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The WTO as a Legal System

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Abstract

Part I describes Hart's view of the primary and secondary rules that are necessary for the existence of a modern legal system. Part II examines his view of international law, as resembling a primitive legal system. Part III evaluates the GATT legal system according to Hart's criteria for a modern legal system, while Part IV will do the same for the World Trade Organization ("WTO"). Part V will conclude with an evaluation of the WTO legal system.

THE WTO AS A LEGAL SYSTEM

*David Palmetier**

INTRODUCTION

In the summer of 1948, at the second meeting of the CONTRACTING PARTIES¹ to the General Agreement on Tariffs and Trade² ("GATT") in Geneva, the delegation of the Netherlands asked the Chairman of the session, Dana Wilgress of Canada, to rule whether the most-favored-nation obligation of Article I of the GATT applied to consular taxes. On August 24, 1948, the Chairman ruled:

[I]n response to a request for an interpretation of the phrase "charges of any kind" in paragraph 1 of Article I with respect to consular taxes, the Chairman ruled that such taxes would be covered by the phrase "charges of any kind."³

With this single sentence report of the ruling from the Chairman, the GATT dispute settlement system was born.⁴ That system, as it evolved, was hardly sophisticated. "[O]n the tree of legal evolution," Robert E. Hudec wrote more than forty years later, "GATT's adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute resolution ceremonies practiced among primitive societies."⁵ As a legal system, GATT dispute settlement shared most of the deficiencies of public international law that have been noted to support arguments that international law is not really "law." H.L.A. Hart, in *The Concept of Law*, observed that primitive law and international law are foremost among the examples usually given of

* Powell, Goldstein, Frazer & Murphy, Washington, D.C. I would like to thank Stanimir A. Alexandrov, William J. Davey, Robert Howse, Celso Lafer, Petros C. Mavroidis, and Niall P. Meagher for comments on an earlier draft.

1. In GATT parlance, the term CONTRACTING PARTIES in upper case generally refers to the parties acting collectively as an organization; with initial capitals or in lower case, the term usually refers to individual parties.

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

3. *The Phrase "Changes of Any Kind" in Article I:1 in Relation to Consular Taxes*, Aug. 24, 1948, GATT B.I.S.D. (vol. II) at 12 (1952).

4. See generally ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 75 (2d ed. 1990).

5. *Public International Economic Law: The Academy Must Invest*, 1 MINN. J. GLOBAL TRADE 5, 6 (1992).

doubtful cases when the question, "What is law?" is asked.⁶

Hart went on to note the familiar: international law lacks a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organized effective system of sanctions. Certain types of primitive law, including those out of which some contemporary legal systems may have gradually evolved, similarly lack these features.⁷

Hart contends that modern municipal legal systems consist of two different kinds of rules: primary rules and secondary rules. The presence of highly developed secondary rules, in Hart's view, distinguishes a mature legal system from both its primitive counterpart and from international law. This Essay will evaluate GATT and its successor, the World Trade Organization⁸ ("WTO"), utilizing Hart's criteria in an attempt to answer the questions: did GATT—and does the WTO—legal regime more closely resemble a primitive legal system or a modern municipal legal system?

Part I will describe Hart's view of the primary and secondary rules that are necessary for the existence of a modern legal system. Part II will examine his view of international law, as resembling a primitive legal system. Part III will evaluate the GATT legal system according to Hart's criteria for a modern legal system, while Part IV will do the same for the WTO.⁹ Part V will conclude with an evaluation of the WTO legal system.

I. HART'S LEGAL SYSTEM

A. *Internal and External Viewpoints*

If anthropologists from Mars were to alight on earth and

6. H.L.A. HART, *THE CONCEPT OF LAW* 3 (2d ed. 1994).

7. *Id.* at 3-4.

8. Marrakesh Agreement Establishing the World Trade Organization, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 1, 33 I.L.M. 1144 (1994) [hereinafter *WTO Agreement*].

9. Hart's positivist jurisprudence has provoked strong dissent. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 133-51 (revised ed. 1969); see also, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 16-45 (1980). It is not the purpose of this Essay to enter into that debate, other than to note that Hart seems to have had the better of it. For an analysis that concedes some of Dworkin's points, but generally supports Hart, see NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 229-64 (1978). It has been noted that the disagreement between Fuller and Hart, which preceded and continued after publication of *The Concept of Law*, "was as much cultural as intellectual." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 230 (1990).

observe our behavior, they would note that when the lights at intersections turned from green to red, we earthlings generally stop our cars; when the lights turn back again from red to green, we move our cars through the intersections. The Martian anthropologists might conclude that this behavior is in response to a rule that we observe, but they would not look at the rule as one that applied to them. They would view the rule "externally." We earthlings, in contrast, look at the rule as one that applies to us; we stop and start our vehicles in response to the rule. We view the rule "internally."

The same point may be made using the example of sports. To those who play a sport, the rules apply to them, and they act in accordance with the rules. They may be said, in Hart's terms, to view the rules of the game internally. An outsider, particularly a person seeing a game for the first time, looks at the rules differently. "Three strikes and you're out" is a rule that applies internally to batters in baseball; to someone who has never seen the game before, it is merely an explanation of why a player left home plate and walked dejectedly back to the dugout. A legal system, as Hart describes it, presupposes an internal point of view.¹⁰

B. *Varieties of Laws*

One of Hart's major objectives was to dispel the simplistic notion that laws simply are a system of orders backed by threats. Certainly law contains what may be described accurately as orders backed by threats, criminal laws being the primary example. But, Hart asks, what about laws that confer powers on private individuals to make wills, contracts, or marriages? What about laws that empower judges to decide cases? What about laws that empower others, such as legislators, to make new laws? What about laws that delegate legislative authority to an administrative agency?¹¹ To say that laws like these are orders backed by threats is an over simplifying distortion.¹² Hart avoids this distortion by describing a modern municipal legal system as a fusion of what he calls "primary rules," some of which may be in the form of

10. HART, *supra* note 6, at 91. For an elaboration of Hart's internal point of view, see MACCORMICK, *supra* note 9, at 275-92.

11. HART, *supra* note 6, at 26.

12. *Id.* at 79.

orders backed by threats, and “secondary rules” that are not in this form.

1. Primary Rules

All legal systems, however primitive or sophisticated, have what Hart calls “primary rules.” These are rules to be obeyed, such as rules against violence, theft, and deception.¹³ A society with only primary rules, however, will face problems because these disparate primary rules do not amount to a “legal system” in the modern sense of the term. They simply are a collection of separate standards, resembling rules of etiquette. Should doubts arise as to the precise scope of a given rule, there is no procedure available for obtaining an authoritative interpretation. Primary rules are difficult, if not impossible, to change except perhaps slowly, over time. Disputes as to whether a rule has been violated will be frequent and often interminable, for no authoritative system exists to ascertain the fact of a violation.¹⁴

2. Secondary Rules

The answer to these problems, Hart writes, is to supplement primary rules with secondary rules. “[W]hile primary rules are concerned with the actions that individuals must or must not do,” he explains, “secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”¹⁵ Hart describe three kinds of secondary rules: (1) rules of recognition, (2) rules of adjudication, and (3) rules of change. The addition of these secondary rules, in Hart’s view, is “enough to convert the regime of primary rules into what is indisputably a legal system.”¹⁶

a. Rules of Recognition

Perhaps the term that is best known from Hart’s theory of a legal system is “rule of recognition.”¹⁷ This is a secondary rule

13. *Id.* at 91.

14. *Id.* at 92-93.

15. *Id.* at 94.

16. *Id.*

17. Hart sometimes uses the singular, *rule* of recognition and sometimes the plural, *rules* of recognition. Whether, in Hart’s view, a given legal system must have only

that "is accepted and used for the identification of primary rules of obligation."¹⁸ Hart avoids the problem of an infinite regress (how is the rule of recognition itself recognized?) by casting it as a matter of fact in any legal system. From the internal point of view, from the point of view of someone who accepts a particular legal system, "it is seldom formulated; it is *used*."¹⁹ From the external point of view, a non-member of a group or society may observe the rules members follow and ascertain the rule of recognition by observation. For example, Hart notes that "[i]t is the law that" is an internal statement. In contrast, "[i]n England they recognize the law as" an external statement.²⁰ Both, however, are statements of fact, using a rule of recognition to identify the laws in a particular system.

Because rules of recognition are used to determine what rules are valid within a legal system, they will differ from system to system. In the United States, the validity of a regulation issued by an administrative agency normally would be determined by reference to a statute delegating authority to the agency. From the internal perspective, that may suffice, although this does not appear to be what Hart is speaking of when he speaks of a rule or rules of recognition. He seems to mean more than simply a law that authorizes another law. Thus, when the validity of the statute itself comes into question, the Constitution becomes relevant. The Constitution probably is the rule of recognition in the legal system of the United States, since there is no looking behind it. Those who function within the system look no further—they do not challenge the validity of the Constitution itself. Lawyers use the Constitution as a basis for their arguments; judges use it as a basis for their decisions.²¹

Hart is careful to say that the rule of recognition is not assumed or postulated or hypothesized. Those who use a system indeed "presuppose" rules of recognition, but these presuppositions are not assumptions, postulates, or hypotheses as those

one rule of recognition or may have several is not clear. See, e.g., *id.* at 94-95, 100-02, 108-09.

18. *Id.* at 100.

19. *Id.* at 102 (emphasis in original).

20. *Id.*

21. "[S]urely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a source of law having supremacy over other sources includes the fact that his judicial colleagues concur in this as their predecessors have done." *Id.* at 267.

terms are normally used. These presuppositions consist of two things:

First, a person who seriously asserts the validity of some given rule of law . . . makes a rule of recognition which he *accepts* as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assess the validity of a particular statute, is not only accepted by him but is *the rule of recognition actually accepted and employed* in the general system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.²²

Since the existence and identity of a rule of recognition in a legal system is a question of fact, there is no rule providing for its validity. It either exists or it does not exist; we do not assume, postulate, or hypothesize that it exists. We presume that it exists and we act on that presumption. To say that we assume, but cannot demonstrate, the validity of the rule of recognition, Hart states that "is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of correctness of all measurements in meters, is itself correct."²³

b. Rules of Adjudication

In a system with only primary rules, the members themselves must determine whether a rule has been breached, much as the players in a sandlot baseball game, without an umpire, determine whether the batter is out. In the absence of an authoritative determination, any system much more complex than a sandlot baseball game is likely to degenerate into chaos or worse.

22. *Id.* at 108 (emphasis added).

23. *Id.* at 109. Hart acknowledges that his rule of recognition resembles Kelsen's "basic norm." *Id.* at 292. See also HANS KELSEN, PURE THEORY OF LAW 46-47 (Max Knight trans., Univ. Calif. 1967, reprinted by Peter Smith, 1989). "The basic norm which is the reason for the validity of the legal order, refers only to a constitution which is the basis of an effective coercive order." *Id.* Hart disagrees with Kelsen's description of a legal order as a "coercive order," arguing, as has been noted, that a legal system includes more than coercive rules. HART, *supra* note 6, at n.35, n.79. Kelsen's terminology, however, can be very close to Hart's. In international law, Kelsen states, "a basic norm is presupposed which establishes custom among states as a law-creating fact." KELSEN, *supra*, at 216 (emphasis added).

Rules that empower certain individuals to make authoritative determinations as to whether a primary rule has been broken overcome this problem. Hart calls these rules "rules of adjudication."²⁴

Any legal system that possesses rules of adjudication necessarily has a rule of recognition as well. This follows from the fact that those empowered to make authoritative determinations as to whether a primary rule has been violated cannot avoid employing a rule of recognition to determine whether a valid primary rule exists.²⁵ Rules of adjudication normally are not confined to those that empower a determination regarding possible violation of a primary rule. They also go to the question of remedy and sanctions, typically curbing private vengeance.²⁶

c. Rules of Change

Change is slow and difficult in a system with only primary rules. The only mode of change is evolutionary, much as changes in manners and etiquette are evolutionary. Courses of conduct once thought optional may become habitual and, eventually, may become obligatory; conversely, deviations once dealt with severely may become tolerated and later pass unnoticed. But there is no means of deliberately adapting rules to changing circumstances, either by eliminating old rules or introducing new ones.²⁷ The process essentially is one of waiting for custom to change.

"Rules of change" remedy this difficulty. In modern democratic municipal legal systems, legislatures typically are empowered to make change.²⁸ At the federal level in the United States, this is done by approval of a majority of both Houses of Congress and by the President, or, if the President vetoes the legislation, by an override of that veto by a two-thirds majority.²⁹ Individuals also are empowered, primarily through state law in the United States, to make legally recognized and binding changes for

24. *Id.* at 97.

25. *Id.*

26. *Id.* "The story of the growth of courts in Athens is the story of the process whereby private protection yielded to public jurisdiction." RAPHAEL SEALEY, *THE ATHENIAN REPUBLIC: DEMOCRACY OR RULE OF LAW?* 113-14 (1987).

27. HART, *supra* note 6, at 92-93.

28. *Id.* at 95-96.

29. U.S. CONST. art I, § 7.

themselves through contracts, wills, and marriages.³⁰

As with rules of adjudication, rules of change are closely connected with rules of recognition. Laws made by the body entitled by the rules of the system to effect change will be recognized by those within the system that use the rules.³¹ Contracts, wills, and marriages made according to the empowering rules of the system will be recognized by those that administer and enforce the system.³²

II. HART'S VIEW OF INTERNATIONAL LAW

Because international law lacks a legislature; international courts lack compulsory jurisdiction, and they both lack a centrally organized system of sanctions, Hart concludes "that the rules for states resemble the simple form of social structure, consisting only of primary rules of obligation."³³ Further, it is at least arguable "that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing for general criteria for the identification of its rules."³⁴

Hart's view of international law has been criticized as an "ex-

30. Most "empowering" law in the United States indeed is state rather than Federal law. Among the exceptions would be instances in which the Federal Government has a comparable role, such as in the District of Columbia.

31. HART, *supra* note 6, at 96.

32. Contracts, wills, and marriages are legal changes made by authorized and empowered individuals.

33. HART, *supra* note 6, at 214.

34. *Id.* Article 38(1) of the Statute of the International Court of Justice, however, certainly provides "general criteria for the identification of" the rules of international law to be applied by the Court and, in this sense at least, could be said to provide a rule of recognition. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 stat. 1055, T.S. No. 993, 3 Beavans 1179 (1945). Article 38(1) states:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom as evidence of a general practice accepted as law;
- (c) the general principles of law accepted by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id. Article 59 provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." *Id.* art. 59.

aggerated critique” that is “deeply colored by Austinian positivism.”³⁵ This seems a bit off the mark, as Austin’s view of law, particularly his view of it as a series of commands, was one of the two major jurisprudential views criticized by Hart.³⁶ None of the shortcomings of international law identified by Hart prevents it, in his view, from properly claiming to be “law.” It just means that international law more closely resembles law in a primitive system than law in a modern municipal system. “[O]nce we emancipate ourselves from the assumption that international law *must* contain a basic rule, the question to be faced is one of fact,” Hart states, “[W]hat is the actual character of the rules as they function between states?”³⁷

In its present stage of development, according to Hart, international law more closely resembles municipal law in function and content, but not in form. The form—with weak or non-existent secondary rules—is deficient, but the function is similar: to provide legal rules. So is the content: “no other social rules are so close to municipal law as those of international law.”³⁸

35. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 185 (1990).

36. HART, *supra* note 6, at 20-25. The other theory criticized by Hart was the so-called “predictive” theory as exemplified in statements by Karl Llewellyn, Oliver Wendell Holmes, and John Chipman Gray. *See id.* at 1-3. Hart may have been guilty of a little unfair criticism himself in his references to Llewellyn, Holmes, and Gray. Llewellyn, for example, used the term “concept of law” in a decidedly Hartian manner some thirty years before Hart did; he simply did not see the merit in the exercise. “The difficulty in framing any concept of ‘law’ is that there are so many things to be included, and the things to be included are so unbelievably different from each other. Perhaps it is possible to get them all under one verbal roof. But I do not see what you have accomplished if you do.” Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), reprinted in KARL LLEWELLYN, *JURISPRUDENCE* 3 (1962). The very existence of this Essay obviously reflects the view that Hart’s effort indeed did accomplish something. In criticizing the incompleteness of the predictive theory, however, Hart may be accused of ignoring the fact that Llewellyn, Holmes, and Gray were not engaged in analytical jurisprudence, but were addressing practitioners and students with rhetoric designed to reflect the “real world” of law, where, as the saying goes, “the rubber meets the road.” Scott Brewer has observed that “there is ample evidence in *The Path of the Law* [Holmes’ most famous statement of the “predictive theory”] that he intended to offer the prediction thesis not as a complete jurisprudential account of the ‘concept of law,’ but rather as a working explanation of the law from the limited *point of view* of the lawyer.” *Traversing Holmes’ Path toward a Jurisprudence of Logical Form*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOMES, JR.*, 95-96 (Steven J. Burton ed., 2000) (emphasis in original).

37. HART, *supra* note 6, at 236.

38. *Id.* at 237.

III. THE GATT LEGAL SYSTEM

GATT, it has been said, was largely an accident.³⁹ It was negotiated in 1947, and was applied provisionally as of January 1, 1948, pending the anticipated creation of an International Trade Organization ("ITO"), into which it was to be folded.⁴⁰ The proposed ITO was an ambitious undertaking, covering not only trade, but also employment, commodity agreements, economic development, and restrictive business practices. It was too ambitious for the United States Congress, and in 1950, the administration formally withdrew the ITO from Congressional consideration. Without United States participation, the ITO was dead. That left GATT, an "agreement," not an organization, consisting of a set of primary rules and some underdeveloped secondary rules, to apply "provisionally"—which they did, for forty-seven years, until GATT was succeeded by the WTO on January 1, 1995.

A. GATT's Primary Rules

Treaty regimes are essentially regimes of primary rules, and GATT is no exception.⁴¹ Its first three articles set forth what are perhaps its basic "constitutional" provisions. Article I requires parties to accord most-favored-nation ("MFN") treatment to the products of other parties. This means that a party may not discriminate among other parties to GATT by, for example, imposing different tariffs on the same product, depending on its source. Article II covers tariff binding. After tariff levels have

39. RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE*, at xxv (Columbia Univ. Press ed., 1980).

40. *Id.* GATT Article XXIX, "The Relation of this Agreement to the Havana Charter," explicitly contemplates replacement of the former by the latter. Gardner's book, sub-titled "The Origins and the Prospects of Our International Economic Order," is the authoritative history not only of the negotiations that led to the creation of GATT, but also of those that led to the two "Bretton Woods" organizations, the International Monetary Fund, and the International Bank for Reconstruction and Development (World Bank). Other excellent sources of this history are HUDEC, *supra* note 4, and JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

41. In terms of United States law, GATT was an executive agreement, not a treaty. From the perspective of international law, however, it is a treaty, which is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2.1(a) 115 U.N.T.S. 331 (entered into force Jan. 27. 1980) [hereinafter Vienna Convention].

been negotiated, parties bind these new rates by agreeing not to raise them. Article III concerns national treatment. This means that once foreign goods have cleared customs and paid whatever tariffs are permitted under Article II, they shall be treated the same as like domestic goods. A party may impose safety standards on imported automobiles, for example, but those standards may not be more stringent than those that apply to domestically produced automobiles.

There are numerous other primary rules in GATT. The remaining seven of the first ten articles, for example, concern cinematograph films (Article IV), freedom of transit for goods (Article V), anti-dumping and countervailing duties (Article VI), valuation of goods for customs purposes (Article VII), fees and formalities (Article VIII), marks of origin (Article IX), and publication and administration of trade regulations (Article X). There are also many exceptions to GATT's primary obligations, such as Article XIX, the so-called "safeguard" or "escape clause," which allows for the temporary imposition of additional restrictions on imports that cause serious injury to domestic producers, and Article XX, which provides that GATT's primary obligations do not prohibit measures necessary to achieve a wide variety of public purposes, such as the protection of human, animal, or plant life (XX(b)); the exclusion of the products of prison labor (XX(e)); or the conservation of exhaustible natural resources (XX(g)).

GATT's primary rules were greatly increased on January 1, 1980, when some nine new "codes," covering a variety of substantive areas, became effective.⁴² These codes, which were negotiated in the Tokyo Round negotiations concluded in 1979, represented a significant departure from GATT's core MFN principle, because they applied only to those contracting parties that chose to adhere to them.

42. These codes included the Agreement on Technical Barriers to Trade; Agreement on Government Procurement; Agreement on Interpretation and Application of Articles VI, XVI and XXIII (relating to subsidies and countervailing duties); Agreement Regarding Bovine Meat; International Dairy Agreement; Agreement on Implementation of Article VII—Protocol to the Agreement on Implementation of Article VII (relating to customs valuation); Agreement on Import Licensing Procedures; Agreement on Trade in Civil Aircraft; and Agreement on Implementation of Article VI (relating to antidumping). See GATT B.I.S.D. (26th Supp.) at 8-188 (1979).

B. GATT's Secondary Rules

In addition to primary rules, GATT also possessed, to a degree, secondary rules of the kinds enumerated by Hart: (1) rules of recognition, (2) rules of adjudication, and (3) rules of change.

1. Rules of Recognition

In GATT, as in any treaty regime, the ultimate rule of recognition is the text of the treaty itself. The treaty alone is the source of legal rights and obligations relating to the regime it establishes. Indeed, it has been observed that "treaties are the most unproblematic source of international law."⁴³ Parties to a treaty view it from an internal perspective. They accept its validity and look to its text, both as initially formulated and as amended by the system's rules of change.⁴⁴

The actual practice of the CONTRACTING PARTIES to GATT supports Hart's view that the rule of recognition in a particular legal system is not formulated by the participants in the system; rather, it is used by them. In the first GATT dispute—quoted at the outset of this Essay—the question concerned the interpretation of the phrase "charges of any kind" in paragraph 1 of Article I of GATT. That is where the inquiry began. Article I was "recognized" by the disputants, by the Chairman of the session, and by the contracting parties, as the relevant legal rule. The obligation to comply with Article I was presupposed by all involved.

The text of GATT itself also supplies examples of what might be called "subsidiary" rules of recognition. Article XXVI provides for acceptance and entry into force of GATT, Article

43. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 116 (1995).

44. Just what generates an obligation to obey a treaty is a question that need not delay this analysis. An obligation may be grounded in the principle *pacta sunt servanda*—agreements are to be kept—which is codified in Article 26 of the Vienna Convention, but, of course, this simply pushes the question back a stage in a potentially endless regress. Hart would avoid this difficulty by noting the fact that parties to a treaty accept its validity and look to its text. HART, *supra* note 6, at 225. Were they not to do so, the treaty effectively would be terminated. Indeed, Article 60 of the Vienna Convention authorizes parties to a treaty to invoke the breach of the treaty by another party as ground for termination. Kelsen notes that he abandoned the view that *pacta sunt servanda* is the basis of international law because that view "can be maintained only with the aid of the fiction that the custom established by the conduct of states is a tacit treaty." KELSEN, *supra* note 23, at 216 n.80.

XXXI for withdrawal, Article XXXII covers who is a contracting party, Article XXXIII deals with accession to the General Agreement, and Article XXXV provides for non-application of GATT between certain contracting parties.⁴⁵

Article XV(2), dealing with exchange rate arrangements, may be viewed as an unusual rule of recognition. It provides that the CONTRACTING PARTIES “shall accept the determination of the [International Monetary] Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement” of the Fund. With this rule, GATT recognizes the decision of another organization as its own primary rule.

GATT’s rules of recognition expanded in 1980 when the Tokyo Round Codes became effective. Each agreement had its own secondary as well as primary rules. As with GATT or any treaty, the rule of recognition for each of these codes was in its text. Each Tokyo Round code had its own provision for accession and acceptance that determined whether a contracting party was a signatory.⁴⁶ Parties and adjudicating panels as a matter of simple fact recognized the codes as applying to those contracting parties that had accepted them and not to others.⁴⁷

No provision of GATT deals explicitly with the status, as legal precedent, of decisions rendered in dispute settlement proceedings and adopted by the CONTRACTING PARTIES. These decisions clearly had great influence, not only in resolving the dispute at hand, but also as a form of precedent. It would be inaccurate, however, to term these decisions as “rules” of GATT and even more inaccurate to term them rules of recognition. The practice of GATT, even in the absence of an explicit provi-

45. Article XXXV provides that GATT, or Part II of GATT, which contains most of its substantive obligations, shall not apply between two parties if they have not entered into tariff negotiations with each other and if, at the time either becomes a CONTRACTING PARTY, does not consent to application.

46. See, e.g., Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

47. An interesting variation on this principle occurred in *German Exchange Rate Scheme for Deutsche Airbus*, SCM/142 (Mar. 4, 1992). The case involved an exchange rate subsidy by Germany covering exports of aircraft components to other Member States of the European Economic Community. None of the EEC Member States was a party to the Tokyo Round Subsidies Code, but the EEC was a signatory. The Panel applied the Code to Germany. *Id.* See also, ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 576-78 (1993).

sion, was consistent with Article 59 of the Statute of the International Court of Justice which provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” In actual practice, most of the time, GATT dispute settlement panels have found prior reports on the same subject highly persuasive, but that is not the same as saying that the prior reports were binding precedent and, therefore, that they were looked upon as a “rule.”⁴⁸

2. Rules of Adjudication

A lack of rules to determine authoritatively whether a violation has occurred is a serious defect in any legal system. For this reason, Hart has observed, rules of adjudication are usually the first thing added to a system of primary rules.⁴⁹ GATT and the WTO, as its successor, could serve as Exhibit A for the accuracy of Hart’s observation. It would not be inaccurate to describe the history of the GATT/WTO system as largely the history of an effort to remedy this defect.⁵⁰

The proposed ITO Charter contained detailed dispute settlement rules, and because it was anticipated that these would soon apply, GATT’s dispute settlement rules were minimal. Primarily, these were GATT Articles XXII and XXIII, which were based on two of the proposed ITO rules. They deal, respectively, with “consultations” and with “nullification and impairment” of benefits accruing under GATT. By itself, Article XXII has no direct consequences; it simply requires consultations with respect to any matter affecting the operation of the Agreement. Eventually, these consultations became a basis for the generation of GATT’s dispute settlement process that was grounded in Article XXIII, GATT’s primary rule of adjudication.

Article XXIII(1) provides that if any contracting party con-

48. See DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 38-45 (1999); David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM.J. INT’L L. 398, 401 (1998).

49. HART, *supra* note 6, at 94.

50. This statement is made with regard to the GATT/WTO legal system itself. Economically, the trade liberalization that has taken place under the auspices of GATT and the WTO has had a positive impact of enormous proportions. Between 1950 and 1998, the volume of world output rose by a factor of five, while the volume of world merchandise exports rose by a factor of 18. See Martin Wolf, *The Dangers of Protectionism*, FIN. TIMES, Nov. 8, 2000, at 21.

siders that any benefit directly or indirectly accruing to it under the Agreement was being nullified or impaired by another party, it can make written representations or proposals to that other party. If this does not lead to a satisfactory adjustment, the complaining party is authorized by Article XXIII(2) to refer the matter to the CONTRACTING PARTIES, who are required to investigate and make recommendations or give a ruling, as appropriate. The requirement that the CONTRACTING PARTIES investigate the claim and make recommendations or give a ruling amounts to a form of compulsory jurisdiction, something not common in international law. This referral to the CONTRACTING PARTIES eventually became the Panel process.

Article XXIII(2) further permits the CONTRACTING PARTIES to authorize the complaining party to suspend the application of tariff concessions or other GATT obligations to the party found to be acting inconsistent with its obligations under the Agreement. This became GATT's trade "sanction" or "retaliation."

Neither Article contains specific procedures; these evolved over time.⁵¹ Early dispute settlement reflected GATT's diplomatic roots. Initially, the process was even referred to as "conciliation," not as dispute settlement. From the beginning, with rulings by the Chair, disputes later came to be referred to working parties consisting of the complaining and responding parties, and any others that had an interest. Eventually, the parties directly involved were dropped, and a three or five-member panel process was adopted, using neutral panelists rather than representatives of parties with an interest in the issue.

Still, the ability of a single party to deny consensus at each step of the process rendered Article XXIII(2)'s apparent compulsory jurisdiction largely illusory. A potential defendant—one of the contracting parties that had to agree to consensus—could block the process at each step. It could refuse to consult under either Article XXII or Article XXIII. If it consulted, it could deny consensus for the CONTRACTING PARTIES to investigate (i.e., to establish a panel), or it could refuse to agree to the panel's terms of reference. If it agreed to the establishment of a panel

51. An early decision by the CONTRACTING PARTIES held that consultations under Article XXII(1) would be considered as fulfilling the consultation requirements of Article XXIII(1). *European Free Trade Association*, Nov. 18, 1960, GATT B.I.S.D. (9th Supp.) at 20 (1961).

and to its terms of reference, it could refuse to agree to the membership of the panel. If it agreed to panel membership, it could deny consensus for adoption of an adverse report by the CONTRACTING PARTIES. If it agreed to adoption of an adverse report, it could deny consensus for the CONTRACTING PARTIES to authorize suspension of concessions or other obligations.

Thus, it was not inaccurate to describe GATT dispute settlement, particularly in its early years, as "primitive." The first formal change in the process was not made until more than thirty years had passed. This occurred with the adoption of the Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 ("Understanding"). The Understanding included an annex setting out an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement as it had evolved since 1948.

Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels.⁵²

Three years later, acting at a Ministerial Conference, the CONTRACTING PARTIES reaffirmed the 1979 Understanding, and added more detail, including a requirement that "[t]he con-

52. Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII(2)), GATT B.I.S.D. (26th Supp.) at 215, 217 (1979). The Agreed Description and subsequent developments regarding dispute settlement in GATT applied, *mutatis mutandis*, to dispute settlement under the Tokyo Round codes, each of which had its own dispute settlement provisions.

tracting party to which such a recommendation [i.e., to bring a challenged measure into conformity with GATT] has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES."⁵³ Further minor steps were taken in Decision on Dispute Settlement Procedures on November 30, 1984.⁵⁴

The process continued to be handicapped, however, by the need for consensus. It is a tribute to the system and the degree to which the parties valued it that blocking did not occur more often than it did. In fact, Professor Hudec's study shows that from 1947 to 1992, the losing party eventually accepted the results of an adverse panel report in approximately ninety percent of the cases.⁵⁵

An important step toward alleviating the blocking problem was taken with the April 1989 adoption of the "Montreal Rules," which the CONTRACTING PARTIES agreed to apply to the end of the then on-going Uruguay Round negotiations.⁵⁶ The most significant portions of the rules were those that (1) required consultations and placed time limits on the process, (2) provided for the automatic establishment of a panel, (3) established standard terms of reference that would apply unless the parties agreed to other terms, and (4) authorized the Director-General to appoint members of the panel, at the request of a party, if the parties could not agree on membership within twenty days of the establishment of a panel. Parties remained able, however, to block adoption of adverse GATT panel reports and implementation of adopted reports, thereby preventing a prevailing complaining party from suspending concessions or other obligations under Article XXIII(2).

While Article XXIII is the primary GATT rule of adjudication, it is not the only provision of GATT that may, at least in broad terms, be considered a rule of adjudication. Several other provisions call for determinations by the CONTRACTING PARTIES

53. Dispute Settlement Procedure, Nov. 30, 1992, GATT B.I.S.D. (29th Supp.) at 13, 15 (1983).

54. Dispute Settlement Procedure, Nov. 30, 1984, GATT B.I.S.D. (31st Supp.) at 9 (1985).

55. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, *supra* note 47, at 278.

56. Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61 (1989).

that strongly resemble adjudication although, in fact, they rarely, if ever, have been used.

Article XII(4)(c) permits the CONTRACTING PARTIES to review import restrictions imposed under Article XII for balance of payments purposes, determine whether they damage the trade of any contracting party and, if so, make recommendations to the party imposing the restrictions. If the recommendations are not accepted within a specified period, the CONTRACTING PARTIES may release an adversely affected party from GATT obligations toward the party taking the action.

Article XVIII(7)(b) authorizes the CONTRACTING PARTIES to examine compensation offered by a developing country that is withdrawing concessions for development purposes under Article XVIII(4)(a). If the CONTRACTING PARTIES find the compensation inadequate, adversely affected contracting parties may modify or withdraw substantially equivalent concessions.

Article XVIII(12)(c) authorizes the CONTRACTING PARTIES to determine whether import restrictions imposed for a variety of developmental and balance of payments reasons damage the trade of any contracting party and, if so, to release any adversely affected contracting party from GATT obligations toward the party imposing restrictions.

Article XVIII(12)(d) authorizes the CONTRACTING PARTIES to examine import restrictions taken by developing countries for consistency with the non-discrimination requirements of Article XIII, and possibly to release adversely affected parties from GATT obligations toward the party imposing restrictions.

Article XVIII(16) authorizes the CONTRACTING PARTIES to determine whether it is practicable for a developing country, providing assistance to promote the establishment of a particular industry, to comply with all of its GATT obligations. If the CONTRACTING PARTIES agree that it is not practicable, and if they concur in the proposed measure, they may release the developing country from its GATT obligations to the extent necessary. Article XVIII(18) provides for an off-setting release from obligations by adversely affected parties. Article XVIII(19) requires the concurrence of the CONTRACTING PARTIES for certain action, while Article XVIII(21) permits action of which they "do not disapprove." Article XVIII(22) authorizes similar determinations by

the CONTRACTING PARTIES involving actions taken by more advanced developing countries.

Article XIX permits contracting parties to take "emergency action" when increased imports cause or threaten serious injury to an industry. The party taking action is required to negotiate compensation with adversely affected parties. If negotiations are not successful, Article XIX(3)(a) authorizes affected parties to take offsetting action "of which the CONTRACTING PARTIES do not disapprove."

3. Rules of Change

Two ways by which change can be effected in a modern municipal legal system are constitutional and legislative. Constitutional amendment, of course, is much more difficult to accomplish.

From the perspective of difficulty of enactment, GATT's provisions for amendment are a closer parallel to municipal constitutional amendment than they are to ordinary legislation. Article XXX specifies that changes to Article I's MFN requirement, and Article XXIX's terms relating to the relation of GATT to the Havana Charter require unanimous acceptance. Other portions of GATT may be amended upon acceptance by two-thirds of the contracting parties, but only as to those contracting parties that accept an amendment.⁵⁷ GATT in fact was amended a few times in its earlier years, perhaps the most significant being the 1965 protocol adding Part IV on Trade and Development. Nevertheless, amendments were relatively rare.⁵⁸

The real difficulty facing international law, however, is not the difficulty of the occasional amendment of a constitutional nature; it is the absence of a body able to make more frequent changes of a legislative nature. At first glance, GATT would seem to have overcome this problem because Article XXV allows for voting. Paragraph 3 of Article XXV provides that each contracting party shall have one vote while paragraph 4 provides that most decisions shall be taken by a majority of votes cast.

57. This accords with Article 40.4 of the Vienna Convention, providing that an amendment does bind parties to a multilateral treaty that do not become parties to the amendment. Vienna Convention art. 40.4.

58. GENERAL AGREEMENT ON TARIFFS AND TRADE, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 1002-1009 (1995).

Paragraph 5 sets forth the exception: the requirement that any waiver of GATT obligations be approved by a two-thirds majority of a vote of more than half of the contracting parties. In addition, Article XXXIII provides for accession to GATT by new parties upon a two-thirds majority.

It all sounds very legislative. While clearly any amendments to the text would have to comply with the requirements and limitations of Articles XXIX, XXX, and XXXIII, Article XXV could be read to permit a majority to amend other provisions. But even if this interpretation is correct, GATT's voting rules were one thing; its practice was another.

GATT indeed utilized its voting provisions for both waivers and accession, but the majority vote provisions were never used. Questions simply were not put to a formal vote, but were resolved by consensus or dropped.⁵⁹ A former Director-General has described the process:

The normal procedure in GATT is to avoid voting on controversial matters. First, a compromise solution acceptable to all interested parties is looked for. The general view is that, if this fails, it is best to wait until the positions of the parties develop sufficiently to enable them to support a decision or at least not to oppose it. Decisions are therefore generally taken by consensus. It means that the Chairman finds that a decision or recommendation is adopted when no delegation objects to its adoption.⁶⁰

Questions of waiver and accession, in fact, seldom were contentious, for the CONTRACTING PARTIES to GATT adhered to the custom of negotiating extensively before bringing even these matters to a vote. Furthermore, on questions of accession of a new contracting party, any contracting party in the minority had the option of utilizing the "non-application" provisions of Article XXXV(1).⁶¹

59. See Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 *Nw. J. INT'L L. & BUS.* 653 (1996).

60. OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL SYSTEM* 55 (1985).

61. GATT Article XXXV(1) states:

This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

(a) the two contracting parties have not entered into tariff negotiations with each other, and either of the contracting parties, at the time

There are a number of other GATT articles providing for joint action by the CONTRACTING PARTIES that permit change with the agreement of all of the contracting parties, or at least an absence of objection. Arguably these are rules of change, but they add little to the analysis, given the requirement of the absence of objection.⁶²

Finally, the ultimate rule of change for an individual contracting party lies in Article XXXI—withdrawal. This would take effect six months after written notice to the Secretary General of the United Nations. This step would not in any way change the rules of GATT, but it is a step available in a treaty regime such as GATT that has no exact municipal law counterpart. Individual emigration is perhaps the closest municipal analog, but that action normally would result only in an individual's trading one municipal legal system for another, albeit one possibly more to the emigrant's liking. A withdrawing GATT party, or any withdrawing treaty party, however, does not necessarily move from one treaty regime to another. National isolation is possible in a way that individual isolation is not.

C. *Summary of GATT*

GATT resembled Hart's prototypical international legal system more than it resembled a modern municipal legal system. Its secondary rules of adjudication and change were particularly underdeveloped compared to those that are to be found in most municipal systems. Nevertheless, the changes made over time in the rules of adjudication, while falling short of their municipal counterpart, seem far more developed than those in most treaty regimes. Not only in theory, but also for the most part in practice, jurisdiction was compulsory as, over time, the ability of a

either becomes a contracting party, does not consent to such application.

62. These include Article XII(5) and XIV(2) (permitting a party to deviate temporarily from Article XII or XVIII requirements "with the consent of the CONTRACTING PARTIES"), Article XVIII(4)(a) (allowing deviation from provisions of other GATT articles), Article XVIII(7)(a) (allowing possible modification of concessions by developing countries), Article XVIII(9) (establishing limitation on imports by developing countries to safeguard external financial position), Article XIX(1)(a) and (b) (dealing with emergency action on imports), Article XXIV(10) (establishing that a two-thirds majority may approve proposals that do not comply fully with paragraphs 5-9 of Article XXIV regarding free trade areas and customs unions), and Article XXVIII (modifying of schedules). These are mostly in the nature of waivers.

potential defendant to deny the establishment of a dispute settlement panel was eliminated. The power to block adoption of an adverse report remained, but as time passed that power could be exercised only at growing political cost.

IV. THE WTO LEGAL SYSTEM

The Marrakesh Agreement, which established the WTO, includes four Annexes. The first Annex, with three parts, sets out most of the WTO's primary rules. These are the Multilateral Agreements on Trade in Goods⁶³ (Annex 1A), the General Agreement on Trade in Services⁶⁴ ("GATS") (Annex 1B), and the Agreement on Trade-Related Aspects of Intellectual Property Rights⁶⁵ ("TRIPS") (Annex 1C). Most of the rules of adjudication are contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes⁶⁶ ("Dispute Settlement Understanding" or "DSU") (Annex 2). The Trade Policy Review Mechanism⁶⁷ (Annex 3) contains both primary rules and secondary rules of procedure. All WTO Members are required to adhere to all of these agreements. There are two "plurilateral agreements" that are optional: the Agreement on Trade in Civil Aircraft⁶⁸ and the Agreement on Government Procurement⁶⁹ (Annex 4).⁷⁰ The legal texts also include more than twenty Min-

63. Multilateral Agreements on Trade in Goods, Apr. 15, 1994, WTO Agreement, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 I.L.M. 1154 (1994).

64. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 I.L.M. 1168 (1994) [hereinafter GATS].

65. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

66. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, art. 3, para. 2, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU].

67. Trade Policy Review Mechanism, Apr. 15, 1994, WTO Agreement, Annex 3, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

68. Agreement on Trade in Civil Aircraft, Apr. 15, 1994, WTO Agreement, Annex 4(a), at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

69. Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4(b), at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

70. There are two other plurilateral agreements, the International Dairy Agreement and the International Bovine Meat Agreement. International Dairy Agreement, Apr. 15, 1994, WTO Agreement, Annex 4(c), at http://www.wto.org/english/docs_e/legal_e/final_e.htm; International Bovine Meat Agreement, Apr. 15, 1994, WTO Agree-

isterial Decisions and Declarations. These Decisions and Declarations are not "covered agreements" and are not directly subject to dispute settlement. Some of them, however, could be relevant to the interpretation of a covered agreement.

A. *The WTO's Primary Rules*

GATT rules were concerned exclusively with trade in goods. The WTO, however, covers not only goods but also, as the names of its agreements indicate, services and intellectual property. A large number of primary WTO rules apply to these new areas. Moreover, the WTO's coverage of trade in goods is far more detailed than was GATT's. The nine Tokyo Round codes were replaced by fourteen separate agreements that are part of the Multilateral Agreements on Trade in Goods.⁷¹ In addition, the Multilateral Agreement on Trade in Goods includes the General Agreement on Tariffs and Trade 1994⁷² ("GATT 1994"). This consists of the complete text of the original GATT, together with its various protocols and decisions, six Understandings on interpretation of the GATT text, and a 1994 Protocol on tariff concessions. By any measure, the WTO is one of the most comprehensive collections of primary obligations existing in the field of public international law.⁷³

ment, Annex 4(d), at http://www.wto.org/english/docs_e/legal_e/final_e.htm. These agreements were terminated on January 1, 1998.

71. Annex 1A contains numerous multilateral agreements, including the Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures [hereinafter SPS Agreement], Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Agreement on Trade-Related Investment Measures, Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Duties, and Agreement on Safeguards. See WTO Agreement, Apr. 15, 1994, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm. In addition, there are the two plurilateral agreements that apply only to those accepting them. See generally Agreement on Trade in Civil Aircraft Agreement; Agreement on Government Procurement.

72. General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND*, vol. 31, 33 I.L.M. 1154 [hereinafter GATT 1994].

73. The official English language version of the WTO's Legal Texts encompasses 558 pages.

B. *The WTO's Secondary Rules*

While the broad scope of the WTO's primary rules accounts for its extensive economic reach and importance, its secondary rules, particularly those of adjudication, are of equal, if not greater, significance. Perhaps the first scholar to note the development of Hartian secondary rules in the WTO was Celso Lafer, then Ambassador and Permanent Representative of Brazil to the WTO.⁷⁴ In his 1996 Gilberto Amado Memorial Lecture to the International Law Commission, after noting the proliferation of secondary rules in the WTO, Professor Lafer went on to coin an extremely apt phrase to describe the legal change from GATT to the WTO—the “thickening of legality.”⁷⁵ The thickening of legality that took place in the transition from GATT to the WTO included secondary as well as primary rules.

1. Rules of Recognition

In the WTO, as in GATT and all treaties, the basic rule of recognition is the treaty text itself. The Members view this text from an internal perspective. They see the text as applicable to them, as providing a reason for their behavior and as providing justification for their expectations concerning the behavior of other Members. Their view differs radically from the external view of a non-Member.

Article I of the WTO Agreement establishes the organization while subsequent articles define, *inter alia*, its scope, functions, and structure, as well as accession, acceptance, and entry into force. The WTO's ultimate rules of recognition lie in these provisions. Article II(2) provides the agreements and associated legal instruments included in Annexes 1, 2, and 3 (“Multilateral Trade Agreements”) are integral parts of the WTO Agreement and binding on all members.

This language covers all of the Multilateral Agreements on Trade in Goods, GATS, and TRIPS. WTO Members and adjudicators utilize these rules of recognition to determine authoritatively which of the primary rules contained in the Multilateral Trade Agreements are relevant to their purposes. As Hart might

74. CELSO LAFER, *THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT SYSTEM* 18-19 (1996).

75. *Id.*

say, these rules are not assumed, postulated, or hypothesized. They are presupposed. They are *used*.

2. Rules of Adjudication

In the law authorizing United States participation in the Uruguay Round, Congress listed the creation of an effective dispute settlement system as one of the country's principal negotiating objectives in the Round.⁷⁶ By any reasonable measure, the results met this standard.⁷⁷ The WTO's Dispute Settlement Understanding, with twenty-seven sections totaling 143 paragraphs plus four appendices, continues the pattern that began in GATT of supplying rules of adjudication to the trading system's primary rules. It is perhaps the most significant achievement of the Uruguay Round negotiations, establishing what may be the most developed dispute settlement system in any existing treaty regime.⁷⁸

The DSU codifies and expands upon much of the prior GATT practice. It continues to reflect the trading system's diplomatic tradition by requiring consultations before a Member can request that a panel be established. It also provides for good offices, conciliation, and mediation. But it then moves directly to provisions regarding the establishment of panels and their composition, terms of reference, procedures for multiple com-

76. *Omnibus Trade and Competitiveness Act of 1988*, § 1101(b)(1), 19 U.S.C. § 2901(b)(1)(2000). The principal negotiating objectives of the United States with respect to dispute settlement are to provide for more effective and expeditious dispute settlement mechanisms and procedures and to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights.

77. This legislation was drafted when Congress viewed the United States as an often-aggrieved plaintiff faced with ineffective rules. By 1992, the United States had had more experience with the process as a defendant, which led some to wonder about the stated negotiating objectives. Senator Lloyd Bentsen, then Chairman of the Senate Finance Committee, reminded his colleagues that there is a "catch" in fast and effective dispute settlement. "The catch is this: If we want tough rules and a fast and effective dispute settlement system when we are plaintiffs in a case, we also have to live with the same rules when we are the defendants." 138 CONG. REC. S1111 (daily ed. Feb. 6, 1992) (comments of Senator Bentsen on the Uruguay Round).

78. *See, e.g.*, ERNEST H. PREGG, *TRADERS IN A BRAVE NEW WORLD* 208 (1995). Despite its flaws, GATT's dispute settlement system probably merited the same characterization. One commentator noted that "GATT's focused mission and relative success make environmentalists both angry and envious. . . . [W]hile denouncing the GATT, environmentalists admire its power and would like to remold it to serve 'green' purposes." DANIEL C. ESTY, *GREENING THE GATT* 77-78 (1994).

plaints, and for third party participation in disputes. Other provisions cover panel procedures, the right of panels to seek information, and the maintenance of confidentiality. Appendix 3 to the DSU sets out detailed Working Procedures for panel proceedings, including a proposed timetable for panel work.

The DSU provides for a unified dispute settlement system, which means that cases brought under any of the WTO agreements will be dealt with by the single Dispute Settlement Body ("DSB") established by the DSU. This unified system contrasts sharply with the GATT system that prevailed after 1980 when the Tokyo Round codes were adopted. Under that system, dispute settlement under each code was supervised by the GATT committee concerned with the particular subject area involved, such as dumping, subsidies, or product standards. The separate committees themselves established panels and considered and adopted reports, a practice that, at a minimum, invited forum shopping. Under the WTO the forum shopping issue is avoided because the DSB administers all dispute settlement proceedings, regardless of subject matter.⁷⁹

There do remain, however, some procedural differences depending upon which WTO agreement is the subject of the dispute. Six of the goods agreements, as well as GATS and TRIPS, include special or additional provisions that cover some aspects of dispute settlement.⁸⁰ To the extent that there is a difference between the DSU and the special or additional rules in the separate agreements, the latter prevail.⁸¹ These special and additional rules for the most part substitute for specific provisions of the DSU in a very limited way. For example, Article 4 of the Agreement on Subsidies and Countervailing Measures provides procedural deadlines for disputes involving alleged prohibited subsidies that generally are half those of the DSU;⁸² Article 14 of the Agreement on Technical Barriers to Trade provides that an annex to the agreement governs the procedures that apply to

79. When a plurilateral agreement is involved, only those Members that are parties to the agreement may participate in DSB consideration of the dispute. *See* DSU art. 2.1.

80. These provisions are the SPS Agreement, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Implementation of Article VI of GATT 1994, Agreement on Implementation of Article VII of GATT 1994, and Agreement on Subsidies and Countervailing Measures.

81. *See* DSU art. 1.2.

82. Agreement on Subsidies and Countervailing Duties art. 4.

technical expert groups established to assist panels;⁸³ and Article 17 of the Agreement on Implementation of Article VI of GATT 1994 contains specific jurisdictional and standard of review provisions for antidumping disputes.⁸⁴

Two particularly significant aspects of the DSU, applicable to all disputes are (1) the effective abolition of the power of the losing party to block adoption of a report and (2) the establishment of a standing Appellate Body to hear appeals of questions of law in panel reports.

While the DSB must adopt reports in order for them to be "official," the DSU reverses GATT's consensus requirements. In GATT, consensus for the CONTRACTING PARTIES to adopt a report could be denied by a single objection. In the WTO, however, a report *will* be adopted unless the DSB decides by consensus *not* to do so.⁸⁵ Since this "negative consensus" will require the acquiescence of the prevailing party, it will occur rarely if ever. Of course, if a panel report is appealed, it will not be adopted until the appellate process is complete.⁸⁶ The innovative step of adding an appeal to the dispute settlement process was taken in response to the need to ensure the quality of adopted reports once it was agreed to eliminate the affirmative consensus requirement.⁸⁷

The WTO Appellate Body has no real international counterpart, since virtually all international tribunals are the equivalent of municipal courts of original jurisdiction that decide both questions of fact and questions of law and from which no appeal can be taken. This is true even of the International Court of Justice.

The Appellate Body is more than a higher level WTO panel in a number of ways. It is a standing group whose seven Members serve a four-year term and are eligible for reappointment once. Panelists, in contrast, are selected, as they were under GATT, on an *ad hoc* basis. Appellate Body Members are not affiliated with any government, whereas most panelists are present

83. Agreement on Technical Barriers to Trade art. 14.

84. Agreement on Implementation of Article VI of GATT 1994 art. 17.

85. DSU art. 16.4.

86. *Id.*

87. See generally JOHN GROOME, *RESHAPING THE WORLD TRADING SYSTEM* 264-68 (1995); HUGO PAEMEN & ALEXANDRA BENSCH, *FROM THE GATT TO THE WTO* 161-63, 255-56 (1995).

or former government officials, frequently Geneva-based delegates to the WTO.⁸⁸ While panelists serve in their individual capacities, governmental panelists—particularly those based in Geneva—are very much a part of the on-going diplomatic work of the WTO.⁸⁹ Appellate Body Members have no other WTO responsibilities. With the establishment of the Appellate Body, the WTO has added an important characteristic of all modern municipal legal systems, the separation of the judicial power from the policy-making power.⁹⁰

Hart cited international law's lack of an organized system of sanctions as a deficiency in the system.⁹¹ The presence of trade sanctions in the WTO, however, is something that has been cited by opponents of the multilateral system as a threat to sovereignty and something that has attracted many in the environmental community who wish to utilize the system for their own purposes.⁹² While trade sanctions may make adjudication in the WTO more effective than adjudication in other treaty regimes, the "remedy" or "sanctions" available in the WTO are far more limited than those available in a modern municipal system.

When a WTO Member fails to bring a measure found to be inconsistent with a WTO agreement into compliance with that agreement, the complaining party will be authorized by the DSB "to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."⁹³ The level of suspension of concessions or other obligations authorized by the DSB is the "equivalent" of the trade damage—called "nullification and impairment"—experienced by the complaining Member.⁹⁴ In other words, if the complaining Mem-

88. In recent years, an increasing number of academics also have served as panelists.

89. The qualifications and responsibilities of panelists are set out in Article 8 of the DSU.

90. Sealey, *supra* note 26, at 140. One of the most important achievements of the Athenians in establishing the rule of law was the creation of "a judiciary independent of the organs which made policy." *Id.*

91. HART, *supra* note 6, at 96.

92. As to the former, see, e.g., ALFRED E. ECKES, JR., OPENING AMERICA'S MARKET: U.S. FOREIGN TRADE POLICY SINCE 1776 284 (1995); as to the latter, see ESTY, *supra* note 78.

93. DSU art. 22.2.

94. *Id.* art. 22.4. In the case of prohibited subsidies, Article 4.10 of the Agreement on Subsidies and Countervailing Measures provides that the complaining Member may take "appropriate countermeasures" if the responding Member does not "withdraw" the

ber's trade is adversely affected by US\$100 million, it may impose restrictions on the trade of the offending Member amount to US\$100 million. In a practical sense, this amounts to a partial rescission of a contract. It is a limited remedy.

The effectiveness of the remedy is compromised by the fact that, from an economic viewpoint, it is the equivalent of a self-inflicted wound. To be sure, trade restrictions impose a cost on firms and workers in the exporting country, but they also impose a cost on consumers and importers in the importing country. This undeniable fact can impose a political as well as economic cost on the Member imposing the sanction.

This point is related to an important factual distinction between municipal legal systems and virtually any international system, including the WTO—the individuals that comprise a municipal legal system are relatively similar in size and strength, as compared to the great disparity in the size and strength of the nations that are the subjects of international law. “[I]t is a fact of quite major importance for the understanding of different forms of law and morality,” Hart states, “that no individual is so much more powerful than others, that he is able, without co-operation, to dominate or subdue them for more than a short period.”⁹⁵ On the other hand, inequality “between units of international law is one of the things that has imparted to it a character so different from municipal law and limited the extent to which it is capable of operating as an organized coercive system.”⁹⁶

Hart goes on to observe that “[t]his fact of approximate equality, more than any other, makes obvious the necessity of a system of mutual forbearance and compromise which is the base of both legal and moral obligation.”⁹⁷ This is of crucial importance in a system of organized sanctions.

[I]f some men were vastly more powerful than others, and so

subsidy; in the case of so-called “actionable” subsidies, the complaining Member is authorized by Article 7.8 to take countermeasures if the responding party does not pursuant to Article 7.8 withdraw the subsidy or remove the adverse effects caused by the subsidy. *Id.*

95. HART, *supra* note 6, at 195.

96. *Id.*

97. *Id.* Enactment of the antitrust laws in the United States in the late 19th and early 20th Centuries might be looked upon as an effort to prevent some individuals in the legal system—in this case, corporations—from becoming too large and too powerful relative to the other individuals—both persons and smaller organizations—in the legal system. There obviously is no international counterpart. *Id.*

not dependent on their forbearance, the strength of the malefactors might exceed that of the supporters of law and order. Given such inequalities, the use of sanctions could not be successful and would involve dangers at least as great as those that they were designed to suppress. In these circumstances, instead of social life being based on a system of mutual forbearances, with force used only intermittently against a minority of malefactors, the only viable system would be one in which the weak submitted to the strong on the best terms they could make and lived under their 'protection.'⁹⁸

There is clearly an element of this in the WTO, which is reflected in the relative ability of Members to impose sanctions on others and accept the cost of doing so. It is one thing for a major economy such as the United States or the European Union to impose restrictions on imports from a smaller Member, it is something else for the smaller Member to do so to the United States or the European Union.⁹⁹ Consider one of the early WTO disputes involving restrictions imposed by the United States on imports of textile products from Costa Rica.¹⁰⁰ Costa Rica prevailed in that dispute, and the United States brought the offending measure into conformity with its WTO obligations, but certainly not because it feared trade sanctions from Costa Rica. Moreover, if the United States had refused to bring its measure into conformity, any retaliatory action Costa Rica could have taken more than likely would have had a greater impact on Costa Rica than on the United States. If the situation had been reversed, however, if it had been Costa Rica that had refused to bring an offending measure into compliance, the United States could have taken action that would have had far more impact on the smaller Costa Rican economy than it had on the United States.

The WTO quite obviously has not escaped the problems at-

98. *Id.* at 198.

99. Ecuador faced this problem when it was authorized to suspend concessions as a result of the European Communities' restrictions on imports of bananas. Ecuador argued that suspension of concessions with regard to goods was impracticable and asked for authorization to take action against European services and intellectual property rights. The request was granted in part. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS27/ARB/ECU (Mar. 24, 2000).

100. *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, Panel Report, WT/DS24/R (Nov. 8, 1996).

tendant to the disparity in the relative size and strength of its Members that Hart has observed in international law generally, nor is it likely to do so. Nevertheless, it seems more than fair to say that, in agreeing to the DSU, the Uruguay Round negotiators, consciously or not, took to heart Thomas Franck's observation that "[o]nly an international law which is subject to case-by-case interpretation via a credible third-party decision-making process is a *serious* norm."¹⁰¹ They avoided the problem, noted by James Crawford as an increasing one in international law, "of the formulation of ever more complex rules in the absence of proper procedures for dispute settlement."¹⁰²

3. Rules of Change

The WTO's rules of change are more complex and more elaborate than those of GATT, but it remains to be seen whether its practice will be any different. The two most important are Articles IX and X of the WTO Agreement, which deal with Decision-Making and Amendments, respectively.

Article IX(1) makes GATT's consensus practice explicit at the outset that "[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947." Footnote 1 to this sentence clarifies what is meant by "consensus" in the WTO: "[t]he 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."

Paragraph 1 of Article IX goes on to state that where a decision cannot be arrived at by consensus, it shall be decided by vote with each Member having a single vote. Present indications are that the organization will continue to follow GATT practice and rely on consensus in virtually all matters, but there are pressures pushing in the opposite direction. The larger membership of the WTO makes consensus more difficult to achieve. Moreover, developing countries are increasingly unwilling to let the "quad"—Canada, the EC, Japan, and the United States—decide issues privately among themselves, and then present their joint

101. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 317 (1995).

102. James Crawford, *Democracy in International Law*, remarks at the Whewell Professorship Inaugural Lecture (Mar. 5, 1993).

positions for uncritical acceptance by other Members.¹⁰³ Difficulties experienced in selecting a successor to Director-General Renato Ruggiero led to consideration of voting to break the impasse.¹⁰⁴

But while Article IX(1) specifies that the WTO shall follow GATT's practice of decision-making by consensus, Article IX(3) provides for waiver of WTO obligations by a decision taken by three-fourths of the Members, and Article XII(2) calls for a two-thirds vote for accession of new members. This apparent discrepancy was addressed by the WTO's General Council, which—after “prolonged and wide-ranging consultations on this matter”—agreed to a statement by the Chair to clarify the procedure.¹⁰⁵ The General Council agreed that, with regard to requests for waivers or accessions to the WTO under Articles IX or XII, it will seek a decision by consensus in accordance with Article IX(1). When a decision cannot be arrived at by consensus, however, the matter shall be decided by voting. Consensus would be assumed in the absence of objection. The decision concludes:

Consequently, if any Member has a particular problem with a proposed decision regarding a request for a waiver or an accession to the WTO, it should ensure its presence at the meeting in which this matter will be considered. The absence of a Member will be assumed to imply that it has no comments on or objections to the proposed decision on the matter.¹⁰⁶

An interesting issue is presented by Article IX(2), which makes explicit the WTO's power to adopt, by a three-fourths majority, interpretations of the WTO Agreement itself and of the Multilateral Trade Agreements. This power was only implicit in GATT.¹⁰⁷ The last sentence of the paragraph limits this power in

103. See, e.g., *EU Council Calls for Report on Seattle Proposals on Rules Changes*, INSIDE U.S. TRADE, Dec. 10, 1999, at 11-12.

104. See *WTO Members Begin Informal Discussion of Director General Vote*, INSIDE U.S. TRADE, May 21, 1999, at 1-3 (indicating that Director-General Designate Supachai Panitchpakdi might go further); *Future WTO Chief Sees Voting as Alternative to Consensus Decisions*, INSIDE U.S. TRADE, Sept. 29, 2000, at 9-10.

105. *WTO General Council: Minutes of Meeting of 15 November 1995*, WT/GC/M/8 (Dec. 13, 1995).

106. *Decision-Making Procedures under Articles IX and XII of the WTO Agreement*, WT/L/93 (Nov. 24, 1995).

107. See, JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 123-24 (2d ed. 1997).

a way that is not totally clear. "This paragraph," it provides, "shall not be used in a manner that would undermine the amendment provisions of Article X." John H. Jackson has noted that a definitive interpretation under Article IX(2) presumably binds all Members "irrevocably, as a matter of treaty text law."¹⁰⁸ The line between a definitive interpretation and amendment might not always be easy to draw.

Article X sets out rules for amendment that are more complex and far-reaching than those of GATT. Paragraph 1 of Article X initially specifies that a decision even to submit a proposed amendment to the Members shall itself be taken by consensus. If consensus is not reached within a specified period, the decision whether to submit a proposed amendment shall be taken by a two-thirds majority of the Members. If the two-thirds majority decides to submit the amendment to the Members, paragraph 3 provides that, in most circumstances, if two-thirds accept, the amendment shall take effect as to those that have accepted it.

Paragraph 3 of Article X then specifies:

[T]he Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

This sentence goes far beyond any provision of GATT. It means that three-fourths of the Members may compel the remaining fourth to accept an amendment that would affect their rights or obligations or leave the organization.

This rather extraordinary power does not extend to all WTO provisions, however. Article X(2) provides that amendments to Article X itself shall take effect only upon "acceptance" by all Members. The same is true of Article IX (Decision-Making), as well as Articles I and II of GATT 1994 (MFN and tariff binding, respectively), Article II(1) of GATS (MFN), and Article 4 of the TRIPS Agreement (also MFN).

Article X(4) concludes the general amending authority by providing that amendments "of a nature that would not alter the

108. *Id.*

rights and obligations of the Members, shall take effect for all Members upon acceptance by two-thirds of the Members.”

The power of a three-fourths majority under paragraph 3 effectively to impose its will on the remaining minority and the power of a two-thirds majority under paragraph 4 to impose its will on all Members, even of amendments that would not alter the rights and obligations of the minority, might appear to be inconsistent with Article 40 of the Vienna Convention on the Law of Treaties, which provides that amendments to multilateral treaties do not bind parties to the treaty that do not become a party to the amending agreement. The Vienna Convention, however, is a codification of customary international law that may be superseded by treaty law.¹⁰⁹ The Members of the WTO have agreed to these provisions and are therefore bound by them.¹¹⁰

Paragraph 5 of Article X applies to GATS. It specifies that, except for the MFN requirement of Article II(1) (which is covered by paragraph 2), amendments to the first three parts of GATS—dealing with scope and definition, general obligations and disciplines, and specific commitments—and their respective annexes shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members. It also provides, parallel to paragraph 3, that the Ministerial Conference may decide by a three-fourths majority that an amendment is of such importance that Members not accepting it shall be free to withdraw or may remain only with the consent of the Ministerial Conference.

Article 71.2 of the TRIPS Agreement provides that amendments to the agreement that merely adjust to higher levels of protection of intellectual property rights in other multilateral agreements that are accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action under Article X(6) of the WTO Agreement. Paragraph 6 of Article X merely provides that amendments meeting the requirements of Article 71.2 of the TRIPS Agreement may be

109. J.L. BRIERLY, *THE LAW OF NATIONS* 57 (1963).

110. Articles X(3) and X(4) clearly do not conflict with a peremptory norm of international law (*jus cogens*) and are therefore not invalid for that reason. See Vienna Convention art. 53.

adopted by the Ministerial Conference without further formal acceptance process.

Article X(10) of the WTO Agreement provides that amendments to the plurilateral trade agreements shall be governed by the provisions of those agreements. Article XXIV(9) of the Agreement on Government Procurement allows for amendment "in accordance with the procedures established" by the Committee on Government Procurement; that amendment shall not enter into force for any party to the Agreement until that party has accepted it. Article 9.5.1 of the Agreement on Trade in Civil Aircraft contains a comparable provision. Article X(9) provides for the addition of new plurilateral agreements, upon the request of Member parties to them, and for the deletion of existing plurilateral agreements upon request of the Members. These decisions require consensus of the Ministerial Conference.

Article X(8) covers amendments to the DSU and the Trade Policy Review Mechanism ("TPRM"). Decisions to approve amendments to these instruments shall be taken by consensus and are effective for all Members upon approval by the Ministerial Conference. Just how difficult this can be in practice is illustrated by the effort to review the DSU. The Uruguay Round Negotiators agreed to review the DSU within four years after the entry into force of the WTO Agreement "and to take a decision on the occasion of its first meeting after completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures."¹¹¹ The deadline for action was December 31, 1998, but to date the Members have been unable to agree.¹¹²

CONCLUSION

The question asked at the outset of this Essay was whether the WTO legal regime more closely resembles a primitive or a modern municipal legal system. It is not an easy question to answer and, perhaps, cannot be answered in a meaningful way.

111. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 1, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

112. See, e.g., *Official Says WTO Members Still Disagree On How to Disagree in Resolving Disputes*, *DAILY REP. FOR EXECUTIVES*, Oct. 28, 1999, A-11.

The dispute settlement system of GATT has been described as the most developed and active of all international regimes, and the WTO—with its thickening of legality—has taken the trading regime's legal system far beyond GATT.¹¹³ Its rules of adjudication are anything but primitive, and closely resemble the rules of adjudication in modern municipal systems, particularly administrative rules of adjudication. A United States lawyer, familiar with the practice of Federal administrative law and judicial review of agency decisions, would be more than comfortable in the WTO system. True, as with international law generally, an exclusively common law approach to WTO law would be insufficient; some familiarity with the approach of civilian lawyers to the analysis and resolution of legal disputes is highly desirable. Still, the similarities with the United States legal system are strong.

While the WTO's adjudicatory machinery resembles very much the machinery of a modern municipal legal system, in other areas it shares the difficulties of the broader field of international law. The WTO legal system has not escaped the problems that accompany great disparities in size and power among its Members, nor is it likely to do so. Perhaps more important, it effectively lacks a legislature. John Chipman Gray observed that a state can create legal rights for itself by enacting new laws, but an individual cannot.¹¹⁴ The WTO is not a state and lacks the power to create legal rights. Only the "individuals" that compose the WTO—its governmental Members—may do that, and they may do so only through the WTO's rules of change, rules that intentionally make change difficult to accomplish. The WTO does not resemble a representative government; it resembles a direct democracy with an effective requirement of unanimity.

The difficulty of change may itself be related to the sophistication of the adjudicatory system. Clearly WTO Members—who comprise most of the world's governments—have seen fit to create and submit to a far more developed legal system in the WTO than they are willing to create and submit to in other areas. The WTO, however, is confined to one narrow area of human activ-

113. "Of all the international regimes, the GATT has the most developed and most active system of formal dispute settlement." ABRAM CHAYES & ANTONIA HANDLER CHAYES, *supra* note 43, at 218.

114. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 81, 83 (Peter Smith ed., 1972) (1921).

ity: trade. While its trade coverage has expanded beyond goods to include services and intellectual property, issues of high policy, of war and peace, and of national security are not part of the WTO system.¹¹⁵

The WTO's limited subject-matter jurisdiction is combined with a limited remedy. If a measure is found not to conform to a WTO agreement, the Member concerned is called upon to bring the measure into compliance; if the Member concerned fails to do so, the complaining Member may suspend concessions or other WTO obligations equivalent to the level injury caused by the violation.¹¹⁶ The process very much resembles partial rescission of a contract based on a partial breach by another party.¹¹⁷ The effect resembles a return to the *status quo ante*. Neither specific performance nor monetary damages is an available remedy.

"However it may arise," Abram and Antonia Handler Chayes have written, "a dispute between nations turns out in the end to be about the exercise of sovereign power, always a delicate matter and hard to resolve within the winner-take-all framework of adjudication."¹¹⁸ GATT and the WTO, however, regularly resolve disputes in a winner-take-all framework. The fact that governments have agreed to the establishment of a legal system that will do this routinely no doubt reflects the limited subject-matter jurisdiction they have assigned to the WTO and the limited remedy they have made available.

It also reflects the confidence governments developed in the system as it has evolved from that first ruling of the Chair in August 1948. The half-century plus since that ruling has witnessed the birth and development of a legal system that, while it inevitably shares many of the characteristics of international law generally, is by any reasonable measure very far from primitive.

115. GATT Article XXI provides a national security exception to GATT obligations.

116. See DSU art. 22.2, 22.4. In the case of certain subsidies, the Member concerned is called upon to "withdraw the subsidy" or remove any adverse effects it may cause. Agreement on Subsidies and Countervailing Measures art. 4.7, 7.8.

117. On rescission see ARTHUR CORBIN, CORBIN ON CONTRACTS (1964).

118. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *supra* note 43, at 205.