed country to other trading partners.

of the TPRM is limited by the absence of a process by which alternative options for achieving TPRM recommendations can be debated and considered. Barriers to the national adoption of internationally agreed-upon policies are domestic in nature and may stem from political, economic, or legal causes. The various operating committees and TPRM reviews are useful in diagnosing whether national policies are consistent with international trade obligations, but the processes involve no opportunity for considering alternative policy options that would cure any noted inconsistencies. Often, a country is aware of its shortcomings—such as, say, an agricultural policy that advantages domestic tomatoes relative to imports. But due to political pressures (from farmer constituencies) or economic reasons (revenue enjoyed from a tariff on imports), the country cannot initiate the necessary policy change. In short, existing second-order dispute resolution processes highlight whether an implementation problem exists, but they do not foster the identification of feasible solutions.

The following is an example of a second-order dispute.

Uruguay's Specific Internal Tax: Reforming a Discriminatory Trade Measure

This story involves the second trade policy review of Uruguay, which was held in November 1998. At that time, more than 50 percent of Uruguay's foreign trade in goods was within Latin America. Its economic reforms had reduced inflation and its GDP had grown at a cumulative rate of 3.5 percent per annum. Its major exports were agricultural—beef, wool, rice, hides, leather, dairy products, and fish. The main objectives of Uruguay's macroeconomic program had been to slow the upward trend in costs, ease the tax burden on labor, improve the administration of its retirement and pension systems, and reform its educational and tax systems. The WTO's 1998 trade policy review of Uruguay noted a reduction of the state's involvement in the economy, including the removal of monopolies in certain production sectors, as well as a steady growth in its foreign trade flows. Uruguay was commended for improving its integration into the world economy, removing barriers

and restrictions, and reducing import duties through unilateral, bilateral, regional, and multilateral measures.³³

Uruguay's main trade policy instrument through the years has been the tariff. Members of Mercosur—a regional trading group comprised of Argentina, Brazil, Paraguay, and Uruguay—began a tariff-reduction program and defined a common external tariff in 1995.³⁴ Nevertheless, some countries expressed concern that Uruguay's effective protection level was higher than indicated by its nominal tariff. One problem was that Uruguay provided significant assistance to its export sector through a tariff concession policy; raw materials, parts, and other inputs entered the country duty-free, as did capital goods for industries deemed to be in the “national interest.” Other countries saw the tariff concession policy as a way for Uruguay to provide unfair protection to its manufacturers without actually raising tariffs on imports.

Many issues were discussed during Uruguay's trade policy review. In addition to the tariff concession policy, the Uruguay representative was asked about its excise tax—the specific internal tax on wholesale levels of certain domestic goods and equivalent imported goods. This excise tax was known as “IMESI” and was adopted in Uruguay by decree in 1995.³⁵ Industry was concerned that the formula used to calculate the IMESI discriminated against imported alcoholic beverages, because each product *category* was assigned a fixed price per liter, which did not accurately reflect real market value. For example, wines are assessed at 20 percent of their tax base, but the tax base varies with the origin of the wine. Chilean wines were assessed at a base of nearly twice that of Uruguayan wines, resulting in a sale price for Chilean wines that is uncompetitive at least, and an effective import ban at worst.³⁶ The IMESI measure placed an additional burden on imported distilled spirits by requiring that 100 percent of the value-added tax and 60 percent of the excise tax be prepaid. The

³³ Minutes of the Trade Policy Review of Uruguay on November 23-25, 1998, WTO Doc. WT/TPR/M/50, January 13, 1999, pp. 4-5.

³⁴ Mercosur is a “common market” in trade terms. Members agree to function as a common trading area and tax imports into any of their nations at the same, or common, level.

³⁵ The fiscal framework for the IMESI was contained in the 1996 Texto Ordenado, Decree 96/990 of February 1990 from the Ministry of Economy and Finance, and bimonthly resolutions of the Director General for Taxation.

³⁶ Request for Consultation by Chile, WTO Doc. WT/DS261/1, June 26, 2002, p. 2.

tax scheme appeared to afford protection to domestic production in a manner inconsistent with GATT Article III.³⁷

Uruguay responded that rules of origin were country-specific due to existing bilateral agreements and that technical groups were currently working on the matter. The representative of Uruguay said: “Uruguay is currently preparing rules which will ensure equal treatment for all products, regardless of their origin. A decree on the IMESI applied to alcoholic beverages should be approved over the next few days.”³⁸ This interchange reflected a second-order dispute.

A few days passed, and then a few years. Finally, on June 18, 2002 (nearly four years after Uruguay’s trade policy review), Chile requested consultations with Uruguay with regard to IMESI and the resulting tax treatment of certain imported goods, including alcoholic beverages, juices, mineral water, tobacco and cigarettes, automobiles, lubricants, and fuels. Thus what was a second-order dispute evolved into a third-order dispute.

Chile claimed that the IMESI violated Articles I and III of GATT 1994, because it established a tax system based on the use of fictitious, rather than real, prices. Chile considered that the system discriminated between national and imported products, and in some cases between imported products depending on their origin. This alleged discrimination constituted a de facto import prohibition as regards certain products. In its request for consultations, Chile recalled that in the trade policy review for Uruguay in 1998, the IMESI system was subject to some discussion and that Uruguay indicated, at the time, that they were in the process of elaborating norms that ensured equal treatment of all products regardless of their origin. The European Communities,³⁹ Mexico, and the United States joined Chile in the complaint against Uruguay in July 2002.

In short, then, a specific tax measure adopted by Uruguay in 1990 was addressed and acknowledged as a potential trade violation in 1998 during Uruguay’s trade policy review—a second-

³⁷ Article III of the GATT provides that internal taxes should not be applied to imported or domestic products so as to afford protection to domestic production.

³⁸ Minutes of the Trade Policy Review of Uruguay on November, 23-25, 1998, WTO Doc. WT/TPR/M/40, January 13, 1999, p. 18.

³⁹ The European Union is, for legal reasons, officially referred to as the “European Communities” in WTO matters. Both terms are used in this paper, depending on the practice in the particular context.

order dispute—but the measure was still in effect in 2002, unresolved. Despite Uruguay’s recognition of the potential violation, the country was unable or unwilling to bring the IMESI into compliance through domestic legislation or other policy reforms. Thus, Uruguay’s trading partners (the United States, Chile, the European Communities, and Mexico) were forced to pursue a third-order dispute resolution enforcement action in 2002. Ultimately, a panel was established to consider the dispute, but the parties reached a mutual solution in January 2004.⁴⁰

Given the widespread economic pressures in Latin America, it can be surmised that it would have been politically difficult, if not impossible, for Uruguay to amend the IMESI to make it consistent with the country’s WTO obligations. Such reform would involve issues of reduced government revenue and increased competition for Uruguay’s domestic alcoholic beverage industry. Uruguayan legislators’ priorities would be to balance the government’s budget and support industry profits and employment. Since few domestic constituents would rally for IMESI tax reform (except perhaps consumers and Uruguayan distributors of foreign alcohol products), a legal mandate from an international body like the WTO may have been necessary to induce such a change.

A senior trade official once said to me, “Never say ‘no’ [to a domestic constituency] if you can get someone else to say it.” Here, Uruguay shifted the burden of provoking legislative policy reform to a trading partner (Chile) to force the point and relied on an international arbiter to require reform. In the meantime, Uruguay enjoyed nearly 14 years of political and economic benefit since adopting the IMESI measure, a delay that cost the country nothing, since the WTO’s policy enforcement process precludes retroactive damages.

Every trading nation has similar stories of balancing the demands of domestic constituencies against international trading rules. From the perspective of one country, delayed compliance may be an acceptable outcome; but multiplied by 146 countries it raises concerns about the integrity and efficiency of the WTO’s power to ensure policy implementation. The WTO’s diagnostic process flushes out numerous policy implementation disputes, but its dispute resolution mechanisms lack an effective, structured means of facilitating resolution short of formal enforcement. The incentives of

⁴⁰ Uruguay: Tax Treatment on Certain Products, WTO Doc. WT/DS261/7, January 14, 2004.

the current system make it in the offending country's interest to delay as long as possible and submit to the WTO rules only when forced to do so. To improve the system, the WTO would have to alter and strengthen the incentives for the resolution of second-order disputes.

Third-Order Disputes: Policy Enforcement Disputes

The goal of policy enforcement is to achieve consistency between a member country's actions (not just their stated policies) and the WTO's system of rules. Under the WTO system, the enforcement of trade policy is not centralized. That is, neither the WTO Secretariat nor any other centralized body directly enforces WTO policy. Rather, such policy is enforced through the resolution of complaints by one trading partner against another.

The resolution of policy enforcement, or third-order, disputes at the WTO follows a prescribed sequence set forth in the Understanding on Rules and Procedures Governing the Settlement of Disputes (known as the Dispute Settlement Understanding, or DSU).⁴¹ Members of the WTO are obligated to use these procedures to resolve covered trade disputes. Under the DSU process, an individual country first determines whether a sufficient political, legal, and economic basis exists to pursue a complaint against a trading partner. This is the diagnosis phase.

The next step is for the two countries to seek to resolve their dispute through informal means (e.g., direct negotiation by the affected parties, before filing a formal complaint) or, if that fails, formal *consultations* (negotiation by the parties after formal notice, with or without facilitation by the WTO's Director-General). As Gary Horlick explains:

“A request for consultations is a possible indication that the requesting country is willing to proceed through dispute resolution if its problem is not resolved satisfactorily. At that point—if not sooner—all sides evaluate their legal positions, gauging the chances of winning and pondering the prospect of losing. To the extent that both sides coincide on the likelihood of success or failure, there is room for negotiation.”⁴²

⁴¹ WTO Agreement, Annex 2.

⁴² Gary Horlick, *WTO and NAFTA Rules and Dispute Resolution* (London: Cameron, May 2003), p. 355.

If consultations fail, the dispute is submitted to an arbitration panel of three experts named by the Director-General. This arbitration panel hears both sides of the case and issues a decision. Either side may appeal the decision.

As an example, say that Country A notifies Country B that A's rights under a WTO agreement have been impaired by B, because B is subjecting A's apple exports to different requirements than B's own domestically grown apples, thus creating a barrier to the sale of A's apples in B's market. If informal discussions between the two countries fail, Country A will then request mutual consultations with Country B (with notice to the WTO), optionally aided by the WTO's Director-General. If the dispute is not resolved in these consultations, a panel of three arbitrators—who are independent trade experts⁴³—will be appointed to determine if B's apple import measure is consistent with the WTO's rules. The panel hears the arguments on each side and renders a decision. Either A or B can appeal the panel's decision to the Appellate Body. If Country A ultimately prevails, Country B will be given some time to “cure” its apple measure—that is, to bring its policies and actions into compliance. (Sufficient time is often needed, for example, if new legislation is required). If Country B does not comply with the decision, then Country A can request a determination on a level of compensation for the trade injury. If the compensation goes unpaid, Country A can be authorized to withhold comparable benefits on B's exports to A.

Between 25 and 50 disputes like this hypothetical one have been handled through the DSU process each year since 1995. Each case represents a claim of noncompliance with one or more of the WTO's trade agreements. It can take up to ten months for a case to progress from the initial filing of a request for consultation through an adopted panel report. Review by the Appellate Body takes up to 60 days, and implementation of the decision can take one or more years. The WTO's Legal Division has a professional staff of 17 to support the panelists. The complaining and responding countries retain counsel, often from the United States and Europe, at a very high cost. The Appellate Body has 7 standing members and a professional staff of 14.

The DSU process has evolved over the past 50 years from a diplomatic approach to dispute resolution to the current highly formal, legal system. Generally, scholars and participants have commended the DSU process in terms of its usage by both developed and developing countries and the quality of its decision-making. More developing countries participate in the DSU process, both as complainants and respondents, under the WTO than in the system associated with the GATT. The process has become more formal, and the quality of the reasoning in panel and appellate reports reflects that orientation. Nonetheless, some WTO member countries complain about the lack of transparency of the arbitrations and the difficulty of enforcement, and they have offered proposals on how to improve the DSU decision-making process. I hypothesize that a system that encourages the earlier consideration of disputes—i.e., that addresses issues as they become clear in the TPRM review process—and explicitly includes more creative alternative dispute resolution options, will lead to quicker, more effective resolution.

Three former GATT/WTO Directors-General issued a joint statement that reflects how the WTO struggles with the interplay of disputes arising within the three policy phases I have described:

We are struck by the very high level of trade dispute settlement cases being handled in the WTO. In one sense, this is a sign of the success and effectiveness of the new system which emerged from the Uruguay Round. It is notable that developing countries are making increased use of the system as complainants. Our concern is that the dispute settlement system is being used as a means of filling out gaps in the WTO system; first, where rules and disciplines have not been put in place by a member government or, second, are the subject of differences of interpretation. *In other words, there is an excessive resort to litigation as a substitute for negotiation* (emphasis added). This trend is dangerous in itself. The obligations which WTO members assume are properly for the member governments themselves to negotiate. The issue is still more concerning given certain public perceptions that the process of dispute settlement in the WTO is over-secret and over-powerful.⁴⁴

⁴³ “Independent” means that each trade expert (nominated by his or her country) is not associated with either the complaining or the responding country. The person must be an expert in trade matters, but need not be a lawyer.

⁴⁴ WTO, “Joint Statement on the Multilateral Trading System,” *WTO News*, February 1, 2001. www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm.

The preceding quote highlights the mixed blessings of the existing system: an enforcement process that is increasingly used by its members, but a perverse trend to utilize the institution's third-order enforcement mechanism rather than first-order (policymaking) and second-order (policy implementation) mechanisms, which by design are more participatory in nature.

The following story describes an extended dispute among 28 members of the WTO that involved a market protection problem relating to bananas. This was not a complicated legal question, and the fact that 28 countries were involved suggests that a more systemic policy problem was at stake, which could have been resolved as a first-order or second-order dispute. In fact, the bananas question was discussed during the Uruguay Round negotiation and more than one trade policy review of the European Union. The importance of internal political factors, and the difficulty in resolving disputes in which those internal political factors dominate, challenges the dispute settlement scholar to consider whether alternative forms of resolution might be developed.

Bananas: Policy Enforcement under the Shadow of Law and Politics

The United States' case against the European Communities' banana regime was to a large extent considered a favor to Carl Lindner of Chiquita Bananas for his extensive campaign contributions to both U.S. political parties. There may not be a better example of a trade dispute brought because of domestic political pressure⁴⁵ (except perhaps the recent U.S. imposition of tariffs on steel imports, which were ruled to be a violation of WTO policy).

Historically, the European Union and the United States have comprised the two largest markets for bananas. Almost 60 percent of Europe's imports originate in Latin America (the main suppliers being Ecuador, Costa Rica, Panama, and Honduras), while around 15 percent each come from African, Caribbean and Pacific (ACP) countries and domestic producers. The "banana war" that erupted between the EU and the U.S. raised eyebrows around the trade world; many "free traders" saw it as a power fight between two stubborn antagonists, neither of which grows bananas. Both

⁴⁵ James Durling, "Rights of Access to WTO Dispute Settlement," in Philippe Ruttley, Iain MacVay, and Marc Weisberger, *Due Process in WTO Dispute Settlement* (London: Cameron May, 2001), p. 146. See also Donald L. Barlett and James B. Steele, "How to Become a Top Banana," *Time*, February 7, 2000.

sides, critics said, were defending the worst of their systems: colonial pretension on the part of the Europeans and the power of political campaign donations in the U.S.⁴⁶

In the late 1980s, Chiquita invested heavily to break into the European market, and then, in the 1990s, expanded production in Latin America. Because Chiquita wanted to sell more Latin American bananas to EU countries, the company sought help from Washington officials to formally complain about the EU's preferential imports from ACP producers. Public financing records show substantial contributions by Chiquita CEO Lindner to both Republicans and Democrats.⁴⁷ The EU did indeed treat ACP bananas more favorably than Latin American bananas, in an effort to support the economies of its former ACP colonies. However, Chiquita was already selling more bananas in Europe than any other company, and three of the top four companies in the European market were American: Chiquita, Dole, and Del Monte. So what was the real issue? "The EU is the only profitable banana market in the world, because it's protected," said Paul Meade, an industry analyst. "It's somewhat of a fallacy that the Americans want the regime disbanded.... Chiquita simply wants a bigger quota."⁴⁸

Before 1993, imports of bananas into European countries were not subject to a common policy. This network of disparate national policies was challenged in 1993 by Colombia, Costa Rica, Guatemala, and Venezuela in a complaint brought before the GATT. The GATT arbitration panel report found the regime inconsistent with GATT law, but the panel report was never formally accepted, and so it had no binding legal effect. (Under the old GATT rules, adoption of a panel report required full consensus of the contracting parties, including the unsuccessful party under the panel ruling. Since the European Union did not accept the panel ruling, the panel report was not formally adopted or binding.)

⁴⁶ Helen Cooper, "Chiquita Imports to Climb in Return for Lifting Tariffs on Europe Goods," *Wall Street Journal* via Dow Jones, April 12, 2001.

⁴⁷ Anthony DePalma, "Citing European Banana Quotas, Chiquita Says Bankruptcy Looms," *New York Times*, January 17, 2001

⁴⁸ Brian Lavery, "Trade Feud on Bananas Not as Clear as It Looks," *New York Times*, February 7, 2001.

In July 1993, the European Commission enacted a new common market organization for bananas to replace the various national import systems.⁴⁹ In 1994, Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela filed a second complaint against the EC. Again, the panel found certain inconsistencies, but again the report was never adopted. That year, the EC concluded an agreement (the Banana Framework Agreement, or BFA) with four of five complainants (Colombia, Costa Rica, Nicaragua, and Venezuela). The BFA was incorporated into the Uruguay Round's schedule of trade concessions, and came into force on January 1, 1995, with a waiver that "grandfathered" preferential treatment for products originating in ACP states.

In February 1996, Ecuador, Guatemala, Honduras, Mexico, and the United States requested consultations with the European Community regarding the continued preferential treatment of ACP bananas, but no mutual solution could be agreed upon. A panel of arbitrators was appointed to consider the complaint in May 1996.⁵⁰ As a case, it was exceedingly complicated: 6 parties (one representing 15 member countries), and 22 third parties, meaning that almost one-third of WTO members were involved. Claims were made under the GATT 1994 (the agreement governing trade in goods), the Agreement on Agriculture, the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Investment Measures, and the General Agreement on Trade in Services.⁵¹

Despite the legal complexity, observers note that "the complicated import regime was nothing but the juridical façade of a more delicate economic and political reality: the historic commercial links with former colonies that the EC wished to preserve through the import system.... Both the Panel and the Appellate Body passed over this highly political contest and analyzed the case from a

⁴⁹ Council Regulation, European Council, July 1993, Doc. EEC 404/93.

⁵⁰ Constitution of the Panel, Dispute Settlement Body meeting of May 8, 1996, WTO Doc. WT/DS27/7, June 7, 1996.

⁵¹ Elisabetta Righini and Peter Morrison, "European Communities: Regime for the Importation, Sale and Distribution of Bananas," in James Cameron and Karen Campbell, *Dispute Resolution in the WTO* (London: Cameron May, 1998) pp. 361-378.

strictly legal point of view.”⁵² The question addressed through the DSU was: did the European Union violate its trade obligations under the WTO agreements to treat all banana imports equally?

Four WTO panel reports were issued in 1997 finding the EC’s regime inconsistent with a number of WTO provisions.⁵³ (Note that one significant change in the WTO’s dispute settlement procedures, as adopted in 1995, was that panel reports would be deemed “accepted” unless there was a consensus by all WTO members *against* doing so.) The WTO Appellate Body upheld most of the panel’s findings.⁵⁴ The WTO arbitrators determined that the reasonable period for the EU to bring their import regime into conformity with WTO agreements would expire on January 1, 1999.⁵⁵ The United States and Ecuador each received an arbitrator’s decision to uphold the suspension of GATT concessions on European exports:⁵⁶ \$191.4 million per year for the United States and \$201 million per year for Ecuador.⁵⁷ Of particular importance was Ecuador’s ability to pursue “cross-sector retaliation” against the EU, i.e. retaliation by withdrawing tariff concessions on nonagricultural products.

In November 1999, the European Commission informed the Dispute Settlement Body of its proposed banana regime reform, which would transition from a licensing scheme to tariffs only and would be in place no later than January 1, 2006.⁵⁸ Finally, in April 2001, the European Union and the United States came to agreement. In a joint statement, the U.S. Trade Representative Robert Zoellick, U.S. Commerce Secretary Don Evans, European Agriculture Commissioner Franz Fischler, and European Trade Commissioner Pascal Lamy said that “the deal is evidence both sides want a more

⁵² Righini and Morrison, “European Communities,” p. 368. In fact, a number of key legal issues were determined in this case: third-party participatory rights (the opportunity to be heard and make written submissions to the panel), the presence of private lawyers (the right of Santa Lucia to be represented by private counsel of choice), the requirement of a party’s legal interest (U.S. not a banana grower), the effect of the Lome waiver, and substantive issues under four new WTO agreements.

⁵³ Report of the Panel, WTO Doc. WT/DS27/R, May 22, 1997.

⁵⁴ Report of the Appellate Body, WTO Doc. WT/DS27/AB/R, September 9, 1997.

⁵⁵ Arbitration under Art. 21.3(c) WTO Doc. WT/DS27/15, January 7, 1998.

⁵⁶ “Concessions” are the value of the tariff reduction granted to a trading partner who exports into your country. So if Ecuador suspends concessions on European exports to Ecuador, it will *raise* a tariff on a product at a value equivalent to the loss it suffers on bananas in order to achieve compensation for its injury.

⁵⁷ The U.S. had sought \$720 million per year. Recourse to Arbitration by the European Communities under Art. 22.6 – Decision by Arbitrators, WTO Doc. WT/DS27/ARB, April 9, 1999.

harmonious trading relationship.... Both parties agreed the time had come to end a dispute which had led to prolonged conflict in the world trading system.”⁵⁹ According to one commentator:

While the economic stakes have been relatively small, the banana issue had been highly symbolic for the U.S.-EU trade relationship. On the U.S. side, the EU’s refusal to open its banana market in compliance with the WTO ruling called the whole WTO dispute settlement system into question. On the European side, a question of resisting pressure from a powerful U.S. company while preserving benefits for small economies in Africa and the Caribbean that depend heavily on banana exports to the protected EU market.⁶⁰

Why and how did the dispute get resolved in April 2001? One journalist wrote: “Pressed to explain why the parties at this time were able to resolve a dispute after so many years of fruitless negotiations, the U.S. trade official pointed to no specific breakthrough. ‘Sometimes you have to get to the brink on an issue before you find a way to reach accommodation,’ he said.”⁶¹ Others suggested that the interpersonal dynamic between U.S. and EC trade officials was the key obstacle to earlier resolution.

Much of the deterioration in transatlantic trade relations since the mid-1990s was due to personal frictions between Sir Leon Brittan and Charlene Barshefsky, U.S. Trade Representative. Messrs. Pascal Lamy and Robert Zoellick have had the maturity and good sense to rise above petty squabbling in the interest of bigger shared goals. That bodes well for the handling of future disputes.... The U.S. and EU may be learning how to settle trade conflicts. The real trick is to stop them arising in the first place.⁶²

From an institutional design perspective, a number of features make the bananas case interesting. Topically, agriculture continues to be one of the most disputed issues among WTO

⁵⁸ “U.S. and EU End Decade-Long Dispute Over EU’s Banana Import Regime,” Bureau of National Affairs’ *WTO Reporter*, April 12, 2001, p. 1.

⁵⁹ Barry James, “U.S. and EU Resolve Banana Dispute,” *Financial Times*, April 12, 2001.

⁶⁰ Edward Alden and Deborah Hargreaves, “Zoellick and Lamy’s friendship bears fruit,” *Financial Times*, April 12, 2001.

⁶¹ Nathaniel Harrison, “US, EU Overcome Contentious Banana Row But Remain Divided on Other Trade Issues,” *Agence France-Presse*, April 11, 2001. (The “other trade issues” referred to in the article title included U.S. hormone-treated beef, government support of the European aeronautics industry, and EU restrictions on airplane noise.) Of interest is the fact that Chiquita complained in January 2001 that it was near bankruptcy, due to the Clinton Administration’s inability to force the EU to trade fairly. DePalma, “Chiquita Says Bankruptcy Looms.” At the same time, Chiquita sued the EU for \$525 million in damages in the European Court of Justice. Anthony DePalma, “Chiquita Sues Europeans, Citing Banana Quota Losses,” *New York Times*, January 26, 2001.

member countries. Almost every country is involved in an agricultural dispute involving export subsidies or import restrictions. The number of parties in the bananas case (28) proved that the issues had broad relevance for countries beyond just the United States and the European Union. Given the importance of agriculture to nearly all WTO members, existing substantive and procedural provisions in the Agreement on Agriculture might be examined for ways to better anticipate and resolve disputes. (This, in fact, is part of the built-in agenda for negotiations scheduled for the WTO.)

Secondly, this case may have had a high-profile political driver, but the prominence of internal politics is not unusual in disputes among WTO members. According to a number of diplomats, most claims are brought under pressure from domestic industry, and many disputes cannot be resolved because of pressure from domestic constituencies within the offending country.⁶³ The GATT and the WTO were designed as rules-based systems, in part, to neutralize such political pressures, but politics cannot be stripped away entirely in practice.

If dispute settlement is the measure of an institution's effectiveness, as many suggest it is, was the outcome (a reformed banana-import regime) by way of a six-year enforcement process a satisfactory one?⁶⁴ The answer is not obvious. Dispute resolution theory offers a way to think about the WTO's experiences within a framework of effective process design and recommend improvements. Five criteria will be used to evaluate the process: transaction costs (in time and money); satisfaction with outcome; effect on relationships; recurrence of disputes; and procedural justice.⁶⁵ Table 1.3 expands upon Table 1.1 and describes the problems encountered in each order of dispute. This research will attempt to draw upon available literature to offer possible improvements.

⁶² "Banana Deal," *Financial Times*, April 12, 2001.

⁶³ One senior trade official commented that a basic rule of thumb for domestic officials is not to say "no" to an industry sector if you can get someone else to say it.

⁶⁴ Ernst-Ulrich Petersmann, "Alternative Dispute Resolution – Lessons for the WTO?" in Friedl Weiss, *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (London: Cameron May, 2000) pp. 33-38. Petersmann expressed concern about the jurisdictional necessity and procedural efficiency of multiple proceedings at the international, national, and local levels. For example, he noted that many proceedings were brought before the EC Court of Justice that did not take note of WTO law or proceedings, which resulted in continuing trade rule violations and increased costs to EC consumers worth billions of Euros per year.

⁶⁵ These criteria are drawn from William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey-Bass, 1988) pp. 11-13.

Table 1.3: Summary of Disputes

Dispute Type	Dispute Diagnosis Process	Dispute Resolution Process	Problems
First Order	All member nations must decide by consensus to consider or reconsider WTO policy.	All member nations must agree by consensus to adopt or amend a policy rule.	<ul style="list-style-type: none"> • Uneven access to essential information by negotiators • Countries that dominate negotiation not representative of diverse membership • Limited attention to implementation capacity
Second Order	A nation (or nations) raises concerns about another nation's trade policies within relevant WTO councils and committee meetings, most notably in the Council for Trade Policy Reviews. The issue may also be raised by the WTO Secretariat.	Resolution takes the form of comments and recommendations—either informally in discussions or formally in Trade Policy Review minutes and summaries—but does not involve any binding action.	<ul style="list-style-type: none"> • No structured review of options by which a target country could feasibly (economically and politically) bring its domestic policy into consistency with international trade rules
Third Order	A nation makes a specific claim of violation against a trading partner.	The complaint is resolved through bilateral consultations (direct or assisted by the Director-General); a decision by a three-expert panel; or legal review by an appellate body.	<ul style="list-style-type: none"> • Too expensive for smaller countries to participate • Concern about professionalism of panelists • Limited transparency to panel and appellate processes • Internal politics a significant barrier to compliance • No retroactive damages

THE STUDY OF INTERNATIONAL DISPUTE SETTLEMENT

A distinguishing characteristic of the WTO is that it is a rule-based institution, as compared to one based solely on ad hoc diplomatic negotiations in which relative power often determines outcomes.⁶⁶ Interestingly, both smaller countries and the superpowers prefer that the trading system exert restraint based on rules agreed to in advance and resolve individual problems through neutral and objective adjudication. Robert Hudec summarizes the several advantages of using rule-based systems in the realm of international relations.

A rule-based system is the most resource-efficient way to resolve conflicts with other countries. A rule-based system creates the most predictable conditions for business decisions.

And, a rule-based system helps to cement one's own liberal trade policies against the internal political pressures of protectionism that large countries invariably generate.⁶⁷

Scholars have used several means to examine the effectiveness of international institutions in resolving disputes. One approach is to focus on principles of negotiation; these theories are especially relevant for first-order disputes and are discussed in Chapter 3.⁶⁸ Another is to examine the incidence of treaty compliance.⁶⁹ Another is to measure the achievement of a policy objective; in the case of the WTO, the policy objective is to reduce trade barriers that impede economic prosperity.⁷⁰ Still another approach is to assess the quality of an enforcement process to legitimize a rule-based system such as the WTO's; this will be the focus in the discussion of third-order disputes in Chapter 5.⁷¹ And yet another is to examine the quality of the process and outcome from the perspective of all stakeholders.⁷²

⁶⁶ The reader may reasonably note, of course, based on the discussion of first-order disputes, that the more economically powerful trading countries carry more weight in establishing those rules.

⁶⁷ Robert Hudec, "The New GATT/WTO Dispute Settlement Procedure," *Minnesota Journal of Global Trade* 8 (1999): 1.

⁶⁸ Fred Charles Ikle, *How Nations Negotiate* (New York: Harper & Row, 1964); Fen Osler Hampson, *Multilateral Negotiations* (Baltimore: Johns Hopkins University Press, 1995); and I. William Zartman and Jeffrey Rubin, Eds., *Power and Negotiation* (Ann Arbor, MI: University of Michigan Press, 2000).

⁶⁹ Robert Hudec, *Enforcing International Trade Law* (Salem, NH: Butterworth Legal Publishers, 1991); Heather Hazard, "Resolving Disputes in International Trade" (PhD diss., Harvard University, 1988); and Christina Sevilla (PhD diss., Harvard University, 1998). Eric Reinhardt's extensive work in building a database on GATT and WTO disputes reviews how the *request* for panel review leverages concessions from the defending party. Eric Reinhardt, "Adjudication without Enforcement in GATT Disputes," *Journal of Conflict Resolution* 45, no. 2 (2001): 174-95; and Marc Busch and Eric Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes," *Fordham International Law Journal* 24 (November-December 2000): 158-172.

⁷⁰ Anne-Marie Slaughter, *Hague Lecture IV: Reforming Dispute Resolution in the World Trade Organization* (from the series of millennial lectures presented by Professor Slaughter, Hague Academy of International Law, August 2000). International economics literature focuses extensively on the effect of international policy on actual trade flows, but that focus is not included here.

⁷¹ Lawrence Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107 (1997): 273; Robert Hudec, "The New GATT/WTO Dispute Settlement Procedure: An Overview of the First Three Years, 1995-98," *Minnesota Journal of Global Trade* 8 (1999): 1; James Cameron and Kevin Gray, "Principles of International Law in the WTO Dispute Settlement Body," *International and Comparative Law Quarterly* 50 (2001): 248-298; John Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism* (Washington, DC: Brookings Trade Forum, 2000); and Ernst-Ulrich Petersmann, "Dispute Settlement in International Economic Law," *Journal of International Economic Law* 2, no. 2 (1999).

⁷² G. Richard Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization," *U. Pa. Journal of International Economic Law* 17 (1996): 359.

An emerging field of study—called *conflict management system design*—draws upon all of the approaches above.⁷³ This relatively new discipline has been applied to organizations and firms in a domestic setting, but it can be usefully extended to the international context as well and will form the umbrella literature for this research. Generally, a conflict management system designer helps an organization to develop coordinated stages of conflict diagnosis, resolution, implementation, and evaluation.

Since the GATT's origins 50 years ago, the objective of the GATT/WTO regime has shifted from one of practical, diplomacy-based problem solving among a fairly homogenous club of members to a highly legal, rule-based enforcement process. This relatively new approach (adopted as the DSU as of 1995) represents a high-profile and financially and politically expensive means of resolving disputes between individual countries, but it has the advantage of setting clear institutional precedents that are observable by others and thus reinforce the system's rule-based integrity. Among those scholars who examined the WTO (and GATT) in terms of outcome and process,⁷⁴ the assumption was that by tightening and "judicializing" the process, the process would gain legitimacy among the members and strengthen the underlying rule system. In fact, use of the WTO's DSU has increased, in terms of both caseload and developing-country access. Thus the DSU, which many consider the "Cadillac" of enforcement processes, has become the dominant dispute resolution option, in large part because it allows the most autonomy and national control for the largest traders. This research asks whether first- and second-order disputes are too often ending up in the DSU, handled as third-order disputes.

⁷³ Ury, Brett, and Goldberg, *Getting Disputes Resolved*. See also Cathy Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass, 1996); Karl Slaikeu and Ralph Hasson, *Controlling the Costs of Conflict: How to Design a System for Your Organization* (San Francisco: Jossey-Bass, 1998); Mary Rowe, "Dispute Resolution in the Non-Union Environment," in Sandra Gleason, ed., *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (East Lansing: Michigan State University Press, 1997); J. Lynch, *CCRA: Contemporary Conflict Resolution Approaches* (Ottawa: Canada Customs and Revenue Agency, 1998); and John P. Conbere, "Theory Building for Conflict Management System Design," *Conflict Resolution Quarterly* 19, no. 2 (2001): 215-236.

⁷⁴ Hudec, *Enforcing International Trade Law*; Busch and Reinhardt, "Bargaining in the Shadow of the Law;" and Reinhardt, "Adjudication without Enforcement."

Throughout this paper I will draw on a theory of dispute resolution that sketches out three ways in which disputes are resolved: according to the parties' interests, their rights, or their power.⁷⁵ *Interests* encompass whatever the parties care about, including economic, political, and social values. Disputes resolved according to interests are usually negotiated among the affected parties directly and tend to produce the highest satisfaction with outcomes. This approach, however, requires significant investment of time, may lead to conflicting results between different parties, and would be exceedingly complex with upwards of 150 parties involved. Resolving disputes on the basis of *rights* calls for the application of agreed-upon rules to a set of facts to determine who prevails. Rights-based processes value procedural justice, but they may not capture more subtle substantive interests that are not reflected in the general rules. Disputes resolved according to *power* weight the outcome to the party with the most leverage and status, but they may be costly in terms of relationships.

ORGANIZATION OF THIS PAPER

This paper's primary inquiry is to assess the WTO's processes for resolving first-order, second-order, and third-order disputes. My findings have application outside the WTO and are intended to stimulate thinking in the wider international dispute resolution community. My research draws on three types of data: primary documents generated by the WTO's negotiating, monitoring, and enforcement processes; the WTO's experience as reflected in its website documents and international trade scholarship; and personal interviews with members of 15 trade missions and the WTO Secretariat. The chapters are organized as follows.

Chapter 2: Multilateral Trade in the GATT and the WTO

Chapter 2 provides an overview of the GATT's and the WTO's institutional origins and the WTO's legal and organizational structure for first-order, second-order, and third-order disputes.

⁷⁵ Ury, Brett, and Goldberg, *Getting Disputes Resolved*.

Chapter 3: First-Order Disputes: Policy Disputes

This chapter considers the two stages of first-order disputes. *Agenda-setting* is the consensus-based selection of issues and problems that member countries agree to negotiate at a given time.

Rulemaking is the negotiation process involved in setting treaty provisions and trade rules to which the members agree to bind themselves. By comparing the agenda-setting and rulemaking processes of four negotiating rounds (Kennedy, Tokyo, Uruguay, and early Doha), I identify ways in which the agenda-setting and rulemaking processes have become or could be more effective, as well as ways they have become more interdependent with the implementation and enforcement processes.

Chapter 4: Second-Order Disputes: Policy Implementation Disputes

Policy implementation by WTO members is monitored primarily in two ways: during meetings of the WTO's operating committees and councils on the various policy areas, and the Trade Policy Review Mechanism. This chapter considers the TPRM and committee experience in identifying and resolving second-order disputes through WTO documents and evaluations.

Chapter 5: Third-Order Disputes: Policy Enforcement Disputes

Third-order disputes in the WTO are handled according to the Disputes Settlement Understanding. This chapter examines the DSU experience of 1995-2003 through the case data, diplomat interviews, and extensive scholarship generated to date.

Chapter 6: A Model for Dispute Settlement Systems

Chapter 6 considers the findings from assessing the three dispute orders and proposes modifications. The chapter concludes with a model system that can be generalized for international dispute settlement system design, some applications, and further research suggestions.

CHAPTER 2: MULTILATERAL TRADE, THE GATT, AND THE WTO

The institutional design of the World Trade Organization was developed based on decades of experience with its predecessor, the General Agreement on Tariffs and Trade. This chapter describes the origin and evolution of the GATT and then outlines the WTO's organizational functions, including its mechanisms for handling first-order (policymaking), second-order (policy implementation), and third-order (policy enforcement) disputes. The chapter concludes with an overarching theoretical framework for the research in the remainder of this paper.

ORIGINS AND PRINCIPLES OF THE GATT

Economic growth is considered a primary engine for any nation's prosperity. Economists argue that trade "liberalization" is one source of growth. This argument is based on the assumption that each country seeks to maximize its comparative advantage in terms of its unique human, natural resource, financial, and technological endowment. Economic benefits, it is assumed, will accrue from liberalization whether or not other countries reciprocate; in reality, however, most countries demand nonprotectionist behavior from their trading partners.

The Great Depression in the United States and the high tariffs instigated by the Smoot-Hawley Tariff Act of 1930 resulted in a period of diminished production and trade between the United States and its trading partners and caused economic collapse worldwide during the 1930s. The U.S. Congress's attempt to protect its industrial and agricultural constituencies only served to stimulate retaliatory high tariffs from other countries. As tariffs escalated, the United States reversed its approach. Congress authorized the President to negotiate a series of bilateral trade agreements through the Reciprocal Trade Agreements Act of 1934. Over the next 15 years, the United States proceeded to negotiate more than 30 bilateral agreements, and then began to champion a more multilateral approach to trade liberalization.

In an effort to restore the international economy after World War II, three institutions comprising the “Bretton Woods International Economic Order” were proposed: The International Bank for Reconstruction and Development (the World Bank) to promote economic development, the International Monetary Fund (IMF) to provide liquidity for countries running trade deficits, and the International Trade Organization (ITO) to reduce tariffs and other trade barriers and to expand world trade.¹ The charter for the ITO was negotiated contemporaneously with the General Agreement on Tariffs and Trade. The GATT provided for the parties’ tariff obligations, but it was not intended to be an organization. The United States took the lead in generating a proposal for establishing the ITO, in order to extend its free-trade approach to the entire international trading system. U.S. negotiators, however, failed to build support for their proposal within Congress and within the U.S. business sector. With Marshall Plan and Korean War pressures before it, Congress declined to ratify the ITO constitution, so no umbrella trading organization was ever formed.

Consequently, the U.S. executive branch’s authority to negotiate trade agreements² included only the GATT—the treaty itself—which came into force in 1948 with 23 contracting parties.³ World trade at that time approached \$10 billion. Half the GATT signatories were developed countries and half were developing countries. As further described in Chapter 3, the contracting parties to the GATT managed eight multiyear negotiating “rounds” between 1948 and 1994. In 1994, the Uruguay Round was completed. One of its chief accomplishments was the formation of the World Trade Organization.

¹ According to the draft charter of the International Trade Organization, the ITO would be the “third leg of a tripod which was to support the international economic relations of the principal nations of the world,” along with the IMF and the World Bank. This draft charter was signed by 53 nations in Havana, Cuba, in March 1948, but the U.S. signature required congressional ratification. Raymond Vernon, “America’s Foreign Trade Policy and the GATT,” *Essays in International Finance* (Princeton, NJ: International Finance Section, Department of Economics, Princeton University, October 1954).

² The U.S. Reciprocal Trade Agreements Act of 1934 delegated authority to the executive branch to negotiate trade agreements; the Act was renewed in 1937, 1940, 1943, 1945, and 1948.

³ The original 23 included Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States.

The basic goal of the GATT (and now the WTO) was to reduce trade barriers (i.e., tariffs, nontariff barriers, and quotas) that impede the free movement of goods and services across borders. The GATT agreements (of 1947 and 1994) comprise a complex set of reciprocal trade commitments among the contracting parties, along with rules to minimize government actions that limit the importation of products.⁴ Parties are obligated to limit tariffs (Article II of the GATT), avoid discrimination among nations (Article I), avoid discrimination between domestically produced goods and those imported (Article III), and avoid the use of quotas and other nontariff restrictions on imports (Article IX). Article XX provides some exceptions, so long as measures do not operate as concealed protectionist barriers to international trade.

THE WORLD TRADE ORGANIZATION

The WTO was established “to provide [the] common institutional framework for the conduct of trade relations among its Members.”⁵ As of April 2003, the WTO had 146 members. Of these, 28 are developed countries, 89 are developing countries, and 29 are least-developed countries.⁶

As mentioned in Chapter 1, the WTO’s umbrella agreement is the Marrakesh Agreement Establishing the World Trade Organization (known as the WTO Agreement), which contains a number of Articles as well as four Annexes. Annexes 1, 2, and 3 of the WTO Agreement comprise the Multilateral Trade Agreements, which are binding on all members. Annex 4 sets forth the Plurilateral Trade Agreements. The adoption of these plurilateral agreements as Annex 4 was approved by all contracting parties, but the plurilateral agreements are only binding on those countries that have specifically agreed to be bound by them.

⁴ Reciprocal trade commitments take the form of “concessions,” in which a country agrees to lower its tariffs on imports from trading partners. The tariff concession schedules adopted at the conclusion of the Uruguay Round number more than 26,000 pages.

⁵ WTO Agreement, Article II, paragraph 1.

⁶ The terms *developing* and *developed* are not legally defined, but are self-determined by countries for international recognition. *Least developed* is a category set by the United Nations.

The content of the WTO Agreement's Annexes are as follows. **Annex 1** has three parts.

Annex 1A is the Multilateral Agreements on Trade in Goods. It includes:

- The General Agreement on Tariffs and Trade 1994 (GATT 1994) together with seven Understandings on various provisions of GATT 1994
- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the GATT 1994
- Agreement on Implementation of Article VII of the GATT 1994
- Agreement on Preshipment Inspection
- Agreement on Rules of Origin
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

Annex 1B is the General Agreement on Trade in Services. Annex 1C is the Agreement on Trade-Related Aspects of Intellectual Property Rights. **Annex 2** of the WTO Agreement is the Understanding on Rules and Procedures Governing the Settlement of Disputes. **Annex 3** is the Trade Policy Review Mechanism. And **Annex 4** includes the plurilateral trade agreements on Trade in Civil Aircraft, Government Procurement, Dairy, and Bovine Meat. The WTO Agreement also includes a series of nearly 30 decisions, declarations, and understandings that formalized previous practices or plurilateral arrangements adopted in the Tokyo Round. The GATT 1947 is the final referenced agreement in the WTO Agreement.

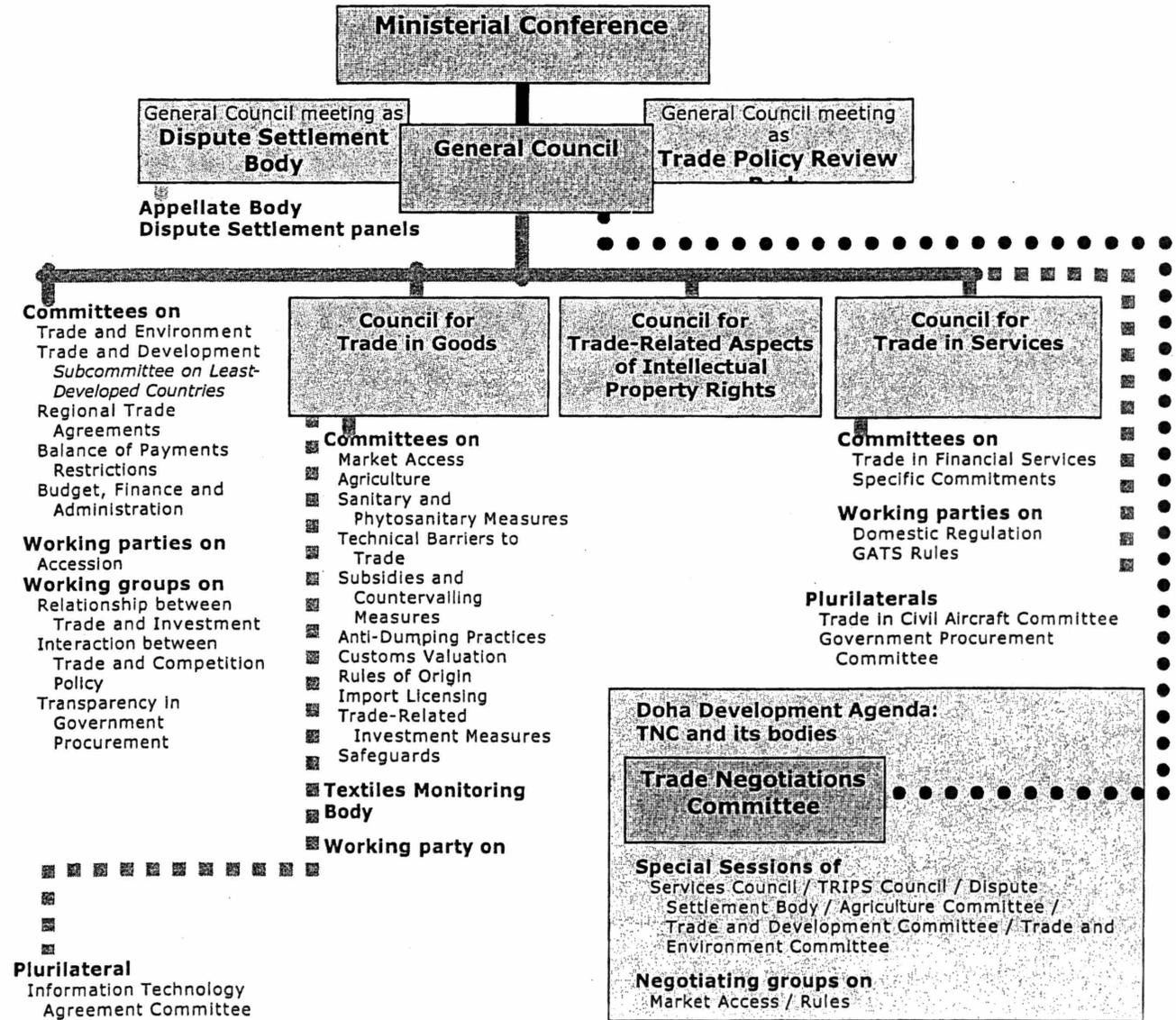
Article VI of the WTO Agreement provides for an institutional secretariat. The Secretariat to the WTO is headed by a Director-General with an international (not government-affiliated) staff to carry out the duties prescribed by the General Council. Figure 2.1 contains an organizational chart for the WTO Secretariat.⁷ As the chart reveals, the Director-General is assisted by four Deputy Director-

⁷ This chart came from http://www.wto/english/thewto_e/whatis_e/tif_e/org2_e.htm.

Figure 2.1 WTO Organigram

WTO structure

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, Textiles Monitoring Body, and plurilateral committees.



Key

- Reporting to General Council (or a subsidiary)
- Reporting to Dispute Settlement Body
- Plurilateral committees inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members
- Trade Negotiations Committee reports to General Council

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body

Generals, each of whom oversees several functional, informational, and support divisions. The current WTO Secretariat includes 601 staff and operates on an annual budget of nearly \$130 million, which comes from member contributions and miscellaneous income (including publication fees and special activity trust funds).

The following sections describe in more detail the legal provisions and operational implications of the WTO's policymaking, policy implementation, and policy enforcement system.

Policymaking at the WTO

Among the primary functions of the WTO is to:

“provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements...and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.... With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development.”⁸

Representatives of all WTO member countries meet in Ministerial Conference every two years. The Ministerial Conference is the highest level of decision-making at the WTO. The General Council, also composed of representatives of all members, meets in the intervals between Ministerial Conferences to discharge its WTO functions. The General Council also convenes as the Dispute Settlement Body and as the Trade Policy Review Body. Designated Councils have been formed to discuss Trade in Goods, Trade in Services, and Trade-Related Intellectual Property Rights, with subsidiary bodies as required. Additional committees are authorized as well.

As mentioned previously, WTO members make decisions by consensus. Like many other GATT practices, the notion of “consensus” developed over many years without explicit language. The WTO formalized this practice in Article IX, paragraph 1 of the WTO Agreement, providing that, for ordinary decisions:

the WTO shall continue the practice of decision-making by consensus followed under GATT 1947...[which means] “the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.... If a decision cannot be achieved by consensus, the matter shall be decided by a majority vote, with each Member having one vote. (The European Communities shall have the number of votes equal to their WTO Member states.)”⁹

In fact, the backup “majority vote” option is essentially never used for policymaking matters. Thus, each member nation has veto power over policy decisions. Note too, however, that consensus does not require unanimity; that is, members may abstain from voting on an issue, but the issue will still pass if no member explicitly votes against it.

The Ministerial Conference and the General Council have the exclusive authority to adopt “interpretations” of WTO agreements, and may do so at the recommendation of the Council overseeing the respective functioning agreement. Such interpretations must be agreed to by a three-fourths majority of the Members.¹⁰ The Ministerial Conference may, in exceptional circumstances, waive an obligation imposed on a member if so decided by three-fourths of the members, under certain conditions.¹¹ Amendments to the WTO agreements may be made according to voting procedures specified in Article X. Except as otherwise provided, the WTO is to be guided by the customary practices followed by the contracting parties to the GATT 1947.

Since the formation of the WTO at Marrakesh in 1994, the Ministerial Conference has met every two years, as noted in Table 2.1 on the following page.

The WTO’s formal institutional process for policymaking is circumscribed by its provisions on decision-making. In practice, countries conduct formal negotiations to consider *what* issues should be regulated by new policy measures, then a network of trade negotiation committees struggles for

⁸ WTO Agreement, Article III, paragraphs 2 and 5.

⁹ WTO Agreement, Article IX, paragraph 1.

¹⁰ WTO Agreement, Article IX, paragraph 2.

¹¹ WTO Agreement, Article IX, paragraph 3.

months or years to integrate a package of provisions into an agreement that can achieve consensual support. This hybrid of formal and informal consensus-building processes is explored in Chapter 3.

Table 2.1: WTO Ministerial Conferences

WTO Ministerial	Date	Location
First	December 9-13, 1996	Singapore
Second	May 18-20, 1998	Geneva, Switzerland
Third	November 30-December 3, 1999	Seattle, Washington, USA
Fourth	November 9-13, 2001	Doha, Qatar
Fifth	September 10-14, 2003	Cancun, Mexico
Sixth	December 2005	Hong Kong

Policy Implementation

Each WTO member must translate international rules adopted in each trade negotiating round into national implementing legislation. Furthermore, countries must not initiate new domestic policies that are contrary to WTO rules. In order to achieve transparency on national regulations and policies, member countries are required to inform the WTO of their specific measures, policies, or laws through regular “notifications.” Discussions in the WTO’s operating committees cover a range of implementation issues, but the most focused consideration of policy implementation issues takes place in the WTO’s regular reviews of individual countries’ trade policies.

The Trade Policy Review Mechanism was established as a pilot program in 1989 and adopted as permanent program in 1994 under Annex 3 of the WTO Agreement. The objectives of the TPRM are:

- to contribute to improved adherence by all members to rules, disciplines, and commitments made under the WTO;
- to increase the transparency and understanding of countries’ trade policies and practices, through regular monitoring;
- to improve the quality of public and intergovernmental debate on the issues; and

- to enable a collective assessment of the effects of policies on the world trading system.¹²

Although the objective of the TPRM is to examine the impact of members' trade policies and practices on the multilateral trading system, each assessment is conducted in the context of a country's wider macroeconomic and development circumstances. Members have undertaken a commitment to transparency in support of these objectives, but acknowledge that implementation must take into consideration each member's legal and political system. The impact of individual members on the functioning of the multilateral trading system is measured in terms of their share of world trade, which determines the frequency of reviews.

The largest four trading nations are reviewed every two years: Canada, the European Union, the United States, and Japan. The next 16 largest trading nations are reviewed every four years. The remaining 126 countries are reviewed every six years (or less for least-developed countries). In this last group of 126 are 20 developed, 77 developing, and 29 least-developed countries.

To structure the reviews, the WTO General Council meets as the Trade Policy Review Body (TPRB). The TPRB examines the impact of each member's trade policies and practices on the multilateral trading system. The review includes three components: (1) a full report from the member nation under review regarding its overall economic situation, together with a detailed analysis of its trade policies (the "country report"), (2) a report prepared by the Secretariat based on information available to it and provided by the member, focusing on special areas of concern (the "Secretariat report"), and (3) a meeting of the TPRB with the member.

Each trade policy review meeting lasts two days. During the first day, after an initial statement by the country under review, two discussants chosen from among the participating members comment (on their own responsibility, not on behalf of their governments) on the country and Secretariat reports. Next, questions from other participants are invited. The country under review can then prepare responses to present during the second day.

¹² WTO Agreement, Annex 3.

Roughly 16 reviews are conducted each year, evenly spaced to allow members time to consider all reports. The Secretariat's TPRM division consists of a Director, 16 professional staff, and 11 support staff. The review process, from initial research and preparation of the country questionnaire to the meeting of the TPRB, takes approximately 10 months.

In terms of diagnosis and resolution, the TPRM process provides a structured analysis of each country's implementation of WTO trade policy. The TPRM "is *not* intended to serve as a basis for the enforcement of specific obligations under the [covered] Agreements or for dispute settlement procedures, or to impose new policy commitments on Members."¹³ Thus, an apparent gap exists between the transparent and comprehensive diagnosis of each member's policy implementation progress, and efforts to identify options for resolution of implementation problems revealed by the assessment. Chapter 4 will consider opportunities to strengthen the policy implementation phase.

Policy Enforcement

This section discusses the policy enforcement procedures used previously under the GATT and then the dispute settlement process used in the WTO.

GATT History and Experience

The discussions surrounding the establishment of the GATT and the ITO considered whether disputes should be forwarded to the International Court of Justice (ICJ) and whether civil or common law principles should apply.¹⁴ Those in support of the ICJ as arbiter argued that its status as a politically independent, impartial mechanism with a rule orientation would protect against the dominance of major trading nations within the ITO. The United States argued that the ITO should maintain jurisdiction over its own disputes and violations. The 1946 U.S. proposals contemplated a three-part

¹³ WTO Agreement, Annex 3, Section A(i).

¹⁴ Note that common law depends upon prior juridical decision for precedent as a supplement to legislated acts, whereas civil law—practiced in countries such as France, Japan, and former European colonies—does not depend on such precedents.

dispute resolution procedure consisting of consultation among the parties; referral of a dispute to the ITO, with the possibility of arbitration; and referral to the ICJ for advisory opinions on legal questions arising within the scope of ITO activities.¹⁵ When the establishment of the ITO was dropped because the U.S. Congress failed to ratify it, so were the provisions for arbitration and referral to the ICJ. The GATT was left to its own devices.

Without a central enforcement mechanism, it fell to the parties to invent some means of resolving conflicts as they arose—in other words, when a contracting party believed that the concessions granted under the GATT had been “nullified or impaired.”¹⁶ Parties agreed not to take unilateral action against perceived violators, but to seek recourse through the dispute settlement mechanisms of Articles XXII and XXIII of the GATT. These articles read in part as follows:

Article XXII: Consultation

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.

Article XXIII: Nullification or Impairment

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired...[and if] no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time...the matter may be referred to the contracting parties¹⁷ [who] 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.

At the outset, then, a complainant had to request consultations with the “aggrieving” party. In the early days, disputes were then simply referred to the chair of the plenary meeting of the contracting parties, and the chair issued a ruling. As the number of complaints grew, the contracting parties used “working parties” composed of the disputants and other interested parties; this mode of

¹⁵ Heather Hazard, “Resolving Disputes in International Trade” (PhD diss., Harvard University, 1988), p. 22; Article 96 of U.S. Proposals, cited in Olivier Long, *Law and its Limitations in the GATT Multilateral Round* (London: Graham and Trotman, 1987), p. 1.

¹⁶ General Agreement on Tariffs and Trade, Article XXIII.

conflict resolution was more in the nature of conciliation than dispute settlement. From the mid-1950s on, practice switched from working parties to independent panels.¹⁸ These panels served in a mediating capacity, helping the parties reach a settlement that both parties could live with.

Robert Hudec describes the 1950s as a period in which the participants were primarily members of the “GATT club”—diplomats and trade officials who had negotiated the original agreement—so “legal rulings were drafted with an elusive diplomatic vagueness” that reflected “an intuitive sort of law, based on shared experiences and unspoken assumptions.”¹⁹

During the 1960s, disputes at first diminished with the formation of the European Economic Community and the addition of more than 40 new developing country members. Hudec characterizes this time as “a period when GATT more or less suspended its legal system, while it tried to work out, by negotiation, the legal and economic adjustments that were needed to accommodate its new members and its new agenda.” In the 1970s, 32 new cases were filed, which spurred an effort to develop a new and improved dispute resolution procedure at the Tokyo Round in 1979. The result was primarily a codification of what had developed informally.

Practice then shifted to convening ad hoc panels of three experts (from nations other than those of the disputants), acting in their individual capacities, to assist the contracting parties. The disputants submitted their legal and factual case in writing, made oral presentations, and the panels issued written reports interpreting the legal issues and reasons for their recommendations. These panel reports came to be relied on as precedents, although only binding on the parties involved.

A well-drafted panel report was described to ideally have the following structure:

- Introduction (origin of the dispute and procedure followed)
- Factual aspects of the dispute
- Arguments of the parties

¹⁷ Note that “CONTRACTING PARTIES” (all caps) refers to the contracting parties to the GATT 1947 acting as a body.

¹⁸ Pierre Pescatore, William J. Davey, and Andreas F. Lowenfeld, *Handbook of WTO/GATT Dispute Settlement* (New York: Kluwer Academic Publisher, 1991), p. 9.

- Submissions of third parties (if any)
- Panel's findings (legal reasoning)
- Panel's conclusions (recommendations and rulings proposed to the Council)²⁰

Unlike a judicial decision, these panel reports involved recommendations to the contracting parties as a whole, and were not binding unless adopted by the GATT Council, which operated by consensus. Therefore, the party adversely affected by the ruling could block its adoption. Even if the ruling was adopted, there were no time periods for compliance with it.

Beyond procedural concerns, there were legal shortcomings. Many older reports were aimed at working out an adjustment of the parties' competing interests rather than at solving the dispute on the basis of specific legal principles. Prepared by non-lawyers, such reports reached conclusions that lacked any legal basis. In their *Handbook of WTO/GATT Dispute Settlement*, Pierre Pescatore, William Davey, and Andreas Lowenfeld write:

[T]he legal value of these reports is low because they do not contain the essential ingredients for the advancement of the law: the structured expression of legal principles.... The problems must...be addressed and solved in a logical order, which means putting preliminaries before merit, separating procedural from substantive issues and, as far as the substance is concerned, putting the expression of legal principles before particulars such as deductions, applications and exceptions.²¹

Since the panels' primary concern was to obtain the General Council's approval of the reports, the panels tended to avoid any arguments that might arouse objections from country delegations, who would not be prepared to assume any new obligations through dispute settlement. Hudec explains:

¹⁹ Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, N.H.: Butterworth Legal Publishers, 1993), pp. 11-14.

²⁰ Pescatore, Davey, and Lowenfeld, *WTO/GATT Dispute Settlement*, p. 18. The GATT contracting parties originally were scheduled to meet annually to make decisions. In the 1960s, when it was obvious that an annual meeting was inadequate to deal with the large volume of regular business, they delegated much work to the GATT Council and various committees. All contracting parties wishing to participate comprised the GATT Council, which typically met monthly and operated by consensus.

²¹ *Ibid*, pp. 22-23.

[The panel reports] are a legal slalom in which panels do their best to get around the obstacles which stand in the way of reaching the finish line, which is to obtain the much desired consensus.²²

Dispute Settlement under the WTO

This uneasy situation led to a reengineering of the GATT dispute resolution process during the Uruguay Round. A principal accomplishment of Uruguay Round was the adoption of Annex 2: The Understanding on Rules and Procedures Governing the Settlement of Disputes (known for short as the Dispute Settlement Understanding, or DSU).

The objective of the DSU's rules and procedures is to provide for consultations and the settlement of disputes between members concerning their rights and obligations under the provisions of the WTO Agreement. The Dispute Settlement Body (DSB) is authorized to establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations, and authorize the suspension of concessions under the covered agreements. The Dispute Settlement Body is called upon to inform the relevant WTO councils and committees of any developments in disputes related to provisions of the respective covered agreements.

The significant changes in the WTO's DSU process over the previous GATT procedures are the rules for the adoption of panel reports, the addition of an Appellate Body, and time schedules for each stage of the process.²³ The first step in settling disputes still requires bilateral consultations between the governments concerned. During this early stage, the Director-General uses his "Good

²² Robert Hudec, *Enforcing International Trade Law*.

²³ GATT 1994, Understanding on Rules and Procedures Governing the Settlement of Disputes.

Offices”²⁴ to discuss the dispute with the parties. Twenty percent of all disputes are resolved at this level, where there is great flexibility and the “parties can trade anything.”²⁵

If the consultations are unsuccessful, the Secretariat selects a panel of three trade experts (drawn from a list of qualified persons, serving in their individual capacities and not subject to government instructions) who are then appointed to examine the case. A new provision allows the panel to request a written advisory report from expert groups.²⁶ The panel’s report includes descriptive (factual and argument) sections, findings, and conclusions and is submitted to the parties, then circulated to all WTO members. If a panel decides that a measure in question is inconsistent with the terms of the relevant WTO agreement, it recommends that the party bring the measure into conformity with the agreement and may suggest ways in which that could be achieved. Panel reports are adopted within 50 days of issuance, unless one party notifies of its decision to appeal, or a consensus emerges *against* the adoption of the report.²⁷ Thus, the consensus decision rule used under the GATT has flipped; now the report is adopted unless all contracting parties oppose it.

If a party chooses to appeal a panel decision, the Appellate Body hears the appeal. The Appellate Body is composed of seven persons, serving four-year terms, who have recognized standing in the field of law and international trade and are not affiliated with any government. The Appellate Body can uphold, modify, or reverse a panel’s legal findings. Again, after issuance, the Appellate Body report is unconditionally accepted unless there is a consensus against its adoption by all contracting parties. After adoption of the appellate report, the party concerned must state its intentions regarding the implementation of the recommendations. If it is impractical to comply

²⁴ Good offices, conciliation, or mediation (“good offices”) may be requested by any part to a dispute at any time (DSU Article 5.3). The term generally includes efforts by the Director-General, by virtue of his position, to assist the parties in resolving their differences. See Lawrence Susskind and Michèle Ferenz, *Good Offices in a War-Wearry World*, Program on Negotiation Working Paper WP01-1 (Cambridge, MA: Program on Negotiation, 2001).

²⁵ Gary Sampson, Secretariat staff for WTO, personal communication, June 16, 1995.

²⁶ WTO Agreement, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 13.

²⁷ Recall that the GATT procedures required a consensus by all contracting parties to adopt a panel report—a rule that allowed the target country to block adoption.

immediately, the member is given a “reasonable period of time” to do so; but if the respondent fails to act within this period, it is obliged to enter into negotiation with the complainant in order to determine mutually acceptable compensation (e.g., tariff reductions in areas of particular interest to the complainant). If no satisfactory compensation is agreed, the issue goes to compulsory arbitration, after which the complainant may request authorization to retaliate by suspending concessions or obligations against the other party.

The timing of the dispute handling process is as follows. A panel must render its decision within one year of the establishment of the panel. An Appellate Body must issue its ruling within two to three months of appeal. If the Appellate Body finds that a violation has occurred, the responding party has up to 15 months, or a reasonable time, to take action. A dispute’s disposition can be extended depending on what is determined to be a “reasonable time,” what constitutes compliance, and the sequence of determining compliance and authorized retaliatory action.

The history of GATT dispute settlement reflects the emergence of a process through which panels of trade experts interpret how the GATT rules and principles should apply in a given situation. Previously, policy recommendations regarding what steps, if any, should be taken to bring the offending policies into compliance with the GATT rules were offered, but not explicitly or consciously intended to constitute “judicial activism,” i.e., policymaking from the bench. Nevertheless, there has since been a radical change in tone, away from decisions designed to achieve a pragmatic consensus among WTO members to outcomes that must be legally justified.

Panels are now liberated from the need to satisfy all parties and can concentrate on the merits of the dispute and the unencumbered application of the facts to WTO law.... [B]y automatic adoption, it appears that the parties “have substituted legal legitimacy for political legitimacy in the dispute settlement process.”²⁸ This innovation in multilateral decision-making is lauded

²⁸ A. Chua, “The Precedential Effect of WTO Panel and Appellate Body Reports,” *Leiden Journal of International Law* 11 (1998): 45, 46.

by one commentator as the “most important change in the jurisprudence of the global economy in the second half of the twentieth century.”^{29, 30}

The annual budget for WTO dispute settlement is approximately \$1 million. The Legal Affairs Division has 18 staff that managed the 304 cases filed from January 1, 1995, through December 31, 2003. The Appellate Body has an additional staff of 14 and a panel of 7 members who are recognized authorities in law, international trade, and the WTO agreements. Six appeals were filed for review by the Appellate Body, and six reports were issued in 2003. The Appellate Body issued its first Annual Report on May 7, 2004.³¹

To review, dispute diagnosis in the policy enforcement phase relies upon an individual complaining country’s legal, economic, and political assessment of whether to file a request for consultations. If consultations are unsuccessful, then the resolution process shifts from the diplomatic to the legal arena. The consequences of that shift will be considered in Chapter 5.

THEORETICAL BASE FOR EVALUATING THE WTO’S DISPUTE SETTLEMENT SYSTEM

As mentioned in Chapter 1, a diverse literature contributes to the assessment of international dispute settlement. The nature of the disputes are different in each of the three orders described, but the common thread is a divergence of interests such that the affected parties’ goals appear incompatible. Settlement processes span a spectrum of strategies: negotiation, domination, capitulation, inaction, withdrawal, or third-party intervention, including structured consultations, arbitration, and review.³² This research contemplates the system as a network of connections among these settlement processes within the international trading regime.

²⁹ P. Nichols, “GATT Doctrine,” *Virginia Journal of International Law* 2 (1996): 379, 380.

³⁰ James Cameron and Kevin Gray, “Principles of International Law in the WTO Dispute Settlement Body,” *International and Comparative Law Quarterly* 50 (2001): 248-298.

³¹ Annual Report for 2003, WTO Doc. WT/AB/2.

³² Dean Pruitt and Sung Hee Kim, *Social Conflict: Escalation, Stalemate, and Settlement* (New York: McGraw Hill, 2004).

This study characterizes and evaluates the dispute settlement processes utilized in each of the three orders of disputes: policymaking, policy implementation, and policy enforcement. The processes are reviewed in three ways. First, each is characterized as to whether the dispute is resolved primarily according to the parties' *power, interests, or rights*. (This framework is discussed more thoroughly below.) Second, each dispute resolution process is situated within its distinctive literature. Policymaking disputes are resolved through multilateral negotiation, which draws upon international negotiation and consensus-building theory. Policy implementation disputes are addressed through structured consultations that focus on transparency and facilitating compliance. Policy enforcement disputes are resolved through an arbitral panel and appellate body review, which is informed by extensive general and trade-based scholarship on international dispute settlement. Chapters 3, 4, and 5, respectively, discuss how these theories emerge in practice.

A third review appears in Chapter 6, where the three orders of WTO dispute resolution processes are considered in terms of cross-cutting criteria: transaction costs (in time and money); satisfaction with outcome; satisfaction with process (procedural justice); effect on relationships; and recurrence of disputes. The literature on conflict management systems design helps to integrate the three orders of dispute resolution into a single system model.

Power, Interests, Rights

In Chapter 1, I introduced a dispute resolution theory that considers the role of power, interests, and rights.³³ In the WTO, power is measured primarily in terms of world trade volume. The four largest trading nations—the United States, Canada, Japan, and the European Union—comprise more than 40 percent of the world's GNP and are called the “Majors” or the “Quad.”³⁴ The interests of the WTO members, as with ruling governments generally, include staying in power, serving powerful voting

³³ William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco, CA: Jossey-Bass, 1988).

³⁴ WTO, *2002 WTO World Trade Statistics*, Tables A4 and A5 (Geneva: WTO, 2003). Note that China joined the WTO in 2002 and, by virtue of its trading volume, may ascend to status as part of the Quad.

factions, pursuing an ideological agenda, and addressing their commercial interests (including what sectors are regulated (e.g., agriculture, telecommunications) and what levels of protection are set). Rights derive from the principles established under the WTO; these include most-favored-nation status, nondiscrimination, and tariff reduction, among others.

Within the power-interests-rights framework, we can consider in each dispute order who participates, with what objective, and by what process. First-order disputes involve all WTO members and thus are extremely multilateral. These disputes are resolved through a consensus-based negotiation of parties' common interests in establishing rules of trade. Each party ostensibly has equal standing: one vote per member country, without regard to trading volume. In fact, however, the process of settlement is dominated by power. Those who have greater resources have greater opportunity to participate and to shape the applicable rules to their interests; they are unlikely to support rules that unduly constrain their ability to satisfy their constituencies and maintain their relative power within the institution. In turn, the practical limitation on the participation of less-powerful members has long-term consequences for the whole membership, in both resentment over the power asymmetry and difficulties in implementation for all members.

Second-order, or policy implementation, disputes involve all WTO members and the WTO institution. These disputes are resolved by a hybrid power-rights-interests consultation that is meant to bring the parties' behavior into the open for appropriate scrutiny. Rules dictate the timing and scope of the process, and members' behavior is measured against existing rules. However, if a gap exists between a country's assessed and expected performance—whether due to political, economic, or social reasons—there is no structured process to sort out feasible options for overcoming the deficit. Power (who participates in the process, who has the economic leverage to pressure a target country), interests (what are the competing demands for a country in meeting its WTO obligations), and rights (what do the WTO rules require) all play a role in the resolution processes.

Third-order disputes are bilateral and are resolved through a series of increasingly directive processes. Dispute settlement has shifted over the years from an informal, interest-based problem-

solving process to a legal, rights-enforcing one. While fairly time-efficient relative to the world of commercial litigation, the resolution of and compliance with third-order disputes remains an expensive process in terms of time, money, and relationships.

Of the three orientations—power, rights, and interests—interests are viewed by scholars as the most-effective basis for resolving disputes. If the parties' essential interests are satisfied, the outcome is more likely to be sustainable. This study considers what factors might temper or transform power- or rights-dominated processes into more interest-oriented ones. The factors vary with the order of the dispute.

CHAPTER 3: FIRST-ORDER DISPUTES: POLICYMAKING

This chapter examines the processes used for addressing the first-order disputes that arise in the context of WTO policymaking. These disputes grow out of the tension between each nation's sovereign right to protect its domestic political and economic interests, and the international community's collective interest in a stable trading system. First-order disputes in international policymaking occur in two phases, which I have called *pre-negotiation* (i.e., consensus building regarding what agenda of problems to take on) and *negotiation* (i.e., consensus building regarding what international policies will resolve those problems).

Chapter 1 introduced a theoretical framework for evaluating dispute settlement processes in terms of power, rights, and interests. The first section of this chapter supplements that framework with negotiation scholarship to analyze the GATT/WTO policymaking experience. The second section poses three hypotheses examined in this research and relating to first-order disputes. The third section describes the development of the GATT's early negotiations on tariff reduction, which leaned more to political and economic efficiency than inclusiveness. (The history reveals that, as more countries joined the GATT and the WTO and the issues extended beyond tariff reduction, the decision-making process was increasingly strained.) The fourth section then chronicles and compares in some detail policymaking disputes from four GATT/WTO negotiating rounds: Kennedy, Tokyo, Uruguay, and Doha. (The Seattle Ministerial, where parties attempted but failed to launch a "Millennium Round," is also briefly discussed.) Each pre-negotiation and negotiation is discussed in terms of participation, issue linkage, information exchange, decision-making resources, and process. The fifth and final section contains a discussion in which the four rounds are evaluated against the hypotheses.

THEORIES OF NEGOTIATION AND CONSENSUS BUILDING

Negotiation literature draws upon a wide range of analytical paradigms. WTO negotiations are resolved by consensus, so in discussing first-order disputes I have chosen to focus on two branches of negotiation theory: international negotiation and consensus building.

International Negotiation

When faced with conflict, parties—whether individuals, firms, or countries—may exhibit any of a number of possible responses. Putting aside acquiescence and avoidance (though these are legitimate responses in certain circumstances), the affected parties can maintain the most control over the outcome of a conflict by negotiating directly with each other in an attempt to seek a solution. As an alternative, the disputing parties may engage a “third party,” or *neutral*, to either facilitate a discussion among them, mediate a solution, or unilaterally decide the outcome through informal or formal means.¹

Negotiation, which is essentially joint decision-making under conditions of conflict and uncertainty, can occur between two or more parties. Over the last three decades, a theory of negotiation analysis has emerged in which the normative approach calls for identifying the parties and their respective interests (both economic and non-economic), assessing alternative strategies to satisfy those interests, and generating options for resolution that parties view as advantageous relative to their alternatives. Barriers to reaching agreement—including problems of communication, information, psychological or cognitive disjuncture, strategy, or procedure—all become increasingly complex as the number of parties increases.²

¹ The distinction among these three roles—facilitation, mediation, and arbitration—concerns the degree of process and decision-making control delegated by the parties to the third party. For an overview of the processes, see Stephen B. Goldberg, Frank E.A. Sander, and Nancy Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes* (Boston: Little Brown, 1992).

² For negotiation theory, see Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Harvard University Press, 1982); Roger Fisher and William Ury, *Getting to Yes* (New York: Houghton Mifflin, 1981); David Lax and James Sebenius, *The Manager as Negotiator* (New York: Free Press, 1986); Dean Pruitt and Jeffrey Rubin, *Social Conflict: Escalation, Stalemate, and Settlement* (New York: McGraw Hill, 1994); H.

History is replete with disputes among nations, and most of those disputes have been solved through diplomacy. Trade negotiations are one subset of this class of international diplomatic endeavors. Trade negotiations are characterized by complex bargaining over problems that span long periods of time, are linked to other disputes, and involve repeat players who are agents of their governments and various domestic constituencies.³

William Zartman and Maureen Berman attempted to identify the essential criteria of successful negotiations in *The Practical Negotiator*. Their study observed three stages: diagnosing the situation and deciding to negotiate; negotiating a common formula that outlines a framework and criteria for developing the details; and then negotiating the details to implement the issues in dispute. They note, however, that the formula and detail phases may not be distinct in practice, and may loop and iterate as the parties seek a solution.⁴

In the WTO, as with international negotiations generally, there is a pre-negotiation, or diagnostic, phase during which member nations identify problems to be addressed, develop a commitment to negotiate, and arrange the negotiations.⁵ This phase corresponds with Zartman and Berman's "diagnosing the situation and deciding to negotiate" stage. In considering a range of pre-negotiations in the commercial, human rights, and security arenas, Zartman and Janet Stein identified a number of pre-negotiation functions. In Stein's view, the pre-negotiation is effective for clarifying the risks associated with negotiation and facilitating sufficient information exchange for parties to make preliminary judgments about bargaining ranges and reservation points without having to make

Peyton Young, *Negotiation Analysis* (Ann Arbor, MI: University of Michigan Press, 1991), I. William Zartman, ed., *International Multilateral Negotiation* (San Francisco: Jossey-Bass, 1994); James Sebenius, *Negotiating Law of the Sea* (Cambridge, MA: Harvard University Press, 1984); Kenneth Arrow, et al., *Barriers to Conflict Resolution* (New York: Norton & Company, 1995); and Fen Osler Hampson with Michael Hart, *Multilateral Negotiations* (Baltimore: Johns Hopkins University Press, 1995), pp. 33-47.

³ Harold Nicolson, *Diplomacy* (London: Oxford University Press, 1963). Nicolson notes the characteristics of an ideal diplomat: "one who exhibits truthfulness, precision, calm, good nature, patience, modesty, adaptability and loyalty, in addition to the assumed attributes of intelligence, knowledge, discernment, prudence, hospitality, charm, industry, courage and tact," (p. 106).

⁴ I. William Zartman and Maureen R. Berman, *The Practical Negotiator* (New Haven, CT: Yale University Press, 1982).

⁵ Harold Saunders, "We Need a Larger Theory of Negotiation: The Importance of Pre-Negotiating Phases," *Negotiation Journal* 1 (July 1985): 250.

public commitments.⁶ This initial phase also allows parties to manage their domestic politics and initiate any necessary coalition building.⁷

Three factors should be taken into account in designing an international pre-negotiation process:

- **Participation:** If a multilateral agreement is the goal (whether achieved by majority voting or consensus), a broad range of key mid-size and smaller actors should be engaged in decision-making.
- **Agenda formulation:** The parties must develop a balanced agenda of problems to be negotiated. When taken as a whole, the agenda should track countries' current interests and priorities.
- **Information:** Sufficient information must be available so that each country can assess and relate their interests (domestic and global) to the tradeoffs available in potential bargains.

If pre-negotiation results in a decision to proceed, full negotiation ensues with the aim of achieving consensus on a package of policy rules. The chief factors involved in negotiation parallel those of pre-negotiation: participation, issues, and information, coupled with effective process management. Since decisions for both the pre-negotiation and negotiation phases in the WTO require consensus, I next explore what contributes to an effective consensus-building process.

⁶ I. William Zartman, "Pre-Negotiation: Phases and Functions," and Janet Gross Stein, "Getting to the Table: The Triggers, Stages, Functions, and Consequences of Pre-Negotiation," in Janice Gross Stein, *Getting to the Table* (Baltimore: Johns Hopkins University Press, 1989), pp. 1-17, 239-268.

⁷ Robert Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization* 42 (1988): 427, 53. Putnam argues that issue bargaining occurs simultaneously at the international and domestic levels and that it is essential to calibrate both sets of parameters. Kenneth Hanf describes a three-level game, including the domestic administrative arms that will implement the policy agreements. Kenneth Hanf and Ben Soetendorp, eds., *Adapting to European Integration*. (New York: Longman, 1998). David Lax and James Sebenius analyze coalition formation and maintenance in "Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing" in H. Peyton Young, ed., *Negotiation Analysis* (Ann Arbor, MI: University of Michigan, 1991) p. 153; and James Sebenius, "Sequencing to Build Coalitions: With Whom Shall I Negotiate First?" in R. Zeckhauser, R. Keeney, and J. Sebenius, eds., *Wise Choices: Decisions, Games and Negotiations* (Boston: Harvard Business School Press, 1996) p. 324.

Consensus Building

Building agreement by consensus is a special class of negotiation that has been the subject of considerable research.⁸ The criteria for evaluating such a process fall into the categories of participation, process, and resources.⁹

Participation. Assuming that consensual agreement is the goal, all parties whose interests are significantly affected must ultimately have a voice in the consensus-building process, and their interests must be represented through multiple venues that allow for both inclusive and focused technical participation. Leaders, including technical experts and those with political and economic power, must be willing to address political obstacles and commit time and resources to the process.

Process. To be most effective, a consensus-building process should be managed by skilled, professional neutrals according to clear ground rules that establish (1) the purpose and expectations of the process and outcomes; (2) the roles and responsibilities of participants; (3) opportunities for informed and candid debate on the issues and options for resolution; and (4) a plan for monitoring and implementing any resulting agreement.

Resources. Adequate resources must be available to the process, including technical expertise, funding, information (collected and disseminated in a transparent manner), and sufficient time for learning and option development.

In the WTO, three aspects of participation correlate with reaching consensus: inclusion, or the openness of the process to all member states; commitment by the leading powers; and the availability of representative, technically expert working groups to master the issue details. Once a negotiation is

⁸ See Society of Professionals in Dispute Resolution (SPIDR), *Best Practices for Government Agencies: Guidelines for Using Collaborative Agreement-Seeking Processes, Report and Recommendations of the Society of Professionals in Dispute Resolution* (Washington, DC: SPIDR, 1997); Lawrence Susskind, Sarah McKearnan, Jennifer Thomas-Larmer, eds., *The Consensus Building Handbook* (Thousand Oaks, CA: Sage Publications, 1999); Lawrence E. Susskind and Jeffrey L. Cruikshank, *Reaching Consensus: Procedures for Overcoming the Tyranny of Majority Rule* (Cambridge, MA: MIT-Harvard Public Disputes Program/Consensus Building Institute, April 2, 2004); and especially Judith Innes, "Evaluating Consensus Building," in Susskind, McKearnan, and Thomas-Larmer, eds., *Consensus Building Handbook*, pp. 631-675.

⁹ Innes describes three time phases for evaluation: *mid-course*, to assess progress and consider improving the process; *post-agreement*, to assess the parties' satisfaction and outcome; and *retroactive*, to consider the quality

launched, the institution and its members are called upon to commit significant human, financial, and technical resources to the effort. Because members vary in their resource capacity, however, some depend on the support of and information generated by other countries and organizations. Information exchange among countries includes a number of sub-tasks: the development and analysis of baseline information; access to information by all participants; and input from outside sources and experts. The WTO's General Council structures the formal negotiation process, and the role of meeting facilitators is usually filled by presiding chairs¹⁰ or the Director-General.

Power, Rights, and Interests in WTO Policymaking

Chapters 1 and 2 introduced the characterization of dispute resolution processes according to power, rights, and interests. Policymaking involves all three for resolution. The overriding goal for policymaking disputes is to find a balance between national interests and the collective global interest in a stable trading system by regulating rights and obligations. But power, even when tempered by rules, appears to influence whose interests dominate.

Zartman identifies power as the foremost factor in negotiation. The more symmetrical the parties' power, the more mutually satisfying and timely the outcomes.¹¹ In most multilateral negotiations, power among the parties is highly asymmetric. When the decision rule is consensus, any country holds veto power over an agreement, but countries vary in their economic and political power—and thus in their ability to use that veto power. Those with greater resources wield the power of information and opportunity to participate, and thus have the ability to shape the applicable rules to their interests. Jeswald Salacuse notes, however, that weaker parties can augment their power with skillful tactics, taking the initiative, developing knowledge on the issues, and mobilizing their

of the agreement and longer-term effects such as relationships and stability. This review of the WTO system is of the retroactive type. *Ibid.*, pp. 654.

¹⁰ WTO, *Guidelines for Appointment of Officers to WTO Bodies*, WTO Doc. WT/L/31 (Geneva: WTO, February 7, 1995).

¹¹ I. William Zartman and Jeffrey Rubin, eds., *Power and Negotiation* (Ann Arbor, MI: University of Michigan, 2000).

available resources.¹² In his treatise on international negotiations, Fred Ikle noted that negotiations designed to redistribute power and rights exhibited the following: a community spirit that led to an interest in reciprocity, interest groups that crossed national boundaries, and the delegation of specific functions to a supranational body.¹³

In the WTO, first-order disputes are resolved not through majority or weighted voting, but through a consensus-driven negotiation of parties' common interests in establishing the rules of trade. Winfried Lang described the process as follows:

Because consensus is not unanimity but the construction of a coalition that agrees surrounded by a group that is willing to go along, power is the way in which consensual coalitions are created. Proximity of parties on issues and differentiation of coalitions among various types account for the types of power available and are applicable to building winning coalitions.¹⁴

Richard Steinberg has also considered whether consensus-based bargaining in the GATT/WTO derives from rules or power. He concludes that agenda-setting (the pre-negotiation phase) is market power-based, while the negotiation itself is more rule-based. He cautions that consensus may be "organized hypocrisy," in which the procedural fiction of consensus and sovereign equality is merely an external display meant to legitimize the outcome.¹⁵

The next section integrates these negotiation and consensus-building factors in three research hypotheses.

HYPOTHESES

First-order disputes involve all WTO members, currently numbering 146 countries. These disputes are resolved through a consensus-based negotiation of parties' common interests in establishing the rules of trade. The settlement process is clearly dominated by those with more power, measured in

¹² Jeswald W. Salacuse, "Lessons for Practice" in Zartman and Rubin, eds., *Power and Negotiation*, p. 258.

¹³ Fred Ikle, *How Nations Negotiate* (New York: Harper & Row, 1964).

¹⁴ Winfried Lang, "Toward a Theoretical Synthesis" in Zartman, ed., *International Multilateral Negotiation*, p. 215.

¹⁵ Richard H. Steinberg, "In the Shadow of Law or Power?" *International Organization* 56, no. 2 (2002): 339-374.

terms of share of world trade. This power is manifested in the pre-negotiation phase, in which the parties determine what issues to address and whether to proceed with formal negotiations, as well as the negotiation phase, where it affects participation, resources, and process management.

Among the factors of power, interests, and rights, dispute resolution scholars consider processes that deal with interests to be most effective. The more a given outcome satisfies the affected parties' interests, the more likely it is to be sustainable over time. This study thus considers what factors might render power-dominated processes to be more interest-oriented. As discussed in the previous section, scholars have identified three factors as important in any consensus-building process: the number and type of participants; the process by which the negotiation is conducted (including the use of neutrals and the development of ground rules to guide participation); and sufficient resources, including expertise, finances, time, and the quality of information available to decision-makers. Since this research is based on historical, anecdotal evidence to assess the GATT/WTO negotiating experience, we can only approximate the direction of effect, not the magnitude, of these factors on outcomes.

For first-order dispute resolution, I present three prime hypotheses. First, the more representative the participation in the pre-negotiation and negotiation phases at the WTO, the more likely the agenda will incorporate a sufficient array of countries' interests, and thus the more likely the agreement will achieve broad-based support at its inception and compliance in its implementation. Participation has been shown to have positive effects on participants' attitudes about an institution and its goals, in part because (in the WTO's case) being invited to participate implies recognition of the participant country as an actor in world trade. Such inclusion has been shown to contribute to party buy-in when agreements are contemplated, and so it might aid in consensus building. In addition, there is ample evidence that "being heard" has a markedly positive effect on the satisfaction

that individuals experience in dispute resolution processes.¹⁶ There is reason to believe that country representatives in WTO negotiations would experience a similar rise in satisfaction if they felt “heard,” which could positively affect a representative’s efforts to convince his or her country to go along with a consensus decision. Finally, there is evidence that parties who participate are more likely to follow through on implementing the decision of a dispute resolution process, whether or not they agreed with the result. If wide participation were to improve implementation at the WTO, it would be well worth the time and effort. So, Test Hypothesis 1 is: *More representative participation (i.e., more in number and kind of participants) contributes to an agenda of interests that will engage short-term and long-term support of an agreement.*

Second, the more resources available to negotiators (e.g., time, financial support, technical expertise, and information) the more likely it is that countries will develop the capacity to understand the issues and negotiate meaningful commitments. Test Hypothesis 2 is thus: *Broader participation in information exchange (including the collection, analysis, and dissemination of information) contributes to sustainable commitments.*

Third, a carefully designed and managed negotiation process, including the use of skilled neutrals, will help to ensure the participation of diverse parties; enable the collection, analysis, and dissemination of relevant information; facilitate more creative options for resolution; and enhance the credibility of the decision-making process. The process is intertwined with the role of the skilled neutral as process manager. A neutral cannot necessarily balance power asymmetries, but he or she can help countries respond to the complexity of participating effectively in the WTO process by helping to ensure access to information, resources, technical training, and working groups.

Professional neutrals have not been used in formal negotiations of the GATT or WTO; however, presiding chairs and the Secretariat have served some of the functions of a neutral. So, Test Hypothesis 3 is: *A negotiation process that includes a skilled neutral(s) and procedural rules to*

¹⁶ John W. Thibaut and Laurens Walker, *Procedural Justice; A Psychological Analysis* (Hillsdale, NJ: Halsted Press Division of Wiley, 1975); and Tom R. Tyler and E. Allan Lind, *The Social Psychology of Procedural*

ensure balanced participation, information exchange, and option generation will increase the likelihood of agreement.

The next sections describe the GATT/WTO's policymaking efforts from 1962 to the present.

THE EVOLUTION OF GATT NEGOTIATION NORMS

As mentioned in Chapter 2, the GATT was adopted in 1947 by 23 countries with the aim of “entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”¹⁷

Recall that the drafters of the GATT contemplated the simultaneous establishment of the International Trade Organization. When the ITO failed to be ratified, the GATT was left as merely an agreement, without a supporting organization. The functional “decision-making body” of the GATT was the contracting parties themselves, who met periodically in eight separate negotiating rounds to discuss continued improvement of the trading system. (Recall Table 2.1 in Chapter 2.) GATT negotiations from 1946 to 1949 functioned as a pre-negotiation for the first five trade negotiation rounds—held from 1949 to 1961—which were devoted to progressively lowering tariff rates.¹⁸ While rounds were designated for discrete periods, the process was really a continual one.

Heather Hazard identified several structural characteristics that emerged from the early tariff-reduction rounds:

- a norm of agreement by consensus, and a strong feeling that agreement must be reached;
- a small number of parties (20 to 40) with a balance of bargaining power, intimate knowledge of the issues, and longstanding relationships;

Justice (New York: Plenum Press, 1988).

¹⁷ General Agreement on Tariffs and Trade, Preamble.

¹⁸ Tariffs were considered a transparent, and thus acceptable, mechanism of trade restraint as compared to quotas, which are more opaque.

- a limited agenda—tariff reduction—with transparent consequences;¹⁹ and
- ease of verification and compliance.²⁰

Tariff negotiations were conducted on a largely bilateral basis, product by product. Each was a relatively simple negotiation, but multiplied many times over for each trading partner/product set. Like many other GATT practices, the notion of “consensus” developed over many years without explicit language. In 1994, the WTO formalized the practice of consensus-based decision-making in Article IX, paragraph 1, which was discussed in Chapter 2. Under this provision, majority voting remains a theoretical option, but members have been highly adverse to its use. Thus each member essentially has veto power, though consensus decisions do not have to be unanimous (that is, a country can abstain from voting). The noted international economic scholar John Jackson explained:

The spirit and practice of GATT...has always been to try to accommodate through consensus-negotiation procedures the views of as many countries as possible, but certainly to give weight to views of countries that have great weight in the trading system. This will undoubtedly not change.²¹

GATT/WTO NEGOTIATING ROUNDS FROM 1962 TO 2003

This section looks at a series of four negotiating rounds to assess how the diagnostic and resolution process factors played out during pre-negotiations, what levels of participation and information exchange were typical, and how issue identification was handled. For the negotiation phase, I consider the scope of participation, information access, resource availability, and management of the negotiation process. The Kennedy Round served as a transition from the first five GATT tariff-reduction negotiations to the three more complex negotiations thereafter.

¹⁹ *Transparent* means that tariff levels on any given product were public knowledge to a potential trading partner, so the competitiveness of an import could be assessed.

²⁰ Heather Hazard, “Resolving Disputes in International Trade” (PhD diss., Harvard University, 1988), p. 35-41. Hazard especially notes that the parties had a high degree of knowledge of their own interests, their adversaries’ interests, the negotiating conventions, and logistics. The original group included modest economic powers, except for the United States. The United States was committed to building the GATT institution and making it worthwhile for countries to join, and so did not exploit its position of leverage.

The Kennedy Round (1962-1967)

The Kennedy Round, negotiated by nearly 80 nations over five years, was the last of the trade negotiations to be primarily concerned with tariff reductions.²² In comparison, the previous five trade negotiations had been conducted among 20-40 nations and had each lasted one to two years. The Kennedy Round is not described in depth here, but its structure is sketched out as a point of reference for subsequent negotiating rounds.²³

Negotiation

Regarding the Kennedy Round, Gilbert Winham wrote:

[The Kennedy Round] took on enormous importance as a symbol as it went along. It became a test of the national will of the major participants to continue the postwar trend toward trade liberalization. Even more important, it was a test of the willingness of nations to avoid a breakdown that would have led to increased protectionism. The main reason the Kennedy Round succeeded is that governments feared what the implications of failure might mean for the international economic system, and because they wanted to avoid blame for causing such implications.... Thus the main political result of the Kennedy Round was the achievement of the agreement itself, especially since the agreement was significant in trade terms.²⁴

During the Kennedy Round, tariff negotiations usually started bilaterally on a given product, between the principal supplier of the product and a major importer. The principle of reciprocity was applied to evaluate any bilateral exchange of concessions. Previous negotiations had involved a “linear-cut approach,” in which requests and offer lists (describing products under consideration, present rate of duty, and requested rate of duty) were exchanged bilaterally. Once concessions were granted between the initial negotiators, the concessions would be “multilateralized” through the

²¹ John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2d ed. (Cambridge, MA: MIT Press, 1997), p. 73.

²² Side agreements were also reached on antidumping and trade in grains.

²³ See generally, Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), pp. 68-78.

“most-favored-nation” principle, which meant that each country was entitled to the most favorable tariff rates for a product that were available to any country.²⁵ Given its intrinsically distributive nature, this negotiation process was slow, highly contentious, and built from the bottom up.²⁶ The end-game negotiation required countries to integrate a complicated set of multilateral and bilateral concerns.

The size of a nation’s economy determined its importance in these negotiations. The larger a nation’s trading volume, the more incentive it would have to make demands on its exports, and the more it had to offer on its imports. This also placed a big negotiating burden on the larger countries—including the United States, European Community, United Kingdom, Canada, and Japan—to meet all demands as primary exporters and importers. Smaller countries were often excluded from negotiations until the end, when the larger nations would attempt to sell the deals already made. In parallel to the various bilateral negotiations were discussions between the national delegations and the GATT Secretariat to access and analyze relevant information. In the final phase, the negotiators made tradeoffs to form packages that balanced concessions within similar product sectors if possible, but across sectors if necessary. Interestingly, within-sector negotiations turned out to introduce a valuable multilateral element to the negotiations, through which participants gained more detailed understandings of the industries concerned and the compromises that were possible.²⁷

As Winham describes it:

The Kennedy Round was a multilateral negotiation, but participants quickly found that meaningful concessions usually could be given only between the principal supplier and major importers. Thus, multilateral negotiations were useful for exchanges of information and for general discussions of structural problems of trade and production in different industries, but they did not facilitate specific discussions of reciprocity (or *quid pro quo*) that were a

²⁴ Gilbert R. Winham, *International Trade and the Tokyo Round Negotiation* (Princeton, NJ: Princeton University Press, 1986), p. 61.

²⁵ General Agreement on Tariffs and Trade, Article I.

²⁶ An alternative process used in the Kennedy Round was to offer a “substantial linear tariff reduction” of roughly 50 percent on industrial products with a bare minimum of exceptions, subject to negotiation. GATT Press Release No. 794, May 29, 1963.

²⁷ Dam, *The GATT*, p. 77.

necessary part of the exchange of concessions. Consequently, what was a multilateral negotiation in name became a large, complicated series of bilateral (or plurilateral) negotiations in fact.²⁸

Major delegations might bring in more senior individuals toward the end of the negotiations, a strategy that would introduce new faces and new ideas and bring some added flexibility to conclude a deal. The Kennedy Round finished rather dramatically, with the U.S. negotiator's authority about to expire and the GATT Director-General, Sir Eric Wyndham-White, actively intervening to bring about a successful conclusion.

Up to the Kennedy Round, the purpose of GATT negotiations was to reduce tariffs. Tariffs were the clearest barrier to trade, and tariff concessions turned on a principle of reciprocity. As tariffs were reduced over 15 years, attention turned to other barriers to trade, which were collectively termed *nontariff measures* (NTMs). In the Kennedy Round, NTMs were recognized as a new issue and were included on the agenda, but discussions of them resulted in only a modest agreement on antidumping and the "American selling price" system of customs evaluation.²⁹ Other NTMs (e.g., quotas, licensing requirements, health standards, and variable levies) were set aside in the end, only to emerge as the trigger issues five years later during pre-negotiation of the Tokyo Round.

One notable shift in dynamics during this round was the emergence of the European Community negotiating as a single unit (the so-called "Europe of the Six"). This was described as "replacing six smaller and generally law-abiding nation states with one muscular superpower."³⁰ For its part, the United States, made a "fundamental decision in initiating the Kennedy Round to meet the potential threat of a unified Europe through liberal rather than isolationist policies."³¹ However, the U.S. negotiators were only authorized by Congress to address tariffs, not NTMs. In the future, the EC

²⁸ Winham, *International Trade*, pp. 64-65.

²⁹ GATT, 1967 Antidumping Code, Basic Instruments and Selected Documents 74, 15th Supplement, 1968. The American selling price was a duty on a foreign product that was based on the value of "like or similar" goods produced domestically—a valuation that could be quite onerous for exporters.

³⁰ Robert Hudec, *Enforcing International Trade Law* (Salem, NH: Butterworth, 1991), p. 12.

³¹ Winham, *International Trade*, p. 34.

and the United States would need to work out issues like NTMs before other nations would, or could, be engaged.

The Kennedy Round was a transitional negotiation between the early years and subsequent rounds. In reviewing the pre-negotiation factors, several points are remarkable. The pre-negotiation, or diagnostic phase, had really begun more than 15 years prior when the original 23 contracting parties to the GATT committed to progressive tariff reduction. The participants, ranging from 43 member countries in 1962 to 74 in 1967, were veterans who knew their own interests, knew their counterparts' interests, credentials, and integrity, and understood the negotiating conventions and the logistics. Information exchange was facilitated between the Secretariat and the respective capitals.

In building consensus, the participation, resource, and process factors mirrored those of earlier rounds. The United States, European Community, United Kingdom, Canada, and Japan carried the burden of initiating tariff negotiations, and in turn expected smaller countries support the deal in the end. The two-tier approach weighted the interests of the primary suppliers and importers, and belied truly inclusive participation. Core decision-making took place among a handful of key players, through their professional diplomats in Geneva; developing countries were marginal participants.

Summary

In summary, the agenda issues, parties, and decision-making norm for the Kennedy Round were pre-established and facilitated through the GATT regime. The negotiation itself followed the model of the previous rounds, with initial bilateral negotiations led by the principal suppliers, followed by multilateral negotiations. Information was generated by the capitals and the Secretariat. The NTM issue was less a bilateral issue between specific trading partners than a multilateral issue on classes of trade practices with a wider target of actors, but it was only preliminarily addressed. A dominant factor was the symbolic importance of consensus on the need to achieve agreement. The common, binding, collective interest was to push for liberalization; the alternative—no agreement—was

deemed unacceptable. The symbolic importance of achieving *any* agreement has echoed in the negotiating rounds since.

Tokyo Round (1973 - 1979)³²

The Tokyo Round was negotiated by more than 80 contracting parties over a six-year period. The historical agenda of tariff reduction was expanded in this round to include nontariff measures: antidumping, subsidies and countervailing measures, government procurement, licensing, and technical trade barriers. GATT contracting parties during this round included many who did not share a common history of negotiating tariff levels over the previous 20 years. The countries' diversity of interests, experience, and knowledge challenged the "old-boy" consensus operation.

At the end of the previous round's negotiations, the GATT Secretariat tried to persuade the major trading nations to extend trade liberalization into the nontariff area. While unsuccessful at introducing this new issue late in the process, nontariff measures clearly triggered the Tokyo Round. But the notion of reducing NTMs was problematic, as they were largely unidentified, numerous, and often buried in government policies designed for nontrade purposes. Thus, a pre-negotiation period for policymaking was essential for building some consensus among diverse participants around the scope and negotiability of agenda issues.

Pre-Negotiation

Several incidents contributed to the launch of the Tokyo Round. The United States suspended convertibility of the dollar into gold in 1972, a move that contributed to a period of increasing instability in international monetary markets. The European Community extended its area of preferential trade treatment to African and Caribbean nations and deepened its agricultural protection. The United States negotiated a number of voluntary export reductions, which, while not inconsistent with GATT rules, did unilaterally unbalance the international trading system. There was also a

growing awareness that the trading system needed to be made more flexible to handle emerging forms of protectionism and that a new balance needed to be struck between national legislation and the regulation of international commerce.³³

Presidents Johnson and Nixon commissioned expert discussions³⁴ that ultimately led to the preparation of the Williams Report in July 1971. The report referenced a number of monetary questions and trade matters and concluded that new international trade negotiations should be launched. The report stated:

These problems will not wait. Several times during the past few years, situations developed in which unilateral actions by one or another major trading nation could have precipitated an international crisis. We believe no time should be lost in getting these negotiations underway.³⁵

Proposals for new multilateral trade negotiations were also endorsed by the Rey Report, published in 1972 by the Organization for Economic Cooperation and Development (OECD).³⁶

Another key event was the expansion of the European Commission to include three new members—Denmark, Ireland, and the United Kingdom—on January 1, 1973. In June 1973, the European Commission issued an “Overall Approach” for forthcoming trade negotiations, encompassing negotiation on international arrangements for certain product price ranges and supply; codes of conduct on export practices; and relations with developing countries.

³² See Winham, *International Trade*.

³³ E.E. Schattschneider, *Politics, Pressures and the Tariff* (New York: Prentice-Hall, 1935), p. 5. See also Thomas Schelling, “National Security Considerations Affecting Trade Policy” in U.S. Government, *United States International Economic Policy in an Interdependent World*, vol. 1 (Washington, DC: GPO, 1971), pp. 723-37.

³⁴ President Johnson appointed a Public Advisory Committee on Trade Policy, composed of leading union and business representatives, who, with the special representative for trade negotiations, were to consider U.S. trade policy. U.S. Government, *Future United States Foreign Trade Policy*, Report to the President submitted by the Special Representative for Trade Negotiations, January 14, 1969 (Washington, DC: GPO, 1969). President Nixon continued this policy exercise by establishing the Commission on International Trade and Investment Policy, also composed of labor, business, and academic representatives and chaired by Albert Williams of IBM.

³⁵ U.S. Government, *U.S. International Economic Policy*, Williams Commission Report (Washington: GPO, 1971), p. 307.

³⁶ The OECD was formed in 1960 to address problems of coordinating and harmonizing economic policy among all advanced industrial states. OECD, *Policy Perspectives for International Trade and Economic*

Before launching a new round, the parties needed to develop an information base that would enable them to understand the issues and develop the mechanisms and capacity to address the issues systematically. Lower-level government officials initiated the process by collecting and organizing the basic technical information; their effort served to facilitate interactions among national delegates and the GATT Secretariat to build intellectual and negotiating capacity on the issues. The GATT authorized the creation of a Committee on Trade in Industrial Products to explore potential progress on trade liberalization, an “objective analysis” of tariff situations relative to Kennedy Round concessions (the “Tariff Study”), and an inventory of nontariff measures affecting the trade of members.³⁷ Development of the Tariff Study, which involved the preparation of computer tapes on product and tariff data, significantly facilitated subsequent tariff reduction concessions.

The NTM inventory started with a “notification drive.” First, all member countries were asked to notify the organizers of their existing nontariff measures. This was based on the common practice of having each GATT member applying a tariff restriction to provide information about that restriction to the international body. It became clear, however, that notification did not work as well for NTMs as it did for tariffs, as NTMs were not necessarily intended (or recognized) as protectionist. So, the notification burden was shifted. Exporting countries were asked to report measures maintained by other (importing) countries that they believed constituted a restriction, and the importing countries maintaining such measures could then respond. This procedure demonstrated the seriousness and good intentions with which GATT members approached the NTM problem. In this manner, the NTM initiative assembled 800 notifications containing the following information: the country maintaining the measure, the notifying country, a description of the measure, a summary of factual aspects, and the positions of the parties. The notifications were organized into five main groups, with working groups established to deal with each. Each of the measures was compared to the legal requirements of

Relations, Report by the High-Level Group on Trade and Related Problems to the Secretary General of OECD (Paris: OECD, 1972).

³⁷ GATT, Basic Instruments and Selected Documents, 17th Supplement, 1970, p. 115.

the GATT. “Essentially this was a bureaucratic act,” Winham wrote, “and in an environment of ignorance, uncertainty, and complexity it was a creative act as well.”³⁸

This tremendous effort at information gathering, spanning more than two years, constituted an important pre-negotiation phase in advance of collective policymaking. The information garnered from the NTM inventory helped to define the prevailing practices and was gradually structured into negotiable categories from which the subsequent Tokyo Round codes eventually evolved. As such, it serves as a dramatic example of the function of pre-negotiation to increase the capacity (and will) of parties to undertake negotiations.

Negotiation

The Tokyo Ministerial, held September 12-14, 1973, was attended by representatives from 102 nations (members and nonmembers).³⁹ The Tokyo Declaration, authored by the parties and issued at the end of the Ministerial meeting, stated that the aim of the negotiation was to “achieve the expansion and ever-greater liberalization of world trade and improvement in the standard of living and welfare of the people of the world and secure additional benefits for the international trade of developing countries.”⁴⁰ The Tokyo Declaration raised the stakes for the round. As Winham observed:

Negotiation is traditionally a mechanism for conflict resolution, but multilateral negotiation in GATT has become more than that: it is an investment in international decision-making. Once entered into, it is difficult to end without some form of agreement being reached, since the time and effort expended create a kind of “sunk cost” for governments that can be justified only through achieving a negotiated settlement.⁴¹

Once the round was launched, however, the negotiations stalled. Internationally, the 1973 Yom Kippur War and ensuing oil boycott disrupted the world markets. Domestically in the United

³⁸ Winham, *International Trade*, p. 88.

³⁹ Nations who are not members, but perhaps are negotiating accession, may attend as observers.

⁴⁰ GATT, The Tokyo Declaration, Tokyo, Japan, September 12-14, 1973. The Declaration structured the exercise of trade policy for participating nations in terms of both process and substance.

States, internal politics among Congress, special interest groups, and the administration blocked the granting of negotiating authority (to include nontariff measures) to the President until 1975. The 1976 presidential election diverted attention further, so that it was not until 1977 that the United States had a top-level team in place to negotiate. Winham sums up that “the period 1974 to mid-1977 constituted down-time for the trade negotiation. Some work got done, but it was mainly technical work, especially the gathering and collecting of data.”⁴² Finally, in January 1978, direct bargaining began.

Three categories of issues were up for negotiation: (1) six codes dealing with NTMs; (2) tariff reductions (an average of 35 percent reduction in tariffs covering \$100 billion in imports, phased over an eight-year period); and (3) a series of revisions to GATT articles of particular interest to developing countries. The revisions, initiated by Brazil, became known as the “framework agreement.” The framework agreement had five parts, with the objective of increasing openness and certainty and decreasing the sometimes arbitrary nature of the trade rules. Of particular note in the framework agreement was the establishment of dispute settlement procedures to increase the likelihood that trade regulations would be explicit, justifiable, and more certain for exporters. This was crucial because “in many cases, it is uncertainty, even more than absolute levels of protection, that deters international exchanges.”⁴³

The Tokyo Declaration expanded the machinery for the negotiations by establishing the Trade Negotiation Committee (TNC), which consisted of all countries participating in the Tokyo Round and was chaired by the GATT’s Director-General, Olivier Long. The task of the TNC was to devise appropriate plans and negotiating procedures and supervise the negotiations. The large size of the TNC precluded any negotiations at that level, but it met regularly, received formal reports from subordinate bodies, and monitored the pace and substance of the negotiations. In February 1974, the TNC formed six specialized subcommittees. The parties apparently recognized that “nothing gets

⁴¹ Winham, *International Trade*, p. 92.

⁴² *Ibid.*, p. 129.

⁴³ *Ibid.*, p. 17.

done unless formal tasks are assigned to specific individuals or groups, and with deadlines attached.”⁴⁴

Despite the careful efforts at organization and procedure, problems plagued the negotiation. The issues were difficult, and the parties found it hard to determine an acceptable scope. Nevertheless, the passage of time also helped the parties build up the necessary technical information base and identify the main lines of disagreement among them. Finally, a series of agreements was drafted to incorporate draft negotiating texts and lists of principles on the various issues. These agreements served as a marker for a certain momentum and capacity to negotiate.

Two particular problems should be noted. One is that diplomats often draft agreements knowing that they are postponing the most insoluble problems for those who must administer the agreements’ provisions down the road. One could expect that implementation problems with the Tokyo Round would surface in the subsequent round—which in fact they did during the Uruguay Round.⁴⁵

A second problem was the pyramidal, “top-down” approach that was taken. The negotiations were initiated by the major trading nations and flowed downward to include other nations once important decisions (and compromises) were made. This process caused considerable resentment among developing countries, who were most often excluded from the process, and who then responded with opposition to the substance. By November 1979, the challenge became how to conclude the agreements—both politically and legally—with such frustrated and marginalized members. An additional legal problem was that the new codes were plurilateral agreements—that is, countries would only be bound by the provisions if they explicitly so agreed. This was in contrast to the multilateral, single-undertaking agreements of the previous and subsequent trade negotiations.

⁴⁴ *Ibid.*, p. 98.

⁴⁵ Similarly, implementation problems with the Uruguay Round are now the subject of negotiation during the Doha Round. This may, in fact, be an efficient use of time and resources in the long run, and it will be discussed in Chapter 6.

Despite these problems, the Tokyo Round framework negotiations concluded in Geneva on April 12, 1979, with four agreements that modified GATT procedures on differential treatment for developing countries, balance-of-payment measures, safeguards, and dispute settlement. Six code agreements (on government procurement, customs valuation, technical barriers to trade, import licensing, antidumping, subsidies, and countervailing duties) were adopted plurilaterally.

Overall, the Tokyo Round was considered a substantial accomplishment that served to limit the damage of trade and monetary tensions, demonstrate the negotiators' ability to deal with very complex issues, and advance the capacity of the international trade bureaucracy. Through delegation management and information handling, the world trading system became more stable and more politically resilient. On the process side, the negotiation strengthened the rule-orientation of the system by increasing certainty, order, and simplicity, all of which represented a clear move away from a process that was primarily power-oriented. The Tokyo Round's negotiation entailed both the management of relationships and the distribution of benefits, essentially "building a cooperative structure that would contain competitive actions by individual nations."⁴⁶

Three distinctive negotiation dynamics emerged during the Tokyo Round. First, the round was a negotiation over words, rather than just over numbers (tariff levels). Second, the issues necessitated a shift from bilateral concessions to multilateral issue management. Third, the importance of negotiating definitions shaped the whole process. Naming political or economic constructs is not value-free, and this had distinctive operational implications.

Winham comments that the world trading system is fragile; it is a system "where relations are expected to be competitive, but where that competition is in turn kept within reasonable bounds by a series of self-imposed rules and norms of behavior."⁴⁷ He anticipated that three problems would occur after the Tokyo Round. First, he said it would be difficult for the GATT to continue to manage its role as negotiating protectionism—in other words, to accommodate national practices that ran counter to

⁴⁶ Winham, *International Trade*, p. 366.

⁴⁷ *Ibid.*, p. 402.

the GATT's concept of free trade. Second, he questioned how member nations would contain economic nationalism, as with the Lome Conventions granting preferential status to certain nations, or the growing number of regional trading arrangements. Third, he suggested it would be difficult to institute effective techniques of system control.

Summary

To review, the pre-negotiation period spanned two years, during which time a diverse group of participants struggled to turn a collective need to avert global financial chaos into a structured negotiation. All three pre-negotiation factors—participation, agenda formulation, and information exchange—were catalyzed by the Tariff Study and NTM inventory. Initial analytical work by the OECD and the United States built support for the NTM issue, and then the two-year GATT notification and information-gathering exercise brought the parties to agreement on an agenda for negotiation.

The negotiation itself was built upon the U.S. commitment, information, and the capacity-building value of the Tariff Study and NTM inventory. A Trade Negotiation Committee, chaired by the Director-General, served to structure the formal negotiations, but was in fact merely a forum for collectively receiving subcommittee reports and information. Instead of the early bilateral to multilateral progression of tariff reductions, the Tokyo Round followed a pyramidal sequence in which important terms were decided by the leading traders and the smaller countries were expected to follow. The latter, however, keenly resented this approach and were observed to express opposition on procedural as well as substantive grounds. Winham characterized the negotiation as an “investment in international decision-making... a symbol.” The sunk costs invested in the negotiation

could only be justified by reaching an agreement. In fact, the agreement was impressive substantively and served to increase certainty in the global markets.⁴⁸

The Uruguay Round (1989-1994)

Pre-Negotiation

As with the Tokyo Round before it, the seeds of the Uruguay Round⁴⁹ lay in the remnants of the previous round. The two “leftover” issues were agriculture and safeguards. To complicate things, the nontariff measure codes adopted as part of the Tokyo Round were plurilateral agreements; they were only binding on those countries that explicitly adopted them, not on all GATT members. As it turned out, it was primarily the OECD countries that signed the NTM codes. Developing countries were far more concerned about agriculture, textiles, and clothing. However, both developed and developing countries were concerned about unilateral, extra-GATT behavior and implementation of the previous agreements. A final category of concerns included new issues, such as services (e.g., shipping, air transport, banking, and insurance), investments, and intellectual property. The GATT Secretariat was not sufficiently staffed to analyze the new issues, nor was it authorized to do so until late in the pre-negotiation process.

The United States pushed the 1982 GATT Ministerial meeting to consider a trade round launch and was especially keen to include the new issues on a draft agenda. The move for a new round (i.e., for even beginning pre-negotiations over a possible agenda) was sharply resisted by developing countries.

⁴⁸ Paul Lewis, “Olivier Long, 87; Led Predecessor of WTO,” *The New York Times*, May 9, 2003. Long was largely credited with holding countries to their commitment to complete the round, despite pleas for protection amidst the OPEC oil shocks and high inflation in the world economy.

⁴⁹ See generally, Gilbert R. Winham, “The Pre-Negotiation Phase of the Uruguay Round” in Stein, *Getting to the Table*, pp. 44-67; Gunnar Sjostedt, “Negotiating the Uruguay Round of the General Agreement on Tariffs and Trade” in Zartman, ed., *International Multilateral Negotiation*, pp. 44-69; and Michael Hart, “Multilateral Trade Negotiations” in Hampson, *Multilateral Negotiations*, pp. 125-254.

The United States thus turned its focus away from the GATT and recommended that the OECD include services in its liberalization program and begin to identify the exchange of services across borders as a form of trade. The OECD undertook some analysis and monitoring, and, in June 1981, issued a report regarding the import of trade in services.

Investment as a new trade topic was handled similarly to services, with initial research and analysis conducted outside of the GATT. Intellectual property was raised at the end of the Tokyo Round as a new issue, but it was far too late (the summer of 1979) to be considered then. In 1980 and 1981, the United States held a series of bilateral talks with the EC, Canada, Japan, and Switzerland on intellectual property. Coincidentally, a U.S.-Canada dispute on patent rights in 1981 moved the issue from conceptual to concrete.

In 1983, the GATT's Director-General appointed a blue-ribbon group, headed by Fritz Leutwiler, to examine the trading system. The Leutwiler Report, issued in 1985, recommended a new trade round that would take up both old and new issues. Many nations, especially Brazil and India, expressed concern that a new round would emphasize new rights for industrialized countries at the expense of sorting out unresolved issues of greater importance to developing countries. Europe was somewhat ambivalent; while interested in advancing rules on services and investment, it was not prepared to scale back its protectionist agricultural policy.

Around this same time, a GATT body called the Consultative Group of 18 (CG18) weighed in. This special GATT entity was not involved in multinational negotiations, nor did it have any formal decision-making authority.⁵⁰ However, it was comprised of high-level, national representatives with responsibility for the GATT's strategic planning. The larger industrialized and developing countries had permanent seats in the group; others rotated membership. In early 1985, the CG18 held a series of informal ministerial meetings among 20 key trading nations from North and South to explore—without any commitment—an agenda for the Uruguay Round.

⁵⁰The CG18 existed in the GATT between 1975 and 1990. It brought together senior officials from Geneva and the capitals.

In June 1985, the GATT Council established an official group with a mandate to find a viable compromise between positions for and against a new GATT round. The United States had made some progress with its allies, and through an unusual but highly calculated call for a procedural vote, succeeded in calling a meeting to prepare for the establishment of a preparatory committee, which would authorize the use of GATT resources and staff for research and discussion of prospective negotiating issues. By January 1986, a GATT preparatory committee was formed and chaired by the GATT Director-General, Arthur Dunkel.

As with the Tokyo Round, then, nearly three years of research and discussion activities were needed to build political support for a new round.⁵¹ This protracted impasse actually gave the parties time to work through differences. Strong opposition by a number of developing countries diminished as export-oriented countries in Southeast Asia and Latin America became favorable to new a GATT round. Early leadership by the United States through issue analysis in collateral forums was later assumed by smaller countries such as Colombia and Switzerland, who involved Canada, the European Free Trade Area (EFTA) nations⁵², Australia, New Zealand, and various developing countries. In the end, almost 50 countries participated in a large coalition of small and middle powers that built a bridge between, on the one hand, the United States, the EC, and Japan, and, on the other, former dissidents Brazil and India. This part of the pre-negotiation phase became a game of issue clarification. The sequence of steps was to identify the issues (e.g., services, investments), and then conduct research to understand them and build a “consensual background” on which the issue could be framed for introduction to the agenda.

The contracting parties met in Ministerial Conference in Punta del Este, Uruguay in September 1986 to develop an agenda for a new round. The struggle at this point was over what issues were to be negotiated in the round and in what sequence; what parties (or institutions, e.g., the

⁵¹ Sjostedt, “Negotiating the Uruguay Round,” p. 54.

⁵² EFTA was formed in 1960 and included Austria, Britain, Denmark, Finland, Norway, Portugal, Switzerland, and Sweden. Most countries left to join the European Community or the European Union; Iceland, Norway, Switzerland, and Liechtenstein remain.

GATT v. the United Nations Commission for Trade and Development) would negotiate the issues; and how to structure the negotiations (with an eye for future tradeoffs). Winham recalled an oft-told metaphor for trade negotiations—the so-called “bicycle theory.” Similar to how a bicycle must maintain forward motion in order to stay upright, Winham explained, “unless the GATT sustains the momentum in the fight to maintain a liberal trade regime, this regime will collapse as nations take unilateral action to protect their producers from foreign competition.”⁵³

The specific drivers for the United States to launch a new trade round were several: its status as a major agricultural exporter; its increasing dependence on the production of services rather than goods; its long-running trade deficit (which was likely to prompt Congress to adopt a unilateral, protectionist trade strategy); and its recognition that nearly half of world trade was outside the GATT disciplines. Winham explained:

Factors that salvaged the new negotiation were strong leadership and organization of the Punta del Este meeting, and the knowledge that a failure to negotiate would have left the GATT without any programme for the immediate future. Delegates to the Punta del Este meeting commented that the fear of renewed protectionism (especially in the United States) finally seemed to have had an impact on all national delegations, and a certain fear of the “long shadow of the future” promoted a willingness to seize on negotiation as a way of avoiding that future.⁵⁴

Once again, Winham said, the pre-negotiation followed a

pyramidal structure, whereby issues tended to be first negotiated between the United States and the EC; and once a tentative trade-off was established, the negotiation process was progressively expanded to include other countries. In this way co-operation between the United States and the EC served to direct the negotiation. Where co-operation was not forthcoming between these economic superpowers, the negotiation went nowhere because they had effective veto power; and when the two did agree, only the combined efforts of other parties (usually the developing countries) had any real prospect of altering the outcome.⁵⁵

⁵³ Winham, *International Trade*, p. 48.

⁵⁴ *Ibid.*, p. 51.

⁵⁵ *Ibid.*, p. 54.

The Punta del Este Ministerial was scheduled for six days and began with three competing texts containing draft negotiating agendas. The main text came from the preparatory committee and was sponsored by a group of 40 developed and developing countries chaired by Colombia and Switzerland (the “café au lait group,” so named for Colombian coffee and Swiss dairy). The second text represented the views of 10 developing countries following the lead of India and Brazil. The third text was submitted by Argentina as an attempt to bridge the other two. The U.S. threatened to withdraw unless the new issues (services, investments, and intellectual property) were addressed. On services, the dispute was between the developed and developing countries. On agriculture, the dispute was between the United States and the EC.

From a process perspective, it was clear from the beginning that negotiating the agenda in full plenary would not suffice. The opening session on September 15 began with each delegation presenting a 10-minute speech—a process that would consume at least two full days alone. Some alternative process was needed that could narrow the interaction and increase efficiency, while maintaining adequate representation. Further, the parties needed a single text to serve as the basis for negotiation. Thus Ministerial Chair Enrique Iglesias, Uruguay’s Minister of Foreign Affairs, turned the plenary session over to the vice chair, the minister from Egypt who was one of the new-round opponents. The vice chair continued to hear all opening statements. Meanwhile, Minister Iglesias created a “little plenary” consisting of the leading minister from each country plus one deputy—still, 180 people. This forum functioned as a “heads of delegation” meeting to develop a common strategy, steer the discussion, and resolve difficult issues. A third initiative, supported by advice of the GATT Secretariat, involved a small, invitation-only consultation committee of 20 nations representing the main factions at the meeting. This group met, generally in confidence, five miles outside of Punta del Este. Its existence was known and tolerated, so long as the little plenary served to balance it out. A fourth process initiative was to establish two substantive groups—one on services and one on agriculture—to run parallel to meetings of the consultation committee. Iglesias chaired the services

subcommittee; the Austrian ambassador chaired the agriculture subcommittee, to mediate between the United States and the EC.

The main challenge was to maximize the interaction between the most important nations at the meeting: those nations whose economic size was large enough to ensure that they were included in an agreement, and whose political importance derived from leadership in GATT affairs. The main protagonists would leave the room to settle differences. Once services was dealt with, then other issues were not worth risking the agreement, so the intellectual property and investment issues fell into line. Negotiations stretched through the last night of the Ministerial meeting and an agreement was delivered late in the morning on the last day. Thus the Uruguay Round was formally launched on September 20, 1986. This was the 8th multilateral trade negotiation round since the adoption of the GATT.

Winham wrote that the pre-negotiation

succeeded in the end because of the widely held perception that failure to begin a new negotiation would have harmful consequences for the GATT regime and for prospects of continued liberalization of international trade. Thus crisis avoidance was an important motivation during both the early pre-negotiation period and the Punta del Este session. However, once the momentum in favour of a new negotiation had developed, the main motivation behind each delegation's activities became even more sharply focused as a fear of being isolated and blamed for the failure of the special session.... Only India and an increasingly uncertain Brazil were left...and [they] found it impolitic to be isolated and acquiesced.⁵⁶

The same held for France, when it was deserted by the EC on its agriculture demands.

[The] final conclusion...is that process (that is, what issues will be raised and how they will be dealt with) appeared to be elevated over substance (that is, how the issues would be resolved) in pre-negotiation.... International negotiation is a less stable form of policy-making than democratic government, and a process has to be worked out between the parties

⁵⁶ Ibid., p. 64.

for each negotiation. How this process is established, and whether or not it will facilitate any negotiation that might follow, is what the pre-negotiation is all about.⁵⁷

Negotiation

Once the Punta del Este Declaration was issued, the negotiations over the substantive issues were organized to place the highest authority with a newly formed Trade Negotiations Committee (TNC). The TNC's task was to supervise and coordinate negotiations in all issue areas. It had two main subsidiary bodies: a Group on the Negotiations on Services (GNS), which was technically outside the GATT framework, and a Group on Negotiations on Goods (GNG), which covered everything except services. Actual negotiations were conducted within 14 negotiating groups reporting to the GNG.⁵⁸ All negotiating bodies were open, in principle, to all countries that were formal participants of the Uruguay Round. These negotiations had two notable characteristics: the tremendous complexity confronting the parties, and the compartmentalization of the agenda. Each negotiating group was quasi-independent, with its own problems, sticking points, conceptual framework, and national representation.

The first essential task was to build up consensual knowledge. By December 1986, the negotiating groups had developed plans of action and timetables. A midterm ministerial review and stocktaking was set for Montreal in late December 1988, followed by another stocktaking in summer 1990, with hopes that the round could conclude at the Brussels Ministerial in December 1990. All negotiating bodies were serviced by the GATT Secretariat for background information and analysis, summaries of session records, and syntheses of country positions. Later the Director-General, Arthur Dunkel, served as mediator.

⁵⁷ *Ibid.*, p. 67.

⁵⁸ The 14 negotiating groups were formed around tariffs; nontariff barriers to trade; natural resources; textiles and clothing; agriculture; tropical products; GATT articles; multilateral trade agreements negotiated in the Tokyo Round; safeguards; subsidies and countervailing duties; intellectual property rights; trade-related investments; dispute settlement; and the functioning of the GATT system. Sjostedt describes these negotiating groups in "Negotiating the Uruguay Round," pp. 58-59.

Recall that tariff negotiations were quantitative and were negotiated as offers/requests by product, or according to a formula across the board. The Uruguay Round issues were not amenable to this procedure. Instead, there emerged “editing diplomacy: the establishment of a convention text with the objective of developing principles, norms, rules, and procedures for a particular issue area—the rules of the game.”⁵⁹ There were two core stages: first, issue clarification, in which strong technical and diplomatic skills were required and up to 70 percent of the parties were inactive, and second, text consolidation.

In the Kennedy and Tokyo Rounds, negotiations essentially rotated around a U.S.-EC axis. In the Uruguay Round it was somewhat different. Several negotiating group chairs, including that from the group on services, were from developing countries. And few coalitions were made up purely of developing countries. A number of issues had mixed coalitions; the Cairns Group, for example, included 13-14 countries that were competitive exporters of agriculture goods. At a more general level was the “de la Paix” group, a coalition of mid-size and smaller trading nations that had paved the pre-negotiation up to Punta del Este and continued to promote negotiating solutions at the table through a mixture of leadership and mediation.⁶⁰

By the summer of 1990, it was clear that it was unrealistic to achieve a draft text. Instead, each negotiating group developed a “profile” to describe its main elements. Integrating the profiles proved difficult, however. In part, this was because some issues could only be resolved in a final and decisive exchange of concessions—and parties wouldn’t do that until they were certain that negotiations were near to being closed once and for all. After the December 1990 Ministerial in Brussels, it was not possible to conclude, but it was generally understood that it would be disastrous to accept official failure, so instead the Director-General was asked to undertake a thorough evaluation of progress in various sectors, which he did throughout 1991.

⁵⁹ Winham, *International Trade*, p. 61.

⁶⁰ *Ibid.*, p. 63.

A new system of seven negotiating groups (dealing with separate clusters of issues) was then established.⁶¹ The stocktaking was completed in the summer of 1991, and the deal was scheduled to close in November. It was during 1991 that the model of a “world trade organization” entered the negotiation. The Director-General finally had a draft Final Act in December 1991, and a new structure of final negotiations was made with four tracks: (1) industrial products and agriculture goods; (2) trade in services; (3) review of all negotiating texts; and (4) tradeoffs at the decisive stage. A new target of April 1993 was set. However, due to unsuccessful talks between the United States and the EC, and another U.S. presidential election, this deadline also passed.

It was noted that the tremendous complexity of the agenda and diverse negotiating groups made it very difficult to reach constructive cross-sectoral trade-offs. The U.S. leadership in earlier rounds was counterbalanced by the EC and Japan, and a number of developing countries were active players as well. Gunnar Sjostedt wrote that, ironically, “a disturbing observation is that the increasing ‘democratization’ of GATT talks occurring at the Uruguay Round—the participation of more countries in informal negotiating groups—is not entirely beneficial. It seems that multilateral processes tend to become unmanageable unless some critical decision can be taken by small groups of leading countries.”⁶²

A new Director-General, a new U.S. President, and another year passed before the negotiations were finally concluded in Marrakesh in April 1994. As described in Chapter Two, the Marrakesh agreement resulted in the formation of the World Trade Organization as an umbrella organization to oversee the multilateral trading system of 121 (now 146) member nations. Three annexes with more than 14 agreements were adopted as a single undertaking by all members; a fourth

⁶¹ These seven groups included market access (tariffs, nontariff measures, natural resource-based products, tropical products); textiles and clothing; agriculture; trade-related investments and rulemaking (subsidies and countervailing duties, antidumping, safeguards, pre-shipment inspection; rules of origin, technical barriers to trade, import licensing procedures, customs valuation, government procurement, and some GATT articles); trade-related intellectual property rights; institutions; and trade in services.

⁶² Sjostedt, “Negotiating the Uruguay Round,” p. 69.

annex covered four plurilateral agreements. Overall, this was seen to be an extraordinary accomplishment.

Summary

To review, the pre-negotiation factors (participation, agenda formulation, and information development) evolved from 1982 to 1989. The number of parties hovered around 90 nations as the issues expanded by an order of magnitude. Insufficient information for decision-making constrained progress.

As early as 1978, before the conclusion of the Tokyo Round, the United States had proposed in the CG18 that services be considered for negotiation. Developing countries' resistance then, and over the next several years, prevented the GATT from directly undertaking any formal preparatory work. The new issues of intellectual property and investments were similarly opposed. The plurilateral codes on NTMs from the Tokyo Round had been adopted by OECD countries primarily, and so required attention to be multilateralized. Once the GATT formally acknowledged possible negotiations, another three years was spent building a consensual background, defining the issues, and agreeing on an agenda framework that included: (1) new issues of services, investments, and intellectual property; (2) continuing issues of agriculture, safeguards, and implementation of the Tokyo Round NTM codes; and (3) establishment of a new institution, the WTO. Informational support from the OECD was necessary until the GATT itself could garner support to launch preparations for negotiation. Coming into the Ministerial Conference in Punta del Este, the overarching motivation was the bicycle theory: global trade liberalization would collapse if the GATT parties did not agree to move forward. The "café au lait coalition" of 50 mid-sized countries functioned as a mediator. Organizational leadership and skilled process management at the conference carried the day. A tri-level negotiation system—the full plenary, little plenary, and smaller consultative meetings among 20 specially invited nations—worked to bring the GATT members to consensus on pursuing negotiations.

Building consensus for full agreement took another five years, and astute coalition building was key. The Cairns Group of agricultural exporters, the Quad (the United States, Europe, Japan, and Canada), the developing country caucus, and the de la Paix Group (small countries that met regularly in Geneva) each in turn served to clarify issues, align interests, and provide creative leadership. Even though the Uruguay Round was more multilateral in tone than earlier rounds, only 30-40 countries set the terms of the deal before the text was consolidated with the full membership. As participation levels increased, negotiations became more divisive, and critical decisions could only be made by smaller groups. The Secretariat provided the background information and analysis, summarized negotiation sessions, and synthesized country positions. The formal process centered on the full Trade Negotiations Committee supplemented by a decreasing number of specialized negotiating groups, with the Director-General serving as mediator.

Seattle: An Attempt to Launch a Millennium Round (1999)

At Marrakesh, WTO member countries agreed to meet at least every two years in Ministerial Conference. At its First Ministerial, held in December 1996 in Singapore, the members agreed to a process of analysis and exchange of information to better understand the current issues and identify interests before undertaking negotiations.⁶³ The Second Ministerial, held in Geneva in May 1998, advanced preparations for negotiations and decided that: “a process will be established under the direction of the General Council to ensure full and faithful implementation of existing agreements, and to prepare for the Third Session of the Ministerial Conference.” The General Council was to construct a work program on the basis of submissions from WTO members and the work resulting from the analysis and information exchange process initiated in Singapore.⁶⁴

⁶³ Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC, December 13, 1996.

⁶⁴ Geneva Ministerial Declaration, WTO Doc. WT/MIN(98)/DEC/1, May 20, 1998.

Pre-Negotiation

Thus, the Third Ministerial to be held in Seattle in 1999 contemplated the launch of major new negotiations to further liberalize international trade—and this only five years since the conclusion of the previous trade negotiation. Two topics—agriculture and services—had been specifically scheduled for new negotiations by the beginning of 2000. Whether, and how many, additional issues would be placed on the agenda of a “Millennium Round” was open to discussion.

From March to November 1999, more than 800 proposals for agenda items, in 20 topical areas, were submitted for negotiation. The General Council started to put the various ideas together in a draft declaration, to be issued in Seattle, that would include an agenda for negotiation. The draft included not only the “built-in agenda” of agriculture and services, but other recurring and new issues as well: tariffs, antidumping, subsidies, safeguards, investment measures, trade facilitation, electronic commerce, competition policy, fisheries, transparency in government procurement, technical assistance, capacity-building and other development issues, and intellectual property protection. Of these, developing countries particularly wanted to examine how the Uruguay Round agreements had been implemented over the past five years (the so-called “implementation” issues).⁶⁵

Five working groups were organized by the General Council to consider the various proposals, and the Seattle Ministerial was scheduled for November 30 – December 3, 1999. During the Ministerial, delegations met formally in working groups (each open to all members) and informally, but no agreement on an agenda could be found. Meanwhile, thousands of people and representatives of nongovernmental organizations protested in the streets over the lack of access to these global negotiations.

Hiramitsu Arai, vice-minister for international affairs for the Japanese Ministry of International Trade and Industry, noted: “In addition to these stumbling blocks on the substantive issues, the balance of transparency and efficiency in the conduct of the negotiations was seriously

⁶⁵ In particular, these included the agreements on antidumping measures, subsidies, textiles and clothing, intellectual property, investments, sanitary and phytosanitary measures, and technical barriers to trade.

distorted. Many developing countries that were left out of the informal consultation process had serious misgivings about the decision-making mechanisms. The result was a serious loss of confidence in the WTO.”⁶⁶

Schott noted that negotiations broke down not only along North-South lines, but among the quadrilateral countries: the United States, European Union, Japan, and Canada: “The U.S., as leader of the trading system and host of the Seattle ministerial...failed to build consensus either at home or abroad on the importance of new trade negotiations and how they should be structured.”⁶⁷ The United States’ narrow objectives—short negotiation, limited agenda, and concrete results in its priority areas—not only did not have support, but provoked equally positional responses from other countries. Thus, trade ministers failed to craft an agenda for new trade talks encompassing the key issues of interest to both developed and developing countries.

Summary

Pre-negotiation factors for the Seattle ministerial mirrored those of previous rounds, but were marked by lack of coordinated leadership and commitment among Europe, the United States, and Japan. The United States hosted the meeting, but failed to align its strategy with either Europe or developing countries. Three years were devoted to the analytical and information-exchange process. Eight hundred proposals in 20 topical areas essentially broke down into three categories: (1) continuing issues of services and agriculture; (2) implementation issues from the Uruguay Round; and (3) new issues of investments, competition, and environment. The information and agenda formulation factors did not appear distinctively deficient, compared to earlier rounds, but the participation factor faltered in its lack of transparency to engage all stakeholders, and the lack of coordinated commitment by the leading powers. The inability of the membership to launch a negotiating round was viewed as a

⁶⁶ Hisamitsu Arai, “Some Reflections on the Seattle Ministerial: Toward the Relaunching of a New Round,” in Jeffrey Schott, *The WTO After Seattle* (Washington, DC: Institute for International Economics, 2000) p. 59, 65.

⁶⁷ Schott, *WTO After Seattle*, p. 5-7.

failure, akin to that suggested by the “bicycle theory,” and the specter haunted the pre-Doha deliberations.

Doha Round (2001-present)

In the months after Seattle, world leaders, scholars, and citizens struggled over the causes of the breakdown and alternative strategies. Nearly a year later, leaders at the Asia-Pacific Economic Cooperation stated, “We believe that a balanced and sufficiently broad-based agenda that responds to the interests and concerns of all World Trade Organization members should be formulated and finalized as soon as possible in 2001, and that a round be launched in 2001.”⁶⁸

Pre-Negotiation

By the summer of 2001, momentum had once again gathered behind the idea of a new round, but the fundamental differences between rich and poor nations, and between the United States and its trading partners over what should be on the agenda, still loomed. Concerns over the global economic slowdown, and the tendency toward protectionism that could follow, created an urgency for trade talks. Japan’s trade negotiator commented: “If we fail for a second time, it will contaminate the atmosphere and create the idea that we can’t take on the hard decision.”⁶⁹

The European Union argued for a broad mandate so that concessions could be made within the constraints imposed by domestic pressure groups. The United States favored a more “focused agenda” concentrating on better access for services and agricultural and industrial goods. Pascal Lamy, the European Union Commissioner for Trade, and Robert Zoellick, the U.S. Trade Representative, issued a joint statement in July 2001:

As the two biggest elephants in the global economy, the EU and the United States need to get our act together on trade. Our governments are natural partners with a rich history of

⁶⁸ Calvin Sims, “World Trade Talks Revived by Pacific Rim Conference,” *New York Times*, November 17, 2000.

⁶⁹ Elizabeth Olson, “Seattle Failure Weighs on Future of New Trade Talks,” *New York Times*, June 26, 2001.

cooperation; now is the time to cash in the chips and build on that history. It's time to recognize a simple fact. If the European Union and the United States do not work together to launch a new round of global trade negotiations, it will not happen. We need to create a framework for negotiating the reduction of trade barriers while also strengthening and extending the rules of the international trading system.... Building a fairer, rules-based trading system is a key way to help integrate these [poorer] nations into the world economic system.... We appreciate that the trading system needs to respect national differences that reflect the decisions of sovereign governments.... We will need to work to achieve a compatibility of distinctive regulatory systems. Given the stakes, we will continue to manage our differences through reason, negotiation, respect for each others' political constraints, and particularly by compliance with WTO rules. We believe the European Union and the United States—and all the members of the WTO—can and must work together to launch a new global trade round this November. For the WTO, and all of its members, the potential reward for success is great. The price for failure would be painfully high.⁷⁰

A two-day meeting in Geneva concluded with strong words from WTO Director-General Mike Moore, who said that the trade group was on the edge of “irrelevance” without a new trade round. The U.S. indicated some support for the European Union's push for a broader agenda to help offset the likely obligations required to reduce Europe's agricultural subsidies. Despite developing countries' resistance to a round (which was due to unfulfilled promises from the Uruguay Round), these countries risked being further marginalized without a new round of talks. Moore noted that “on their own, they do not have enough leverage to negotiate beneficial bilateral deals with large countries.”⁷¹

By the November 2001 Ministerial in Doha, Qatar, a tangle of alliances and issues emerged. Key among the issues proposed for the agenda were agriculture, textiles, intellectual property, and dumping.⁷² On agriculture, the United States and developing countries pressed Europe and Japan to

⁷⁰ Pascal Lamy and Robert Zoellick, “In the Next Round,” *Washington Post*, July 17, 2001.

⁷¹ Elizabeth Olson, “Two Camps at WTO Said to Be a Bit Closer,” *New York Times*, August 1, 2001.

⁷² “Dumping” occurs when a country exports a product for sale at a price lower than the cost required to produce it. As an example, the United States has invoked its antidumping laws frequently to protect its steel industry against imports from Brazil, Japan, and Korea. Joseph Kahn, “A Trade Agenda Tempts Murphy's Law,” *New York Times*, November 9, 2001; and Helene Cooper and Geoff Winstock, “Domestic Demands Limit U.S., EU Bargaining at Trade Talks,” *Wall Street Journal*, November 12, 2001.

reduce the extensive protection of their farmers. On textiles, the European Union and developing countries pressed the United States to improve market access for low-end manufactures of textiles and clothing by reducing its quotas and tariffs to protect its politically influential industries. Japan and developing countries pressed the United States on its antidumping rules. India and Brazil, along with a number of African nations, pushed the United States on the intellectual property front relative to a public health exception on pharmaceutical patents. Europe argued for a broader agenda, including environment, investment, and competition, to help offset its anticipated concessions on agriculture. WTO officials drafted an 11-page text with hopes that it might serve as the basis of agreement.⁷³

Drawing lessons from Seattle, Zoellick extensively prepared on the issues and talked with trade officials around the world—many of whom had not been consulted by U.S. diplomats in years. Recognizing the diversity of the developing world, he attempted to listen, be respectful, and put himself in his counterparts' shoes in order to better solve their problems. Further, the personal commitment and relationship between Lamy and Zoellick contributed to the essential leadership needed to launch the round.⁷⁴

Peter Drahos described the negotiating process as decision-making in concentric circles. Through a series of informal meetings, the United States and the European Union would form a core coalition, then successively draw in Japan and Canada, other developed countries, then the developing countries. Drahos also described countries' sources of bargaining power, including their share of market power (via domestic markets); commercial intelligence networks (gathering, distribution, and analysis of information regarding trade, economy, and business of self and others);

⁷³ While acknowledging the tremendous pressure on the Secretariat, developing country observers expressed real frustration with the drafting process. "In the process, we would object to a text, but it would still appear. We would state that we wanted a text added in, and still it would not appear. It was like a magic text." Aileen Kwa, "Power Politics in the WTO," *Focus on the Global South*, January 2003, p. 23.

⁷⁴ Joseph Kahn, "Trade Talks Hinge on Finesse of U.S." *New York Times*, November 10, 2001.

ability to enroll other states and nongovernmental organizations in the coalitions; and support of domestic institutions.⁷⁵

A final deal on the negotiating agenda was ultimately made in the green room, where only 23 countries were admitted.⁷⁶ In the end, after seven years, the 142 nations of the WTO launched a new round of trade negotiations. Commitment to study the new issues—competition and investment—was pivotal in giving the Europeans the political cover they needed to offset agricultural subsidies. Brazil, Africa, and India stood up to the United States and other industrial countries to get the intellectual property rules on drug patents suspended in certain public health situations (such as AIDS).⁷⁷ At the meeting's conclusion, Robert Zoellick commented: "This agreement sent a powerful signal to the world that we have removed the stain of Seattle. We will continue to build a common trading system based on common rules."⁷⁸

The agreement—called the Doha Declaration⁷⁹—constitutes a mandate for negotiations on a range of subjects and other work including issues concerning the implementation of the present agreements, analysis, and monitoring. The negotiations are taking place in the Trade Negotiations Committee, as well as other WTO councils and committees. The Declaration includes a timetable running from November 2001 to the Fifth Ministerial Conference in September 2003 in Cancun, Mexico, with an ultimate deadline of the Sixth Ministerial on January 1, 2005, for a single undertaking.⁸⁰ The negotiations are headed by the TNC under the authority of the General Council and chaired by the WTO Director-General. The organizing principles for the negotiations include:

⁷⁵ Peter Drahos, "When the Weak Bargain with the Strong: Negotiations in the World Trade Organization" *International Negotiation* 8, no. 2, 2003, pp. 79-109, 85. The sequencing power for building coalitions is discussed extensively by Sebenius in "Sequencing to Build Coalitions"

⁷⁶ The 23 included Australia, Brazil, Botswana, Canada, Chile, Egypt, European Union, Guatemala, India, Japan, Kenya, Malaysia, Mexico, Nigeria, Pakistan, Singapore, South Africa, Switzerland, Tanzania, Uruguay, United States, and Zimbabwe, plus the Director-General. Kwa, "Power Politics in the WTO," p. 27.

⁷⁷ Helene Cooper and Geoff Winstock, "Poor Nations Win Gains in Global Trade Deal, as U.S. Compromises," *Wall Street Journal*, November 15, 2001; Joseph Kahn, "Nations Back Freer Trade, Hoping to Aid Global Growth," *New York Times*, November 15, 2001.

⁷⁸ Kahn, "Nations Back Freer Trade."

⁷⁹ Doha Ministerial Declaration, WTO Doc. WT/MIN(01)/DEC/1, November 20, 2001.

single undertaking, participation, transparency, special and differential treatment, development, and environment.

A separate Implementation Programme decision contains 12 subject headings and two catchall headings for outstanding issues, covering more than 40 items settled at Doha.⁸¹ Most outstanding issues are the subject of immediate negotiations, and all concern developing countries' problems in implementing the WTO Agreement, which was adopted as part of the Uruguay Round.⁸² Nearly 50 decisions were adopted in Doha to clarify the obligations of developing country member governments relative to issues of agriculture, subsidies, textiles and clothing, technical barriers to trade, trade-related investment measures, and rules of origin. Further, a work program was outlined to address other matters not already settled, some to be negotiated according to the mandate and others to be handled as "a matter of priority" by relevant WTO councils and committees. The latter bodies reported to the Trade Negotiations Committee by the end of 2002 for "appropriate action."

The Negotiation

The TNC met four times during 2002 to oversee progress on the negotiations mandated at Doha. Director-General Mike Moore reported at the July 19, 2002, meeting that the "road map and deadlines are now clear" for the Fifth Ministerial Meeting scheduled for September 10-14, 2003 in Cancun, Mexico, and the work of TNC bodies "is now about substance and real negotiations."⁸³ Adequate technical assistance was once again highlighted as being essential. One delegation warned against

⁸⁰ *Single undertaking* means that all member countries agree to the whole set of agreements as a single act. In contrast, the Tokyo Round negotiation allowed members to select which agreements to approve, which created a series of plurilateral agreements that were difficult to monitor and enforce.

⁸¹ Doha Ministerial: Ministerial Declarations & Decisions, Implementation-Related Issues and Concerns Decision, WTO Doc. WT/MIN(01)/DEC/17, November 14, 2001.

⁸² The barriers to implementation are institutional, political, and economic. For example, one World Bank report estimated that "the average cost for a developing country to implement just three of the Uruguay Round agreements is US\$150 million—more than what many countries receive in foreign investment in a year." S. Sothi Rachagan, *WTO Reform and the Role of Civil Society*, paper presented at the WTO Symposium in Issues Confronting the World Trading System, July 6-7, 2001.

⁸³ "Trade Negotiations Committee," *WTO News*, July 18-19, 2002.

moving the process out of Geneva by holding small meetings of ministers.⁸⁴ Another, however, stressed the importance of involving ministers and capital-based officials, and hoped that not too many issues would be left to ministers at Cancun.

Supachai Panitchpakdi succeeded Mike Moore as Director-General and assumed Chairmanship of the TNC in September 2002. Supachai explained his aim of focusing on four “pillars:” (1) the legal framework to bind the multilateral trading system together; (2) assistance to developing and least-developed countries; (3) the promotion of coherence in international economic policymaking; and (4) strengthening the WTO as an institution.⁸⁵

The October 3-4, 2002, TNC meeting was chaired by incoming Director-General Supachai, who offered these comments:

[The Fifth Ministerial Conference in Cancun, Mexico] is set to act as a mid-term review. This means that by then we will need a clear picture of what is achievable across the negotiating agenda. Only on that basis will ministers be able to provide the necessary additional political guidance in order to conclude the Doha Development Agenda Work Programme successfully by the 1 January 2005 deadline.... It is important we meet these [interim] deadlines.... Deadlines are important because they allow us to measure how we are advancing.... A successful outcome for the Doha Development Agenda is essential for the future of our societies. A larger degree of openness and predictability in international relations can only come about if we have the same set of rules and if we set our sights on similar objectives. That is precisely what this Organization can offer.”⁸⁶

There is already a widespread sense of the globality of the negotiations, of the need to make progress across a broad front and to build a balanced overall result. But I would encourage delegations to move rapidly away from defensive positions—we no longer have the time to wait for someone else to make the opening move. This is not a zero-sum game. It is certainly about national interests, but it is also about our shared interest in a system which delivers for all its members. We can only counter these economic uncertainties by strengthening

⁸⁴ This is a reference to a series of “mini-ministerials” held in Mexico, Singapore, Sydney, and Tokyo.

⁸⁵ *WTO News*, Speech by Director-General Supachai to Swiss Bankers Association on September 20, 2002, Basel, Switzerland.

⁸⁶ “Trade Negotiations Committee,” *WTO News*: Press/315, October 3, 2002.

predictability, by achieving what we are supposed to achieve within the time that we have been mandated to do so.⁸⁷

In November 2002, 25 trade ministers were hosted by the Australian Trade Minister to push forward the negotiations and provide some political direction on areas that had been progressing more slowly. Previous “mini-ministerials” were held in Mexico (August 31-September 1, 2002), Singapore (October 16, 2002), Tokyo (February 15-16, 2003), and Montreal (July 2003).

The October TNC meeting marked a new phase of the negotiations—that of substantive engagement.⁸⁸ Smaller delegations had special practical problems in participating effectively within the accelerating time demands for negotiations. Supachai commented that “the key to a successful endgame is for everyone to understand that, while delaying tactics may seem useful as a tactical move, they will never secure a final outcome.... As we come towards the period between the middle game and the endgame, all deadlines can be calibrated to be more in tune with one another.”⁸⁹

At the December 2002 TNC meeting, 46 delegations spoke on the negotiation topics, especially agriculture, trade and development, trade-related intellectual property issues (TRIPs), and public health. Supachai noted a rising level of participation since October, and committed to schedule the negotiating group meetings carefully to strike a balance between flexibility and predictability. Despite all the hard work to date, members could not reach agreement on definitive solutions on most of the issues before them. It was suggested that Supachai consult on all issues and report back to the TNC. He also committed to consider how to engender a more interactive type of discussion at meetings and to turn general statements into more specific ones, with the aim of clarifying positions and moving toward convergence.

A mini-ministerial held in Tokyo on February 15-16, 2003, was attended by ministers from 22 countries, but could mark no significant progress in either formal or informal proceedings, due in part to the impending war in Iraq and U.S.-European tensions. Supachai warned: “We are facing

⁸⁷ “Supachai Urges Negotiators to Stop Waiting for Others to Move First,” *WTO News*, October 15, 2002. These remarks were made at meeting of the General Council.

imminent gridlock. Only tightly focused political energy can avoid it.... Failure to make real progress on [TRIPS and access to essential medicines for poor countries] has deepened suspicions among developing countries that the 'Development' part of the Doha Development Agenda may be little more than a slogan."⁹⁰ Another mini-ministerial of 25 select countries was held in Montreal in July 2003. The Wall Street Journal wrote: "Frustrated by the difficulties of achieving consensus among all members..., WTO leadership is giving increasing importance to these so-called mini-ministerial meetings."⁹¹ The hope was that streamlined groups of "movers and shakers" would better understand each other's positions and form the seed of consensus for the full negotiating group. But the secretive, selective nature of the meetings, whose participants were chosen by the host country, caused resentment and suspicion from other members and the public. Pascal Lamy, the EU Commissioner for Trade, commented that the United States and the European Union "remain the two big elephants of the system, accounting for 40 percent of world trade...." He continued: "In the WTO of 2003, EU-U.S. agreement is necessary, but not sufficient, to get an overall deal. Developing countries demand, rightly, that their views must count in the final deal."⁹²

In August 2003, a group of 12 African nations proposed a process innovation to accommodate diverse interests in a transparent yet tractable way. The proposal provided in substantial part as follows:

- 1) "We reiterate the crucial importance of creating a transparent, democratic, all-inclusive, and consultative decision-making process in the WTO, as this is vital to enhancing the credibility of the WTO and the multilateral trading system...
- 2) We reiterate the importance of taking decisions by consensus
- 3) We urge that the remainder of the preparatory process is transparent and inclusive, through the adoption of procedural rules, that ensure
 - a) proposals are reflected adequately in draft texts that form the basis of negotiations

⁸⁸ Chairman's Statement, Trade Negotiations Committee, October 3-4, 2002.

⁸⁹ Ibid.

⁹⁰ "Tokyo Mini-Ministerial Fails to Deliver Results," *Bridges Weekly*, March 5, 2003.

⁹¹ Scott Miller, "Seeking to Simplify Negotiations, WTO Holds Smaller Meetings," *Wall Street Journal*, July 29, 2001.

⁹² Pascal Lamy, "Strip Poker at Cancun," *Wall Street Journal*, July 17, 2003.

- b) transparent and inclusive mechanisms and procedures must be established so that all Members effectively participate in the drafting, revision, and adoption of draft Ministerial texts
- c) at the Ministerial Conference, a plenary should be established and should operate through the Conference as the main decision-making body, to decide on items, including: the agenda, the appointment of officials, the establishment of any working groups or consultation groups, the Chairs of such groups, and the transparent and inclusive procedures for drafting, revising, and adoption of Ministerial texts
- d) any consultations should be open ended and inclusive and such meetings should be announced and publicized in proper time
- e) if small meetings or consultations on particular issues are considered useful, they should be governed by proper rules, and reports on these meetings should be made to the plenary for the information and decision by all Members
- f) ministers are entitled to choose whichever officials to accompany them.... The number should not be restricted, given that the Ministers may require expert advice from various officials
- g) there should be fair procedures especially in the final day and hours of the Ministerial conference.... There should not be a last night or last day exclusive green room meeting.”⁹³

The September 2003 Cancun Ministerial marked the midpoint assessment for the Doha negotiations. Concern over lack of progress spurred last-minute moves over the summer by Europe to modify its agricultural policy and by the United States to facilitate the sale of essential medicines to poor countries. General Council Chair Carlos Perez del Castillo distributed a draft Ministerial Declaration to the heads of delegations on August 24, 2003, for consideration.⁹⁴ Prepared on his own responsibility, but in close cooperation with the Director-General, the draft declaration outlined decisions in the various areas under negotiation plus a framework for modalities on agriculture and market access. Castillo noted that

⁹³ Proposals for Improving the Decision-Making Process in the WTO Before and at the Fifth Ministerial Conference, WTO Doc. WT/GC/510, August 14, 2003. Recall that “green room” meetings are small gatherings of like-minded countries, named for a conference room down the hall from the WTO Director-General’s office in Geneva.

⁹⁴ WTO Doc. WT/MN/Job 03, August 24, 2003.

while the text had drawn much criticism, the criticism had been varied and focused on different aspects of the text, and no one had outright rejected it. The fact that no one loved it, but everyone could live with it, was a good sign rather than a bad sign.... He concluded that discussions had come to an end in Geneva, and the large remaining divisions could only be worked out at the political level by ministers.⁹⁵

The ministers, however, were unable to achieve consensus on any agenda items in Cancun. The factors blamed for the failure were many, including the scheduling of negotiations on the more contentious Singapore issues (e.g., competition, investment, government procurement, and trade facilitation) before agricultural subsidies, which was a topic of primary importance to developing countries; tension between the United States and Europe; the decision-making process itself (i.e., the consensus requirement, but limited participation in the green room); and the intransigence of the G-20, a new coalition led by India, Brazil, Argentina, and South Africa that said that “no deal was better than a bad deal.”⁹⁶

The Director-General continues to meet with ministers in Geneva and the capitals to develop a feasible negotiation package and recapture a sense of urgency. It is generally agreed that the talks on agriculture are central to any progress. The G-20 group of developing countries and the Cairns Group of agricultural exporters are working on a consolidated position for market access, having already agreed to a common position on domestic subsidies and export support.⁹⁷ The United States and the European Union have indicated a willingness to drop the Singapore issues from single undertaking of the Doha Round in order to facilitate progress; negotiations on these issues might be pursued plurilaterally outside the round.⁹⁸

A committee assembled by the WTO is reconsidering the consensus approach to decision-making. Options being considered include narrowing the scope of topics within the WTO’s purview,

⁹⁵ *Bridges Weekly* 7, no. 29, August 28, 2003.

⁹⁶ Elizabeth Becker, “Poorer Countries Pull Out of Talks Over World Trade,” *New York Times*, September 15, 2003.

⁹⁷ “Mixed Signals for Doha Round,” *Bridges Weekly* 8, no. 4, April 2004, p. 1.

⁹⁸ *Ibid.*, p. 2; Robert Zoellick, letter to Ministers dated January 11, 2004, reprinted in the *Financial Times*, January 11, 2004.

increasing Secretariat staff, improved organizational preparation and structure of ministerials, and relaxing the single-undertaking requirement, thus allowing members not to sign new trade agreements through an “opt-out clause.”⁹⁹

Summary

The Doha pre-negotiation was significantly shaped by the Seattle experience—a sense that if the WTO failed to build an agenda for negotiations, that it would cement its institutional irrelevance. The United States’ behavior was pivotal: if it didn’t cooperate with Europe and consult with a broad range of parties, then success would elude the WTO again. For their part, developing countries could either resist and be marginalized, or engage and be counted. Several cross-coalitions formed on the issues. The United States and developing countries lined up against Europe and Japan on agricultural subsidies; Europe and developing countries challenged the United States on textiles; Japan and developing countries countered the United States on antidumping; India, Brazil, and Africa demanded that the United States compromise on intellectual property rights related to essential medicines; and, as seen in the Tokyo and Uruguay Rounds, developing countries demanded assistance with implementing previously adopted commitments. The resulting Doha Development Agenda managed to accommodate the requisite array of interests, but is proving to be difficult to negotiate.

Negotiators continue to struggle over process and participation. The Trade Negotiation Committee was organized similarly to previous rounds and is governed by principles of single undertaking, participation, transparency, special and differential treatment, development, and environment. Nevertheless, the complexity of the issues and number of parties has overwhelmed the ability of the formal process to manage it. Deadlines are missed and negotiators are unable to even define the modalities for negotiating. A series of mini-ministerials sought to streamline negotiations, but frustration over exclusive participation outweighed the value of an exchange that might sow the

⁹⁹ Scott Miller, “After Cancun, WTO Panel Seeks an End to Gridlock,” *Wall Street Journal*, September 29, 2003; “Lamy, Experts Take Serious Look at WTO Reform,” *Bridges Weekly* 8, no. 4, February 4, 2004, p. 3.

seeds of consensus. The demand for an inclusive, transparent, consultative process echoes. If consensus is to be achieved on the Doha Development Round by 2005, the WTO may need to consider reforming its procedural rules.

DISCUSSION

Policymaking disputes arise from countries' differing perceptions on what global trade issues are sufficiently troublesome to require international collective action. Negotiating an agenda requires that nearly 150 countries agree, by consensus, on a set of issues to be regulated, in order to better balance the trading rights and obligations among countries, facilitate more predictable behavior, and produce a more stable system. I have looked at policymaking disputes in the two phases of first-order dispute resolution: (1) determining what problems need to be negotiated (pre-negotiation), and (2) negotiating what rules will remedy those problems.

This discussion has three parts. The first is a synthesis of the pre-negotiation and negotiation phases from the last four negotiating rounds. The second is a review of the hypotheses for first-order policymaking disputes. And the third is a preliminary assessment of those patterns against the criteria of a successful dispute resolution process.

Synthesis of the Four Negotiating Rounds

Pre-Negotiation Phase

We have considered participation, agenda formulation, and information to be the chief elements of the pre-negotiation, or diagnosis, phase of policymaking.

Participation has both quantitative and qualitative aspects. On the quantitative side, all member countries need an opportunity to voice their concerns in decision-making. When broad participation is curtailed, whether for reasons of political expediency or logistical management, those

excluded are likely to resent the process (for its perceived unfairness and lack of transparency) and the outcome (for its failure to incorporate their interests).

On the qualitative front, there appear to be three prongs of leadership required for both the pre-negotiation and negotiation phases: (1) the United States and Europe must agree to participate, (2) a representative group of other trading nations must be identified and engaged, and (3) the Director-General must act as a generally recognized leader. These are discussed below.

Major trading countries generally, and the United States and Europe in particular, are necessary actors in any negotiating round. The threshold to launching a round is that both the United States and the European Union be committed to the undertaking and coordinated in their efforts. In each case described, both the United States and Europe led the pre-negotiation effort, often preceded by an information-gathering and analysis period in cooperation with Japan and Canada. The lack of success in Seattle was attributed to the lack of coordination between these two actors, as much as to the gulf between developed and developing countries. In contrast, Doha's success in developing a negotiating agenda reflected the U.S. and Europe working out their differences and also accommodating a threshold of developing countries' concerns (as the name implies—the Doha Development Agenda).

The second prong of leadership comprises more than 20 mid-size trading countries that are representative of the remaining parties and whose participation shapes the balance of a feasible agenda. These countries filled out the CG18 and Consultation Group in the Uruguay Round, and the green room in Doha. But it is not only the number and kind of participation by mid-size countries, but how those countries are selected, that is critical. The ad hoc selection of “friends of the chair” to attend green room meetings has been perceived as biased and obscure, and so green room decisions lack legitimacy in the eyes of many.

The third prong of leadership is the executive authority of the Secretariat, in the person of the Director-General, to facilitate both the pre-negotiation and negotiation phases. Since its origin, the GATT and WTO Directors-General—from Long to Wyndham-White to Dunkel to Supachai—have

each informally mediated information and interests among the parties to facilitate eventual agreement. The Director-General formally chairs the Trade Negotiation Conference, and his neutrality is scrutinized. Some countries find the current Director-General less oriented to facilitating the expression of both sides of debates than promoting the views of major powers. One observer writes: “What we have then is a system of decision-making in the WTO in which formal democracy is actively undermined by the processes in which the major powers, with the active participation of a supposedly neutral secretariat, impose their will on the majority of the members.”¹⁰⁰

Agenda formulation. The agenda represents agreement on what the parties identify as the most critical, disputed issues that can be negotiated at a given time. Over the last 50 years, the international trade agenda has expanded from tariff reduction (freer trade), to include nontariff measures (measures affecting more fair trade) and institutional governance topics. The increase in both topical complexity and numbers of parties has both substantive and procedural dimensions. The dynamic has shifted from a bilateral one over tariff concessions granted between key exporter and importer nations to include multilateral consideration of cross-cutting policies. Generally, the U.S. and Europe push for setting policy on emerging issues, while developing countries seek an improved ability to implement previously negotiated issues. A balanced and consensually supported agenda requires a decision-making process that is both representative and informed. However, an overly comprehensive agenda becomes unwieldy and impossible to manage. Few, if any, smaller countries can master all of the issues up for consideration, much less appreciate the potential of those issues to produce cross-cutting options once the perspective of nearly all the other countries is added to the mix.

This tension is apparent in the trends we examined from the Kennedy Round to the Doha Round. With the increasing diversity of WTO membership, and the increasing interdependency of the

¹⁰⁰ Chakravarthi Raghavan, “Member-Driven or Secretariat-Driven Process?” *Third World Network*, December 2001; see also Tetteh Hormeku, “Institutional Reform of the World Trade Organisation,” *Third World Network*, July 6, 2001.

commercial world, the more complex agendas reflected the need to include the interests of a wide range of parties, but may also have made meaningful participation more illusory.

Information. While “resources” figure prominently in the negotiation phase, the information component is particularly critical during pre-negotiation. Negotiators must be well-informed to be able to identify, define, and understand the disputed topics to be negotiated. The principal sources of information are each nation’s domestic ministries, who are knowledgeable about what has the most significant effect on the nation’s trade, but may have limited resources to prepare the delegation. The GATT/WTO Secretariat is an important source of information, but again, the demand for information (especially during the pre-negotiation phase) may exceed the Secretariat’s resources and authority. In such cases, other organizations (governmental, nongovernmental, and private) make significant contributions. The parties need a baseline understanding of identified problems in order to establish priorities for negotiation, and the parties need to participate in the design of that information gathering. The long lead time between proposing a new round and actually launching it is essential in enabling that consensual base of information to be built. The seeming pre-negotiation impasses reached before launching the Tokyo, Uruguay, and Doha rounds served, in retrospect, as necessary periods of information absorption that enabled the subsequent negotiations to occur.

Questions persist about how to develop member countries’ capacities to develop, analyze, and share the information needed to participate effectively in the increasingly complex agenda-setting and negotiation processes. Suggestions for managing the interdependence of information and agenda formulation are included in Chapter 6.

Negotiation Phase

The negotiation, or resolution, phase of policymaking is an elaborate consensus-building process. The key elements of consensus building are participation, resources, and process.

Participation. In a consensus-based organization, the need for an inclusive decision-making process is apparent. Adequate participation is essential in both the pre-negotiation and negotiation

phases, but it has a more formal character in the latter. In each case observed, a plenary trade negotiation committee (TNC) that included all of the member countries was where decisions were ultimately made. However, the plenary was too large a body to address more than organizational issues, periodic stocktaking, and formal information exchange. Subsidiary to the TNC were two kinds of working groups: (1) subcommittees or councils, with universal participation but a narrower substantive scope, and (2) working groups with smaller numbers of people who were sufficiently expert and representative to assess linkages and tradeoffs among the competing issues and texts. Both kinds of groups are important for making progress in negotiations, but the composition of the latter can be quite politically sensitive. The use of mini-ministerials in the Doha Round (and special steering committees and green room meetings in previous rounds) triggered a frustrated response from those not included. The more transparently selected and representative the group, the more likely it can persuade the next strata of participants that any resulting proposed agreement merits consideration.

Resources. Access to adequate resources is critical to negotiation. Member nations develop a consensual information base in the pre-negotiation phase and then refine it in the negotiation phase.¹⁰¹ Once a round formally begins, the Secretariat is authorized to develop the relevant background research and policy papers for the respective negotiating committees. Input from outside experts offers a significant supplement. The ideal is an institutional “capacity to collect, analyze, and publicize critical information...neutrally acquired and channeled.”¹⁰² The Secretariat commits tremendous resources to gathering and disseminating information, building its members’ capacity to negotiate, and facilitating that process. At the national level, ministry officials need access to information in order to gauge interests and priorities on the negotiated issues. The increasing complexity of the issues themselves, and the number of issues to consider, make this a daunting task

¹⁰¹ *Consensual information base* refers to a shared responsibility for the identification, collection, and analysis of the information needed to address a particular issue.

¹⁰² David Malone, “If the U.N. Were Being Created Today...Intelligent Intelligence,” *New York Times*, March 15, 2003.

for all but the largest countries. One source estimates that the Doha negotiation workload for trade missions and their Geneva-based negotiators will be at least 50 percent greater than for the Uruguay Round.¹⁰³

Process. Along with procedures for representative participation, a key prescription in the negotiation literature is the opportunity for all stakeholders to work together to develop a range of options for achieving their respective interests, and then to freely debate the respective merits and potential tradeoffs. Again, a smaller number of parties makes for more manageable negotiations, but the credibility of any decision depends upon the participants' acknowledged expertise and the extent of parties' perception that they are represented.

Critics have noted the importance of process not only in party selection but also in division of labor and decision-making. For example, Winham noted during the Uruguay Round:

There is a well-established yet informal structure of senior steering committees that organize and direct work, and ultimately make important decisions in the various key areas of the negotiation. This structure is ephemeral, and likely would not be continued beyond the Uruguay Round. However, the organizational experience is lasting and would likely be re-created again in the event the GATT faced another series of important policy decisions.¹⁰⁴

Use of the GATT and WTO Directors-General to manage the resolution of negotiating rounds demonstrates that the employment of a neutral is integral to process management in the resolution phase. The GATT and WTO Directors-General are repeatedly relied upon, formally and informally, to exhibit an array of skills commonly demonstrated by skilled neutrals. The Directors-General engage the parties, create a vision of need (e.g., the "bicycle theory") and opportunity, establish a work plan, and cajole participants to relinquish their positional bargaining and invest in a creative problem-solving approach that will improve the institution and its members. The presiding chairs of the plenaries, committees, and working groups serve as partners in this meta-dispute-management endeavor.

¹⁰³ Raghavan, "Member-Driven or Secretariat-Driven Process?"

This overview of policymaking dispute resolution has highlighted factors that contribute to the success of pre-negotiation and negotiation. As discussed previously, dispute resolution processes can be characterized as to whether they emphasize parties' power, interests, or rights. The WTO's policymaking process, like most such processes, appears to be a hybrid. Given the "one country-one vote" system, each member country has the opportunity to grant or withhold its support for consensus on a negotiating agenda, and then on an agreement to regulate its international trading rights. In making these decisions, each country weighs the extent to which its national interests can be synchronized with global interests in an equitable, efficient, and mutually acceptable manner. Power, however, appears to skew both rights and interests in the agenda-setting process. Those countries with greater trading power also tend to be those with greater access to resources, information, and ability to participate, and they use that leverage to achieve policies that advantage their interests. Lesser trading powers, when organized into substantial coalitions, can effectively counter the pressure, but they are typically cautious about risking offense to significant trading partners and sources of economic aid. The WTO was established as a rule-based institution in part as an effort to reduce the potential power dominance of some members and decrease the overall inequality of members.

First-Order Dispute Resolution Hypotheses

In this section, the factors highlighted in the four negotiating rounds are discussed in terms of the research hypotheses outlined earlier in this chapter. For each hypothesis, there is a summary from the four negotiating rounds followed by a preliminary assessment of whether the hypothesis is confirmed. Since the first-order, second-order, and third-order dispute resolution processes are conceived as a whole system, a more comprehensive assessment is considered in Chapter 6.

¹⁰⁴ Gilbert Winham, *The Evolution of International Trade Agreements* (Toronto: University of Toronto Press, 1992) p. 67.

Test Hypothesis 1: More representative participation (i.e., more in number and kind of participants) contributes to an agenda of interests that will engage short-term and long-term support of an agreement.

Kennedy: Between 43 and 74 countries participated in the Kennedy Round. Most negotiators were veterans of trade negotiations who knew their own and their counterparts' interests. For them, the short-term goal of tariff reduction was consistent with the common interest among old and new member countries of reaching an agreement that symbolized progress on trade liberalization. The newly admitted developing countries were more marginally involved; in deference to their developing status, they were granted liberalization benefits without an obligation to fully reciprocate, but this early concession served to diminish their power at the bargaining table because they had no additional concessions to offer. While the number of participants may have been adequate, the kind was not sufficiently balanced among developed and developing countries, long-term and newer members, and larger and smaller economies, to support long-term implementation of the agreement. The consequence was a short-term agreement on tariff reduction, but long-term resentment among those newer members who were not included.

Tokyo: More than 80 contracting parties were involved in the Tokyo Round. The newer members did not share the older members' 20 years of experience in establishing the values and structure of the GATT trading system. By virtue of their numbers, the newcomers could overcome any two-thirds requirement for agreement amendments.¹⁰⁵ The top-down approach to negotiations caused considerable resentment among the parties. Negotiations were initiated by the major trading nations and flowed downward to include others once the important decisions (and compromises) were made. The consequence of this approach was that only two agreements were agreed upon by all members; the other nine agreements were plurilateral (i.e., signed voluntarily by some of the member countries).

Uruguay: The Uruguay Round involved 91 to 128 countries over an eight-year period. The United States pushed hard for the inclusion of new issues (services and intellectual property) for nearly six years before the round was launched. Developing countries expressed concern that an emphasis on new rights for developed countries would come at their expense. An agenda was finally accepted under exhortation by the Director-General that failure to initiate negotiations would endanger the international trading system. Strong leadership by the United States and the European Community represented a double-edged sword. Without their commitment, no progress would be made. But the top-down approach during pre-negotiation, building from the Quad down to the smaller countries, provoked resentment. During the negotiation itself, a bridging coalition of 40 developed and developing countries (the de la Paix group) continued to promote agreement through leadership and mediation. The increasing “democratization” of the GATT talks—in other words, the participation of increasing numbers of countries in the informal negotiating groups—tended to make decision-making unmanageable, but in the end “ensured that this round would be more multilateral, and thus potentially more broadly supported, than any previous GATT negotiation.”¹⁰⁶ Furthermore, the cross-membership coalitions based on national interests rather than North-South ideologies helped move the negotiations forward productively once they got started.

Doha: The Doha Round negotiators have numbered more than 140 nations since the round’s launch in 2001. Spurred on by the disappointment in Seattle, the United States engaged in extensive consultations with trade officials around the world in order to build a mandate for the agenda. Since 2001, however, negotiations on the complex agenda, under a tight timetable, have foundered in gridlock. A series of mini-ministerials, attended by a mix of 20 to 30 developed and developing countries, have sought to use a streamlined group of “movers and shakers” to form the seed of consensus for the full negotiating group. However, the lack of transparency in the selection of

¹⁰⁵ Article X of the WTO Agreement provides that an amendment of a covered multilateral trade agreement be approved by consensus of the Ministerial Conference, or, if consensus is not reached, by a two-thirds majority vote.

¹⁰⁶ Hampson, *Multilateral Negotiations*, p. 247.

members to participate is proving troublesome: A group of 22 countries was able to block agreement at the Cancun Ministerial in September 2003, saying that no agreement was better than a bad agreement.

The Kennedy and Tokyo rounds depended upon the top-down approach to negotiation, with the United States-Europe axis driving the agreement, and others engaged subsequently with limited leverage to pursue their interests. The Uruguay and Doha negotiation agendas reflect an increasingly diverse membership, but the complexity of issues and parties challenges the formal processes. Despite the fact that “participation” and “transparency” are two of the stated organizing principles for the Doha Round, attempts to utilize smaller working groups are met with suspicion for failure to select a balanced mix of participants in a transparent manner. A greater number and kind of participants does contribute to a more balanced agenda and potential agreement, but the process of participant selection appears to be the more determinative limitation on the effectiveness of wider participation.

Test Hypothesis 2: Broader participation in information exchange (including collection, analysis, and dissemination) contributes to sustainable commitments.

Kennedy: The chief issue regarding negotiation and agreement in the Kennedy Round was tariff reduction, for which information was generated by the Secretariat and the respective capitals. Participants in the within-sector negotiations were able to gain detailed understandings of those industries, which contributed to a willingness to support the concession packages promoted by the larger traders. Preliminary information was generated on the new issue of nontariff measures, but absent U.S. authority and a full understanding of the issue by the negotiators, this information played only a minor part in the final agreement.

Tokyo: The NTM inventory was a comprehensive, two-year effort to gather information from all member countries in order to define and assess the role of nontariff measures. That consensual learning process marked a real institutional step toward the substantive success of the Tokyo Round agreements. Unfortunately, the level of participation in the negotiation was not the same as in the

information exchange, which ultimately curtailed the number of countries who adopted the NTM agreements.

Uruguay: A wealth of information was developed inside and outside of governments on the issues covered by the Uruguay Round during the three-year pre-negotiation period and the five years of negotiations. Fen Osler Hampson remarked on the “large and committed epistemic community of trade experts...to ensure a professionally committed and competent negotiating process.”¹⁰⁷ Even with that, however, a number of developing countries lacked sufficient understanding of the implications of certain agreements, such as TRIPs. The consequence of so many countries feeling unduly pressured to sign the Uruguay single undertaking was that the subsequent pre-negotiation for the Doha Round was dominated by developing countries demanding that the core of the agenda be a discussion of the implementation of the Uruguay Round commitments.

Doha: With so many countries and so many issues on the agenda, information exchange has moved slowly in the Doha negotiation. Negotiations on the Singapore issues have faltered, with insufficient time to build a broadly participatory database on the complex issues of investments, competition, and market access. Negotiations on agriculture have made some progress in the Cairns Group (the group of agricultural exporters, including developed and developing countries). The negotiators have been unable to agree on how to structure the information base and approach the agenda issues.

The importance of broadly participatory information exchange appears confirmed. In the Kennedy Round, there was insufficient information to adopt any NTM provisions, despite U.S. pressure; in the Tokyo Round, the two-year NTM inventory involved notifications from all members, and the resulting consensual information base built both joint understanding of the issue and the basis on which negotiators could assess priorities and tradeoffs. The Uruguay Round involved an extraordinary number of new and complex issues. After three years of pre-negotiation and five years of negotiation, under increasing time pressure, countries adopted the single undertaking. Yet a

significant number of countries regretted their lack of understanding on the meaning of their commitments. This has jeopardized countries' ability and willingness to comply with those commitments. In the Doha Round, the Singapore issues are of greatest importance to the developed countries, so much of the information collection and analysis is done by the U.S., the European Union, and the OECD. This is helpful at a preliminary stage, but other countries still need to be involved at some point if they are to be sufficiently informed to evaluate and negotiate tradeoffs between those issues and others of more significance to their own countries.

Test Hypothesis 3: A negotiation process that includes a skilled neutral and procedural rules to ensure balanced participation, information exchange, and option generation will increase the likelihood of agreement.

Kennedy: The GATT Director-General, Sir Wyndham-White, was credited with actively engaging the key parties, disseminating relevant information, and facilitating the terms of agreement. The number of member countries was relatively low. The issue (tariff reduction) was a fairly straightforward issue on which most countries were well-informed. And the process of initiating negotiations as bilateral deals between primary suppliers and importers was accepted practice.

Tokyo: The full plenary Trade Negotiation Committee, chaired by Director-General Oliver Long, served to structure the formal negotiations, but it was merely a forum to collect subcommittee reports and information. Six specialized subcommittees conducted the negotiations under specific deadlines, but after four years had only managed to draft working texts. The shift from negotiating over numbers (tariff levels) to words was difficult and required a higher degree of understanding. Many developing countries were excluded from the process, and they responded by opposing the substance of the agreements. As a consequence, most of the Tokyo Round agreements were not included in the single undertaking, but were instead plurilateral.

¹⁰⁷ Ibid., p. 246.

Uruguay: In the Uruguay Round, the complex agenda was broken down into 15 separate, formally mandated working groups. The informal work of various coalitions (the Cairns Group, the Rio Group, the de la Paix Group) served to move the negotiations forward. Director-General Dunkel succeeded in preparing a draft that served as the intellectual framework for ultimate agreement, though he was unable to build political support for it. His successor, Peter Sutherland, and a new U.S. President were able to build momentum and eventual agreement.

Doha: WTO Director-Generals Moore and Supachai have both played key roles in guiding pre-negotiation and negotiation. Supachai serves as chair of the Trade Negotiation Committee, remonstrating when countries lag and cheering their progress. However, some countries have expressed concern that he is biased toward the major developed countries. More than 80 percent of the Secretariat staff, which services the members with background papers and issue syntheses, are from developed countries, which contributes to the perception of bias.

The importance of process to a sustainable agreement has only increased over the period studied. As the number of parties and issues has increased the complexity of the negotiation task, there has been a corresponding increase in the demand for a more transparent process. The Directors-General and presiding committee chairs have attempted to manage negotiations in multiple venues, including the formally structured, fully participatory Trade Negotiation Committee and the more exclusive green room meetings. Deal-making is clearly done in the more informal sessions among key players. While most parties agree that smaller working groups are necessary, the means of selecting attendees is too obscure to be credible. The African proposal (described previously) highlights the importance of “creating a transparent, democratic, all-inclusive and consultative decision-making process...through the adoption of procedural rules” for operation of the plenary and smaller meetings.¹⁰⁸ The use of professional neutrals in the working groups, possibly in partnership with presiding chairs, in order to develop and carry out a protocol on the selection of representative

¹⁰⁸ Proposals for Improving the Decision-Making Process in the WTO, WTO Doc. WT/GC/510, August 14, 2003.

participants in the smaller meetings and to make explicit the procedures for those meetings would go a long way toward diminishing suspicion about the process. It would also allow greater focus on the substantive aspect of negotiations.

A preliminary overview of these results is provided below.

Table 3.1: First-Order Dispute Resolution Hypotheses

	H ₁ : Increased number and kind of participation → agenda of interests → increased agreement support	H ₂ : Broader participation in information exchange → sustainable commitments	H ₃ : Skilled neutral and procedural rules → agreement
Kennedy Round	+	+	+
Tokyo Round	+	+	+
Uruguay Round	+, but with limits. Good process may substitute.	+	+
Doha Round	+, but with limits. Good process may substitute.	+	+

A plus sign (+) denotes that a positive correlation in the hypothesis is confirmed

Assessment of the WTO's First-Order Dispute Resolution against Dispute Resolution Criteria

Through a more practical lens, how does the WTO's resolution of policymaking disputes fare if we weigh the various costs and benefits of increased participation and improved process facilitation? The costs include time, financial and human resources expended, opportunity costs, and stress on relationships. The benefits all tend to correlate positively and cover countries' satisfaction with the negotiation process and outcome, the maintenance of good working relationships among trading partners, and decreased recurrence of the same problem issues. While this research lacks absolute quantitative measures on these criteria, relative assessments are possible.

Transaction Costs

The costs of multilateral negotiations over several years amount to a significant total in every measure (e.g., time and financial and human resources) to every party. The test of effectiveness, however, is less about the cost-benefit analysis of more participation in these negotiations, and more about whether it is more or less costly to pursue an alternative resolution process at a different stage of the dispute. If a country does not have a voice in the multilateral negotiation, its alternatives are several. It can withhold support (for an agenda or an agreement) unless and until it is coerced to do so by larger players. Even if it does ultimately support the adoption of an international rule, it can defer national implementation and compliance until a trading partner complains.¹⁰⁹ A country may also decide to pursue bilateral or regional negotiations instead of multilateral negotiations. Each of these alternative strategies carries a different cost in terms of time, economics, human resources, constituent relationships, and diplomacy.

The most compelling cost of deficient participation is the consequent failure of implementation. Because smaller and developing countries were excluded from principal decision-making in the Tokyo and Uruguay Rounds, these countries were unprepared to implement the obligations they had assumed. The result was a demand that the same issues be re-negotiated in the subsequent rounds.¹¹⁰ It may be that iterated negotiations are desirable or even necessary, especially when there is insufficient information or experience to support full resolution in early stages. However, the political and economic complications of noncompliance, the ill will of excluded participants, and the frustration of establishing renegotiation as accepted precedent should also be taken into consideration when comparing the transaction costs of top-down *versus* managed participation.

¹⁰⁹ Examples of this approach include Argentina's protection of its leather and footwear industry and Indonesia's protection of automobile manufacturers. In both cases, the issue was raised during the Uruguay Round negotiations, during subsequent trade policy reviews, and finally became the basis for a complaint before the Dispute Settlement Board.

Satisfaction with Outcome and Process

Parties' satisfaction with the agreed-upon outcome is a function of whether their (dynamic) interests have been met (or at least, not significantly compromised)—including both the global interest in a stable, predictable, trading system and each country's national political and economic interests. Part of that satisfaction derives from whether the outcome was negotiated through a fair process. We know that parties' perceptions of a fair process are highly influenced by the extent to which each country is allowed a voice in deciding upon an agreement's provisions. One researcher found that, in evaluating dispute outcomes, process was twice as important as substance in terms of satisfaction with the outcome.¹¹¹ The critical elements of fair process are not consensus, but rather engagement on the merits, explanation of how decisions are made, and clarity on what is expected under the agreement. If process management and participation are so critical, what steps can the WTO take to address the intense criticism of its consensus-building processes? The African proposal is consistent with the literature in answering this question.

Relationships

Relationships among trading nations form the foundation of diplomacy. Having an opportunity to learn about each other's perspectives, exchange ideas, and explore options is fundamental to building long-term working relationships. Power- or rights-focused resolution processes are more likely to risk harming relationships, perhaps unnecessarily. In contrast, an interest-based resolution process is consistent with the WTO's consensus-building framework, and with preserving relationships. For

¹¹⁰ For example, antidumping and government procurement were negotiated in the Tokyo Round, then again in the Uruguay Round; services and intellectual property were negotiated in the Uruguay Round, but implementation is part of the Doha negotiations.

¹¹¹ See, for example, Thibaut and Walker, *Procedural Justice*; Tyler and Lind, *The Social Psychology of Procedural Justice*; and W. Chan Kim and Renee Mauborgne, "Fair Process: Managing in the Knowledge Economy," *Harvard Business Review*, July-August 1997, p. 65.

example, substantive working groups, where country representatives get to know each other across interest groups, would serve the function of both relationship-building and information-building.

Recurrence

Recurrence (or lack thereof) of the same problem issues is partially a test of a durable resolution. Issues that recur from round to round, like government procurement and intellectual property, may reflect a failure to adequately engage all of the essential parties in decision-making. Not only do excluded parties resent being left out of negotiations, they lack the access to information and deliberations that would have built their capacity to implement the policies. Other disputes may recur with different countries, who have increasing obligations as their level of development progresses. Other issues recur because they are ongoing, and in many (if not most) cases the agreements will need modification in light of later events. So, the test may be less whether the issue recurs, than if former signatories are more able to wrestle with it intelligently in subsequent cases—in other words, to agree upon adequate and fair representatives, identify and share the most important information, and identify appropriate ground rules and/or effective third parties to help.

Pursuing the theory that an interest-based resolution process is more effective, what might the WTO do to improve its approach to policymaking? How might the WTO foster a transparent, consultative, consensus-building process in which all views are considered? The concerns expressed by the African missions in their WTO reform proposal revolve around procedural rules on the preparation of draft negotiating texts and participation in the drafting and decision-making process. In that proposal, smaller working groups are recognized as an important tool for reaching consensus. Establishing rules for the selection of participants and the operation of those smaller groups would alleviate suspicion and contribute to the groups' credibility as representative deliberations. Utilizing neutrals (internal and external) who are impartial, expert, and fairly selected would contribute to the

effectiveness and legitimacy of the process.¹¹² In short, increased levels of participation in a more transparent, consultative process would enable more interests to be met. The costs of fostering a highly participatory multilateral process may be high in terms of time and resources, but those costs may be outweighed by the benefits of satisfaction with the outcome and subsequent implementation and compliance.

The relative benefits of resolving disputes at the policymaking, policy implementation, and policy enforcement stages will be revisited in Chapter 6.

¹¹² The WTO Director-General has floated the idea of appointing facilitators who could travel and consult as a way of improving the management of the WTO and its decision-making processes at ministerial conferences. Raghavan, “Member-Driven or Secretariat-Driven Process?”

CHAPTER 4: SECOND-ORDER DISPUTES: POLICY IMPLEMENTATION

The previous chapter described how the WTO identifies and resolves what I have termed first-order disputes—those that arise in setting international trade policy. Once policies are adopted by the WTO, it is incumbent upon member states to translate those international rules into national legislation and regulations—in other words, to operationalize the WTO rules into domestic policy. This chapter will look at how the WTO and its member states monitor that translation. I first consider a theoretical structure for diagnosing and resolving these second-order, or policy implementation, disputes, and set forth two hypotheses. I then describe two mechanisms for assessing countries' implementation of WTO policy: operating committees and the Trade Policy Review Mechanism (TPRM). Next, several evaluations of the TPRM are discussed in some detail. The chapter closes with an assessment of the WTO's experience relative to the hypotheses.

POLICY IMPLEMENTATION – A THEORETICAL PERSPECTIVE

As discussed in Chapter 2, the WTO's primary purposes are to ensure the reduction of tariffs and other barriers to trade and to eliminate discriminatory treatment in international trade relations. To achieve these aims, the WTO has a substantive code of conduct and an institutional framework for the administration and implementation of that code. Article XVI(4) of the WTO Agreement provides that “Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements.”

At the simplest level, *policy implementation* is what a nation does to make its national regulation of domestic industries align with its international commitments. As described in the implementation vignette in Chapter 1, for example, all WTO members agreed in Article III of the General Agreement on Tariffs and Trade of 1994 that they would not apply internal taxes to imported products so as to afford protection to domestic products. In 1995, Uruguay adopted a decree that

placed differential taxes on domestic and imported alcoholic beverages. In 1998, during a review of Uruguay's various trade policies that was open to all WTO members, Uruguay's trading partners expressed concern that this tax was not consistent with WTO requirements. The existence of Uruguay's differential tax represented a second-order policy implementation dispute—the question was, had Uruguay failed to incorporate international nondiscrimination standards into its domestic trade policy on alcoholic beverages? In contrast, a first-order policymaking dispute (the subject of Chapter 3) arose at an earlier time: should WTO members be able to favor domestic protection against imports? Article III says no, in principle. A third-order policy enforcement dispute (the subject of Chapter 5) arose later and involved a complaint by a particular trading partner—Chile, in this case—as compared with a complaint by a collective body or the Secretariat of the WTO, over the harm its alcoholic beverage industry suffered from Uruguay's disparate treatment of Uruguayan and Chilean beverage products.

A nation's policy implementation, then, can be defined as compliance with its negotiated obligations. Most fundamental may be the legal infrastructure to make international law also the law of the nation through legislative, executive, and judicial means. Professor Harold Koh, Dean of Yale Law School, has noted that, "It is through this repeated process of interaction and internalization that international law acquires its 'stickiness,' that nation-states acquire their identity and that nations define promoting the rule of international law as part of their national self-interest."¹ The likelihood of compliance is increased by the law's perceived legitimacy, which Thomas Franck describes as "a property of a rule...which itself exerts a pull toward compliance...because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."² In order to achieve compliance, two additional factors matter: the political context in which governmental leaders manage the interests of domestic producers,

¹ Harold Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181, 204.

² Thomas Franck, "Legitimacy in the International System," *American Journal of International Law* 82 (1988): 705, 706.

importers, exporters, and consumers, and a nation's administrative capacity, which includes human, technical, and financial resources.

Abram Chayes and Antonia Handler Chayes took up the question of compliance with international regulatory agreements in *The New Sovereignty*. Their study of compliance with security, economic, and environmental treaties concluded that acts that appear to be “noncompliance” really encompass more than incidents of willful disobedience. A party in noncompliance may in fact be experiencing one or more of four circumstances: (1) ambiguity and indeterminacy of treaty language, (2) limitations on the capacity of the party to carry out its undertakings, (3) a need for more time to implement the social and economic changes contemplated by the treaty, and (4) a decision to address more pressing national priorities first. All of these may be better addressed through regime management than enforcement sanctions. By more finely distinguishing among the various kinds of defecting behaviors, one might assemble an array of “managerial” strategies, including reporting, monitoring, capacity building, and institutional development.³ Chayes and Chayes focused especially on “transparency” of countries’ activities—a term interpreted broadly to include the availability of and access to information about the meaning of the norms, policies, and activities of parties that are relevant to treaty compliance. The interacting processes of justification, discourse, and persuasion engender transparency, which in turn serves to reassure others of the intent to comply and deters those considering noncompliance. The study describes the various incentives used by the International Monetary Fund (IMF), the International Labor Organization (ILO), and the Organization of

³ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995). A counter view considers the quality of the underlying treaty the primary function, and thus finds that weightier enforcement action is necessary as a tool to both generate and enforce a deeper and more meaningful agreement. George Downs, David Rocke, and Peter Barsoom, “Is the Good News about Compliance Good News about Cooperation?” *International Organization* 50 (Summer 1996): 379-406.

Economic Cooperation and Development (OECD) to couple positive and negative incentives with dialogue and accountability.⁴

A leading scholar of economic law, Asif Qureshi, has written extensively about the implementation of international economic rules generally and those of the GATT/WTO in particular.⁵ Qureshi believes that implementation depends on political consciousness that is grounded in technical expertise, and he discusses three principal methods for assessing implementation: surveillance, supervision, and dispute settlement.⁶ Surveillance involves collecting information and assessing behavior in accordance with a particular standard. The assessment of behavior can be either legal in nature, following a teleological approach, or economic, based on empirical observations of the target's activities. The WTO lacks explicit surveillance powers, but derives implicit ones from Article III: "to facilitate implementation of the WTO code."

Supervision as an implementation method poses problems at the WTO, as it suggests the oversight of one party over another and would require a state to accede its sovereignty. States have not granted such authority to the WTO Secretariat nor to fellow members.

Dispute settlement, as a third method of implementation, may involve disputes between an organization and its members, or between members. In the WTO, enforcement is not initiated by the institution against its members, but by one member against another. Such enforcement actions, or third-order disputes, are the subject of Chapter 5. Of the three potential methods of implementation, only surveillance is initiated by the WTO.

Qureshi goes on to categorize implementation in terms of achieving compliance with the WTO code in time phases: to preempt noncompliance, to ensure compliance, and to correct

⁴ For example, the IMF has long used surveillance and monitoring as part of its conditionality of funding applicant countries. The ILO has a progressive review process to assess member countries' compliance with treaty obligations; noncompliance can lead to shaming through a form of "blacklisting."

⁵ Asif H. Qureshi, "The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or Enforcement?" *Journal of World Trade* (June 1990): 147-160; Asif Qureshi, "Some Lessons from 'Developing' Countries' Trade Policy Reviews in the GATT Framework: An Enforcement Perspective," *The World Economy* 18, no. 3, (1995): 489-503; and Asif H. Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester, England: Manchester University Press, 1995).

noncompliance. To preempt noncompliance, he highlights: (1) involving a broad range of stakeholders in trade policy formulation, including national legislators, diverse ministries, nongovernmental organizations and interest groups (industry, unions, consumers), WTO representatives, and trading partners; (2) harmonizing national trade policy with the WTO, with possible prior approval; and (3) transparency in trade policy development. He notes the overall importance of establishing

conditions that create a disposition to conform from within. Such conditions comprise, for example, the construction of domestic systems that operate at the level of national policy formulation to effect the desired policy; the engendering of the psychologically most responsive posture in targeted officials of member states, for example, Ministers, delegates; the creation of a conducive environment for parties predisposed to the objectives of the [WTO] organization.⁷

Efforts to preempt noncompliance thus take place in the pre-negotiation phase: involvement of a broad range of stakeholders and transparency in trade policy development. This would suggest that within a system as contemplated by this study, the more preemptive effort is invested during the policymaking phase, the less burden is placed on the policy implementation phase. This relationship will be discussed in Chapter 6.

Finally, Qureshi notes that, to ensure compliance, a number of specific information-sharing techniques are needed, including notification, exchange of information among international economic organizations, collection of information by the WTO, national information, and enquiry points. Techniques to correct noncompliance—many of which are addressed in Chapter 5—include a variety of third-party consultation, administrative review, and enforcement processes through the WTO and national courts.

In this chapter I consider the conditioning and corrective aspects of the surveillance processes that address second-order disputes. Disputes in this arena may arise when a member has not

⁶ Qureshi, *The World Trade Organization*, pp. 49-61.

⁷ *Ibid.*, p. 63.

conformed its national trade policy with that of the agreed-upon WTO rules. The array of techniques Qureshi prescribes as “conditioning compliance” are found primarily in two domains: the WTO operating committees and councils, and the Trade Policy Review Mechanism.

In terms of our overarching framework, second-order disputes emanate from the confluence of power, rights, and interest pressures. The rights are embodied in the policies established by the WTO agreements. Power is exerted by trading partners in establishing those rules, and then by the dominant players on the domestic scene and their representatives—industry, importers, exporters, consumers—to temper those rule constraints. Interests flow at two levels—international and domestic. A ruling government seeks to remain in power domestically *and* enhance its standing internationally by satisfying the interests of its key constituencies, consistent with its political principles.

HYPOTHESES

Second-order, or policy implementation disputes, concern whether a country has incorporated its WTO-negotiated obligations into domestic policy. The more transparent a country’s policymaking process, the more likely the WTO and trading partners are to be able to assess whether the country has in fact complied with its obligations. Indeed, a target country may prefer to avoid such an assessment of its compliance status, unless it receives compensating benefits in the process. For example, if a country cannot implement certain policies due to a lack of legal, economic, administrative, or political capacity, the WTO may be able to offer assistance to ease the transition. This would meet the target country’s interest in remaining in good standing and the trading partners’ expectations of compliance, in addition to upholding the institution’s integrity.

The evaluation of a policy implementation process might usefully focus on two aspects. First, is there a diagnostic process to determine whether a country is implementing its international obligations? Second, if the country has not implemented its obligations, is there a process to diagnose

the barriers to doing so, and resolve how those barriers might be overcome? The following two hypotheses relate to these two aspects.

Test Hypothesis 1: Transparent Surveillance

A country is more likely to be transparent about its national policymaking if all fellow members are subject to the same process and there is a reciprocal obligation and benefit to the collective information exchange. Surveillance involves the collection of information from countries and an assessment of their behavior in accordance with a particular standard or rule. The most productive surveillance process would require all nations to notify the institution periodically of their domestic trade policies and provide an opportunity to explain their particular circumstances. *Test Hypothesis 1: A rights-oriented surveillance process is likely to be more successful if universal, periodic, discursive, and transparent.*

Test Hypothesis 2: Overcoming Barriers

If implementation issues are identified—e.g., incidents of apparent noncompliance—theory suggests that they result from a lack of understanding or capacity. For the target country, the perceived consequences of noncompliance may be less onerous than the domestic political or economic costs of compliance. In the interest of stabilizing trade among the collective membership and upholding the legitimacy of the institution's rules, identified implementation disputes are more likely to be resolved within a flexible, problem-solving process that addresses not only international legal obligations, but also domestic economic and political interests. *Test Hypothesis 2: The resolution of implementation problems will be enhanced by a process that allows for the exploration of a range of transitional options to bring the party into compliance.*

In the next two sections, I consider two implementation processes at the WTO. In the first, operating committees, membership is universal (i.e., committees are open to all WTO member

countries) and the scope of review is specific to the covered agreement that forms the mandate of the committee's work. In the second, the Trade Policy Review Mechanism, participation is also universal, but the scope of review is much broader and includes any issue covered by the WTO Agreement.

WTO IMPLEMENTATION IN PRACTICE: OPERATING COMMITTEES

In the first decade of the GATT, decision-making authority was vested directly in the 20 to 30 contracting parties, who managed all necessary business. In 1960, a General Council, composed of the contracting parties, was authorized to meet monthly. In 1979, the Tokyo Round introduced a new innovation: standing committees of signatories, who were charged with monitoring the implementation of each of the separate nontariff barrier codes (i.e., on customs valuation, import licensing, antidumping, technical barriers to trade, government procurement, and subsidies).

These committees were comprised of representatives of the member states and staffed by the Secretariat. They met several times each year to allow members the opportunity to consult on any issues relevant to the committees' topical mandate. Committees considered changes in legislation, notifications⁸ of national regulatory measures, trading partner practices and policies, and interpretations of any operating issues relative to the respective agreement, with support by the Secretariat. This committee practice was confirmed under the 1994 WTO Agreement and continues today.

The committee structure was illustrated in Figure 2.1 in Chapter 2. Three councils report to the General Council, one for each broad area of trade: Councils for Trade in Goods, Trade in Services, and Trade-Related Aspects of Intellectual Property. Subsidiary to these councils are a number of committees, each of which consists of all WTO members and is responsible for consulting on any matter relating to the operation of its mandate. These committees and councils serve as the

⁸ The term *notification* refers to a country's act of advising the WTO of a domestic trade measure it has enacted.

principal norm-setting bodies for WTO policies in the implementation phase. Table 4.1 summarizes the mandate and operations of the councils and committees.

Table 4.1: Summary of Operating Committee/Council Mandates and Annual Report

Council or Committee	WTO Agreement	Council/Committee Mandate	Meetings in 2003	Highlights from 2003 Annual Report
Council for Trade in Goods	Agreement on Trade in Goods	WTO Agreement, Art. IV.5: Authorizes a council to oversee functioning of Multilateral Trade Agreements	5	(Review of annual reports of subsidiary committees) ⁹
Committee on Agriculture	Agreement on Agriculture	Art. 17: Authorizes a committee Art. 18: Calls for committee to review implementation of commitments, including notifications	4	<ul style="list-style-type: none"> • 171 notifications in four areas: market access, domestic support, export subsidies, and export restrictions¹⁰
Committee on Sanitary and Phytosanitary Measures	Agreement on Application of Sanitary and Phytosanitary Measures	Art. 12: Authorizes a committee Art. 17: Calls for transparency Art. 13: Authorizes implementation Annex B: Calls for transparency, enquiry points, notification	3	<ul style="list-style-type: none"> • Discussions regarding implementation • 650 notifications submitted • Problems with enquiry points • 32 countries submitted request for technical assistance¹¹
Textiles Monitoring Body (TMB)	Agreement on Textiles and Clothing	Art. 8: Authorizes a Textiles Monitoring Body ¹²		
Committee on Technical Barriers to Trade	Agreement on Technical Barriers to Trade	Art. 13: Authorizes a committee to consult on matters relating to operation of agreement, including preparation, adoption, and application of technical regulations	3	<ul style="list-style-type: none"> • Each member to notify on implementation and national enquiry point; 92 submitted statement of implementation and 121 submitted information on enquiry points • Improved notification addressed in triennial review¹³

⁹ 2003 Report of the Council for Trade in Goods, WTO Doc. G/L/665, December 4, 2003.

¹⁰ Committee on Agriculture, General Council Overview of WTO Activities 2003, WTO Doc. G/L/662, November 21, 2003.

¹¹ 2003 Report on the Activities of the Committee on Sanitary and Phytosanitary Measures, WTO Doc. G/L/661, November 18, 2003.

¹² The TMB is different than the other operating committees, both in composition and function. Its operation is discussed further below.

Committee on Trade-Related Investment Measures (TRIMs)	Agreement on Trade-Related Investment Measures	Art. 7: Authorizes a committee to consult on matters relating to operation and implementation of agreement	3	<ul style="list-style-type: none"> Members obligated to notify if TRIMs inconsistent with agreement; 26 members notified on 37 measures in 1995-97 22 countries notified that no TRIMs were inconsistent with agreement¹⁴
Committee on Anti-Dumping Practices	Agreement on Implementation of Article VI of the GATT 1994 (Antidumping)	Art. 16: Authorizes a committee to consult on matters relating to operation of the agreement	3	<ul style="list-style-type: none"> Semiannual reports required of members, but only 27 reported 414 provisional and final measures Concern regarding low level of reporting and notification¹⁵
Committee on Customs Valuation	Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation)	Annex II: Authorizes Technical Committee on Customs Valuation to ensure uniformity in interpretation and application of agreement, including technical problems and advisory opinions	3	<ul style="list-style-type: none"> 74 members have notified of national legislation; 57 members not yet made any notification Meetings spent reviewing notifications and extension requests¹⁶
	Agreement on Pre-shipment Inspection	No committee. Ministerial Conference to review implementation		
Committee on Rules of Origin	Agreement on Rules of Origin	Art. 4 and Annex I: Authorizes a committee to consult on matters relating to agreement and review implementation	1	<ul style="list-style-type: none"> Fewer than 90 members have notified regarding rules of origin Concern about low level of compliance with notification requirements¹⁷
Committee on Import Licensing Procedures	Agreement on Import Licensing Procedures	Art. 4: Authorizes a committee to consult on any matters relating to operation of agreement and to review notifications and implementation	2	<ul style="list-style-type: none"> Members required to notify regarding legislation, but only 94 have done so to date Low level of compliance with mandatory notifications—main topic of committee¹⁸

¹³ 2003 Report of the Committee on Technical Barriers to Trade, WTO Doc. G/L/657, November 11, 2003.

¹⁴ 2003 Report of the Committee on Trade-Related Investment Measures, WTO Doc. G/L/649, October 22, 2003.

¹⁵ 2003 Report of the Committee on Anti-Dumping Practices, WTO Doc. G/L/653, October 28, 2003.

¹⁶ 2003 Report of the Committee on Customs Valuation to the Council for Trade in Goods, WTO Doc. G/L/654, October 31, 2003.

¹⁷ 2003 Report of the Committee on Rules of Origin to the Council for Trade in Goods, WTO Doc. G/L/656, November 4, 2003.

¹⁸ 2003 Report of the Committee on Import Licensing Procedures to the Council for Trade in Goods, WTO Doc. G/L/652, October 28, 2003.

Committee on Subsidies and Countervailing Measures	Agreement on Subsidies and Countervailing Measures	Art. 24: Authorizes a committee to consult on any matters relating to operation of the agreement; review notifications; and conduct surveillance. Authorizes Permanent Group of Experts to assist panels and provide advisory opinions to members and committee	5	<ul style="list-style-type: none"> • All members required to submit new and full notification of subsidies: only 45 members have done so • 96 members have notified of domestic countervailing duty legislation; 35 have not notified • Countervailing duty actions under-notified¹⁹
Committee on Safeguards	Agreement on Safeguards	Art. 13: Authorizes a committee to monitor implementation of agreement, recommend improvements, and review notifications	4	<ul style="list-style-type: none"> • Reviewed notifications on national legislation; 100 members notified of national safeguards legislation • Concern regarding noncompliance on notifications • 18 findings of serious injury or threat²⁰
Council for Trade in Services	Council on GATS	WTO Agreement Art. IV.5: Authorizes a council to oversee the functioning of the GATS	2	<ul style="list-style-type: none"> • Two notifications received • Discussions of implementation²¹
Council for Trade-Related Aspects of Intellectual Property Rights (TRIPs)	Council on TRIPs	WTO Agreement Art IV.5: Authorizes a council to oversee the functioning of the TRIPs agreement	4	<ul style="list-style-type: none"> • 124 members notified regarding implementing legislation to date • Reviews completed on five countries; 15 reviews pending²²

Each of the committees and councils meets regularly, is open to all member nations, and provides a knowledgeable forum to aid countries in the translation of formal rules to national practice. Committee and council agendas each include consideration of national legislation and implementing regulations. Despite specified reporting forms and offers of assistance from the Secretariat, however, the annual reports for nearly all the committees in 2003 expressed concern over noncompliance with notification and reporting requirements.

¹⁹ 2003 Report of the Committee on Subsidies and Countervailing Measures, WTO Doc. G/L/655, November 4, 2003.

²⁰ 2003 Report of the Committee on Safeguards to the Council for Trade in Goods, WTO Doc. G/L/651, October 24, 2003.

²¹ 2003 Annual Report of the Council for Trade in Services to the General Council, WTO Doc. S/C/19, December 5, 2003.

²² 2003 Annual Report of the Council for Trade-Related Aspects of Intellectual Property Rights, WTO Doc. IP/C/30, December 1, 2003.

While this research does not include a full analysis of the WTO operating committees, the work of another scholar has made a significant contribution to understanding how these committees function. Christina Sevilla examined the effectiveness of the operating committees as an informal means of enforcing compliance. She considered two types of oversight compliance: “police patrol” oversight, which involves the centralized and routinized monitoring of all countries’ policies in order to detect and address possible treaty violations; and “fire alarm” oversight, which involves the creation of procedures and channels of access to alert governments to possible treaty violations.²³ Complaints raised in committees (concerning failure to transpose WTO rules into domestic law) represent the “police patrol” type; third-order disputes submitted to dispute panels represent the “fire alarm” mechanism and are the subject of Chapter 5.²⁴ Sevilla’s research of informal complaints reviewed allegations of inconsistency between relevant standing rules and a member government’s policy behavior—allegations that were raised during private and multilateral committee meetings in Geneva.²⁵ The committees met several times per year and allowed signatories to consult on notifications and discuss changes in legislation and interpretation of the rules. The committees were found to help adjust target country behavior.

Sevilla compared complaints raised formally before dispute panels (the subject of Chapter 5), to those raised informally in committee meetings. She hypothesized that the costs of complaining would have an effect on which institutional process (formal or informal) was used most often. The costs a government bears in bringing complaints include bureaucratic costs (e.g., of information-gathering and case preparation), the opportunity costs of pursuing alternative strategies, and diplomatic costs. One would expect to find that governments tend to use the less costly, decentralized

²³ Matthew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Policy Patrols versus Fire Alarms,” *American Journal of Political Science* 28 (February 1984): 1.

²⁴ Christine Sevilla, “The Politics of Enforcing GATT/WTO Rules” (PhD diss., Harvard University, 1988), p. 80. See also McCubbins and Schwartz, “Congressional Oversight Overlooked.”

²⁵ Sevilla looked at the Committee on Subsidies and Countervailing Measures’ Code and the Committee on Government Procurement’s Code; both of these codes were adopted as plurilateral agreements under the Tokyo Round. These committees were chosen because each had members from the Quad and the mid-sized and

complaint processes more frequently. Sevilla's research, targeted at the GATT rather than WTO period of operation, noted that the complaint forum available through operating committees functioned to facilitate both the diagnosis and resolution of implementation problems. Sevilla concluded that this informal forum was used substantially more than the formal dispute panel process, and it appeared to lower the costs of complaining for small countries. However, the committee system (like the formal process) was used more by the larger trading countries than small or developing ones, as small countries refrained from using the committees as often as they could.²⁶

Seasoned GATT/WTO officials have noted that while the WTO was designed to reflect the separation of powers doctrine, its organization really only exercises the legal rationale of the judicial branch. One former GATT official noted that the institution's General Council has legislative competency, but lacks the legal procedures that would allow it to balance domestic political and economic interests.²⁷

Another former GATT official wrote that the institution's councils and committees are under-utilized as "operational forums to discuss WTO law, to devise adequate means for its implementations, and so reconcile diverging opinions, that could help to diminish the heavy case load of the adjudicative organs."²⁸ Individual members, he says, would be well-advised to exercise more self-restraint on submissions to the Dispute Settlement Body (i.e., for third-order disputes) and instead "devote their energies to facilitating the work of WTO committees established to oversee the functioning of the different covered agreements."²⁹ This is particularly apropos for developing countries' access to justice, which Annet Blank contends will depend on their being "meaningfully

smaller development economies. The complaints raised in these committees were categorized into three types: transposition of the code into domestic law; filing of notifications; and application of rules in specific instances.

²⁶ Sevilla, "The Politics of Enforcing GATT/WTO Rules," pp. 119-121, 172-3.

²⁷ Armin von Bogdandy, "Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship," *Max Planck Yearbook of United Nations Law* 5 (2001): 608-674.

²⁸ Claus-Dieter Ehlermann, "Tensions between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO," *World Trade Review* 1, no. 3 (2003): 301-308.

²⁹ *Ibid.*

involved in the...everyday work of the WTO, such as the drafting of agendas within the WTO councils and committees and participation in their discussions and decisions.”³⁰

These preliminary observations on operating committees suggest that they function only moderately well as informal surveillance bodies to assess member countries’ implementation of WTO rules into domestic law and notification of policy measures adopted. The committees provide regular, transparent discussions that are open to all WTO members, and they are designed to gather relevant information and consult on implementation. This mandate would appear to offer a relatively lower-cost process for understanding the basis for noncompliant behavior and developing a program for improvement. The reality, however, is a high degree of noncompliance on even the *reporting* of implementation. Thus, the committees alone do not appear to be a model for success in evaluating implementation.

POLICY IMPLEMENTATION IN PRACTICE: THE TRADE POLICY REVIEW MECHANISM (TPRM)

This section examines the work of the Trade Policy Review Mechanism, a more elaborate implementation process launched by the GATT as a pilot in 1989. The progenitors of the TPRM were several. Both the OECD and the IMF long considered various means to increase policy accountability by developed countries. The 1985 Leutwiler Report (also known as the “Wisemen’s Report”) recognized this need and called for regular surveillance by the GATT itself of all its members on matters of trade policy. The report noted that, “Governments should be required regularly to explain and defend their overall trade policies.”³¹ The next year, in 1986, the Negotiating Group on the Functioning of the GATT System (known as the “FOGS”), recommended that the GATT “...develop understandings and arrangements: (1) to enhance the surveillance in the GATT to enable regular

³⁰ Annet Blank, “Equal Access to Justice in the WTO for Developing Countries,” in Philippe Turrley, Iain MacVay, and Marc Weisberger, *Due Process in WTO Dispute Settlement* (London: Cameron May, 2001), p. 193.

³¹ *Trade Policies for a Better Future: Proposals for Action* (Geneva: GATT, 1985) (“The Leutwiler Report”), Recommendation 8, p. 42.

monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system.”³²

The FOG proposed that a trade policy review mechanism be established to monitor the trade policies and practices of contracting parties. Such monitoring should not enforce nor create new GATT obligations. Rather, monitoring should encourage transparency in the trade policies and practices of the contracting parties, to connect GATT principles with the economic circumstances of each country.³³

At the 1988 Uruguay Round Mid-Term Review in Montreal, a TPRM, as devised by the FOG, was proposed. It was endorsed in April 1989 and became provisionally effective immediately as a pilot program. The TPRM became permanent under Annex 3 of the WTO Agreement in 1994.

As noted previously, Article XVI of the WTO Agreement requires that each signatory transpose the international rules adopted in each trade negotiating round into corresponding domestic legislation. Further, countries must not initiate new policies that are contrary to the WTO rules. In order to achieve transparency on national regulations and policies, WTO governments have to inform the WTO of specific measures, policies, or laws through regular notifications, as discussed in the previous section. Through the TPRM, the WTO conducts regular reviews of individual countries’ trade policies. The objectives of the TPRM are:

- to contribute to improved adherence by all members to rules, disciplines, and commitments made under the WTO;
- to increase the transparency and understanding of countries’ trade policies and practices, through regular monitoring;
- to improve the quality of public and intergovernmental debate on the issues; and
- to enable a collective assessment of the effects of policies on the world trading system.³⁴

³² Ministerial Declaration of Punta del Este, paragraph E, GATT Doc. MIN.DEC, September 20, 1986.

³³ Qureshi, “The New GATT Trade Policy Review Mechanism,” p. 148.

³⁴ WTO Agreement; Annex 3: Trade Policy Review Mechanism.

The general process established in 1989 for the TPR pilot continues to the present. The TPRM examines the impact of a member's trade policies and practices on the multilateral trading system within the context of the country's wider macroeconomic and development circumstances. Members have undertaken a commitment of transparency in support of these objectives, but acknowledge that implementation of domestic transparency must be voluntary and take into consideration each member's legal and political system.

The frequency of a member nation's review is determined by its share of world trade. Countries are categorized into three tiers. Tier 1 includes the four largest trading entities, who are reviewed every two years: the European Union, United States, Canada, and Japan. Tier 2 includes the next 16 countries, by size of global trade,³⁵ who are reviewed every four years. They are as follows:

Developed³⁶	Developing
Australia	Brazil
Norway	Hong Kong, China
South Africa	India
Switzerland	Indonesia
	Israel
	Korea, Rep. of
	Malaysia
	Mexico
	Poland
	Singapore
	Thailand
	Turkey

Tier 3 encompasses the remaining WTO members, who are reviewed every six years, or less for least-developed country members.

The WTO General Council meets as the Trade Policy Review Body (TPRB) to conduct the reviews, which are based on three components: (1) a "country report"—a full report from the member

³⁵ These are the leading exporters in world merchandise trade (excluding intra-EU trade), 2001. WTO, *International Trade Statistics Report for 2001*, Table 1.6 (Geneva: WTO, 2002). China joined the WTO in 2002. It ranks just behind Canada with 3.54 percent of total world trade, according to *The Economist: World in Figures* (London: Profile Books, 2003). China's first TPR is not yet scheduled.

³⁶ As mentioned in Chapter 2, the designation of *developed* or *developing* is self-selected. Developing countries are not defined, but, following the general guidelines set by the IMF, have a per capita income per annum of

under review on its overall economic situation, together with a detailed analysis of its trade policies, based on a questionnaire sent by the Secretariat,³⁷ (2) a “Secretariat report”—a report prepared by the Secretariat based on information available to it and provided by the member, focusing on special areas of concern,³⁸ and (3) a two-day meeting involving the TPRB and the member.

The two-day meeting is scheduled at least four weeks after the country and Secretariat reports are distributed to all WTO member countries. The first day opens with an initial statement by the country under review, after which two discussants chosen by the TPRB chair comment on the two reports.³⁹ Next, questions from other participants are invited.⁴⁰ The country under review is then able to prepare responses to present during the second day. Depending on the skill of the chairman, this second day can elicit additional comments and questions and is usually quite interactive. Small and large countries alike have an opportunity to question large trading countries. The major trading powers aggressively question each other. “Questions are in fact probing, even barbed, comments and critiques.”⁴¹ Canada and United States

regularly trade sharp blows and the United States goes after Japan with great gusto. At times, however a ‘glass houses’ effect inhibits participants from throwing stones. Countries are also often reluctant to criticize fellow members on whom they are dependent for special privileges: when the European Union is up to review, for example, developing-country beneficiaries of the EU trade preferences conspicuously hold their fire.⁴²

\$1000 or less. China will fall within this tier, but has not yet been scheduled for review. The designation of *least developed* is according to the United Nations.

³⁷ The Secretariat provides technical assistance to developing country and least-developed country members in preparing this report. The outline format for country reports is based on the Decision of July 19, 1989 (BISD 36S/406-409) and is reproduced as Appendix ___ hereto.

³⁸ The Secretariat report is usually organized into six chapters: I. The Economic Environment; II. The Trade Policy Regime Framework and Objectives; III. Trade-Related Aspects of Foreign Exchange Regime; IV. Trade Policy and Practices by Measures; V. Trade Policy and Practices by Sector; and VI. Trade Disputes and Consultation.

³⁹ The discussants comment on their own individual responsibility, not on behalf of their governments.

⁴⁰ Those who submit written questions in advance are addressed first.

⁴¹ Donald B. Keesing, “Improving Trade Policy Reviews in the World Trade Organization,” *Policy Analyses in International Economics*, No. 52 (Washington, DC: Institute for International Economics, 1998), p. 11.

⁴² *Ibid.*

The TPRM offers a remarkable opportunity from several perspectives. The country being reviewed receives a comprehensive analysis of its legal and economic trade policy from WTO staff.⁴³ The country's trading partners receive a copy of the report and have a two-day open meeting in which to raise any concerns about the matters disclosed or their trading relationship with the country. As the TPRM is explicitly prohibited from serving as a pre-dispute settlement forum, what could be an adversarial process tends to take a more problem-solving tone to address pending tensions.

The following table summarizes the Trade Policy Reviews from January 1995 through December 2003. Approximately 16 reviews are conducted each year. The Secretariat's TPRM division consists of a director, 16 professional staff, and 11 support staff. The review process, from initial research and preparation of the country questionnaire to the meeting of the TPRB, takes approximately 10 months. The budget for the division is approximately \$6 million of WTO's annual budget of \$115 million.

Table 4.2: Summary of Trade Policy Reviews, 1995 – 2003

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Total # of Reviews (GATT/WTO)	11	15	8	16	12	15	15	15	17
Tier 1 Members	2	2	1	2	1	3	1	2	1
Tier 2 Members – developed	0	3	1	2	1	4	0	2	0
Tier 2 Members – developing	1	2	1	4	2	2	1	3	4
Tier 3 Members – developed	1	2	1	1	1	1	2	0	1
Tier 3 Members – developing	7	5	3	4	5	3	8	6	5
Tier 3 Members – least-developed	0	1	1	3	2	2	3	4	5
Cumulative # of Reviews since 1989	65	80	88	109	120	135	150	165	182
Cumulative # of Members reviewed since 1989⁴⁴		71	75	81	85	88	98	103	110

⁴³ The scope of this analysis is akin to what a client might pay a consultant like McKinsey and Company up to \$500,000.

⁴⁴ The EU counts here as 15 members. On May 1, 2004, the EU expanded to 25 members.

The 182 TPRM reports reveal a consistent effort to compliment the reviewed country on its progress and recognize its particular challenges. The target country representative has an opportunity to explain its policies, highlight its improvements, and address its trading partners' concerns. Overall, the review is looking for evidence that the country has increased the transparency of its policies, simplified its tariff structure, implemented policies to sustainably stabilize its economy, and opened its market consistent with the WTO's rule-based system. There is now a push to reach those who have not yet been reviewed, while maintaining the periodic schedule of reviews on larger trading nations. The TPR program for 2004 proposes 16 reviews, including at least five least-developed countries.

The following tables summarize the key issues raised in reviews of the Tier 1 and Tier 2 countries.

Table 4.3: Key Issues Raised in Tier 1 Trade Policy Reviews

Tier 1 Country	Last Review (and # of reviews from 1989 to 2003)	Last Review Issues: Special Sectors	Last Review Issues: Trade Measures
Canada	2000 (7)	Agriculture Steel Textiles/clothing	Antidumping Local content requirements Sanitary/phytosanitary (SPS) nontariff measures (NTMs) Tariff peaks/escalation
European Union	2002 (6)	Agriculture Textiles	Antidumping Government procurement Health and safety Import restrictions Intellectual property Preferential trade agreements Safeguards Services
Japan	2002 (6)	Agriculture	Competition Government procurement Market access SPS Tariffs Technical barriers to trade (TBT)
United States	2001 (6)	Agriculture Textiles/clothing	Antidumping Carousel amendment ⁴⁵ Unilateralism

Table 4.4: Key Issues Raised in Tier 2 Trade Policy Reviews

Tier 2 Country	Last Review (and # of reviews from 1989 to 2003)	Last Review Issues: Special Sectors	Last Review Issues: Trade Measures
Australia	2002 (4)		Antidumping Government procurement Intellectual property Services SPS Tariffs
Brazil	2000 (3)		Antidumping Government procurement Intellectual property Services SPS Tariffs
Hong Kong, China	2002 (4)	Wine	Intellectual property Tariffs
India	2002 (3)	Agriculture	Antidumping Import licensing SPS Tariffs
Indonesia	2003 (4)	Steel Textiles/clothing	Antidumping Import measures Tariff gap
Israel	1999 (2)	Agriculture	Import restrictions Services Tariffs
Korea, Republic of	2000 (3)	Agriculture Steel	Tariffs
Malaysia	2001 (3)		Export diversity Government procurement Licensing
Mexico	2002 (3)	Agriculture Steel	Antidumping Customs Government procurement Import licensing
Norway	2000 (3)	Agriculture Textile/clothing	Tariffs
Philippines	1999 (2)	Beverages Distilled spirits Motor vehicles	Import restrictions
Singapore	2000 (3)	Alcoholic beverages Motor vehicles	Labeling of genetically modified organisms
South Africa (SACU)	2003 (3)	Agriculture Motor vehicles Textiles/clothing	Antidumping Customs valuation NTMs

⁴⁵ If a country is authorized to suspend concessions to a trading partner as a result of a ruling from the Dispute Settlement Body, the country may rotate or change its list of suspended concessions, which is called a "carousel."

Switzerland	2000 (3)	Agriculture Clothing	Labeling SPS
Thailand	2003 (4)	Agriculture Intellectual property	Customs valuation Import licensing Tariff structure
Turkey	2003 (3)	Agriculture	Antidumping SPS Tariff structure

In nearly every country across trading volume size, agriculture and textiles are noted as sectors of concern, while antidumping, government procurement, intellectual property, and import restrictions are leading trade matters of concern.

Each year, the TPRM prepares an annual report to the General Council that highlights the value of the reviews to the members, the cost effectiveness of the process, and the procedural improvements made. The evaluative aspects of these reports are discussed later; the key issues raised in the annual TPRM reports for 1997-2003 are summarized in Table 4.5.

Table 4.5: Summary of Key Issues Raised in TPRM Annual Reports⁴⁶

ISSUE	1997	1998	1999	2000	2001	2002	2003
Antidumping & countervailing duties	*	*		*	*	*	*
Competition & investment policy	*	*	*	*	*	*	*
Customs clearance, duties, & valuation		*			*	*	*
Economic performance/Financial crisis	*	*	*				
Government procurement	*			*	*	*	*
Implementation of WTO agreements							*
Import & export restrictions; licensing				*	*	*	*
Intellectual property/TRIPs	*	*	*	*	*	*	*
Nontariff measures		*	*				
Regional v. unilateral, bilateral, and multilateral trade policymaking	*	*		*	*	*	*
Sectors: Ag., motor vehicles, textiles/clothing	*	*	*	*	*	*	*
Services/GATS			*	*	*	*	*
Special & differential treatment		*	*				*
Standards & international norms			*	*	*	*	*
State-owned enterprises	*			*	*	*	*
Subsidies & tax rebates		*		*	*	*	*
Tariffs (peaks, escalation, gaps)	*		*	*	*	*	*
Technical assistance		*	*	*	*	*	*
TBT, SPS, & market access			*	*	*	*	*
Trade liberalization & economic reform	*	*	*	*	*	*	*
Transparency of policymaking	*		*	*	*	*	*

⁴⁶ Annual Reports of the Trade Policy Review Mechanisms, October 28, 1996 (WTO Doc. WT/TPR/27); December 15, 1997 (WTO Doc. WT/TPR/41); January 15, 1999 (WTO Doc. WT/TPR/59); October 7, 1999 (WTO Doc. WT/TPR/69); October 13, 2000 (WTO Doc. WT/TPR/86); September 18, 2001 (WTO Doc. WT/TPR/101); October 11, 2002 (WTO Doc. WT/TPR/122); and October 31, 2003 (WTO Doc. WT/TPR/140).

In a cursory review of this table from the annual reports and the previous tables regarding the top 20 trading nations, it's clear that there is some consistency in the issues that continue to challenge WTO members and the institution. Chapter 5 will review the formal disputes that have been submitted to panels—disputes that are in large part based on the same issues.

The question, then, is whether the TPRM assists countries in not only identifying but *resolving* policy implementation problems. Members clearly benefit from the opportunity for self-analysis and the information gained from this external audit.⁴⁷ According to interviews with representatives of selected countries, the reviews provide valuable input for national policymaking and strengthen internal interagency discussions. For many, a review provides an opportunity to explain national policies and technical needs, and to discuss trade policy with their trading partners. Others describe the process as “trade policy lite,” suggesting that it is a less-than-rigorous examination of countries’ trade policies. The TPR particularly benefits developing countries, in the scope and depth of policy information generated through the process of being reviewed, and in the opportunity to participate in the review of their trading partners. Overall, the process promotes nonconfrontational discussion of key trade issues, de-linked from dispute settlement proceedings, resulting in a comprehensive assessment of where the tensions lie. However, the process clearly does little to help *resolve* key issues that arise, as the TPRM itself is explicitly not meant to be a dispute resolution mechanism. Greater cross-fertilization between the TPRB discussions and other WTO bodies might advance the parties’ ability to resolve these disputes.

WTO POLICY IMPLEMENTATION EVALUATED

The previous sections described the establishment and practice of the TPRM for 15 years, from 1989 to the present. This section discusses three formal evaluation studies prepared during this period. These studies help consider what was expected, and achieved, of the TPR process. First, Asif Qureshi undertook an extensive, scholarly assessment of what effective policy implementation might entail

⁴⁷ This discussion is based on personal interviews with the TPRM staff and WTO missions, as described in Appendix ____.

and what the first few years of the TPR revealed. In 1998 Donald Keesing, of the Institute for International Economics, prepared a study to publicize the TPRM, analyze the practical experience with it to date, and suggest improvements. And in 1999 the TPRB itself presented a five-year review to the Ministerial Conference at Seattle. These three studies are summarized here and then linked with the dispute resolution assessment criteria for the policy implementation phase of this research.

Implementing International Trade Norms: Transparency or Enforcement?

Qureshi devoted a series of writings to the theory and practice of implementation in the GATT/WTO. He first considered whether WTO implementation was oriented to enforcement or transparency,⁴⁸ and he determined that the TPRM affected state behavior both *ex ante* as a “conditioning” mechanism and *ex post* as a “corrective” mechanism.⁴⁹ The conditioning, or pre-emptive influence, worked by establishing norms (adopted as WTO agreements); the corrective function worked as parties evaluated their respective trade policies, were drawn into consultations, and were pressured to reform their trading practices. Qureshi said the impact of a country’s trade policies and practices on the multilateral trading system could be considered in legal, economic, and political terms,⁵⁰ but he notes that the GATT lacks competence in the political sphere. A legal review would inquire whether the country had enacted the necessary laws and regulations to correspond to the respective WTO rules. An economic assessment would consider whether domestic trade policy formed a barrier to international trade, or was discriminatory within the international context. He distinguished between economic analysis (determining the causal relationship between declared national policy objectives and methodology) and economic prescriptions (determining the most efficient means to achieve national policy objectives). Against this framework, Qureshi found that the TPRM exhibited both

⁴⁸ Schermer’s international law commentary notes: “When using the term enforcement, we include all methods which help to realize the application of legal rules made by international organizations. Members will be encouraged to comply with the rules, not only by the possibility of sanctions being imposed for non-compliance but also recognition of violations.” Henry G. Schermer, *International Institutional Law* (Alphen aan den Rijn, The Netherlands: Sijthoff and Noordhoof, 1980), p. 684.

⁴⁹ Qureshi, “The New GATT Trade Policy Review Mechanism,” p. 147, 152.

⁵⁰ *Ibid.*, p. 154.

broad enforcement and transparency qualities, such that “transparency is a pre-condition...and a facet of the enforcement function.”⁵¹

He recommended that the TPRM improve in three areas: data gathering, partnering with accession negotiations, and reviews of developing countries. Regarding data gathering, Qureshi found the country reports quite comprehensive, but framed in general economic terms. More detailed data might be gained, he said, if members and private parties were encouraged (perhaps through anonymity) to bring items to the Secretariat’s attention and if specific follow-up procedures were in place, similar to the IMF’s ongoing surveillance on exchange rate policies. On accession negotiations (the negotiations by which a country becomes a member of the WTO), Qureshi believes that certain preconditions to WTO membership could include more transparent criteria on national trade policy formulation and implementation and administrative decision-making accountability. Lastly, regarding reviews of developing countries, Qureshi emphasized that developing nations have limited access to systematic data or expertise that could help them evaluate the relationship between their economies and the multilateral trading system. For example, a developing country may have great difficulty evaluating the relationship between the revenue it derives from trade-related taxes and its capacity to raise revenue from non-trade-related sources. In some countries, as much as 40 percent of revenue is trade-based, which curtails the ability to reduce tariffs without any alternative source of revenue. In addition, the ability of a developing country to invoke self-help (e.g., antidumping and countervailing measures) is complicated by non-trade political considerations and significant administrative costs.⁵²

Improving Trade Policy Reviews in the WTO

Keesing, an academic and long-time economist for the World Bank, looked at the TPRM’s substantive effectiveness. He noted that while opening trade is advantageous to a country in theory, in practice,

⁵¹ Ibid., p. 159.

⁵² Qureshi, “Some Lessons from ‘Developing’ Countries’ Trade Policy Reviews,” p. 489, 497.

trade concessions hurt certain groups in the economy even as they help others (and help the economy as a whole). Injured groups and industries are often well organized and politically powerful, while those that benefit are neither.... In multilateral trade, countries hold on to their protectionist policies as valuable bargaining chips.⁵³

Domestic politics can make it very difficult for countries to integrate their international obligations. Therefore, some efficient, effective means of mutual surveillance of unbiased information is needed if multilateral trade negotiations are to operate efficiently and fairly. The WTO agreements require that members notify the WTO of all changes in trade policy. But there are problems with submitting all required notifications, and even if notifications are received by the WTO, the Secretariat is overwhelmed with the need to assess and organize the information into a meaningful form for review. The TPRM offers a more comprehensive and cohesive means than notifications for evaluating members' trade policies.

Against this background, Keesing asked: "Are the Trade Policy Reviews sufficiently probing and analytical to provide information of real value? Do they cover all relevant aspects of members' trade? Are they unbiased and objective? Does the WTO devote sufficient resources to the task of conducting the reviews—and to organizing, focusing, and disseminating the information that they generate? Is the potential value of this information to those outside the trade negotiations process being realized?"⁵⁴

Keesing determined that the substance of the reviews was comprehensive, rigorous, analytical, probing, and objective enough, given the quality of information available. He observed that improvements could be made in some quantitative measures and the process could be fine-tuned. He also found that the credibility and sustainability of specific reforms depended on legal infrastructure capacity, in which case the "best course may be to raise doubts softly" and not sour relations with too-harsh comments.⁵⁵ Of particular note is his remark, echoing that of Jeffrey Schott,

⁵³ Keesing, "Improving Trade Policy Reviews," p. 3.

⁵⁴ *Ibid.*, p. 2.

⁵⁵ *Ibid.*, p. 28.

that the “TPRs *neglect to propose alternative approaches of adjustment measures that could be deployed instead of trade restraints*”⁵⁶ [emphasis added]. Keesing said that more focus on specific issues would contribute to the reports’ relevance, but he recognized the problem of balancing the size and detail of the report against its readability.⁵⁷

Keesing commended the number and level of country representatives engaged in the TPRB. He found the institution was fulfilling its responsibilities quite efficiently⁵⁸ and noted a significant benefit to members, especially developing countries. However, he found the

limited dissemination of TPR reports and their findings a major disappointment for those who hoped the TPRM would influence debate on trade policy and practices beyond diplomatic circles in Geneva. Used mainly by insiders in trade negotiation process, especially country delegations, and so benefits beyond this inner circle are only seen as spillovers. The External Relations Division is responsible; their help is critical if TPRs are to systematically influence policymakers in member countries and beyond.⁵⁹

Keesing recommended that the WTO disseminate the TPR reports more widely by targeting business writers, trade and industry associations, chambers of commerce, labor experts and lobbyists, political leaders, and advisors, rather than relying on indirect information flows.⁶⁰

Keesing concluded with several recommendations. First, that the TPRM be supplemented with an advisory committee of a dozen renowned trade economists and policy experts who could support the work of the TPRB with advice on improving the substance and methodology of the TPR process and dissemination of the reports. Substantively, he said that the costs of protectionism needed to be quantified more concretely, and that alternative transitional policies should be developed for

⁵⁶ Ibid., p. 33. See Jeffrey Schott, *The Uruguay Round: An Assessment* (Washington, DC: Institute for International Economics, 1994).

⁵⁷ For example, antidumping, regional and bilateral arrangements, export promotion, corruption, and global problems. Keesing, “Improving Trade Policy Reviews,” pp. 39, 50.

⁵⁸ Keesing noted that, at the WTO, relatively low pay but high expectation of mastery and productivity relative to other international organizations led to high staff turnover. The use of outside consultants was recommended and has since been adopted.

⁵⁹ In a personal conversation I had with a representative of a developing country, the representative noted that, despite the value of the TPR report and process, he did not believe the report was ever read, let alone addressed seriously by his trade minister.

⁶⁰ Keesing, “Improving Trade Policy Reviews,” p. 47.

country members to consider. Lastly, he suggested an increased emphasis on issues that surfaced repeatedly in the policy reviews, dispute settlement panels, and negotiations, including antidumping, regional trade arrangements, export promotion, corruption, and global problems like textiles, motor vehicles, and agricultural tariffs.⁶¹

Appraisal of the Operation of the Trade Policy Review Mechanism - Report to Ministers

In 1999 the WTO Secretariat published a TPRM Appraisal, which focused on whether the TPRM was facilitating countries' implementation of WTO rules, and whether the TPRM served an effective institutional function. The appraisal opened with a restatement of the TPRM mission: to focus on improved adherence by members to rules, disciplines, and commitments already made. It was noted that the TPRM functions were effectively met and that

its objectives were generally being achieved, although not all members had yet been reviewed... [The] Mechanism had demonstrated that it had a valuable public-good aspect, particularly in its contribution to transparency. The Mechanism had also been a catalyst for Members to reconsider their policies, had served as an input into policy formulation and had helped identify technical assistance needs.⁶²

As for resource efficiency, the TPRM Appraisal reported that TPR staff were using trade-relevant macroeconomic information from other international governmental agencies and retaining outside professional consultants. Information was being increasingly exchanged with other parts of the WTO Secretariat, including the Integrated Framework for technical assistance to least-developed countries, but care was being taken to safeguard restricted information as appropriate. The expense of the TPRM—5 percent of the WTO budget—seemed well spent.⁶³

The Appraisal further noted that the substance of the TPR reports generally reflected a good complement between the Secretariat and the respective government reports, and a balance between

⁶¹ *Ibid.*, p. 51.

⁶² Appraisal of the Operation of the Trade Policy Review Mechanism, Report to Ministers, ("TPRM Appraisal"), WTO Doc. WT/MIN(99)/2, October 8, 1999, pp. 1-2.

traditional and relatively new areas of WTO operation. It was noted that a continuing effort for focus and readability would be sought.⁶⁴

The Appraisal said that the TPRM's meeting schedule balanced the competing considerations of managing a realistic workload but reviewing all members as soon as possible. Meetings were paced over the year, rather than bunched, and deadlines were being better met. The change to two half-day forums with a day in between (for the reviewed country to prepare its responses) had worked well, and the participation of high-level representatives had increased markedly.⁶⁵ There was a desire to make the discussion sessions more interactive.⁶⁶

While the Appraisal is only five pages long and so is not a very detailed assessment, it reflects a positive attitude on the part of the WTO institution and the TPRB leadership that the policy review process serves an important ongoing function, consistent with its mandate. Overall, the TPRM has increased the transparency of domestic trade policy and impact information. The scheduled "external audit" reviews have imposed a useful discipline on members to reexamine and reevaluate their policies, promote nondiscrimination in treatment of trading partners, stimulate interagency discussion and cooperation, and help exporting countries identify barriers to trade.

These three evaluations offer fairly consistent conclusions about the effectiveness of the TPRM. The reviews are considered sufficiently comprehensive, analytical, probing, and objective to promote transparency of domestic trade policies and enhance compliance with WTO obligations. An advisory committee of international experts might guide improvement in the substance, methodology, and dissemination of the reports. On substance, more emphasis could be placed on recurring issues,

⁶³ Ibid, p. 3.

⁶⁴ Ibid, pp. 2, 4.

⁶⁵ One country commented on the importance of the U.S. trade official being present, and that the U.S. example of more regular attendance in the last couple of years had appeared to improve attendance overall.

⁶⁶ TPRM Appraisal, p. 3. Clemens Boonekamp, Director of the TPRM, noted to me that countries increasingly seek reviews and that he meets with the ministers in country as part of the process. He said there has been an increased number of notifications and an increased delivery of technical assistance to least-developed countries. He also noted that developing countries are just beginning to recognize the value of challenging their trading partners, and not viewing the TPRM as a mandatory defense of their own policies. Personal communication, Clemens Boonekamp, April 2001.

such as antidumping and agriculture. On methodology, countries (especially developing countries) would benefit from specific follow-up procedures that include alternative transitional adjustment measures to bring domestic policies in line with WTO requirements, akin to IMF practice. Lastly, broader dissemination of the TPR reports to relevant ministries and industry representatives would increase the likelihood of improved trade policy development.

DISCUSSION

In this discussion I summarize the WTO's experience with policy implementation disputes in the operating committees and the TPRM, and then consider how that experience squares with the hypotheses posed at the beginning of the chapter. Next, I view this experience through the lens of our overarching framework on the role of power, interests, and rights in the dispute resolution processes, and offer a preliminary evaluation against the criteria of costs, outcome, process satisfaction, relationship maintenance, and problem recurrence. The chapter closes with a few observations on how other institutions approach policy implementation, and aspects that might benefit the WTO.

Synthesis of Implementation Experience in Operating Committees and TPRM

Policy implementation concerns how countries domestically adopt rules that they have already agreed upon. Conflict between international commitments and domestic priorities gives rise to disputes, which are identified through surveillance by trading partners and the WTO. The WTO's operating committees and Trade Policy Review Mechanism provide the primary means of surveillance.

The WTO's several operating committees provide the first line of monitoring. They are charged to manage and consult about the operation and implementation of various issue areas, such as intellectual property, subsidies, and government procurement. These committees meet periodically to consider members' transposition of international rules into domestic law, notifications of trade measures to the WTO, and application of the rules in specific instances. Most committees have noted a consistent problem of noncompliance with these reporting requirements. With limited staffing,

committees lack capacity to assimilate these notifications very deeply and handle more than the crisis of the moment. While committees provide a relatively low-cost, informal forum to condition compliance and help adjust members' behavior in accordance with the rules, they appear to be underutilized.

The TPRM was specifically established to facilitate members' adherence to the GATT rules, increase the transparency of national trade policy practice, and improve the quality of debate and collective assessment of policies. Members are subject to periodic reviews that are generally considered to be valuable educational exercises in both their preparation and the ensuing discussion among trading partners. Structured as a diplomatic peer review process, the TPRM provides bi-directional signals to trading partners on practices that cause concern and on the feasibility of implementation given a country's particular pressures.

We now return to the hypotheses raised at the beginning of this chapter.

Assessing the WTO's Experience Against the Hypotheses

Test Hypothesis 1: A rights-oriented surveillance process is likely to be more successful if universal, periodic, and transparent.

When nations agree on a set of international rules, such as the WTO agreements, it is expected that those nations will take whatever action is required to make the international rules effective domestically. In the WTO, implementation is explicitly assessed in two ways: operating committees for the various topical areas and the TPRM. Legal rights and obligations form the frame of reference for both. Each country is obligated to report to committees on whether it has adopted national legislation consistent with its obligations under each WTO agreement; further, in many cases, it is obligated to notify the committees of any relevant measures in effect. If a country requires technical assistance, this is available through the WTO and the Secretariat. This self-reporting obligation is not controversial, yet notification noncompliance is endemic. Notwithstanding the

universal, periodically prescribed, and transparent characteristics of this process, the surveillance function is hampered by noncompliance.

The TPRM is organized by country rather than by topical issue. The trade policies of up to 16 countries are reviewed each year according to a prescribed procedure. The reviewed country prepares an extensive report according to a specified outline that requires coordination among several ministries. The TPR professional staff, who are economists by training, prepare a report as well. Both the country and Secretariat reports are circulated to all WTO members, who are all invited to participate in a two-day review session. The TPR Chairman's summary report of the review meeting highlights findings that usually include both compliments on progress and recommendations on sectoral issues and trade policies that bear improvement. The TPR process is explicitly prohibited from exerting any enforcement action; it is intended to increase transparency of domestic trade policies in order to facilitate adherence to the WTO rules. No country has refused to participate in its review. In the review forum, which involves universal participation (in that all countries are subject to review and all countries participate in reviews) and is a periodic and transparent process, sufficiently detailed information is garnered in order to analyze the trade policies of the reviewed country in an unbiased fashion.

Hypothesis 1 appears to capture elements that are necessary, but not sufficient, for effective surveillance. An additional quality of the surveillance process is that it be clearly targeted to each individual country, such that the target country cannot easily evade its obligations without provoking a publicly noticeable reaction. Further, the higher the value of the information-gathering and analysis process to the target, the less likely is resistance. Therefore, the process should serve not only the interests of the institution in ascertaining the progress of a country in implementing agreed-upon rules, but should enable the reviewed country to better manage its trade policies.

Test Hypothesis 2: The resolution of implementation problems will be enhanced by a process that allows for the exploration of a range of transitional options to bring the party into compliance.

The mandates of the operating committees are certainly broad enough to contemplate formal and informal consultations on implementation problems. Without a more detailed study of the committee discussions through analysis of meeting minutes and participant interviews, however, this research is inconclusive as to how well the committees could function to facilitate substantive and procedural compliance. One committee did note a highly successful seminar on preparing notification reports,⁶⁷ so perhaps more individualized capacity-building efforts might be effective.

The TPR process has been reviewed in more detail, in both this and other studies. Evidence from the summary reports, personal interviews, and the literature indicates that TPRs are quite valuable in identifying implementation issues, but lack the structure and commitment to solve identified problems. A country under review has an opportunity to explain barriers to implementing WTO policy, but there is no designated time to propose and evaluate alternative strategies to overcome such barriers, no options developed for transitional measures, nor any specific obligation to report back on efforts made to act on recommended improvements. Hypothesis 2 is thus indirectly confirmed: the absence of an opportunity to explore options for resolution and prescribe a follow-up time appears correlated with the failure to resolve policy implementation disputes.

Second-Order Disputes and the Power-Interests-Rights Framework

Policy implementation disputes are identified through a hybrid rights and interests process that is meant to bring the parties' behavior into the open for appropriate scrutiny. Rules (rights) dictate the timing, scope, and terms of reference of the process, and members' behavior is measured against existing rules. However, if there is a gap between a country's assessed and expected performance—whether for political, economic, or social reasons—there is no structured process to sort out feasible options for overcoming the deficit. Operating committees appear to offer a forum for education and discussion at a general level. The Trade Policy Reviews provide a more individualized approach that

⁶⁷ 2003 Report of the Committee on Subsidies and Countervailing Measures, paragraph 10, WTO Doc. G/L/65, November 4, 2003.

involves extensive time and technical resource investment—and elicits a much more comprehensive response. The operating committees are more rights-driven, but lack enforcement power, and so result in only moderate compliance. The TPR process is motivated by rights as well, but also serves the interests of the institution, the reviewed country, and its trading partners. By increasing the transparency of a country's trade policies, the institution's mandate is advanced and countries are pre-conditioned to compliance and discouraged from defection. The reviewed country participates in a rigorous review of its own policies that contributes to coordination among its affected ministries, plus the country can explain certain policies that may be provoking trading partners. Trading partners have an opportunity to raise questions in a softer tone than filing a complaint directly against the country.

Assessment of Second-Order Dispute Resolution against Dispute Resolution Criteria

The existing WTO processes for dealing with second-order disputes are here preliminarily assessed against the dispute resolution criteria introduced in Chapter 1: transaction costs, satisfaction with outcome and with process, effect on relationships, and recurrence of disputed issues. A more detailed analysis appears in Chapter 6, when the processes for first-, second-, and third-order dispute resolution are compared.

Transaction Costs. Institutional theory points out the efficiency of reducing transaction costs of interaction among members of a multilateral regime. The WTO has no central enforcement authority; rather, the burden falls to individual countries to complain if they believe their rights under the agreements have been impaired. Trading partners can complain formally, through the Dispute Settlement Understanding (DSU), or more informally during operating committee meetings or the TPR process. Generally, more informal processes are less costly in terms of bureaucratic costs (e.g., information-gathering and preparation), as well as legal, economic, diplomatic, and opportunity costs. Over a continuum of formality and costliness, operating committees and the TPRM are significantly less costly (in bureaucratic and diplomatic terms) than the DSU. Even so, the level of noncompliance on notifications in the operating committees suggests that the cost of such notifications are not

insignificant and the incentive to defect exists. In the TPR, trading partners criticize with care, in part due to concern for reciprocal treatment, especially with regard to developing countries who are dependent on their larger trading partners.

Satisfaction with Outcome. The operating committees enjoy moderate success in getting countries to notify about their implementation efforts. Countries generally commend the TPR process as a highly valuable exercise, especially for developing countries. If the process were modified to address the resolution of implementation problems, it would likely benefit from increased satisfaction. Recall that, as discussed in Chapter 3, the inability of many GATT members to implement provisions of the Tokyo and Uruguay Rounds became a negotiating issue itself in subsequent negotiations (Uruguay and Doha, respectively).

Satisfaction with Process. Both the operating committees and the TPRM provide for universal participation, are routinized processes, and promote transparency of trade policy in a nonadversarial way. Dissatisfaction is more directed at deficiencies in resolving the implementation problems, not at their diagnosis.

Effect on Relationships. By virtue of the universal participation and ongoing nature of committee operations, and the nonadversarial orientation of the TPRM, relationships are at least not harmed in these processes. If the processes could be modified to develop feasible options for more countries to implement their obligations, trading relationships would likely be improved.

Recurrence. The recurrence of policy implementation issues is a problem. The TPR is excellent at eliciting enough information and engaging enough people to recognize what the implementation problems are. Agriculture, antidumping, intellectual property, and government procurement are among the issues that consistently surface as problems for large, medium, and small countries, developed and developing, year after year. So parties know what the problems are, but they have been unable to sort out how to remove the barriers to implementation.

The WTO, through its operating committees and TPR process, manages to diagnose a wide range of policy implementation disputes, but has developed only limited capacity to resolve them.

The consequence of this resolution void is that the burden shifts from a multilateral institutional initiative to individual trading partners having to complain about perceived policy violations. While there is a legitimate concern about the TPR veering into the enforcement realm, countries might usefully explore the experience of other institutions on ways to improve.

Policy Implementation in Other Venues

The WTO might consider the experience of other institutions in facilitating the resolution of policy implementation, including the Climate Change Convention, the International Monetary Fund, the United Nations High Commission for Refugees, and the WTO's own Textile Monitoring Board.

Reporting provisions are a key part of the Framework Convention on Climate Change. The Convention itself represented an international agreement that climate change was a significant issue and that countries would negotiate the reduction of their anthropogenic emissions. As a first step in achieving that aim, countries were required to communicate:

- A) a detailed description of the policies and measures [they have] adopted to implement [their] commitments...; and
- B) A specific estimate of the effects that the policies and measures...will have on anthropogenic emissions by sources and removal by sinks [by the end of the present decade].⁶⁸

Thus, the starting point was a transparency strategy to generate the reporting of actions taken and contemplated, and their estimated effect to advance the purposes of the Convention. Key here was a conscious reporting strategy to achieve transparency on various countries' contribution to resolving the problem.

The IMF was established to promote international cooperation in monetary policy. Members contribute to a pool of currencies, proportionately to their economic importance. Countries may seek to draw against the pool during periods of adjustment. The IMF exercises "firm surveillance over the

⁶⁸ United Nations Framework Convention on Climate Change, Articles 4 and 12.

exchange rate policies of members” by conducting routine consultations with each member.⁶⁹ The review involves consultations by the IMF staff with the country’s government officials. When a country negotiates a draw, the conditions are set forth in a letter of intent. The Fund uses argument, advice, influence, and persuasion to induce debtor governments to comply with those commitments and preserve their drawing privileges. The IMF’s success in influencing countries’ fiscal policies is due largely to its control over resources, but in some part to its managerial skill through policy dialogue that is evidenced in concrete terms.⁷⁰

A third example of monitoring policy implementation comes from an innovation of the United Nations High Commission for Refugees, called the “Ladder of Options,”⁷¹ which lays out a series of steps to take in high-conflict situations. This approach seeks to establish an early warning and prevention strategy in circumstances of refugee insecurity, using the human and physical resources available from both international organs and a host country to take preventive actions and monitor progress. One critic has said, the “ladder here is long on fact-finding and short on fact-facing.” Problems that emerged did not “lack of information; it was a lack of interest on the part of those states with the capacity to stop the [refugee] manipulation.”⁷² The notion of a “ladder of options” is appealing, but requires a political willingness by partners to engage and act.

A final example comes from the Textile Monitoring Board. When the GATT was first adopted in 1947, textiles and clothing were exempted from the trade rules. Even by the time the Uruguay Round was launched, the textiles and clothing sector was still barely regulated by the GATT. Included in the Uruguay Round was an Agreement on Textiles and Clothing (ATC) that would phase this sector into the discipline of other products by January 1, 2005. The ATC established

⁶⁹ IMF Agreement, Article IV.

⁷⁰ Chayes and Chayes, *The New Sovereignty*, p. 242.

⁷¹ *The Security, Civilian and Humanitarian Character of Refugee Camps and Settlements: Operationalizing the ‘Ladder of Options’*, UN Doc. EC/50/SC/INF.4, June 27, 2000; and Stephen John Stedman and Fred Tanner, eds., *Refugee Manipulation: War, Politics, and the Abuse of Human Suffering* (Washington, DC: Brookings Institution Press, 2003), pp. 180-183.

⁷² Stedman and Tanner, *Refugee Manipulation*, p. 182.

the Textile Monitoring Board (TMB) “in order to supervise the implementation of this Agreement.”⁷³ The TMB is to be balanced and broadly representative, with a chairman and 10 members who are appointed by Members of the Council for Trade in Goods to serve in their personal capacity.⁷⁴ Critics note that the TMB is neither balanced nor representative, but it accepts the political reality of the more powerful actors playing a dominant role. As the TMB has no adjudicatory role or enforcement power, its recommendations are not binding. The TMB makes decisions by consensus and met 10 times during 2003 to review notifications and communications received from members relative to the stages of integrating textiles into the GATT. The TMB issues recommendations to members who are called upon to endeavor to accept them in full.⁷⁵ Such recommendations are based on consultations among the direct and affected parties to consider their capacity and interests to reach mutual resolution if possible. Historians of the ATC’s predecessor note that, “Practically all recommendations made were accepted and acted upon by the participants concerned, even if at the same time many rulings by GATT panels were being ignored by the ‘losing side.’”⁷⁶ There remains a tension over how to proceed when a member is unable to conform with a TMB recommendation: should the “unresolved issue” be reviewed again by the TMB or moved to another forum (i.e., the WTO’s Dispute Settlement Body)? Thus the TMB appears to sit unsteadily on the edge of implementation surveillance and enforcement.

Points from each of these examples have been or could be incorporated into the WTO’s policy implementation process. The TPR reviews do generate a detailed assessment of the nature and source of national implementation problems, which can be seen as good “fact-finding.” A more structured phase of “fact-facing” might be managed by a balanced and representative group of implementation experts who could further assess the capacity and interests of the reviewed country,

⁷³ Agreement on Textiles and Clothing, Article 8(1).

⁷⁴ At the beginning of 2003, the following WTO members appointed individuals to serve on the TMB: Canada, China, the European Communities, Hong Kong China, India, Indonesia, Japan, Peru, Turkey, and the United States.

⁷⁵ Marcelo Raffaelli and Tripti Jenkins, *The Drafting History of the Agreement on Textiles and Clothing* (Geneva: International Textiles and Clothing Bureau, 1995), p. 119.

explore alternative strategies (a “ladder of options”), draft an undertaking of specific measures for the country to pursue, and then monitor and reassess follow-up progress. The relationship between the resolution of these second-order disputes and that of first- and third-order disputes will be discussed further in Chapter 6.

⁷⁶ *Ibid.*, p. 119.

CHAPTER 5: THIRD-ORDER DISPUTES: POLICY ENFORCEMENT

This chapter examines the WTO's processes for dealing with third-order disputes—those involving the enforcement of policies agreed to by WTO members. As described in Chapter 2, third-order disputes surface when a member country believes that its rights under the GATT/WTO agreements have been nullified or impaired and gives formal notice to the offending country. As in our bipartite analysis of disputes in which diagnosis precedes resolution, the complaining country diagnoses the problem, and the WTO institution provides a range of processes to resolve the problem.

This chapter includes five sections. In the first I review the theory of dispute settlement relative to these kinds of disputes, and in the second I pose three hypotheses. In the third section I describe the mechanics of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (known as the Dispute Settlement Understanding, or DSU) and the cases filed from January 1995 through December 2003.¹ The fourth section summarizes critiques of the DSU by scholars and WTO members. The fifth and concluding section is a discussion of the data and critiques relative to the hypotheses.

POLICY ENFORCEMENT: THEORIES OF DISPUTE SETTLEMENT

The GATT's and WTO's practices for handing third-order disputes have been the most-utilized international dispute settlement procedures in the world, and as such they have been extensively studied and reviewed. Before reviewing various commentaries, however, it is important to consider their underlying objectives. Third-order disputes at the WTO are those geared to enforce the obligations agreed to by member countries as part of the overall rule orientation of the trading institution. The choice in the 1947 GATT of a rule-based regime over a power-based one marked the

¹ Appendix I lists the dispute settlement provisions of the WTO agreements. Appendix II provides an overview of the cases filed with the DSU.

beginning of a trend that has continued over the past 50 years. Recall that GATT 1947 provided for the following:

Article XXII: 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 PARTIES² 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.

Article XXIII: 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..., the contracting party may...make written representation...to the other contracting party...which it considers to be concerned....
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time...the matter may be referred to the CONTRACTING PARTIES...[who] shall promptly investigate...and shall make appropriate recommendations...or give a ruling on the matter, as appropriate...[or if they] consider that the circumstances are serious enough to justify such action, they may authorize a contracting party...to suspend the application to any other contracting party...of such concessions...under this Agreement.

Under these provisions, and without the planned-for International Trade Organization to provide institutional support, the members of the GATT developed their own practices for resolving disputes as they arose. Robert Hudec wrote that a “diplomat’s jurisprudence” characterized the procedures until the 1970s.³ Given limited procedural rules and a fairly homogenous group of parties,

² Recall that the capitalized term “CONTRACTING PARTIES” means the contracting parties acting jointly as a body pursuant to Article XXV.

³ Robert Hudec, “The GATT Legal System: A Diplomat’s Jurisprudence,” *Journal of World Trade Law* 4, (1970): 615.

disputes were handled by the Director-General, the working parties, and eventually by panels, in a manner that wrapped law in diplomacy.

In the 1970s, however, several pressures surfaced. Nontariff barriers, which are more complicated means than tariffs to impair trade benefits, called for more sophisticated legal rulings. Also, the United States and the European Community more aggressively pursued claims, so that it became harder to finesse the decisions. At the Tokyo Round, therefore, the evolving, de facto panel process was reduced to written agreement.⁴ Hudec noted:

Although the procedure was not compulsory, defendant governments invariably decided to cooperate with it, under the pressure of a strong community consensus that every GATT member should have a right to have their legal claims heard by an impartial third-party decision-maker.... Once the community arrived at a consensus that the ruling was correct, it did not seem to matter greatly whether the defendant blocked formal approval.⁵

As important as enforceability, Hudec said, was the “political will of governments who wanted to have a legal order in this area.” He explained: “Governments wanted to have effective restraints on every government’s behavior, including their own.... The GATT’s two largest superpowers—the United States and the European Community—also wanted this kind of regulatory system.”⁶

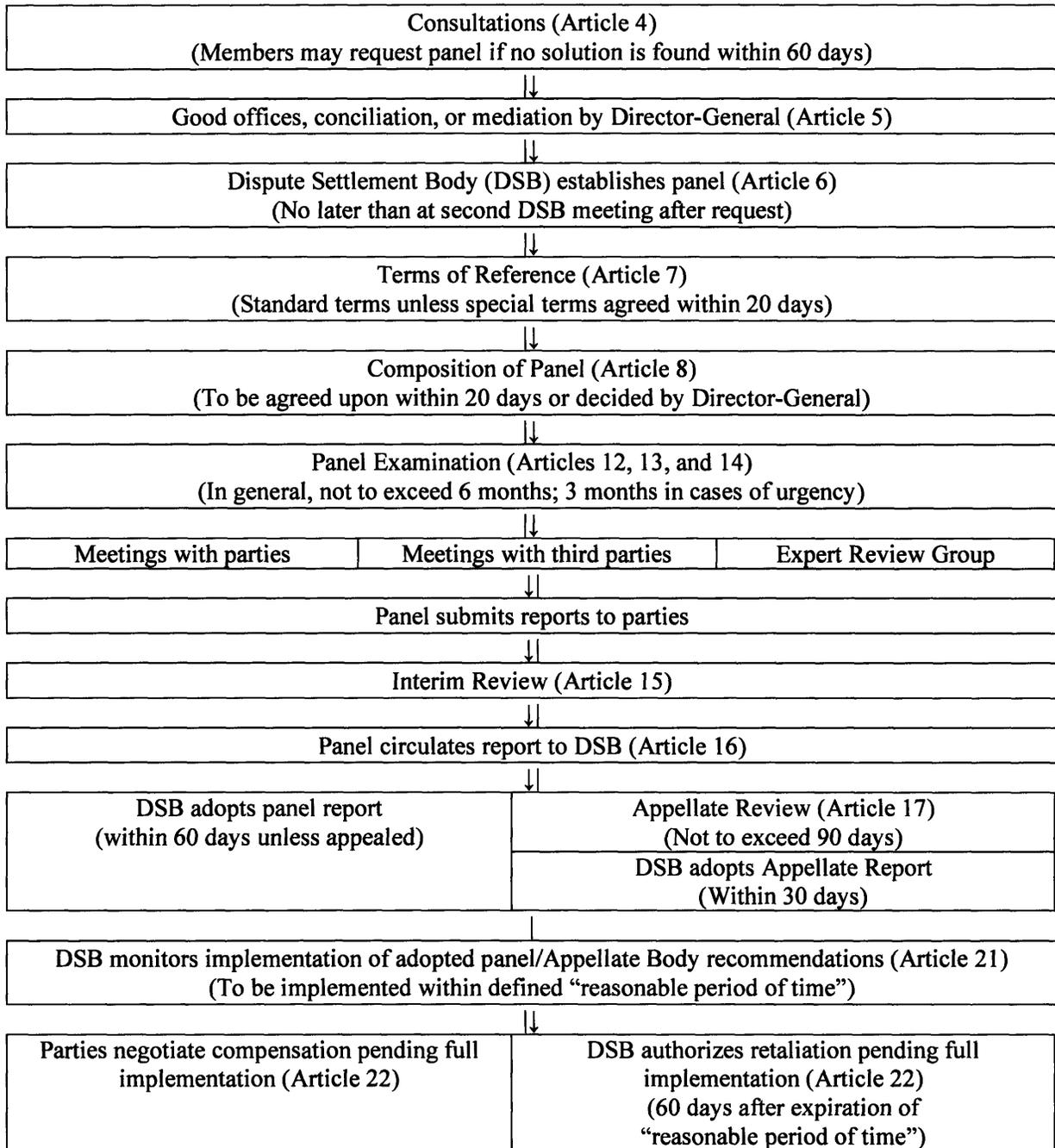
In the Uruguay Round in 1994, WTO members amended and memorialized these adjudication procedures in the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU). The key features of the DSU were several: the right to bring a complaint; a binding ruling on the parties; appellate review; and the right to impose sanctions for noncompliance with a ruling. Figure 5.1 lays out the sequence of the DSU’s procedures.

⁴ GATT, *The Agreed Description of Customary Practice and the Understanding on Dispute Settlement, Basic Instruments and Selected Documents*, 26th Supplement 210-219, 1980. Most of the plurilateral agreements signed at conclusion of the Tokyo Round had their own dispute settlement procedures.

⁵ Robert Hudec, “The New GATT/WTO Dispute Settlement Procedure: An Overview of the First Three Years, 1995-1998,” *Minnesota Journal of Global Trade* 8 (1999): 1, 6.

⁶ *Ibid.*, p. 7.

Figure 5.1: Flowchart of the WTO's Dispute Settlement Procedures⁷



⁷ WTO Agreement, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes.

Figure 5.1 reveals that the DSU procedures offer a very legalistic approach to resolving disputes, which prompts one to assess the goals of the procedures and whether the shift from diplomatic to legal means was effective. The DSU could aspire to a number of possible goals, which I have categorized as pragmatic, institutional, and legal.

At a pragmatic level, the goal of the WTO's dispute settlement procedures may be simply to solve problems raised by one country about another's behavior. To do this requires resources for assessing the facts and a process for engaging the parties so that they can feasibly preserve their underlying rights and obligations under the WTO Agreement. Negotiation, conciliation, good offices, and mediation are all processes by which parties can pursue agreement by probing their respective interests and exploring options for resolution. Within the framework of rights, interests, and power, these approaches would value diplomacy and compromise to accommodate essential interests, but they are admittedly still shaped by the power balance between the parties.

If institutional integrity is the primary goal, then both quality of process and compliance with rules—manifested as the changed behavior of governments—would be important. Compliance draws upon issues of capacity, legal determination, and enforceability. Process concerns transparency, perceptions of fairness, and an opportunity to assess evidence with adequate technical input, all of which have to be managed in a way that reduces the transaction costs associated with enforcement. The institution's interest is in preserving itself and in maintaining its *raison d'être*: stable economic relations among its members.

If the goal is legal legitimacy, then dispute settlement has both substantive and procedural facets. Lawrence Helfer and Anne-Marie Slaughter analyzed in detail the qualities of effective supranational adjudication; they found that authoritative, impartial tribunals that issue final rulings have the most legitimacy.⁸ Other aspects of adjudication—for example, the professionalism of the panelist-adjudicators, the transparency of the decision-making process, and the access of affected

⁸ Lawrence Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107 (1997).

stakeholders to the process—have been discussed as well and will be considered in more detail below. Critics appear to conclude that if the legal quality of the process is improved, the ensuing decisions will have more legitimacy. Determining the lawfulness of a nation's behavior, decreasing the ambiguity of the law, making application of the rules more consistent, and ensuring coherence with international law are all legal issues that would benefit from an approach that is oriented to answering legal questions. Here, then, the determination and preservation of rights dominates individual interests and would appear to discipline overt power moves.

Thus the settlement of third-order disputes has multiple objectives that are weighted differentially under varying circumstances. Three hypotheses are posed below.

HYPOTHESES

Test Hypothesis 1: Legal Legitimacy

I posit that the more transparent, authoritative, and explicit the legal procedures for resolving disputes at the WTO, the more likely it is that member countries will perceive the institution as legitimate, and thus the more likely it is that countries will comply with their obligations. *Test Hypothesis 1: The more explicit the legal procedures for enforcement, the more likely that countries will comply with their obligations.*

Test Hypothesis 2: Resource Capacity

A country is more likely to ensure that its rights under the WTO Agreement are protected if it has access to adequate legal expertise and financial resources. *Test Hypothesis 2: Increased access to legal, financial, and technical resources will increase the ability of countries to enforce their rights.*

Test Hypothesis 3: Alternative Dispute Resolution

Research suggests that noncompliance occurs not only under conditions of legal uncertainty, but in conditions of economic and political incapacity.⁹ If compliance is the objective, then legal enforcement alone may not be sufficient to solve the problem. Alternate resolution processes that consider individual and collective interests and generate options for achieving compliance are more likely to be effective. *Test Hypothesis 3: An array of direct and facilitated resolution procedures will increase the opportunity for parties to resolve problems of noncompliance.*

POLICY ENFORCEMENT PRACTICE UNDER THE DSU

From January 1995 through December 2003, 304 complaints were notified to the WTO.¹⁰ These complaints are the “disputes” that are contemplated in dispute settlement studies. To analyze these 304 complaints, I have first analyzed the parties involved according to their proportion of world trade. Countries in Tier 1 include the top four trading nations: the European Union, United States, Canada, and Japan; Tier 2 includes the next 16 largest trading nations (both developed and developing countries); and Tier 3 includes the remaining 126 countries in the WTO. I have then analyzed the issues in dispute according to GATT 1994 provisions and the 15 ancillary agreements. And I have assessed to what stage each dispute progressed: mutual consultation, panel review, appellate review, or decision implementation. The tables in this section summarize my analysis. Tables 5.1, 5.2, and 5.3 provide summary statistics on *who* filed complaints and against whom; Table 5.4 summarizes *what* the disputes were about; and Table 5.5 summarizes *how* the disputes were resolved. The statistics compiled for these tables are based on the total number of disputes filed and do not combine cases that were considered together by a single panel. (Such combined cases are referred to “separate distinct matters” in the DSU overview reports.)

⁹ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

¹⁰ The data in this section were compiled from the WTO’s Dispute Settlement website (www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes) and DSU annual reports. See Appendix ___ for detail on the 304 complaints.

Table 5.1: Who Files Complaints Against Whom, according to Developed and Developing Status¹¹

	1995	1996	1997	1998	1999	2000	2001	2002	2003	TOTAL
# of Disputes	22	42	46	44	31	30	27	34	28	304
I Complainants	13 (59%)	27 (64%)	38 (83%)	35 (80%)	24 (77%)	16 (53%)	5 (18%)	16 (47%)	10 (36%)	184 (60%)
D Complainants	8 (36%)	13 (31%)	8 (17%)	9 (20%)	6 (19%)	14 (47%)	20 (74%)	18 (53%)	18 (64%)	114 (38%)
I & D Complainants	1 (4%)	2 (5%)	0 (0%)	0 (0%)	1 (3%)	0 (0%)	2 (7%)	0 (0%)	0 (0%)	6 (2%)
I Respondents	17 (77%)	21 (50%)	26 (56%)	33 (75%)	17 (55%)	11 (37%)	14 (52%)	28 (82%)	18 (64%)	185 (61%)
D Respondents	5 (23%)	21 (50%)	20 (43%)	11 (25%)	14 (45%)	19 (63%)	13 (48%)	6 (18%)	10 (36%)	119 (39%)
I v. I Disputes	11 (50%)	14 (33%)	18 (39%)	26 (59%)	15 (48%)	7 (23%)	7 (26%)	14 (41%)	7 (25%)	119 (39%)
I v. D Disputes	3 (14%)	15 (36%)	20 (43%)	9 (20%)	10 (32%)	9 (30%)	0 (0%)	2 (6%)	3 (11%)	71 (23%)
D v. I Disputes	6 (27%)	7 (17%)	8 (17%)	7 (16%)	2 (6%)	4 (13%)	7 (26%)	14 (41%)	11 (39%)	66 (22%)
D v. D Disputes	2 (9%)	6 (14%)	0 (0%)	2 (4%)	4 (13%)	10 (33%)	13 (48%)	4 (12%)	7 (25%)	48 (16%)

¹¹ "I" represents developed, or industrialized, countries. "D" represents developing countries.

Table 5.2: Who Files Complaints Against Whom, according to Size of Trading Economy

	1995	1996	1997	1998	1999	2000	2001	2002	2003	TOTAL
# of Disputes	22	42	46	44	31	30	27	34	28	304
Tier 1 Complainants	13 (59%)	29 (69%)	34 (74%)	31 (70%)	21 (68%)	16 (53%)	6 (22%)	12 (35%)	8 (28%)	170 (56%)
Tier 1 Respondents	14 (64%)	20 (48%)	19 (41%)	22 (50%)	15 (48%)	10 (33%)	13 (48%)	26 (76%)	15 (54%)	154 (51%)
Tier 2 Complainants	4 (18%)	9 (21%)	7 (15%)	9 (20%)	8 (26%)	9 (30%)	11 (41%)	12 (35%)	11 (39%)	80 (26%)
Tier 2 Respondents	8 (36%)	17 (40%)	14 (30%)	9 (20%)	6 (19%)	5 (17%)	4 (15%)	4 (12%)	7 (25%)	74 (24%)
Tier 3 Complainants	5 (23%)	4 (9%)	5 (11%)	4 (9%)	2 (6%)	5 (17%)	10 (37%)	10 (29%)	9 (32%)	54 (18%)
Tier 3 Respondents	0 (0%)	5 (12%)	13 (28%)	13 (30%)	10 (32%)	15 (50%)	10 (37%)	4 (12%)	6 (21%)	76 (25%)

Table 5.3: Disputes in which Other Countries Had a Substantial Interest

	1995	1996	1997	1998	1999	2000	2001	2002	2003	TOTAL
# of Disputes	22	42	46	44	31	30	27	34	28	304
Cases with Requests to Join ¹²	12 (54%)	21 (50%)	25 (54%)	20 (45%)	16 (52%)	11 (37%)	15 (55%)	24 (70%)	11 (39%)	155 (51%)

¹² Article 10 of the DSU provides that, "Any Member having a substantial interest in a matter before a panel...shall have an opportunity to be heard" and may request to join.

Table 5.1 reveals a significant variation over the years covered, with few obvious trends over time. Developed countries do consistently bring more complaints: 60 percent overall, ranging from 18 percent to 83 percent each year, but with no particular trend over time. Developing countries initiated action in 38 percent of cases overall, ranging from 17 percent to 74 percent of the cases each year. In comparison, Hudec's landmark study of the GATT's early dispute settlement history—from 1947 to 1989—noted that 207 disputes were filed during that period. Four developed countries (Australia, Canada, the European Community, and the United States) brought 73 percent of the disputes. Only 17 of the 207 disputes involved neither the United States nor Europe. Developing countries filed 19 percent of the complaints during that time.¹³

On the respondent side, developed countries were respondents 61 percent of the time in the recent period I studied, ranging from 37 to 82 percent each year; developing countries were respondents in 39 percent of the cases, ranging from 18 to 63 percent. During the GATT period, four developed countries (the United States, European Community, Canada, and Japan) were respondents in 83 percent of the cases, and developing countries were respondents in only 13 percent of the cases. The majority of GATT contracting parties (105) never participated in any dispute.¹⁴

By combining the complainant and respondent profiles in my research, we see that 40 percent of the disputes filed were between developed countries; 23 percent of the disputes involved developed against developing countries; 22 percent involved developing against developed countries; and 16 percent were disputes by developing against other developing countries. The only noticeable trend was a decreasing number of cases by developed countries against developing countries during the last five years.

Hudec observed that larger countries are less concerned than small countries about retribution that may be provoked by filing a claim. Further, a legal victory requires the prevailing party to exert significant political and economic pressure to ensure that the respondent complies with the DSB

¹³ Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, NH: Butterworth Legal Publishers, 1993), p. 295.

¹⁴ *Ibid.*, p. 295.

recommendation; larger countries can exert such pressure more easily. There is a high incidence of "tit-for-tat litigation," and only countries that can handle the reciprocity tend to initiate complaints. From the defendant perspective, however, larger countries offer the larger and more profitable markets, thus making filing complaints more worthwhile. Additional criticisms and observations will be discussed below.

Table 5.2 describes the disputes in terms of what tier of trade volume the parties represented. Tier 1 countries were complainants in 56 percent of all cases and respondents in 51 percent of all cases during the WTO period of 1995-2003. (Compare this to Hudec's GATT study, in which Tier 1 countries were complainants in 73 percent and respondents in 83 percent of the disputes.¹⁵) In the WTO period, Tier 2 countries were complainants in 26 percent and respondents in 24 percent of the disputes. Tier 3 countries were complainants in 18 percent of the cases, and this figure has been increasing over the last five years. Tier 3 countries were respondents in 25 percent of the cases overall.

Table 5.3 is interesting in that consistently about half of the disputes have involved requests by other parties to join, suggesting a significant collective interest in the target measures, rather than simply bilateral tensions.

We can see from these first three tables, then, that who files complaints against whom has changed somewhat from the GATT period to the WTO period. In both cases, the Tier 1 countries dominate both as complainants and respondents, but less so in the WTO period. During the WTO period, about 40 percent of the disputes are brought by developed countries against other developed countries. Cases of developed against developing, and developing against developed, are both more than 20 percent. Cases involving developing against other developing countries are 16 percent. Thus, the WTO period has witnessed a significant increase in involvement by smaller and developing countries, both as complainants and respondents.

¹⁵ Ibid., p. 295.

Not only is participation more diverse in the dispute settlement procedures today, but the incidence of usage has increased significantly as well. During the GATT period of 1948 to 1994, 277 disputes were filed. During the first nine years of the WTO period, 304 cases were filed. Hudec updated his historical data to look at the first three years of the WTO period and considered several possible contributing factors for this increase in caseload. First, he noted that the increase was likely generated by increased confidence in the dispute settlement procedure as a more effective mechanism to discipline trade restrictions. Second, the Uruguay Round substantially increased members' legal obligations, with services and intellectual property providing the bases for additional causes of action. And third, developing countries' legal obligations were tightened, resulting in their more frequent appearance as complainants and respondents.¹⁶

Table 5.4 reveals that most of the disputes (half to three-quarters) involved provisions of the General Agreement on Tariffs and Trade. Significant numbers of disputes were brought for violations of the Antidumping Agreement (16 percent), the Agreement on Agriculture (18 percent), and the Agreement on Subsidies and Countervailing Measures (17 percent). The next echelon of dispute frequency includes the Import Licensing Agreement (9 percent), Safeguards Agreement (9 percent), Sanitary and Phytosanitary Measures Agreement (10 percent), Trade-Related Intellectual Property Rights (TRIPs) (7 percent), and Technical Barriers to Trade (8 percent).

Not surprisingly, these trade areas correlate precisely with the issues of concern highlighted during the trade policy reviews discussed in Chapter 4. Since the topical areas could be anticipated from policy implementation issues, the question is more the nature of a given dispute: Is it a matter of legal interpretation or clarification? Is it a matter of technical expertise? Or is it a matter of political or economic capacity? The DSU is essentially a "one track system"¹⁷ from which country-complainants seek all of the above. The discussion section below will consider its strengths and limitations in meeting those demands.

¹⁶ Hudec, "The New GATT/WTO Dispute Settlement Procedure," p. 1.

¹⁷ J.G. Merrills, *International Dispute Settlement* (Cambridge UK: Cambridge University Press, 1998), p. 217.

Table 5.4: Which WTO Agreements Formed the Basis for Complaint

	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total
Total # of Disputes	22	42	46	44	31	30	27	34	28	304
GATT	22	30	29	25	19	20	19	31	25	220 (72%)
Antidumping Agreement	0	4	3	6	8	7	9	6	6	49 (16%)
Agmt. on Textiles & Clothing	1	5	2	1	1	4	0	0	0	14 (5%)
Agmt. on Agriculture	5	6	12	7	6	5	1	6	7	55 (18%)
Customs Valuation Agmt.	3	0	0	1	0	3	1	0	1	9 (3%)
DSU	0	1	0	1	1	1	1	0	0	5 (2%)
General Agreement on Trade in Services	1	3	1	3	0	2	1	0	1	12 (4%)
Gov't Procurement Agmt.	0	0	3	0	1	0	0	0	0	4 (1%)
Import Licensing Agmt.	2	1	10	6	3	1	2	2	2	29 (9%)
Rules of Origin	0	0	1	2	0	0	0	1	0	4 (1%)
Safeguards	0	0	2	2	5	3	5	10	2	29 (9%)
Subsidies & Countervailing Measures	1	5	8	12	3	5	6	6	7	53 (17%)
Sanitary & Phytosanitary Measures	5	3	3	5	0	2	1	4	7	30 (10%)
TRIMS	1	7	4	3	1	1	1	2	0	20 (6%)
TRIPs	0	5	4	5	4	2	1	0	1	22 (7%)
Technical Barriers to Trade	0	5	4	5	0	2	3	1	5	25 (8%)
WTO Agreement	0	1	0	2	0	1	5	6	0	15 (5%)

Table 5.5: How Disputes are Resolved

	1995	1996	1997	1998	1999	2000	2001	2002	2003	TOTAL
# of Disputes	22	42	46	44	31	30	27	34	28	304
Mutual Solution	3	7	9	12	0	6	7	4	3	51 (17%)
Panel Established	9	11	21	16	22	12	16	15	19	141 (46%)
Panel Report Issued	0	6	7	10	14	19	7	10	9	82 (27%)
Appellate Body Review	0	2	6	7	10	8	6	8	5	52 (17%)
Arbitration under 21.3¹⁸	0	0	1	3	2	4	5	2	2	19 (6%)
Compliance under 21.5¹⁹	0	0	0	0	1	5	5	2	1	14 (5%)
Arbitration under 22.6²⁰	0	0	0	0	3	2	0	1	1	7 (2%)

¹⁸ Article 21.3 of the DSU provides for an arbitration to determine the reasonable period of time for implementation of the DSB's recommendations. Recall that once a panel or the Appellate Body issues a report, it is given to the Dispute Settlement Body (which is all members of the WTO sitting as the Dispute Settlement Body). Reports are adopted unless there is consensus by all DSB members not to do so. This is the reverse of previous GATT practice. Whatever recommendations are included in the adopted report then become DSB recommendations.

¹⁹ Article 21.5 of the DSU concerns disagreements over whether measures taken bring the responding country into compliance with DSB recommendations. For example, if the DSB recommends that a respondent eliminate or revise an offending trade measure, the complainant may later charge that the changes made did not bring the respondent into full compliance.

²⁰ Article 22.6 of the DSU provides for the DSB to authorize the suspension of concessions or other obligations if a member fails to bring its measure into compliance according to the DSB's recommendations.

Table 5.5 shows at what stage disputes were resolved. Of the 304 separate cases initiated from 1995 through 2003, 17 percent were resolved through mutual agreement. Panels were established for 46 percent of the cases and a panel report issued in 27 percent of the cases (i.e., in 58 percent of the cases for which a panel was established). Of the 82 cases in which a panel report was issued, 52 cases obtained appellate review, which represents 17 percent of the total cases and 63 percent of the cases in which a panel report was issued.

Issues regarding the implementation of DSB decisions fall into three areas: reasonable period of time for implementation; consistency of revised measures with the DSB's recommendations; and the suspension of concessions. Six percent of the cases overall, or 23 percent of the cases for which a panel report was adopted, pursued arbitration under Article 21.3 to determine the reasonable period of time for implementation. Five percent of the cases overall, or 17 percent of the cases for which a panel report was adopted, involved disagreements under Article 21.5 on compliance with a DSB recommendation. Two percent of the cases overall, or 8 percent of the cases for which a panel report was adopted, sought arbitration to authorize suspension of concessions under Article 22.6.

Hudec's recent analysis of GATT disputes in the 1980s and the early WTO period,²¹ and my data for the WTO period to date, are compared in Table 5.6.

Table 5.6: Comparison with Hudec's Research

	GATT 1980-89	WTO 1995-1997	WTO 1995-2003
Cases filed	110	84	304
Cases for which a panel was established	53%	38%	46%
Cases for which a panel report was issued	45%	23%	27%

²¹ Hudec, "The New GATT/WTO Dispute Settlement Procedure," p. 23.

Hudec suggests two hypotheses concerning the lower rate of panel formation and report issuance in recent years.²² First, he argues that the binding quality of the new procedure persuades more parties to reform their practices voluntarily. And second, more governments may be using the filing of a complaint as negotiating leverage.²³ Testing Hudec's hypotheses will require more in-depth interviews and analysis of panel and nonpanel cases, which is beyond the scope of this research.

CRITIQUES OF THE DSU

The WTO's DSU has been subject to intense scrutiny by its own members, other affected stakeholders, and international trade scholars. At the conclusion of the Uruguay Round, for example, Andreas Lowenfeld, a foremost international legal scholar, commented on the challenge facing the GATT/WTO dispute settlement process.

While many believe that GATT dispute settlement should aim at lowering tensions, defusing conflicts, and promoting compromise, others, notably American officials and writers, have looked to the dispute mechanism of GATT as an opportunity to build a system of rules and remedies.... It seems clear that the adjudicatory model prevailed in the Uruguay Round.... If it turns out (1) that the panels operate within the prescribed time tables, (2) that their decisions are respected not only by the parties to a given dispute but by other states considering comparable measures, and (3) that decisions upholding complaints lead to termination of offending measures rather than to retaliation—three sizable ifs—then the prediction will turn out to have been true, and the commitment will continue to grow.²⁴

Lowenfeld's concerns center on well-managed procedures, the enforceability of decisions, and achieving a norm of compliance rather than retaliation. Other scholars' criticisms of the WTO's

²² Ibid., p. 22.

²³ See Marc L. Busch and Eric Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes," *Fordham International Law Journal* 24 (November-December 2000): 1; and Marc Busch and Eric Reinhardt, "Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement," in Daniel Kennedy and James Southwick, eds., *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge, UK: Cambridge University Press, 2002), p. 457. Busch and Reinhardt observe that the cases that ended prior to a panel ruling (67 percent according to their data), concluded with a much higher incidence of full or partial concessions by the defendant than those that proceeded to a panel ruling.

²⁴ Andreas F. Lowenfeld, "Remedies Along with Rights: Institutional Reform in the New GATT," *The American Journal of International Law* 88 (1994): 479, 487.

effectiveness sort into three dimensions: Lowenfeld's predicted issues of procedures and enforcement, plus questions about who has access to the DSU process. Amending the DSU is one of the topics on the Doha agenda, so the status of those negotiations will be reviewed first. I will then review what the recent literature recommends, according to the three dimensions.

Negotiations to Amend the DSU

The Doha Ministerial Declaration included a commitment to negotiate improvements to and clarification of the DSU by a target date of May 2003, in advance of the Cancun Ministerial meeting.²⁵ The May 2003 deadline was extended to May 2004, then extended indefinitely in June 2004.²⁶ In May 2003, Negotiating Committee Chair Ambassador Peter Balas (Hungary) circulated a consolidated negotiating text that included a number of issues, including third-party rights, consultation proceedings, sequencing, remand from the Appellate Body, compensation for litigation costs, and special treatment for developing countries.²⁷ Issues that had been proposed for but were not included in the negotiating text included the formation of a permanent body of panelists, publication of dissenting opinions from the Appellate Body, acceptance of amicus curiae briefs, opening dispute settlement hearings and documents to the public, retroactive remedies, and collective retaliation.

Following the Cancun Ministerial in September 2003, at which little progress was made in the overall Doha negotiations, Mexico prepared a study paper to help focus the discussion about DSU reform and establish some priorities among the issues.²⁸ The Mexico study identified ten major issues, categorized into three areas:

- *Access to the system*: developing country access, internal transparency, and external transparency

²⁵ Doha Ministerial Declaration, paragraph 30, WTO Doc. WT/MIN(01)/DEC/1, November 20, 2001.

²⁶ Special Session of the DSB, May 24, 2004, Report by the Chairman, WTO Doc. TN/DS/10, June 21, 2004.

²⁷ Special Session of the DSB, Report by the Chairman, Ambassador Peter Balas, to the Trade Negotiations Committee, WTO Doc. TN/DS/9, June 6, 2003; and WTO Doc. JOB(03)69/Rev.2.

²⁸ *Diagnosis of the Problems Affecting the Dispute Settlement Mechanism: Some Ideas by Mexico*, paper presented to the special negotiating session of the WTO Dispute Settlement Body, November 13, 2003.

- *Procedural issues*: professionalism in panelists, timeframes, ADR, control of disputes, and miscellaneous
- *Compliance*: enhanced compliance, limits to the application of remedies

For each issue, the Mexico study identified the fundamental problem, considered specific proposals to solve the problem, and described the significance of the problem in view of actual experience. Of the ten identified issues, the study observed that some had only limited significance in practice, but that “noncompliance (both a priori and a posteriori) is the most important problem of the dispute settlement mechanism.”²⁹ The problem areas from the Mexico study are consistent with both Lowenfeld’s predictions and the literature. The following sections integrate these criticisms according to the three dimensions mentioned previously: access to the DSU, procedures, and enforcement.

Access to the DSU

Three issues are of concern regarding access to the DSU process. First is the ability of developing country members to raise complaints and obtain effective results. The other two are the ability of other WTO members and interested nongovernmental parties to participate in the DSU process.

Developing countries face significant barriers to engaging in the WTO’s dispute settlement process. As indicated in the data summary above, the proportion of complaints filed by developing countries has increased over the WTO’s period of operation, but it still represents one-third fewer cases than those initiated by developed countries. The Mexican study looked at WTO membership participation in the DSU and found the following: Of the 29 developed countries,³⁰ 11 had initiated a dispute; of the 72 developing countries, 28 had initiated a dispute; and of 30 least-developed countries (LDCs), none had initiated a dispute.³¹ Despite developing countries’ reliance on trade as a significant proportion of their economies, they are not resorting to the DSU at a level commensurate

²⁹ *Ibid.*, p. 14.

³⁰ The WTO includes 146 members, but for these figures the European Community is counted as one rather than 15 separate members.

³¹ *Some Ideas by Mexico*, p. 4.

to that of developed countries, and LDCs are not using it at all. The reasons for this are twofold: the financial expense of litigation, and pressure from more powerful trading partners. Countries with limited domestic legal expertise must retain counsel in Washington, DC, or Brussels. Moreover, administrative resources for identifying and preparing the factual cases are scarce.³²

The WTO has taken some steps to address these barriers. For example, the WTO established an Advisory Centre on WTO Law to provide legal training, support, and advice on WTO law and dispute settlement procedures to developing countries.³³ The Centre has a sliding scale of legal fees for handling a whole case (consultation, panel, and Appellate Body proceedings) that ranges from \$6,000 for 240 hours to \$222,250 for up to 635 hours. Beatrice Chaytor wrote that, even as developing countries gain confidence in the DSU and obtain financial and technical support from the WTO, they:

will need to build the capacity to counteract trade barriers, primarily through education and training, infrastructural and intellectual development for the missions in Geneva and complementary action in key ministries in the capitals, because increasingly there will be a need to monitor compliance with the WTO agreements, monitor trade flows, and other actions of a very technical nature.³⁴

The WTO's own infrastructure would benefit from increasing the number of professional staff in the Secretariat and using more panelists from developing and LDC countries. One observer has also suggested that the WTO establish regional resource centers to help members define their priorities, coordinate trade strategies, build public-private networks, identify trade barriers, and

³² See, for example, Rajiv K. Gupta, "India and WTO Dispute Settlement Procedure: An Analysis of Indian Cases," February 2001 manuscript in possession of author; Beatrice Chaytor, "Developing Countries and GATT/WTO Dispute Settlement: A Profile of Enforcement in Agriculture and Textiles" in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997), pp. 347-355; Alban Freneau and Asif Qureshi, "WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective" (Thesis of Alban Freneau, University of Manchester School of Law, 2001); Dukgeun Ahn, *WTO Dispute Settlements in East Asia*, (Cambridge, MA: National Bureau of Economic Research, 2003); and Hyuck Choi, "WTO Dispute Settlement Mechanisms: Korea's Experiences and Lessons Learned," speech given December 2001.

³³ Agreement Establishing the Advisory Centre on WTO Law, signed at the Seattle Ministerial on December 1, 1999, and entered into force on July 15, 2001.

³⁴ Chaytor, "Developing Countries and GATT/WTO Dispute Settlement," p. 35.

provide legal support.³⁵ Related to participation in the DSU is a proposal to more explicitly consider developing countries' particular problems and interests during consultations, the panel, the Appellate Body, and the implementation process, pursuant to DSU Articles 4.10 and 12.10.³⁶

A second issue of access is what the Mexico study has termed "internal transparency."³⁷ WTO disputes are essentially bilateral, and the final rulings are binding only on the parties directly involved. However, the cases themselves create precedents that affect other members and panels in the future. Third parties, who "have a substantial interest" in a dispute (from either the complainant or the defendant point of view), may request to join. They have no right of participation at the consultation stage, but a limited right to be heard during panel proceedings. Of the total number of cases filed, roughly half have had third-party participants; of the cases in which a panel report has been adopted, 90 percent have involved third parties. These third parties have limited access to documents and meetings and to having their arguments considered by the panel or Appellate Body. Chair Balas's draft negotiating text outlined ways to enhance third parties' rights.³⁸

The third access problem concerns the rights of interested nongovernmental organizations. Particularly since the Earth Summit in 1992, pressure has been building to allow broader participation—beyond just government diplomats—in all international forums. The WTO is no exception. Civil society groups have increasingly demanded to obtain WTO documents, attend WTO meetings, and submit *amicus curiae* briefs in WTO cases.³⁹ The WTO has hosted a series of meetings

³⁵ Gregory Shaffer, "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies," February 14, 2003, manuscript in possession of author.

³⁶ See Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania, and Zimbabwe, WTO Doc. TN/CTD/W/2; and Communication from India, WTO Doc. TN/CTD/W/6.

³⁷ *Some Ideas by Mexico*, p. 7.

³⁸ Report by the Chairman, Ambassador Peter Balas, to the Trade Negotiation Committee, Annex: Chairman's text, as of 28 May (the "Balas Draft"), WTO Doc. TN/DS/9, June 6, 2003, p. 5. See also Frieder Roessler, "Review of the WTO Dispute Settlement Procedures: An Inventory of Issues," draft manuscript of March 1998 in possession of author.

³⁹ See Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization," *U. Penn. Journal of International Economic Law* 17 (1996), p. 331.

over the past few years to engage these stakeholders at a general policy level,⁴⁰ but it has not as yet opened its proceedings to the public. In a 1998 case, the Appellate Body determined that WTO panels and the Appellate Body may accept amicus curiae briefs from nonmembers, but they have no obligation to consider them in their proceedings.⁴¹ The Mexico study noted that amicus curiae briefs had been submitted in fewer than 20 cases.⁴²

Professor Richard Shell has proposed engaging nongovernmental stakeholders at an even higher level, by employing a “trade stakeholder” model of dispute resolution. Shell recommends democratizing the WTO dispute settlement process and granting much broader standing to nonstate actors. He emphasizes that “direct participation in trade disputes not only by states and businesses, but also by groups that are broadly representative of diverse citizen interest, will address critical problems of distributive justice and procedural fairness.”⁴³ His proposal has generated widespread discussion.

Of the access problems raised, the lack of participation by developing countries seems the most significant. If not all WTO members have effective access to dispute resolution procedures—whether due to financial and technical constraints or power asymmetry with trading partners—the legitimacy of the institution and its rules is called into question. Also, the satisfaction of the parties (and potential parties) with outcomes and process is compromised, as are national and collective interests. The issues of internal and external transparency are corollaries of that concern.

Improving the DSU’s Procedures

A number of observers have recommended—given several years’ experience with the system—procedural improvements to the DSU process. These recommendations pertain to the staffing and

⁴⁰ For example, the WTO has hosted annual public symposiums such as “Multilateralism at the Crossroads,” held May 25-27, 2004 in Geneva and attended by 1,200 people.

⁴¹ United States Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R/58, adopted November 6, 1998, para. 99-110.

⁴² *Some Ideas by Mexico*, p. 10.

⁴³ G. Richard Shell, “The Trade Stakeholder Model and Participation by Nonstate Parties in the World Trade Organization,” *Journal of International Economic Law* 17, no. 1 (Spring 1996), pp. 359-382.

operation of panels and the Appellate Body, the timeframes for various matters, and the use of alternative dispute resolution (ADR) methods.

The selection of panelists has become increasingly difficult, due to geography, expertise, and strict ethical rules. The three-member panels are usually made up of diplomats from the trade delegations of countries that are perceived to be neutral to the outcome of the dispute. While selected for their judgment and trade policy experience, most do not have legal training, and so they rely upon the Secretariat's legal staff on legal issues. Especially since the adoption of the WTO Agreement, the complexity and range of international legal knowledge required suggests that nonlawyer diplomats are unlikely to be as suitable as those trained in law. It has been proposed that the WTO appoint 15-24 permanent panelists (with government experience and legal training) instead of using the current method of choosing from a larger roster of experts who have other professional responsibilities.⁴⁴ With more than 15 cases submitted to panels each year, and three members needed per panel, a professional panel staff is likely to need at least five to ten full-time members.

With regard to timeframes, it has become clear that almost every DSU procedure deadline—including deadlines for consultations, panel establishment, panel review, and Appellate Body review—is consistently exceeded. Table 5.7 illustrates the Mexico study's findings regarding missed deadlines.⁴⁵

⁴⁴ See Roessler, "Review of the WTO Dispute Settlement Procedures," pp. 18-19. Thailand has proposed that a roster of panel chairs be formed. DSB, Special Session, Communication from Thailand, WTO Doc. TN/DS/W/31, January 22, 2003. The European Community has proposed a body of permanent panelists. DSB, Special Session, Contributions of the European Communities and Its Member States to the Improvement and Clarification of the WTO DSU, WTO Doc. TN/DS/W/38.

⁴⁵ *Some Ideas by Mexico*, p. 17.

Table 5.7: The Mexico Study's Findings regarding Deadlines

	De jure	De facto average	Difference
Consultations	60 days	148 days	88 days
Panel establishment	10 days	41 days	31 days
Panel procedure (from establishment to circulation of report)	9 months	12 months	3 months
Appellate Body procedure (from notice of appeal to circulation of report)	60 days	86 days	26 days
From adoption to circulation of 21.3 award	90 days	135 days	46 days
Matter referred and final report circulated in 21.5 panels	90 days	159 days	69 days

The WTO is now considering modifying these timelines and exploring means of increasing institutional capacity. Supplementary procedures have been discussed as well, including a remand procedure from the Appellate Body to the original panel when issues of fact need to be reviewed, and the issuance of confidential interim reports to parties for review and revision prior to the distribution of final reports.

As mentioned, ADR options have also been considered. The DSU obligates WTO members to use its procedures to settle disputes arising under the WTO Agreement, and it makes available a range of processes: consultation, good offices, conciliation, and mediation, as well as the panel and Appellate Body process. The current Director-General has specifically expressed his readiness to

assist members in the use of good offices, conciliation, and mediation,⁴⁶ but these processes have rarely been used. Two observers wrote:

[The] WTO system makes it easy to litigate a dispute and secure a legal ruling, it unfortunately does not provide a structured way to achieve negotiated settlements.... [C]onsultations have all too often proven perfunctory and ineffectual. Negotiations would become far more meaningful if the parties were assisted by an independent, professionally trained facilitator. Mediation already exists as a concept in the WTO, but only in the form of ad hoc intervention by the secretariat. It does not exist as a pre-hearing process conducted by independent experts schooled in alternative dispute resolution. The current rules should thus be amended to require mediation before a matter goes to full dispute settlement.⁴⁷

The notion of ADR is appealing, but given its infrequent use to date, more thought needs to be devoted to aligning incentives with the nature of disputes filed. If a respondent prefers to wait out the process before having to reform its policies, an early settlement through ADR is not attractive unless there is some incentive to do so (e.g., a transitional time to reform and a restored trade relationship). Another process to consider is that of advisory opinions, which would require the services of an expert legal body akin to the International Court of Justice. This option was contemplated in the GATT's formation, but not implemented in practice.

The Enforceability of DSB Decisions

The Mexico study considered two kinds of compliance: a priori and a posteriori. The former concerns what members do to bring their domestic laws, regulations, and administrative procedures into conformity with their obligations under the WTO agreements, which this research has termed second-order disputes. The latter concerns reforming or withdrawing measures that are found to be inconsistent with the provisions of any of the covered agreements, which I have termed third-order disputes and which are the subject of this chapter. Several issues have been raised in connection with

⁴⁶ Article 5 of the DSU, Communication from the Director-General, WTO Doc. WT/DSB/25, July 17, 2001. See also Hudec, "The New GATT/WTO Dispute Settlement Procedure," pp. 1, 31.

⁴⁷ Susan Esserman and Robert Howse, "The WTO on Trial," *Foreign Affairs* (January/February 2003), pp. 130, 136, 137.

the enforcement of third-order dispute decisions—in particular, the enforcement of panel and Appellate Body decisions. These issues include implementation, sequencing, and remedies.

The implementation of panel and Appellate Body recommendations is monitored by the DSB. DSU Article 21 provides that “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” After adoption of a panel or Appellate Body report, the member concerned must inform the DSB of its intentions with regard to implementing the recommendations and rulings, with an obligation to do so within a “reasonable period of time.” That period can be mutually agreed by the parties, or determined by binding arbitration under Article 21.3. Article 21.5 provides for handling disagreements over whether the measures taken by the member concerned are consistent with the DSB’s recommendations. Article 22 provides for compensation and the suspension of concessions if the DSB’s recommendations are not implemented within a reasonable time. Sequencing pertains to the order in which Articles 21.5 and 22 are addressed. The Balas draft provides for the clarification of these procedures at the implementation stage.⁴⁸

Enforcement includes both a determination of whether a violation has occurred, and, if one has, the violator’s reformation of its behavior or compensation of the injured party. The Mexico study concludes that, of the 89 panel reports adopted, the respondent was found to have violated its WTO obligations in 77 cases. The average period of time between the establishment of a panel and expiry of the “reasonable period of time” was 775 days, or more than two years; counting from the original request for consultations, the average period was more than four years. Of the cases in which a violation was found, compliance was immediate in five cases. But the average time to comply was 292 days, and 28 cases exceeded the reasonable period of time for implementation.⁴⁹ Thus even though the DSU’s procedures are more stringent than previous GATT practice, implementation and enforcement problems continue. Asif Qureshi argues:

⁴⁸ Balas Draft, pp. 11-16.

⁴⁹ *Some Ideas by Mexico*, p. 13.

The most significant flaw from an enforcement perspective is that it is still reliant in important respects on the consent and initiative of the parties to the dispute. Thus, whilst the parties can no longer in most respects block the adoption of panel reports, there is still the possibility of a creeping kind of blocking, particularly in the context of the implementation of panel decisions. There is ambiguity in the affirmation of the role of law and a general absence of availability of redress provisions independent of the parties to the dispute.⁵⁰

These enforcement problems raise questions about whether the remedies are adequate to the problem, and whether some steps can be taken to improve overall compliance.

The issue of remedies is complex and controversial. The use of the DSU is triggered when a party believes that its negotiated benefits under the covered agreements have been nullified or impaired. A panel and the Appellate Body will determine whether the challenged measure is consistent with the respective agreement. If found inconsistent, the respondent party has a reasonable period of time to bring the measure into compliance. If the respondent party fails to reform its policy measure, then the complainant can seek compensation from the respondent. If the complainant and respondent cannot agree on the amount of compensation, the complainant may request authorization from the DSB to suspend concessions granted under the agreement.⁵¹ John Jackson notes that neither compensation nor retaliation is equivalent to compliance. He argues that:

the treaty text imposes an international law obligation to perform and does not give a free choice to prefer compensatory measures. Policy considerations, moreover, suggest that performance is the more equitable requirement: to have a system under which wealthy countries can buy their way out of obligations, particularly those with respect to small or less powerful countries, raises an important asymmetry that could undermine the credibility of the entire dispute settlement procedure. It also creates a climate of uncertainty for millions of

⁵⁰ Asif Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester, UK: Manchester University Press, 1996), p. 107.

⁵¹ Recall that, in the bananas case described in Chapter 1, the United States was authorized to retaliate against the European Community in the amount of \$191.4 million. Overview of the State-of-Play, WTO Doc. WT/DS/OV3, p. 97. The United States was entitled to draw up a list of products exported by the European Community to the United States on which the U.S. would raise tariffs above the level otherwise agreed in the tariff schedules and equivalent in value to \$191.4 million.

independent entrepreneurs and traders, who depend upon the rule structure as formulated by the treaty text.⁵²

Other remedy policies have been proposed, including: a refund of antidumping duties for antidumping violations; provisional or retroactive remedies in which the time required for the DSU procedures would cause significant harm to the complainant; an award to cover litigation costs if a developing country complainant prevails; an award of monetary compensation for noncompliance; and collective retaliation by multiple countries against a respondent found in violation.

Political economist and international trade scholar Robert Lawrence has examined the whole notion of WTO remedies, and the ongoing retaliation between the United States and European Community in particular. Lawrence is concerned that these cases could “undo the liberalization of previous trade negotiations, poison the atmosphere for future agreements, raise serious questions about the efficacy and legitimacy of the dispute resolution system, and strengthen the hand of those who oppose the WTO as an unwarranted intrusion on national sovereignty.”⁵³ The reciprocal concessions embodied in the WTO agreements represent both commercial contracts and international treaty commitments. Remedies are used to induce compliance, provide compensation, or permit legal breach. Lawrence suggests reframing the purpose of the remedies to be one of rebalancing, and he believes that the “system will operate best if it induces compliance where this is possible and limits retaliation where it is not.”⁵⁴ He proposes four reforms, the most intriguing of which is the idea of liberalization security deposits (LSDs). Under this scheme, each WTO member would post an LSD based on its primary trade sectors as security against its performance as determined by the DSB. This approach is consistent with others who argue that an international regime would be more stable if it “permit[s] countries to temporarily deviate from their obligations in periods of excessive, unexpected

⁵² John Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism* (Washington, DC: Brookings Trade Forum 2000), p. 194.

⁵³ Robert Z. Lawrence, *Crimes and Punishments? An Analysis of Retaliation under the WTO* (Washington, D.C.: Institute of International Economics, 2004), p. 2 of manuscript.

⁵⁴ *Ibid.*, p. 11.

political pressure at some pre-negotiated cost.”⁵⁵ It would, of course, be important to set the level of security so that it is neither too cheap nor too expensive to use.

DISCUSSION

Third-order disputes arise when a WTO member believes that the benefits for which it has contracted in the various WTO agreements have been nullified or impaired. The WTO’s dispute settlement process, the DSU, is mandatory and binding, and provides for a progression of steps: consultations; optional conciliation, good offices, or mediation with the aid of the Director-General; panel review; and Appellate Body review. The use of the DSU has been steady, at more than 30 cases per year, and participation is more diverse than in the past. WTO jurisprudence has been generally well received.⁵⁶ More serious criticisms have been generated over access to the process, the enforcement of the decisions, and the adequacy of the remedies. This discussion will first briefly summarize the WTO’s DSU statistics and criticisms, reconsider the hypotheses raised at the beginning of this chapter, then evaluate how well third-order disputes are being handled.

The chapter has described how the WTO’s DSU has functioned according to its mandate to: make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations.... Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.⁵⁷

The data available reveal that the DSU has been increasingly used over the past nine years, by an increasingly diverse set of parties. The case load during the WTO period (1995-2003) is double that of the late GATT period (1980-1994), with more than 30 cases now submitted each year. Developed

⁵⁵ Peter Rosendorff and Helen Milner, “The Optimal Design of International Trade Institutions: Uncertainty and Escape,” *International Organization* 55 (2001): 289.

⁵⁶ Hudec, “The New GATT/WTO Dispute Settlement Procedure,” p. 1; Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, p. 179; Jeffrey Waincymer, “World Trade Organization: A Guide to the Jurisprudence” in Jeffrey Waincymer, ed. *WTO Litigation* (London: Cameron May, 2001).

⁵⁷ DSU, Article 11.

countries still use the process most, but both smaller and developing countries have participated as complainants and respondents. The issues raised in these third-order disputes parallel those raised as second-order disputes: provisions under the GATT, agriculture, antidumping, subsidies, and countervailing measures. In terms of process, of the 304 cases submitted since 1995, less than 20 percent reach mutual agreement, and nearly half resulted in the establishment of a panel. Of those cases submitted to a panel, more than half resulted in a report being issued, and more than two-thirds of those with panel reports were subsequently reviewed by the Appellate Body. Implementation problems (including determining a reasonable period of time for implementation, compensation, and authorized suspension of concessions) were raised 40 times. (Multiple implementation issues were raised in some cases.) In short, the DSU is used extensively.

With both the previous GATT period (1948-1994) and the WTO period (1995-2003) for reference, practitioners and scholars have a basis for evaluating the effectiveness of the dispute settlement process. Criticisms of the DSU center on three areas: access to the process, procedures, and compliance. Access is a concern with regard to three groups: developing countries, who lack the financial and administrative resources and political and economic leverage to pursue cases; other WTO members who have an interest in a given bilateral dispute and desire to join the process; and nonstate actors who seek access to both documents and meeting participation. Regarding the access of developing countries, certainly many more are participating in the DSU than in the past, and the Advisory Centre offers significant legal and technical assistance. The WTO is considering procedural reforms for third parties, but it is unlikely to expand participation for nonstate entities in the immediate future. Other procedural improvements regarding panelist qualifications, extended or accelerated timeframes, and ADR options have been proposed. The compliance problems relative to the implementation of DSB recommendations and the adequacy of remedies are most troublesome, and it is not clear what steps would engender the consensus support required to amend the DSU process.

Assessing the WTO's Experience with Third-Order Disputes against the Hypotheses

Based on the above overview of the DSU's current status, the three hypotheses are considered.

Test Hypothesis 1: The more explicit the legal procedures for enforcement, the more likely that countries will comply with their obligations.

The advent of the DSU was lauded as one of the primary achievements of the Uruguay Round. The negotiators attempted to deal with the frustrations experienced in GATT dispute settlement by providing for a mandatory, binding process that set specific timelines for panel review, provided for Appellate Review, and flipped the previous consensus-for-adoption rule that allowed an unhappy respondent to block the adoption of a panel's recommendations. All in all, the new DSU was a remarkable achievement that crystallized the transition from the more diplomatic approach of dispute resolution to a rule-oriented arbitration by an impartial tribunal. The existence of an impartial, respected tribunal, applicable substantive rules, and limited recourse to pursue alternative power-oriented methods creates the foundation for adjudicatory legitimacy.⁵⁸ The question is whether this more legal approach is effective in causing countries to comply with their WTO obligations generally, and with DSU decisions specifically.

International legal scholar Joseph Weiler pushes further on the diplomatic-to-adjudication paradigm shift.

Juridification is a package deal: it includes both the Rule of Law and the Rule of Lawyers. It does not simply (and very importantly) have an impact on the power relations between Members, on the compliance pull of the Agreements, on the ability to have definitive settlement of disputes, on the prospect of having authoritative interpretations of clumsy or deliberate drafting of opaque provisions. It imports, willy-nilly, want it or not, the norms, practices, habits—some noble some self-serving, some helpful some disastrous, some with a concern for justice others with a concern for arcane points of process and procedure—of legal

⁵⁸ Ernst-Ulrich Petersmann, "Dispute Settlement in International Economic Law: Lessons for Strengthening International Dispute Settlement in Non-Economic Areas," *Journal of International Economic Law* 2, no. 2 (June 1999), p. 198.

culture.... Lawyers, practicing lawyers, will be involved early on in all stages of dispute management by and within Members.⁵⁹

Weiler comments that with juridification comes a shift in power. The panel's target is less about crafting a decision geared to the parties than one that is legally sound and will withstand Appellate review. To the extent that panelists rely on the legal advice of the Secretariat, power is focused there as well, but it lacks transparency.

Political institutions' legitimacy, of a more enduring nature [than politicians' concern with results] will depend on inputs (process). The legitimacy of courts which is meant to transcend specific results and to enjoy long endurance will depend on both the integrity of process but, in addition and uniquely, on the quality both substantive and communicative of its reasoning.... The legitimacy of courts rests in grand part on their capacity to listen to the parties, to deliberate impartially favouring neither the powerful nor the meek, to have the courage to decide and then, crucially, to motivate and explain the decisions.⁶⁰

Overall, the tightening of legal procedures in the WTO appears to have advanced dispute settlement, but it comes at the cost of adopting a legal culture and is not sufficient in itself. One important pre-condition for legal procedure is the existence of applicable substantive legal rules against which behavior can be measured—in other words, the resolution of first-order disputes. If the rules—procedural and substantive—are sufficiently clear that an impartial tribunal can render a ruling that is perceived as correctly drawn, then the number and sensitivity of cases brought manifest the parties' confidence in the system—a measure of success. In fact, the number of cases brought at the WTO and the complexity of the legal arguments made and decisions rendered suggest that such confidence does exist. The remaining condition is the commitment and political willingness of parties to abide by those decisions. The members have already agreed to subordinate sovereignty to the DSU's review of third-order disputes. And parties have, in most cases, complied with the rulings, albeit taking much longer to implement them than the rules require. Overall, then, the hypothesis is

⁵⁹ J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement," Jean Monnet Working Paper 9/00 (2000), p. 6.

⁶⁰ *Ibid.*, p. 12.

confirmed, but conditionally along with substantive rules of behavior and a common political willingness to comply with the DSB's recommendations.

Test Hypothesis 2: Increased access to legal, financial, and technical resources will increase the ability of countries to enforce their rights.

Developing country observers,⁶¹ scholars,⁶² and the DSU's own assessment make clear that limited legal and financial resources severely constrain developing countries' ability to enforce their rights under the WTO agreements. The formation of the Advisory Centre addresses this problem in part. A significant aspect of the resource limitation, however, is a domestic ministry's ability to assess and monitor national trade practices, to ascertain whether the country and its trading partners are complying with WTO obligations. The development of regional WTO resource centers might contribute to the necessary administrative capacity. What cannot be addressed directly is the limited economic and political leverage that smaller and developing countries have in bringing a complaint against a larger, more-powerful trading partner. A rule-based regime is an institutional attempt to constrain the effects of power asymmetry. This hypothesis, too, is confirmed conditionally. Direct support in the form of legal and financial assistance is critical for many countries to utilize the DSU; however, additional domestic capacity with supplementary administrative support are necessary as well.

Test Hypothesis 3: An array of direct and facilitated resolution procedures will increase the opportunity for parties to resolve problems of noncompliance.

The final question is whether the DSU procedures need to be improved, or whether there needs to be differentiation among cases submitted to the DSU. For example, one practitioner-scholar notes:

⁶¹ Choi, "WTO Dispute Settlement Mechanisms."

⁶² Chaytor, "Developing Countries and GATT/WTO Dispute Settlement," pp. 347-355; and Shaffer, "How to Make the WTO Dispute Settlement System Work."

A case may go forward because the outcome of the application of the rules to the facts of a particular dispute is not clear in advance. Or it may go forward even though the outcome is clear because a government may wish to show a domestic constituency that it did all that it could, or because it may wish to show a parochial ministry the consequences of not considering international commitments before acting.⁶³

Should all of these instances be submitted to the same process? Can they be differentiated? A number of commenters have proposed that the conciliation/good offices/mediation processes prescribed in the DSU be activated. These processes have been available since the GATT 1947, but have rarely if ever been used. The current Director-General has explicitly offered his services in this regard, but no parties have accepted. The availability of the process is clearly insufficient. Thus, a more activist approach may be warranted. Perhaps a pilot program could be introduced that creates some incentives for the use of conciliation (for fact-finding) and mediation (with professionally trained mediators) on certain kinds of cases. It could even be made mandatory for certain classes of disputes. Advisory opinions could also be offered. The International Court of Justice has the power to give advisory opinions on any legal questions. Within the WTO, only the Ministerial Conference and the General Council have the power to adopt interpretations, and to do so requires a three-quarters majority decision.⁶⁴ If the decision were made to delegate interpretative authority to the Appellate Body, some kind of advisory opinion process could be devised that links with the Trade Policy Review Mechanism, such that if an opinion were sought, there might also be a transitional process devised to help overcome economic disincentives.

There exists little incentive for respondents to comply early with DSU decisions, as evidenced by the nearly four-year lag time between a request for consultation and implementation. Andrew Guzman has considered the political economy of disputes versus settlement at the WTO.⁶⁵ He looked at the 262 cases from 1995 to mid-2002, of which 82 went to a panel. In 90 percent of the

⁶³ David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization* (London: Kluwer Law International, 1999), p. 175.

⁶⁴ See Roessler, "Review of the WTO Dispute Settlement Procedures," p. 27.

⁶⁵ Andrew Guzman, *The Political Economy of Litigation and Settlement at the World Trade Organization*, Working paper 81 (Berkeley, CA: Berkeley Olin Program in Law and Economics, 2003).

cases, he noted that the respondent had violated its WTO obligations. While the noneconomic/relationship costs are difficult to measure, it is clear that it may benefit both the complainant and respondent to wait for a panel decision. The complainant gains a legal victory, satisfies its constituents, and appears “tough” to other countries. The respondent benefits from extending the amount of time it has to restructure an industry and protect it, pending the decision being issued. The harm experienced by other (nonparty) countries, however, is not integrated into the calculation. This serves as a reminder that the procedural incentives for settlement, including the use of assisted negotiation and mediation, need to be explored carefully. Thus, hypothesis 3.3 is not confirmed. A variety of ADR processes have been optionally available for decades, yet parties have not pursued their use. While the experience with domestic legal systems, suggestions by scholars, and the interest of diplomats validate making ADR processes available, they have in fact been available to no avail.

Third-Order Disputes and the Power-Interests-Rights Framework

Recall the framework principle that was proposed at the outset: that processes that are primarily motivated by the parties’ interests (rather than rights and power) are more likely to be sustainable over the long term. With third-order disputes, there has been a gradual shift from a more diplomatic approach (shaped by power and interests) to a more adjudicatory one (guided by rights, but tempered by power). One might ask whether the now more-legalistic processes come at the expense of the institution’s and parties’ interests. The interests of a complainant are to obtain a remedy if its benefits have been impaired and to maintain its trading relationships; the interests of the respondent are to obtain a clear legal ruling, gain time to adapt as necessary, and maintain trading relationships. The institution’s interest is to maintain its status and build its legitimacy for effectively managing its functions. Friedl Weiss, international scholar and currently head of the Advisory Centre, wrote:

Hitherto, adaptability not legal consistency, predictability, and certainty were the goals to be achieved. The dominant aspects of disputes was that of “settlement” of accommodation of

interests rather than of vindication of rights in a “victory versus defeat” pattern. An entirely new philosophy derived from an inverted order of the mentioned goals. Thus, while the policy option for flexibility in settlement still exists, it is now backed by an intricate two-instance system of procedural rules providing for enhanced certainty in rule application. This should generally benefit weaker Members, especially when confronted with market pressures from more powerful ones.⁶⁶

There may be a lingering difference of view on whether the legal stringency of the DSU is necessary for its effectiveness—a difference that may be better evaluated after time.

Assessment of Third-Order Dispute Resolution against Dispute Resolution Criteria

In closing, I will touch on the five criteria for evaluating dispute settlement processes.

Transaction Costs: Clearly, the costs of litigation are high in financial, administrative, opportunity, relationship, and diplomatic terms. So if a case is initiated, the harm to the complainant must be high as well. Noting the high number of cases in which more than one country has a substantial interest, the costs of bringing a complaint can more easily be borne by a developed country; accordingly, developing countries may defer if a developed country is willing to do so. This “piggybacking” may skew the impression of which countries are more likely to bring complaints in the DSU, but reflect a more efficient allocation of costs. In terms of relative compliance costs, if a respondent does not respond to informal or formal consultations, its incentives may lie with waiting out the final decision and implementation period.⁶⁷ The DSU provides a clear process to pursue one’s rights, but it is a lengthy one.

Satisfaction with Outcome: The Mexico study found that, in 77 percent of cases reviewed by a panel, the respondent was determined to be out of compliance. Most cases have eventually resulted in the implementation of changes, either through reformed target measures, compensation, or

⁶⁶ Friedl Weiss, “WTO Dispute Settlement and the Economic Order of WTO Member States” in P. van Dijk and G. Faber, eds., *Challenges to the New World Trade Organization* (The Hague: Kluwer Law International, 1996), pp. 77-94, 83.

⁶⁷ See Guzman, *The Political Economy of Litigation and Settlement*.

approved suspensions of concessions. The continued elevated use of the DSU suggests at least a modicum of satisfaction with DSU rulings and implementation.

Satisfaction with Procedure: DSU reviews indicate that members believe the panel and Appellate Body are generally satisfactory, but that more time and resources are needed. Even developing countries use the procedures, but they have proposed reforms to ensure adequate legal counsel and additional time to participate.

Effect on Relationships. For most countries, considerable effort is expended to avoid third-order disputes. Periodic consultations with key trading partners reduces the likelihood that tensions will progress to the filing of a complaint. Nevertheless, a significant number of disputes occur. Forty percent of complaints filed are between developed and other developed countries, and most of those cases involve the United States or the European Community. While the US-EC relationship can withstand a certain level of reciprocal trade tension, it needs to be managed so as not to disrupt critical trade flows. Twenty percent of the DSU cases are developed versus developing countries, and another 20 percent are developing versus developed countries; these trading relationships are likely to be more sensitive to disruption, as are the developing versus developing country disputes. If, however, a problem is serious enough to warrant the filing of a complaint, and consultations are unsuccessful, then a third-party decision may be necessary for both parties to satisfy their respective constituencies. The question would be whether a less adjudicatory process could achieve satisfactory outcomes and better maintain ongoing trading relationships.

Recurrence. The issues raised in the DSU as third-order disputes mirror those identified in second-order disputes, and the DSU is not particularly effective at reducing the recurrence of these problems. The presence of third parties joining the disputes demonstrates that the problems are more systemic than bilateral. The transaction costs involved in multiple countries filing complaints against a single violator, or a complainant filing complaints against multiple respondents, are cost-prohibitive. We have already questioned whether there is a more efficient way to address these issues and create some kind of feedback mechanisms among first-order, second-order and third-order

disputes. Additional research would inform this assessment. For example, it would be very useful to measure the compliance pull of sanctions and measure the short-term and longer-term effects on respondent (and other similarly-situated) country behavior. These ideas will be discussed in Chapter 6.

CHAPTER 6: DISPUTE SETTLEMENT SYSTEM DESIGN

This research has described how the WTO identifies and resolves what I have termed first-order: (policymaking), second-order (policy implementation), and third-order (policy enforcement) disputes. The opening chapter described the three orders of disputes, the diagnosis and resolution processes utilized, and the problems encountered. Drawing upon selected theoretical literature, hypotheses were posed. The WTO's processes were characterized in terms of power, rights, and interests, then assessed against five criteria: transaction costs; satisfaction with process; satisfaction with outcome; effect on relationships; and recurrence of the substantive problem among the parties.

This final chapter has four sections. First, I synthesize the three dispute order analyses and the hypothesis results. The next two sections compare the power-rights-interest characteristics, and the effectiveness criteria, among the three dispute orders. The concluding section considers how these existing processes might be integrated as a system to better diagnose and resolve the disputes that an international system is called upon to manage.

THREE DISPUTE ORDERS: PROCESS SUMMARY

Recall that in the first chapter, the three dispute orders were laid out in terms of both diagnosis and resolution processes. First-order disputes at the WTO concern differences among the membership on what issues warrant common institutional policies. Member nations must decide to what extent their national domestic trade policies will defer to a common global interest in stable, predictable international trade. First-order disputes are diagnosed by all member countries, who decide by consensus what issues of WTO policy will be included on the agenda for a given negotiating round. Once the agenda is agreed upon, the negotiations continue until the member nations agree, again by consensus, on a final agreement as to new or revised WTO policies. Chronic problems encountered during both the agenda-setting and negotiation processes are threefold: negotiators have uneven

access to essential information; countries that dominate the negotiations may not be representative of the overall membership; and limited attention is paid to the parties' ability to implement the rules once adopted.

Second-order disputes arise in the context of policy implementation—in other words, in the adopting of national legislation and regulations to implement WTO policies. These disputes are diagnosed when a nation (or nations, or members of the Secretariat) raises concerns about another nation's trade policies during relevant WTO councils or committee meetings, and particularly in the Council for the Trade Policy Review Mechanism (TPRM). Second-order dispute resolution takes the form of comments and recommendations, but does not involve any binding action. One problem with the handling of second-order disputes is that it does not involve any structured review of options by which a target country could feasibly (economically, politically, and legally) bring its domestic policy into consistency with the WTO's trade rules.

Third-order disputes are more in the nature of litigation. These disputes surface when one nation makes a specific claim against another nation that the latter has abrogated (“nullified or impaired”) a benefit to which the complainant was entitled under the WTO Agreement. The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) prescribes a sequential set of resolution processes. Bilateral or assisted consultations are attempted first, followed if necessary by a decision by a three-expert panel, and finally in some cases the legal review of a panel decision by the Appellate Body. The DSU process, adopted in 1994, was a culmination of GATT dispute resolution experience from 1948 to 1994 and is significantly more legally binding than the GATT procedures. The problems most often raised with the DSU are several: the process is often too expensive (financially and diplomatically) for smaller countries to participate; the panel experts are not as well-versed in law as a roster of professionals might be; the proceedings could be more transparent to other interested countries and nonstate stakeholders; and the implementation of panel/Appellate Body decisions is often significantly delayed.

The literature in international negotiation and consensus building, implementation, and dispute settlement was considered in developing hypotheses for each of the dispute order resolution processes. Table 6.1 lays out the hypotheses and results.

Table 6.1: Preliminary Hypotheses Results

	Hypothesis	Hypothesis Result	Comment
First-Order Disputes: Policymaking	H 1.1: <i>More representative participation (i.e., more in number and kind of participants) contributes to an agenda of interests that will engage short-term and long-term support of an agreement</i>	Confirmed conditionally	The process by which participants are selected is critical.
	H 1.2: <i>Broader participation in information exchange (including collection, analysis, and dissemination) contributes to sustainable commitments</i>	Confirmed	
	H 1.3: <i>A negotiation process that includes a skilled neutral and procedural rules to ensure balanced participation, information exchange, and option generation will increase the likelihood of agreement</i>	Confirmed conditionally	The more parties and the more issues, the more transparent the process needs to be.
Second-Order Disputes: Policy Implementation	H 2.1: <i>A rights-oriented surveillance process is likely to be more successful if universal, periodic, and transparent</i>	Confirmed conditionally	Some concrete cost must be imposed on the target for failure to actively pursue compliance; the surveillance process must be of value to both the institution and the target
	H 2.2: <i>The resolution of implementation problems will be enhanced by a process that allows for the exploration of a range of transitional options to bring the party into compliance.</i>	Indirectly confirmed	No such process currently exists, but member countries expressed a desire and need for it.

Third-Order Disputes: Policy Enforcement	H 3.1: <i>The more explicit the legal procedures for enforcement, the more likely that countries will comply with their obligations</i>	Confirmed conditionally	Clear substantive rules are also necessary. Ultimate compliance may not fall within prescribed time bounds.
	H 3.2: <i>Increased access to legal, financial, and technical resources will increase the ability of countries to enforce their rights</i>	Confirmed conditionally	Access to these resources is certainly necessary, but not sufficient to enable countries to enforce their rights.
	H 3.3: <i>An array of direct and facilitated resolution procedures will increase the opportunity for parties to resolve problems of noncompliance</i>	Not confirmed	The availability of optional, varied processes is insufficient; ADR processes must either be mandatory, or incentives for compliance need to be aligned with such processes to make them attractive.

The analysis of these processes is by necessity a qualitative one, with quantitative support for some aspects. The hypotheses regarding first-order dispute processes focused on (1) representative participation in the negotiations, (2) broad participation in information exchange (including collection, analysis, and dissemination of information), and (3) characteristics of the negotiation process.

H 1.1: More representative participation (i.e., more in number and kind of participants) contributes to an agenda of interests that will engage short-term and long-term support of an agreement.

Based on the experience of the last four international trade negotiations—the Kennedy, Tokyo, Uruguay, and current Doha Rounds—this hypothesis was conditionally confirmed. As the institution has grown from 23 to 146 member nations, it has wrestled with an increasing number of people and an increasing complexity of issues. The inclusion of more participants is more representative, but also more difficult to manage. Over the same period, the issues in contention have expanded from simple

tariff reduction to highly complex issues such as intellectual property and competition policy. With more participants, more issues are submitted for consideration, which allows a greater degree of flexibility for making tradeoffs, but the large number of participants also overtaxes the ability of formal proceedings to function. Key actors with the secretariat are tempted to shrink the size of the informal negotiating groups, but such moves risk generating suspicion among those not included. In short, the greater number and kind of participants does contribute to a more balanced agenda and potential agreement, but the process of selecting key participants needs to be transparent in order for the process to retain credibility.

H 1.2: Broader participation in information exchange (including collection, analysis, and dissemination) contributes to sustainable commitments.

This hypothesis is a corollary of the first. In the last three negotiating rounds, the investment of time and effort into developing a consensual information base served to build joint understanding of the issues and the basis on which negotiators could assess priorities and tradeoffs. Even if lead countries like the European Communities and the United States take the initiative to begin the information investigation, other countries need to be involved as well. Only in that way can they be sufficiently informed to evaluate and negotiate tradeoffs between issues of importance to the EC and U.S. and other issues of more significance to their own countries, and subsequently to implement any agreement.

H 1.3: A negotiation process that includes a skilled neutral and procedural rules to ensure balanced participation, information exchange, and option generation will increase the likelihood of agreement.

This hypothesis draws upon the extensive mutual gains negotiation literature in which interests form the core of effective negotiation. The GATT and WTO have not utilized professional neutrals precisely, but the skilled assistance of directors-general and talented committee chairs supports the premise. As the number of parties and issues has increased, so has the importance of process.

Contributing factors to “creating a transparent, democratic, all-inclusive and consultative decision-making process”¹ include expert facilitation and mediation of the informal and formal meetings, transparency of the process, the development and exchange of essential information, and an opportunity for generating multiple options to craft an agreement.

H 2.1: A rights-oriented surveillance process is likely to be more successful if universal, periodic, and transparent.

The work of the WTO’s operating committees and the Trade Policy Review Mechanism has provided a natural laboratory for this hypothesis. The operating committees, all of which are open to all members of the WTO and focus on one of its agreements (e.g., intellectual property, agriculture, subsidies), call for various self-reported notifications on countries’ respective implementation. However, in practice such notifications are conspicuously lagging. The TPRM provides for a periodic review of each WTO member, according to a prescribed list of criteria. The institutional and country reports are disseminated to all WTO members, who then have an opportunity to discuss the findings with the target country. The TPRM does succeed in diagnosing a number of implementation issues, but there is no consequence; the process results in recommendations, but there is no means for helping the target country overcome its shortcomings. In short, the rights-based (rule-based), universal, periodic, and transparent criteria are fulfilled, yet these processes are insufficient to resolve the implementation disputes. The process should serve not only the interests of the institution in ascertaining the progress of a country in implementing agreed-upon rules, but should enable the reviewed country to better manage its trade policies consistent with its WTO obligations.

¹ Proposals for Improving the Decision-Making Process in the WTO, WTO Doc. WT/GC/510, August 14, 2003. For an illustrative strategy in the environmental context, see L. Susskind, *Environmental Diplomacy: Negotiating More Effective Global Agreements*, (New York, NY: 1994), and more broadly, L. Susskind, S. McKearnan and J. Thomas-Larmer, *The Consensus Building Handbook* (Thousand Oaks, CA: Sage Publications, 1999). On the role of an individual mediator, see L. Antrim and J. Sebenius, “Formal Individual Mediation and the Negotiators’ Dilemma: Tommy Koh at the Law of the Sea Conference,” in J. Bercovitch and J. Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management* (London: Macmillan, 1991).

H 2.2: The resolution of implementation problems will be enhanced by a process that allows for the exploration of a range of transitional options to bring the party into compliance.

The previous hypothesis focused on the diagnostic aspects of the policy implementation processes; this hypothesis focuses on resolution. Evidence indicates that TPRs are quite valuable in identifying implementation issues, but lack the structure and commitment to solve identified problems. A country under TPR review has an opportunity to explain the barriers to implementation, but there is no designated time to propose and evaluate alternative strategies to overcome such barriers, no options developed for transitional measures, nor any specific obligations to report back on progress over time. Thus, it is largely left to injured trading partners to complain in the DSU in order to bring a country into compliance. This hypothesis is thus indirectly confirmed: the absence of an opportunity to explore options for resolution and prescribe a follow-up review appears correlated with the failure to resolve policy implementation disputes.

H 3.1: The more explicit the legal procedures for enforcement, the more likely countries will comply with their obligations.

The advent of the DSU crystallized a shift to a mandatory, binding process for resolving third-order disputes. The tightening of legal procedure appears to have advanced dispute settlement, as measured by the number of complaints, diversity of parties, and issues in dispute. Of the cases in which a decision was rendered, approximately three-quarters found the respondent in some measure of violation of WTO rules. Most violations are cured eventually, usually through reformed domestic policies. More study to measure the direct and indirect effect of sanctions on country behavior would inform this assessment. The commitment and political willingness to abide by panel and Appellate Body decisions is soft. In sum, the procedures may facilitate compliance, but may also come at the cost of discouraging alternative solutions. Use of the DSU procedure is steady, at a rate one-third higher than the previous GATT process, with a more diverse group of complainants and respondents.

Although the TPRM is expressly prohibited from engaging in enforcement activity, future research may be able to more carefully correlate compliance measured at the policy implementation level with compliance at the policy enforcement level.

H 3.2: Increased access to legal, financial, and technical resources will increase the ability of countries to enforce their rights.

Prior to the DSU, smaller and developing countries infrequently filed complaints against their trading partners, due mostly to a lack of legal, financial, and technical resources. The WTO Advisory Centre was formed in response to that urgent need. The Centre is a concrete tool to enhance the participation of developing countries and economies in transition to participate more fully in the WTO, and its services are coordinated with the other technical and training assistance provided by the Secretariat. As important is the need for the cultural, administrative, and legal infrastructure that would enable domestic ministries to assess and monitor their national trade practices and determine whether they and their trading partners are complying with WTO obligations. An additional point is that it may be more efficient for developing countries to piggyback if a developed country is willing to take the lead in enforcing compliance in a situation that affects a number of countries.

H 3.3: An array of direct and facilitated resolution procedures will increase the opportunity for parties to resolve noncompliance with the agreed-upon rules.

The dispute settlement literature and international practice have long supported the use of various direct and assisted negotiation processes. Article 33 of the United Nations Charter and the DSU suggest a “stepladder” of process options through which parties might resolve their differences: negotiation, conciliation, good offices, mediation, and adjudication. The WTO’s Director-General has specifically offered his assistance in resolving disputes, but the recent absence of takers mirrors the long-term general response. These alternative dispute resolution (ADR) processes have been very effective in domestic disputes, but it appears that availability is insufficient to prompt their use. Two

reasons may be the unpredictability of these processes and countries' inexperience in using them. Also, the incentives for early settlement may be misaligned. More than half of the cases submitted to the DSU are settled short of a panel being established, and half of those assigned to a panel settle before the panel issues a ruling. For those cases that await a panel ruling, both parties may prefer a third party determination and the passage of time before implementation with any decision is required. The availability of optional ADR processes may be helpful, but effective use will require more, such as mandatory use in certain circumstances, incentives for early compliance, and the compilation of a professional roster of neutrals.

These hypotheses do not provide a precise recipe, but can serve as a guide to direction for improving the three orders of dispute resolution processes. The next section briefly refers to the relative weight given to power, rights, and interests in these processes.

THE POWER-RIGHTS-INTERESTS FRAMEWORK

The power-rights-interests framework posits that processes that are primarily oriented to the parties' interests are more likely to lead to results with long-term sustainability. Interests encompass whatever the parties care about, including economic, political, and social values. Disputes resolved according to interests take time, and it is exceedingly cumbersome to balance the myriad interests of nearly 150 countries. Resolving disputes on the basis of rights calls for the application of agreed-upon rules to a given circumstance in order to determine who prevails. Rights-based processes value procedural justice, but may not address the more qualitative underlying interests. Disputes resolved according to power weight the outcome to the party with more leverage and status, but may do so at the expense of relationships. Table 6.2 summarizes the factors—power, rights, or interests—in each of the three orders of dispute handling at the WTO.

Table 6.2: Summary of Dispute Resolution Processes within Power-Rights-Interests Framework

		Power	Rights	Interests
First-Order Disputes	Diagnosis	X		x
	Resolution	X		x
Second-Order Disputes	Diagnosis	x	X	x
	Resolution			
Third-Order Disputes	Diagnosis	x	X	x
	Resolution	x	X	x

X = primary determinant; x = contributing factor

First-order disputes tend to be diagnosed and resolved in favor of those countries with more power, where power is seen chiefly in terms of world trading volume. The United States and the European Communities have long taken the lead in identifying issues to be negotiated. With the rule of consensus decision-making, countries are able to express their interests as well, but it takes a substantial coalition of medium, smaller, and developing countries to counter the pressure of the more powerful first-tier countries.

Second-order disputes are identified through a hybrid rights and interests process that serves to scrutinize and guide the parties' behavior relative to existing rules. If a gap exists between assessed and expected performance—whether for political, economic or social reasons—there is no specific process for bridging it. A target country has an opportunity to explain its interests, but no mechanism to synchronize those interests with the rules in question. Power is indirectly felt as countries use care in their critical comments during council sessions. There is no formal resolution process, partly due to the TPR's explicit prohibition against enforcement activity.

Third-order disputes are handled through the DSU's judicialized process. In earlier times, the smaller and more homogenous membership and more limited scope of rules made it easier to consider how to accommodate both complainants' and respondents' interests within the rules. That approach

has since given way to a more important institutional interest in having a predictable, legally legitimate procedure.

By considering these processes as an integrated whole, rather than separately, one might better take advantage of the qualities each offers. The last section will examine that balance. The next section compares the three orders of dispute resolution processes against the five criteria.

DISPUTE RESOLUTION CRITERIA AND THE WTO

Through a more practical lens, how does the WTO's resolution of the various disputes fare if we compare across dispute orders? Transaction costs include time, financial and human resources expended, opportunity costs, and stress on relationships. The benefits of a process all tend to correlate positively with countries' satisfaction with the process and outcome, the maintenance of good working relationships among trading partners, and decreased recurrence of the same problem issues. While this research lacks absolute quantitative measures on these criteria, relative assessments are possible. Table 6.3 summarizes the comparisons.

The costs are high to very high in both first- and third-order disputes for all parties, but relatively moderate for a particular country and the institution in second-order disputes. Satisfaction with outcome and process in each order is moderate on average—higher for some, much lower for others. Relationships are at least not damaged in first- and second-order disputes, but are negatively affected in third-order disputes. The measure of problem recurrence is moderate in first-order disputes, as issues are subsequently renegotiated if insufficiently clear on the first try; problems identified in the policy implementation processes tend to recur, as there seems to be no means to remedy what is found. Third-order disputes have a high incidence of recurrence; half of the disputes have interested third parties, and many are filed by and against multiple parties.

As noted in the opening chapter, the same issues tend to arise in all three dispute orders in some variant form. Many critics focus on fixing the faults of each process. Some faults can be corrected, but perhaps it would be useful to consider what form of the problem is more tractable and

less costly to resolve, and steer those problems into the more effective processes—in other words, not only modify the processes, but more carefully distinguish among the disputes that are directed to those processes. Both policymaking (legislative) and policy enforcement processes are necessary in any institution, and a number of proposals are being considered to improve them at the WTO. What is striking is the potential advantage of second-order dispute resolution: The transaction cost is moderate, the satisfaction with outcome and process is moderate to high, and the effect on relationships is neutral to positive. Relative to the alternative processes of multilateral negotiation and litigation, it would be useful to seek ways to take greater advantage of policy implementation resolution. The next section considers a number of ideas and how they might help to integrate the first-, second-, and third-order dispute processes.

Table 6.3: Dispute Resolution Criteria and the WTO Processes

	First-Order Disputes: Policymaking	Second-Order Disputes: Policy Implementation	Third-Order Disputes: Policy Enforcement
Transaction Costs (time, financial and human resources expended, opportunity costs, and reputation)	High costs for all countries	Moderate costs for countries and for the institution in time and administrative support	High costs for all parties; too high for many potential complainants to engage
Satisfaction with Outcome: Interests met, or at least not compromised	Low to moderate	Moderate to high	Moderate
Satisfaction with Process: Fair and transparent process	Low	Moderate to high	Moderate
Effect on Relationships	Moderate	Moderate to positive	Negative
Problem Recurrence	Moderate	High	High

INTEGRATING PROCESSES AND SYSTEM DESIGN

Policy analysis begins with articulating the objective, then considering what strategies will best achieve that goal. This section considers the goal, inputs, process, and outputs for each dispute order, and the linkage points among them. I conclude by corresponding this modified WTO process schema with the concept of an integrated conflict management system.

First-Order Disputes

The WTO was formed to provide a common institutional framework that would promote security and predictability in multilateral trade relations. The organization provides a forum for negotiations among its members to do so. In current practice, all parties have an opportunity to propose topics for consideration in a given negotiation round. Hundreds of proposals from nearly 150 countries may be submitted; these proposals may include old rules that need revision and new topics that require research to understand. The proposals are the inputs to the first-order dispute resolution process. The parties work to categorize and winnow down these proposals into a more tractable package of topics for consideration. Using informal and formal meetings, some of which some are open and others exclusive, it can take many years to reach consensus; this is the process. We have noted above that as the number of members and complexity of the issues increases, the demand for a more transparent process increases as well.² Once an agenda is agreed upon,³ the negotiation process continues until consensus is achieved on an agreement: this is the output. The agreement is likely to include explicit provisions where possible, and more ambiguous provisions where there is less agreement or less

² Interestingly, the WTO institution (as distinguished from process) has been cited as one of the most transparent and accountable, primarily based on its online information access. "WTO gets high marks for accountability, transparency," *WTO News*, February 11, 2003.

³ Note, notwithstanding how long it can take to agree upon an agenda, it is not cast in stone. As described in Chapter 3, the pending Doha agenda included a number of issue areas when issued in 2000. The negotiation proved too difficult and the most recent draft agreement contemplates only five areas: agriculture, non-agriculture market access, development, trade facilitation (movement, release, and clearance of goods), and

knowledge to support more precise language. A number of reforms have been suggested to help “unblock the political decision-making process,”⁴ including more representative participation,⁵ greater access to essential information, amended decision-making rules, and the use of professional neutrals. Another approach might be to improve the quality of the information development phase.

A key link between second- and first-order disputes is the extent to which policymaking anticipates and establishes the basis for parties’ implementation of the agreed-upon provisions. Any steps taken to ensure that all parties are informed on the negotiated issues sufficiently to understand the consequences for their own constituencies will reap benefits. The question is whether these process reforms would improve the quality of the output (agreement), and better achieve the goal of more stable, predictable trade relations. Third-order disputes link to first-order disputes by highlighting the ambiguity and need for clarification in a rule applied to a concrete circumstance. In the GATT days, an unadopted panel report could function as a signal that the members needed a rule to be clarified. In some circumstances, it may be preferred to resolve an issue as a legal point through dispute settlement, rather than try to negotiate consensus for a specific agreement provision.⁶

Second-Order Disputes

Once members agree to specific trade policies, the goal is for governments to adopt domestic trade measures that are consistent with the policies. One measure of institutional effectiveness is its ability

services. “WTO: July Framework Agreement at Eleventh Hour,” *Bridges Weekly Trade Digest* 8, August 3, 2004, p. 2.

⁴ Claus-Dieter Ehlermann, “Tensions between the dispute settlement process and the diplomatic and treaty-making activities of the WTO,” *World Trade Review* 1 (2002), pp. 301-308.

⁵ Ironically, WTO members have expressed mixed opinions on the recent advance in the Doha negotiations; on the one hand, countries are relieved and encouraged that progress is being made on a draft framework agreement. On the other hand, countries are highly frustrated that the agreement was reached by an exclusive group, the “Five Interested Parties” (US, EC, India, Brazil, and Australia). Staff, “WTO: July Framework Agreed at Eleventh Hour,” *Bridges Weekly Trade Digest* 8, August 3, 2004, p. 2. The shrinking of the agenda is reminiscent of the “negotiation arithmetic” described in David Lax and James Sebenius, “Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing,” in Peyton Young, ed., *Negotiation Analysis* (Ann Arbor, MI: University of Michigan Press, 1991), p. 153.

⁶ For example, negotiating an amendment to the DSU would have required a three-quarters vote support by the WTO membership in order to accept amicus briefs. This issue was dealt directly by the Appellate Body in the

to influence the behavior of its member governments. Existing practice provides countries with opportunities for informal and formal consultations on the extent to which countries have taken the necessary domestic steps to implement their WTO obligations. Specifically, the TPR's purpose is to "contribute to the adherence by all Members to the rules, disciplines, and commitments" made under the trade agreements "by achieving greater transparency in, and understanding of, the trade policies and practices of Members."⁷ The input is a country's own prepared report, the Secretariat's report, and trading partners' comments. The process is periodic and transparent and happens to each country. The output is a report that points out areas for improvement. It has been suggested that the process and output be modified to more explicitly provide for the dissemination of reports to its ministries and follow-up consultations within a specific timeframe that emphasize devising implementation options tailored to a country's circumstances.⁸

The capacity of a country to implement WTO policies links clearly to first- and third-order disputes. Policymaking should anticipate the capacity of nations to implement new WTO obligations. Concerns raised during TPR reviews are signals to trading partners that, if unaddressed, can escalate into DSU complaints. In turn, DSU complaints include both willful and incapacity-based violations, both of which could likely be ameliorated by early intervention.

Third-Order Disputes

Shrimp-Turtle case. United States Import Prohibition of Certain Shrimp and Shrimp Products WTO Doc. WT/DS58/AB/R/58, adopted November 6, 1998, para. 99-110.

⁷ TPRM, Paragraph A(i).

⁸ See, for example, Abram Chayes and Antonia Handler Chayes on managerial compliance, *The New Sovereignty* (Cambridge, MA: Harvard University Press, 1995); complaint-based monitoring in John H. Knox, "A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission," *Ecology Law Quarterly* 28 (2001). See also Alec Stone-Sweet, "Judicialization and the Construction of Governance," CCOP Working Paper # 1999-04, January 1999. Sweet conceives of the continuous resolution of dyadic conflicts by a third party, using continuous discourse about the rulefulness of behavior, which is gradually absorbed into political behavior, thus judicializing political behavior. Sungjoon Cho describes a broad, long-term approach to domestic behavior changes in "Reconciling a Clash between Free Markets and State Regulation: Toward a New International Economic Law," (Diss., Harvard Law School, 2002) p. 364.

The DSU is a central element of the WTO that serves “to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”⁹ Inputs to the DSU take the form of complaints by one (or more) countries against another that the benefits expected under the WTO agreement have been nullified or impaired.¹⁰ The process is carefully prescribed to include a period of consultation, optional conciliation/good offices/mediation, submission to an expert panel, and optional review by the Appellate Body. While adjudication doesn’t ensure compliance, most states do comply with the DSB’s recommendations. The process provides a legitimate basis for seeking the cessation of an improper trade practice or the award of compensation or retaliation rights (which are costly to both the complainant and the target), and it increases the determinacy of law. The output is a decision by a panel or Appellate Body that is formally adopted and recommends action by the respondent if a violation is found. Both the process and output components could bear improvement, as already raised in Chapter 5. Such improvements could include the formation of a professional panelist roster, more active use of ADR processes, and modified remedies.

Again, these third-order disputes link back to both policymaking and policy implementation, and can have serious consequences. A former U.S. official warned: “We have an increasingly difficult economic relationship that’s threatening to spill over into our political and even our security relationship... Trade disputes are piling up without an effective ability to deal with them.”¹¹ The notion of problem-solving courts “extends the role of the legal system beyond fact-finding and imposition of sanctions...to restore the well-being of communities.”¹² On the other hand, it may be more efficient to use dispute settlement procedures to resolve a particular issue, rather than look to the

⁹ DSU, Article 3.2.

¹⁰ However, “Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanisms is to secure a positive solution to a dispute.” DSU, Article 3.7.

¹¹ U.S. Commerce Undersecretary David Aaron in Michael Smith, “Disputes put political links at risk, says US,” *Financial Times*, March 15, 2000.

full-membership to negotiate a specific legal provision. Open issues that would inform a deeper study of this order include an evaluation of what happens after dispute settlement concludes: how and when does the respondent (and other similarly-situated countries) change its trading behavior. Does the compliance pull of a panel and Appellate Body decision establish a precedent for measuring behavior and are subsequent trade negotiations facilitated by reference to a particular case experience.

Integrating the Orders

This research has described three domains to facilitate analysis, but in fact the borders are porous. The overview of each dispute order's inputs, process, and outputs allows us to examine how the pieces fit together. Chayes and Chayes's work highlighted the importance of bringing all compliance measures and instruments into a single coherent compliance strategy.¹³ One Geneva diplomat describes three kinds of players in the trade world who are only minimally coordinated in their activities: negotiators who have particular political sense, administrators who are technically proficient, and litigators/lawyers. These actors roughly correlate to first-, second-, and third-order activities. A system design should consider not only what each order of activity aims to achieve, but who performs the function.

An emerging field is that of integrated conflict management systems.¹⁴ While geared to organizations in a domestic context, the principles are portable. An optimal system needs to prevent unnecessary conflict as well as manage conflict when it does arise. Lynch states that a system is likely to be more effective if it integrates power-, interest-, and rights-based processes, provides different options for resolution, and includes a support structure with independent neutrals and feedback opportunities. All of these elements have been touched upon in this research.

¹² Jeffrey A. Butts, "Introduction: Problem-Solving Courts," *Law & Policy* 23, no. 2 (April 2001), p. 121.

¹³ Chayes and Chayes, *The New Sovereignty*, p. 249.

¹⁴ Jennifer F. Lynch, Q.C., "Beyond ADR: A Systems Approach to Conflict Management," *Negotiation Journal* (July 2001), p. 207; and Jennifer Lynch, "Integrated Conflict Management Programs Emerge as an Organization Development Strategy," *CPR Institute for Dispute Resolution* 21, no. 5 (May 2003), p. 99.

I conclude that some conflicts might be prevented and others might be more effectively resolved by recognizing where the process costs and benefits are more advantageous. The most underutilized dispute handling process seems to be that of second-order disputes. These processes, which are concerned with policy implementation, are focused on translating international rules into domestic practice. Surveillance mechanisms (e.g., notifications, trade policy reviews) are in place to diagnose the barriers countries experience in fulfilling their obligations. An ongoing review of those barriers, and a structured discussion in which to develop options for short-, medium-, and long-term action, would likely decrease the number of second-order disputes that ripen into third-order, DSU complaints and avoid costs in resources and trading relationships. Implementation experience can feed back to policymaking and enable negotiators to draft agreements with more specificity; more success at the implementation phase will also diminish the number of cases that go to the DSU. Of course, there are always cases of countries in which constituent pressure is so great that they have no incentive to comply before a tribunal so requires.¹⁵ If, however, there were some transitional implementation allowance made for countries willing to pursue compliance sooner, then the incentives for governments to change their policies could shift. For example, if a target country can articulate the barriers to compliance, and does so after a request for consultation, but before a panel is established, some kind of mediated process might trigger access to financial and technical assistance, as well as an extended time to phase in full compliance. The DSU represents a highly judicialized process that is unlikely to revert to a more diplomatic one. However, the DSU could usefully be supplemented with an enhanced second-order dispute process, as well as with the mandatory use of other processes already contemplated, such as conciliation and mediation using professional neutrals.

These ideas are preliminary. This research closes with some guidelines for thinking about dispute settlement within a system of processes, based on the WTO's experience, and some

¹⁵ For an interesting discussion of compliance constituencies (e.g., import-competing industries, exporters, lawyers) from the political scientists' perspective, see Miles Kahler, "Conclusion: The Causes and

recommendations for further research. The guidelines start with what the WTO is and requires. The WTO system manages highly complex issues according to an intricate structure of rules, involves ongoing relationships among most of the world's nations, and uses a nested set of policy making, policy implementation and policy enforcement processes. When representative decision making is critical, when maintaining relationships is paramount, or transaction costs are prohibitive, then first-order or second-order processes will be much more effective. If, however, building consensus among 150 nations is too hard, or premature, then addressing the issue in more concrete terms within the context of a specific case in the DSU may be preferable. When pursuing a legal process will carry more legitimacy, then third-order processes should dominate. However, when facilitating compliance in a less-costly, more deliberative and low-profile manner is important, then second-order processes will be most valuable.

Three recommendations for future research are suggested. First is to organize a working group to consider more deeply the issues I have raised among the first-order, second-order, and third-order phases, and the links among them. The working group should involve representatives not only of diverse countries, but of diverse professional experience: negotiator-diplomats, in-country administrators and technocrats, and lawyers from the public, nongovernmental, and private sectors.¹⁶ With breadth of experience and scope of reference, the group could issue a series of proposals to make the existing trade institution more efficient and effective, and serve as a pilot for other institutions aiming to emulate the successes of the WTO. Two specific points to explore would be to evaluate the extent to which sanctions have effectively modified country behavior to be more consistent with the WTO policies. Secondly, it would help to probe what makes the hard cases, e.g., bananas and beef hormones, hard, and what processes could more effectively resolve future hard cases, such as trade involving genetically-modified organisms and agricultural subsidies. A second

Consequences of Legalization," *International Organization* 54 (Summer 2000) pp. 661-683, 692.

¹⁶ A new approach to analyzing the interaction of process and substance is found in James Sebenius, "A 3-D View of Negotiation Theory and Practice," in D. Lax and J. Sebenius, *3-D Negotiation: Creating and Claiming Value for the Long Term* [forthcoming].

area of research would be to examine country behaviors after conclusion of the DSU processes, both when complainants prevail, and when respondents prevail. With the input provided by the first two research areas, a third could more carefully compare the WTO experience with that of other international institutions, e.g., the OECD and North American Free Trade Agreement (NAFTA), and extend the findings for application to newer institutions, such as contemplated by the more recent global environmental treaties.

APPENDIX 1: DISPUTE SETTLEMENT PROVISIONS IN WTO AGREEMENTS

AGREEMENT	SECTION/PROVISION
Marrakesh Agreement Establishing the WTO	Annex 2: Understanding on rules and Procedures Governing the Settlement of Disputes (DSU).
GATT 1994	<p>Art. XXII: Consultations. Each party shall accord sympathetic consideration to, and afford adequate opportunity for consultations with, a party who raises representations with respect to any matter affecting operation of the Agreement.</p> <p>Art. XXIII: Nullification or Impairment. If a benefit is considered nullified or impaired, party may submit representations or proposals to other party, which shall be given sympathetic consideration. If matter not concluded, consultations, investigations, recommendations, and possible suspension of concessions by CONTRACTING PARTIES may be pursued.</p> <p>Art. 19: Consultation and Dispute Settlement. Art. XXII, XXIII of GATT 1994 and DSU apply.</p>
Agreement on Agriculture	Art. 11: Consultation and Dispute Settlement. Art. XXII, XXIII of GATT 1994 and DSU apply. Should seek advice of experts, may establish an advisory technical experts group or consult relevant international organizations.
Agreement on the Application of Sanitary and Phytosanitary Measures	Art. 8: Textiles Monitoring Body to supervise implementation of the agreement.
Agreement on Textiles and Clothing	Art. 14: Consultations and Dispute Settlement. Art. XXII, XXIII of GATT 1994 and DSU apply. May establish a technical expert group to assist, subject to procedures of Annex 2 on technical expert groups.
Agreement on Technical Barriers to Trade	Art. 8: Consultation and Dispute Settlement. Art. XXII, XXIII of GATT 1994 and DSU apply.
Agreement on Trade-Related Investment Measures	Art. 17: Consultation and Dispute Settlement. DSU applies. Consultations encouraged. Evaluation of facts as unbiased and objective. Confidentiality of certain information.
Agreement on Implementation of Art. VI of the GATT 1994 [Antidumping]	Art. 19: Consultations and Dispute Settlement. DSU applies. Consultations encouraged. Technical Committee available to assist [see Annex 2]. Confidentiality of certain information.
Agreement on Implementation of Art. VII of the GATT 1994 [Customs valuation]	Art. 7: Consultation. Art. XXII and DSU apply.
Agreement on	

Prereshipment Inspection	Art 8: Dispute Settlement. Art. XXIII and DSU apply.
Agreement on Rules of Origin	Art. 7: Consultation. Art XXII and DSU apply. Art 8: Dispute Settlement. Art. XXIII and DSU apply.
Agreement on Import Licensing Procedures	Art. 6: Consultation and Dispute Settlement. Art. XXII, XXIII and DSU apply.
Agreement on Subsidies and Countervailing Measures	Art. 9: Consultations and Authorized Remedies. If a program is consistent with Agreement criteria, but results in serious damage, may request consultations to reach mutual solution. May refer matter to Committee [Art. 24]. Art. 13: Consultations. Consultation and investigation of matters relative to countervailing measures. Art. 30: Dispute Settlement. Art. XXII, XXIII and DSU apply.
Agreement on Safeguards	Art. 12: Notification and Consultation. Notification, investigation and consultation re: safeguard measures. Art. 14: Art. XXII, XXIII and DSU apply.
General Agreement on Trade in Services	Art. XXII: Consultation Art. XXIII: Dispute Settlement and Enforcement Recourse to DSU.
Agreement on Trade-Related Aspects of Intellectual Property Rights	Art. 42: Fair Equitable Procedures. Civil judicial procedures to enforce intellectual property rights under Agreement Art. 43: Evidence. Judicial authorities have authority to order production of certain evidence. Art. 44: Injunctions. Authority of judicial authorities to desist from infringement. Art 45: Damages. Authority of judicial authorities to order damages to compensate for infringement. Art 46: Other Remedies. Deterrents to infringement. Art. 47: Right of Information. Authority of judicial authorities to order certain information disclosed. Art. 48: Indemnification of the Defendant. Authority of judicial authorities to order compensation for abuse of process. Art. 49: Administrative Procedures. Availability of civil remedies. Sect. 3: Provisional Measures. Art. 63: Transparency. Notification of laws and regulations. Art. 64: Dispute Settlement. Art. XXII , XXIII, [except 1.b and 1.c] and DSU apply, subject to specific provisions of the Agreement. Matters relative to XXIII.1.b and XXIII.1.c shall be referred to TRIPS Council, then with recommendations to the General Conference.

WTO Case #	Name	Complainant	Respondent/GATT'94	WTO Other	CONSLTN Request	PANEL Request	Estab'd	Mutual Solution	Pan Rpt Adopted	AB Rpt Adopted
WT/DS1	Prohibition of Imports of Polyethylene Standards for Reformulated Venezuela	Singapore	Malaysia	ILP	1/13/95	3/17/95	4/10/95	7/19/95	5/20/96	5/20/96
WT/DS2	Measures Concerning the Tariffs	U.S.	U.S.	TBT	1/24/95	3/27/95				
WT/DS3	Standards for Reformulated Brazil	U.S.	Korea	SPS; TBT; AoA	4/6/95		6/19/95	7/31/95		
WT/DS4	Measures Concerning the SPS	U.S.	U.S.	TBT	4/10/95	5/22/95		7/19/95		
WT/DS5	Imposition of Import Duties	Japan	U.S.	SPS; TBT; AoA	5/3/95			7/19/95		
WT/DS6	Trade Description of Scallops	Canada	EC	TBT	5/22/95			7/5/96		
WT/DS7	Taxes on Alcoholic Beverages	Canada	Japan	CVA	6/21/95	7/10/95	7/19/95		11/1/96	11/1/96
WT/DS8	Duties on Imports of Cereals	Canada	Japan	TBT	7/10/95	9/15/95	10/11/95			
WT/DS9	Taxes on Alcoholic Beverages	Canada	EC	CVA	7/7/95	7/7/95	9/27/95			
WT/DS10	Taxes on Alcoholic Beverages	Canada	EC	TBT	7/25/95	9/15/95	10/11/95	7/5/96		
WT/DS11	Trade Description of Scallops	Peru	EC	TBT	7/19/95	9/15/95	10/11/95	5/2/97		
WT/DS12	Duties on Imports of Grains	U.S.	EC	CVA	7/31/95	9/15/95	10/11/95	7/5/96		
WT/DS13	Trade Description of Scallops	Chile	EC	TBT	8/18/95	9/15/95	10/11/95	7/5/96		
WT/DS14	Measures Affecting the Importation	Guat., Hon., Pa	Japan	AoA, ILP, TRIMS, GATS	10/3/95	3/7/97	4/10/97		11/6/98	11/6/98
WT/DS15	Duties on Imports of Rice	Thailand	EC	CVA	10/3/95			7/16/96		
WT/DS16	Measures Affecting Imports of Automobiles	Canada	EC	SPS	10/5/95			4/24/96		
WT/DS17	Import Regime for Automobiles	Canada	Australia	SPS	9/28/95					
WT/DS18	Measures concerning bottle	Canada	Poland	SPS; TBT	11/17/95	5/11/99	6/16/99			
WT/DS19	Measures Affecting the Importation	U.S.	Korea	SPS	11/27/95	2/5/96	3/5/96	10/27/00	3/20/97	3/20/97
WT/DS20	Measures Affecting Desiccated	Philippines	Australia	SPS, AoA	12/5/95	Term		5/26/97		
WT/DS21	Anti-dumping Investigation	Mexico	Brazil	AD	1/15/96	2/27/96	3/5/96			
WT/DS22	Restrictions on Imports of	Costa Rica	US	ATC	12/18/95					
WT/DS23	Implementation of the Uruguay	Uruguay	EC	AoA	1/13/96	4/25/96	5/20/96		2/13/98	2/13/98
WT/DS24	Measures Affecting Meat &	US	EC	SPS, TBT, AoA	2/13/96	4/12/96	5/8/96		9/25/97	9/25/97
WT/DS25	Regime for the Importation,	Ecuador, Gua	EC	ILP, TRIMS, AoA, GATS	8/31/98					
WT/DS26	Regime for the Importation,	Ecuador, Gua	EC	TRIPS	2/9/96			1/24/97		
WT/DS27	Measures Concerning Sound	US	Japan	TRIPS	2/12/96					
WT/DS28	Restrictions on Imports of	Hong Kong	Turkey	AoA	2/23/96					
WT/DS29	Countervailing Duties on Imports	Sri Lanka	Brazil	AoA	3/14/96	5/24/96	6/19/96		7/30/97	7/30/97
WT/DS30	Certain Measures Concerning	US	Canada	ATC	3/14/96	3/14/96	4/17/96	4/25/96	5/23/97	5/23/97
WT/DS31	Measures Affecting Imports	India	US	ATC	3/15/96	3/15/96	4/17/96			
WT/DS32	Measures Affecting Imports	India	US	ATC	3/25/96	2/2/98	3/13/98	7/30/97	11/19/99	11/19/99
WT/DS33	Restrictions on Imports of	India	Turkey	AoA	3/27/96	1/9/97	2/25/97	2/25/97		
WT/DS34	Export Subsidies in Respect	Argentina, Al	Hungary	TRIPS	4/30/96	7/4/96		10/3/96		
WT/DS35	Patent Protection for Pharm	US	Pakistan	TRIPS	4/30/96			10/3/96		
WT/DS36	Patent Protection under the	US	Portugal	TRIPS	5/3/96			4/22/98		
WT/DS37	The Cuban Liberty & Democ	EC	US	GATS, WTO	4/17/96					
WT/DS38	Tariff Increases on Products	EC	US	DSU	5/9/96	6/19/96				
WT/DS39	Laws, Regulations & Practic	EC	Korea	SPS, TBT, AoA	5/24/96			10/22/97		
WT/DS40	Measures Concerning Inspe	US	Korea	TRIPS	5/24/96			11/7/97		
WT/DS41	Measures Concerning Sound	EC	Japan	TRIPS	6/12/96	1/9/97	2/25/97	7/14/97		
WT/DS42	Taxation of Foreign Film Re	US	Turkey	TRIPS	6/21/96	9/29/96	10/16/96		4/22/98	
WT/DS43	Measures Affecting Consum	US	Japan	GATS	6/13/96					
WT/DS44	Measures Affecting Distribu	US	Japan	SCM	6/21/96	9/17/96	7/23/98		8/20/99	8/20/99
WT/DS45	Export Financing Program	Canada	Brazil	SCM	6/20/96					
WT/DS46	Restrictions on Imports of	Thailand	Turkey	ACT	7/8/96	9/17/96	10/16/96		2/13/98	2/13/98
WT/DS47	Measures Affecting Meat &	Canada	EC	AoA, SPS, TBT	7/1/96					
WT/DS48	Anti-Dumping Investigation	Mexico	US	AD	7/9/96					
WT/DS49	Patent Protection for Pharm	US	India	TRIPS	7/9/96+	11/8/96	11/20/96		1/16/98	1/16/98
WT/DS50	Certain Automotive Investm	Japan	Brazil	TRIMS, SCM	7/30/96					
WT/DS51	Certain Measures Affecting	US	Brazil	TRIMS, SCM	8/9/96					
WT/DS52	Customs Valuation of Import	EC	Mexico	TRIMS, SCM	8/27/96					
WT/DS53	Certain Measures Affecting	EC	Indonesia	TRIMS, SCM, TRIPS	10/14/96	5/12/97	6/12/97		7/23/98	7/23/98

WTO Case #	Name	Complainant	Respondant	GATT'94	WTO Other	Request	Request	Request	Request	Request	Request	Solution	Adopted	Adopted
WT/DS169	Measures Affecting Imports	Australia	Korea	II, III, XI, XVII	AoA, ILP	4/13/99	4/16/99	7/26/99	1/10/01	1/10/01				
WT/DS170	Term of Patent Protection	US	Canada		TRIPS	5/6/99	7/15/99	9/22/99	10/12/00					
WT/DS171	Patent Protection for Pharms	US	Argentina		TRIPS	5/21/99								
WT/DS172	Measures Relating to the De	US	EC	XXIII:1(b)	SCM	5/21/99								
WT/DS173	Protection of Trademarks at	US	France	XXIII:1(b)	SCM	5/21/99								
WT/DS174	Measures Affecting Trade at	US	EC	III, XI	TRIMS	5/1/99	5/15/00	7/27/00						
WT/DS175	Section 211 Omnibus Appr	EC	India	I, XIX	TRIPS	7/15/99	7/7/00	9/26/00						
WT/DS176	Safeguard Measure on Imop	NZ	US	I, II, XIX	Sfads	7/16/99	10/14/99	11/19/99	5/16/01	5/16/01				
WT/DS177	Safeguard Measure on Imop	Australia	US	I, II, XIX	Sfads	7/23/99	10/14/99	11/19/99						
WT/DS178	Anti-Dumping Measures on	Korea	US	VI	ADA	7/30/99	10/14/99	11/19/99						
WT/DS179	Reclassification of Certain	Canada	US	II	AoA	9/6/99	9/17/99W							
WT/DS180	Safeguard Measure on Imop	Thailand	Colombia		ATC									
WT/DS181	Provisional Anti-Dumping Me	Mexico	Ecuador	VI	AD	10/5/99								
WT/DS182	Measures on Import Licensi	EC	Brazil	II, VII, VIII, X, XI	AoA, ILP	10/14/99								
WT/DS183	Anti-Dumping Measures on	Japan	US	VI, X	AD	11/18/99	2/11/00	3/20/00	8/23/01	8/23/01				
WT/DS184	Certain Measures Affecting	Costa Rica	Trinidad & Tobago	III	AD	11/18/99								
WT/DS185	Section 337 of the Tariff A	EC	US	III	TRIPS	1/12/00								
WT/DS186	Provisional anti-Dumping Me	Costa Rica	Trinidad & Tobago	I, II	AD	1/17/00								
WT/DS187	Measures Affecting Imports	Colombia	Nicaragua		ATC	1/17/00	3/28/00	5/18/00						
WT/DS188	Definitive anti-Dumping Mea	EC	Argentina		AD	1/26/00	2/11/00	3/20/00	11/5/01	11/5/01				
WT/DS189	Transitional Safeguard Mea	Brazil	Argentina		ATC									
WT/DS190	Definitive Anti-Dumping Mea	Brazil	Ecuador	VI	AD	3/15/00	4/3/00	6/19/00	11/5/01	11/5/01				
WT/DS191	Transitional Safeguard Mea	Mexico	US	V, XI	ATC	4/3/00	4/3/00	12/12/00						
WT/DS192	Measures Affecting the Tra	EC	Chile			4/19/00	7/24/00	9/11/00	8/23/01	8/23/01				
WT/DS193	Measures Treating Export R	Canada	US	III-4, III-5, XI:1	WTO, SCM	5/19/00	7/24/00	9/11/00						
WT/DS194	Measures Affecting Trade at	US	Philippines		TRIMS, SCM	5/23/00	10/12/00	11/17/00						
WT/DS195	Certain Measures o the Prot	US	Brazil			5/30/00								
WT/DS196	Measures on Minimum Impos	US	Argentina			5/30/00								
WT/DS197	Measures on Minimum Impos	US	Brazil			5/30/00								
WT/DS198	Measures on Minimum Impos	US	Romania	II, XI	CVA, ILP, ATC, AoA	5/30/00								
WT/DS199	Measures Affecting Patent	US	Brazil	II, X, XI	CVA, AoA, ATC	5/30/00								
WT/DS200	Section 306 of the Trade A	EC	US	III	TRIPS	5/30/00	2/1/01	7/5/01						
WT/DS201	Measures Affecting Import	Honduras	US	I, II, XIX	DSU, WTO	6/5/00								
WT/DS202	Definitive Safeguard Measur	Korea	Nicaragua		GATS	6/26/00	9/15/00	10/23/00						
WT/DS203	Measures Affecting Trade in	US	Mexico	I, XIII, XIX	Sfads	6/13/00								
WT/DS204	Measures Affecting Telecom	US	Mexico	III-4, XI:1	AoA, SPS, TBT	7/10/00								
WT/DS205	Import Prohibition on Came	Thailand	Mexico		GATS	9/22/00	11/10/00							
WT/DS206	Anti-Dumping and Conterva	India	US	I, XI, XIII	SPS	10/4/00	7/24/01							
WT/DS207	Price Band System and Safe	Argentina	Chile	VI, X	AD, SCM, WTO	10/5/00	1/19/01	3/12/01						
WT/DS208	Anti-Dumping Duty on Steel	Brazil	Turkey	II, XIX:1(a)	AoA, Sfads	10/12/00								
WT/DS209	Measures Affecting Soluble	Brazil	EC	VI	AD	10/12/00								
WT/DS210	Administration of Measures	US	Belgium	I, II, VII, VIII, X, XI	CVA; TBT; AoA	10/12/00	1/10/01	3/12/01	12/18/01	12/18/01				
WT/DS211	Definitive Anti-Dumping Me	Turkey	Egypt	X-3	AD	11/6/00	5/3/01	6/20/01						
WT/DS212	Countervailing Measures on	EC	US		SCM	11/10/00								
WT/DS213	Countervailing Duties on Cel	EC	US		SCM	11/10/00								
WT/DS214	Definitive Safeguard Measur	EC	US	I, I, XIX:1	Sfads	11/30/00								
WT/DS215	Anti-Dumping Measures red	Korea	Philippines	VI	AD	12/15/00								
WT/DS216	Provisional Anti-Dumping Me	Brazil	Mexico		AD	12/20/00								
WT/DS217	Continued Dumping and sub	Austr. Braz. CF	US	XXIII	AD, SCM, WTO	12/21/00	7/12/01	8/23/01						
WT/DS218	Countervailing duties on cel	Brazil	US		SCM	12/21/00								
WT/DS219	Anti-dumping duties on mal	Brazil	EC	VI	AD	12/21/00								
WT/DS220	Price Band System and Safe	Guat	Chile	II, XIX	SG	1/5/01								
WT/DS221	Section 129C(1) of the Uri	Canada	US	VI	DSU, SC, AD, WTO	1/17/01								
WT/DS222	Export Credits & Loan Guar	Brazil	Canada	Australia, EC, India, SCM	1/22/01	1/22/01								
WT/DS223	Tariff-Rate Quota on Corn	G US	EC	I, II, XIX	SG	1/25/01								
WT/DS224	US Patents Code	Brazil	US	III, XI	TRIMS, TRIPS	1/31/01								
WT/DS225	Anti-dumping duties on Seal	EC	US		AD, WTO	2/5/01								

WTO Case #	Name	Complainant	Respondant	GATT/94	WTO Other	Request	Estab'd	Solution	Adopted
WT/DS226	Provisional Safeguard Measures on Cigarettes	Argentina	Chile	XIX	SG	2/19/01	6/24/01w		
WT/DS227	Taxes on Cigarettes	Chile	Peru	III		3/1/01			
WT/DS228	Safeguard Measures of Sugar	Colombia	Chile			3/19/01			
WT/DS229	Anti-Dumping Duties on Jute	India	Brazil	VI, X	WTO, AD		7/24/01		
WT/DS230	Safeguard Measures and M	Colombia	Chile	II, IX, XXVIII	SG	3/20/01			
WT/DS231	Trade Description of Sardines	Peru	EC	I, III, XI	TBT, ILP	5/17/01			
WT/DS232	Measures Affecting the Impo	Chile	Mexico	III	TBT, WTO	5/25/01			
WT/DS233	Measures Affecting the Impo	India	Argentina	I, III	ADA, SCM, WTO	5/21/01	9/10/01		
WT/DS234	Continued Dumping and sub	Canada, Mex	US	VI, X, XXIII(1)	SG	7/11/01			
WT/DS235	Safeguard Measure on Impo	Poland	Slovakia	VI(3)	SCM, WTO	8/21/01	12/5/01		
WT/DS236	Preliminary Determinations	Canada	Turkey	II, III, VIII, X, XI	SPS, ILP, AoA, GATS	8/31/01			
WT/DS237	Certain Import Procedures f	Ecuador	Argentina	XIX:1	AD	9/14/01	12/6/01		
WT/DS238	Definitive Safeguarded Meas	Chile	US			10/18/01	11/27/01w		
WT/DS239	Anti-dumping duties on Silic	Brazil	US	III, XI	AD, CVA	11/7/01			
WT/DS240	Import Prohibition on Wheat	Hungary	Romania	III, XI		11/7/01			
WT/DS241	Definitive Anti-Dumping Dut	Brazil	Argentina	I, XXIII		12/7/01			
WT/DS242	Generalized System of Prefe	Thailand	EC			1/11/02	6/24/02		
WT/DS243	Rules of Origin for Textiles &	India	US	VI, X	ARO	1/30/02	5/22/02		
WT/DS244	Sunset Review of Antidumpi	Japan	US	XI	ADA, WTO	3/1/02	5/8/02		
WT/DS245	Measures Affecting the Impo	US	Japan		AoA, SPS	3/5/02	12/6/02		
WT/DS246	Conditions for the granting	India	EC			3/6/02	1/27/03		
WT/DS247	Provisional Anti-Dumping Me	Canada	US		ADA	3/6/02	6/3/02		
WT/DS248	Definitive Safeguard Measur	EC	US	I, XIII, XIX	Sfdds	3/7/02	5/8/02		
WT/DS249	Definitive Safeguard Measur	Japan	US	I, II, X, XIII, XIX	Sfdds	3/20/02	5/24/02		
WT/DS250	Equalizing Excise Tax Impos	Brazil	US	I, III		3/20/02	8/19/02		
WT/DS251	Definitive Safeguard Measur	Korea	US	I, X, XIII, XIX	Sfdds, WTO	3/20/02	5/24/02		
WT/DS252	Definitive Safeguard Measur	China	US	I, II, X, XIX	Sfdds	3/26/02	5/27/02		
WT/DS253	Definitive Safeguard Measur	Switz	US	I, XIX	Sfdds	4/3/02	6/24/02		
WT/DS254	Definitive Safeguard Measur	Norway	US	I, II, X, XIX	Sfdds	4/4/02	6/4/02		
WT/DS255	Tax Treatment on certain In	Chile	Peru	II		4/24/02	6/14/02		
WT/DS256	Import Ban on Pet Food from	Hungary	Turkey	XI	SPS, AoA	5/3/02	7/19/02		
WT/DS257	Final Countervailing Duty De	Canada	US	VI, X	SCM	5/3/02	10/1/02		
WT/DS258	Definitive Safeguard Measur	NZ	US	I, X, XIX	Sfdds	5/14/02	6/28/02		
WT/DS259	Definitive Safeguard Measur	Brazil	US	I, XIX	Sfdds, WTO	5/21/02	7/22/02		
WT/DS260	Provisional Safeguard Meas	US	EC	XIX	Sfdds	5/30/02	8/19/02		
WT/DS261	Tax Treatment on certain In	Chile	Uruguay	I, III		6/18/02	4/3/03		
WT/DS262	Sunset Review of Antidumpi	EC	US	VI, X	ADA, SCM, WTO	7/25/02	5/19/03		
WT/DS263	Measures Affecting Imports	Argentina	EC	I, III	TBT, WTO	9/4/02			
WT/DS264	Final Dumping Determinatio	Canada	US	X	ADA	9/13/02	12/6/02		
WT/DS265	Export Subsidies on Sugar	Australia	EC	III, XVI	AoA, SCM	9/27/02	7/9/03		
WT/DS266	Export Subsidies on Sugar	Brazil	EC	III, XVI	AoA, SCM	9/27/02	8/29/03		
WT/DS267	Subsidies on Upland Cotton	Brazil	US	III	AoA, SCM	9/27/02	2/6/03		
WT/DS268	Sunset Review of Antidumpi	Argentina	US	VI, X	ADA, WTO	10/7/02	5/19/03		
WT/DS269	Customs Classification of Fr	Brazil	EC	II, XXIII, XXVIII		10/11/02	9/19/03		
WT/DS270	Certain Measures Affectin	Philippines	Austral	XI, XIII	SPS, ILP	10/18/02	7/7/03		
WT/DS271	Certain Measures Affecting	Philippines	Austral	XI, XIII	SPS	10/18/02			
WT/DS272	Provi'l Antidumping Duties	Argentina	Peru	VI	ADA	10/21/02	6/11/03		
WT/DS273	Measures Affecting Trade in	EC	Korea		SCM	11/1/02	7/21/03		
WT/DS274	Definitive Safeguard Measur	Chinese Taipei	US	I, XIX	Sfdds	11/1/02			
WT/DS275	Import Licensing Measures	US	Van	III, X, XI, XIII	AoA, TRIMS, ILP	11/7/02			
WT/DS276	Measures Relating to Export	US	Canada	III, XVII	TRIMS	12/17/02	3/6/03		
WT/DS277	Investigation of the US Tr	Canada	US	VI	ADA, SCM	12/20/02	4/3/03		
WT/DS278	Definitive Safeguard Measur	Argentina	Chile	XIX	Sfdds	12/20/02	5/7/03		
WT/DS279	Import Restrictions, Maintain	EC	India	III, X, XI	AoA, ILP, SPS, TBT	12/23/02	8/4/03		
WT/DS280	Countervailing Duties on Ste	Mexico	US	III, VI, X	SCM	1/21/03	7/29/03		
WT/DS281	Antidumping Measures on C	Mexico	US	ADA	ADA	1/31/03	8/29/03		
WT/DS282	Antidumping Measures on O	Mexico	US	VI, X	ADA	2/18/03	7/29/03		

WTO Case #	Name	Complainant	Respondant	GATT'94	WTO Other	Request	Request	Request	Estab'd	Solution	Adopted	Adopted
WT/DS283	Export Subsidies on Sugar	Thailand	EC	III	SCM, AoA	3/14/03	7/9/03	8/29/03				
WT/DS284	* Certain Measures Preventing	Nicaragua	Mexico	I, X, XI, XIII	ILP, SPS	3/17/03						
WT/DS285	Measures Affecting the Cross	Antigua & Barbuda	US		GATS	3/13/03	6/12/03	7/21/03				
WT/DS286	* Customs Classification of Fruit	Thailand	EC	II		3/25/03	10/27/03	8/29/03				
WT/DS287	Quarantine Regime for Imports	EC	Austral		SPS	4/3/03						
WT/DS288	Definitive Antidumping Measure	Turkey	S. Africa	III, VI, X	AoA	4/9/03						
WT/DS289	Additional Duties on Imports	Poland	Czech Rep	I, II	TRIPS, TBT	4/16/03	8/18/03	10/2/03				
WT/DS290	Protection of Trademarks &	Australia	EC	I, III	SPS, TBT, AoA	4/17/03	8/7/03	8/29/03				
WT/DS291	* Measures Affecting the App	US	EC	I, III, X, XI	SPS, TBT, AoA	5/13/03	8/7/03	8/29/03				
WT/DS292	* Measures Affecting the App	Canada	EC	I, III, X, XI	SPS, TBT, AoA	5/13/03	8/7/03	8/29/03				
WT/DS293	* Measures Affecting the App	Argentina	US	I, III, X, XI	ADA	5/14/03						
WT/DS294	* Laws Reg. Method for Dumping	EC	US	VI	AD, SCM	6/12/03	9/19/03					
WT/DS295	Definitive Antidumping Measure	US	Mexico	VI	AD, SCM	6/16/03	11/21/03					
WT/DS296	Countervailing Duty Investigation	Korea	US	VI, X	SCM	6/30/03	7/14/03					
WT/DS297	Measure Affecting Imports of	Hungary	Croatia	XI, XX	SPS	7/9/03						
WT/DS298	Certain Pricing Measures for	Guatemala	Mexico	I, II, VII, X	AoA, CVA	7/22/03						
WT/DS299	Countervailing Measures on	Korea	EC	VI, X	SCM	7/25/03	11/21/03					
WT/DS300	Measures Affecting the Import	Honduras	DomRep	I, II, III, XI	SCM	8/28/03						
WT/DS301	* Measures Affecting Trade in	Korea	EC	I, III	SCM	9/3/03	12/9/03					
WT/DS302	* Measures Affecting the Import	Honduras	DomRep	II, III, XI, XV	Sfgds	10/8/03						
WT/DS303	Definitive Safeguard Measure	Chile	Ecuador	XIX	ADA	11/24/03						
WT/DS304	* Anti-Dumping Measures on	EC	India	VI		12/11/03						

* Add'l parties to Cplt. & Respt. Bold = developing country

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