WTO DISPUTE SETTLEMENT SYSTEM: The MOVE FROM PRAGMATISM TO LEGALISM

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L Introduction

Before the end of the Second World War, the allied leaders foresaw the need to rebuild not only the physical destruction brought about by the war, but also the financial destruction it caused. Realizing tliat the world economy would play a more significant role in national economies, the allies saw the need to establish international agreements to facilitate and support international economic development. The United States and Great Britain led this effort.

At the Bretton Woods Conference in New Hampshire the allies envisioned three organizations that would help facilitate a world economy: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (the World Bank) and the International Trade Organization (ITO).[1] While the IMF was created in 1945, the World Bank was established in 1944, the International Trade Organization failed, largely due to President Harry Truman's refusal to send the proposed agreement to the U.S. Senate for advise and consent.[2] Because many in Congress believed the original agreement had been compromised too severely and that the US should not support yet another international organization right after the adoption of the United Nations Charter[3] Senate opposition to the ITO grew. Congress' reaction to the ITO would become a marker for public international agreements. To achieve an agreement that is acceptable to all the diverse parties involved, compromise becomes necessary. In this instance, the Senate did not object to the concept of the ITO, but felt that the compomises before it weakened the ITO and undermined the integrity of the goals of U.S. negotiators at Bretton Woods.[4]

Despite the failure of the ITO twenty-three countries came together in Geneva in 1947 to negotiate an agreement to reduce tariffs and trade barriers.[5] They formalized their agreements in what became known as The General Agreement on Tariffs and Trade (the GATT). Although the U.S. Senate never ratified the 1947 GATT Agreement, the U.S. has abided by the obligations imposed by the GATT.[6] The GATT headquartered in Geneva, Switzerland governed international trade

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[1] MICHAEL J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 20(2ded. 1999).

[2] *Id.* at 21.

[3] *Id.*

[4] Alan C. Swan and John F. Murphy, Cases and Materials on the Regulation of International Business and economic Relations 219(1991).

[5] *See* WORLD TRADE ORGANIZATION, THE MULTILATERAL TRADING SYSTEM: 50 YEARS OF Achievement 9 (1998).

[6] Richard Schaffer, Beverley Earle and Filiberto Agusti, International Business Law and its Environment 327 (4th ed. 1999).

amongst the world's trading partners until 1994. In 1994, one hundred and twenty- five countries signed a new GATT agreement.[7] This is known as the Uruguay Round, with negotiations beginning in 1986 in Uruguay. This time the U.S. adopted GATT'94 under the fast track negotiating process. As such, it is deemed an executive agreement between the President and the Congress.[8] At the same time an agreement was signed which created the World Trade Organization (WTO). The WTO serves the purpose of providing administrative support for the GATT members. It replaces The GATT which provided administrative support for the trading partners under the GATT of 1947.

IL THE NEED FOR GATT

In constructing trade policies, every nation can be assumed to act in its own best interest. Based upon sovereign authority, nations regulate their trade with other nations through a variety of devices used to control the import and export of goods.[9] These devices, however, can lead to trade wars, which in turn, can lead to isolationism and reduced opportunities to sell goods in international markets. It was largely believed that isolationism after the First World War contributed in large part to the Great Depression.[10] Determined not to repeat the mistakes of the past, the leaders of the allied forces understood the importance of constructing an international trade agreement with a view towards liberalized trade." The free movement of goods became the driving force behind the GATT Agreement.

Trade barriers are defined as "any impediment to trade in goods or services."[12] Although trade barriers take many different forms, they all seek to accomplish one primary goal; which is to limit wliat comes into or leaves a nation's stream of commerce. Restrictions on imports often lead to retaliation by the country whose goods have been denied access to another country's markets. Nations use trade barriers to accomplish many other objectives as well:

1. Collection of revenue (taxing imports)
2. Regulation of import competition (the protection of domestic industry, agriculture, or jobs)
3. Retaliation against foreign government trade barriers
4. Implementation of foreign policy (refusing to allow the import of goods from a country that violates international norms or is a military adversary)
5. Implementation of national economic policies (preservation of foreign exchange; implementation of industrial policy)

[7] *Id.*

[8] *Id.*

[9] *Id.* at 315.

[10] Trebilcock and Howse, *supra* note 1, at 20.

11 Id.

[12] Richard Schaffer et al., *supra* note 6, at 315.

6. Protection of the national defense (barriers to foreign firms selling defense- related equipment or essential products such as machine tools; protection of strategic national industries such as aerospace or telecommunications)
7. Protection of natural resources or of the environment (band on export of scarce minerals; a requirement that imported cars be equipped with antipollution devices; or ban on import of tuna caught in fishing nets tliat trap dolphins)
8. Protection of public health, safety and morals, and plant and animal life (band on the import of disease-carrying fruit, explosives, or obscene materials; use of safety requirements for construction equipment or consumer goods)
9. Protection of local cultural, religious, or ethnic values (limitations on foreign television programming; import of religiously offensive materials in fundamentals Middle Eastern countries; ban on export of artifacts or antiques)[13]

Whatever the purpose for enacting trade barriers they take one of two major forms: tariff or nontariff barriers.[14]

A tariff is "a duty levied in excess of an importing country's revenue needs and the administrative costs of trade."[15] It is a tax on goods entering a country. In contrast, nontariff barriers include "any impediment to trade other than a tariff. barrier."[16] Nontariff barriers, which are the more insidious and difficult of the two to reduce and eradicate, take many different forms. "Common [nontariff barriers] *sic* include conditonal import authorizations, domestic or local content rules, "buy- national" procurement policies, import licensing, internal network distributions systems, nonauthomatic licenses, opaque product standards, performance requirements, undue certification requirements, unpublished regulations, and voluntary export restraints."[17] While nontariff barriers usually take the form of quotas or embargoes, indirect nontariff barriers fall into a category of trade restrictions that are less identifiable.[18] Because they may not be intended to act as a barrier to trade, yet have the effect of nonetheless restricting trade. For example, a product safety standard intended to protect the consumer from dangerous products will restrict the import of a particular country's products if they do not meet the standard. Even if the standard is unrealistic or unproven to actually improve product safety, however, as a non-tariff barrier, the standard effectively blocks a country s products from entering the stream of commerce and competing in the market.

[13] *Id.* at 329.

[14] *Id.* at 321.

[15] CAROLYN GIPSON, DICTIONARY OF INTERNATIONAL TRADE AND FINANCE 364 (1994).

[16] *Id.* at 270.

[17] *Id.*

[18] Richard Schaffer et al., *supra* note 6, at 322.

Despite the availability of trade restrictions and barriers, nations with developed economies understand the dangers involved in restricting free trade.

> Most nations have come to realize that trade barriers are damaging to the international economy- and ultimately to their own. Moreover, they have realized that if they restrict the products of their trading partners in order to protect one segment or sector of their economy, then another sector will suffer. For instance, restrictions on the import of steel benefit domestic steel producers, but injure the automakers that use the finished product (as well as increase automobile prices to consumers). Similarly, import restrictions that protect one sector sometimes result in foreign retaliation against another sector.[19]

Thus GATT's trading structure can be viewed as an attempt at cooperation in matters of trade amongst nations by allowing for trading partners to open their markets to produce freer and fairer trade.[20] In order to accomplish this goal, trade barriers like tariffs, quotas and embargoes must be reduced and ultimately eliminated. This is the goal of the GATT.[21]

IIL How GATT WORKS The GATT Agreement is based on four

major principles. They are as follows:

1. Multilateral trade negotiations: nations will meet periodically to reduce tariffs and nontariff barriers to trade.
2. Nondiscrimination and unconditional most-favored-nation trade: members will not give any import advantage or favor to products coming from one member over the goods of another member.
3. National treatment: members will not discriminate in favor of domestically produced goods and against imported goods, nor treat the two differently under their internal tax laws, regulations and other national laws.
4. Elimination of quotas and other nontariff barriers: nations first "convert" their nontariff barriers to tariffs (through a process called tariffication), and then engage in negotiations to reduce the tariff rates.[22]

The driving principle behind GATT is that of non-discrimination.[23] Signatories to the agreement are expected to enact domestic trade regulations that do not

[19] Mat 333.

[20] *See* WORLD TRADE ORGANIZATION, TRADING INTO THE FUTURE 4 (2nd ed. 1999).

[21] *Id* at 5.

[22] RICHARD SCHAFFER ET AL., *supra* note 6, at 343.

[23] *See* WORLD TRADE ORGANIZATION, *supra* note 20, at 5.

discriminate against their trading partners. Article I of the GATT Agreement states that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destine for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[24]

Members of the World Trade Organization (WTO), previously referred to as contracting parties, agree to meet periodically at meetings called rounds. At the rounds, the members negotiate trade concessions from each other.[25] These take the form of reduced tariffs and elimination of non-tariff barriers. The reduced tariffs and other trade concession that are negotiated between members are extended to like products of all other members. As Article I states, advantages and favors granted by one member to another member on a particular product shall be extended to all other members of the WTO for the same product.[26] This concept is what is commonly referred to as most-favored nation status (MFN).

> The guiding concept of trade liberalization under GATT is that of nondiscrimination. This concept, which runs throughout the GATT agreement, requires that the products of all nations be treated equally and without discrimination by importing nations.
> Simply put, nations should not "play favorites" with each other's products. Nondiscrimination is the principle behind unconditional most-favored-nation (MFN) trade. MFN principles require that any trade advantage or privilege granted by one GATT member to the goods of another member should be granted to all.

Although the GATT has other goals, its main goals are the reduction of tariffs, the elimination of non-tariff barriers, and nondiscrimination amongst trading partners." This all comes about from the result of negotiations amongst members of the WTO.

[24] 55 U.N.T.S. 194(1947), Article I.

25*See* WORLD TRADE ORGANIZATION, *supra* note 20, at 9.

26 Id. at 5.

[27] RICHARD SCHAFFER ET AL., *supra* note 6, at 346.

[28] *See* WORLD TRADE ORGANIZATION, *supra* note 20, at 6.

IV. RESOLUTION UNDER THE GATT

Because the GATT is essentially a series of contracts, inevitably there will be disputes amongst the parties. The process of dispute settlement under GATT 1947 and under GATT 1994 are very different. Under GATT 1947, decisions were not binding and rarely capable of being enforced.[29] The process was not considered a legalistic approach to dispute settlement, but rather one of pragmatism. Significantly, under GATT 1994, members can no longer unilaterally veto decisions from panels that have settled disputes.[30] Before examining the dispute settlement process under GATT 1994, however, it is necessary to examine the history of dispute settlement under GATT 1947 and The GATT organization of 1947.

When The GATT was first created there were neither formalized systems or structures of dispute settlement in place nor an organizational structure to support it. As disputes presented themselves, The GATT reacted by establishing a process, on a case-by-case basis, that continued until 1958.[31] "By the end of the period its collection of ad hoc arrangements had grown together into a loose, informal, but clearly functioning international organization."[32] Any effort to construct a more formalized system was rejected by the contracting parties, who resisted giving up any of their sovereignty or independence to an outside body charged with resolving trade disputes. This attitude contributed in large part to the ultimate flaw of the dispute settlement process of GATT 1947.[33] The absence of a formal dispute settlement process suited the needs of many of the contracting parties. "For some governments, the absence of any more formal structure has given GATT exactly the kind of institutional "flexibility" they had tried to build into the original GATT/ITO model."[34] This pragmatic approach dominated the early history of dispute settlement under GATT 1947.

Disputes were addressed at ad hoc meetings of representatives of the contracting parties called sessions. The first session was held in Havana in March of 1948; the second one in Geneva of the same year and the third one in Annecy France in 1949.[35] The fourth session, which started in Geneva in 1950, was moved to Torquay, England and continued until 1951. At this time the United States began to push for a more formal structure and at the sixth session in 1951 in Geneva, the issue of a more formalized structure was discussed. Despite these attempts by the U.S. to

[29] Richard Schaffer et al., *supra* note 6, at 331.

[30] *Id.*

[31] ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 67 (2nd ed. 1990).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

move the GATT to a more legalistic process, the ad hoc process continued through the seventh and eight sessions.[36]

The first dispute to the agreement is seen in 1948.[37] Cuba had enacted a tax on consular documents. The Benelux Governments notified the contracting parties that it was holding discussions with the Cuban Government over its objection to the tax. Unable to resolve its dispute with Cuba, the Netherlands requested that the matter be placed on the agenda of the second session. In keeping with the informal structure of the time, the Netherlands requested a ruling from the chairman,[38] who issued a decision stating that Article I of the GATT agreement applied to Cuba's consular tax. Following the ruling, Cuba repealed the tax.[39] According to Hudec, "The Netherlands-Cuba dispute was not a serious controversy. The issue was relatively clear-indeed, so clear that one suspects that the entire GATT proceeding was merely a rehearsed bit of stagecraft designed to formalize the legal obligations. Nonetheless, the dispute did represent a recognition of GATT's authority to administer and apply the substantive rules of the General Agreement."[40] While this first dispute between two of the contracting parties clearly demonstrated the absence of a formalized GATT structure in 1948, it did establish The GATT's authority to decide disputes between its signatories.

By the third session in Annecy, France, the first semblance of what later develops into the 1947 GATT dispute settlement process is evident.[41] At this session, disputes were referred to working parties.[42] Working parties, which date back to the ITO discussions, were made up of the parties to the dispute and sometimes neutral members.[43] "Appointed to do work that cannot be efficiently done in "the more formal round-robin of a plenaiy meeting. They offer the advantages of limited numbers, enough time to look at tilings in depth, and informal face-to-face bargaining where delegates can explore possibilities without formal commitment to a position."[44] The purpose behind using working parties was to encourage the parties to resolve their disputes, with working parties acting as negotiators in the settlement process. If the parties could not be brought to a negotiated agreement, there was no resolution. This process satisfied important political goals by not forcing any party to accept a decision; instead, it allowed the parties to come to a mutual resolution without an outside third party imposing a resolution on them. The use of working parties in 1949 is yet another example of the pragmatic approach taken in the early years of the dispute settlement system. The

use of working parties in 1949 laid the groundwork for how disputes would be settled until 1994.

The seventh session saw the development of what became known as a "panel." When a large number of complaints was brought to the seventh session, the chairman of the contracting parties suggested that a panel, instead of a working party, be established to hear all the complaints on the agenda.[45] "In GATT parlance, the word "panel" comes from the phrase "panel of experts." The term refers to a group of individuals, chosen because of their technical expertise, to make findings or conclusions about some technical matter."[46] The chairman of the panel was a named individual, while the remaining panel membership was by country. Thus a particular country was named to the panel and that country would name its own representative to the panel. The new panel was instructed

> To consider, in consultation with the representatives of the countries directly concerned and of other interested countries, complaints referred to the CONTRACTING PARTIES under Article XXIII and such other complaints as the CONTRACTING PARTIES may expressly refer to the Panel and to submit findings and recommendations to the CONTRACTING PARTIES.[47]

None of the contracting parties seemed to notice any difference between the new panel and the former working parties.[48]

Beyond moving to a panel to hear all disputes, the internal procedures used by the panel also changed from that of the former working parties.[49] The panel allowed the parties to the dispute to present their cases directly and would hear from anyone else who had an interest in the dispute.[50] After both cases had been presented, the panel would then hear the parties once again if they wished to address any of the points raised by others during the initial presentations. The panel would then deliberate in private, prepare a preliminary report to the parties for their comments, and then the final report to be presented to the contracting parties.[51]

The GATT Secretariat implemented this new procedure with relative ease.[52] Given how new the GATT was at the time, this was a major political accomplishment. Something as sensitive as dispute settlement, surely could have received closer scrutiny.

[45] *See id.*
[46] *Id.* at 86.
[47] *Id.*
[48] *See id.*
[49] *See id.*
[50] *See id.*
[51] *See id.* at 87.
[52] *See id.*

> The manner of establishing this new procedure was as remarkable as the procedure itself. The only formal discussion before the Contracting Parties had been the brief and uninformative proposal by Mr. Melander. The critical decisions had all been made in the guise of routine procedural decisions by the Panel. It is virtually certain, of course, that certain governments had been consulted in advance. Indeed, by the time one counts the Panel members, the litigants, and the major delegations whose support was essential it can be assumed that a fairly large part of the membership must have known what was being done. One can only conclude that the bold new experiment was deliberately launched in this quiet way in order to reduce its visibility.[53]

From the very early days of the dispute settlement process it was evident that political factors would have to be taken into consideration. There was always a danger, however, that political compromises could lead to compromises in the dispute settlement process itself.[54]

In summary, the move from working parties to a panel structure and new procedure brought about five major changes: "First was the expanded role of the Secretariat in the dispute settlement process. GATT members noticed the manner in which the Secretariat handled the process of bringing about the changes in the dispute settlement process. The skill in putting the new structure and procedure into place was acknowledged. Second, now that the parties to the dispute were no longer present during deliberations, the panel members were more at ease and better able to discuss the cases before them. Third, the panel proceedings tended to take on more of a legal process. Writings were produced that were orderly and reasoned. Fourth even the seating of all the parties in the room had taken on a more formal atmosphere. The panel members sat at the head of the room with the parties to the dispute in front of them. Other members who were interested in the proceedings sat in the back of the room. Fifth and lastly, the fact that the parties were asked to comment on the draft report before a final report was submitted to the Contracting Parties, gave the participants in the process the opportunity to resolve the dispute on their own."[55] "These consultations had an element of negotiation to them, for the object was to learn the reaction of each party, to identify changes which would make the report easier to accept, and ultimately to obtain the acceptance of both parties." [6] The early participants to the panel structure were always very careful to address the political concerns of the parties throughout the entire process. This is strikingly evident in the later stages of the dispute settlement process when a final attempt at

[53] *id.*

[54] *See id.*

[55] *Id.* at 88.

[56] *Id.*

bringing the parties to agreement on their own is made, as opposed to a decision made by a third party.[57]

The tenth session produced the most significant statement to date concerning the use of panels as opposed to working parties to resolve disputes.[58] The Denmark delegation proposed that the procedure of using panels of experts be extended to other GATT areas of interpretation.[59] Although this proposal was not adopted, it did provide an opportunity for the contracting parties to discuss the topic of panels to resolve disputes. More importantly, however, it gave the Secretariat the opportunity to make a definitive statement on the use of panels.

> The Secretariat produced a four-page document setting out the purpose and practice of panels in considerable detail. The document stressed the difference between the tendency of working parties to serve as a vehicle for political compromises, and the "objectivity" achieved through the panel procedure. In panels, the document noted carefully, "the special interest of individual governments are subordinated to the basic objective of applying the Agreement impartially and for the benefit of the Contracting Parties in general.

Besides formalizing the new panel process, the Secretariat's statement demonstrates continuing sensitivity to political concerns and the compromising effect political issues can have on the outcome of the dispute settlement process.[6] Yet it is clear, that he felt the new process removed the dispute settlement process further away from the potentially damaging effects of the individual political interests of the Contracting Parties.[62] Thus, while the tenth session produced no major dispute decisions, it did firmly establish the use of panels instead of working parties, and along with the use of panels the creation of new and more legalistic procedures as well.

V. GATT DISPUTE RESOLUTION BY DECADE: THE 1950'S

The new procedure was now in place and working. Between 1948 and 1959, fifty- three complaints were filed. Out of the fifty-tliree, twenty-one resulted in actual decisions by panels. Twenty-two others resulted in settlement; ten were either abandoned or withdrawn resulting in no decision.[63] In percentages this translates as follows:

[57] *See id.*

[58] *See id.*

[59] *See id.* at 91.

[60] *Id.*

[61] *See id.*

[62] *See id.*

[63] ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 287 (1983).

Number of Complaints Filed	% Resulting in Decision	%Settled	%Other
53	40	42	19

These numbers become very important, as they allow a comparison between the dispute settlement process under the original GATT agreement of 1947 and the new process established as a result of the Uruguary Round put in place in 1995. In the early days of dispute settlement, these numbers clearly show most cases (sixty-one percent-total of settled and "other'' category) were settled or disposed of in some other manner.[64] This is consistent with the overall intent of the GATT Agreement to promote conciliation and negotiation. Bringing parties together to resolve their trade disputes through settlement and not by means of adversary behavior could achieve GATT's underlying goals. Using this pragmatic approach, as opposed to the legalistic approach of dispute settlement that merged later, also met political concerns of the time. Disputes needed to be carefully handled as to not threaten the stability and goals of this young international agreement. Thus these numbers reflect the overall mood of the time, which as to bring parties tliat were in dispute to settlement as opposed to having third parties force a result on them. Yet, one can see that in the early development of the GATT dispute settlement process the process was gradually moving away from a pragmatic approach toward a more legalistic approach.

The new working parties consisted of neutral representatives from member countries.[65] Although they were experienced in trade matters, they did not have any formal training in the law or legal procedures. These factors also contributed to the relaxed less contentious manner of dispute settlement, which was very appealing to many of the members of the GATT.

The Second World War devastated most of the world's developed countries. The U.S. however experienced a tremendous era of growth following WWII. Arbitration, as opposed to outright litigation, appeared to be less contentious. For non-superpowers this form of dispute settlement was more acceptable. It also worked for the U.S., which did not want to appear threatening to the new developing economies of the world following WWII.[66]

The new process and procedure that evolved during this time period was important for the future development of the dispute settlement process. These greatly impacted the legal aspects of dispute settlement and remained the dominant manner in which disputes were settled until 1995.

[64] *See id.* at 588. (explaining the "other" category). These include the following possibilities: a panel was requested, but not established; it could have been established, but withdrawn or abandoned without a public decision; an impasse resulted or an unreported settlement occurred.

[65] *See id.* at 30.

[66] *See id.*

A. The 1960's

The next period of GATT dispute settlement occurred in the 1960's. Although the 1960's produced few cases for resolution, and in fact none after 1962, there were important developments in the 1960's that affected dispute settlement in the future. The decade started out with Uruguay filing a complaint against fifteen countries in 1961 and then doing nothing to move the case along the dispute settlement process.[67] The panel chose not to prosecute the case for them and as a result, nothing of significance happened to the case. However, Uruguay's actions did leave a mark upon the dispute settlement process. First, it set the stage for developing countries making demands upon developed countries for better compliance with the GATT.[68] Second, it brought to the attention of the members the need for better compliance, particularly in the area of agriculture.[69] Third it alerted members that damage was being caused to developing countries by the European Community's Common Agricultural Policy.[70] Thus, the Uruguay complaint set the frame work for future disputes, and in a very strong sense put the important issue of agricultural trade on the agenda for the future.

The next important development of the 1960's was four cases brought by the United States, which were politically motivated by the Kennedy Administration to win over Congressional support for legislation that would come out of the Kennedy Round.[71] Because Congress perceived the GATT dispute settlement and enforcement process as weak, it was unwilling to entertain new trade legislation that would come out of a new trade round. [2] The Kennedy Administration brought these four cases before GATT panels in an attempt to show Congress the U.S. could win complaints.[73] There is noting particularly significant about the cases or their outcomes. "The significant element in all four United States complaints was the emergence of a political need to take strong legal action in GATT. In future years, this political imperative would return to become the driving force behind reform of GATT's dispute settlement system."[74]

For the remainder of the decade there was no dispute settlement activity. Developing countries continued to push the developed countries for better compliance with the GATT Agreement[5] and a growing number of members began to feel the effects of the emerging European Community. When concerns began to surface concerning its growth as an economic power, the U.S. typically sided with the EC.

[67] *See id.* at 31.
[68] *See id.* at 32.
[69] *See id.*
[70] *See id.*
[71] *See id.*
[72] *See id.*
[73] *See id.* at
[74] *Id.*
[75] *See id.*

During the 1960's there was also an attempt to move away from the legalized approach, which had slowly began to develop, and to remain with conciliation. According to Hudec, "Both superpowers became exponents of "antilegalism," a view that rejected legal claims as a nonconstructive way to solve trade problems. By the end of the decade, any sort of "confrontational" behavior was being treated as very bad form."[76] The effect of this was to, have fewer cases brought to the GATT dispute settlement system and less developed countries were satisfied with this result since strict compliance with GATT did not serve their goals either.[77] They were interested in the growing system of general systems of preferences for developing economies, which were permitted as an exception to the principles of GATT. It was viewed by the two major players in the process (the U.S. and the EC) that approaching the dispute settlement process purely from a legalistic approach could have had devastating effects. Therefore, although there were small moves to a legalistic approach, there was a period of time where this was not looked upon favorably.

Between 1960 through 1969 there were only seven complaints filed with the GATT.[78] Five resulted in decisions and two were settled. In percentages this translates as follows:

Number of Complaints Filed	% Resulting in Decision	%Settled	% Other
7	71	29	0

Compared to the period covering 1948 -1959, the percentage of complaints that resulted in decisions increased, with a corresponding decrease in the percentage of cases that were settled. Given the small number of complaints, it is difficult to draw any firm conclusions from these figures. When viewed over a larger period of time the 1960's run counter to the pattern in all other decades, where a combination of the "settled" and the "other" categories exceeds the percentage of cases resulting in decisions.

B. The 1970's

The 1970's in the U.S. started off much like the 1960's. Congress perceived a lack of effectiveness in the GATT enforcement process and was hesitant to embrace new trade legislation. In an effort to demonstrate that the GATT could enforce trade violations, the U.S. administration again brought several cases to the

[76] *Id.* at 34.

[77] *See id.*

[78] *Id.* at 287.

GATT for dispute settlement.[79] Most were settled. What is important about the dispute settlement process in the 1970's is the case known as DISC, which had tremendous influence on the dispute settlement process.

DISC stands for Domestic International Sales Corporation. In 1971 Congress passed a law in response to the U.S. trade imbalance [0] that resulted from greater imports than exports. To correct the imbalance, Congress passed legislation, designed to give U.S. exporters greater incentives. Essentially a tax law, the statute permitted U.S. exporters to set up a domestic corporation called a DISC. The purpose of this corporation was to allow an exporter to sell its goods to the DISC and then re-sell them from the DISC to foreign markets.[81] If the transaction complied with the legislation, the exporter would only be taxed on a portion of the profits derived from the sale.

The DISC statute was intended to combat foreign tax havens that encouraged exporters to set up subsidiaries in a countries that taxed income at zero or a very low rate.[82] Exporters would set up foreign subsidiaries in these countries, sell their goods to the foreign corporation and then re-sell the same goods in another foreign market. The profitc derived from the sale from the tax haven country would then escape taxation. This did not work for U.S. exporters, however, because in 1962 Congress had amended the tax code to include the profits from a foreign subsidiary to be included in the U.S. parent corporation.[83] The DISC was designed, in part, to once again allow U.S. exporters to take advantage of foreign tax havens without leaving the U.S.

This taxing scheme was analogous to what is known as the territoriality principle. "In simplest terms, "territoriality" means that the government does not tax income earned outside the country's territory, nor does it impose more than a token tax on the proceeds of such foreign earnings when they are remitted to the home country."[84] In effect the U.S. Congress imitated this principle when it enacted the DISC legislation.

The European Community filed a complaint claiming that the DISC legislation violated Article XVI:4 of the GATT.[85] The U.S. responded by claiming that if the DISC legislation violated Article XVI:4, so did the territoriality principle adhered to in France, Belgium and the Netherlands. A panel was appointed in 1976 to hear the cases. In 1976, the panel submitted its reports to the Council. The panel concluded that both the DISC legislation and the territoriality principle violated the GATT's prohibitions on export subsidies.[86] The U.S. agreed not to veto the

[79] *See id.* at 60.

[80] Alan C. Swan and John F. Murphy, *supra* note 4, at 425.

[81] *See id.*

[82] *See id.*

[83] *See id.*

[84] Robert E. HUDEC, *supra* note 63, at 61.

[85] Alan C. Swan and John F. Murphy, *supra* note 4, at 425.

[86] *See id.*

Council's acceptance of the report if France, Belgium and die Netherlands would do the same.[87] However, the European countries would not agree to accept the report.

It was not until 1981 that an agreement was reached between the parties. All parties to the dispute agreed to accept the panel's report with the proviso that territorial tax laws were not in violation of Article XVI:4 of the GATT.[88] In effect this ended the United States' claims against the European countries. In 1984 the U.S. repealed the DISC legislation and in its place enacted legislation that allows a foreign sales corporation.[89] Instead of the export leaving a U.S. port in order to receive the favorable tax treatment, under a foreign sales corporation, the export leaves a port in a foreign country that does not tax (or taxes at a reduced rate) the income derived from that sale. This is identical in concept and practice to the territorial principle of taxation.

The outcome of the DISC case has been extensively analyzed. Its impact on future dispute settlements within the GATT framework is not to be understated. In the end, the impact upon the dispute settlement process was greater than the actual impact of the legal disputes contained in the case. In 1984 when the U.S. changed the DISC law and replaced it with the foreign sales corporation legislation, the effect on U.S. tax revenues was minimal. "[T]he value of the subsidy remained nearly the same. The change from DISC to FSC was revenue neutral; FSC would grant the same dollar amount of tax subsidy as DISC would liave done."[90]

Of greater significance is the contribution the DISC case made to the GATT dispute settlement process as it moved from pragmatism to greater legalism. Professor Hudec points out that first, the five years it took to settle the dispute demonstrated the GATT's willingness and determination in resolving disputes.[91] Second, he points out that even though GATT was considered less sophisticated than in prior years, it was still capable of handling rather complex legal questions.[9"] Lastly, he points out that a stronger dispute settlement procedure would need a stronger source of legal expertise.[93] Ultimately, this led to the establishment of a legal staff in the GATT Secretariat [9,1]

Other commentators have disagreed. The DISC case was seen as a failure not only in substance, but also with respect to the dispute settlement process. Professors Swan and Murphy point out that "(i]n the end, employing the traditional impressionistic style of decision making, working from a traditional "technocratic mind-set rather than the broader jurisprudential outlook required to fashion a more adequate legal tlieoiy, the GATT system of adjudication failed in the DISC case.

[87] *See id.* at 426.
[88] *See id.*
[89] *See id.*
[90] Robert E. HUDEC, *supra* note 63, at
[91] *See id.* at 100.
[92] *See id.*
[93] *See id.*
[94] *See id.*

Again, the fear of being too legalistic rendered the system too unsophisticated for the task at hand."[95] These are two different points of view. Hudec uses the same wording as Swan and Murphy, but arrives at a different conclusion.[96] Hudec states that the GATT, although not sophisticated as in years past, was still capable of handling the legal complexities of the case.[97] On the other hand, Swan and Murphy flatly dismisses the system as too unsophisticated to handle the legal task before it, but more importantly conclude that the failure was due in part to a fear of being too legalistic.[98] All concerned recognizing the role of the DISC case moving the process towards legalism.

The impact of the DISC case upon the dispute settlement process must be recognized. The length of time it took to resolve the case, as well as its complexity, tested the overall strength of the GATT to deal with major trade disputes. In the end, the GATT dispute settlement process developed, learned and prepared for the future. It pointed out for the future where the weaknesses in the process were and where change would be needed. This more legalistic process of having a third party (the panel) resolve a trade dispute between trading partners proved to be an effective method for deciding complaints. The panel concluded its hearings and submitted its findings in the same year it was appointed, which lends credibility to the efficiency and functionality of the panel system. The flaw in the dispute settlement process at this time, was the party's ability to block acceptance of a panel decision. It is because of the ability to block the decision that the DISC case lasted so long. It is also the most obvious. If a dispute settlement process lacks the ability to bring finality to the process, the dispute will not be resolved absent agreement of the parties. The history of dispute settlement to this point demonstrates exactly that phenomenon. With disputes being resolved through conciliation, the most significant lesson learned from the DISC case was that the major flaw was the fact that decisions could be vetoed. This flaw generated stronger support for a more legalistic approach, because under a legalistic approach there is a final third party decision maker that all parties to the dispute must abide by.

Trade disputes under the GATT system through the DISC case did not follow a strictly legal approach; in fact, quite the opposite was true. Although there were small movements toward the legalistic approach, it was generally avoided throughout the 1950's and 1960's. Since GATT was a diplomatic creation, the working parties and panels tliat followed them relied upon less legalistic procedures and more on diplomatic procedures. The focus, thus, was not upon the process used to reach the result, but rather upon the result. The DISC case, however, pointed out that as the disputes grew more complex, past practices might have to be abandoned in favor of a more legalistic approach. After DISC, dispute settlement appeared to be headed in this direction.

[95] SWAN AND Murphy, *supra* note 4, at

[96] Robert E. HUDEC, *supra* note 64, at

[97] *See id.*

[98] Swan AND MURPHY, *supra* note 4, at

There were only two more cases of significance in the 1970's. The first one is the Minimum Import Price case." This is commonly referred to as MIPS. The MIPS complaint stemmed from a European Community requirement of minimum import prices on certain foods. The U.S. charged a violation of Article XI:I of the GATT Agreement.[100] Although the panel issued a decision largely favorable to the U.S. it was not based on sound legal reasoning.

What is important, however, is the impact MIPS had on the dispute settlement process. First, it took a long time for the actual process to begin.[101] The panel was formed only after great debate. There was a procedural defect on the United States' application for a panel to be formed. While the parties argued over whether or not a panel should be appointed, the actual dispute was not being heard in a timely manner. Second, the U.S. used the same legalistic tactics it had used in the DISC case.[102] The dispute settlement process was in no better shape to handle this in the MIPS case than it was in the DISC case. It did force the panel to answer the United States' complaint. Once again, it showed the inability of the dispute settlement process to deal with complex legal questions. "The MIPS panel decision sent another signal that the nature of dispute settlement proceedings was changing and that the existing procedures' capacity for legal analysis was inadequate to the task. The signals were getting stronger."[103]

The other case of significance in the 1970's was the Animal Feed Proteins Case.[104] Once again, the U.S. was the complainant and the EC was the defendant. The dispute centered on an EC regulation that required sellers of animal feed to also purchase EC milk powder. The U.S. prevailed. In terms of substance this was not a major victory for the U.S. either; however, in terms of the impact on the dispute settlement process, the animal proteins case demonstrated the problems associated with the current system.[105] The complaint showed, just as it did in the MIPS case, that the panel was slow in being established. This panel, however, was able to deal with the legal arguments put forth by the U.S.

> This time, the panel took only 19 pages to catalogue the long list of arguments and counter arguments, and to rule on them. And this time, surprisingly enough the panel made no legal mistakes. The opinion sorted out the various U.S. arguments, identified their overlaps and their inconsistencies, and cut a clean line to the correct conclusion. The animal Feed Proteins case demonstrated that the existing panel procedure could sometimes do a highly

99 *See* Robert E. Hudec, *supra* note 64, at 47.

[100] *See id.* at 49.

[101] *See id.* at 50.

[102] *See id.* at 49.

[103] *Id.* at 50.

[104] *See id.* at 50.

[105] *See id.* at 51.

> professional job. The problem with the existing procedure, stated more precisely, was that it could not be counted on to do so consistently.[106]

The Animal Proteins Case showed that the dispute settlement process could work. The entire process was not without merit. There were problems as demonstrated in this case and previous ones, but the process was clearly capable of rendering decisions in an orderly legalistic manner, even if not consistently.

During the remainder of the 1970's there were fourteen more complaints filed.[107] The activity of cases forced the GATT to use its dispute settlement process. Complaints and the panel process once again became a normal part of GATT. This is in sharp contrast to the 1960's. The U.S. was a major contributor to this flurry of activity. At the same time the Tokyo Rounds were taking place. The contracting members took notice of the dispute settlement process results. The parties expressed their concerns with the system and the need to make it stronger.[108]

There were no major substantive changes made to the dispute settlement process as a result of the Tokyo Rounds. There were, however, two agreements relating to the dispute settlement process. Both agreements expressed the opinions of the contracting parties, but did not make any significant changes to the process. The first agreement was the Agreed Description of Customary Practice.[109] The second one was the Understanding on Dispute Settlement.[110]

The Agreed Description of Customary Practice reaffirmed the GATT's commitment to third party resolution of disputes.[111] In order to have a dispute settlement process fashioned in a legalistic manner, there needs to be third party involvement. At the same time, this has always been a point of contention in the history of the GATT. There has long been a diplomatic fear of third parties resolving disputes between sovereigns. Even though this agreement did not make substantive changes to the dispute settlement process, it did soundly reaffirm a commitment to it and pointed in the direction of a legalistic approach to dispute settlement.

The Understanding on Dispute Settlement made several declarations and some limited changes to the process, which were intended to improve the effectiveness of the dispute settlement process. The Understanding stated that complaints should not be viewed as contentious and it provided for procedures for creating panels and set time limits on the process.[112] This was a step in the right direction and addressed the immediate problems of panel creation and the length of

106 Id. at 51.
[107] *See*
[108] *See*
[109] *See*
[110] *See id.* "'*See id.* at 56.
111 See id. At 56.
112 See id.

time taken to resolve complaints. Both of these issues had been problematic in the DISC, MIPS and Animal Feed Proteins Cases.[113]

The 1970's concluded with thirty-two complaints being filed from the beginning through the end of the decade. Of these, fifteen resulted in decisions by panels, twelve resulted in settlements and five others resulted in withdrawals or no action taken.[114] In percentages this translates as follows:

Number of Complaints Filed	%Resulting in Decision	%Settled	%Other
32	47	38	16

In contrast to the period covering 1960-1969, there was a twenty-four percentage point decrease in the number of cases that resulted in decisions.[115] The number of cases settled as compared to the previous decade increased by nine percentage points. The trend was still moving away from disposal of complaints by use of the panel process and towards settlement or disposal in some other manner. The combination of these two categories accounted for fifty-four percent of the total number of case.

C. The 1980's

The 1980's started out with an attempt to put into force the changes made to the dispute settlement process by the Tokyo Round. The United States once again took the lead by bringing complaints to demonstrate the value of the Tokyo Round.[116] The U.S. brought five complaints aimed at the European Community. These were highly contentious cases, which resulted in defeats for the dispute settlement process. As a result, members realized that the Tokyo Round reforms did not accomplish what they had hoped.[11]

The number of complaints brought in the 1980's continued to grow dramatically, which had a positive effect of bringing the dispute settlement process to the attention of the members. Early in the decade, decisions were considered adequate, through lacking legal consistency. The panel system remained unable to deal with complex legal issues, driven again in large part by complaints brought by the U.S. Not only did the U.S. present complicated legal issues, but it also made it a habit to bombard the panel with complex legal tactics, resulting in similar counter

[113] *See id.* at 57.

[114] *See id.* at 287.

[115] *See supra* section 1960's.

[116] ROBERT E. HUDEC, *supra* note 64, at

[117] *See id.* at 147.

tactics. Mistakes became common and the members realized something needed to be done to address the situation.[118]

Members concluded that a professional legal staff was needed to assist the Secretariat in the panel process.[119] In 1981, the Secretariat created a legal office. By 1983, it became a three person staff. This did not come without difficulty. As was to be expected, political concerns of members drove the creation of a legal staff. As Professor Hudec has pointed out "[t] he new legal office was still understaffed, and legal officials still had to compete for influence with officials from other Divisions of the Secretariat. Moreover, the political attitude of governments toward the legal office still contained a large measure of distrust."[120] Despite the difficulties involved, the creation of the legal office was a major step forward, which allowed the Secretariat to obtain advice and, for the first time, provided professional legal assistance to the panels.[121]

At the same time, it became clear that the creation of a legal office was not going to solve the problems the dispute settlement process was experiencing, as evidenced by an on-going tactical war between the United States and the European Community. A 1982 meeting, convened, in part, to discuss the dispute settlement process,[122] produced only an agreement to do better in the future, but no substantive changes to the process.[123] "It was time, governments were saying, for GATT adjudication to raise its ambitions, and to become an objective legal arbiter capable of giving clear answers to all comers. The final reform recommendation called for a more serious follow-up procedure for rulings of violation, including specific reference to authorizing retaliation."[124]

The 1980's concluded with one hundred and fifteen complaints being filed during the decade. Of these, forty-seven resulted in decisions by panels, twenty- eight resulted in settlements, and forty others resulted in withdrawals or no action taken.[125] In percentages this translates as follows:

Number of Complaints Filed	%Resulting in Decision	%Settled	%Other
115	41	24	35

Compared to the 1970's, this actually represents a 14% decrease in both the percentage of complaints resulting in a decision and the percentage of cases settled. Conversely, there was a 19% increase in the "other" category. Despite the record

118 See id. at 137.

119 See id.

[120] *Id.*

[121] *See*

[122] *See*

[123] *See*

[124] *Id.*

[125] *See id.* at 287.

number of complaints the trend toward settlements or withdrawals with no action taken continued, further supporting the argument that the dispute settlement process was still incapable of effectively rendering legal decisions that could be enforced.

D. The 1990's

Between 1990 and 1994 there was very little activity in the dispute settlement system. Of the forty-three complaints brought,[126] only twelve resulted in decisions and four in settlements. None of the cases had particular significance for the dispute settlement system. In 1994, the contracting parties reached a new trade agreement called The General Agreement on Tariffs and Trade 1994[127] that provided for the creation of the World Trade Organization[128] as a formal administrative body to oversee its operations. In addition to strengthening world trade, GATT 1994 brought about sweeping changes to the dispute settlement process[129] which set the stage to move the system from pragmatism to legalism.

VIL THE Post Uruguay Dispute Settlement System

Article 11:2 of the WTO Agreement established the Understanding on Rules and Procedures Governing the Settlement of Disputes (die "Understanding").[130] This document, which outlines the new dispute settlement system under the World Trade Organization (WTO), is binding on all members[131] and applied to all disputes that arise under the 1947 GATT Agreement, GATS or TRIPS.[132] It also applies to disputes that may arise concerning the Understanding itself and its procedures.[133]

Central to the new WTO system was the creation of the Dispute Settlement Body (DSB), which serves as the administrative arm of the dispute settlement system. The DSB has direct responsibility for overseeing the consultation and dispute settlement provisions contained in any of the agreements that form the WTO.[134] It also has the authority to establish panels, adopt panel and appellate body reports, maintain surveillance and implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.[135] The DSB has an obligation to keep WTO councils and committees

[126] *See* Debra P. Steger and Susan M. Hainsworth, *World Trade Organization Dispute Settlement: The First Three Years,* Vol. 1, No. 2, J. INT'L ECON. L. 204 (1998).

[127] RICHARD SCHAFFER ET AL., *supra* note 6, at 329.

[128] *See id.*

129 See id.

[130] <http://www.WTO.org>

[131] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization [hereinafter WTO Agreement].

[132] *See id.*

[133] *See id.*

[134] *See id.* at Article 2:1.

[135] *See id.*

informed of disputes that are currently being administered under its direction.[136] It can meet as often as necessary and it makes its decisions by way of consensus:[137] if no member of the DSB who is present at a meeting objects to the matter on the table, then it is deemed decided by consensus.

Article 3 of the Understanding reaches back to the old dispute settlement system under the 1947 GATT Agreement and the subsequent changes to the system. Rather than abandoning GATT 1947 to create a new dispute settlement system, members affirm their adherence to the principles for the management of disputes applied under GATT 1947, its rules and procedures.[138]

Under Article 3, members also recognize that the dispute settlement system is designed to preserve the rights and obligations of members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[139] It specifically states that the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided for in the agreements binding the members.[140]

Accordingly, Article 3:7 states that the purpose of the dispute settlement system is to secure a positive solution to a dispute. Before a member can bring a complaint to the DSB, the member must first examine its complaint and conclude that the dispute settlement system is likely to yield a "fruitful" result.[141] "A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."[142] As a last resort Article 3:7 states that a member might be able to suspend concessions or other obligations under the WTO Agreements, with the authorization of the DSB.

Because Article 3:7 outlines the new dispute settlement system, it deserves closer attention. The overall intent of the members, as reflected in 3:7, is that the dispute settlement system should only be looked to as an avenue of last resort after conciliation and settlement fail. This is a consistent theme of the GATT dating back to its beginnings. Although the new dispute settlement system produced a more legalistic approach, there is still very clear and explicit language in the Understanding that the members do not like using an adversarial system to resolve their disputes. Article 3:10 states that complainants should view the dispute settlement system as a means of facilitating resolutions of disputes and not as a means of using the system to harass and aggravate the opposite party involved in the

136 See id.

137 See id.

[138] *See id.* at

[139] *See id.* at

[140] *See id.*

[141] *See id.* at

[142] *Id.*

dispute. The Understanding still allows for both political and legal resolutions of disputes as the following table[143] demonstrates:

Political methods of dispute settlement	Legal methods of dispute settlement
Consultations (Article 4)	Panel Procedures (Articles 6-16, 18, 19)
Good Offices (Articles 5, 24)	Appellate Review Procedures (Articles 17-19)
Conciliation (Articles 5, 24)	Rulings by Dispute Settlement Body on Panel and Appellate Reports (Articles 16, 17)
Mediation (Articles 5, 24)	Arbitration among States (Article 25)
Recommendations by -Panels (Article 19) -Appellate Body (Article 19) -Dispute Settlement Body (Articles 16, 17)	Private International Arbitration (e.g. Article 4 Agreement on Preshipment Inspection)
Surveillance of Implementation Of Recommendations and Rulings (Article 21)	Domestic Court Proceedings (e.g. Article X GATT, Article 13 Anti-Dumping Agreement, Article 23 Agreement on Subsidies, Article 32, 41-50 TRIPS Agreement, Article XX Agreement on Government Procurement)
Compensation and Suspension of Concessions (Article 22)_____	

[144]ERNST PETERSMANN, The GATT/WTO DISPUTE SETTLEMENT SYSTEM, INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 183 (1997).

The Understanding and the WTO have not abandoned political methods of dispute resolution; however, the framework created to resolve disputes moves closer to a legalistic approach. Under the new dispute settlement system, once the parties bring their complaint to a pane, the process takes on a more formal legalistic character, which was not the case under the old GATT process.

Article 4 of the Understanding details the procedures for consultations,[144] which are now mandatory, if requested. Article 4:3 states that once a request for consultations are made, a member *shall* enter into consultations within thirty days and in good faith, with a view to reaching a mutually satisfactory solution. If the potential defendant fails to respond or enter into consultations within the proscribed thirty days, then the complaining member may request the establishment of a panel.[145] Similarly, if there is no resolution to the complaint within sixty days from the request for consultations, then the complaining party may request that a panel be established.[146]

The right to have a panel convened is clearly established by the Understanding. Under GATT 1947, members could not force a panel to convene. This allowed for abuses to the system and contributed to many of the criticisms of the 1947 GATT dispute settlement system. Article 6 explicitly established the right to a panel.[147]

Article 10 of the Understanding speaks to the common practice under GATT of allowing third parties to intervene. Like the composition of panels, multiple complaints and third party intervention practices are codifications of prior GATT practices. This too is an example of the move to a legalistic approach.

Article 12 sets forth the working procedure of the panels. A panel has six months to conduct its work, three months in urgent cases. [48] If the panel finds it cannot do so within these time periods, it must report back to the DSB giving its reasons and an estimate of how much longer it will take to complete its work.[149] A maximum time period of nine months is allowed from the establishment of the panel to the circulation of its report to members.[150] The panels also have the right to seek information from any relevant source and to request an advisory report in writing from an expert review group.[151] Within sixty days after the report is circulated to the members, the report is adopted by the DSB unless one of the parties to the dispute

[144] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 134, at Article 4.
[145] *See id.*
[146] *See id.* at Article 4:7.
[147] *See id.* at Article 6:1.
[148] *See id.* at Article 12:8.
[149] *See id.* at Article 12:9.
[150] *See id.*
[151] See ERNST PETERSMANN, *supra* note 143, at 183.

notifies the DSB that it intends to appeal the findings of the report.[152] The DSB may also decide on its own by way of consensus not to adopt the report.[153]

The DSB has the responsibility of creating a standing appellate body[154] composed of seven persons. Of the seven, three serve on each case. This is done on a rotating basis. The members of the appellate body must be recognized authorities with expertise in law and international law.[155] Appeals are limited to sixty days from the day the DSB received notice of intent to appeal to the day the appellate body circulates its report.[156] Like a panel, the appellate body can take an additional thirty days to complete its work, but is must notify the DSB and state its reasons for the delay.[157] Article 17:13 grants the appellate body the authority to uphold, modify or reverse the legal findings and conclusions of the panel. Most significant is 17:14 of the Understanding. It states:

> An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the members. This adoption procedure is without prejudice to the right of members to express their views on an Appellate Body report.

Article 17 also removes from the members the ability to unilaterally block a decision,[159] which is a fundamental change from the previous dispute settlement process under GATT 1947. "The legally binding effect of dispute settlement rulings by the GATT Council was politically reinforced by the adoption of panel reports on the basis of consensus, whereby the legal findings were endorsed by all GATT member countries, including the government of the country complained against. Under the new WTO dispute settlement process as set forth in Article 17:14 of the Understanding this is no longer the case. "The new WTO dispute settlement system provides for quasi-automatic adoption of panel reports by the DSB, without the previously existing possibility of blocking consensus, as well as for strengthened procedures for the enforcement of adopted panel reports."

Article 19 addresses the effect of panel and appellate body recommendations. Once either the panel or the appellate body reaches a conclusion,

[152] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 134, at Article 16:4.
[153] *See id.*
[154] *See id.* at Article 17.
[155] *See id.* at Article 17:3.
[156] *See id.* at Article 17:5.
[157] *See id.*
[158] *See id.* at Article 17:14
[159] *See id.*
[160] *See* ERNST PETERSMANN, *supra* note 143, at 186.
[161] *Id.*

it must communicate its recommendations to the member concerned to bring the offending activity into conformity with the agreement.[162] Article 21:3 requires that the member inform the DSB of its intentions to implement the recommendations and rulings of the DSB. Article 21:3 also grants the DSB the authority to monitor the implementation of its recommendations.

If this is not done within a reasonable time, as defined in the Understanding, then Article 22:2 requires the parties in the dispute to negotiate a mutually acceptable compensation. They have twenty days to reach an agreement on their own,[163] and failing that the DSB has the power to authorize suspension of concessions or other obligations upon the request of the non-offending member, although the request may be rejected by consensus of the DSB. If the member concerned objects to the suspension of concessions, then the matter is referred to arbitration.[164] The arbitration process shall be completed within sixty days from the expiration of the reasonable time period.[165] The arbitrator's decision shall be final and accepted by the parties.[166]

One of the criticisms of the dispute settlement system under GATT 1947 was its lack of both a legalistic approach and the ability to enforce panel decisions. Contracting parties (now members) could simply reject the panel's report, defeating the requirement of unanimous acceptance. In effect, all contracting parties held a veto power over the panel's decision. As a result the members demanded change resulting in the 1994 WTO Agreement. As Professor Petersmann has observed:

> The dispute settlement procedures in the 1994 WTO Agreement are the most ambitious worldwide system for the settlement of disputes among more than 130 states ever adopted in the history of international law. They provide for compulsory jurisdiction, quasijudicial panel procedures, independent appellate review quasiautomatic dispute settlement rulings within one year, alternative dispute settlement and arbitration procedures, and an effective surveillance and enforcement system, including access of individuals to domestic courts.[167]

Certainly the changes made to the system as a result of the 1994 WTO Agreement are extensive, aggressive and bold. How these changes have impacted the process and its outcomes is important because it is against these results that the success or failure of the new system will be measured. The new system was implemented on

[162] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 134, at Article 19:1.

[163] *See id.* at Article 22:2.

[164] *See id.* at Article 22:6.

[165] *See id.*

[166] *See id.*

[167] Emst-Ulrich Petersmann, *From Hobbessian International Law of Coexistence to Modern Integration Law: WTO Dispute Settlement System*, Vol. 1, 2, J. INT'L ECON. L. 183 (1998).

January 1, 1995 and has been in place for six years. While it is difficult to measure the success or failure of the new system in such a short time period, compared to the forty-seven years of experience under the GATT 1947 system, WTO members are already declaring the system a success. In 1996 the Ministerial Conference called the new system effective.[168] In 1997, Renato Ruggiero, then Director-General of the WTO, stated that the new system was "the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy."[169] Picking up on the Director-General's comments, "defenders of the system point to the large volume of cases, including high-profile disputes, that the system has handled with a reasonable degree of success in terms of quality decisions and compliance."[170] Commentators have gone even farther in their declarations. It has been pointed out that "now we have arguably the most sophisticated dispute resolution system in all of the international law specialties. We have a mechanism with real deadlines. We have a mechanism with set procedures. Best of all, we have a mechanism that, to put it in its mildest form, expresses a clear preference for compliance, and failing compliance, ineluctably leads to compensation or retaliation."[171]

The dispute resolution system under GATT 1994 can be examined in terms of several broad categories:[172]

1. The inter-relationship of the different WTO Agreements and the dispute settlement system;
2. General principles of international law and the impact on the new system;
3. Issues of burdens of proof;
4. The issue of precedent & standing; and
5. Overall usage of the system.[173]

By analyzing some of the major cases that have come before the new dispute settlement system from a procedural point of view, one can see the development of a more legalistic approach.

[168] WT/Min (96)/DEC, adopted on Dec. 13, 1996, at para. 9.

[169] *See* <http://www.sto.org[h]wto/about/dispute l.htm >

[170] Raj Bhals, *Five Theoretical Themes in the World Trade Organization Adjudicatory System,* J. INT'L & COMP. L. 437 (2000), *available in* LEXIS-Nexis Library.

[171] *Id.*

[172] *See* ERNST PETERSMANN, *supra* note 143, at 200; *see also* JOURNAL OF INTERNATIONAL ECONOMIC Law SPECIAL ISSUE WTO DISPUTE SETTLEMENT SYSTEM, Vol. 1 No. 2 (1998).

[173] *Id.*

VIII. The Inter-Relationship of the Different **WTO** Agreements and the Dispute Settlement System

The WTO Agreement contains a number of side agreements attached to it known as Annex 1: the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS), the Agreement on Agriculture, the Customs Valuation Agreement, the Agreement on Import Licensing Procedures, the Anti-dumping Agreement, the Agreement on Trade-Related Investment Measures (TRIMS) and the Agreement on Textiles and Clothing.[174] In addition, there is the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[175] The new dispute settlement system is designed to work with all of these agreements and has already produced some interesting questions for the new dispute settlement system.

For example, in July 1996 the U.S. filed a complaint against India and Pakistan. The U.S. claimed there was inadequate patent protection for pharmaceutical and agricultural chemical products in India.[176] Specifically, the U.S. alleged that India had violated Articles, 27, 65 and 70 of the TRIPS Agreement.[177] The U.S. requested a panel in November 1996, which was established the same month by the DSB. The panel found that India had failed to comply with TRIPS because id had not developed a mechanism that adequately preserved novelty and priority, nor had it established a system for the grant of exclusive marketing rights.[178]

The panel circulated its report in September of 1997 and the next month India gave notice of its intention to appeal.[179] In large part, the appellate body upheld the findings of the panel. The appellate panel circulated its report in December of 1997 and the DSB adopted the report in January of 1998. The following April, the parties announced implementation plans.[180] The case tested not only the procedural aspects of the new dispute settlement system, but also provided an opportunity to test a dispute brought under a new WTO agreement.

In another example, Venezuela and Brazil brought a complaint against the United States in 1996 concerning U.S. standards for gasoline. The complaints alleged that U.S. gasoline regulations were discriminatory.[181] Venezuela claimed that regulations under the United States Clear Air Act violated the national treatment provisions in the GATT under Article III and the most favored nation provisions of Article I.[182] The complainants also claimed that the U.S. regulation was a technical

[174] RICHARD SCHAFFER ET AL., *supra* note 6, at

[175] *See id.*

[176] WT/DS50/R (5 September 1997)

[177] *See id.*

[178] *See id.*

[179]See id.

[180] *See id.*

[181] *See* WT/DS2/R (29 January 1996)

[182] See id.

regulation covered by the Agreement on Technical Barriers to Trade (TBT) that violated TBT Articles I and II and Article 2. A panel was established in April of 1995. The panel concluded its findings in January of 1996, the U.S. appealed in February of the same year. The DSB adopted the panel's findings in May of 1996. Although this case provided an excellent opportunity for the new dispute settlement system to deal with another new WTO agreements, the TBT, the panel "concluded ... that in view of its findings under the General Agreement it was not necessary to decide on issues raised under the TBT Agreement."[183] The panel found the U.S. regulation in violation of GATT Article III: 4 and under Article XX.[184] The panel did not address the relationship between the GATT and the TBT or specifically, whether it violated Article 2.1 and 2.2 by creating discriminatory and unnecessary obstacles to international trade. Annex 1A of the WTO Agreement states that "in the event of conflict between a provision of the General Agreement on Tariffs and Trade
1994 and a provision of another agreement in Annex 1A ... the provision of the other Agreement shall prevail to the extent of the conflict."[185] Neither the panel nor the appellate body addressed the complainant's claims under the TBT Agreement.[186] TTie panel's decision relied on the GATT. "Having found the US measure to be inconsistent with GATT Article III: 4 and not justified under GATT Article XX, the panel followed the traditional "GATT pragmatism" and avoided a finding on the controversial relationship between the TBT Agreement and GATT Articles III and XX."[187] Despite the opportunity to apply a more legalistic approach to a dispute, the panel and appellate body did not do so, but, as Professor Petersmann has pointed out, relied upon the GATT pragmatism approach.[188]

A claim of a violation of Article 2 of the TBT appeared previously in 1995 in a dispute between the European Communities and Canada, Peru and Chile. [189] The dispute centered on a French Government Order, which established a trade description for scallops.[190] The complainants claimed that the description would reduce competitiveness on the French market because their scallops could no longer be sold as Coquille Saint-Jacques in France could. The principal argument was tliat they were like products[191] and the description violated Articles I and II of the GATT and Article 2 of the TBT. Although this case was never brought to a conclusion because the parties reached a mutual settlement, the panel had issued a draft report discussing the violations of Article 2 of the TBT.[192]

[183] *See* ERNST PETERSMANN, *supra* note 143, at 200.

[184] *See* WT/DS2/R, *supra* note 181.

185 WTO Agreement Annex 1A

186 See id.

[187] *See* ERNST PETERSMANN, *supra* note 143, at 200.

[188] *See id.*

[189] *See* WT/DS7, WT/DS12 and WT/DS14 (19 July 1995)

[190] See id.

[191] See id.

[192] See id.

Annex 1 of the WTO Agreement will continue to play an important role in the new dispute settlement system. As Professor Petersmann has pointed out:

> Given the large number of more than 25 different multilateral trade agreements listed in Annex 1 of the WTO Agreement, their complex legal interrelationships will give rise to many new legal problems, compared with the old GATT 1947. In view of the legal primacy of the "multilateral agreements on trade in goods" over the GATT 1994, WTO dispute settlement panels will have to examine very carefully to what extent the panel findings adopted under GATT 1947 continue to be legally relevant for the interpretation of GATT 1994 as modified by the various multilateral agreements on trade in goods.[193]

The WTO Agreement brings with it not only a new dispute settlement procedure, but also new multilateral agreements that must be interpreted by the new system. It is too soon to tell whether the new dispute settlement system will deal effectively with these new agreements. To date it has refused to do so, although it has had the opportunity.

IX. IMPACT OF GENERAL PRINCIPLES OF INTERNATIONAL LAW

An interesting development since the adoption of the new dispute settlement system in 1995 has been the WTO Appellate Body's references to customary rules of international law. Under the GATT 1947 system, the old panel system was not accustomed to making references to outside sources of law in its decisions.[194] Because a legalistic approach had not been accepted; instead the emphasis was on conciliation and political solutions. This new approach is echoed in the personal views of professionals closely connected to the WTO. Joost Pauwelyn of the legal affairs division of the WTO stated that "the argument is that WTO rules should be considered as creating international legal obligations that are part of *public international law* and that a more collective and effective enforcement mechanism, one aimed at inducing compliance, is required."[195]

The Appellate Body has repeatedly made reference to rules of customary international law in its reports since 1995.[19] It has done so in both the Japan Taxes

[193] *See* ERNST PETERSMANN, *supra* note 143, at 200.

[194] *See* Emst-Ulrich Petersmann, *From The Hobbesian International Law of Coexistence to Modern Integration Lav: The WTO Dispute Settlement System*, Vol. 1, No. 2, J. INT'L ECON. L. 185 (1998).

[195] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach*, 94 AM. J. INT'L L. 335 (2000), *available in* LEXIS-Nexis Library, (emphasis added).

[196] *See* ERNST PETERSMANN, *supra* note 194 at 185.

on Alcoholic Beverages case and Ihe USA Standards for Gasoline case.'[9]

The India Patent Protection for Pharmaceutical and Agricultural Chemical Products case[198] is a good example of the new dispute settlement system expanding beyond the "four comers" of the WTO Agreement. Relying upon Article 31:1 of the Vienna Convention on the Law of Treaties,[199] the panel in the India patent case stated that "good faith interpretation requires the protection of legitimate expectations derived from the protection of intellectual property rights provided for in the Agreement."[200] The panel further stated:

> The protection of legitimate expectations is central to creating security and predictability in the multilateral trading system. In this connection, we note that disciplines formed under GATT 1947 (so- called GATT acquis) were primarily directed at the treatment of the goods of other countries, while rules under the TRIPS Agreement mainly deal with the treatment of nationals of other WTO Members. While this calls for the concept of the protection of legitimate expectations to apply in the TRIPS areas to the competitive relationship between a Member's own nationals and those of other Members ... it does not in our view make inapplicable the underlying principle.[201]

The underlying principle referred to in the last sentence is Article 31:1 of the Vienna Convention on the Law of Treaties. The panel found that India did not provide a system that protects legitimate expectations as required in Article 70.8 of the TRIPS Agreement.

The Appellate Body disagreed with the panel. It felt that the panel misapplied Article 31 of the Convention."[03] It stated that the panel created an interpretative principle that was inconsistent with customary international law and the established law of the GATT/WTO.[204] The appellate body went on to state "[we] do not agree with the Panel that the legitimate expectations of Members and private rights holder concerning conditions of competition must always be taken into account in interpreting the TRIPS Agreement."'[05] Although the Appellate Body disagreed with the panel report, it has opened the door in other cases for outside reference to general principles of customary international law." The appellate body

197 See id.
198 See id. at 186.
199 See id.
200 WT/DS50/R (5 September 1997) at para.
201 WT/DS50/R, paras. 7.19-7.21.
202WT/DS50/R, para. 7.41
[203] WT/DS50/AB/R, paras. 45, 46,48.
204 Id.
205 Id.
[206] *See* discussion *supra* Section IX.

in India IP seemed to be saying that it did not disagree in principle with the panel, but rather with the panel's application and interpretation of Article 31 of the Vienna Convention.

X. THIRD, BURDENS OF PROOF[207]

Under the 1947 GATT Agreement, the issue of burdens of proof did not present a large problem because the parties presented to the panel with the so-called "cluster of undisputed facts" that they had agreed upon previously.[208] Nonetheless, there are two rules that developed under the 1947 GATT dispute settlement procedure that surface repeatedly in panel and appellate body decisions under the new dispute settlement system. The first was that the party bringing the complaint bears the burden of proof regarding the violation.[209] This rule is not found in any of the GATT Agreements; it is inferred from examining panel reports. The 1954 panel report on the Treatment by Germany of Imports of Sardines stated that "[t]he examination of the evidence submitted led the Panel to the conclusion that no sufficient evidence has been presented to show that the German Government had failed to carry out its obligations under Article 1:1 and Article XIII: l."[210] The second rule was that the party who invoked a defense had the burden of proving they met the conditions set forth in the GATT Article they were relying upon.[211] This generally revolved around Article XX and Article XI:2(c)(i).[212] The panel report on Canada - Administration of the Foreign Investment Review Act case is an example of this rule.[213] In this case, the panel found the act violated the national treatment rule of GATT 1947.[214] Canada responded by asserting the exceptions found in Article XX(d).[215] The panel stated "[s]ince Article XX(d) is an exception to the General Agreement it is up to Canada, as the party involving the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act."[216]

Through 1997, eleven WTO panels have addressed issues of burdens of proof and four of the nine Appellate Body reports raised burdens of proof issues.[217] The new dispute settlement system has shown an interest in this topic and has further clarified these issues. Since the new WTO Dispute Settlement System has gone into force, observers can conclude that the burden of proof still lies with the party

[207] *See* Foost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement,* Vol. 1, No. 2, J. INT'L ECON. L. 227 (1998).

[208] *See id.*

[209] *See id.* at 235.

[210] Panel Report adopted Oct. 31,1952, para. 15.

[211] *See id.*

[212] *See* Article XX and Article Xl:2(cXi) of 1947 GATT Agreement.

[213] *See* ROBERT E. HUDEC, *supra* note 64, at 498.

[214] *See id.*

[215] *See* Article XX(d) of the 1947 GATT Agreement for list of exceptions.

[216] Panel Report adopted Feb. 7, 1984, para. 5.20.

[217] *See* PAUWELYN, supra note 207, at 288 nn. 4, 6 (1998).

asserting a violation. As clearly stated in the panel reports on Japan - Alcohol and India - Patent cases, the appellate body also addressed the issue in the report on the USA - Shirts and Blouses case.[218]

In the Japan - Alcohol case, the complainants alleged that Japan had engaged in discriminatory taxing practices with regard to liquor exported into Japan.[219] In the body of its decision, the panel it stated, "complainants have the burden of proof to show first, that products are like and second, that foreign products are taxed in excess of domestic ones."[220] In the USA Shirt - Blouses case the appellate body stated:

> We find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rest upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense.[221]

The WTO dispute settlement system has clearly adopted a more legalistic approach to burdens of proof.

In addition, the new dispute settlement system has confirmed that the party who relies upon an exception must prove it. The appellate body also addressed this issue in the U.S. Shirts - Blouses case. When it said "[I]t is only reasonable that the burden of establishing such a defense should rest on the party asserting it.' The panel and appellate body addressed the same issue again in the USA - Gasoline case.[223] In speaking to the defenses raised by the United States, the panel set its position very clearly. It stated that as the party invoking a defense, the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope.[224] This proposition was stated again in the Canada - Periodicals case

[218] *See* <www.wto.org/english/tratop _ edispute _

[219] *See* ROBERT E. Hudec, *supra* note 64, at 539.

[220] Panel Report adopted Nov. 1, 1996, para. 6.14.

[221] PAUWELYN, *supra* note 207, at 238.

[222] *See* Panel Report, *supra* note 220, at 16.

[223] *See* Pauwelyn, *supra* note 207, at 239.

[224] *Id.*

225 *Id.*

and in the USA - Underwear case.[225] In the Underwear case, a panel again referred to general principles of law, stating that "it is a general principle of law, well- established by panels in prior GATT practice, that the party which invokes an exception in order to justify its action carries the burden of proof that it has fulfilled the conditions for invoking the exception."[227]

The renewed interest in burdens of proof by the new dispute settlement system under the WTO underscores the system's move towards a more legalistic approach on procedural issues. This move began in the 1980's and helped produce the changes brought about by the new WTO dispute settlement system. At the same time, the panels and appellate body took the opportunity to draw upon general principles of international law, further demonstrating a shift to a more legalistic approach to resolving trade disputes.

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XL Precedent and Standing

Although issues of precedent and standing are not new for the GATT, they merit further discussion since they provide additional information on the move towards legalism under the WTO.

Under the 1947 GATT agreement there was never any question that the effect of panel reports were not binding on future panels and did not extend beyond the parties before a panel.[228] The legal concept of *stare decisis* did not exist. The same conclusion can be drawn by looking at panel decisions adopted under the new dispute settlement system. The appellate body addressed the issue of precedents in the case of Japan - Taxes on Alcoholic Beverages[229] in 1996. The appellate body stated "[they are] an important part of tire GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."[230] This appellate body did not find any reference in the 1947 agreement or the WTO agreement that dictated the concept of stare decisis.

[226] Id.
[227] Panel Report adopted Feb. 25, 1997, para. 7.15 - 7.16.
[228] *See* Steger and Hainsworth, *supra* note 126, at 209.
[229] WT/DS8/11, (1 November 1996)
[230] Panel Report adopted Nov. 1, 1996, p. 14.

The appellate body in the Japan (Alcohol - Taxes case) was relying upon Article IX:2 of the WTO agreement.[231] Article IX:2 states that "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." The appellate body has not been willing to override Article IX:2. According to Steger and Hainsworth, "[i]n the view of the Appellate Body, the fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude tliat such authority does not exist by implication or by inadvertence elsewhere".[232] The appellate body in the Japan- Taxes case was only willing to go so far and stated that, although adopted panel reports create legitimate expectations that future panels can consider, they are not binding, and un-adopted panel reports have no legal status. This position is unlikely to change. More importantly however, it points to the difference between a dispute settlement system under an international agreement and a domestic system. The call for a more legalistic system, presumably more efficient and yielding better results, has not yet resulted in the adoption of the legal concept of *stare decisis.*

The WTO Agreement is silent on the issue of legal standing before the dispute settlement body. There is, however, an important case that addresses the issue. In the Bananas case, the issue of legal standing before the WTO dispute settlement system arose. The European Community appealed the panel decision to the appellate body claiming that the United States did not have standing to bring a complaint under the 1994 GATT Agreement. The EC stated in its appeal that "the USA has no actual or potential trade interest justifying its claim, since its banana production is minimal, it has never exported bananas, and this situation is unlikely to change due to climactic and economic conditions in the USA.""[34] The appellate body did not agree with the EC position. Instead it agreed with the panel decision that the U.S. could indeed participate in the complaint even without a legal interest. The appellate body reasoned that there is nothing in the dispute settlement understanding that requires a party to have a legal interest before bringing a complaint.[235]

In this case, the parties made reference to principles of general international law in support of their arguments.[236] The appellate body took the opportunity to address these claims. It stated that there was no principle of general international law that required a party before an international dispute tribunal to demonstrate legal standing.[23] Consistent with Article 3:7 of the DSU, the appellate body cited Article XXIII of the 1994 GATT agreement, which states that "if any Member should

[231] *See* Steger and Hainsworth, *supra* note 126, at

[232] *Id.*

[233] WT/DS27/AB/R (25 September, 1997)

[234] WT/DS27/AB/R, adopted Sept. 25, p. 8, para.

[235] *See id.*

[236] *See id.*

[237] *See id.*

consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of ..."[238] After concluding that members have broad discretion when deciding to bring a complaint before the WTO, it held in favor of the United States stating:

> The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panels statement that: With the increased interdependence of the global economy... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance or rights and obligations is more likely than ever to affect them, directly or indirectly.[239]

The appellate body was quick to point out that the reasoning in this case should not be construed to indicate how it might rule in the future. This is in keeping with its stance on precedent.[240] The appellate body's view on the issue of standing again demonstrates the WTO's refusal to adopt a purely legalistic system despite the calls for a more legalistic system that led to the new dispute settlement system. Although the concept of standing is a legal concept familiar to most domestic legal systems, the appellate body has been unwilling to extend this concept to an international dispute settlement regime.[241]

XII. USAGE OF THE SYSTEM[242]

Since the WTO dispute settlement system went into effect on January 1,
[219] there were 190 complaints including consultation request notified to the WTO through January of 2000, representing 149 distinct matters In January 2000, there were 22 active cases in process,[244] thirty-two (32) cases had been completed and thirty-two (32) cases had been settled or withdrawn. The status of the remainder is unclear.[245] The total numbers of active, completed and settled cases equaled 86. Out of the 190 complaints, 149 of these were distinct matters. Subtracting a total of 86

[238] WTO Agreement Article XXIII.

[239] WT/DS27/AB/R, adopted Sep. 25, 1997, p. 63, para. 135.

[240] *See* discussion *supra* Section XI.

[241] *See id.*

[242] Statistical analysis in this section was made with the assistance of Madan Annavaijula, Ph.D., Assistant Professor of International Business, Northern Illinois University.

[243] *See* <www.wto.org/english/tratop _ e/dispu _ e/stplay _ e.doc>

[244] As of Jan. 13, 2000.

[245] *See* <www.WTO.org> WTO public data showed 22 active cases, 32 completed cases and 32 settled cases. There is no indication as to the remainder.

from the 149 distinct number figure, leaves a difference of 63. Of the 149 distinct matters, about 68 of these are request for consultations that were still pending and not actual complaints. However, they have been counted with the complaints and reported as such. About 8 of these consultation request are not distinct. This roughly accounts for the 63 number difference.[246] It is extremely difficult to arrive at exact figures using WTO public data. One possible explanation is diplomatic concerns on the part of the WTO.

These numbers indicate an increase in usage over the GATT 1947 dispute settlement system as the following table shows[247]:

Decade	#of Complaints	Average # per year	# of decisions	Average # panel reports
1950's	53	5	21	2.1
1960's	7	<1	5	<1
1970's	32	1.5	15	1.2
1980's	115	4.7	47	2.8
1990-94	43	12	12	4
1995-99	149	29.8	32	6.4

See Appendix A for further explanation.

This chart illustrates average number per year rather than percentages per year. The period of greatest annual usage of the system occurred after the adoption of the new WTO dispute settlement system (1995 - 1999), as did actual decisions. Two conclusions can be drawn from this. First, usage of the new dispute settlement system is clearly up; either by way of request for consultations or actual complaints and second, the average number of decisions per year has also increased. It is the highest than any other year.

With respect to percentage of decisions versus settlement, between 1995 and 1999 there were 190 complaints and request for consultations, with the real number of complaints being 81.[248] Of the 81, thirty-two resulted in decisions. Thirty-two resulted in settlement,[249] as illustrated below:

[246] Telephone interview with Reto Malacrida, Office of the Director of Legal Affairs, WTO, (Mar. 22, 2000).

[247] *See supra* note 63.

[248] *See* discussion *supra* Section XII. . .

[249] A percentage of these have been disposed of by other means. It is difficult at this time to ascertain accurate data. *See id.*

Number of Complaints filed	% Resulting in Decision	% Settled	%Other
81	40	40	-0-

Although usage has increased and the number of decisions has also increased, it is not clear whether the past trend towards settlement by the parties will continue. The percentage of cases being settled (or withdrawals/no action taken) versus decisions has decreased significantly. If this trend continues, it would demonstrate that moving from a pragmatic system to a more legalistic system has increased the number of decisions. However, in the five-year period since the new WTO dispute settlement system has been in place, there appears to be an evening out of the number of decisions versus settlements. The following table provides a comparison since 1948:

Decade	# of Complaints	% Resulting in Decisions	%Settled	%Other
1950's	53	40	42	19
1960's	7	71	29	0
1970's	32	47	38	16
1980's	115	41	24	35
1991-93	36	33	n/a	n/a
1994	7	0	n/a	n/a
1995-99	81	40	40	0

While the graph below shows a reduction in percentage of cases settled after 1990, it is at least partially attributable to the unavailability of settlement and other data between 1990 and 1994. Based on the data available however, it is reasonable to predict that settlements will continue to decline.

See Appendix B for further explanation.

There has also been a development in who is using the new system. Since the adoption of the new dispute settlement system in 1995, there has been an increase in usage by less developed countries. Beginning in 1948 through 1994, the United States, the European Community, Japan and Canada accounted for approximately

90% of the cases brought to the dispute settlement system.[250] This is no longer the case. "Out of 25 dispute settlement consultations under Article 4 of the DSU in 1995, 13 were requested by developing countries. In 1996, almost one third of the more than 40 requests for dispute settlement consultations came from less developed countries."[251]

Several reasons can account for this. First, less developed countries played a greater role in the creation of the new system.[252] Second, the WTO Agreement allows for special provisions for less developed countries[253] and also, obligations can be met over a longer period of time. Third, the new dispute settlement understanding allows special treatment for less developed countries.[254] "There is a pronounced, new tendency for smaller and developing countries to bring complaints, which shows that they are taking their rights and obligations seriously." [55] This is a trend that was unexpected but nonetheless explainable. With a more legalistic approach, less developed countries feel more comfortable in using the system. There is more structure and less of a chance of being at a disadvantage because of a lack of economic and political power. At the same time, it must be acknowledge that less developed countries will continue to feel the pressure of participating in the process. As Professor Bhala has pointed out "WTO adjudication is extraordinarily expensive, and developing countries can neither afford the weaponry needed, in the form of a counsel of choice, nor is it firmly established that they have a right to private-sector attorneys; or, at least, that is the perception."[256] There is the fear that if the WTO dispute settlement process is perceived as denying equal access, the system will become suspect and lose its credibility.[257]

XIII. CONCLUSION

Whether a pragmatic approach or a legal approach is used, world trade has been greatly impacted by the General Agreement on Tariffs and Trade. The economic case for open and free trade, based upon multilaterally agreed upon rules, is very strong and the track record of the GATT provides evidence for continued support by WTO Members. One need only to look at the growth of world trade after the Second World War to see that the GATT is working. Tariffs on industrial products have fallen consistently since the inception of the GATT in 1948, from double digits to roughly four percent on average in industrial countries."' During

[250] *See* PETERSMANN, *supra* note 143, at 202.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] Steger and Hainsworth, *supra* note 126, at 205.

[256] Bhala, *supra* note 170, at 437.

[257] *See id.*

[258] *See* WORLD TRADE ORGANIZATION, TRADING INTO THE FUTURE , *supra* note 20, at 8.

the decade that followed WWII, world economic growth averaged about five percent per year.[259] During the same time period, world trade grew at about eight percent per year.[260] In addition, merchandise exports have grown on an annual average basis by six percent between 1948 and 1997.[261] A similar argument can be made for an increase in worldwide foreign direct investment (FDI). From 1973 to 1996, FDI expanded from US$21.5 billion to US$350 billion.[262] This is an annual average growth rate of twelve point seven percent.[263]

Developed and developing countries should support free trade because it works. There are strong arguments in favor of free trade. First, a stable trading system based on free trade promotes world peace.[264] There are many examples throughout history where trade wars have turned into actual combat wars. People do not fight with their trading partners when it is a prosperous relationship. Prosperous stable societies are also less likely to go to war. Second, with successful trade also comes the opportunity for disagreements over trade.[265] The WTO now provides a refined dispute settlement system. Trading partners can now more effectively look to the WTO for assistance in resolving their trade disputes. Third, protectionism causes prices to rise because the cost of production will rise if imports used in production are more expensive.[266] Fourth, imports allow us greater choice in the market place providing more goods and services.[267] Fifth, freer trade increases personal incomes.[268] Sixth, freer trade with transparent rules provides for a more stable business environment allowing business to plan for the future easier.[269]

The impact the Uruguay Round has had upon the dispute settlement system is extensive. The most significant effect, however, is the binding nature of decisions produced from the new system. Central to the idea of a third party dispute resolution process is the finality of the outcome, acceptance and enforceability of that decision. The contracting parties to the 1947 GATT Agreement recognized the importance of this, but at the same time understood the fragile structure they had created. Measured against recent world events at that time, their concerns were legitimate. Thus, the dispute settlement system developed a pragmatic approach, evident in procedure and final outcome. As disputes grew more complex, it became apparent to the contracting parties that a more structured process was needed, and the system moved to a more legalistic approach over time.

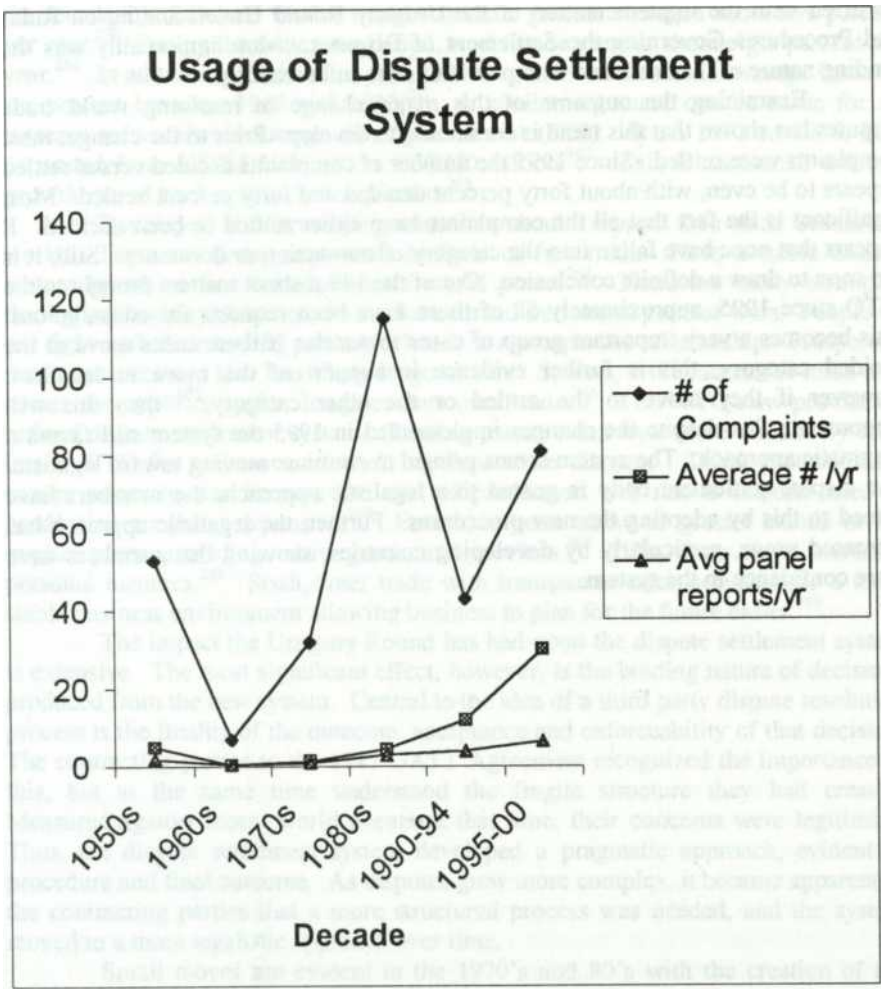
Small moves are evident in the 1970's and 80's with the creation of the legal office within the Secretariat. In 1995, of course, the most sweeping changes

[259] See id.
[260] See id.
[261] *See* WORLD TRADE ORGANIZATION, 50 YEARS OF ACHIEVEMENT 5 (1998).
[262] *See id.*
[263] *See id.*
[264] *See* WORLD TRADE ORGANIZATION, 10 BENEFITS OF THE WTO TRADING SYSTEM 2 (1999).
[265] *See id.* at 3.
[266] *See id.* at 5.
[267] *See id.* at 7.
[268] *See id.* at 8.
[269] *See id.* at 12.

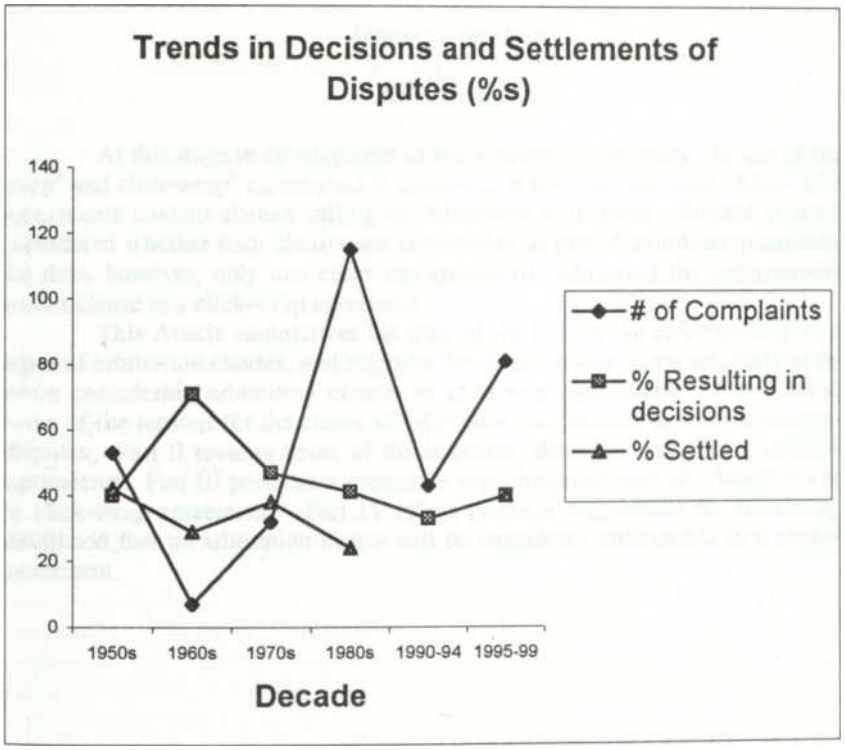
occurred with the implementation of the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes. Most importantly was the binding nature of the decisions with provisions for enforceability.

Examining the outcome of this major change in resolving world trade disputes has shown that this trend is continuing to develop. Prior to the change, most complaints were settled. Since 1995 the number of complaints decided versus settled appears to be even, with about forty percent decided and forty percent settled. Most significant is the fact that all the complaints have either settled or been decided. It appears that none have fallen into the category of non-action or dormancy. Still, it is too soon to draw a definite conclusion. Out of the 149 distinct matters brought to the WTO since 1995, approximately 68 of these have been requests for consultations. This becomes a very important group of cases to watch. If these cases move to the decided category, this is further evidence in support of the move to legalism. However if they move to the settled or the other category,[270] then this will demonstrate that despite the changes implemented in 1995 the system still favors a pragmatic approach. The system seems primed to continue moving toward legalism. The dispute settlement body is geared to a legalistic approach; the members have agreed to this by adopting the new procedures. Further, the legalistic approach has increased usage, particularly by developing countries, showing that members have more confidence in the system.

[270] *See supra* note 64.


Usage of Dispute Settlement System
140
120
100
80
60
40
20
0
1950s
1960s
1970s
1980s
1990-94
1995-00
Decade
# of Complaints
Average # /yr
Avg panel reports/yr

Appendix A


Trends in Decisions and Settlements of Disputes (%s)
140
120
100
80
60
40
20
0
1950s
1960s
1970s
1980s
1990-94
1995-99
Decade
# of Complaints
% Resulting in decisions
% Settled

Appendix B