Part IV

The operation of the WTO dispute settlement procedure
15 Testing international trade law: empirical studies of GATT/WTO dispute settlement

MARC L. BUSCH AND ERIC REINHARDT

Law did play an important role in this lawyerless multilateral trade order, but which one?

Roessler (1999, 10)

1 Introduction

Dispute settlement under the General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organization (WTO), is the very “backbone of the multilateral trading system” (Moore 2000). Indeed, despite being likened to a “court with no bailiff” (Rossmiller 1994, 263), the GATT/WTO system is widely touted as the most successful of any comparable institution today (Hudec 1993, 353; Petersmann 1997, 63–65; Moore 2000).1 Add to this that the WTO’s Dispute Settlement Understanding (DSU) has corrected many of the shortcomings of GATT 1947, and it is little wonder that most observers are even more optimistic about the future. Until recently, however, there has been virtually no empirical evidence brought to bear on the most important questions in the field. Why do countries take some of their complaints to GATT/WTO and prosecute others unilaterally, “out of court”? Why are some disputes settled with liberalization by the defendant, while the status quo prevails in others? And has greater legalization of the system made dispute settlement more efficacious? Taking Robert Hudec’s Enforcing International Trade Law as its point of departure, a growing literature has begun to tackle these and related questions, testing hypotheses against data on the hundreds of complaints filed since 1948. Some of the results confirm prevailing views about the political economy of GATT/WTO dispute settlement. Other findings, however, pose a serious challenge to conventional wisdom about the workings of the system. In this essay, we survey the empirical literature on GATT/WTO dispute settlement.

The authors would like to thank Bob Hudec for his insightful comments on this paper and for his invitation to contribute to this volume. Thanks also to Ken Abbott, Steve Charnowitz, John Jackson, Pieter Jan Kuijper, Andreas Lowenfeld, Petros Mavroidis, David Palmer, Amy Porges, Frieder Roessler, Debra Steger, and other conference participants for helpful suggestions. Michael Nesbitt provided exceptional research assistance.

1 As former Director-General Ruggiero (1998a) said, the WTO’s adjudication process is the “only one of its kind.”
focusing on the questions that Enforcing International Trade Law called attention to, as well as some of the questions that Hudec’s classic work helped anticipate.

The essay is in seven sections. Section 2 discusses some of the assumptions upon which empirical studies of GATT/WTO dispute settlement necessarily build. Sections 3, 4, and 5 review the main results reported in this literature with respect to patterns of dispute initiation, escalation, and outcomes, respectively. Section 6 identifies key areas for future research. Section 7 concludes the chapter with some implications of this research for policy.

2 The empirical study of GATT/WTO disputes

It would be difficult to overstate the scholarly interest in GATT/WTO dispute settlement. Indeed, several legal journals routinely devote the bulk of their pages to this subject, as do an increasing number of journals in economics and political science. The vast majority of this literature is appropriately concerned with GATT/WTO jurisprudence; i.e., the interpretation and significance of the institutions’ dispute settlement rulings, and other theoretical aspects of the law. Very little of this literature, however, concerns the law’s actual effect on either domestic or international political behavior, and only a handful of studies have ever compared large numbers of cases in any systematic fashion. Against this backdrop, Hudec’s Enforcing International Trade Law stands out as a roadmap for doing empirical work on GATT/WTO dispute settlement.

2.1 Hudec’s contributions

One of Hudec’s main contributions, in this respect, has been to refocus attention on the political economy of dispute settlement. Indeed, one of the more fascinating distinctions that he draws is between panel rulings, on one hand, and dispute outcomes, on the other. In making this distinction, he encourages scholars to think about dispute settlement in a distinctly political way, asking about the factors that lead governments to make concessions in the wake of a panel ruling. And while domestic factors in the United States figure prominently in his work, Hudec’s analysis is far more robust and generalizable. For one thing, bringing a case to the GATT, like doling out protectionism more generally, can pay off at the ballot box, a political economy truism that Hudec expertly scrutinizes. But it is equally clear that the GATT has figured prominently in executive-legislative tensions as well. For example, in a dispute over dairy products brought by the Netherlands against the US, Hudec explains that the administration gladly conceded the case, looking to counter protectionist impulses in Congress (1987, 219; 1990, 182). This reminds us, of course, that dispute settlement can make for good “theater” (Hudec 1996), yet the reasons for this tap the fundamentals of democratic politics, bargaining.
theory, and a wide variety of other literatures. Not surprisingly, *Enforcing International Trade Law* has generated hypotheses that are not only interdisciplinary in nature but also increasingly being tested against data.

On this latter point, Hudec's authoritative dataset of GATT disputes (Hudec 1975, 275–296; Hudec 1993, 417–608) has done much to encourage empirical work. The appendices to *Enforcing International Trade Law* list essential descriptive information about 207 GATT/WTO disputes from 1948 through 1989, including the complainant, defendant, date, and case title. Just as important, the appendices also summarize the legal claims and arguments of both the complainant and the defendant; chronicle GATT's involvement in the case and interpret any ruling issued; and qualitatively characterize the degree to which the defendant ultimately changed the contested policy. As a result, Hudec's (1993, 273–355; also published as Hudec, Kennedy, and Sgarbossa 1993) descriptive statistics concerning these disputes are prominently cited in any serious work on the subject. By linking Hudec's list of disputes with standard international economic and political datasets, subsequent studies have been able to examine a wide variety of cause-and-effect relationships as well. We turn to these momentarily. First, we consider some of the most important data issues, on which *Enforcing International Trade Law* shed considerable light.

2.2 Approaches to analyzing disputes

Before one can test hypotheses on international trade law, one must necessarily make a number of decisions about how to set up the analysis. Here, we consider a few of the most important issues in this regard. We should further note that these issues are as relevant for non-quantitative work on dispute settlement as they are for those interested in statistical testing.

*Unit of observation.*

What counts as a “dispute”? Perhaps surprisingly, defining the unit of observation requires some nontrivial choices. First, following Hudec (1993, 369), most studies count as “disputes” only those cases explicitly invoking GATT/WTO law regulating dispute proceedings, naming defendants, and alleging the infringement of specific legal rights, most often in the form of a “request for consultations.” This rules out, for instance, general objections raised concerning other members’ policies in the form of comments in a General Council or Trade Policy Review Mechanism.

---

2 As of 1993, Hudec’s dataset was the most comprehensive of those publicly available, though the GATT’s *Analytical Index* editions (e.g., WTO 1995b, 620, 623–628, 771–787; see also Petersmann & Jaenicke 1992) listed most complaints. Other sources on GATT disputes are restricted to those in which rulings were issued (e.g., Pescatore, Davey, & Lowenfeld 1991; Petersmann 1997, 248–290).
session. It also rules out unilateral actions, like the US’s section 301 case in 1995 against Japan over autos and auto parts, which was not accompanied by a formal GATT/WTO legal complaint.\(^3\)

Second, many cases involve multiple complainants or, less frequently, defendants. Hudec’s tallies, and the WTO’s records (WTO 2000a), do not break such complaints into bilateral units. Counting each bilateral dispute separately would treat a case like the Standards for Gasoline complaint by Venezuela and Brazil against the US (WTO 2000a, 3) as two observations. Doing so allows the analyst to properly record, for instance, levels of retaliation, discriminatory liberalization by the defendant, and other types of state-specific outcomes. It is also more in line with the realities of filing for consultations and requesting a panel, since even where multiple complainants bring a case, they can file at different times and proceed according to their own schedules, where they choose to proceed at all. As a result, this approach to counting disputes is widely employed in the empirical literature (Horn, Nordström, and Mavroidis 1999, 9; Busch 2000b; and Reinhardt 2000a, 2001).

Third, how does one account for repeated filings on essentially the same issue? For example, four different sets of complaints were made against the EU bananas import regime under the GATT and WTO. The usual approach is to treat each request for consultations as separate, although, under GATT 1947, Article XXII requests that were subsequently filed as Article XXIII actions (thereby becoming eligible for panels) can be treated as the same complaint (see Hudec 1993; Reinhardt 2000a).\(^4\)

Selection bias.

One of the most pressing issues in studying dispute settlement is the potential problem of selection bias. Obviously, many cases – including ones with clear legal merits – are never filed at the GATT/WTO. Litigation can be costly; the potential complainant may not want to draw attention to the dubious legality of policies it, too, employs (Petersmann 1994, 1190; Reinhardt 2000b); or the parties may feel a cooperative settlement is more likely in the “shadow of the law” (Mnookin and Wilson 1998) rather than in the spotlight. These “non-cases” make it hard to interpret the results of tests performed on actual cases, since there may be something special about the types of cases that get “selected” for dispute settlement. Ideally, those testing hypotheses on international trade law would have information about all instances of disputes among GATT/WTO members, potential or realized. These data are, at present, unavailable. So what, then, can be done?

\(^3\) The US threatened to, but did not, file a WTO complaint in this case (WTO 1995a). Japan, however, did submit a formal request for consultations (Import Duties on Automobiles; see WTO 2000a, 54), which it dropped once the matter was settled bilaterally.

\(^4\) Horn, Nordström, & Mavroidis (1999, 9) go further by aggregating sequential complaints as long as (a) the first did not lead to a panel and (b) the second quickly followed the first.
Testing international trade law

With a certain amount of creativity, the analyst can learn a great deal just by observing those disputes that were formally filed. The idea is to preserve as many of the stages of escalation in the data as possible. Only about 45 percent of all GATT/WTO disputes, for instance, have reached the stage of establishment of panels; and little more than a third have lasted until a panel report was issued (see table 3). This variation gives the analyst a great deal of leverage to examine the effect of the “shadow of the law.” Hence, in contrast to students of the regime’s jurisprudence, who look at just those cases in which panel reports were adopted (i.e., no more than a third of all bilateral disputes), those seeking to understand the political economy of dispute resolution under GATT/WTO follow Hudec in examining all cases, paneled or not, from the earliest point at which they come to the organization’s attention.

Another approach is more theoretical. In technical language, the problem of selection bias arises if there is a high probability that the variables of interest are strongly correlated with some unobserved variable(s). To get at this potential, one can theorize about the kind of relationships that might exist, draw empirical implications, and test these. For example, in a study of the effects of GATT legal reform, Busch (2000b) considers the testable implications of some of the more obvious would-be sources of selection bias. One candidate argument along these lines, for example, might be that only relatively straightforward (or, alternatively, complicated) cases are brought to GATT, the logic being that the most (least) obvious trade violations are (not) subject to established disciplines, and that these concerns are highly correlated with GATT legal reform. This would suggest that concessions ought (not) to be typical, yet the data belie these suspicions: concessions are evident in 68 percent of disputes resolved through consultations, and 66 percent of those disputes that escalate to a panel. More telling still, the majority of disputes (58 percent) in the data set center on agricultural products, an area in which GATT disciplines remain relatively weak, and yet concessions are evident in 65 percent of those agricultural disputes that end in consultations, and in 57 percent of those that go on to a panel. These data cast doubt on the suspicion that only the “easiest” (“hardest”) cases are brought to GATT to begin with. While this exercise cannot rule out all sources of selection bias, the point is to rule out as many sources as possible.

Data and measurement challenges.

While it may seem that obtaining data and quantifying variables would pose the greatest obstacle to doing empirical work on GATT/WTO disputes, the truth is that this is probably the most tractable hurdle, given Hudec’s signal contributions in this regard. Most informed observers know the disposition of prominent cases like the Bananas or Hormones disputes, but what about the 1957 Spring Clothespins complaint by Denmark and Sweden against the US, which was dropped prior to the establishment of a panel (Hudec 1993, 443)? Hudec (1993) collates a vast amount
patterns of dispute initiation

The number of disputes filed before GATT/WTO has increased dramatically over time, especially since the late 1970s. Figure 1 displays the trend, using the procedures described in section 2 to define what counts as a distinct “dispute.” In line with Hudec’s (1993) coding criteria, we (Reinhardt 2000a; Busch 2000b; see also WTO 2000a) count 654 bilateral disputes from 1948 through the end of June 2000. Of these, 340, or 52 percent, have involved the United States (US) as either complainant or defendant, while 238, or 36 percent, have involved the European Union (EU), not including those cases in which EU member states acted alone.

What accounts for the pattern of GATT/WTO dispute initiation – which Bayard and Elliott (1994, 345) have called “aggressive multilateralism” – across time and across countries? Rather optimistically, most observers have asserted that the “growing confidence among … members that they can get justice from the [GATT/WTO dispute procedures]” (Journal of Commerce, November 5, 1998, 4A) accounts for the rising numbers of disputes (see also Hudec 1993, 290, 362; Petersmann 1994, 1205; Jackson 1998, 59–60; Moore 2000). When we consider that the International Court of Justice (ICJ), a comparable institution with many more states in its parent body, has dealt with fewer than one sixth as many lawsuits in the same period, this optimism seems well placed.

5 Under the astute management of Joost Pauwelyn in the WTO’s Office of Legal Affairs, this deficit is expected to be corrected by late 2000.
6 The list of cases used for this figure, along with all other data discussed in this paper, can be obtained at user www.service.emory.edu/∼erein/.
7 As Hudec (1999, 8) observes, “the best measure of the success of the GATT disputes procedure … was the increasing number of complaints governments chose to bring before it.”
Figure 1. Trends in GATT/WTO membership and disputes initiated, 1948–1999. (Squares at bottom represent years in which a multilateral trade negotiation was underway.)
However, closer statistical investigation tells a different story. Controlling for various political and economic determinants of a member’s decision to file a GATT/WTO complaint, Reinhardt (2000a, 19) finds, for example, that, compared to the procedures in place before, the 1989 “Improvements” (see WTO 1995b, 638–641) markedly increased the probability that any two states would experience a dispute by a factor of roughly 3. But, surprisingly, the WTO dispute settlement reforms did not significantly raise the likelihood of disputes among developed states, at least through the end of 1998. Given its removal of the unilateral veto over panel establishment and report adoption, the Dispute Settlement Understanding (DSU) is usually viewed as a much more substantial reform than that of the mid-term harvest of 1989 (Young 1995, 399; Jackson 2000, 178). Yet, as Hudec (1993, 239) presciently noted, the DSU did not alter the institution’s fundamental lack of enforcement power. With respect to dispute initiation, Hudec (1999, 4) concludes that “writers have tended to overstate the difference between the new procedure and its GATT predecessor.” We concur wholeheartedly.

Most of the variation in the frequency of disputes is, instead, due to factors that are not directly related to institutional reform. Instead, it appears that the greater the number of members of the regime, the greater the diversity of issues over which dispute resolution becomes necessary. As even a cursory look at Figure 1 confirms, the total number of disputes does indeed closely track the growth in GATT/WTO’s membership. In addition, the most active traders (Reinhardt 1996, 213; Horn, Nordström, and Movroidis 1999) and those most dependent on trade for national income (Reinhardt 2000a, 19) are, not surprisingly, far more likely to participate in disputes.

Moreover, dispute initiation under GATT/WTO is subject to positive feedback. Defendants often file what might loosely be called “countersuits.” Canada, for example, filed a complaint against US dairy restrictions in 1988 immediately after the US initiated a dispute against Canadian ice cream and yogurt quotas (Hudec 1993, 575). According to one study, the average complaint increases the probability that the target will file a retaliatory suit within a year by fifty-five times. Initiating a dispute also makes third parties likely to “bandwagon,” targeting the defendant’s policy in complaints of their own, so as to forestall discriminatory liberalization by the defendant on behalf of the initial complainant. That is to say, being targeted in one dispute raises every other state’s probability of filing against the defendant by an average of one-third (Reinhardt 2000a, 19–20).

These findings shed light on the remarkable drop in GATT’s caseload during the 1960s, which shows up clearly in figure 1. This phenomenon has gone unnoticed by most scholars. However, it poses problems for the conventional wisdom that disputes are a result of the success of the system, since the previous period

---

8 This is true despite the DSU’s explicit language (in article 3.10) condemning such retaliatory litigation (Horn, Nordström, & Movroidis 1999, 21).
Testing international trade law

(i.e., the 1950s) witnessed very high levels of compliance with rulings (Hudec 1993, 12). Hudec (1975, 216–217; 1993, 12, 299) argues that the lull through the 1960s was primarily due to the consolidation of the European Community, whose members could handle disputes with internal, rather than GATT, procedures and were not yet in the position of raising new legal challenges against other countries’ practices. Consistent with this interpretation, Reinhardt’s (2000a, 21) statistical analysis demonstrates that members of preferential trade agreements are about seven times less likely to file disputes against one another than are other states.

In any case, it is hypothetically possible, as the conventional wisdom suggests, that past successes in resolving complaints could cause greater reliance on GATT/WTO dispute procedures. However, many disputes are filed for precisely the opposite reason, to redress insufficient compliance with past rulings. The case in point is the EU’s failure to properly implement the first Bananas ruling, an outcome that has resulted in three additional sets of complaints (two of which led to further rulings) but no resolution as of July 2000. This effect is not restricted to the disappointed complainants either: Reinhardt’s (2000a, 20) statistical tests demonstrate that past successes of the dispute settlement system overall, measured in terms of the level of liberalization on the part of the defendant, make all members less likely to file new complaints. Hence the intuition about complaints being the result of “growing confidence” in the dispute settlement system is misleading. Instead, the ballooning caseload is mostly a function of the expansion of the organization and of world trade more generally; and disputes are just as likely to be responses to the failure rather than success of the adjudication system.

Recent statistical evidence illuminates one other aspect of dispute initiation patterns, i.e., participation by developing countries. Hudec (1993, 353) argued that the “system is . . . more responsive to the interests of the strong than to the interests of the weak.” GATT/WTO litigation is, after all, costly and time-consuming (Sevilla 1998). Just recognizing opportunities to use the system effectively requires legal expertise which LDCs often lack, since many maintain no permanent Geneva-based WTO delegation and have rarely, if ever, participated in prior GATT/WTO disputes (Michalopoulos 1999; Reinhardt 1999, 7). Hudec’s (1993, 295) evidence validated this hypothesis; table 1 updates the figures through mid-2000 with the same result. Using a more sophisticated test, Horn, Nordström, and Mavroidis (1999) argue persuasively that most of this bias is due to less-developed countries (LDCs)’ lesser role in world trade, relatively undiversified export portfolios, and smaller market size (see also Reinhardt 1996, 214). And yet they nonetheless find that, whether due to lack of legal expertise or smaller litigation budgets, LDCs participate in WTO disputes significantly less frequently than they “should” because of these other factors.

9 Blackhurst, Lyakurwa, & Oyejide (2000, 499) note that, in 1999, only 19 of 38 sub-Saharan Africa members of the WTO had any Geneva staff available for more or less full-time WTO work of any sort.
Table 1. GATT/WTO dispute participation by developing countries, 1948–2000

<table>
<thead>
<tr>
<th>State classification</th>
<th>Member-years</th>
<th>Cases as complainant</th>
<th>Cases as defendant</th>
<th>Total cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>All developed</td>
<td>1,329</td>
<td>457</td>
<td>535</td>
<td>992</td>
</tr>
<tr>
<td></td>
<td>(32.3%)</td>
<td>(70.2%)</td>
<td>(82.2%)</td>
<td>(76.2%)</td>
</tr>
<tr>
<td>All less developed</td>
<td>2,787</td>
<td>194</td>
<td>116</td>
<td>310</td>
</tr>
<tr>
<td></td>
<td>(67.7%)</td>
<td>(29.8%)</td>
<td>(17.8%)</td>
<td>(23.8%)</td>
</tr>
<tr>
<td>Just least developed</td>
<td>830</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>(20.2%)</td>
<td>(0.3%)</td>
<td>(0.0%)</td>
<td>(0.2%)</td>
</tr>
<tr>
<td>Total</td>
<td>4,116</td>
<td>651</td>
<td>651</td>
<td>1,302</td>
</tr>
</tbody>
</table>

Note: The \( \chi^2 \) tests contrasting developed with developing state rates as complainant, defendant, and total participation, respectively, result in statistics of 508.4, 880.5, and 1,678.9, which are all significant at the \( p < 0.001 \) level.

The WTO was widely expected to rectify some of these acknowledged imbalances. In view of a spate of disputes between LDCs, such as the Desiccated Coconut complaints by the Philippines and Sri Lanka over Brazilian countervailing duties (WTO 2000a), observers have concluded that the WTO system is indeed more open than its predecessor (Sevilla 1998; Jackson 1998, 74). As former WTO Director-General Ruggiero said, “many more [disputes] are being brought by developing countries, underlining their growing faith in the system” (Ruggiero 1998b; see also Petersmann 1997, 202–205). But the statistics in table 2 betray this. Developing countries constituted some 31 percent of GATT complainants, yet only 29 percent of WTO

Table 2. Dispute participation by developing countries under GATT versus WTO

<table>
<thead>
<tr>
<th>Regime</th>
<th>State classification</th>
<th>Member-years</th>
<th>Cases as complainant</th>
<th>Cases as defendant</th>
<th>Total cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT, 1948–94</td>
<td>Developed</td>
<td>1,134</td>
<td>302</td>
<td>400</td>
<td>702</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(34.1%)</td>
<td>(69.4%)</td>
<td>(92.0%)</td>
<td>(80.7%)</td>
</tr>
<tr>
<td></td>
<td>Less developed</td>
<td>2,189</td>
<td>133</td>
<td>35</td>
<td>168</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(65.9%)</td>
<td>(30.6%)</td>
<td>(8.0%)</td>
<td>(19.3%)</td>
</tr>
<tr>
<td>WTO, 1995–2000</td>
<td>Developed</td>
<td>195</td>
<td>155</td>
<td>138</td>
<td>293</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(24.6%)</td>
<td>(70.8%)</td>
<td>(63.0%)</td>
<td>(66.9%)</td>
</tr>
<tr>
<td></td>
<td>Less developed</td>
<td>598</td>
<td>64</td>
<td>81</td>
<td>145</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(75.4%)</td>
<td>(29.2%)</td>
<td>(37.0%)</td>
<td>(33.1%)</td>
</tr>
</tbody>
</table>
complainants, despite their ballooning proportion of the overall membership.\textsuperscript{10} Controlling for market power, trade dependence, and other variables, Reinhardt (2000a, 19) shows that LDCs are one-third less likely to file complaints against developed states under the WTO than they were under the post-1989 GATT regime. At the same time, as Table 2 indicates, the fraction of cases targeting LDCs has risen dramatically, from 19 to 33 percent. Reinhardt’s (2000a, 19) tests suggest an LDC is up to five times more likely to be subject to a complaint under the WTO than under the 1989 Improvements.\textsuperscript{11}

Hence, the evidence strongly supports the claims of many developing country advocates that the WTO dispute settlement system is not working as effectively for LDCs. One need not look far for an explanation. By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law (Hudec 1999, 16); by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews, and compensation arbitration; by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential two years or more to defendants’ legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing LDCs contemplating litigation (Reinhardt 1999, 6–7; Reinhardt 2000a, 11; Hoekman and Mavroidis 2000; South Centre 1999; Trade and Development Centre 1999). To be sure, as Moore (2000) notes, “It must be emphasized that this system gives small countries a fair chance, they otherwise would not have, to defend their rights.” But if, as Kuruvila (1999, 171) contends, “the success of this dispute settlement system may be measured, to a great extent, by its capacity to attract the participation of the developing … countries,” the results are rather disappointing.

4 Patterns of dispute escalation

One of the least publicized facts about dispute settlement is that most cases are never heard by a panel. This will not be terribly surprising for those familiar with the workings of domestic courts, where most cases are pleaded or withdrawn in advance of a trial. Much the same is true at the GATT/WTO, where upwards of 55 percent of disputes end in consultations (table 3), a required first step before a complainant can even request a panel. Indeed, as WTO Director-General Mike Moore (2000) has recently commented, “The system’s emphasis on negotiating a settlement … is the key principle … Without this system … disputes would

\textsuperscript{10} Kuruvila (1997) draws the opposite conclusion, because her study uses three years’ less data and fails to control for differing proportions of developing country membership in GATT versus the WTO.

\textsuperscript{11} Hudec (1999, 24–5) attributes the rising frequency of disputes against LDCs to the WTO’s “significant increase in legal discipline against developing countries.”
Table 3. Patterns of GATT/WTO dispute escalation

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Disputes initiated</td>
<td>620</td>
<td>313</td>
<td>122</td>
<td>185</td>
</tr>
<tr>
<td>of which Panel established</td>
<td>276 (44.5%)</td>
<td>137 (43.8%)</td>
<td>59 (48.4%)</td>
<td>80 (43.2%)</td>
</tr>
<tr>
<td>of which Panel ruling issued</td>
<td>233 (37.6%)</td>
<td>120 (38.3%)</td>
<td>51 (41.8%)</td>
<td>62 (33.5%)</td>
</tr>
<tr>
<td>of which Appellate ruling issued</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>44 (23.8%)</td>
</tr>
</tbody>
</table>

Note: Since adjudication in the first years of GATT relied less on formal panels than on other bodies (e.g., working parties or the entire Council) to issue judgments, the term “panel” above includes those alternative authorities as well. The figures in parentheses reflect the row’s percent of the total cases initiated in that period. Cases filed in 2000, as well as seventeen earlier WTO disputes whose panels had not yet had a suitable chance to form or issue a ruling as of July 2000, are not included.

drag on much longer, have a destabilizing impact on international trade, which, in turn, could poison international relations in general.” In light of this, recent research has sought to understand why some cases are settled early, and why others “escalate” to a panel.

Several hypotheses are suggested in the scholarly literature. One concerns the nature of the consultations held. In particular, many observers have speculated that consultations held under Article XXIII:1 are more likely to go on to a panel, in contrast to those held under Article XXII (both of GATT 1947). The reason is that, even though both texts fulfill GATT’s requirement that consultations be held before a complainant can make a request a panel (WTO 1995b, 617), Article XXIII:1 boasts more explicit language about “nullification and impairment,” and thus seems a more natural transition to the subsequent paragraph, which provides for a panel. It might thus be argued that complainants choosing Article XXIII:1 are likely to have grievances that are not only more contentious, but better defined with respect to GATT disciplines (Von Bogdandy 1992; Petersmann 1994, 1171). Article XXII, by way of contrast, is widely viewed as the preferred choice of those countries looking to gather information, or to consult in the most general sense (Hudec 1993, 370).
Does the evidence bear out the conventional wisdom? Quite convincingly, in fact: in a study of GATT 1947, Busch (2000a) finds that those disputes brought for consultations under Article XXIII:1 were fully 40 percent more likely to escalate to a panel, controlling for other attributes of the case, including the contested measure, type of good, the complainant’s and defendant’s bilateral trade dependence, and whether the case pitted the United States against the European Community (EC). In short, it appears that, at least under GATT 1947, Article XXIII:1 consultations are substantially more likely to feed into a panel proceeding, in all likelihood because complainants choose this text where they are predisposed to invoke GATT’s language of nullification and impairment. Interestingly, however, some of the most heated disputes heard by WTO panels have, instead, emerged from Article XXII consultations, most notably Hormones, Periodicals, and Sections 301–310. Further research is needed to see if there is a new trend underfoot since 1995 and, if so, why?

Another familiar hypothesis concerns the effect that GATT legal reform has had on the propensity to panel disputes. In particular, it has long been remarked that, before the 1989 Dispute Settlement Improvements Procedures (“Improvements”), a defendant’s threat to delay or block the formation of a panel would likely have deterred many complainants from even trying to escalate their disputes. By extending the “right” to a panel, the Improvements may thus have encouraged more escalation by clearing away this obstacle. Indeed, in a nod to this argument, many scholars insisted that the Improvements had revitalized dispute settlement (Castel 1989), given GATT its “teeth” (Montañá i Mora 1993; Young 1995), and that this would embolden complainants to panel their disputes, in particular (Pescatore 1993, 29). In much the same spirit, the right to a panel is among the more celebrated innovations to have been firmed-up by the WTO’s DSU (Bello and Holmer 1998; Jackson 1998, 72). But has the right to a panel changed the way cases brought before the GATT/WTO are prosecuted? The evidence to date is a resounding no.

To begin, the expectation that the Improvements might lead to more escalation is simply not borne out by the data. In particular, Busch (2000a) find that cases filed for consultations were no more likely to go to a panel after, than before, the Improvements. On one hand, this is rather surprising, given the expectation that complainants would presumably favor the greater “legalism” of a panel over the “power politics” of consultations. On the other hand, this finding may not be surprising at all, since by formally extending the right to a panel, the Improvements may have inspired more early settlement, rather than more escalation. In other words, under the “shadow of the law,” defendants would likely plead stronger cases, and complainants would presumably withdraw weaker ones. If so, then rather than look to see if more cases were paneled as a result of the Improvements, the data would be expected to reveal a pattern of more early settlement. They do not. Rather, concessions at the consultation stage turn out to be no more likely
after, than before, the improvements, controlling for a host of attributes of the dispute itself.

Of course, it could still be argued that the codification of dispute settlement norms, as opposed to the right to a panel per se, may have changed the way cases were prosecuted at the GATT. If so, it might be more useful to look at the effects of the 1979 Understanding on Dispute Settlement ("Understanding"), and its annex on customary practices, in particular (WTO 1995b, 632–636). Here, too, however, the data paint a very different picture. More to the point, the Understanding did not encourage more escalation, nor did it lead to more early settlement. In sum, it appears that the norms codified by the Understanding were as robust before 1979 as after. The role that these norms play in dispute outcomes is a topic to which we now turn.

5 Patterns of dispute outcomes

Despite Hudec’s (1993, 359) admonition that “one can never really prove that an international legal institution has made a difference,” the outcomes of dispute settlement are widely seen as a benchmark for evaluating the institution’s effectiveness (Hudec 1993, 360). The data tell an intriguing story.

By “outcome,” following Hudec (1993), we mean the ultimate policy result of a dispute, not the nature of a ruling per se. In other words, the key is whether the defendant liberalized the disputed trade policy practices, conceding to some or all of the complainant’s demands, as opposed to whether a ruling (where there was one) favored one side or the other. On this latter point, it is interesting to note that, as Reinhardt (2001) observed for the GATT period, there is an enduring pro-plaintiff bias in those cases decided by a panel, on the order of 4 to 1. But as we keep emphasizing, many cases are never heard by a panel, let alone reach the stage of a panel ruling. This is why Hudec’s focus on concessions is so important; we need a benchmark that has meaning at each stage of dispute settlement, from consultations through to a panel verdict. Hudec (1993) coded the policy result of each dispute into one of three categories, depending on whether the objectionable practices were fully, partly, or not at all removed. This judgment is obviously a subjective one, and it can be hard to find information sources concerning the exact nature of settlements. But armed with Hudec’s coding criteria, a growing number of scholars has begun the task of measuring concessions for new disputes under the WTO, as well as for those earlier disputes for which a “paper trail” is only now beginning to emerge. Results of this work for 298 bilateral disputes in the GATT period, broken down by stage of dispute escalation, are displayed in table 4.13

---

12 He further classified outcomes by whether a ruling was issued and whether the defendant’s policy change was “internal” or motivated by bilateral pressure, but these distinctions are probably best saved to help explain why the defendant conceded (or not) rather than folding them into the outcome measure in the first place.
Testing international trade law

Table 4. The pattern of dispute outcomes, 1948–1994

<table>
<thead>
<tr>
<th>Final disposition of case</th>
<th>None</th>
<th>Partial</th>
<th>Full</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panel not established</td>
<td>47</td>
<td>40</td>
<td>38</td>
<td>125</td>
</tr>
<tr>
<td>Panel established, no ruling</td>
<td>4</td>
<td>7</td>
<td>19</td>
<td>30</td>
</tr>
<tr>
<td>Ruling for complainant</td>
<td>28</td>
<td>25</td>
<td>38</td>
<td>91</td>
</tr>
<tr>
<td>Mixed ruling</td>
<td>5</td>
<td>9</td>
<td>15</td>
<td>29</td>
</tr>
<tr>
<td>Ruling for defendant</td>
<td>21</td>
<td>0</td>
<td>2</td>
<td>23</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>105</strong></td>
<td><strong>81</strong></td>
<td><strong>112</strong></td>
<td><strong>298</strong></td>
</tr>
</tbody>
</table>

Note: As in table 3, since adjudication in the first years of GATT relied less on formal panels than on other bodies (e.g., working parties or the entire Council) to issue judgments, the term “panel” above includes those alternative authorities as well. “Ruling” above refers to the issuance of reports and not their formal adoption by the Contracting Parties.

These data raise a number of compelling questions. For instance, as table 4 attests, dispute outcomes under GATT exhibit a puzzling selection effect. That is, the chances the defendant will concede are greater prior to a ruling than they are after a ruling against the defendant. In particular, as quantified by Reinhardt (2001), the probability of full concessions by the defendant jumps an average of 27 percent after a panel is established, but it drops 18 percent if the panel rules for the complainant and 55 percent if the panel rules for the defendant. This pattern would not be surprising in a domestic civil context, in which the court’s rulings are enforced. But under GATT, as Bhagwati (1991, 55) has put it, “the sheriff is asleep at the saloon”; in Hudec’s (1987, 219) evocative phrase, an adverse ruling is a “punch that will not hit anyone.” Furthermore, retaliation by the complainant is extraordinarily unlikely (Jackson 1998, 67, 95), and legally authorized retaliation is even less so. Why would defendants plea bargain if they know they can spurn rulings with impunity?

One possible explanation is that states are wary of bringing down the GATT system; anticipation of the stream of benefits flowing from membership in a thriving GATT regime in the future is enough to induce costly cooperation in the short run. There is much to be said for this reasoning, which has provided valuable insights in other political economy contexts. Yet it fails to predict the pattern of GATT dispute outcomes effectively (Reinhardt 2001). First, noncompliance with panel rulings by small or less developed states would have little bearing on the survival of the GATT regime (Krugman 1993, 74); only the behavior of the great economic powers would

---

13 The source is Reinhardt (2001, table 1).
matter, and thus only they would be compelled to comply with adverse rulings. But precisely the opposite is true: the major trading states account for virtually all of the noncompliance that occurs. Second, the most significant cases of noncompliance, in a set of US–EU disputes in the late 1980s (Hudec 1993, 199–231), were followed not by the destruction of the regime but rather by the most liberalizing trade accord in history: namely, the conclusion of the Uruguay Round.

Hence, to explain the puzzling pattern of early settlement in GATT disputes, we must look elsewhere. Reinhardt (2001) offers a bargaining model in which the complainant has the option of (unauthorized) unilateral retaliation in addition to GATT litigation. Whether the complainant state might be politically capable of implementing costly retaliation is uncertain, as is the extent to which the defendant would suffer politically if it fails to comply with an adverse ruling. Both states attempt to exploit this uncertainty to maximum advantage, leveraging concessions or upholding the status quo, as the case may be. The model shows that even when the defendant has no inherent interest in complying with rulings, it will be compelled to offer a more generous early settlement package than it otherwise might, since the complainant’s resolve is boosted by its (in this case, erroneous) belief that the defendant is going to be compelled to concede in the event of an adverse ruling. Thus, “the basic force of the procedure [comes] from the normative force of the decisions themselves and from community [read: complainant] pressure to observe them” (Hudec 1987, 214). And the normative power of a GATT ruling can constrain the behavior even of states that do not subscribe to the norm. But the norm is not divorced from the underlying power contest; the defendant’s uncertainty about the complainant’s willingness to implement retaliatory measures (if called upon to do so) is absolutely necessary to give recalcitrant defendants some interest, however slight, in cutting a deal in the first place. What is surprising is not that the twin levers of the legal norm and the threat of sanctions combine to elicit cooperation from defendants, but that they do so disproportionately in the form of early settlement. By the point a ruling is issued, the system has lost its best chance to influence the defendant’s policy.  

This argument, while perhaps sufficient to account for the broad pattern of concessions across the stages of dispute escalation, does not tell us which states are more likely to settle than others. Busch (2000b) takes up this question explicitly, again just for the GATT period. He finds that pairs of highly democratic countries (e.g., US–Canada) are up to 21 percent more likely to settle their disputes cooperatively in the consultation stage, as compared to pairs with one or more states which are not fully democratic (e.g., Mexico–Guatemala). But pairs of democracies are no more likely than non-democratic pairs to resolve their disputes cooperatively after a panel has been formed. This finding has clear implications for the WTO’s

---

14 As Hudec (1993, 360) writes, “No functioning legal system can wait until then to exert its primary impact.”
increasingly heterogeneous membership. It suggests, moreover, that the greater transparency of a panel proceeding makes it difficult for those countries that are highly accountable at the ballot box to compromise in full public view. If so, then efforts to increase transparency at the consultation stage may well prove counterproductive.

It also appears that more “open” economies (i.e., those that are highly receptive to trade, as a percentage of gross domestic product (GDP) are less likely to make concessions at either the consultation or panel stages. More precisely, the most open economies are about 31 percent less likely than the least open economies to make concessions at the consultation stage, and about 13 percent less likely at the panel stage (Busch 2000a). This is surprising, to say the least, given the view that more trade-dependent economies ought to be especially concerned about provoking foreign retaliation (Katzenstein 1985), and thus presumably more likely to make concessions than less trade-dependent countries. One explanation for this finding may be that more open economies have less slack to liberalize further, given their investment in “social insurance” measures (Rodrik 1997), for example.

The data on dispute outcomes allow us to answer another question: exactly how frequent is compliance with GATT/WTO rulings? Speaking just of the GATT period, most scholars have adopted the sanguine view that noncompliance is quite rare (Jackson 1989, 101; Hudec 1993, 278–279; Chayes and Chayes 1993, 187–8; Davey 1993, 72; Petersmann 1994, 1192–1195). The figures in table 4, however, reveal a different result. Namely, only two-fifths of rulings for the complainant result in full compliance by the defendant. In nearly a third, defendants fail to comply at all, effectively spurning panel rulings (as a result, some of these rulings were not invested with formal legal authority by virtue of the defendant’s veto). The WTO track record may well be better, though there are plenty of negative results here as well: e.g., Bananas and Hormones. The point here is not that the institution is ineffective but rather that, as highlighted above, whatever positive effect it has on a defendant’s willingness to liberalize occurs prior to rulings, in the form of early settlement. To put it another way, we cannot judge the institution’s effectiveness by looking at compliance alone.

Which states are more likely to comply with adverse rulings? Counter to conventional wisdom, democracies, even controlling for their (typically) greater market power, are less likely to comply (Reinhardt 2000a, 19, 33). As noted above, once GATT has openly thrown down the gauntlet, it can be harder for a government that is highly sensitive to public opinion to cave in. Otherwise, the evidence fits intuition. For example, a defendant that is highly dependent on the complainant’s export market, or whose GDP is a small fraction of the complainant’s (speaking to terms-of-trade considerations), are more likely to liberalize in the wake of an adverse ruling. And LDCs are more likely to comply with adverse rulings than are their comparably sized, but more developed, counterparts (Reinhardt 1999, 36; 2000a, 33). Many LDCs since the later 1980s have embarked upon unilateral trade
liberalization programs, and adverse GATT rulings help reinforce leaders facing opposition to the reforms, tying their hands. Ironically, given GATT/WTO’s lack of autonomous enforcement power, only when the national public is incompletely informed about the (lack of) consequences of noncompliance (as is more often the case is LDCs, which participate in GATT/WTO disputes less frequently) can a leader credibly tie his hands with an adverse ruling.

Finally, what do the data say about the overall impact of the adjudication system on states’ behavior in trade disputes? Would states resolve their trade conflicts the same way if GATT/WTO litigation were not an option? Reassuringly, evidence is accumulating that the regime indeed makes a difference. First, Reinhardt’s (2001) statistical analysis concludes that, despite the lower probability of concessions expected after rulings, the net effect of invoking adjudication, in the form of panel establishment, is to significantly increase the level of liberalization of disputed measures, by about 10 percent. The “shadow of the law” elicits deeper concessions from even those defendants that would not suffer politically from noncompliance with an adverse ruling. Second, if the institution did not affect the bargaining between the disputants, then the direction of a ruling would not condition the probability of concessions by the defendant. As we see in table 4, however, liberalization of the disputed measures is more than 4 times as likely after a ruling for the complainant than after a ruling for the defendant. Third, coming as close to a “smoking gun” as one could wish, Busch (2000a, 13) demonstrates that, even controlling for factors like bilateral trade dependence and market size, the target of a US Section 301 action is up to 38 percent more likely to concede when the 301 action is accompanied by a GATT/WTO complaint than when it is not. Hudec was right: the threat of a “punch that will not hit anyone” can nevertheless make a state flinch.

6 Questions for future research

The body of empirical work on GATT/WTO dispute settlement is still small. Wide-ranging academic debates, plus the fact that dispute settlement is once again going to lie at the heart of the next round of multilateral trade negotiations, call for further research on aspects of the process about which we currently know very little.

First, many legal scholars have rightly observed that the GATT/WTO dispute settlement process has become increasingly “judicialized” (Montañá i Mora 1993; Young 1995; Petersmann 1997; Jackson 2000, 178), moving away from the “diplomat’s jurisprudence” (Hudec 1970) that it once exhibited. Exactly how political are rulings by GATT/WTO legal authorities? Are judgments biased to favor the interests of the major trading states, especially the US and EU? Looking at nineteen decisions from 1995 to 1999, Garrett and Smith (1999, 21) argue that the Appellate Body (AB) indeed engages in “strategically motivated conciliatory behavior,” within the
Testing international trade law

limits of established GATT and WTO jurisprudence, so as to minimize the risks of institutionally damaging noncompliance. Iida (1999) examines Hudec’s (1993) set of cases and concludes that more powerful defendants (namely, the US, EC, and Japan) were less likely to be found in violation. But a full-scale analysis of this question, using the set of all rulings and controlling for the effects of other variables, has yet to be performed. The need to do so is clear. As a first cut, we estimated a regression of the direction of 139 GATT-era rulings on measures of the disputants’ relative market power, LDC status, and indicators of the type of policy and sector covered by the dispute. Figure 2 depicts the predicted probability that the ruling fully upholds the complainant’s arguments, conditioned on the size of the complainant’s GDP relative to the defendant’s, and controlling for other variables. As the very large confidence intervals show, the data do not permit a statistically certain conclusion. Yet, if anything, when the complainant’s GDP is notably larger than the defendant’s, its legal arguments are least likely to be upheld. In addition, Mota’s (1999, 104) analysis of WTO-era panel (but not AB) rulings arrives at a similar conclusion, i.e., that developing countries are disproportionately likely to prevail as complainants. Of course, selection effects pose a big hurdle for any such analysis: if disputants expect a ruling to be biased, they may be more likely to settle early, which will prevent the analyst from ever observing the bias in practice. To grapple with this problem, future studies will need to use econometric models that explicitly correct for such selection processes.

Second, why do states file some cases before GATT/WTO but not others? The answer to this question is likely to be complex, since a complainant will factor in not only the economic stakes and legal merits of the case, the costs of litigation, and the effectiveness of GATT/WTO enforcement, but also the political credit it may get from domestic interest groups by doing so.15 Comparing US GATT/WTO complaints to section 301 cases that could have been brought to GATT/WTO but were not, Reinhardt (2000b) finds that the US is less likely to litigate (rather than act unilaterally) its disputes against large states, perhaps because filing a GATT/WTO lawsuit inherently sends the signal that the US is reluctant to retaliate unilaterally. Yet, reflecting the increasing judicialization of the regime, the US has clearly relied more heavily on the GATT/WTO litigation instrument, as opposed to the pure unilateralism of section 301, since 1989, and especially since 1995. In further research on this question, however, analysts need to obtain information on the legal merits of both potential and filed complaints (and even most of the latter, again, are never ruled upon), a considerable task. The challenge for empirically oriented analysts is to identify valid yet quantifiable indicators of each case’s legal merits, and then to use those indicators to parse the political from the legal calculations of the litigants.

15 Hence, as in the (Fuji-Kodak) Photographic Film and Paper case, what looks like “bad lawyering” may turn out to have an important political economy rationale (Goldman 1999).
Figure 2. How the disputants’ relative power affects the direction of a panel ruling, 1948–1993.

Note: this figure displays the predicted probability that a ruling fully upheld the complainant’s contentions, for those 139 bilateral disputes initiated between 1948 and 1993 which culminated in rulings of any sort. The index of complainant’s market power is the case’s percentile value of the complainant’s GDP divided by the complainant’s plus the defendant’s GDP. The figure plots the partial (probit) regression results, along with high and low 95 percent confidence interval bands, controlling for the effects of each state’s GDP by itself, LDC status, and various measures of the types of policies and issues under dispute. Nicaragua–EC 1993 falls on the far left, EC–US 1963 falls around 50 percent, and US-Jamaica 1970 is represented by the far right of the x-axis.
Testing international trade law

7  Policy prescriptions

Seven years after he wrote it, Pescatore's (1993, 27) claim that “whoever speaks of dispute settlement in GATT must start from nearly nothing” is no longer true. Thanks to the foundation established by Robert Hudec, scholars have begun to make significant progress in understanding the track record of GATT/WTO dispute settlement. What do the results of these initial studies imply for the practice and optimal design of WTO adjudication procedures? We conclude this chapter by considering a few such policy prescriptions.

One prescription concerns the way in which the WTO can help LDCs make the most of dispute settlement. To date, GATT reform has focused on streamlining the access that LDCs have to a panel, most notably the 1966 Decision on Procedures Under Article XXIII (WTO 1995b, 641–642). While this is certainly a laudable goal, it may not have the desired effect, since LDCs are still at a disadvantage when it comes to bargaining under the “shadow of the law.” Indeed, LDCs are often not in a position to recognize and take advantage of potential meritorious complaints because they have zero or few in-house experts and are “less sophisticated buyers of legal advice” (Trade and Development Centre 1999, 45). Hence they are frequently unable to make the most of consultations, where other disputants are more readily able to achieve early settlement. This suggests that the WTO would do well to put more emphasis on helping LDCs in general, and at the consultation stage in particular. The goal is not to make consultations more formal, but rather to put LDCs on a more equal footing. The recent establishment of the Advisory Centre on WTO Law, based in Geneva (Trade and Development Centre 1999), goes a long way toward supplementing the WTO’s insufficient existing regular technical assistance budget of $430,000 (WTO 2000b). Still, as LDC advocates have argued (South Centre 1999), the next round of multilateral trade negotiations should focus on reforms that might increase developing countries’ capabilities to bargain more aggressively in the “shadow of the law.”

Another policy prescription concerns recent demands for greater “transparency” in dispute settlement. Particularly in the wake of the Seattle ministerial, few analyses of the WTO fail to raise the issue of giving non-governmental and other groups more access to panel proceedings, for example (e.g., Hudec 1999, 43–50). And while, at first blush, it seems hard to argue against greater transparency, we would caution against opening up the consultation and panel operation stages to more prying eyes. The reason is that highly democratic pairs of countries are especially likely to settle early in consultations (Busch 2000b), suggesting that they find it easier to compromise in a setting that is relatively less transparent, when the terms of any arrangement, in sharp contrast to what occurs after panel rulings, are not

---

16 For obvious reasons, having high-powered legal argumentation ready from the start lends a great deal of credibility to one’s position during consultations.
subject to 21.5 or “compliance” reviews. This should not be surprising, since after rulings pressure from legislators and industries at home will invariably be greater, if for no other reason than that post-ruling proceedings leave a clear paper trail, and policy changes at that point are more likely to require implementing legislation. Consultations, by way of contrast, are sometimes not even reported to the GATT/WTO until after they are concluded. This gives the disputants more latitude to strike a deal, latitude that may be especially important for democracies, given their greater accountability to domestic constituents.

A final prescription concerns what to do about noncompliance. Given the Bananas and Hormones outcomes, along with several other highly protracted cases not far short of the point of authorized retaliation, Hudec (1999, 14) is probably right that, “after celebrating its considerable initial success during its first three years or so, the new WTO legal system will have to learn to cope with legal failure.” The central problem is the long delay, which can be several years, before the institution’s definitive legal statement emerges, with the added stages of appeal, compliance review, appeal of the compliance review, and mandated arbitration of compensation amounts. Moreover, compensation, when it is finally legally authorized, is limited to the level of the infraction; and, in any case, is unlikely to be even that high since arbitration ends up splitting the difference between the estimates of the complainant and defendant. This amount is nearly guaranteed to be less costly to the defendant than removing the offending measure in the first place. For that reason, the system is unable to deter many violations. Plus, of course, any compensation that is mandated need not be retroactive, which (especially for temporary protectionist measures or for those affecting fledgling industries) can be enough to deter complainants from filing otherwise meritorious cases (Pauwelyn 2000). The bottom line is that the WTO adjudication system is as much about “defendants’ rights” as it is about removing violations of established trade law. Correcting this problem requires stiffer penalties and speedier legal authorization for retaliation, though even this would not redress the inability of LDC complainants to credibly retaliate (Hoekman and Mavroidis 1999). One possibility would be to authorize collective retaliation (Pauwelyn 2000, 347), though, given the costs to the complainant of retaliating and the difficulties posed for such a scheme by free trade areas and customs unions, this proposal is politically infeasible. The challenge is to structure incentives to minimize the risk of extralegal sanctions while boosting the credibility of legal ones (Hudec 1990). In the end, this may be out of reach for the institution.

REFERENCES
Testing international trade law


Busch, Marc L. 2000a, Accommodating Unilateralism? U.S. Section 301 and GATT/WTO Dispute Settlement, Typescript, Queen’s School of Business.


(1975) THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (Praeger).


To GATT or Not to GATT: Which Trade Disputes Does the U.S. Litigate, 1975–1999? Typescript, Emory University.

(forthcoming 2001) Adjudication without Enforcement in GATT Disputes, 45 J. CONFLICT RES.


