

## REVIEWS

This issue sees the launch of a book review section in the *Journal of International Economic Law*. Our first book review is presented below, and we hope that in later issues we will be able to develop a more substantial book review section. We invite readers to consider submitting short reviews to the Editorial Office (details on inside back cover).

**Engaging Countries: Strengthening Compliance with International Environmental Accord.** By EDITH BROWN WEISS and HAROLD K. JACOBSON (eds), Cambridge, MA, MIT Press, 1998. ISBN 0262231980. 564 pp. \$55 hardbound.

### INTRODUCTION

Edith Brown Weiss and Harold K. Jacobson's book, *Engaging Countries: Strengthening Compliance with International Environmental Accords*, represents an ambitious effort to identify the factors that result in successful environmental treaties.<sup>1</sup> The Brown Weiss and Jacobson study examines five international environmental treaties: the World Heritage Convention, the Convention on International Trade and Endangered Species (CITES), the London Convention of 1972 (formerly called the London Ocean Dumping Convention), the 1983 International Tropical Timber Agreement (ITTA), and the Montreal Protocol on Substances That Deplete the Ozone Layer. The study examines compliance with these treaties by eight countries (Brazil, Cameroon, China, Hungary, India, Japan, Russia, and the United States) as well as the European Union. It reviews four major hypotheses and dozens of sub-hypotheses about what produces effective agreements.

The information that the authors have gathered is sweeping in its coverage and helpful in developing a picture of what leads to good international pollution control and resource management programs. Nevertheless, the volume falls short in some regards. In particular, the matrix implied by the analytic framework described above is not fully developed. Indeed, the editors concede early on that they have 'too many variables and too few cases'<sup>2</sup> to be conclusive about what it takes to successfully engage countries in international environmental protection efforts.

The book contains several overarching chapters that provide important theoretical insights into what makes for successful global-scale environmental programs. In 'How Compliance Happens and Doesn't Happen Domestically', David Vogel and Timothy Kessler identify the critical variables that determine policy success at the national level.<sup>3</sup> They focus on administrative compliance and monitoring (including the strength of feedback mechanisms and the number and size of parties within the regulated community), the adequacy of enforcement mechanisms, political will (a function of public opinion, the leadership of politicians, and the impact of nongovernmental organizations), and the economic environment (in which wealth provides both the resources and the will to make environmental protection a priority). A number of these factors also shape the success of internationally agreed environmental policies, which, to be successful, must be implemented at the domestic level.

<sup>1</sup> Edith Brown Weiss and Harold K. Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) at 3 (hereinafter *Engaging Countries*).

<sup>2</sup> *Engaging Countries* at 8.

<sup>3</sup> *Engaging Countries* at 19–38.

In another chapter, Abe Chayes, Antonia Chayes, and Ronald Mitchell renew their calls for less emphasis in the international domain on 'enforcement' of agreements and more efforts devoted to assisting countries in trying to meet their obligations.<sup>4</sup> The 'Managed Compliance' School argues that a good bit of noncompliance with international agreements is not intentional but rather a function of incapacity. Thus, international efforts should focus on providing inducements as well as technical support to those who would like to comply but whose ability to do so is limited.

Sheila Jasanoff argues in a chapter entitled 'Contingent Knowledge: Implications for Implementation and Compliance' that science can play an important role in environmental policymaking but that it must be understood that all environmental knowledge is socially constructed.<sup>5</sup> Jasanoff nevertheless notes that, while there is often a high degree of uncertainty in the important factors that go into environmental policymaking, the contingency of scientific and technical information can be overcome through 'convergent interpretative practices', including standardization and the cognitive evolution of transnational agencies and actors.<sup>6</sup> Jasanoff argues that standardization offers a process by which policy-relevant knowledge can be stabilized across divergent political and cultural spheres.<sup>7</sup> She concludes that the need to build on a scientific and technological base for successful treaty-making calls for a focus on the institutional and procedural dimensions of international regimes – particularly as places where words and ideas are translated into action.<sup>8</sup> Jasanoff's explanation of how international agreements can work as mechanisms to bring people with divergent visions and values together represents real insight.

#### COMPARATIVE ANALYSIS

Perhaps the most valuable element of the volume is Edith Brown Weiss's central chapter on the five treaties that are the focus of the study.<sup>9</sup> Professor Brown Weiss's comprehensive analysis of the different approaches that have been taken across the natural resource management and pollution control spectrum is full of interesting data and observations. She notes, for example, the very significant role that nongovernmental organizations, particularly the World Wildlife Fund's TRAFFIC, have played in highlighting violations of CITES. And she adds that one of CITES's major weaknesses lies in its limited focus on protecting endangered species that are traded across international borders.

In some cases, an even deeper level of analysis might have been possible. Other studies of CITES have noted, for example, that the treaty is also less than fully successful, in part, because it is often applied only to 'charismatic mammals'. CITES does little, moreover, to focus attention on habitat destruction, which is the cause of the loss of species in many cases.<sup>10</sup>

One of the most interesting elements of the Brown Weiss effort is her rigorous adherence to the matrix of analysis identified at the outset of the book. With regard to each

<sup>4</sup> See Abram Chayes, Antonia Handler Chayes, and Ronald D. Mitchell, *Managing Compliance: A Comparative Perspective* (Chap. 3) in *Engaging Countries* at 39–62. See also Abram Chayes and Antonia H. Chayes, *The New Sovereignty: Compliance with Treaties in International Regulatory Regimes* (1995).

<sup>5</sup> *Engaging Countries* at 63–88.

<sup>6</sup> *Engaging Countries* at 68.

<sup>7</sup> *Engaging Countries* at 72.

<sup>8</sup> *Engaging Countries* at 85.

<sup>9</sup> Edith Brown Weiss, *The Five International Treaties: A Living History* (Chap. 5) in *Engaging Countries* at 89.

<sup>10</sup> See Ginette Hemley, *International Wildlife Trade: A CITES Sourcebook* (1994) (hereinafter Hemley, *CITES Sourcebook*).

major accord, Professor Brown Weiss examines treaty commitments and structure, implementation of the agreement, the secretariat and support structure, the role of non-governmental organizations, financial arrangements, dispute settlement, and monitoring and compliance mechanisms. This analytic consistency across all five treaties allows for real comparative insights. One can see, for example, that the data on reporting under CITES has steadily improved and that the very high degree of compliance with the reporting requirements is now a considerable strength of the international effort to protect endangered species.<sup>11</sup> In contrast, fewer than 50 percent of the reports required under the London Convention have been filed in recent years<sup>12</sup> – and thus the treaty continues to fall short of expectations.

Given the enormous amount of information that Professor Brown Weiss advances and her success in applying a comparative structural framework to the various treaties, it is perhaps quibbling to note that, in many cases, it would have been valuable to have some deeper analysis of the data presented. It is very interesting to hear, for instance, that a third of the budget of the ITTA is provided by Japan. But left unanswered is the question of the implications of having such a significant percentage of an international agreement funded by a single country with a particular set of interests.

Professor Brown Weiss's review leads to some notable conclusions. First, the role of NGOs in helping to provide support to the inevitably limited treaty secretariats has become very important. Second, transparency and openness of the policy process makes a big difference in the level of compliance and the effectiveness of the policy that flows from the treaty. Third, given the limitations on enforcement in the international domain, the vigor of monitoring and reporting requirements represents a critical determinant of success. Fourth, the world of international environmental protection is quite dynamic, and the most successful treaties have evolved over time in directions that improved their effectiveness.

Professor Brown Weiss does not explore several other conclusions that might also have been drawn. In particular, she soft-peddles (as do almost all of the authors in this volume) the value of trade penalties as an enforcement mechanism to reinforce international environmental policies. Passing references are made to the threat of trade measures. Little is made of the accounts by others of the important role the Montreal Protocol trade provisions played in getting India and China to sign on to the global-scale effort to protect the ozone layer.<sup>13</sup> The role trade measures (especially those unilaterally threatened by the United States) have played as a mechanism for improving compliance with CITES is also largely overlooked.<sup>14</sup> A significant number of other analysts of international agreements have concluded that these trade measures were an important part of the structure that emerged and had some impact on the level of compliance.<sup>15</sup> That this study comes to different conclusions may not be a surprise. But that the authors and editors spend so little

<sup>11</sup> *Engaging Countries* at 112–13.

<sup>12</sup> *Engaging Countries* at 332.

<sup>13</sup> See Richard Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (1994); Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (1994); Johannes Heister, 'Who Will Win the Ozone Game?', Kiel Working Paper No. 579 (1993).

<sup>14</sup> The United States, for example, has imposed sanctions against Taiwan for failing to control trade in tiger and rhinoceros bones and body parts. See 59 Fed. Reg. 40,463 (2 August 1994). The sanctions were lifted in 1997. See 62 Fed. Reg. 23,479 (30 April 1997); see also Hemley, *CITES Sourcebook*.

<sup>15</sup> See, e.g., 'The Creation of International Environmental Agreements', 104 Harv. L. Rev. 1521, 1539 (1992); Duncan Brack, *International Trade and the Montreal Protocol* (1996); Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (1994).

time explaining why their results diverge from what others have found is unfortunate.<sup>16</sup> Indeed, the very structure of the comparisons, which does not even include trade measures as a category for analysis, is revealing.

One might also question whether more time and attention should have been given to the role of economic incentives in supporting international environmental goals. Increasingly, it is recognized in domestic policymaking that harnessing market forces is a critical dimension of successful policymaking. The same point is now being advanced in the international realm.<sup>17</sup>

#### CASE STUDIES

The nine chapters studying individual country compliance are interesting but uneven. Unlike Professor Brown Weiss, who carefully follows a matrix approach to analyzing the treaties across a common set of key issues, the individual country analyses do not track systematically any taxonomic structure. Thus, the evidence that is brought forth and the information that is made available is anecdotally instructive but hard to draw clear conclusions from.

The chapter by Michael Glennon and Allison Stewart identifies a range of reasons why the United States is relatively good at implementing international environmental treaties.<sup>18</sup> They note that the United States has an environmental orientation both by culture and religion. The existence within the United States of legal mechanisms to reinforce policy and administrative agencies in courts adds to the seriousness of environmental purpose. More importantly, the US political system is relatively open; both NGOs and the press play an important role in keeping the pressure on government officials to perform. Glennon and Stewart note that the wealth of the United States and its capacity to afford environmental protection cannot be gainsayed as a reason for the relatively high degree of compliance by the United States with international environmental agreements. They also observe that political leadership is important and that the US federal structure makes compliance with environmental policy goals easier and cheaper. Some discussion of whether the factors that Glennon and Stewart identify as critical to the United States are also present in other federal systems would have been useful.

The chapter by Alberta Spragia and Philipp Hildebrand on the European Union addresses some of the variables identified by Glennon and Stewart, but not all.<sup>19</sup> Spragia and Hildebrand note that the institutional capacity of the European Union is still evolving and emerging. They suggest that the lack of depth and breadth in the EU legal mechanisms and institutions explains why compliance has been less strong in parts of Europe than in the United States. Spragia and Hildebrand argue that the presence of a European Union level of governance in Brussels improves compliance, but they do not push this analysis very far.

<sup>16</sup> In fact, having downplayed the threat of trade measures as a critical factor in treaty compliance through 500 pages, Professors Jacobson and Brown Weiss do list 'coercive measures' as one of three 'broad strategies' for strengthening international environmental efforts in their closing chapter. See text discussion at footnote 23 below.

<sup>17</sup> See, e.g., Daniel C. Esty and Robert Mendelsohn, 'Moving From Domestic to International Policymaking', 31 *Policy Sciences* 225 (1998) (hereinafter 'International Policymaking'); Robert W. Hahn and Kenneth R. Richards, 'The Internationalization of Environmental Regulation', 30 *Harv. Int'l. L.J.* 421 (1989); Richard B. Stewart, 'Environmental Regulation and International Competitiveness', 102 *Yale L.J.* 2039 (1993).

<sup>18</sup> Michael J. Glennon and Allison L. Stewart, 'The United States: Taking Environmental Treaties Seriously', (Chap. 6) in *Engaging Countries* at 173-214.

<sup>19</sup> Alberta M. Spragia and Philipp Hildebrand, 'The European Union and Compliance: A Story in the Making', (Chap. 7) in *Engaging Countries* at 215-52.

Ellen Comisso and Peter Hardi provide an interesting review of compliance in Hungary.<sup>20</sup> They find two key reasons why Hungary has made reasonably significant efforts to implement international environmental agreements. First, they note that accession to international environmental treaties, while in some respects symbolic, has served as an important signal of Hungary's interests in reaching out to the West. Second, the authors argue that Hungary's regulatory institutions, which did not collapse after the fall of communism (in contrast with Russia), provided an apparatus for implementing environmental policy, including priorities agreed upon at the international scale. In fact, the presence of a functioning civil service emerges as one of the critical variables across all of the country studies.

#### CONCLUSIONS AND POLICY RECOMMENDATIONS

Professors Jacobson and Brown Weiss pull the study together in a final chapter on 'Assessing the Record and Designing Strategies to Engage Countries'.<sup>21</sup> They note a secular trend toward better international environmental policy implementation and compliance. They see commitments to international environmental efforts deepening over time with increased funding and, in some cases, treaties being ratcheted up in strength as the parties become comfortable with the environmental efforts they are undertaking jointly. They observe an important and growing role for NGOs as part of the policy structure.

Jacobson and Brown Weiss attempt to distill the critical variables from the case studies. They suggest, for instance, that the particular features of the environmental activity matter, including the number of actors involved (fewer actors are easier to manage), the size of the firms that must be regulated (bigger firms are easier to regulate), and the degree of compliance of key participants (once the pattern is set by the major actors others will follow).

The 'characteristics of the accord' also appear to matter. Fairness is a critical variable. One of the reasons the Montreal Protocol has attracted a large number of signatories is its structure, which acknowledges different compliance capacities, establishes differentiated obligations for developed and developing countries, and makes funding available to developing countries to subsidize the purchase of CFC substitutes. In general, treaties with more precise obligations function more effectively than those with vague requirements. Access to scientific and technical information will often support compliance, as do regular reporting requirements and the capacity to monitor the data that is presented.

The international policy context is also clearly important. Major international conferences can raise the salience of particular issues. For example, the Rio Earth Summit in 1992 helped to push forward the effort to conclude a number of international environmental agreements, including the Climate Change Convention. International momentum for action can also be generated by the media, public opinion, NGOs, international organizations, and international financing bodies.

In terms of understanding what policy interventions might improve compliance and implementation, a number of critical factors are identified. First, richer and more democratic countries will generally comply more fully than poorer and less democratic ones. Unfortunately, these are hard variables to change in the short run. Similarly, the greater the degree of administrative capacity in general and environmental regulatory strength in particular, the more likely it is a country will be able to meet international obligations. As a rule, market economies appear better positioned to meet the demands of

<sup>20</sup> Ellen Comisso and Peter Hardi with Laszlo Bencze, 'Hungary: Political Interest, Bureaucrat Will' (Chap. 10) in *Engaging Countries* at 327-52.

<sup>21</sup> Harold K. Jacobson and Edith Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries', (Chap. 15) in *Engaging Countries* at 511-54.

implementation than non-market economies. Likewise, countries engaged in significant international trade will, in general, have structures in place that help make treaty implementation possible.

One of the conclusions that is touched on briefly but not developed as fully as it might have been involves the strength of federalism within a country. Jacobson and Brown Weiss suggest that excessive decentralization makes it difficult to implement international environmental policy. They point to the weakening of political control in Moscow and Beijing as unconstructive developments *vis-à-vis* compliance by Russia and China with international environmental accounts. They might, however, have drawn an even stronger conclusion: successful policy implementation requires multiple tiers of regulating authorities and governance structures.<sup>22</sup>

In synthesizing the results of the study, Jacobson and Brown Weiss identify three broad strategies for strengthening global-scale environmental efforts: (1) greater 'sunshine' including monitoring, reporting, inspections, access to information, and NGO participation; (2) 'positive incentives' including such inducements as financial and technical support, training, and access to technology; and (3) 'coercive measures' including trade penalties, sanctions, and withdrawal of other privileges.<sup>23</sup> Each, they suggest, can contribute to treaty compliance.

They close with prescriptions for policymakers on how to engage countries in international environmental programs. Some of the recommendations reflect advice on how to draft treaties, other suggestions go to the institutional structures that should be put in place to support international accords, and some of the ideas reflect strategies for making sure that what is agreed upon will be implemented effectively.

#### WHAT'S MISSING

While *Engaging Countries* covers a great deal of ground, it underplays or misses some quite critical points that relate to the success of international environmental policymaking. For example, almost no mention is made of the importance of targeting international policymaking on issues where there are significant gains to collective action.<sup>24</sup> To the extent that the World Heritage Convention has not been a great success, perhaps the reason is that there is no pressing reason for the substance of this treaty to be handled at an international level. Where the gains from international cooperation are more clear, such as the benefits of protecting the ozone layer addressed by the Montreal Protocol, it is often easier to get countries to participate and to take their obligations seriously.

It would have been useful to have some discussion of the conditions that make 'collective action' possible. In fact, although the volume is interdisciplinary in many respects, it is light on economic perspectives. The lessons learned from game theory about how to overcome prisoners' dilemma dynamics and to achieve collective action are important to understanding international environmental policymaking and are largely missing from this volume.<sup>25</sup>

<sup>22</sup> See, e.g., Daniel C. Esty, 'Revitalizing Environmental Federalism', 95 *Michigan L. Rev.* 570 (1996) (arguing against a sweeping presumption in favor of decentralized environmental governance and for a multi-tier regulatory structure).

<sup>23</sup> Jacobson and Brown Weiss, *Engaging Countries* at 542.

<sup>24</sup> See Esty and Mendelsohn, 'International Policymaking' at 227-28.

<sup>25</sup> For an introduction to game theory, see Avinash Dixit and Barry Nalebuff, *Thinking Strategically* (1991). For articles applying game theory to international cooperation, see e.g., Hugh Ward, 'Game Theory and the Politics of the Global Commons', 37 *J. Conflict Resolution* 203 (1993); Hugh Axelrod and Robert O. Keohane, 'Achieving Cooperation Under Anarchy: Strategies and Institutions', *World Politics*, October 1985 at 226; Kenneth A. Oye, 'Explaining Cooperation Under Anarchy: Hypotheses and Strategies', *World Politics*, October 1985 at 1; Arthur A. Stein,

Although there is some discussion of the danger of excessive decentralization, there is too little analysis of the proper structure of environmental policymaking. One can conclude from the case studies presented that federal systems, with regulatory authorities available to implement policy at various geographic scales, generally work better than systems where all policy-making is done at a single level. In fact, the data presented strongly reinforce the value of having authorities at various levels and scales providing a system of checks and balances. But the need for multi-tier environmental policymaking, including a more vigorous governance structure at the international level, is not a conclusion that is driven home in this volume.

Another observation that emerges from the case studies, but which does not emerge as a theme in this volume, is the need for analytic rigor in international environmental policymaking.<sup>26</sup> Where international collaborative efforts have been weak, it is often because the underpinnings and logic of a global-scale project are not well founded. For example, the ITTA (recognized by the authors of this volume to be one of the less successful international environmental agreements) has a weak underlying rationale. UNCTAD's interest in commodity agreements has now been recognized to be largely off the mark, and inconsistent with market economics.<sup>27</sup> My own experience as an environmental negotiator<sup>28</sup> and the stories presented in this volume lead me to believe that the most important feature of good international environmental policymaking is sound analysis. Where a solid intellectual foundation is laid and good logic prevails, the treaties that emerge will be valuable. Where these features are missing, no matter what the structure or the process by which the treaty was produced, the international agreement is not likely to be seen to have value over time.

A final striking aspect of the material presented in *Engaging Countries* – but given little attention by the authors and editors – is the degree to which the world community underinvests in international environmental policymaking. As the data in *Engaging Countries* suggests, the budgets for the World Heritage Convention, CITES, ITTA, the London Convention, and the Montreal Protocol range from under one million dollars per year to about four million dollars per year.<sup>29</sup> This pittance, in a world with a global economy that generates nearly \$30 trillion of economic activity each year, is remarkable.<sup>30</sup>

---

'Coordination and Collaboration: Regimes in an Anarchic World', 36 *International Organization* 299 (1982). For a combination of game theory and negotiation analysis in studying international cooperation, see James K. Sebenius, 'Challenging Conventional Explanations of International Cooperation: Negotiation Analysis and the Case of Epistemic Communities', 46 *International Organization* 323 (1992); James K. Sebenius, 'Designing Negotiations Toward a New Regime: The Case of Global Warming', *International Security*, Spring 1991 at 110. For legal literature on game theory analyses of the formation of international environmental agreements, see, e.g., Robert J. Schmidt, Jr., 'International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission', 26 *Envtl. L.* 95 (1996); Adam Chase, 'Barriers to International Agreements for the Adaptation and Mitigation of Global Climate Change: A Law and Economics Approach', 1 *Envtl. L.J.* 17, 35 (1994).

<sup>26</sup> See Daniel C. Esty, 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion', 1 *J. of Int'l. Econ. L.* 123, 126–27 and 135–37 (1998).

<sup>27</sup> See, e.g., Christopher L. Gilbert, 'International Commodity Agreements: An Obituary Notice', 24 *World Development* 1 (1996).

<sup>28</sup> As an official of the US Environmental Protection Agency from 1989–93, the author participated in negotiations on the London Amendments to the Montreal Protocol, the 1992 Climate Change Treaty, the environmental provisions of the NAFTA, the environmental provisions of the GATT Uruguay Round, the negotiations that led to the setting up of the Global Environmental Facility among others.

<sup>29</sup> *Engaging Countries* at 91.

<sup>30</sup> By way of comparison, the annual budget of the US Environmental Protection Agency exceeds \$7 billion.

The integrity of the international economic system depends on internalizing global scale externalities. Where shared resources are mismanaged, or transboundary pollution is not controlled, market failures will disrupt the economic efficiency of international economic relations. The result will not only be reduced social welfare and diminished gains from trade, but also significant environmental degradation. That the world community invests so little in protecting itself against these market failures and in acquiring the benefits of public health and ecological protection from international-scale threats is the real story of *Engaging Countries* – and yet one that is barely noted.

*Daniel C. Esty\**

\* Yale Law School and Yale School of Forestry & Environmental Studies, PO Box 208215, New Haven, CT 06520, USA; formerly Deputy Chief of Staff and Deputy Assistant Administrator for Policy, Planning and Evaluation at the US Environmental Protection Agency; AB, Harvard; MA, Oxford; JD, Yale. Thanks to Eric Biber and Tracy Triplett for research assistance.

## SUCCESS FOR PRIVATE COMPLAINANTS UNDER THE EU'S TRADE BARRIERS REGULATION

*Natalie McNelis\**

### INTRODUCTION

Private parties have often complained that they do not have direct access to what is proving to be the highly effective dispute settlement system of the WTO. To address this concern, in December 1994, the European Union adopted its Trade Barriers Regulation (TBR)<sup>1</sup> in order to provide a mechanism for private parties to bring their allegations of violations of international trade agreements to the attention of the EU authorities, with the pledge that the EU would pursue worthy cases in the WTO.

The response from private parties has been slow at the start, as, by the end of 1998, the Commission had only received eleven complaints that set out a sufficient *prima facie* case of a WTO violation to justify the opening of the TBR's examination procedure. However, the treatment of those cases should prove encouraging to potential complainants, as 1998 saw the first complaints brought by private parties under the TBR referred to WTO dispute settlement: the *USA – Rules of Origin for Textile and Apparel* case, the *USA – Antidumping Act of 1916* case and the *Japan – Imports of Leather* case. Furthermore, the Commission has published two further decisions to pursue private TBR complaints in the WTO, the *Argentina – Leather Exports and Imports* case and the *USA – Copyright Act* case.<sup>2</sup>

\* Attorney, Stibbe Simont Monahan Duhot, 47–51 rue Henri Wafelaerts, 1060 Brussels, Belgium. The author wishes to thank Mr. Petros Sourmelis of the European Commission for helpful comments on a draft of this note, although any errors or omissions are solely those of the author. This note is a follow-up to McNelis, 'The European Trade Barriers Regulation: A More Effective Instrument', which appeared in the *Journal of International Economic Law* (J. Int'l Econ. L.), vol. 1, no. 1, at 149. See also, Mavroidis and Zdouc, 'Legal Means to Protect Private Parties' Interests in the WTO', 1 J. Int'l Econ. L. 3 (September 1998), at 407.

<sup>1</sup> Council Regulation (EC) No. 3286/94 of 22 December 1994, laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, Official Journal of the European Communities (OJEC) of 31 December 1994, L 349, p. 71.

<sup>2</sup> References to the European Commission decisions in these cases are as follows: *USA – Rules of Origin for Textile and Apparel* (OJEC 1997 L 62, p. 43, investigation opened by OJEC 1996 C 351, p. 6); *USA – Antidumping Act of 1916* (OJEC 1998 L 126, p. 36, investigation opened by OJEC

This note will first review those five cases, and then will draw some conclusions about the early TBR practice.

### 1. USA – RULES OF ORIGIN FOR TEXTILE AND APPAREL

The first complaint brought under the TBR, the *USA – Rules of Origin for Textile and Apparel* case, was also the first to be referred to the WTO for consultations, in May 1997. However, the day before formal consultations were due to begin, the EU reached a solution through informal consultations with the US. Therefore, the WTO dispute settlement procedure was suspended, and on 11 February 1998, the two parties notified their mutually agreed solution to the WTO, pursuant to Article 3.1 of the Dispute Settlement Understanding.

However, the mutually agreed solution was not to last: on 19 November 1998, the EU again asked for formal WTO consultations in this matter, claiming that the US had not implemented its commitments as contained in that agreement with the result that, in the EU view, the US is still acting in a manner inconsistent with its obligations under the WTO.

This dispute arose as a TBR complaint lodged in October 1996 by the Italian textile association Federtessile. Federtessile alleged that, contrary to its WTO obligations, the US had changed its rules of origin such that 'grey' fabric made outside the EU but dyed, printed and finished in the EU would no longer be considered to have Community origin, but rather would have the origin of the grey fabric. Furthermore, Federtessile complained that such textiles would no longer be allowed to be marked 'Made in Europe' in the US. Federtessile was, among other things, concerned that the exports of its members to the US would be hit by quotas applying to third countries, and that loss of the 'Made in Europe' marking would make its members' products less commercially attractive.

The Commission found that the complaint contained sufficient evidence to warrant the opening of an examination procedure under Article 8 TBR, and it initiated said procedure on 22 November 1996. Through its investigation of the case, the Commission ultimately found that the complaint was correct in its allegations that the changes to the US rules of origin amounted to violations of the WTO Agreement on Textiles and Clothing, the Agreement on Rules of Origin, Article III GATT 1994, and the Agreement on Technical Barriers to Trade. The Commission further determined that these violations are likely to have adverse trade effects within the meaning of Article 2.4 TBR and that it would be in the Community interest to take action. Therefore, it formally decided on 18 February 1997 to refer this case to the WTO.

---

1997 C 58, p. 14); *Japan – Imports of Leather* (OJEC 1998 L 159, p. 65, investigation opened by OJEC 1997, C 110, p. 2); *Argentina – Leather Exports and Imports* (OJEC 1998 L 295, p. 46, investigation opened by OJEC 1997 C 59, p. 6); *USA – Copyright Act* (OJEC 1998 L 346, p. 60, investigation opened by OJEC 1997 C 177, p. 5).