INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600

THE WORLD TRADE ORGANIZATION AND THE EVOLUTION OF INTERNATIONAL ECONOMIC LAW

SUSAN MARY HAINSWORTH

A thesis submitted to the Faculty of Graduate Studies
in partial fulfilment of the requirements
for the degree of

Doctor of Jurisprudence

Graduate Programme in Law
York University
North York, Ontario

October 1997

The World Trade Organization and the Evolution of International Economic Law

by

Susan M. Hainsworth

a dissertation submitted to the Faculty of Graduate Studies of York University in partial fulfillment of the requirements for the degree of

DOCTOR OF JURISPRUDENCE

UNIVERSITÉ
YORK
UNIVERSITY

FACULTY OF GRADUATE STUDIES

I recommend that the dissertation prepared

under my supervision by

Susan M. Hainsworth

entitled

The World Trade Organization and the Evolution of International Economic Law

be accepted in partial fulfillment of the

requirements for the degree of

DOCTOR OF JURISPRUDENCE

November 1997

J. -G. Castel
Supervisor

Recommendation concurred in by the following

Examining Committee

Chair
B. Geva

M. Trebilcock

A. de Mestral

J. -G. Castel

J. Kirton

S. Williams

January 1998

Abstract

International economic law is evolving toward an unprecedented degree of institutionalization and supranational legal authority. This supranationalism is expressed through the availability of legalistic and more coercive mechanisms to develop international legal obligations and to enforce them upon states. Building on new conceptions of sovereignty emerging in international economic law, this thesis examines the legal order established by the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") and the legal arrangements for the creation, application, surveillance and enforcement of rules under the *WTO Agreement*. It assesses the extent to which these features represent a transfer of sovereignty in the trade sphere from the state to the supranational level.

This thesis argues that the legal order of the World Trade Organization (the "WTO") formally embodies a degree of legalism that is unprecedented in international law, and that the potential scope of authority for supranational rule-creation and rule-enforcement in the legal order and in the supervisory mechanisms of the WTO spearheads the international economic law "revolution". However, this high degree of formal legalism and supranationalism co-exists with, and is tempered by, pragmatic arrangements contained in the *WTO Agreement* itself, and the practice of Members.

The transfer of sovereignty from the Members to the WTO evident in the provisions of the Agreement concerning rule-creation through decision-making are tempered by other provisions of the Agreement and by practice. In

particular, the practice of seeking consensus in most cases before submitting a matter to a formal vote tempers the curtailment of international legal autonomy inherent in the fall-back simple or qualified majority voting procedures.

While supervision under the Trade Policy Review Mechanism acknowledges the necessity for some supranational authority residing in the Organization, and encourages adherence to WTO norms, practice reveals that its quasi-legalistic function is secondary to its primary role of increasing transparency of Members' trade policies.

It is in the realm of supervision through dispute settlement that the international economic law "revolution" is most apparent and that the highest degree of supranational legal authority resides in the Organization. The dispute settlement system serves to apply and enforce the legal obligations in the *WTO Agreement* through binding international adjudication. It also plays a vital informal rule-creation function that will grow in significance due to the difficulties associated with other forms of rule-creation under the Agreement.

Acknowledgements

To Mark, who made this possible;

and to Jane, who reminded me what matters

I am indebted to many people for helping me to complete this task. My sincere gratitude goes to my thesis supervisor, Professor Jean-Gabriel Castel, for his time, advice and constant encouragement throughout. I owe much to Sabrina Shaw, who gave me early encouragement to come to the WTO to do research, and who has helped me immensely on many levels. I would also like to thank all of the people at the WTO Secretariat whom I interviewed, and who have offered me inspiration, comments and criticism. In particular, Debra Steger, Director of the Appellate Body Secretariat, has been extremely encouraging and generous in sharing her thoughts and insights with me since I arrived in Geneva in January 1996. Peter Van den Bossche is always kind enough to discuss ideas and has been helpful in commenting on sections of a draft of this study. Naturally, I remain solely responsible for any mistakes or shortcomings that remain.

I am grateful to Trinity College at the University of Toronto, and particularly to Professor John Kirton, for encouraging my early interest in international relations. I am indebted to the College of Europe for sparking my interest in international law and economic integration. I owe much to Osgoode Hall Law School, where I received my legal training, and where Professor Jean-Gabriel Castel, Professor Sharon Williams and others encouraged my thinking on international law.

On a more personal level, I would like to remember my father, Howard Hainsworth, with the greatest affection. I would like to thank my mother, Mary Hainsworth, and siblings, Andrew and Sarah, for their help and senses of humour. Finally, I am eternally grateful to my husband, Mark Filipiuk, for his unwavering support, patience and wit, which sustained me in many difficult moments.

Table of Contents

Detailed Table of Contents

List of Figures

Introduction

The *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") was concluded by 125 states[1] on 15 April 1994. It entered into force on 1 January 1995. Embodying the results of the eight-year Uruguay Round of Multilateral Trade Negotiations, the *WTO Agreement* constitutes the most comprehensive international trade agreement in history.[2] A huge undertaking in international law, the *WTO Agreement* is an illustration of the current state and potential of international economic law.

---

[1] The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (the "Final Act") was signed by 124 states and the European Communities. By 31 December 1994 the GATT 1947 had 128 signatories, and on 1 January 1995, there were 85 WTO original Members. By 1 July 1997, the number of WTO Members had increased to 131. Accession negotiations with 28 further states, including Russia and China, were underway.

[2] The Final Act is over 500 pages in length. It includes the *Agreement Establishing the World Trade Organization* (the *"WTO Agreement"*). Annexed as integral parts of the *WTO Agreement* are: the Multilateral Agreements on Trade in Goods, including the *General Agreement on Tariffs and Trade 1994* (the "*GATT 1994*") and twelve other agreements; the *General Agreement on Trade in Services* (the "*GATS*"); the *Agreement on Trade Related Aspects of Intellectual Property Rights* (the"*TRIPS Agreement*"); the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the '*DSU*'); and the Trade Policy Review Mechanism (the "TPRM"). It also contains two Plurilateral Trade Agreements (the signatories of two other Plurilateral Trade Agreements originally included took a decision on 30 September 1997 to dissolve the two agreements with effect from 31 December 1997). The Final Act also includes 27 Ministerial Decisions and Declarations; and the *Understanding on Commitments in Financial Services*. This is accompanied by approximately 26,000 pages of national tariff and services schedules. It has been estimated that the results of the Uruguay Round on market access for goods should lead to world income gains of US$235 billion annually, and trade gains of US$755 billion annually, by 2002. These figures should increase substantially when the extension of trade discipline into new areas, revamped dispute settlement procedures, and new institutions are taken into account. See GATT FOCUS No. 107, May 1994 at 6.

The legal order established by the *WTO Agreement* strengthens and amplifies the international trade law disciplines concerning trade in goods that had existed under the *General Agreement on Tariffs and Trade 1947* (the "*GATT 1947*"). Whereas the *GATT 1947* and related legal instruments dealt exclusively with trade in certain goods, the World Trade Organization (the "WTO") now has under its aegis international arrangements for almost every sector of trade-related interaction. This includes multilateral agreements for trade in goods in the traditionally problematic areas of agriculture, textiles, and trade-related investment measures ("TRIMs"). This also includes trade in other sectors: trade in services, and trade-related aspects of intellectual property ("TRIPs"). The scope of the *WTO Agreement* is therefore far broader than that of the *GATT 1947*, and it is involved in many areas which formerly were seen as falling within the *domaine reservé* of states.

While the substantive scope of the *WTO Agreement* is impressive, perhaps the most important aspects of the *WTO Agreement* are the institutional and legal developments it contains. The Agreement established the WTO to provide the common institutional framework for the regulation of commercial relations among its Members. The WTO is "the legal and institutional pillar of international trade in the twenty-first century".[3] It is intended to provide "an integrated, more viable and durable multilateral

[3]Moroccan Crown Prince Sidi Mohammed in a speech at the opening of the Marrakesh Ministerial meeting on 12 April 1994 cited in GATT FOCUS No 107, May 1994 at 2.

trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all the results of the Uruguay Round".[4]

The *WTO Agreement* explicitly sets out the legal and institutional characteristics of the WTO. This includes its legal order; institutional framework; decision-making rules; and supervisory mechanisms. While the *WTO Agreement* continues many of the procedures and customary practices developed under the *GATT 1947*, its legal and institutional features remedy several of the shortcomings that plagued the *GATT 1947* over its 47 years of its existence. Key reforms resulting from the Uruguay Round include: the creation of a full-fledged international organization with its own administrative infrastructure; a comprehensive and integrated legal order explicitly set out in the constitutive treaty; more precise rules on rule-creation through decision-making within the organization itself; and strengthened supervisory mechanisms for the surveillance and enforcement of compliance with the substantive and procedural norms set out in the Agreement. In terms of supervision, multilateral trade policy surveillance occurs within the Trade Policy Review Mechanism (the "TPRM"), while dispute settlement is governed by the clarified, strengthened and expanded procedures for rule enforcement contained in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*Dispute Settlement Understanding*" or "*DSU*"). By virtue of the single undertaking approach adopted by the drafters of the *WTO Agreement*, each WTO Member has undertaken to be bound by the legislative and institutional provisions of the *WTO*

[4] Preamble to the *WTO Agreement*.

Agreement, the substantive multilateral trade agreements on trade in goods, services and intellectual property, as well as by the supervisory obligations of the TPRM and the *DSU*. The combined effect of these reforms has caused at least one noted scholar to proclaim this a watershed and the most profound change in international economic relations since Bretton Woods.[5]

The substantive and institutional aspects of a legal order are inextricably intertwined. A right or obligation exists only to the extent that it can be applied, protected or enforced. The effectiveness of international rules therefore depends on the existence of additional flanking rules governing decision-making and rule-creation, surveillance and rule-enforcement. The *WTO Agreement* and its annexes represent the integrated legal foundation -- the "constitution" -- of the new international trading system. The *WTO Agreement*, the *DSU* and the TPRM provide the institutional framework for the application, surveillance, enforcement and organic development of the substantive commercial rights and obligations set out in the annexes to the Agreement. The WTO's legal and institutional aspects therefore impact profoundly upon the present and future effectiveness of the substantive rules governing the multilateral trading system. The negotiation of the WTO's substantive and institutional features proceeded in tandem during the Uruguay Round: it was only with the strengthened and broadened substantive norms that the Uruguay Round's institutional innovations became both acceptable and necessary. Conversely,

---

[5] J. Jackson, "Introduction: "Reflections on International Economic Law"" (1996) 17 *U. Pa. J. Int'l. Econ. L.* 17.

the WTO Members would only agree to the supranational regulation of certain issues under the aegis of the WTO once there was an assurance that effective mechanisms for surveillance and enforcement would be in place to ensure the protection and effective application of these substantive norms. This thesis focuses upon the legal and institutional attributes aspects of the WTO, as opposed to the significant substantive legal rules that resulted from the Uruguay Round. It is premised on the view that the evolution of the legal and institutional features of the international trading system are more important than the existence of any particular substantive rules.[6]

The transition from the *GATT 1947* to the *WTO Agreement* did not occur by chance. The WTO was established in an era of increasing international economic interdependence, and of novel forms of transnational economic activity, which have thrown into question many traditional assumptions concerning international law, sovereignty, the *domaine reserve* of states, and the appropriate allocation of decision-making power among states, and between states and international organizations. The altered international context calls for a reconceptualization of the traditional notion of state sovereignty as the

---

[6] This view was also espoused early on by certain observers of the *GATT 1947* legal system. See *e.g.* J. Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969) at 788: "...in the long run, it may well be the machinery that is the most important...rather than the existence of any one or another specific rule of trade conduct"; and K. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970) at 4-5: "Law is not solely, or even primarily, a set of substantive rules. It is also a set of procedures, adapted to the subject matter and designed to resolve disputes that cannot be foreseen at the moment when those procedures are established...Ironically enough, the importance of legal procedures and the insufficiency of substantive rules alone are more clearly recognized in domestic legal systems than in the primitive and decentralised international legal order...Part of the history of the GATT is in fact a movement away from the naive view of law that held sway for many years and toward an interest in procedures."

basic tenet of international law. It also invites new approaches to international legal regulation and international institution-building. The WTO is an institutional manifestation of the common interest of its Members in jointly designing and participating in a new legal framework for the management of their growing economic interdependence. In comparison with the previous *GATT 1947* system, it constitutes a more robust supranational legal and institutional framework to govern the interaction of states in their multilateral trading relations. As an expression of current international economic law, the WTO represents an attempt at institutionalization to respond to increasing international economic interdependence.

This thesis examines the legal order established by the *WTO Agreement* and the legal arrangements for the creation, application, surveillance and enforcement of rules under the *WTO Agreement*. It evaluates the extent to which the major legal and institutional features that WTO Members have put in place to govern their commercial interaction represent a move towards a more legalistic international trade order characterized by a transferral of sovereign authority from the state to the supranational level. The legal and institutional attributes of the WTO system that it examines are: (i) the legal order and institutional framework of the Organization; (ii) the legal arrangements for rule-creation through decision-making by the Organization; (iii) supervision through dispute settlement under the *Dispute Settlement Understanding;* and (iv) supervision through multilateral trade policy surveillance in the Trade Policy Review Mechanism (TPRM).

This thesis is premised on the view that international economic law is evolving toward an unprecedented degree of institutionalization and supranational legal authority and that it is less dependent for its effectiveness on the consent or will of individual states. This supranationalism is expressed through the availability of legalistic and more coercive mechanisms at the international level to develop and enforce international legal obligations upon states. Building on the new conceptions of sovereignty that are emerging in international economic law, this thesis will assess the extent to which these legal-institutional arrangements represent a transferral of sovereignty in the trade sphere from the state to the supranational level, thereby connoting a limitation on the international legal autonomy of states that are WTO Members. The essential issues to be examined in this regard are the nature and scope of the authority or power that WTO Members have transferred to the WTO, the context in which this transfer occurs, and the extent to which this transfer is binding and irreversible.

This thesis argues that the legal order of the WTO formally embodies a degree of legalism that is unprecedented in international law, and that the potential scope of authority for supranational rule-creation and rule-enforcement in the legal order and supervisory mechanisms of the Organization spearheads the international economic law "revolution". This high degree of formal legalism and supranationalism co-exists with, and is tempered in certain areas by, pragmatic arrangements contained in the *WTO Agreement* itself, and the practice of Members that has developed under the *WTO Agreement*. Nevertheless, the more cooperative and pragmatic nature of the practice that

has developed under the *WTO Agreement* in certain areas can only function effectively with the assurance of the strong supranational legal framework in the background.

With respect to rule-creation through decision-making, the transferral of sovereign rights from the Members to the Organization evident in the explicit provisions of the Agreement are tempered by other express provisions of the Agreement and by practice. In particular, the practice of seeking consensus in most cases before submitting a matter to a formal vote softens the curtailment of international legal autonomy inherent in the fall-back simple majority voting procedures. The decision-making provisions on amendments, interpretations, waivers and accessions calling for a special qualified majority vote also have procedural safeguards in place that render it unlikely that a state will be bound by a decision of the Organization without its consent.

It is in the realm of dispute settlement under the *DSU* that the most marked transferral of sovereign authority is apparent, and that the most supranational legal authority resides in the Organization. The dispute settlement system serves to apply and enforce the legal obligations in the treaty through binding international adjudication. It also plays a vital informal rule-creation function that will grow in significance due to the difficulties associated with other forms of rule-creation under the Agreement (*i.e.* negotiation and legislation). Even with the unprecedented degree of legalism in the WTO dispute settlement system, pragmatic or cooperative alternatives remain: parties to a dispute are still able to negotiate a mutually-agreed settlement prior to, or even after, invoking the supranational

adjudicative machinery available under the *DSU*. The multilateral trade policy surveillance of the TPRM promotes adherence to the legal norms set out in the *WTO Agreement*, but this quasi-legalistic function is secondary to its primary role of increasing transparency of Members' trade policies and practices. The very existence of the TPRM constitutes an acknowledgement of the interdependence of Members' economies and the necessity for some supranational authority residing in the organization. Nevertheless, practice of Members in the TPRM demonstrates that they do not perceive it as a strict legalistic mechanism for the enforcement of compliance with WTO obligations.

In carrying out this specific examination of the legal and institutional arrangements that states have established in the WTO, this thesis aims to make a contribution to the theory of international economic law and organization. Such a study requires a theoretical framework founded broadly in international law, and more specifically in international economic law and international institutional law. For this reason, Chapter 1 provides the theoretical basis for the thesis by fitting it into the contextual doctrines of international economic law and international institutional law and setting out the basic premises and prescriptions underlying the thesis. Chapter 2 provides the historical basis by briefly tracing the evolution of the *GATT 1947*, highlighting its legal and institutional deficiencies, and identifying the historical roots of the WTO. Following an examination of the legal order and institutional framework of the WTO in Chapter 3, Chapter 4 analyses the provisions of the *WTO Agreement* for decision-making and rule-creation. Chapter 5 addresses supervision through the dispute settlement mechanism, while Chapter 6

examines supervision through the multilateral surveillance of the Trade Policy Review Mechanism. Drawing upon the contents of the first six chapters, Chapter 7 contains concluding observations.

Chapter 1

Premises and Prescriptions: International Economic Law and Organization

A. The Forces of Change: Interdependence, Sovereignty and Jurisdiction

Progressive international economic integration -- the globalization of the world economy -- is the most powerful force propelling the transformation of the contemporary international legal system. Global integration, described as the process "by which markets and production in different countries are becoming increasingly interdependent due to the dynamics of trade in goods and services and the flows of capital and technology"[7], is evidenced, *inter alia*, by the steadily rising ratio of world merchandise trade to output[8] and by the marked increase in flows of increased foreign investment (especially foreign direct investment).[9]

---

[7] OECD, *International Investment, 1993* (Paris: OECD, 1993) at 7.

[8] For example, the volume of world merchandise trade is estimated to have increased at an annual average rate of slightly more than 6% during the period 1950-94, compared with close to 4% for world output. This means that every 10% increase in world output has been associated with a 16% increase in world trade. The excess of world trade growth over output growth ranged from an average of 0.5% in 1974-1984 to nearly 3.5% from 1984-1994. See WTO, *International Trade: Trends and Statistics, 1995* (Geneva: WTO, 1995) at 15.

[9] Flows of foreign direct investment exceeded $220 billion in 1994, in contrast to an annual average of $57 billion from 1981-1985. The increase in inflows to developing and transition economies was proportionately greater, from an average of $20 billion in 1981-1985 to an estimated $91 billion in 1994. See *Id.*, at 20.

Economic interdependence is altering the way we conceptualize sovereignty and jurisdiction in international law. It is therefore requiring a profound reconsideration of some of the fundamental tenets of classical international law. It is also acting as a catalyst for the development of an increasingly robust legal discipline, known as international economic law. Increasing economic interdependence is exerting a twofold effect upon the sovereignty, or decision-making authority, of the state. First, within the internal orders of states, there is a movement toward giving private actors more freedom to manoeuvre in terms of economic decision-making to facilitate trade and investment. Second, at the international level, there is a move toward international rule-making and the delegation of sovereignty to international institutions in certain contexts. This thesis focuses upon this second effect.

Tension between the international legal autonomy of the state and international legal authority (in the sense of international legal norms and institutions directing the conduct of states) is the defining dynamic of the global economy.[10] The evolution of the concept of sovereignty has profoundly affected the development of

---

[10]G. Winham, *The Evolution of International Trade Agreements* (Toronto: University of Toronto Press, 1992) at 130 describes this tension as one between nationalism and internationalism. D. Palmeter, "International Trade Law in the Twenty-First Century" (1995) 18 *Fordham Int'l L. J.* 1653 at 1656 observes that the struggle between desire to act locally and the need to cooperate internationally will be the struggle of the twenty-first century.

international law, and will be the driving force for change in perceptions of international law in the coming years.[11]

Historically, the concept of sovereignty developed in the context of the internal power and authority of a sovereign ruler over his/her subjects and over matters occurring within the territory of the state. With the evolution of modern democracy, the concept of sovereignty later embraced ideas of popular and parliamentary sovereignty. It was still rooted in the constitutional relationship within the state between the government and the governed. As such, sovereignty was originally a concept used to describe the internal constitutional order of a state.

There is doctrinal disagreement over whether sovereignty can also have an external aspect. Some question whether it is possible, or appropriate, to apply the internal conception of sovereignty to the situation of states in the international legal order. [12] Others see sovereignty as Janus-like, with an external manifestation in the international

---

[11]See *e.g.* R. Brand "External Sovereignty and International Law" (1995) 18 *Fordham Int'l L. J.* 1685 at 1686: "The development of international law in the twenty-first century will be determined by the continuing evolution of the concept of sovereignty".

[12]R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (London: Longman, 1993) at 125. Brand, *op. cit.*, note 7 at 1670; L. Henkin, "The Mythology of Sovereignty" in R. St. J. MacDonald (ed.), *Essays in Honour of Wang Teiya* (Dordrecht: Martinus Nijhoff, 1994) 351 at 352-252. According to Henkin, "[a]s applied to states in their relations with other states, "sovereignty" is a mistake. Sovereignty is essentially an internal concept, the locus of ultimate authority in a society, rooted in its origins in the authority of sovereign princes. ...Surely, as applied to the modern secular state in relation to other states, it is not meaningful to speak of the state as sovereign".

system complementing its internal expression within the state.[13] Regardless of the terminology used, the external legal aspect of statehood that has been the focus of international legal scholars traditionally related to the external independence of the state and its equality in relation to other states in the international system. It was the essential quality that described the autonomy of states in the international legal order, and that established the prerequisite in most cases for state consent to be bound by international law. This classical conception of the external "sovereignty" of the state undermined the notion of a truly valid and effective international law: state "sovereignty" and the effective or binding nature of international law rules were typically thought of as inversely proportional. The effectiveness of international law was considered dependent on the will of "sovereign" states.[14]

These perspectives of sovereignty influenced the development of international law. Early legal theorists viewed the state as the ultimate and absolute sovereign entity. No effective international law could exist as, by definition, the sovereign

---

[13]See J. Tumlir, "National Sovereignty, Power and Interest" (1981) 31 *ORDO* 1.

[14]*The Lotus* (*S.S. Lotus France v Turkey*) [1927] P.C.I.J., series A, No. 10 at 18: "[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally as expressing principles of law...."

could not be subject to any higher law or command.[15] The Westphalian system[16] was premised on the territorial sovereignty of the state. It was characterized by the co-existence of independent sovereign states with minimal interaction. States acted as they wished within their own territory. They did not interfere with each other's sovereignty. Nor did they promote international cooperation among them by transferring their sovereign powers to, and pooling them in, any international legal framework . No international legal institution existed that could create binding rules without the consent of states. International law was limited to regulating the co-existence among states, delineating the respective rights and powers of states while leaving their external and internal sovereignty essentially untouched.

Inextricably intertwined with state sovereignty is the concept of jurisdiction. This describes the extent of a state's rights to regulate conduct or the consequences of events.[17] The exercise of jurisdiction is rooted in the sovereignty of the state. While a state's internal law prescribes the extent to which, and manner in which, the state asserts its jurisdiction, international law determines the permissible limits of a state's jurisdiction. [18]

---

[15]See *e.g.* J. Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* (1576) edited and translated by J.H. Franklin (Cambridge: Cambridge University Press, 1992) at 10-11.

[16]The Peace of Westphalia, which occurred in 1648, is commonly viewed as the starting point for the classical international legal system and the foundation for international law. See *e.g.* L. Gross , "The Peace of Westphalia, 1648-1948" (1948) 42 *Am. J. Int'l L.* 20 at 26.

[17]Jennings and Watts (eds.), *op. cit.*, note 12 at 456.

[18]*Ibid.*

Those areas which fall to be regulated exclusively by the state have traditionally been referred to as the "*domaine reservé*" of the state. In 1923, the Permanent Court of International Justice aptly observed that, "[t]he question whether a certain question is or is not solely within the jurisdiction of a State is essentially a relative question; it depends upon the development of international relations". [19] Recent developments in international relations, in particular deepening international economic integration, have placed many areas that were formerly within the *domaine reservé* of the state squarely onto the international agenda.[20]

The traditional conceptions of state sovereignty (in the sense of international legal autonomy), and *domaine reservé* fail to acknowledge the toll that advanced economic integration has taken upon the ability of a state to regulate economic activities pursued by its citizens or juridical persons, or within its territory. The international economic system is no longer composed of states that can co-exist without interfering with each other's exercise of jurisdiction. The inexorable progress of economic integration has penetrated state borders, making the state a porous entity transcended by multiple transnational commercial forces which do not fall within the jurisdiction of single states. Burgeoning transnational economic relations and novel forms of transnational economic activities

---

[19] *Tunis-Morocco Nationality Decrees* [1923] P.C.I.J., series B, No. 4 at 23-24.

[20] See, for example, D. Steger, "The Impact of GATT/MTO Rule-making and Rule-interpretation on the Sovereignty of States" in *State Sovereignty: The Challenge of a Changing World.* Proceedings of the 1992 Conference of the Canadian Council on International Law, Ottawa, October 1992, 138 at 140-141. Examples are trade in services, trade-related investment measures, trade-related aspects of intellectual property, and product standardization.

have strained the regulatory and normative capacity of the state. The lives and jobs of individuals within states are becoming more directly affected by economic forces from outside their countries' boundaries.[21] Trade takes place increasingly among multinational corporations and private individuals, undermining the domination of state markets.[22] Direct links are being developed increasingly between individuals and international law, circumventing the traditional role of the state as intermediary between the international legal order and the citizen.[23] In these circumstances, the *domaine reservé* of the state is shrinking and economic sovereignty is becoming virtually meaningless or irrelevant for an isolated state.[24]

An increasing number of issues can be tackled only at the international level. The constraints upon the ability of the state to confront these challenges have expanded the areas which require cooperation or concerted action at the international

---

[21] J. Jackson, *Restructuring the GATT System*. (New York/London: Royal Institute for International Affairs, 1990) at 53-54.

[22] M. Hart & D. Steger, "Due Process and Transparency: The Changing Context of International Trade Relations" in M. Hart & D. Steger (eds.), *In Whose Interest?: Due Process and Transparency in International Trade*. Proceedings of a Conference of the Centre for Trade Policy and Law, Ottawa, May 1990, 1 at 2.

[23] Brand, *op. cit.*, note 11 at 1695-1696 argues that a redefinition of sovereignty has developed direct links between the individual and international law, moving away from the classic view of sovereignty as a Lockean second-tier social contract. Brand notes that states are increasingly held accountable to international norms, scrutiny, and sanction.

[24] J. Paul, "Interdisciplinary Approaches to International Economic Law: The New Movements in International Economic Law" (1995) 10 *Am. U. J. Int'l L. and Pol.* 607 at 614 observes that, with the contraction of the state before the market, "there is very little else left for the sovereign to manage other than the consciences of its nationals".

level and have thereby increased the significance, scope and content of international law. As Brierly noted in relation to the past relative weakness of international law,[25]

> The restricted range of international law is merely the counterpart of the wide freedom of independent action which states claim in virtue of their sovereignty...Law will never play a really effective part in international relations until it can annex to its own sphere some of the matters which at present lie within the "domestic jurisdiction" of the several states...

Applying Brierly's terminology, progressive economic integration has lead to a situation where the international level is "annexing to its own sphere" ever more substantive trade-related sectors. This phenomenon both permits and demands the creation of a more robust international framework of precise and detailed legal rules to regulate and coordinate the interaction of states in these areas. Economic interdependence has brought the recognition that states are no longer able to achieve their domestic policy objectives without designing and participating in legal frameworks for international cooperation. States have recognized the utility of developing mechanisms for coordination and cooperation among themselves. They have acknowledged the necessity to establish international organizations to create, apply, monitor and enforce the implementation and application of these rules and to foster common approaches in these areas.[26] Interdependence has therefore led to a proliferation of international treaties, and to varying degrees of institutionalization and supranational legal authority in international law.

---

[25] J.L. Brierly, *The Law of Nations*, sixth edition (London: Waldock, 1963) at 73-74.

[26] *E.g.* P. van Dijk (ed.), *Supervisory Mechanisms in International Economic Organizations* (Deventer: Kluwer, 1984) at 779.

The classical paradigm of international law, with its dual tenets of state sovereignty and *domaine reservé*, is inadequate in the face of these developments. [27] In order better to accommodate the economic interdependence of states, the erosion of the legal and regulatory capacity of the state in the contemporary international legal order, and the increase in the possibilities of institutionalization, there have been recent attempts to reconceptualize and redefine the concept of sovereignty in international law, and to construct a new theoretical framework with which to analyze current developments in the international legal system.[28] Even the distinction between "international" and "domestic" law is disappearing as the international legal order undergoes a transformation. This analytical re-orientation is most apparent in the developing doctrine of international economic law.

---

[27]See J. Trachtman, "L'État, C'est Nous: Sovereignty, Economic Integration and Subsidiarity" (1992) 33 *Harvard Int'l L. J.* 459 at 461. Also see Gross, *op. cit.*, note 12 at 40 (arguing that the Westphalian system of international law, characterized by "rugged individualism of territorial and heterogeneous states, balance of power, equality of states and toleration...ill accommodates itself to the international rule of law reenforced by necessary institutions").

[28]Henkin, *op. cit.*, note 12 at 352 (suggesting "it is time to bring sovereignty down to earth, cut it down to size, discard its overblown rhetoric; to examine, analyse, reconceive the concept and break out its normative content; to repackage it, even rename it, and slowly ease the term out of polite language in international relations, particularly in law").

B. The Changing Legal Framework: The International Economic Law "Revolution"

International economic law has both substantive content [29] and institutional aspects. While some authors have classified international economic law as "a curious and ultimately inconsequential byway,"[30] recent scholarly literature has, by contrast, observed the occurrence of an international economic law "revolution".[31] The "revolutionary" aspect of international economic law emerges from the consistent doctrinal emphasis among certain international economic law scholars on the need to reconceptualize the basic Westphalian precepts of state sovereignty and the *domaine reservé* in light of interdependence and institutionalization in the international legal order.[32] International economic law provides the vehicle for just such a reconceptualization.[33] It furnishes the

---

[29] The fundamental substantive norms of international economic law include: the most-favoured-nation principle, minimum standards, an obligation to refrain from injuring others, safeguards, escape clauses, and preferential treatment for developing countries. See *e.g.* *Encyclopaedia of International Law* (Amsterdam: North-Holland/Elsevier, 1995). G. Schwarzenberger, "The principles and standards of international economic law" (1966-I) 117 *Recueil des Cours* 1 at 66*ff* refers to these as "standards of international economic law". See also S. Zamora, "Is There Customary International Economic Law"(1989) 32 *German Yearbook of Int'l L.* 9.

[30] D. K. Tarullo, "Logic, Myth and International Economic Order" (1985) 26 *Harvard Int'l L .J.* .533 at 535: "Far from being a route to the millennium, international economic law often seems at most a curious and ultimately inconsequential byway."

[31] J. Trachtman, "The International Economic Law Revolution" (1996) 17 *U. Pa J. Int'l Eco. L.* 33.

[32] *E.g.* E.-U. Petersmann, "International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order" in R. St. J. MacDonald & D. Johnston (eds.), *The Structure and Process of International Law* (The Hague:Martinus Nijhoff, 1983) 227 at 227*ff*.

[33] Trachtman, *op. cit.*, note 31 at 33 (arguing that international economic law is the "leading engine for revising the domaine reservé of traditional public international law, the unquestioned

(continued...)

basis for a new era of constitutionalization in international law.[34] As interdependence intensifies, there is a growing need to create international legal rules governing state economic interaction to facilitate cooperation, and a need to adapt, monitor and enforce the application of these rules through international organizations. International economic law provides the foundation for the establishment or reform of international institutions to govern relations among states[35] and for a new perspective concerning the allocation of decision-making authority and responsibility among states and international institutions. International economic law unlocks new possibilities concerning the structure and competence of international organizations, in particular in their mechanisms for decision-making and rule-creation, and for supervision through surveillance and enforcement of compliance with the rules of the organization.

In international economic law, in particular, the concept of sovereignty is being redefined to mean "decision-making authority" and responsibility. As such, sovereignty is not a finite concept reserved exclusively and absolutely to the state. Rather, it is a fungible and flexible quality that can be transferred and reallocated as most

---

(...continued)
margin of deference left to states").

[34] *Ibid.*

[35] S. Voitovich, *International Economic Organizations in the International Economic Process* (Dordrecht:Martinus Nijhoff, 1995)at 2 (observing that international economic law is the most institutionalized sphere of international life).

appropriate among different strata of government and decision-making bodies.[36] Specifically, in establishing and determining the powers to be exercised by an international organization, states may opt to design the constitutional order of the organization so as to allocate sovereign authority in certain areas as most appropriate between them and the organization. Thus, "[s]overeignty, viewed as an allocation of power and responsibility, is never lost, but only reallocated".[37] When a state's sovereignty is reduced, "the important question raised is where the sovereignty goes".[38] The transferral of sovereign authority from the state to the international level can be viewed as a cost-benefit analysis between the degree of local autonomy foregone and the prosperity and measure of influence over other states' actions obtained.[39]

This view is not without its detractors. For example, Seidl-Hohenveldern has argued that states retain their ability to legislate under their domestic constitutions even in those areas within the competence of international organizations, and that the vacuum created where a state opts to refrain from using this legislative ability is filled

---

[36] In this way, Jackson argues that sovereignty can be considered a corollory of subsidiarity. See J. Jackson, *op. cit.*, note 5; J. Jackson, "International Economic Law: The "Boilerroom" of International Relations" (Winter 1995) 10 *Am. U. J. Law & Pol* 595. Also see J. Delors, "The Future of Free Trade in Europe and the World" (1995) 18 *Fordham Int'l L. J.* 715 at 724 (arguing that a form of worldwide subsidiarity is emerging).

[37] J. Trachtman, "Reflections on the Nature of the State: Sovereignty, Power and Responsibility" (1994) 20 *Canada - U.S. L.J.* 399 at 400.

[38] *Ibid.*

[39] Trachtman, *op. cit.*, note 27 at 465, 467.

by the international organization exercising its own legislative power.[40] Other writers caution that, while such a transfer of sovereign authority may be possible, in practice it rarely occurs. For instance, VerLoren van Themaat has acknowledged that although some tempering of principles of sovereignty and equality had been observed in the literature in order to make international organizations more effective, "the central core of the sovereignty principle is more than a dogma, it is a principle which expresses a social fact which cannot be changed solely by rules of law".[41] Others[42] note that, in principle, it is precisely as a result of their sovereignty that states enjoy the complete freedom to transfer their powers to a supranational institution, but that, in practice, states are inclined not to transfer powers on international organizations without retaining decisive influence.

This thesis is premised on the view that sovereignty is a quality that can be allocated among states and international organizations. To the extent that sovereign authority is ceded by the state, it can be transferred to --and pooled at -- the international level to reside in an international organization. The legal authority of an international organization will depend upon nature and extent of the sovereign powers transferred to it, the context in which the transfer occurs, and the degree of bindingness and irrevocability

---

[40] I. Seidl-Hohenveldern, *International Economic Law*, 2nd ed. (Dordrecht: Martinus Nijhoff, 1992) 25.

[41] P. VerLoren van Themaat, *The Changing Structure of International Economic Law* (The Hague: Martinus Nijhoff, 1981) at 29-30.

[42] *E.g.* G.J.H. Van Hoof & K. De Vey Mestdagh, "Supervisory Mechanisms in International Economic Organizations" in P. van Dijk (ed.), *Supervisory Mechanisms in International Economic Organizations* (Deventer: Kluwer, 1984) .

of the transfer. The more binding and irreversible the transfer, the less dependent the organization is on the will of individual states and the more supranational legal authority resides in the organization. Taking the doctrinal observations and objections outlined above into account, in examining the legal and institutional aspects of the WTO as an international organization, the essential issues to be examined are the nature and scope of the sovereign authority that WTO Members have transferred to the WTO, the legal and institutional context of the transfer (*i.e.* whether it occurs in the design of the legal order or institutional framework, in decision-making rules, or in the supervisory mechanisms), and the extent to which this transfer is legally binding and irreversible.

C. The Theoretical Framework of International Economic Law

Whereas classical public international law was based on the sovereignty, equality and independence of states, contemporary international economic law is premised on interdependence.[43]

Several doctrinal milestones punctuate the re-orientation of international law and the emergence and development of international economic law. In 1956, Jessup observed that international law was not limited to the regulation of relations among states.

---

[43]This is a more recent doctrinal perspective. See *e.g.* M. Montana i Mora, "A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes" (1993) 31 *Columbia J. Transnat'l L.* 103. For a different and earlier view, see Schwarzenberger, *op. cit.*, note 29 at 1 (arguing that, while emphasis on economic interdependence was in fashion, economic sovereignty was the starting point for international economic law).

He coined the phrase "transnational law" to subsume "all law which regulates actions or events that transcend national frontiers".[44] In the 1960's, Friedmann posited that prevailing views on the reality of international law were inadequate and argued that a new type of "international law of cooperation" with different principles, rules and institutions was developing to replace the traditional "international law of co-existence". In this new type of cooperative international law, the concept of sanction was de-emphasized. The effectiveness of international law was predominantly predicated on the privilege of participation in joint endeavours serving the common interests of mankind.[45] This willingness of states to cooperate in the common interest and the shift from the regulation of the co-existence of states to the development of principles and methods of cooperation found one form of expression in the developing network of international organizations. The community of interest underlying the developing cooperative international law radically affected the dimensions and objectives of state self-interest, thereby requiring a reconceptualization of the science of international law. While Friedmann's work[46] only devoted a few pages to international economic law, it lay the conceptual foundations for the many later developments in international economic law doctrine.[47]

---

[44]P. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) at 2.

[45]W. Friedmann, "National Sovereignty, International Cooperation, and the Reality of International Law" (1963) 10 *U.C.L.A. L. Rev.* 739 at 740-41 and *The Changing Structure of International Law* (New York: Columbia University Press, 1964).

[46]Friedmann, *Id.* (1964). See in particular pages 176-181, 317-324.

[47]See, for example, E.-U. Petersmann, "Constitutional Functions of Public International Economic Law" in P. van Dijk (ed.), *Restructuring the International Economic Order: The Role of Law and Lawyers* (Deventer: Kluwer, 1987) at 49.

There is no standard or generally accepted theoretical framework for international economic law. However, in the recent surge of relevant literature,[48] numerous scholars have attempted to provide a legal framework for the international economic system and to set out the content and direction of international economic law. As early as 1948, Schwarzenberger[49] advocated the recognition of "a special branch of law" concerning international economic relations. Yet, in 1992, Hudec could still bemoan the paucity of analytical literature in the area and the lack of a general theory of public international economic law, noting that the state of normative and institutional development in this area is "very primitive, at best", with a booming international economy being only poorly served by public law that was failing to keep pace.[50]

Recent literature in the field of international economic law challenges the definitive distinction made in classical international law between public law and private law, and international law and domestic law. The more recent writers on international economic law tend to move away from these distinctions and see international economic

---

[48] D. Kennedy, "The International Style in Postwar Law and Diplomacy: John Jackson and the Field of International Economic Law" (1995) 10 *Am. U. J. Int'l L & Pol.* 671 at 671(observing "a new stream of international legal scholarship" dealing with international economic law. Kennedy credits Professor Jackson with having 'largely invented it'). Also see Paul, *op. cit.*, note 24; and K. Abbott, "International Economic Law: Implications for Scholarship" (1996) 17 *U. Pa. J. Int'l. Econ. L.* 505. Abbott argues that the recent surge in international economic law scholarship is not due to any fundamental change in the law or in the rules and institutions affecting international economic activity, but rather to internal changes in scholarly perception.

[49] G. Schwarzenberger, "The Province and Standards of International Economic Law" (1948) 2 *International Law* 401 at 405.

[50] R. Hudec, "Public International Economic Law: The Academy Must Invest" (1992) 1 *Minnesota J. Global Trade* 5 at 6-8.

law as an integrator of these multiple strands of law. The debate about the nature of international economic law therefore focuses on the issue of whether international economic law is part of public international law, is at the crossroads of public and private international law, or is a distinct strain of legal theory -- set off from the general international law discipline -- which merges public and private, international and domestic law.

Some scholars argue that a distinct international economic law does not exist.[51] Others have analysed international economic law as part of public international law, focusing primarily upon international commercial regulation at the state-to-state level. Proponents of this limited view include Schwarzenberger;[52] and Carreau, Juillard and Flory.[53] Seidl-Hohenveldern[54] similarly takes the more limited view of international economic law as an integral part of, and limited to, public international law. He argues that international economic law is so grounded in public international law that the latter would be crippled by any doctrinal separation. In his seminal 1981 study, VerLoren van

---

[51] See P. Weil, "Le Droit International en Quête de Son Identité (1992-VI) 237 *Recueil des Cours* 1 90-93.

[52] Schwarzenberger, *op. cit.*, note 29 at 7-1 defined international economic law as a branch of international law concerned with the public international law aspects of "(1) the ownership and exploitation of natural resources; (2) the production and distribution of goods; (3) invisible international transactions of an economic or financial character; (4) currency and finance; (5) related services and (6) the status and organization of those engaged in such activities".

[53] D. Carreau, T. Flory and F. Juillard, *Droit International Economique*, 3rd ed. (Paris: LGDJ, 1990) at 43-86.

[54] Seidl-Hohenveldern, *op. cit.*, note 40 at 1.

Themaat[55] defines international economic law as "the range of norms (directly or indirectly based on treaties) of public international law with regard to transnational economic relations". While he acknowledges the broader integrative approach to international economic law, he concludes that analyzing norms from both national and international sources would hinder his study, as his main object was to look at transnational issues that required international or supranational norms.[56]

Other writers take a different tack, and do not limit their focus to the public international law aspects of international economic law. These scholars observe the legal interrelationship between private, national and international law. They therefore consider that international economic law embraces and integrates all aspects of the law of the international economy, including national law and public and private international law.

Two of the preeminent contemporary international economic law scholars, Jackson and Petersmann, espouse this view. For Jackson,[57] the phrase "international economic law" integrates public and private, domestic and international law.[58] It covers

---

[55] VerLoren van Themaat, *op. cit.*, note 41 at 9.

[56] *Id.* at 13.

[57] Jackson, *op. cit.*, note 32 at 596-597; Jackson, *op. cit.*, note 5; J. Jackson, "The Uruguay Round, the World Trade Organization and the Problem of Regulating International Economic Behaviour", Hyman Soloway Public Lecture on Business and Trade Law, Ottawa, 30 May 1994 at 2-3.

[58] Also see J. Jackson, *The World Trading System* (Cambridge: MIT Press, 1989) at 21-22:
(continued...)

a broad inventory of subjects, embracing: the law of economic transactions; government regulation of economic matters; and related legal relations, including litigation and international institutions for economic relations. At the same time, Jackson believes that international economic law cannot be separated from public international law and notes that mutually beneficial cross-fertilization has occurred between the two. Jackson's approach concentrates on the national and international legal and regulatory factors affecting trade and emphasizes the interrelationship between international law and national law, particularly national public law. Jackson notes that there is a strong interplay between national, especially constitutional, jurisprudence, and international law norms. For him, an understanding of this strong link between international law and national constitutional systems is essential to an understanding of developments in the international legal system. [59] Jackson emphasizes the constitutional aspect of regulation by government institutions, both national and international. His focus is not transactional law.[60]

According to Petersmann, international economic law is:

(...continued)
"An even less fortunate distinction of subject-matter is often made between international and domestic rules. This book will not indulge in that separation. In fact, domestic and international rules and legal institutions of economic affairs are inextricably intertwined. It is not possible to understand the real operation of either of these sets of rules in isolation from the other. The national rules (especially constitutional rules) have had enormous influence on the international institutions and rules. Likewise the reverse influence can be observed."

[59] J. Jackson, "National Constitutions, Transnational Economic Policy and International Economic Law: Some Summary Reflections" in M. Hilf & E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* (Deventer: Kluwer 1993) 569 at 570.

[60] Jackson, *op. cit*, note 5 at 596-597.

> ...a conglomerate of private law (including 'law merchant' and 'transnational commercial law'), state law (including 'conflict of laws') and public international law (including supranational integration law as in the EEC) with a bewildering array of multilateral and bilateral treaties, executive agreements, 'secondary law' enacted by international organizations, 'gentlemen's agreements', central bank arrangements, declarations of principles, resolutions, recommendations, customary law, general principles of law, de facto orders, parliamentary acts, governments decrees, judicial decisions, private contracts or commercial usages".[61]

Petersmann emphasizes the 'constitutional functions' of public international economic law, and its ability to strengthen and supplement the constitutional principles of national laws, and considers the limitations and constraints resulting from the decentralized legal structures of the international economic order.[62] He observes that international economic law has come of age and that there is no need for general international lawyers to neglect international economic law as an "immature specialization".[63]

Several other international legal theorists also espouse the broader view of international economic law as an instrument of legal integration. For example, Zamora views international law as an important subfield of international law, comprising a broad collection of laws and customary practices that govern economic relations between actors in different nations and including the examination of both law and policy issues on multiple

---

[61] Petersmann, *op. cit.*, note 32 at 251.

[62] Petersmann, *op. cit.*, note 47 at 70.

[63] E.-U. Petersmann, "Constitutionalism and International Organizations" (1997) 17 *Northwestern J. Int'l Law and Bus.* 398.

levels, including private law, local law, national law and international law. [64] Paul [65] believes that international economic law includes all national and international legal norms that affect transnational movements of goods, services, capital and labour. For Trachtman, international economic law simply refers to a type of "public"international law with economic goals, providing a new or expanded legislative field for public international law to address. However, Trachtman redefines the world "public" to subsume and integrate private international law. He describes the role of international economic law as the central forum for mediating between national, international, public and private law. Trachtman also notes the necessity for a reevaluation of the very term "international law", as both states and individuals now constitute its subjects.[66]

This thesis follows the approach of Jackson, Petersmann and others in agreeing that the broader conception of international economic law -- as a composite of international, national, public and private law -- more accurately reflects the current legal regulation of international trade. It is not possible to analyse the allocation of sovereign authority among different levels of governance without acknowledging the multiple strata

---

[64] S. Zamora, "Introduction: International Economic Law" (1996) 17 *U. Pa. J. Int'l. Econ. L.* 63.

[65] Paul, *op. cit.*, note 24 at 609 (note 9).

[66] Trachtman, *op. cit.*, note 27 at 33. Also see H. Berman, "World Law" (1995) 18 *Fordham Int'l L. J.* 1617 at 1617-1619 (suggesting that the term "world law" will replace "international law"and "transnational law". "World law" could be the "law of the world economy" with constituent states and economic enterprises, as "[w]e live not only in an "international" economy but also in a "world" of interdependent domestic economies").

of legal regulation of international trade. However, this thesis also follows Jackson and Seidl-Hohenveldern concerning the inseparability of international economic law and public international law. It espouses the view that the public international law aspect of international economic law occupies a critical subfield of public international law. On this basis, this thesis takes the approach adopted by VerLoren Van Themaat, that it is necessary to limit the study to public international law concepts of international economic organization and international economic law. It therefore concentrates on the regulation of international trade at the state-to-state level by focussing on the international treaty norms contained in the *WTO Agreement*.

The focus in this thesis is upon the allocation of decision-making power and authority between WTO Members and the WTO, and the manner in which the legal and institutional arrangements for rule-creation, rule-application, surveillance and rule-enforcement set out in the *WTO Agreement* accomplish this allocation. It examines the extent to which the legal and institutional arrangements in the *WTO Agreement* constitute a transfer of decision-making authority to the organization and a consequent loss of international legal autonomy for WTO Members. It requires consideration of international treaty norms, and their impact upon the autonomy of Members of the WTO. As it concentrates on the "constitutional" aspects of the multilateral trading system, it leaves untouched the more specific "transactional" elements of international economic law. While it is limited to "public international" economic law, however, it recognizes that much of the subject-matter regulated by the *WTO Agreement* profoundly affects the activities

of private individuals and decision-makers within the domestic orders of WTO Members. It also recognizes that national legal systems play an integral part in the application of the *WTO Agreement*. At the most fundamental level, it is necessary in most cases for Members to implement the Agreement into their domestic legal systems in order for it to have legal force in those systems. In addition, it is national measures that are the subject of multilateral surveillance in the TPRM, and of international surveillance and enforcement procedures through the WTO dispute settlement mechanism.

D. Theoretical Functions of International Economic Law

Doctrine ascribes two principal functions to international economic law and international economic organization.[67] The first, more traditional and widely accepted function, is an international one, external to the state. Espoused by writers such as Jackson, this approach views the primary function of international economic law and international economic organizations as the regulation of the economic relations among states.[68] The second approach is to view the function of international economic law and international economic organizations as internal to the state, an extension of the domestic political and

---

[67] See *e.g.* N. Blokker, *International Regulation of World Trade in Textiles* (Dordrecht: Martinus Nijhoff, 1989), Chap. 1.

[68] Jackson, *op.* cit., note 6 at 9; R. Hudec, *Enforcing International Trade Law: The Evolution of the GATT Legal System* (Salem, N.H.: Butterworths, 1993). Hudec (at 359) also acknowledges the internal role played by international law and organizations. To his mind, international legal institutions increase the domestic strength of domestic political allies and thus play a role in domestic systems.

constitutional order. This approach views international agreements as strengthening governments in their dealings with domestic pressure groups. Several writers espouse this second approach. For Tumlir, the constraints on government action embodied in GATT are a "second line of national constitutional entrenchment".[69] While Petersmann acknowledges the external function of international economic law, he views international economic law and organization as a vehicle to anchor national laws to an international "mast" and thereby provide better resistance against selfish protectionist pressures from domestic sectional interest groups. In his estimation, GATT/WTO law is an international extension of constitutional principles of democratic societies and an added guarantee for the protection of the constitutional rights of individuals.[70] Roessler similarly emphasizes the domestic constitutional functions of international economic law and organization, arguing that the essential function of the law of the GATT is to resolve conflicts of interest within, not between, nations. Roessler posits that international economic law should be regarded as part of the domestic constitutional framework for trade-policy-making.[71]

While recognizing that the second, internal function, is an important aspect of international economic law and international economic organizations, this thesis follows

---

[69] J. Tumlir, "International Order and the Decline of Multilateralism". Address to the Australian Economics Society, Canberra, March 1983.

[70] Petersmann, *op. cit.*, note 32; Petersmann, *op. cit.*, note 63.

[71] F. Roessler, "The Constitutional Function of the Multilateral Trade Order" in M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* (Deventer: Kluwer, 1993) 53.

the first approach. It views the primary purpose of international economic law and international economic organization as regulating the interaction of states in the international legal order.

This thesis espouses this view of the primary function of international economic law because the state is not yet completely disappearing in the legal order of the international economy. While state economic sovereignty and jurisdiction are being eroded by interdependence, and have become almost meaningless for an isolated state, the state itself remains the basic premise and the fundamental unit in international law. It is still the primary political unit for organization and governance. Although some international legal norms are now directly applicable to the individual, and the individual may derive certain rights and duties from international law, the overwhelming majority of norms in international law remain binding solely upon states. In most cases, it remains necessary for states to implement international treaty obligations into their domestic legal order in order to make the norms applicable to domestic citizens. It is states that conclude international treaties, establish international organizations, determine their legal and institutional infrastructure, and determine the nature and scope of the powers to be wielded by the organization. Under the *WTO Agreement*, international trade is still regulated predominantly at the state-to-state level, although individuals have direct access to some WTO legal processes.[72]

---

[72] For example, Article 4 of the *Agreement on Preshipment Inspection* provides a procedure for the settlement of disputes between private parties.

E. International Economic Organizations and International Institutional Law

I. General

The basis of the legal order of an international organization is its constitutive treaty, which establishes the legal authority, functions, and competence of the organization and the fundamental rights and obligations of its Member states. International legal scholars acknowledged the significance of the legal and institutional element of international organization at an early stage.[73] Particularly in the sphere of international economic law, the legal and institutional design and constitutional role of international organizations has been recognized as a critical element for the functioning and legitimacy of the substantive legal rules which they administer and enforce.[74] A primary focus in the

---

[73] See L. Sohn. "The Growth of the Science of International Organizations" in K. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law: Essays in Honour of Leo Gross* (Cambridge, Mass.: Schenkman Publishing Co, 1968) 251 at 251 (arguing that "[t]he science of international organizations is a branch of political science which contains a strong, constantly increasing, element of constitutional law"). Significant early postwar contributions included: C. Jenks: "Some constitutional problems of International Organizations" (1945) 22 *British Yearbook of Int'l L.* 11; I. Seidl-Hohenveldern "Das Recht der Internationalen Organisationenen einschliesslich der supranationalen Gemeinschaften (Cologne, 1967); D. Bowett, "The Law of International Institutions"(London, 1963) at 273-340. G. Alexandrowicz presented early theoretical legal analysis of substantive and institutional aspects of international economic organizations: Alexandrowicz, *World Economic Agencies: Law and Practice* (London: Stevens, 1962).

[74] P. van Dijk (ed.), *op. cit.*, note 26 at xiii; Jackson, *op. cit.*, note 6 at 788; J. Jackson, "The Crumbling Institutions of the Liberal Trade System" (1978) 12 *J. of World Trade L.* 93 at 101. Jackson states: "with so many pressing substantive issues that are more readily understood by political interests back home, governments tend to downplay the importance of the more remotely related procedural questions such as dispute settlement". See also J Jackson, "The Role of Supervisory Mechanisms in the Restructuring of the International Economic Order" in P. van Dijk et al. (eds.), *Restructuring the International Economic Order: The Role of Law and Lawyers* (Deventer: Kluwer, 1987); Jackson (1990), *op. cit.*, note 17.

literature on international institutional law is the relationship among member states, and between member states and the organization. There is a consistent emphasis on the basic tension between the external "sovereignty", or international legal autonomy, of the state, and the role and function of international organizations.[75]

International organizations are established only through the will of states, and their legal capacity and authority are dictated by the legal arrangements that states put in place to permit them to execute their functions.[76] States provide international organizations with the institutional mechanisms to achieve their mandate.[77] For their establishment and institutional design, international organizations remain largely dependent upon the will of states.[78] Therefore, although the economic sovereignty and jurisdiction of the state are eroding, the state still remains a critical element in the study of the scope and nature of legal authority wielded by an international organization.

In addition to the fundamental legal order and institutional framework of the organization, there are two particular areas in which states may allocate their sovereign authority to an international organization in order to administer, enforce and develop the

---

[75] H. G. Schermers and N. Blokker, *International Institutional Law*, 3rd ed. (The Hague: Martinus Nijhoff, 1995) at 2-3.

[76] D. Vignes, "The Impact of International Organizations on the Development and Application of Public international Law" in R. St. J. MacDonald and D. Johnston (eds.), *The Structure and Process of International Law* (The Hague: Martinus Nijhoff, 1983) 809 at 832.

[77] Schermers and Blokker, *op. cit.*, note 75 at 1186.

[78] Vignes, *op. cit.*, note 76 at 834.

legal framework that they have established to coordinate their interaction. These are: first, the rules concerning rule-creation and decision-making by, or within, the organization; and second, the mechanisms for supervision, involving the surveillance and enforcement (and, potentially, the development) of the international legal rules administered by the organization. One of the most significant forms that such international supervision may take is dispute settlement, the adjudication of complaints that arise among member states of an organization concerning their rights and obligations under the relevant legal instruments.

Depending upon the degree of autonomy retained by the member states, an international organization may be considered "supranational" or "intergovernmental" in terms of its decision-making and supervisory functions.[79] In an intergovernmental organization, decision-making powers are exercised by representatives of state governments. In important matters, there is generally a requirement of unanimity in decision-making. This means that a state cannot be bound by a decision of the organization without its consent. On the other hand, a supranational organization enjoys several basic[80] decision-making and institutional characteristics: (i) the organization has the power to take decisions binding on the member states; (ii) the decision-making organs of the organization are not entirely dependent on the cooperation of all member states, allowing for some or all

---

[79]Schermers and Blokker, *op. cit.*, note 75 at 39-42.

[80]Schermers and Blokker, *Id.*, at 41-42 add two additional characteristics of a supranational organization: (i) the organization has some financial autonomy; and (ii) unilateral withdrawal from the organization by a member state is not possible.

decisions to be taken by majority, rather than unanimous, voting; (iii) the organization has the power to make rules that are directly binding upon citizens of member states; and (iv) the organization has the power to enforce its decisions. This categorization is not rigid, but rather one of degree. The term "supranational" can thus be used in relative sense. The closer these conditions are to being fulfilled, the more supranational the organization will be, although all intergovernmental organizations have some supranational aspects.

II. Decision-making in International Organizations

The competence to legislate gives authority to create, modify and develop the basic legal rules of an international organization. It involves the ability to affect the legal rights and obligations of member states by creating new or amended international legal norms. Decision-making rules in international organizations are a prime indicator of the relationship between the members and the organization, and of the scope and nature of sovereign authority member states have transferred to, and pooled in, the international organization.

A primary focus in the literature on the decision-making rules of international organizations concentrates on voting structure and procedures. The fundamental issue is whether decisions must be taken by unanimous vote, require a consensus of the members, or whether at least some decisions may be taken by majority vote. This inquiry finds its roots in the traditional international law concept of state sovereignty and in the strict

positivist precept that international law was based on the consent of states so that no state could be bound against its will by an international legal rule or decision.

It is representatives of state governments that are charged with decision-making in the organization's legislative bodies. This fact alone raises the potential for states to retain significant influence in the decision-making process. Coupled with a requirement of unanimity in voting, or the requirement of the attainment of consensus for taking decisions, it assures the continued pre-eminence of states in the functioning of an international organization.[81] Unanimity requires the consent of each state. Consensus is a compromise approach that safeguards state sovereignty while taking into account the decision-making preferences of the majority of states.[82] Consensus decision-making is a more pro-active process that involves a negotiating process aimed at eliminating controversial points in order to bring about agreement.[83] Both unanimity and consensus ensure that states retain their decision-making authority and international legal autonomy. By contrast, majority voting signals a capacity for the organization to take certain actions without the specific approval of all of its constituent member states. This connotes a

---

[81] Vignes, *op. cit.*, note 76 at 834.

[82] Schermers and Blokker, *op. cit.*, note 75 at 515.

[83] K. Zemanek, "Majority Rule and Consensus Technique in Law-making Diplomacy" in R. St. J. MacDonald and D. Johnston (eds.), *The Structure and Process of International Law* (The Hague: Martinus Nijhoff, 1983) 857 at 863. Also see C.W. Jenks, "Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations" in R. Jennings (ed.), *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Cambridge: Cambridge University Press, 1965) 48 at 62; and M. Footer, "The Role of Consensus in GATT/WTO Decision-Making" (1997) 17 *Northwestern J. Int'l Law and Bus.* 653.

transferral of decision-making authority from the state to the international organization, and a diminished degree of autonomy for member states. With majority voting, a state may be bound by a decision of the organization which it did not expressly approve. Because it does not require the express assent of each state, majority voting enhances the decision-making efficiency of an organization. As long as they represent the requisite majority, those states desiring to develop or alter their legal rights and obligations, or to proceed with a specific course of action, can ensure the adoption of the enabling decision.

Because majority voting presents the risk of alienating minorities that might include politically powerful states, the majority decision-making approach has traditionally been considered to have its limitations in the international sphere. It functions best where common values and interests exist, a phenomenon which has traditionally been lacking in the international community.[84] There is also a perception in the literature that consensus decision-making enhances the effectiveness of international declarations or resolutions,[85] as it accommodates the interests of, and ensures the support (or at least non-opposition) of, all member states. This enhances prospects for subsequent implementation and compliance.

Another basic inquiry in decision-making literature is whether each state has one vote in the decision-making arrangements of an organization, or whether the rules

---

[84]Schermers and Blokker, *op. cit.*, note 75 at 870.

[85]Zemanek, *op. cit.*, note 83 at 878.

call for weighted voting. The one-vote-per-country concept is based on the fundamental notion of sovereign equality among states in the international legal order.[86] The alternative decision-making methodology of weighted voting contemplates the equitable adjustment of decision-making power to accommodate differences in economic or political might, proportion of financial contribution to the organization, size of population, or other circumstance, although the criteria on which to base the allocation of different weights can be problematic.[87]

III. Supervisory Mechanisms in International Organizations

The legal obligations contained in the constitutive treaty of an international organization are only effective to the extent that they can be applied, protected and enforced. The fact that the rules exist does not, alone, ensure their effectiveness.[88]

---

[86] R. Klein, *Sovereign Equality Among States* (Toronto: University of Toronto Press, 1974) at 148-149.

[87] Schermers and Blokker, *op. cit.*, note 75 at 520.

[88] Jackson, *op. cit.*, note 21 at 52. See also J. Jackson "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT (1979) 13 *J. World Trade L.* 1 at 4: "The mere existence of the rules, however, is not enough. When the issue is the application or interpretation of those rules (as compared with the formulation of new rules), it is necessary for the parties to believe that if their negotiations reach an impasse the settlement mechanisms which take over for the parties will be designed to fairly apply the rules. If no such system exists, then the parties are left basically to rely upon their respective "power positions", tempered (it is hoped) by the good will and good faith of the more powerful party (cognizant of his long range interests)."

By undertaking to be bound by the norms contained in the constitutive legal instruments of an international organization, states commit themselves to observe certain behaviour. Observance of the basic legal norms of an international organization is crucial to promote the effective functioning of the organization, and thus to achieve the objectives for which states initially opted to establish the organization. Pursuant to the international legal principle of *pacta sunt servanda*, states are under a general legal obligation to respect their treaty obligations and to fulfill them in good faith. [89] However, this basic principle is often not adequate to ensure compliance by states with their international treaty obligations. The institutionalization that has arisen from progressive international economic interdependence has also brought recognition of the need for effective supervisory mechanisms to monitor and enforce compliance by states with their international legal obligations. An important function of international organizations is, therefore, to supplement the general legal obligation of *pacta sunt servanda* through mechanisms to supervise and review state conduct and ensure that states are complying with their international legal obligations.[90]

---

[89] The legal principle of *pacta sunt servanda* is codified in Article 26 of the *Vienna Convention on the Law of Treaties* (1969) 1155 *U.N.T.S.* 331, 8 *I.L.M.* 679 and is a generally accepted principle of customary international law. The International Court of Justice has ruled that the principle is based on good faith: *Nuclear Test Cases*, [1974] I.C.J. Rep. 268, para. 46; 473, para. 49. See generally J. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991).

[90] I. Seidl-Hohenveldern, "Failure of Controls in the Sixth International Tin Agreement" in N. Blokker and S. Mueller (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers*, Vol. I (Dordrecht: Martinus Nijhoff, 1994) 255 at 255 calls this "the raison d'etre of any international organization".

It has been argued that supervision and state sovereignty (in its traditional sense) are to some extent irreconcilable. Supervision implies the existence of a higher authority, while state sovereignty embodies that highest authority. [91] Interdependence has forced states to accept encroachments on their sovereignty, in the form of surveillance over the observance of their legal obligations and of the possibility of sanctions in the event of non-compliance. Thus, "...interdependence is the bridge between supervision and sovereignty. It is the magic word that reconciles these two seemingly irreconcilable concepts..." [92]

The nature of the supervisory mechanism(s) of an international organization will be dictated by the organization's institutional and legal structure and objectives, the legal instruments it has at its disposal, and by the nature of the substantive and procedural legal obligations which it has been designed to monitor and/or enforce. In turn, the nature and scope of the supervisory mechanism of an international organization will have an immense impact upon the autonomy or sovereignty of the member states.

International supervisory mechanisms are therefore a defining factor for the relationship between the member states and the international organization. They are

---

[91] N. Blokker and S. Mueller, "Towards more Effective Supervision by International Organizations: Some Concluding Observations" in N. Blokker and S. Mueller (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers*, Volume I (Dordrecht: Martinus Nijhoff, 1994) 275 at 309.

[92] *Id.*, at 310.

a prime area for member states to delegate rule-creation and decision-making authority to, and to pool this authority in, an international organization.[93] Indeed, they represent the focal point of the balance between the supranational legal authority of the organization and the international legal autonomy retained by the member states of the international organization. In international economic organizations such as the WTO, supervisory mechanisms are an embodiment of the potential of international economic law. [94] They are also an illustration of, and are hostage to, the particular problems associated with surveillance, adjudication and enforcement in international economic law.

The international legal system labours under the disadvantage of lacking an overarching "world court" with a comprehensive and compulsory mandate to provide relief for the violation of international obligations. In the absence of a universal international adjudicative mechanism to monitor compliance with, and enforcement of, the legal norms of an organization, the authority for supervision and enforcement to ensure that states are complying with their obligations will generally be demarcated by the constitutive treaty of the particular organization.

---

[93] See *e.g.* van Hoof & De Vey Mestdagh, *op. cit.*, note 42 at 5: "Although the sovereign states are still the highest authorities, they have delegated an increasing number of functions to international institutions, including parts of their supervisory functions. Accordingly, international supervision has gained in importance and has acquired a much more diverse and complex character".

[94] See J. Waincymer, "Revitalizing GATT Article XXIII – Issues in the Context of the Uruguay Round" (1989) 12 *World Competition* 5 at 7.

Supervision in an international organization may serve a range of functions and may take a variety of forms. These functions and forms are discussed below.

a. Functions of International Supervision

From a legal perspective, international supervisory mechanisms serve three principal functions: a review function, a corrective function and a creative function.[95] The review function lies in assessing the consistency of a national policy or measure with an international legal norm, that is in the "process of judging whether the behaviour of states conforms to a rule of international law".[96] The corrective function lies in recommending changes in a national policy when a review exposes inconsistencies between it and an international rule. Its object is to ensure compliance with international legal obligations through external persuasion or pressure.[97] The creative function "consists of the clarification and elaboration of existing rules in order to make them sufficiently specific to be applied in a concrete case".[98] It therefore contemplates the creation of supplemental interpretations for the general legal rules contained in the constitutive instruments of the organization. The creative function has a strong link to the review function, as international rules must be interpreted before the consistency of a Member's

---

[95] van Hoof and De Vey Mestdagh , *op. cit.*, note 42 at 11.

[96] *Id.*, at 35-36, 720.

[97] *Id.*, at 37, 733.

[98] *Id.*, at 38, 747.

policies with these rules can be assessed.[99] Depending upon the specific legal arrangements governing the supervision within the organization, the same institutional supervisory mechanism may fulfil all three of these functions to varying degrees.[100]

A distinction may be drawn between two different kinds of supervision: general and specific.[101] Whereas specific supervision is triggered by the emergence or existence of certain facts that are alleged to be inconsistent with a state's international legal obligations, general supervision occurs on a periodic basis, independent of any particular set of prevailing facts or circumstances.

b. Nature of International Supervision: Legalism vs. Pragmatism

Supervisory authority in an international organization may rest either with the member states, with the organization itself, or it may be a blend of these two options. It may consist merely of an obligation for states to notify the organization and the other member states of measures that have been (or will be) implemented. It could consist of regular monitoring of compliance by the organization, which may or may not be accompanied by an ability on the part of the organization to identify inconsistent state

---

[99] *Id.* at 12.

[100] See Jackson, *op. cit.*, note 74 (1987) at 164; and P. Mavroidis, "Surveillance Schemes: The GATT's New Trade Policy Review Mechanism" (1992) *Mich. J. Int'l. L.* 374 at 409.

[101] Van Hoof and De Vey Mestdagh, *op. cit.*, note 42 at 14.

conduct, or even to review and assess compliance of such conduct on its own initiative. The organization may enjoy the ability to challenge the conduct of member states before an adjudicative body. Supervision could also consist of adjudication by the organization of complaints of non-compliance by a member against another member. Member states and/or the organization may also be subject to other forms of scrutiny and challenge, such as the possibility for complaints by citizens of member states of the organization before their national courts, or before the international tribunal of the organization.

Supervision in international organizations can range from judicial ("rule-oriented" or "legalistic") to political ("power-oriented" or "pragmatic"). The debate over the nature, role and effectiveness of supervisory mechanisms in international organizations reflects larger concerns about the very nature of international law and legal obligation. Thus, "[t]o some, the answer to the world's problems is to be found in legal codes and international tribunals. To others, observing the disregard for legality which is a feature of most international crises, law at best plays a marginal role in world affairs, and at worst is a pious illusion."[102] This statement succinctly articulates the debate between the "pragmatist" and "legalist" approaches to the role of law and legal obligations in international organizations, and particularly in the supervision of international obligations by, and within, international organizations.

---

[102]J. Merrills, *International Dispute Settlement* (Cambridge: Grotius, 1991) at 236-237.

The power-oriented or pragmatic approach focuses on international institutions as fora for state interaction characterized by negotiation, conciliation and political accommodation. This approach envisages a general framework of basic rules allowing for flexibility, and lacking an effective supervisory mechanism for assessing compliance with, and enforcing , these rules. In power-oriented institutions, international legal obligations are flexible in nature, allowing for derogations and deviations. Surveillance and supervisory procedures are weak. Enforcement procedures are either non-existent or are imbued with political considerations so as to allow resort to discretionary state action, compromise and diplomatic solutions deviating from international legal obligations. Permitting state power to prevail due to the absence of effective and legally binding rules governing the conduct of member states, pragmatism has traditionally been founded upon entrenched state resistance to encroachment upon state sovereignty. Pragmatism favours the larger and more politically powerful members of an organization. It also permits the non-transparent conduct of trade policy by states, as the political manoeuvring and bargaining inherent in the pragmatist approach to international relations may not be comprehensible to the domestic citizenry of member states.[103]

On the other hand, a rule-oriented, or legalistic, international institution is based upon a legally binding constitution setting out clear and precise substantive obligations, enforced by a legalistic and impartial adjudication mechanism to assess rule-

---

[103] *E.g.* Jackson, *op. cit.*, note 74 (1978) at 100-101.

conformity and to enforce compliance with the rules. The relative political weight of the member states is not a paramount consideration. Political considerations are superseded by the focus on the application and enforcement of the legal obligations, which are equally binding upon, and enforceable against, all member states. The primary objective of a rule-oriented supervisory mechanism is the maximization of stability and predictability in the system. There are relatively stringent procedural disciplines governing the supervisory or adjudicative process, and it achieves relative uniformity and reasonable fairness in the interpretation and application of the legal rules of the organization. [104] Legalism promotes transparency in the administration of international trade policy, as citizens can understand the "rules of the game" and contribute to the formation of policy. [105] Legalism does not favour the larger or more politically powerful members. Rather, it serves the interests of all member states by maximizing legal predictability and certainty and assuring that all states are bound to the same extent by the same legal obligations. Because international treaties are the product of international negotiation, however, it is true that the more politically powerful states will exert more influence over the formation of the legal rules that will govern even a legalistic international organization.

Of course, an international organization may not be exclusively pragmatic or legalistic, but will probably manifest some features of both approaches. While supervision by international organizations has traditionally been pragmatic, there is an

---

[104] Van Dijk (ed.), *op. cit.*, note 26 at 777; Jackson, *op. cit.*, note 74 (1978) at 98-99.

[105] Jackson, *op. cit.*, note 74 (1978) at 100-101.

increasing trend towards legalism in international economic law and organization. [106] This increasing legalism has significant implications for the theoretical characterization of international economic law, and is the driving force of the international economic law "revolution". [107]

c. Legalism vs. Pragmatism in the GATT/WTO System

The pragmatist-legalist debate has been the main intellectual focus of those examining the role of law and legal obligations, including the nature of the supervisory mechanisms, in the GATT/WTO system. [108] This debate addresses both the legal nature of the rules contained in the *GATT 1947/WTO Agreement*, and the supervision and enforcement of these rules. At issue is both whether GATT/WTO law is sufficiently defined to provide an adequate foundation for supervision or adjudication, and if so, what is (and should be) the nature of this supervision or adjudication.

---

[106] *E.g.* E.-U. Petersmann, "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948" (1994) 31 *Common Market L. Rev.* 1157 at 1169: "As international relations are increasingly determined by economic relations, this change from power-oriented "diplomatic" to rule-oriented "legal" methods of dispute settlement can be seen as a new stage in the development of international law".

[107] Waincymer, *op. cit.*, note 94 at 7: "The question whether and to what extent international economic law is law as such...depends in no small part upon the viability of the dispute resolution process".

[108] Some commentators have difficulty with this analytical distinction. See, for example, Dam, *op. cit.*, note 6 at 4-5 (arguing that it is a "false antithesis" as both the legalistic and pragmatic approaches rest on a single faulty view of the law which overly stresses the significance of substantive rules to the detriment of the legal role played by process and procedures in the achievement of goals); Montana i Mora, *op. cit.*, note 43 at 109-110 (labelling the distinction a "somewhat artificial line"). However, for the most part, scholars espouse one of the two views.

Numerous writers support the pragmatic view that the principal function of *GATT 1947* (and now the *WTO Agreement*) was, and continues to be, to furnish a general framework of rules within which negotiation and political compromise can resolve any frictions or problems that arise. These pragmatists highlight the necessity of consensus for international organizations to operate effectively, and also stress the function of pragmatism and diplomacy within the legal system of an international organization. According to the pragmatic view, the role of law and international legal obligation is (and should be) tempered to accommodate divergent national commercial interests. A balance is perpetually sought between the application of legal rules and diplomatic compromise in order to preserve flexibility.[109]

Pragmatic commentators point out that the *GATT 1947* (and now the *WTO Agreement)* has provisions for exceptions to the basic legal principles of non-discrimination and reciprocity, and allows for the imposition of safeguards, anti-dumping and

---

[109]See , for example, P. Trimble, "International Trade and the 'Rule of Law'"(1985) 83 *Michigan L. Rev.* 1016 at 1017; O. Long, *Law and its Limitations in the GATT Multilateral Trade System* (Dordrecht: Martinus Nijhoff, 1985) at 7 (arguing that "[t]he place of law and its limitations in GATT reflect the coexistence of a multilateral legal order and national trade interests that are sometimes in conflict". At 107, Long argues that the *GATT 1947's* legal rules provided what the member countries expect from them: assurance of a reasonable degree of certainty in the conventional conditions under which international trade takes place, and transparency in the conduct by member countries of their trade relations. Also see T. Flory, *Le GATT - Droit International et Commerce Mondial* (Paris: LGDJ, 1968) at 27 (noting that the effectiveness of the *GATT 1947* was based in this permanent association of law and interests). Jackson, *op. cit.*,note 64 at 535-536 also notes that the relaxation of legal norms in an international agreement to accommodate certain developments is essential to preserve flexibility.

countervailing duty measures in certain circumstances,[110] and that waivers from obligations may be granted. For pragmatists, these "exceptions" or "loop-holes" allow some flexibility in the application of the rules. They are a pragmatic concession that permits acceptable and controlled derogation from the rules. Others point to the indeterminate wording of certain provisions and the vagueness of certain concepts as indications[111] that the *GATT 1947* (and now the *WTO Agreement)* were not intended to furnish a comprehensive and rigid legal code of conduct.

The pragmatic view emphasizes the political role played by international legal institutions. It rests on the premise that international law is subject to the will of states, and that international supervision and enforcement are ineffective in the face of state opposition. International legal systems have "no legal force behind them" and "are supported only by the most shallow habits of legal obedience".[112] States are wilful actors who choose to construct frameworks for international cooperation in an interdependent economy but "yield their sovereignty only grudgingly, and rarely irreversibly".[113] In the pragmatic view, while states may, they do not relinquish "sovereignty" upon becoming

---

[110] For example, Articles XI.2, XII, XIV, XVIII, XIX, XX, and XXI of the *GATT 1947* and *GATT 1994*.

[111] Tarullo, *op. cit.*, note 26 at 540 (arguing that additional sets of value choices and rules were necessary to implement the norms of the *GATT 1947*).

[112] Hudec, *op. cit.*, note 68 at 358-359.

[113] *Id.* at 359.

WTO Members.[114] The system is based on voluntary compliance with the rules because this is in the best interests of the Members. Pragmatists oppose legalism, with the relatively strict supervision and adjudication it envisages. They see its potential for prolonging hostilities and deepening rifts between member states through contentious litigation. They also argue that legalism may undermine confidence in the legal system in the event of non-observance of obligations by Members.[115]

On the other side of the debate about the legal system of the *GATT 1947/WTO Agreement*, are the legalists. This school views the *GATT 1947/WTO Agreement* as an instrument to promote security and predictability through an agreed set of international norms enforced by legally binding and effective supervision in the form of dispute settlement. The legalistic view is premised on the argument that international law is effective and binding, and that international legal obligations can be enforced to compel states to act.

Legalists range from moderate to visionary. A noted proponent of the moderate legalistic approach is Jackson. He has been a consistent advocate of a rule-oriented development of the *GATT 1947*, and of the WTO, arguing that such an evolution brings security and predictability to the process of trade liberalization in a world where

---

[114] J.H. Bello, "The WTO Dispute Settlement Understanding: Less is More" (1996) 90 *Am. J. Int'l L.* 416.

[115] Montana i Mora, *op. cit*, note 43 at 396.

global economic forces are increasingly transcending state borders.[116] He has consistently argued in favour of the institutionalization and constitutionalization of the multilateral trading system under the *GATT 1947*, and now the *WTO Agreement*, favouring more precise legal rights and obligations, as well as more rigorous and legalistic procedures for dispute settlement. His perspective is grounded in his belief that the move toward rule-orientation is a natural, virtually inevitable development.[117]

Jackson observed that the *GATT 1947* had a "fairly rigourous approach to legal obligations", and argues that the GATT/WTO dispute settlement procedures result in an international legal obligation on the parties to the dispute to comply.[118] Steger,[119]

---

[116] Jackson, *op. cit.*, note 6; Jackson, *op. cit.*, note 58. See Kennedy, *op. cit.*, note 48 for a recent criticism of the latter work.

[117] Jackson, *op. cit.*, note 74 (1978) at 99: "To a large degree, the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rule-oriented approach".

[118] J. Jackson, "The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation" (1997) 91 *Am. J. Int'l L.* 60.

[119] *E.g.* D. Steger, "WTO Dispute Settlement: Revitalization of Multilateralism after the Uruguay Round", Paper delivered at the Conference on The Asia-Pacific Region and the Expanding Borders of the WTO: Implications, Challenges and Opportunities, Vancouver, 7-8 June 1996; "WTO Dispute Settlement: The Role of the Appellate Body", Paper delivered at the Conference on Dispute Resolution in the World Trade Organization, Brussels, 14 June 1996.

Davey,[120] Lowenfeld,[121] Pescatore,[122] Castel,[123] Palmeter,[124] McCrae,[125] Dillon[126] and Montana i Mora[127] are also among the contemporary moderate legalists. Tarullo expresses some skepticism concerning legalism in international trade. Nevertheless, he concedes that while the international economic order is not a comprehensive legal system, "the international trade system looks more like a legal system than do areas of international law traditionally denominated public".[128] Trachtman advocates legalism, but only in some circumstances. He argues that rule-oriented institutions may be useful, and are in fact used, to address some problems. However, they should be viewed as a useful alternative,

---

[120]W. Davey (with J. Jackson and A. Sykes), *Legal Problems of International Economic Relations* (St. Paul's: West Publishing Co., 1995); W. Davey, "Dispute Settlement in GATT, (1987) 11 *Fordham J. Int'l L.* 51-109; "GATT Dispute Settlement: the 1988 Montreal Reforms" in A. Dearden, M. Hart and D. Steger (eds.), *Living with Free Trade: Canada, the Free Trade Agreement and the GATT* (Ottawa: Institute for Research on Public Policy, 1989) 167.

[121]A. Lowenfeld, "Remedies Along With Rights: Institutional Reform in the New GATT" (1994) 88 *Am. J. Int'l L.* 477.

[122]*E.g.* P. Pescatore, "The New WTO Dispute Settlement Mechanism". Paper delivered at the Conference on Regional Trade Agreements and Multilateral Rules, Liege, 3-5 October 1996.

[123]J.-G. Castel, "The Uruguay Round and Improvements to the GATT Dispute Settlement Rules and Procedures" (1989) 38 *Int'l and Comparative Law Quarterly* 834.

[124]Palmeter, *op. cit.*, note 10 (arguing that the "judicial model" has prevailed in the WTO, but at the same time counselling that some flexibility be maintained).

[125]D. McRae, "From Sovereignty to Jurisdiction: The Implications for States of the WTO", Paper delivered at the Conference on The Asia-Pacific region and the Expanding Borders of the WTO: Opportunities, Implications and Challenges, Vancouver, 7-8 June 1996.

[126]T. Dillon, "The World Trade Organization: A New Legal Order for World Trade?" (1995) 16 *Michigan J. Int'l L.*349.

[127]Montana i Mora, *op. cit.*, note 43.

[128]Tarullo, *op. cit.*, note 30 at 533.

not wholly replacing pragmatic solutions in all circumstances. In his view, certain circumstances remain that call for increased flexibility in order to promote the durability of the system. Trachtman posits that different levels of legal bindingness may be appropriate in different circumstances.[129]

Petersmann is the most visionary and ambitious of contemporary legalists. He has consistently been an avid proponent of a legalistic approach, arguing that freedom for states to act within an established framework of rules is far more secure than freedom of action without such rules.[130] In his estimation, WTO rules are extensions of domestic constitutional principles, and provide guarantees which protect individuals and promote democracy by restraining political activity within the domestic systems of WTO Members. He sees the *WTO Agreement* as an instrument securing the rule of law in international trade, by means of global requirements of nondiscrimination, transparency, and the peaceful settlement of disputes through the mandatory WTO dispute settlement system. He advocates the direct application of liberal international trade rules in domestic systems to guarantee property rights and individual freedoms. In his view, agreed procedures and institutions for rule-making, rule-application and rule-enforcement are necessary both within, and among, states.

---

[129] Trachtman, *op. cit.*, note 31.

[130] *E.g.* Petersmann , *op. cit.*, note 32; Petersmann, *op. cit.*, note 47 (1987); E.-U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Deventer: Kluwer, 1996); Petersmann, *op. cit.*, note 63 (1997).

d. Characterization of WTO Supervisory Mechanisms in the Literature

Dispute Settlement Mechanism

The dispute settlement mechanism is generally considered the primary supervisory instrument in the WTO legal system. Literature examining the dispute settlement mechanism has focused on its substantive nature, as well as on the institutional or procedural aspects of the dispute settlement process.[131] With respect to the latter, the primary inquiry for pragmatists has been the extent to which the rules and procedures governing the settlement of disputes promote consultations and negotiated settlement between states. By contrast, the primary inquiry for legalists has been the extent to which the dispute settlement procedures promote third party adjudication by a panel (and now by the Appellate Body), and the modalities of such third party adjudication. These modalities include, for example, the procedural requirements for the establishment of a panel and the adoption of a panel (and now Appellate Body) report, and for the enforcement of compliance with a dispute settlement decision. Legalists have consistently criticized the ability of an unwilling party to block or delay the dispute settlement process, and thereby avoid adjudication and the imposition of a legally binding obligation.

In the past, under the *GATT 1947*, international economic law was characterized to a certain extent by the pragmatic nature of the dispute settlement process.

---

[131] *E.g.* Dam, *op. cit.*, note 6 at 4-5.

Third party adjudication could be blocked by an unwilling party, and there were relatively weak provisions for the surveillance and enforcement of legal obligations. It is generally acknowledged that the dispute settlement rules and procedures in the *DSU* are a decisive step towards legalism,[132] although one influential commentator deems that the apparent quantum leap forward in the effectiveness and enforceability of WTO law in the *DSU*, in terms of automaticity and procedures for enforcement and compliance, is contradicted by practice that has demonstrated that politics rather than law still dominates the equation. [133]

Trade Policy Review Mechanism

The TPRM is a secondary supervisory mechanism in the legal order of the WTO. In analysing the TPRM, the focus of international legal scholars has been on the extent to which the TPRM concentrates upon conformity of Member state policies and conduct with the international norms in the *WTO Agreement*, and the extent to which it promotes or enforces compliance with these norms. While the dispute settlement reforms introduced by the *DSU* have generally been considered a rule-oriented or legalistic development, Price for example, argues that the TPRM in contrast "reflects a diplomatic and peer-pressure approach to the enforcement problem".[134] Jackson, too, classifies the

---

[132] See *e.g.* Petersmann, *op. cit.*, note 106; Jackson (1997), *op. cit.*, note 118; Steger, *op. cit.*, note 119; Lowenfeld, *op. cit.*, note 121; Pescatore, *op. cit.*, note 122; Palmeter, *op. cit.*, note 10; McRae, *op. cit.*, note 125.

[133] R. Hudec, "International Economic Law: The Political Theatre Dimension" (1996) 17 *U. Pa. J. Int'l Econ. L.* 9.

[134] V. Curzon Price, "New Institutional Developments in GATT" (1992) 1 *Minnesota J. Global Trade* 87 at 100-101.

TPRM as a primarily pragmatic and power-oriented instrument. While he believes that the trade policy reviews could be useful in providing information about trade policies, and offering an opportunity for criticism of those policies, he is of the view that they represent a potential step back for GATT's rule-oriented development.[135] Mavroidis notes that, "[a] legal purist will be disappointed with the overall performance of the TPRM",[136] as the TPRM has been reluctant to make pronouncements concerning the compatibility of national policies with GATT rules, or to recommend measures to render the national policies more consistent with GATT objectives. Nevertheless, he predicts that, "[t]he TPRM, not so much in its present form...but in its future evolved form, will likely make a great contribution to the multilateral system".[137] Qureshi[138] considers that the TPRM could be seen as international legal 'enforcement' in the wider sense, as an instrument to promote transparency and to expose inconsistency with international norms. Qureshi's approach received harsh criticism from Abbott,[139] who argues that Qureshi's legal perspective flew in the face of the objective of the TPRM to avoid in-depth debates on GATT-conformity. Arguing that the TPRM is an economic surveillance mechanism, Abbott

---

[135]Jackson, *op. cit.*, note 21 at 80.

[136]Mavroidis, *op. cit.*, note 100 at 409-410.

[137]*Id.*, at 375.

[138]A. Qureshi, "The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or 'Enforcement'"? (1990) 24 *J. World Trade* 147; and A. Qureshi, "Some Reflections on the GATT TPRM, in the Light of the Trade Policy Review of the European Communities: A Legal Perspective" (1992) 26 *J. World Trade* 103.

[139]R. Abbott, "GATT and the Trade Policy Review Mechanism: Further Reflections on Earlier Reflections" (1993) 27 *J. World Trade* 117 at 117-118.

asserts that it is misguided to refer to the TPRM as a legalistic instrument of compliance. Petersmann considers that the TPRM plays a conflict-avoidance role, which supplements the legalistic dispute settlement mechanism.

F. Summary: premises and prescriptions

This thesis operates on the premise that international law is effective and binding, and that international legal obligations can be enforced to compel states to act. It views international economic law as a mature, increasingly autonomous legal discipline that integrates public, private, domestic and international law. However, an examination of the legal and institutional arrangements for rule-creation, rule-application, surveillance and rule-enforcement in the *WTO Agreement* concentrates on the "constitutional" rather than the "transactional" elements of international economic law. For this reason, the thesis is limited to "public international" economic law, which occupies a vital sub-field of public international law.

The thesis is also premised on the view that the primary function of international economic law is to regulate relations between states. Although the sovereignty and jurisdiction of the state is waning in the international order, states still retain influence over the legal architecture and authority of international organizations and over the development of international law through their exclusive ability to conclude international treaties and to establish international organizations. This thesis argues that, on its own,

the pragmatic approach to international obligations does not provide a viable framework to govern state interaction given the present actual extent of interdependence driven by transnational economic activity. It views the institutionalization and constitutionalization of the international legal order in the trade sphere as a necessary and inevitable response by states to their ever-increasing economic interdependence. It argues that the availability of more legalistic supranational mechanisms is necessary to ensure the orderly and effective operation of the international trade system. Because an effective supranational institution is critical to the viability of the trading system, this thesis prescribes legalism to supplement the more pragmatic forms of interaction in the international economic order. Supranationalism requires legalism in certain contexts.

Increasing economic integration is exerting a twofold effect upon the sovereignty, or decision-making authority, of the state. First, within the internal orders of states, there is a movement toward giving private actors more freedom to manoeuvre in terms of economic decision-making to facilitate trade and investment. Second, on the international level, there is a move toward international rule-making and the delegation of sovereignty to international institutions. This thesis focuses upon this second effect. Based on the emerging reconceptualization of sovereignty as "decision-making authority", this thesis presumes that sovereignty is a fungible quality that can be allocated among states and international organizations. To the extent that sovereign authority is ceded by the state, it can be transferred to -- and pooled at -- the international level to reside in an international organization. The legal authority of an international organization will depend

upon nature and extent of the sovereign powers transferred to it, the context in which the transfer occurs, and the degree of irrevocability of the transfer. The supranational legal authority of the organization increases in step with the degree of bindingness and irrevocability of the transfer. The dependence of the organization on the will of individual states decreases proportionately.

A legalistic international institution, involving a set of effective previously agreed-upon precise and enforceable norms acceptable to all the state participants, can be seen as a way to ensure that individual states at least have conceptual and legal input into the architecture of the international legal system that will govern their commercial relations. The transferral of sovereign authority in certain areas as necessary, and its pooling at the supranational level, allows the state far more authority and more opportunity to exercise influence over the actions of other states in the system, and over the legal environment in which it and its citizens operate. The legalistic international institution does not supplant, but rather supplements, the state and represents the interests of the state participants on the international level. The transparency inherent in a legalistic system promotes informed participation by domestic actors in the formation of their state's trade policy. This enhances accountability in governance.

The costs of the diminished degree of legal autonomy of the state inherent in transferring sovereignty to a legalistic international organization are far outweighed by the benefits gained from membership in such an organization. By pooling their

sovereignty at the international level, states gain influence over the conduct of other states within the system. Rather than being subject to the flexibility and uncertainties inherent in an organization characterized exclusively by pragmatism and diplomatic accommodation, states may operate on the assumption that other states will respect the legally binding international norms which they have collectively negotiated and agreed upon.

Chapter 2

A Historical Overview of the Legal and Institutional Development of the International Trade System

A. Introduction

While the international community acknowledged the wisdom of designing, and adhering to, an international trade agreement providing a code of commercial conduct with the emergence of the *GATT* in 1947, it was reluctant to accept the reduced international legal autonomy for states that would have accompanied the creation of an international organization to administer, monitor, legislate and adjudicate on the basis of this code of conduct. The *WTO Agreement* represents the third endeavour over the last fifty years to introduce an institutional and organizational framework to oversee the operation of the international trading system and administer the GATT. The previous two attempts, in 1948 and in 1955, both met with defeat in the United States Congress, and therefore never produced concrete institutional results.

In order properly to understand the legal nature of the WTO and the significance of the transition from the *GATT 1947* system of agreements to the *WTO Agreement*, it is necessary to examine briefly the origins and legal character of the *GATT 1947*. It is beyond the scope of this thesis to give an exhaustive account of the

negotiating history and subsequent institutional development of the *GATT 1947*,[140] and of the Uruguay Round negotiations that led to the establishment of the WTO.[141] This Chapter aims merely to provide a brief account of those elements necessary to form the foundation for the subject-matter covered in the following chapters. To this end, this Chapter briefly examines the preparatory work for the Havana Charter for an International Trade Organization (the "Havana Charter"), and of the *GATT 1947*, which are inextricably interwoven. After addressing the circumstances surrounding the failure of the Havana Charter, the Chapter then examines the organizational and institutional development of the *GATT 1947*, and the rules for decision-making and rule-creation, and for supervision through dispute settlement and surveillance under the *GATT 1947*. It subsequently traces institutional developments that occurred during the Uruguay Round. With respect to reforms to the institutional framework, it addresses the emergence of the

---

[140]For a comprehensive account of the demise of the Havana Charter for an International Trade Organization and the origins of the *GATT 1947*, see, for example: W.A. Brown, *The United States and the Restoration of World Trade* (Washington, D.C.: The Brookings Institution, 1950); R.N.Gardner, *Sterling-Dollar Diplomacy* (Oxford: Clarendon Press, 1956); C. Wilcox, *A Charter for World Trade* (New York: Macmillan, 1949); G. Bronz, "The International Trade Organization Charter" (1949) 62 *Harvard L. Rev.* 1089-1125; W. Diebold, "The End of the ITO" (October 1952) 16 *Princeton Essays in International Finance*; K. Kock, *International Trade Policy and the GATT* (Stockholm: Almqvist & Wiksell, 1969); Jackson, *op. cit.*, note 6; and R. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2nd ed. (Salem: Butterworths, 1990). The 1955 attempt to form the Organization for Trade Cooperation (OTC) is dealt with in Jackson, *supra.* at 50-52; Hudec, *supra.* at 72-73 and in G. Bronz, "An International Trade Organization: the second attempt" (1956) 69 *Harvard L. Rev.* 44.

[141]A thorough but concise account of the Uruguay Round negotiating history can be found in J. Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (Geneva: WTO, 1995). A detailed account up to 1992 is contained in T.P. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History 1986-1992* (Deventer: Kluwer, 1993).

World Trade Organization. With respect to dispute settlement reforms, it discusses the 1989 Decision on Improvements to the Dispute Settlement System that resulted from the December 1988 Mid-Term Review, and the subsequent development of the integrated dispute settlement mechanism governed by the *Dispute Settlement Understanding*. Finally, with respect to supervision through surveillance, it addresses the introduction of multilateral surveillance under the Trade Policy Review Mechanism.

B. The First Attempt: The International Trade Organization

I. Preparatory Work for the Havana Charter and the *GATT 1947*

Informal discussions in 1943 between American and British policy experts within the framework of Article VII of the Lend-Lease Agreement of 1942[142] laid the

---

[142]*Agreement between the Governments of the United States of America and the United Kingdom on the principles applying to mutual aid in the prosecution of the war against aggression*, signed by the US and the UK on 23 February, 1942. The cardinal objective of this agreement was to establish principles to govern the provision of lend-lease supplies. Article VII of the Agreement dealt with the eventual conditions of lend-lease settlement, and it "became the basic legal framework for post-war planning in the economic field" (Gardner, *op. cit.*, note 140 at 54). This Article contained the hope that the arrangement concerning the lend-lease benefits -- that would be provided by the UK to the US in return for aid furnished for the war effort -- would not impair commerce between them. Rather, it would, "promote mutually advantageous relations between them and the betterment of world-wide economic relations. To that end, they [would] include provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all

foundations for postwar work on the legal and institutional design of the international trading system The discussions resulted in broad agreement in principle between the two countries on the utility of a multilateral commercial convention and an international organization to interpret and administer the convention, investigate complaints, and settle disputes that arose under the convention.[143] Postwar commercial policy negotiations commenced between American and British officials in 1945,[144] leading to the publication in November 1945 of the "Proposals for Consideration by an International Conference on Trade and Employment".[145] The Proposals consisted of two parts: "Proposals Concerning Employment" and "Proposals Concerning an International Trade Organization". They listed suggested areas which could be covered by a future charter for an international

---

peoples; to the elimination of all forms of discriminatory treatment in international commerce; and to the reduction of tariffs and other trade barriers...". See Wilcox, *op. cit.*, note 140 at 38.

[143]See Memorandum Concerning the Washington Meeting between British and American Economic Experts with Reference to Article VII of the Mutual Aid Agreements. cited in Gardner, *op. cit.*, note 140 at 104.

[144]Gardner, *op. cit.*, note 140 at 145.

[145]As transmitted by the Secretary of State of the United States of America to His Majesty's Ambassador at Washington, in *Proposals for Expansion of World Trade and Employment*, US Department of State Publication No. 2411, Commercial Policy Series No. 79 (Washington D.C., November 1945) referred to in Gardner, *op. cit.*, note 140 at 146. The "Proposals" were drafted by the American government. Rather than co-sponsor them, the British government merely endorsed them, stating that it was "in full agreement on all important points in these proposals and accept[ed] them as a basis for international discussions; and it [would], in common with the United States Government, use its best endeavours to bring such discussions to a successful conclusion, in the light of the views expressed by other countries". Anglo-American Financial and Commercial Agreements, Department of State Publication 2439 (Washington D.C., 1945) at 3 cited in Gardner, *op. cit.*, note 140 at 146.

trade organization, including: trade barriers and restrictions imposed by governments; restrictions imposed by private cartels; market disorder in primary commodities caused by intergovernmental agreements; and irregularity in domestic production and employment. The Proposals also called for separate negotiations for tariff reduction.

At the first meeting of the United Nation's Economic and Social Council (the "ECOSOC") in London in February 1946, the US introduced a resolution calling for a "United Nations Conference on Trade and Employment" to promote the expansion of trade. The ECOSOC passed the resolution, accepted the US Proposals, and convened the United Nations Conference on Trade and Employment (the "Havana Conference"). The Havana Conference was charged with drafting a Charter for an International Trade Organization and pursuing tariff reduction negotiations.[146] Pursuant to the resolution, a Preparatory Committee of eighteen was appointed to fashion an agenda and prepare a draft Charter (the "Havana Charter") for the plenary Conference's consideration.

Prior to the Preparatory Committee's first meeting, scheduled for October 1946, the US published a "Suggested Charter for an International Trade Organization of

---

[146]1 U.N. ECOSOC Res. 13 U.N. Doc. E/22 (1946).

the United Nations".[147] The Suggested Charter contained seven chapters, including Chapter IV on commercial policy, and furnished the foundation for the Havana Charter negotiations. The four basic commercial principles contained in the Suggested Charter were: most-favoured nation treatment to the trade of other members subject to long-established preferences; no increase in such preferences; negotiations for tariff reduction and the eradication of preferences; and limitation of quotas.[148]

There were four preparatory sessions held from 1946-1948-- in London, New York (drafting committee only), Geneva and Havana -- in order to negotiate and draft the Havana Charter. In a parallel process, negotiation and drafting of the *GATT 1947* occurred at the sessions in 1946-1947. The *GATT 1947* was concluded in Geneva on 30 October 1947. Because these sessions shed light on the reasons for the demise of the Havana Charter and the subsequent emergence of the *GATT 1947*, a brief account of the relevant work of the preparatory sessions follows.

---

[147]United .States Suggested Charter, Department of State Pub. No. 2598, Commercial Policy Series 93, Washington D.C., 1946. See Gardner, *op. cit.*, note 140 at 269.

[148]Brown, *op. cit.*, note 140 at 69-70.

The First Session of the Preparatory Committee convened in London in the autumn of 1946.[149] It hammered out chapters on commercial policy[150], full employment, restrictive business practices and international commodity agreements, and economic development.[151] However, voting and organizational details remained unresolved. The London Draft of the Havana Charter incorporated the basic provisions of the US Proposals and Suggested Charter: the necessity of substantial reductions of barriers in international trade based on the most-favoured-nation principle of multilateral non-discrimination; and a restriction on the creation of new preferences or the increase of existing preferences. It also included an obligation to enter upon request into "reciprocal and mutually advantageous negotiations...directed to the substantial reduction of tariffs...and to the elimination of import tariff preferences".

The First Session called for multilateral tariff negotiations based on a tariff agreement. It mandated that the results of the tariff negotiations be "incorporated in an agreement among the members of the Preparatory Committee which would contain,

---

[149]The session produced the *Report of the First Session of the London Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. EPCT/33 (October 1946) (the "London Report").

[150]The work of Committee II on commercial policy furnished the foundations for the *GATT 1947*. Their discussions are contained in U.N. Document EPCT/C.II/1-66 (1946). See Jackson, *op. cit.*, note 6 at 42.

[151]See GATT, *Analytical Index* (Geneva: GATT, 1994) at 4.

either by reference or reproduction, those general provisions of [the commercial policy chapter of the draft Havana Charter] considered essential to safeguard the value of tariff concessions and such other concessions as may be appropriate".[152] The motive was to set the stage for broader and enhanced international co-operation at the Havana Conference by achieving progress in tariff negotiations before it convened. At this point, then, the Preparatory Committee assumed dual functions: i. a sponsor for tariff negotiations and a general multilateral code of commercial conduct; and ii. a preparatory body for the Havana Conference.[153]

A technical drafting committee met in early 1947 in New York to produce a further draft of the Charter and a first full draft of the *General Agreement on Tariffs and Trade* (the "*GATT 1947*").[154] As the London Session had directed, the drafting committee considered the articles of the Havana Charter that were to be included in the *GATT 1947* as necessary for the protection of tariff concessions. The basic rationale of

---

[152]See "Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions", and "Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee". Annexes 7 and 10 respectively in the London Report cited in Hudec, *op. cit.*, note 140 at 50.

[153]Kock, *op. cit.*, note 140 at 62.

[154]See *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. EPCT/34 (the "New York Report").

the *GATT 1947*, as a distinct trade agreement within the broader institutional and administrative context of the ITO,[155] excluded articles involving purely domestic policy, articles dependent on the existence of the ITO, and articles which required a grace period and could not come into effect immediately.

The Second Session of the full Preparatory Committee met in Geneva from April to October 1947. Its tasks were: to finalize the draft Havana Charter [156] to serve as the basis of the Havana Conference, and to participate in multilateral trade negotiations to reach tariff concession commitments within the *GATT 1947* framework.

This Second Session was strongly coloured by US domestic politics. Throughout the negotiations, the US executive was acting on the authority of the *Reciprocal Trade Agreements Act* (the "*RTAA*"). This legislation would only permit the adoption of a "foreign trade agreement", not of an agreement establishing a new international trade organization. United States congressional hearings that had taken place between the New York and Geneva sessions had been highly critical of the US executive for attempting to sneak approval for the ITO in under *RTAA* authority. For this

---

[155]Jackson, *op. cit.*, note 6 at 43. See U.N. Doc. EPCT/C.6/55 (1947) and London Report at 22-25; New York Report at 45.

[156]*Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. EPCT/186, 10 September 1947 (the "Geneva Report").

reason, all references to an "Interim Trade Commission" in the New York draft of the *GATT 1947* were altered to read the "CONTRACTING PARTIES acting jointly" in the Geneva Draft.[157]

The influence of American politics also played an important, if subtle, role in the adoption process of the Final Act of the Second Session that was signed by 23 countries in Geneva on October 30, 1947, validating the *GATT 1947* and Protocol of Provisional Application.[158] By this process, the *GATT 1947* was not recommended by the Preparatory Committee under UN auspices for acceptance by governments, but was rather a completely independent proposal made by the government representatives, which coincidentally occurred simultaneously with a UN drafting session. Brown[159] points out that this pragmatic distinction achieved a double purpose. It enabled the US government to negotiate the *GATT 1947* as part of a broad UN effort to create a more rational international commercial system, while simultaneously preserving the character of the *GATT 1947* as an unadulterated commercial agreement "between sovereign states independent of the Charter and completely outside the jurisdiction of the Economic and

---

[157]See Jackson, *op. cit.*, note 6 at 44.

[158]*Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* 55 *U.N.T.S.* at 187 and 194.

[159]Brown, *op. cit.*, note 140 at 62.

Social Council". This latter consideration allowed the US government to negotiate and adhere to the *GATT 1947* as an international "trade agreement" under the *RTAA*.

The *GATT 1947* was negotiated with the intent that it would be integrated into the legal system of the International Trade Organization (the "ITO") when the Havana Charter entered into effect; its substantive commercial rules were thus essentially identical to those contained in the Havana Charter. The provisional application of the *GATT 1947* under the Protocol commenced on January 1, 1948. Stripped of the cumbersome organizational elements and other substantive chapters of the Havana Charter, the *GATT 1947* had been relatively easier and speedier to negotiate, and had also secured significant multilateral tariff concessions. It was intended to build goodwill and to provide a firm foundation to launch the Havana Conference.

The 56-country Havana United Nations Conference on Trade and Employment opened on November 21, 1947. The Final Act including the text of the Havana Charter was signed on March 24, 1948.[160] Simultaneous with the signing of the

---

[160]*Final Act and Related Documents*, United Nations Conference on Trade and Employment, Havana, Cuba, November 21, 1947 to March 24, 1948, U.N. Doc. ICITO/1/4 (1948). The Official text of the Charter is also published in: E/Conf.2/78 (March 24, 1949), reprinted as U.N. Doc. ICITO/1/4/ (1948)and in US Department of State Publication No 3206, Commercial Policy Series No. 114 (1948). The Charter is reproduced in full in Wilcox, *op. cit.*, note 140 at 227*ff*.

Final Act, the Conference adopted a resolution establishing the Interim Commission for the International Trade Organization (ICITO) "pending the establishment of the Organization certain interim functions should be performed".[161] The ICITO had the task of preparing the administrative foundations for the entrance into force of the ITO, and to clear up several matters left unresolved at Havana.

II. The Proposed Institutional Design of the ITO

The Havana Charter was the first attempt to create an international trade organization and to establish a constitution for the international trade system. It would have created the International Trade Organization. The ITO would have been a single undertaking: a full-fledged international trade organization with international legal personality and an organizational infrastructure to administer, apply, develop and enforce the detailed and extensive substantive obligations contained in the Havana Charter.[162]

---

[161]Resolution establishing an Interim Commission for an International Trade Organization Adopted upon Signing of the Havana Conference Final Act 24 March 1948 in *Havana Conference Final Act and Related Documents*, E/CONF.2/78 or ICITO/I/4 cited in GATT, *Analytical Index* (Geneva: GATT , 1994) at 1032. The ICITO was to cease to exist upon the appointment of the ITO Director-General.

[162]The contents of the Havana Charter were as follows: Chapter I: purpose and objectives; Chapter II: employment and economic activity; Chapter III: economic development and reconstruction; Chapter IV: commercial policy (including provisions on tariffs, preferences and internal taxation and regulation, quantitative restrictions, subsidies, state trading, general and special commercial provisions); Chapter V: restrictive business practices; Chapter VI: intergovernmental commodity agreements; Chapter VII: structure and functions of the

The Havana Charter contained provisions governing decision-making and supervision. It provided for decision-making by the plenary Conference and the 18-member Executive Board by simple majority vote in most situations, although certain rule-creating decisions (such as amendments) required a qualified majority vote. The Havana Charter contemplated supervision of compliance with Charter obligations through a relatively elaborate dispute settlement mechanism that had both pragmatic and legalistic attributes. Dispute settlement was to be initially pragmatic, through reference of a complaint to the political organs of the organization for investigation. While the ITO retained the final word on economic and financial questions, a remarkable degree of legalism was apparent in the possibility of requesting an advisory opinion from the International Court of Justice (the "ICJ") on pure questions of law. The ICJ decision would be binding upon the Organization, rather than directly binding upon the parties to the dispute, and the ITO itself retained the responsibility for enforcement. The Havana Charter regulated enforcement of legal obligations through sanctions. Unilateral retaliation was prohibited. The ITO would have been competent to authorize the imposition of sanctions, but only "on a limited and compensatory basis". The Havana Charter dispute settlement provisions envisaged only state-to-state proceedings: the idea of allowing individuals to bring complaints and to be directly involved in the proceedings

---

International Trade Organization; Chapter VIII: settlement of differences; Chapter IX: general provisions (including subsections on relations with non-members, withdrawal and termination, etc.).

had arisen, but had been rejected as a threat to the sovereignty of the member states of the Organization.[163]

III. The End of the ITO

Factors emerged in the domestic political orders of both of the chief proponents of the Havana Charter, the United States and Britain, that presaged the demise of the Havana Charter. In the United States, a Republican victory in the 1946 Congressional election signalled a potential protectionist backlash that could seriously threaten American approval of the Havana Charter. In this negotiating environment, all of the Havana Charter signatories (except Lebanon) made their ratification of the Final Act dependant upon US approval. Although the original American intention had been to present the Havana Charter for congressional ratification early in 1948, immediately following the Havana Conference, submission of the Charter was delayed -- as it turned

---

[163]The U.S. delegate to the Preparatory Committee had stated that "governments might not want to identify themselves with certain complaints and yet would want to grant their nationals the right of complaint" (E/PC/T/C.6/37 at 5). However, the member states wanted to avoid the "danger that private persons or organizations would be allowed the right of direct complaint in matters affecting the jurisdiction and legislation of sovereign States" (E/PC/T/C.6/37 at 5). It was also stated that "[t]he lodging of complaints by affected business entities, even with the permission of the Member in whose jurisdiction they are, raises objections of a juridical and practical nature" (E/PC/T/C.6/W.54). Also see M. Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 *Journal of World Trade* 181 at 191.

out, fatally -- until April 1949.[164] By this time, much of the postwar enthusiasm and cooperative spirit that had inspired the drafting of the Havana Charter had waned.

The US Administration voiced its traditional arguments in support of the Havana Charter's passage.[165] The ITO would foster world peace; establish the rule of law in international commerce; reflect the universality of US economic ideals; and eliminate harmful foreign trade practices. The US president persistently advocated the Havana Charter's prompt acceptance.[166] However, the Havana Charter encountered virulent opposition from domestic commercial groups in the US, and these views found their way into Congress.[167] The protectionist resistance heightened particularly as tariff cuts made in Geneva under *GATT 1947* auspices began to take effect within the US market. This

---

[164]See Gardner, *op. cit.*, note 140 at 369-378 for a thorough account of the ITO's demise.

[165]See *Ibid.* at 372.

[166]For example, on the signing of the extension of the *RTAA* in 1949, the President stated that prompt action by Congress to ratify the Charter would "constitute the firmest assurance to the world that the United States recognizes its position of world economic leadership, and is prepared to do its share in re-establishing world economic relations..." (Text of the president's message in the *New York Times*, Sept. 27, 1949 cited in Brown, *op. cit.*, note 140 at 338). Similarly, in the address to Congress in January 1950, the president stated "we should promptly join the International Trade Organization". (Congressional Record, Vol. 96 Part 1 at 62 January 4 1950) cited in Kock, *op. cit.*, note 140 at 58.

[167]As Diebold points out, domestic opposition in the US came from both the "protectionists" (those that deemed that the Havana Charter went too far in removing barriers protecting domestic economies) and the "perfectionists" (those that deemed that the Havana Charter did not go far enough toward removal of these barriers , and was neither "liberal" nor sufficiently "internationalist"). See Diebold, *op. cit.*, note 140 at 11*ff.*

opposition, as well as a general disenchantment with the Bretton Woods institutions and a reluctance to assume the expense of another international bureaucracy of questionable utility, seriously harmed its prospects for receiving congressional approval.[168]

Opposition to the Charter also mounted in Britain, where certain groups believed that the Havana Charter "was of American origin and therefore embodied American views as to the conduct of international trade".[169] A major bone of contention between the US and the UK was the system of imperial preferences. While the US deemed the elimination of the preferences to be a necessary pre-condition to the establishment of the ITO; Britain was adamant that the imperial preference perpetuate.

It was the crisis in the British external economic position in 1947 following the attempt to make the pound convertible that emerged as a decisive factor

---

[168]See Gardner, *op. cit.*, note 140 at 373-377 and Kock, *op. cit.*, note 140 at 58-61. For example, in June 1950 the US Council of the International Chamber of Commerce labelled the ITO Charter "a dangerous document because it accept[ed] practically all of the policies of economic nationalism" [and] because it jeopardiz[ed] the free enterprise system by giving priority to centralized national governmental planning of foreign trade...From the point of view of the United States, it has the further very grave defect of placing this country in a position where it must accept discrimination against itself while extending the Most-Favoured-Nation treatment to all members of the Organization. It places the United States in a permanent minority position owing to its one-vote-one-country voting procedure. Because of that, membership in the ITO based on [the Havana Charter] would make it impossible for the United States to engage in an independent course of policy in favor of multilateral trade". For Diebold, this epitomized the "perfectionist" perspective on the Havana Charter. See Diebold, *op. cit*, note 140 at 20-21. Other groups lined up against the ITO Charter included the National Association of Manufacturers, the National Foreign Trade Council, and the US Chamber of Commerce.

[169]W.A. Wells, *The Havana Charter, GATT and the ITO* (London: Empire Industries Association and British Empire League, 1950).

militating against ratification of the Havana Charter in the UK. As the Havana Charter permitted unilateral protective measures only in limited circumstances, there was concern that weaker countries would be deprived of the tools to combat economic disequilibria. The Havana Charter ideal of non-discrimination was perceived as hostile to Britain's short-term needs.[170] In Britain, therefore, the idea of an international organization promoting multilateral trade attracted suspicion.

The Havana Charter was thus defeated by domestic forces that emerged in both Britain and the United States. Ultimately, the ITO's "obituary" consisted merely of a clause in a rather mundane press release published on 6 November 1950 by the US Administration:

> [T]he interested agencies have recommended, and the President has agreed, that, while the proposed Charter for an International Trade Organization should not be resubmitted to Congress, Congress be asked to consider legislation which will make American participation in the General Agreement more effective...[171]

Although the ideal of establishing an international organization with

---

[170]Harold Wilson, then President of the Board of Trade, admitted this was the case when he stated, "[t]here has been particular criticism that we are tied down prematurely to obligations of non-discrimination and that nothing is being done to restore the fundamental imbalance of world payments. I do not disagree with that point of view. However, this is essentially a long-term scheme." See 446 H.C. Debates 1321-1322 (29 January 1948) cited in Kock, *op. cit*, note 140 at 57.

[171]Department of State Bulletin, xxiii (1950) at 977, cited in Gardner, *Ibid.* at 378. The British government subsequently took note of this statement and declared that it would not seek ratification of the Havana Charter (483 HC Deb. 232-3 (Written Answers) (8 February 1951)).

authority to supervise the application of a code of global trade conduct had floundered, the negotiating and preparatory process for the Havana Conference had borne some fruit. The *GATT 1947*, and the negotiations proceeding under its aegis, had effectively demonstrated that international trade cooperation was feasible, if in a more limited domain and under a less rigid legal regime. Notwithstanding the ITO's failure, the signatories of the GATT's Protocol of Provisional Application were still bound by the Geneva tariff concessions, as well as major commercial obligations parallel to those that had been contained in the Havana Charter concerning trade and tariff barriers, preferences, and quotas.

C. The *GATT 1947* Emerges by Default

The story of the legal and institutional development of the international trade system, and of the emergence of the *GATT 1947* as the principle international instrument governing world trade before the creation of the WTO, thus begins with the failure of the Havana Charter for an International Trade Organization in 1948-1949. The *GATT 1947* had been negotiated as an interim multilateral commercial agreement -- devoid of any institutional or organizational elements -- to be integrated into the legal

and institutional framework of the ITO when the Havana Charter entered into effect.[172] It then emerged, by default, as the primary legal instrument for international trade regulation. It did not have its own organizational or administrative infrastructure, and borrowed the services of the Secretariat for the Interim Committee for the International Trade Organization (the "ICITO"), the entity that had been established to make arrangements for the ITO before it became evident that the Havana Charter would not be ratified.

Because the *GATT 1947* was intended only as an interim arrangement pending the entry into force of the Havana Charter, contracting parties applied the *GATT 1947* only provisionally, through the Protocol of Provisional Application (the "PPA"), which "grandfathered" certain inconsistent legislation. The PPA accommodated the concerns of certain countries that some of their domestic legislation might be inconsistent with the *GATT 1947* at the time it was drafted.

The *GATT 1947* consisted originally of three parts. Part I, containing Articles 1 and 2, included the MFN principle and tariff concessions; Part II, comprising Articles III through XXIII, contained the substantive commercial policy provisions. Part

---

[172]See *GATT 1947*, Article XXIX. Also see U.N. Doc. EPCT/C.6/55 (1947); and Jackson, *op. cit.*, note 6 at 43.

III contained certain procedural, general and final provisions. The PPA stated that signatory governments undertook to apply Parts I and III of the *GATT 1947*. However, it provided that they undertook to apply Part II of the *GATT 1947* only "to the fullest extent not inconsistent with existing legislation". The PPA therefore "grandfathered"any existing legislation that conflicted with the obligations contained in Part II. The "grandfather date" for the original contracting parties was 30 October 1947.[173] The accession protocols of contracting parties that acceded to the *GATT 1947* at a later time contained the same language with respect to Part II, with the "grandfather date" being the date of accession. Governments could, therefore, apply mandatory legislation that was contrary to Part II of the *GATT 1947* if that legislation had been in force when the country acceded to the PPA. Grandfather rights expired if a government adopted new mandatory legislation or took an executive act which had the effect of making the grandfather rights expire. Originally to last only pending the entry into force of the Havana Charter, the *GATT 1947* 's provisional application lasted until the entry into force of the *WTO Agreement* in 1995.

---

[173]See BISD II/35 (1952), and for example, the panel report in *United States Manufacturing Clause*, BISD 31S/74, p. 88, para. 35.

D. The Second Attempt: The Organization for Trade Cooperation

During the early years of the *GATT 1947*, the contracting parties acknowledged the need for a more robust institutional structure to support its operation. A second, far more modest, attempt was made to create a multilateral trade organization (the Organization for Trade Cooperation or "OTC") to administer the *GATT 1947* at the review session in 1954-1955.[174] It would have integrated arrangements which had evolved under the *GATT 1947* to that time, and would have left the substantive rules of the *GATT 1947* intact. Intended "to pick up the ITO institutional pieces",[175] the OTC Agreement was a separate legal instrument that consisted exclusively of institutional and procedural provisions. The OTC was to have international legal personality and to establish cooperative arrangements with other intergovernmental organizations.

The OTC Agreement made explicit provision for an organizational structure with executive and administrative organs, including a secretariat. Decision-making by a seventeen-member Executive Committee elected by the plenary Assembly would have required a two-thirds qualified majority vote, although the OTC had no

---

[174]OTC Agreement, BISD I (1955, revised). See also the Report on Organizational and Functional Questions (L/327), adopted 28 February, 5 and 7 March, 1955, BISD 3S/231.

[175]K. Dam, "The GATT as an International Organization" (1969) 3 *J. World Trade L.* 374 at 376.

authority to amend the *GATT 1947* nor to take any decision or other action that would have had the effect of imposing a new obligation on a Member that it had not specifically consented to undertake.[176] The OTC Agreement contained no provision for an institutionalized legal procedure for the settlement of disputes, nor for multilateral surveillance of commercial policies. The dispute settlement system that was gradually evolving under Articles XXII and XXIII of the *GATT 1947* would presumably have been administered, unchanged, by the OTC.[177] Despite the limited nature of this proposed international organization to administer the *GATT 1947*, the OTC Agreement also met with defeat at the hands of the United States Congress.[178] Protectionist sentiment was one reason for its defeat: the United States had announced at the review session itself that Congress would probably not ratify the OTC Agreement unless GATT removed all legal restraints upon the US agricultural trade restrictions programme.[179] The OTC Agreement also fell victim to a power struggle between the US administration and the executive.[180]

---

[176]OTC Agreement, Article 3(d).

[177]See discussion of *GATT 1947* dispute settlement procedures, *infra.*

[178]See Hearings on H.R. 5550 before the House Committee on Ways and Means, 84th Congress, 1st Session 1444 (1956). Also see Bronz, *op. cit.*, note 140 (1956)at 476.

[179]L/315, 28 January 1955. A waiver was subsequently granted for the US programme: BISD 3S/32, 141 (1955). Also see Hudec, *op. cit.*, note 140 at 73.

[180]Jackson, *op. cit.*, note 6 at 51.

E. After the Second Attempt: Towards a *De Facto* Organization

Intended as a provisional instrument to promote trade reform and protect tariff concessions pending the coming into existence of the ITO, the *GATT 1947* was left as an independent legal instrument to pick up the pieces after the ITO's failure. Jackson[181] notes that "because of this background, the fiction was maintained for a number of years that GATT was not an international organization..." However, even without explicit international legal foundation, the GATT gradually assumed a role which was effectively "one of an organization for the consultation, negotiation, and application of rules regarding international trade".[182]

The GATT's evolution, from its peculiar origins as a provisional international treaty to a *de facto* international organization,[183] was a process of

---

[181]Jackson, *op. cit.*, note 6 at 120-121.

[182]Jackson, *op. cit.*, note 58 at 45.

[183]See for example, Schermers and Blokker, *op. cit.*, note 75 at 30 (arguing that the GATT was not originally an international organization, but that it developed institutional organs and became accepted as one); Benedek, *Die Rechtordnung des GATT aus Voelkerrechtlicher Sicht* (Heidelberg: Max Planck Institut, 1990) at 262 (arguing that the GATT has had status of international organization since the creation of the Council of Representatives in 1960); Jackson, *op. cit.*, note 58 at 119-122; Dam, *op. cit.*, note 175 observing that, fairly early on, the GATT was looked upon as an "organization" despite its roots. At 374 (note 1), Dam cites the following from a speech by Sir Eric Wyndham White, then Executive-Secretary of GATT, entitled "GATT as an International Trade Organization" to the Polish Institute of International Affairs, Warsaw, 6 June 1961: "The General Agreement on Tariffs and Trade, as its name clearly indicates, is, juridically

institution-building "by accident".[184] Its informal institutional growth has been cited as an important precedent in international law for the formation of necessary institutional attributes without express legal foundation.[185] The pragmatism and informality of the GATT's procedures, as well as meager institutional and legal attributes may have been its strongest assets in the early years. The virtual non-existence of supranational authority residing in the *GATT 1947*, and the consequent low degree of limitation on the sovereignty of contracting parties, coincided with the level of international legal regulation acceptable to states in this period of low interdependence.

I. Institutional Organs: The CONTRACTING PARTIES

The GATT's pragmatic legal and institutional evolution was driven by the CONTRACTING PARTIES acting jointly, the only quasi-institutional entity acknowledged in the treaty. The CONTRACTING PARTIES based their actions and their exercise of legislative authority on the broad mandate provided to them by Article

---

speaking, a trade agreement and nothing more. But because it is a multilateral agreement and contains provisions for joint action and decision it had the potentiality to become, and has in fact become, an international "organization" for trade cooperation between the signatory States". The GATT was treated *de facto* as a specialized agency in its relations with the United Nations", resulting from an exchange of letters between the Secretary-General of the UN and the Executive Secretary of GATT in August 1952.

[184]Winham, *op. cit.*, note 10 at 44.

[185]Jackson, *op. cit.*, note 6 at 153.

XXV:1 of the *GATT 1947* to further the objectives and facilitate the operation of the Agreement, read in conjunction with the preamble to the Agreement.[186]

The CONTRACTING PARTIES created the Council of Representatives in 1960. It became the GATT's chief institutional organ.[187] Composed of "representatives of all contracting parties willing to accept the responsibilities of membership", the Council was charged with considering and making recommendations concerning matters arising between the sessions of the CONTRACTING PARTIES requiring urgent

---

[186]The preamble to the *GATT 1947* states, in relevant part:

> Recognizing that their relations in the field of trade and economic endeavour shall be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding production and exchange of goods;
> Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce...

Art XXV.1 reads:

> Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement.

[187]The Ad Hoc Committee on Agenda and Intersessional Business, created in 1951, was made permanent by the CONTRACTING PARTIES in 1955 and renamed the "Intersessional Committee" (BISD 3S/9, 246). By the Decision of 4 June 1960, the CONTRACTING PARTIES terminated the Intersessional Committee and delegated its functions to the Council of Representatives (BISD 9S/7).

attention and considering any other work delegated to it by the CONTRACTING PARTIES and "such other matters with which the CONTRACTING PARTIES may deal at their sessions"; supervising committees, working parties, and other subsidiary bodies and making recommendations on their reports; and preparing for sessions of the CONTRACTING PARTIES. After 1968, the Council dealt with almost all decision-making and other matters, except for final decision on waivers. It took on most functions relating to dispute settlement under Article XXIII:2, including the appointment of panel members, the establishment of panel terms of reference and the adoption of panel reports.[188]

In addition to the Council, other organizational entities and subentities were established. For example, the Council or the CONTRACTING PARTIES struck standing or *ad hoc* committees to conduct in-depth examinations of certain matters. They also established working parties and panels to conduct dispute settlement functions.

---

[188]The Decision taken at the Twenty-fifth session, 25 November 1968, SR.25/9, December 1968, at 176 gave the Council an expanded role to allow the contracting parties to concentrate on major issues at their sessions.

The Council established the Consultative Group of Eighteen (the "CG-18") in 1975.[189] It was made permanent in 1979.[190] The CG-18 was intended to facilitate the execution by the CONTRACTING PARTIES of their responsibilities. In particular, it was to: follow international trade developments with a view to the pursuit and maintenance of trade policies consistent with GATT objectives and principles; prevent, where possible, sudden disturbances which could threaten the operation of the multilateral trading system and facilitate action if such disturbances occurred; and coordinate between GATT the IMF with respect to the international adjustment process. The CG-18 was chaired by the Director-General and its membership was broadly representative of GATT composition. It was motivated by the belief "that the GATT should have at its disposal a small but representative group which would permit existing and emerging trade policy issues to be discussed in confidence among responsible officials from capitals and thus facilitate a concertation of policies in the trade field".[191] While it had the potential to act as a non-plenary executive steering group, it never realized this potential.[192] Reflecting the unwillingness of contracting parties to transfer

---

[189]Council Decision of 11 July 1975, BISD 22S/15.

[190]BISD 26S/289.

[191]L/4869, BISD 26S/284 at 285.

[192]Jackson deemed the CG-18 to be of little influence and importance. See J. Jackson, "The Birth of the GATT-MTN System: A Constitutional Appraisal" (1980) 12 *L. and Pol. in Int'l Bus.* 21 at 49.

sovereignty in decision-making to the international level, the Consultative Group was, as its name suggested, purely consultative in nature. It was devoid of any decision-making power and could not assume powers or functions of any other bodies.

Initially, the CG-18 met about three to four times per year to discuss commercial policy issues and set the broad parameters for the work of the GATT. Although the CG-18 noted in 1987 that there was "general agreement" that it "had an important role to play as evidenced by the number of major initiatives which had received their first discussion in the Group", [193] it did not meet in 1988. As Chairperson of the CG-18, the Director-General "understood the general feeling of delegations to be that intense pressure of work in the Uruguay Round in addition to the normal business of GATT made it preferable not to convene the Group unless a real need to do so became apparent".[194] Such a need never arose. The CG-18 never reconvened. It remained in suspense for the remainder of the Uruguay Round.

---

[193]L/6244, BISD 34S/168 at 169.

[194]C/M/226 (extract), BISD 35S/293.

II. Decision-making and Rule-creation

Under the *GATT 1947*, each contracting party technically had one vote. Most decisions of the CONTRACTING PARTIES, and of the Council, were technically to be taken by a simple majority vote.[195] Certain rule-creating procedures, including waivers, accession decisions, and some amendments had special two-thirds qualified majority voting requirements. Some amendments required unanimous approval. There was no explicit provision for interpretation of the agreement, although in practice, the CONTRACTING PARTIES did adopt interpretations of the agreement on the basis of the authority vested in them by Article XXV.[196]

Despite these explicit voting requirements, the practice of consensus prevailed in decision-making. The Chairperson of the body concerned would declare a decision adopted if no delegation formally objected to it.

Manifesting a wish on the part of the contracting parties to retain some control over intersessional matters, the contracting parties designed an appeal

---

[195]The 1960 Decision establishing the Council clarified that Council decisions were technically to be taken by a majority of the contracting parties, including those who were non-members of the Council and those who were absent (BISD 9S/7-80).

[196]Jackson, *op. cit.*, note 6 at 132, 137.

mechanism that allowed a state to retain its sovereign authority over decision-making by the Council. Where a contracting party deemed itself to be adversely affected by acts of the Council, it could submit a written appeal to suspend the operation of any such acts.[197] Because of the practice of decision-making by consensus, contracting parties found no need to invoke this procedure. While this right was never exercised, its existence demonstrated the unwillingness of contracting parties to allocate sovereign decision-making authority irrevocably to the international level during this period.

Beyond its explicit provisions on decision-making, the *GATT 1947* did not contain any further provisions for the formulation of new rules. Nevertheless, a preeminent function of the GATT was to act as a forum for negotiation and rule-creation among the CONTRACTING PARTIES. Such rule-creation occurred at the eight successive Rounds of multilateral trade negotiations convened by the CONTRACTING PARTIES.[198]

This rule-creating activity led to problematic legal results. Increased economic integration in the 1970's made it necessary (and more possible) to tackle the

---

[197]BISD 9S/9.

[198]The eight Rounds of Multilateral Trade Negotiations were: Geneva (1947); Annecy (1949); Torquay (1951); Geneva (1956); Dillon Round (1960-1961); Kennedy Round (1964-1967); Tokyo Round (1973-1979); Uruguay Round (1986-1993).

growing problem of non-tariff trade barriers ("NTBs"),[199] which had taken the place of tariffs as the most prevalent obstacles to international trade liberalization efforts. The 1973-1979 Tokyo Round of Multilateral Trade Negotiations focused on this problem of NTBs. Because of the procedural and substantive difficulties in amending the *GATT 1947*,[200] and in the absence of a consensus concerning the scope and content of newly-negotiated substantive rights and obligations among all of the contracting parties, the results of the Tokyo Round were limited to a series of nine side agreements.[201] The nine side agreements were "stand-alone treaties", most of them containing specific

---

[199]As the term suggests, non-tariff barriers (NTBs) are practices constituting restrictions of trade which are not in the form of tariffs. NTBs include: quantitative restrictions (quotas), government procurement practices, technical standards, administrative procedures, subsidies, etc.

[200]Under *GATT 1947* Article XXX, amendments to Articles I (containing the MFN principle), II and XXIX required unanimity among the members. Amendments of other parts of the Agreement required acceptance by two-thirds of the Contracting Parties and were only binding upon those Contracting Par ties which accepted them.

[201]The nine Agreements were: *Agreement on Technical Barriers to Trade*, BISD 26S/8; *Agreement on Implementation of Article VII of the GATT - Protocol to the Agreement on Implementation of Article VII of the GATT*, BISD 26S/116, 151; *Agreement on Implementation of Article VI of the GATT* (the "*Tokyo Round Anti-dumping Code*"), BISD 26S/171; *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (the "*Tokyo Round SCM Code*"), BISD 26S/56; *Agreement on Import Licensing Procedures*, BISD 26S/154; *Agreement on Government Procurement*, BISD 26S/33; and *Agreement on Trade in Civil Aircraft*, BISD 26S/162. [The dispute settlement provisions of the *Agreement on Import Licensing Procedures* and the *Agreement on Trade in Civil Aircraft*, BISD 26S/162 referred to Articles XXII and XXIII of the *GATT 1947*. The *Arrangement Regarding Bovine Meat*, BISD 26S/84 and the *International Dairy Arrangement*, BISD 26S/91 did not provide for a dispute settlement mechanism. The Tokyo Round also produced: *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD 26S/210; *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD 26S/ 203; *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*, 26S/205; and *Decision on Safeguard Action for Development Purposes*, BISD 26S/209.

institutional arrangements. These included an administering Committee to oversee the operation of the particular agreement as well as specific dispute settlement procedures. There was no legal obligation on the *GATT 1947* contracting parties to adhere to these side agreements. Consequently, they were signed only by some, not all, contracting parties. Despite a legislative initiative on the part of the CONTRACTING PARTIES[202] reaffirming "their intention to ensure the unity and consistency of the GATT system" and to "oversee the operation of the system as a whole and take action as appropriate", the results of the Tokyo Round splintered the *GATT 1947* legal system.

The *GATT 1947*, therefore, served not only as an international treaty establishing rights and obligations of states. It also served as a forum for the creation of new rights and obligations and as a framework for the implementation, administration and enforcement of these rights and obligations. On the basis of the general authority granted to them by Article XXV:1, the CONTRACTING PARTIES administered the Agreement created new rules to develop the legal framework for international trade, and developed a fairly elaborate dispute settlement mechanism to adjudicate and enforce the international legal norms in the Agreement. They also established relations with states, other international organizations and private persons, and assumed legal personality

---

[202]Adopted on 28 November 1979, "Action by the Contracting Parties on the Multilateral Trade Negotiations" (L/4905, BISD 26S/201).

under international and municipal law.[203]

III. Supervision Through Dispute Settlement under the *GATT 1947*

In order to understand properly the provenance and significance of the WTO dispute settlement procedures, it is necessary briefly to trace their origins in the *GATT 1947*.[204]

In addition to numerous specific provisions for mandatory consultations and dispute resolution among contracting parties,[205] the *GATT 1947* contained general consultation and dispute settlement procedures in Articles XXII and XXIII. Articles XXII and XXIII of the *GATT 1947* were relatively sparse provisions. They set out the broad parameters for consultations and dispute settlement, but did not contain details

---

[203]See *e.g.* F. Roessler, "The Competence of GATT" (1987) 21(3) *J. World Trade L.*73-83; Dam, *op. cit.*, note 184 at 374.

[204]For an examination of the history of GATT dispute settlement, see Hudec, *op. cit.*, note 68 and Hudec, *op. cit.*, note 141 at 75 *ff.* Also see Jackson, *op. cit*, note 6; Petersmann, *op. cit.*, note 106.

[205]Jackson, *op.* cit., note 6 at 164-165 lists nineteen clauses in the *GATT 1947* which obligated contracting parties to resolve differences by consultations, and seven permitting withdrawal or suspension of concessions. For a detailed discussion of the legal nature of these provisions, see I. Courage van Lier, "Supervision within the General Agreement on Tariffs and Trade" in P. van Dijk (ed.), *Supervisory Mechanisms in International Economic Organizations* (Deventer: Kluwer, 1984) 47.

concerning the precise procedures to be followed. Practice developed under these Articles, and they were supplemented by successive negotiated texts. The major secondary legal instruments supplementing the basic dispute settlement provisions in Articles XXII and XXIII of the *GATT 1947* were: the 1979 *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (the "1979 Understanding"), negotiated during the Tokyo Round;[206] and the 1989 Decision on *Improvements to the GATT Dispute Settlement Rules and Procedures* (the "1989 Decision"), resulting from the Mid-Term Review of the Uruguay Round .[207] Procedures concerning disputes with developing countries under Article XXIII were recorded in the

---

[206]Adopted 28 November 1979, BISD 26S/210.

[207]Decision of 12 April 1989, BISD 36S/61.

Decision of 5 April 1966.[208] Minor changes to the procedures were introduced in 1958,[209] 1982[210] and 1984.[211] These arrangements supplied the basic rules and procedures for pre-WTO dispute settlement under the *GATT 1947*.

---

[208] BISD 14S/18. The Decision was reaffirmed in 1979 and again in 1994. The provisions of the Decision can be grouped into two main categories: (I) procedural assurances taking into account the special needs and interests of developing countries; and (ii) time limits and automaticity for certain phases of the dispute settlement process to promote procedural efficiency. With respect to (I), the Decision provided the possibility for a less-developed contracting party to refer the matter to the good offices of the Director-General, acting in an *ex officio* capacity, with a view to facilitating a solution; if appointed, a panel was to take special account of the circumstances of a less-developed country; and there were special provisions concerning the authorization of suspension of concessions in the event of non-compliance and consideration of further appropriate measures. With respect to (ii), where consultations failed to achieve a mutually satisfactory solution within 2 months, at the request of a party, the Director-General would submit a report to the CONTRACTING PARTIES or the Council and a panel would be established; a panel was to submit its findings and recommendations to the CONTRACTING PARTIES or the Council within 60 days from the date the matter was referred to it; and the contracting party to which recommendation directed had to report the action taken in pursuance of the decision within 90 days from the date of the decision of the CONTRACTING PARTIES or the Council.

[209]Procedures Under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties, adopted 10 November 1958, BISD 7S/24.

[210]The 1982 Ministerial Declaration on Dispute Settlement, BISD 29S/9 at 13-16. In this Decision, the Ministers noted that no major change was required to the dispute settlement framework, "but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures to this end". The Ministerial Declaration did not introduce any major reforms, but only minor refinements. It observed that the Secretariat assisted panels "especially on the legal, historical and procedural aspects of the matters dealt with". It maintained the consensus rule for the adoption of panel reports, but admonished, "obstruction in the process of dispute settlement shall be avoided". It also stressed that dispute settlement decisions "cannot add to or diminish the rights and obligations in the General Agreement".

[211]Decision of 30 November 1984: Dispute Settlement Procedures, BISD 31S/9. The chief changes introduced by this Decision dealt with the composition of panels. Notable was the creation of a roster of non-governmental experts qualified to serve on panels. If the parties were unable to agree on panel composition within 30 days, the Director-General could appoint individuals from this roster, at the request of party and in consultation with the Chairman of the Council and the parties.

Article XXII of the *GATT 1947* set out consultation procedures. It provided for consultations with respect to any matter affecting the operation of the Agreement. It invited contracting parties to give sympathetic consideration to representations of another Member and to resolve disputes through resort to bilateral consultations. If consultations failed to resolve the dispute, a contracting party could request multilateral consultations to conciliate the dispute.

Article XXIII of the *GATT 1947* furnished the basic principles of dispute settlement, and supplied the foundation for action by the CONTRACTING PARTIES. Article XXIII:1 set out the possible causes of action, while Article XXIII:2 set out dispute settlement procedures in the broadest terms.

Article XXIII:1 of the *GATT 1947* set out the causes of action. A contracting party could have recourse to dispute settlement when it deemed that any benefit accruing to it directly or indirectly was being nullified or impaired or that the attainment of any objective was being impeded as a result of:

(a) the failure of another contracting party to carry out its obligations under the agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of the agreement, or

(c) the existence of any other situation.

Paragraph XXIII:1(a), involving so-called "violation complaints" formed the basis of almost all disputes under the *GATT 1947*. Paragraph XXIII:1(b) involves so-called "non-violation complaints". The basis of this cause of action is not necessarily a violation of the rules, but rather the nullification or impairment of a benefit accruing to a WTO Member under the covered agreements. Only 14 of the approximately 200 complaints brought under the *GATT 1947* involved non-violation claims, and non-violation claims prevailed in only 4 of these cases.[212] Paragraph XXIII:1(c), covering "situation complaints", never formed the foundation for a recommendation or ruling, although it was the basis for parties' arguments before panels in a few cases.

Article XXIII:2 of the *GATT 1947* provided the broad parameters for dispute settlement procedures. It stated that, if consultations failed to result in a satisfactory adjustment, the matter could be referred to the CONTRACTING PARTIES. It further stated: "The CONTRACTING PARTIES shall promptly investigate any matter referred to them and shall make appropriate recommendations to the contracting parties which they consider concerned, or give a ruling on the matter, as appropriate". If they deemed it warranted, the CONTRACTING PARTIES could authorize a contracting party

---

[212] *I.e. Australia- Subsidy on Ammonium Sulphate* BISD II /188; *Germany - Imports of Sardines* BISD IS/53; *Germany - Import Duties on Starch and Potato Flour*, BISD 3S/77; *European Communities - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal -Feed Proteins*, BISD 37S/86.

or parties to suspend concessions or obligations under the Agreement.

Beyond these general guidelines, the *GATT 1947* did not elaborate any more precise dispute settlement procedures. It did not indicate the modalities of investigation and review by the CONTRACTING PARTIES. In particular, it made no mention of panels or other mechanisms for third party adjudication. Nevertheless, on the basis of this provision, *GATT 1947* dispute settlement practice gradually developed. The primary means of resolving disputes were consultations aimed at finding a mutually satisfactory solution. However, where consultations proved fruitless, more formal dispute resolution procedures gradually became available. The procedures evolved pragmatically to accommodate the requirements of particular cases.

Early complaints that could not be resolved by negotiations between the parties were dealt with by a "ruling" by the Chairperson of the session of the CONTRACTING PARTIES, or by reference to a working party. Early working parties included delegates from the parties to the dispute and focused on negotiation to reach an agreement between the parties. Where they reached no agreement, early working parties did not make recommendations or rulings, but merely reported the basis of the dispute between the parties. Later working parties evolved slightly toward actual third party adjudication by reporting the decision of the members of the working party, not including

the parties to the dispute. Subsequently, the practice evolved of referring unresolved complaints to a panel.

The developments in the GATT dispute settlement system were progressively codified and advanced. In general, these legal arrangements manifested a consistent evolution toward a more "legalistic" and "judicial" dispute settlement system. They progressively diminished the possibility for a reticent contracting party to delay or interfere politically with the progress of a dispute through the five key phases of the process: the pre-panel consultation phase; the establishment of the panel, the determination of its composition and terms of reference; examination by the panel; the adoption of the panel report; and the surveillance and enforcement of adopted recommendations and rulings. This evolution towards more rule-oriented procedures gradually diminished state autonomy and a state's sovereign authority to stall or block the process and thereby avoid being subject to an adverse binding legal outcome of the dispute against its will. The pre-WTO GATT dispute settlement system still contained significant elements of pragmatism, the major one being the retention of the necessity for the adoption of panel reports. Nevertheless, it lay the foundation for the legalistic procedures contained in the *DSU*. A brief overview of the major characteristics of the system, as codified in the 1979 Understanding, is set out below.

1. The 1979 Understanding

According to the procedures codified in the 1979 Understanding, where consultations failed to resolve a dispute, a party could request the establishment of a panel. The CONTRACTING PARTIES would decide on its establishment in accordance with "standard practice". It was unclear whether the complaining party had a right to a panel, or whether it was within the discretion of the CONTRACTING PARTIES to decide whether a panel would be established to examine the matter. In practice, the CONTRACTING PARTIES would generally establish the panel, although sometimes after a delay of several sessions.

The panel was composed of three to five individuals, preferably governmental, that were not citizens of parties to the dispute. The panel would "assist the CONTRACTING PARTIES" by investigating and making a ruling or recommendation on the matter referred to it, pursuant to its terms of reference. Panels established their own working procedures. The practice was to hold two or three informal meetings with the parties, to receive written and oral submissions and for the panel to question the parties. Panels could seek information and technical advice from any appropriate individual or technical body. While there were no precise deadlines for the phases of the procedure, in most cases the proceedings were completed within three

to nine months, although, in practice, some disputes took longer.

A panel could recommend the withdrawal of a measure if it was found to be inconsistent with obligations under the agreement. Where it found non-violation nullification and impairment, it could direct the party concerned to consider ways to make a satisfactory adjustment, without requiring withdrawal of the measure. The panel report would then come before the GATT Council, acting on behalf of the CONTRACTING PARTIES, for consideration. Technically, decisions of the Council were to be taken by simple majority vote. However, in practice, all decisions were taken by consensus. If there was a consensus among the CONTRACTING PARTIES concerning the rulings and recommendations in the report, the report would be adopted. Adoption of the report by the CONTRACTING PARTIES gave it binding legal force with respect to the parties to the dispute. It was generally accepted that unadopted reports had no legal value. Counterbalancing the quasi-judicial nature of panel examination, the adoption procedure offered a pragmatic safety valve to avoid the imposition of a binding legal obligation. The practice of seeking consensus on adoption meant that a losing party could block the adoption of a report.

The CONTRACTING PARTIES would keep recommendations under surveillance, and if no implementation occurred within a reasonable period of time, the

complaining party could ask the CONTRACTING PARTIES "to make suitable efforts with a view to finding an appropriate solution". The aggrieved contracting party could request authorization for retaliation against the offending party. In practice, retaliation was only authorized once, and it never actually occurred in full. In 1952, the CONTRACTING PARTIES authorized retaliation by the Netherlands against the United States as a result of a dispute relating to United States dairy quotas that violated *GATT 1947* Article XI.[213] The authorized retaliation was limited to the imposition of discriminatory imports of wheat flour from the United States. It did not consist of the withdrawal of substantially equivalent concessions, but only aimed to achieve withdrawal of the infringing measure. The Netherlands did not pursue the retaliatory action, as it would have been detrimental to its own interests. This highlighted the limitations of the suspension of concessions as an instrument of enforcement.[214] It was also consistent with the general view that the aim of the dispute settlement system was to achieve the withdrawal of the measure in question, and the restoration of the negotiated balance of concessions in the *GATT 1947*, rather than to inflict punitive sanctions on contracting parties.

---

[213]BISD 3S/46 (1955).

[214]See Hudec, *op. cit.*, note 140 at 165-184 for a detailed examination of this dispute. In 1990, the United States requested authorization from the GATT Council to retaliate against Canada for its non-implementation of a panel report in *Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies* BISD 35S/37. While Canada acknowledged that it was not in full compliance with the panel recommendations and rulings, a negotiated settlement between the parties obviated the need for retaliation.

The procedures codified in the 1979 Understanding also offered avenues for dispute avoidance and for negotiated settlement. The procedures promoted dispute avoidance by requiring publication and notification of trade measures in advance of their implementation, or as soon thereafter as possible. In addition, a complaining party had to engage in consultations with the contracting party concerned before proceeding to the request for establishment of a panel. At any point in the panel process, parties could reach a negotiated settlement to the dispute. The report of the panel would then be limited to reporting that a settlement had been achieved.

The 1979 Understanding was the first "codification" of the GATT dispute settlement procedures applying to all contracting parties. It articulated for the first time a coherent set of rules and procedures governing many aspects of the *GATT 1947* dispute settlement process. The 1979 Understanding did not introduce major changes to the dispute settlement process. It nevertheless constituted an important expression of the willingness of the contracting parties to affirm their commitment to the existing procedures and to codify a consensus understanding of procedures that had previously constituted merely practice. It recorded these procedures in a legal instrument and reflected a degree of progress towards legalism.

However, a number of factors revealed that the pragmatic approach to dispute settlement still prevailed in these procedures. These factors included: the emphasis on consultations and negotiated settlement; the absence of any time frame defining the exhaustion of the pre-panel consultation phase; the ambiguities surrounding the "right" to the establishment of a panel; the usually governmental composition of the panel; the lack of precise time frames for the various phases of the panel process; the practice of consensus decision-making, especially in the adoption of panel reports, but also in the loose procedures for the establishment of the panel's composition and terms of reference; and the lack of effective provisions on surveillance and enforcement of recommendations and rulings. All of these factors permitted a losing or unwilling state party to block or delay the dispute settlement process, and to avoid implementation of recommendations and rulings even if the dispute ultimately resulted in an adopted panel report. They cast doubt on the effectiveness of the outcome of dispute settlement process, putting the legally binding nature and effectiveness of an adopted panel report into question. The complaining party's quest for an effective remedy could be easily frustrated. States did not transfer their decision-making autonomy to the international level with these arrangements. While it provided disciplines for dispute settlement, the loose international rule structure still left state sovereignty essentially untouched.

The legal status and utility of the 1979 Understanding was ambiguous, and its contents were undermined to a certain extent by the simultaneous adoption at the completion of the Tokyo Round of numerous codes regulating non-tariff barriers to trade.[215] The Codes were independent side agreements, binding only upon those GATT contracting parties that had signed them, and their legal relationship to the *GATT 1947* was unclear. Each of these codes had different membership, and a distinct administering body. Some of the codes contained their own procedures for the settlement of disputes, which applied only to signatories. While the dispute settlement provisions in some of the codes were similar to those in the 1979 Understanding,[216] others had more detailed procedures.[217] One referred to Article XXII and XXIII of the *GATT 1947*, and one contained its own specific procedures but also referred to these Articles in conjunction

---

[215]*Agreement on Technical Barriers to Trade*, BISD 26S/8; *Agreement on Implementation of Article VII of the GATT - Protocol to the Agreement on Implementation of Article VII of the GATT*, BISD 26S/116, 151; *Agreement on Implementation of Article VI of the GATT*, BISD 26S/171; *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*, BISD 26S/56; *Agreement on Import Licensing Procedures*, BISD 26S/154; *Agreement on Government Procurement*, BISD 26S/33; *Agreement on Trade in Civil Aircraft*, BISD 26S/162; *Arrangement Regarding Bovine Meat*, BISD 26S/84; and *International Dairy Arrangement*, BISD 26S/91.

[216]*Agreement on Technical Barriers to Trade*, BISD 26S/8; *Agreement on Government Procurement*, BISD 26S/33; *Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade*, BISD 26S/116.

[217]*Agreement on Interpretation of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*; *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*.

with the 1979 Understanding.[218] Still others established specific procedures although reference was made to Articles XXII and XXIII of the *GATT 1947*.[219] Two of the Codes[220] contained no detailed dispute settlement provisions.[221] The Tokyo Round therefore resulted in the fragmentation of the *GATT 1947* legal system.[222] Some critics praised this diversification of dispute settlement procedures. They argued that it permitted the adaptation of dispute settlement to the requirements of the particular agreement, and limited any risk of damage to the rest of the system in the event of a failure under one Code.[223] However, the balkanization of the *GATT 1947* legal system ultimately proved unwieldy and detrimental. It introduced the possibility of forum-shopping, rule shopping, double jeopardy, legal awkwardness and inconsistencies in panel rulings.[224] The procedural shortcomings and legal fragmentation of dispute

---

[218]*Agreement on Trade in Civil Aircraft.*

[219]*Agreement on Import Licensing Procedures.*

[220]*Bovine Meat Arrangement; Dairy Arrangement.*

[221]On the dispute settlement provisions in the Tokyo Round Codes, see *e.g.* R. Hudec, "GATT Dispute Settlement after the Tokyo Round: An Unfinished Business (1980) 13 *Cornell Int'l L. J.* 145; T. Flory, "Les accords du Tokyo round du GATT et la reforme des procedures de reglement des differends dans le systeme commercial interetatique" (1982) 86 *Revue Generale de Droit International Public* 235; Long, *op. cit.*, note 106 at 78-80.

[222]See generally Jackson, *op. cit.*, note 192 at 32.

[223]See *e.g.* Montana I Mora, *op. cit.*, note 43 at 125.

[224]*E.g. German Exchange Rate Scheme for Deutsche Airbus*, SCM/142, 4 March 1992 (unadopted); *European Communities - Payments and Subsidies Paid to Processors and Producers of Oilseeds* and Related Animal-feed Proteins BISD 37S/86; *United States -*

settlement procedures contained in the 1979 Understanding and the Tokyo Round Codes persisted until the Uruguay Round.

In general, *GATT 1947* dispute settlement procedures were effective, and were perceived as such. From 1948 to 1994, 196 complaints were brought under Article XXIII of the *GATT 1947* (8 in 1948-1949; 42 from 1950 to 1959; 6 from 1960 to 1969; 29 from 1970-1979; 80 from 1980-89; and 24 from 1990-1994). Panels were established in 104 of these cases. Reports were circulated in 90 cases, and 81 of these reports were adopted. Thus, resort to dispute settlement was relatively frequent, a large number of panels were established, and the GATT Council adopted the vast majority of panel reports. Practice under the Tokyo Round Codes did not reflect quite the same degree of success. For example, only 7 of the 12 reports released by panels under the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII* (the "*Tokyo Round Subsidies Code*") were adopted. And of the 10 reports released by panels under the *Agreement on Implementation of Article VI* (the "*Tokyo Round Antidumping Code*"), only 3 were adopted.

Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada BISD 38S/30. For an example of the legal complexities inherent in this fragmentation that lasted after the coming into force of the *WTO Agreement*, see *Brazil -Measures Affecting Desiccated Coconut*, WT/DS22/R, WT/DS22/AB/R, adopted 20 March 1997.

In addition, contracting parties regularly implemented recommendations and rulings. Even where reports remained unadopted, parties sometimes chose to settle the dispute in accordance with the panel's recommendations.[225] Based on his exhaustive study of the dispute settlement system[226] from 1948-1990, Professor Hudec concluded, "[t]he GATT dispute settlement procedure has been a quite successful international legal institution. The overall success rate of 88 percent, or even the 1980's success rate of 81 percent, means that at least four out of five valid complaints are being dealt with successfully...[T]he accomplishments to this point, if not unique, are at least rare in the history of international legal institutions".[227]

Hudec's conclusions concerning the success of the *GATT 1947* dispute settlement system are difficult to refute. One factor mitigating this success in the late 1980's and early 1990's was the increasing proportion of panel reports that remained unadopted, particularly under the Tokyo Round Codes. For example, the 5 reports produced in the 1960's, and the 16 reports produced in the 1970's were all adopted. Of

---

[225]*Spain - Measures Concerning the Domestic Sale of Soyabean Oil* (L/5142); *EEC - Production Subsidies on Canned Fruit* (L/5778); *EEC - Tariff Treatment of Citrus Products from Certain Mediterranean Countries* (L/5776); *Canada - Measures Affecting the Sale of Gold Coins* (L/5863). See Petersmann, *op. cit.*, note 106.

[226]Note that Hudec's statistics include complaints brought under the *GATT 1947*, as well as those brought under the Tokyo Round Codes.

[227]Hudec, *op. cit.*, note 68 at 353.

the 47 reports produced in the 1980's, 8 remained unadopted (5 under the *GATT 1947* and 3 under the *Tokyo Round Subsidies Code*). Of the 20 reports produced from 1990 to 1994, 12 remained unadopted (5 under the *GATT 1947*; 2 under the *Tokyo Round Subsidies Code*; 4 under the *Tokyo Round Antidumping Code* and 1 under the Tokyo Round *Agreement on Government Procurement)*. This increasing trend towards the non-adoption of panel reports highlighted the systemic difficulties associated with the ability of a losing party to block adoption.

Despite his laudatory appraisal of the *GATT 1947* dispute settlement system, in 1992, Hudec could still remark,[228]

> Governments have not yet been willing to surrender any meaningful degree of autonomy to international legal regimes in economic affairs. GATT's dispute settlement machinery has been celebrated as a major victory along the road to enforceable norms -- and rightly so. But on the tree of legal evolution GATT's adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute resolution ceremonies practised among primitive societies.

---

[228]Hudec, *op. cit.*, note 50 at 6.

IV. Supervision Through Surveillance under the *GATT 1947*

Early supervision of the operation of the Agreement was carried out by the GATT CONTRACTING PARTIES under the general authority of Article XXV of the *GATT 1947* for facilitating the operation and furthering the objectives of the *GATT 1947*. The CONTRACTING PARTIES and other bodies also conducted supervision under other specific provisions of the Agreements comprising the *GATT 1947* legal system. The *GATT 1947* Secretariat played a role in supervisory activities, by collecting and disseminating notifications and other information. These early supervisory activities supplemented the central supervisory provisions on consultations and dispute settlement in Articles XXII and XXIII of the *GATT 1947*. They included specific surveillance procedures.[229] They also included obligations or opportunities for contracting parties to notify trade policy measures taken, or proposed, which would affect the operation of the *GATT 1947* or the Tokyo Round Codes, and obligations to consult on the use of certain

---

[229]See R. Blackhurst, "Strengthening GATT Surveillance of Trade-related Policies" in E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, 2nd. ed.(Deventer: Kluwer, 1991) 123 at 132-134. In the legal system of the *GATT 1947*, Blackhurst lists the following surveillance activities in addition to the biannual reviews conducted by the GATT Council commencing in 1979: (I) regular reviews by the Committee on Trade and Development of the operation of Part IV of the *GATT 1947* and implementation of the enabling clause; (ii) the Committee on Balance of Payments Restrictions; (iii) surveillance procedures for the Tokyo Round Codes (each Code provided for an annual review, as well as for an automatic examination of national legislation when a country acceded); (iv) the Textiles Surveillance Body, which received notifications and had authority to seek information to ensure MFA-consistency; and (v) the Textile Committee's Sub-Committee on Adjustment, which collected data on structural adjustment developments in the signatory countries.

measures.[230]

In addition to the supervisory procedures provided for in the *GATT 1947*, or that subsequently evolved in the *GATT 1947* legal system, the *GATT 1947* contained a provision emphasizing the importance of transparency in the domestic trade policy process. Article X of the *GATT 1947* required the contracting parties to publish their trade laws and trade agreements; refrain from enforcing a law until it was published; administer trade laws in an impartial and reasonable manner; and maintain or institute appropriate judicial, arbitral or administrative tribunals to review administrative action concerning customs matters. This provision acknowledged that uncertainty caused by the non-transparent administration and application of trade policies and practices was detrimental to the operation of the multilateral trading system.

The 1979 Understanding introduced enhanced supervision into the legal system of the *GATT 1947*. In addition to strengthening notification obligations,[231] the 1979 Understanding provided for a limited kind of surveillance according to which the CONTRACTING PARTIES would "conduct a regular and systematic review of

---

[230]See I. Courage-Van Lier, *op. cit.*, note 205 at 71-75.

[231]BISD 26S/ 210, paras. 2 and 3.

developments in the trading system".[232] In these reviews, "particular attention would be paid to developments which affect rights and obligations under the GATT". When they adopted the 1979 Understanding, the CONTRACTING PARTIES determined that the *GATT 1947* Council would convene special meetings to carry out these reviews of general developments in the international trading system, and to assess the degree of compliance of contracting parties with their notification obligations under the *GATT 1947*.

Accordingly, from November 1980, the *GATT 1947* Council began meeting on a biannual basis to conduct this limited surveillance. The basis of its review was initially a compilation by the Secretariat of notifications received pursuant to the various *GATT 1947* notification commitments. As the process evolved, the Secretariat documentation became broader in scope. It included additional information, including more comprehensive background notes, and explanatory information concerning notification commitments. From 1983, the preparatory documentation included information on trade measures and agreements that had not been the subject of notifications, as well as notified actions. In practice, the *GATT 1947* Council reviews adhered to their original objectives of examining general developments in the international trade system, and the extent to which contracting parties had complied with

---

[232]BISD 26S/210, para. 24.

their notification obligations. They did not conduct a strict legal assessment as to whether the substantive trade policy measures imposed by contracting parties were themselves consistent with the *GATT 1947*. Nevertheless, these reviews were significant as they established a precedent for multilateral surveillance and acknowledged the need for enhanced transparency at the international level.

F. The Problems with the *GATT 1947* Legal System

The peculiar circumstances of the *GATT 1947*'s origins left it devoid of any explicit legal or institutional provisions which might have implied the existence of an organization. While the GATT evolved on an *ad hoc* and pragmatic basis into a *de facto* international organization, gradually developing certain organizational attributes and procedures for the performance of necessary functions, it was increasingly plagued by legal and institutional deficiencies, unwieldiness and complexity.[233] Briefly, these problems fell in four main areas: (a) the lack of a coherent institutional and organizational framework; (b) an unclear and fragmented legal order; (c) ambiguous decision-making procedures; and (d) problems with the supervisory mechanisms for enforcement of obligations under the Agreement.

---

[233]Jackson, *op. cit.*, note 58 at 33; Jackson, *op. cit.*, note 21; J. Jackson, "The World Trade Organization and the 'Sovereignty' Question" (1996) 1 *Legal Issues of European Integration* 179 at 180-181.

(a) *lack of a coherent institutional and organizational framework*

The fundamental treaty structure and basic legal status of the *GATT 1947* remained problematic, due to its de *jure* non-organizational status and legal capacity, its provisional application through the Protocol of Provisional Application (the "PPA") and its accompanying grandfathered rights.

(b) *unclear and fragmented legal order*

The *GATT 1947* legal system had been fragmented by the Tokyo Round Codes, and the legal relationship of the *GATT 1947* to the Tokyo Round Codes was ambiguous. The *GATT 1947* and the nine Tokyo Round Codes were each separate treaties under international law, with their own distinct membership, administering body and dispute settlement procedures. This led to differentiated levels of legal obligation among the GATT contracting parties that were signatories of the Codes vis-a-vis those that were non-signatories. Problems also existed with respect to supervision and enforcement of the obligations in the *GATT 1947* and the Codes. In the event a dispute arose between two GATT contracting parties who were also signatories to a particular relevant Code, there was a possibility of forum shopping and a risk of double jeopardy. A party had to choose whether to bring the dispute under the *GATT 1947* or under the relevant Code, sometimes leading to anomalous legal results. This problem occurred

predominantly in the context of antidumping and countervailing duty measures.[234]

(c) *ambiguous decision-making procedures*

The decision-making powers of the CONTRACTING PARTIES in certain situations were not clearly defined. The practice of decision-making by consensus, except in those specific situations which required voting -- such as waivers, amendments and accessions -- was problematic. While consensus-seeking provided an opportunity for pragmatic accommodation and compromise, it also had the potential to provide each contracting party with the power to veto decisions.[235] In addition, the waiver provisions were unclear, with a lack of procedural safeguards controlling the scope and duration of waivers.[236] The amendment provisions were rigid and stringent, rendering amendments virtually impossible to achieve. No formal procedure existed for adopting definitive interpretations of the Agreement. The existence of such a competence was thus unclear.

---

[234]See *e.g. United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, BISD 38S/30, adopted 11 July 1991.

[235]Jackson, *op. cit.*, note 58 at 49.

[236]Jackson, *op. cit.*, note 200 at 181.

(d) *problems with the supervisory mechanisms for enforcement of obligations under the Agreement*

Problems also existed with respect to supervision. Until 1989, the *GATT 1947* lacked a basic mechanism for multilateral surveillance of the trade policies of the contracting parties, and suffered from a lack of transparency that impeded the promotion of adherence to GATT disciplines.

Rule-enforcement through the dispute settlement mechanism had developed into a relatively sophisticated legal process whereby a panel established by the GATT Council would investigate a complaint on a matter, produce a report, and make recommendations and rulings. While the system was generally successful,[237] the effectiveness of the process was increasingly impeded by the consensus rule for adoption of panel reports, which allowed the losing contracting party to block the adoption of a panel report and to avoid compliance with panel rulings. In the late 1980's and early 1990's, an increasing proportion of panel reports remained unadopted, particularly under the Tokyo Round Codes. Of the 47 reports produced in the 1980's, 8 remained unadopted (5 under the *GATT 1947* and 3 under the *Tokyo Round Subsidies Code*). Of the 20 reports produced from 1990 to 1994, 12 remained unadopted (5 under the *GATT 1947*; 2 under the *Tokyo Round Subsidies Code*; 4 under the *Tokyo Round Antidumping*

---

[237]See *supra*, section 2.E.III for a more detailed assessment of the *GATT 1947* dispute settlement system.

Code and 1 under the Tokyo Round *Agreement on Government Procurement)*. This increasing trend towards the non-adoption of panel reports undermined the credibility of the system.

Even if a panel report were adopted, problems remained with respect to implementation of the recommendations and rulings contained in the report. Other problems and uncertainties existed with respect to dispute settlement, such as the unclear status of prior panel reports, and the lack of principles guiding the process of interpretation by panels.

The GATT's gradual and organic legal and institutional development during the first four decades of its existence has been considered its basic strength. In an era of relatively low -- but growing -- interdependence, the GATT's evolution provided an international legal framework for cooperation and coordination of state conduct concerning trade in goods that coincided with what sovereign states were willing to tolerate, and were thus more likely to respect and comply with.[238] The loosely rule-oriented pre-Uruguay Round *GATT 1947* legal system, containing many pragmatic elements, did not represent a significant intrusion on the international legal autonomy of

---

[238]Curzon Price, *op. cit.*, note 134 at 88-89 and Long, *op. cit.*, note 109 at 61-64.

contracting parties. During this period, international economic law was characterized by pragmatism, cooperation and informality. Although the *GATT 1947* contained provisions promoting transparency, there was no general supranational surveillance mechanism until the creation of the Trade Policy Review Mechanism in 1989. Although the dispute settlement system operated fairly successfully, it was hampered by the practice of consensus decision-making at key phases of the process, in particular, for the adoption of panel reports. It also lacked effective sanctions to enforce the results of dispute settlement rulings. In the era of the *GATT 1947*, there was a very low degree of concentration of sovereign authority and decision-making power at the supranational level.

An increase in the number and diversity of GATT membership; the mushrooming legal complexity and unwieldiness caused by the multiplicity of legal instruments in the fragmented *GATT 1947* legal system; and concern with the deterioration in the observance of GATT legal disciplines raised calls from certain states for a stronger, more integrated and streamlined legal framework for the multilateral trading system. There were different views on the form of action that should be taken in light of these challenges. Advocates of a new negotiating Round, particularly the United States, argued that a new demonstration of political commitment to international trade norms was necessary, and that it was unrealistic to believe that the requisite

strengthening of the GATT legal framework could be achieved without a comprehensive negotiation in which all participants could find advantage. Other states, including many developing countries, argued that an agreement to launch a new Round would not be credible unless existing commitments were fully implemented.[239] While industrialized states, led by the United States, wanted the Round to include new sectors beyond the traditional competence of GATT, particularly services and intellectual property, developing countries were initially opposed to this: "almost all saw no sense in giving new tasks to GATT at a time when it was having great difficulty in handling its recognized responsibilities".[240] At the outset, developing countries were adamant that, if there was going to be a new Round, it be limited to the traditional area of trade in goods.

The international economic slump in the early 1980's, coupled with increased economic interdependence and a body of novel forms of unregulated transnational economic activity, such as trade in services, investment and trade-related aspects of intellectual property, encouraged the contracting parties to address the need to revitalize the *GATT 1947* system by strengthening existing disciplines and extending

---

[239]See Report of the Consultative Group of 18 to the Council, L/5887, BISD 32S/44 at 45.

[240]Croome, *op. cit.*, note 141 at 9.

commercial norms into new areas. The CONTRACTING PARTIES launched the Uruguay Round of Multilateral Trade Negotiations in September 1986 on the basis of the Punte del Este Ministerial Declaration (the "1986 Ministerial Declaration").[241] Because of continued disagreement over extending GATT disciplines into new sectors, negotiations were split into two parts: negotiations on trade in goods were firmly under the aegis of the *GATT 1947*, while those on trade in services were conducted separately by ministers acting simply as representatives of their governments.[242] However, the 1986 Ministerial Declaration stressed the need to avoid a repetition of the fragmentation that had resulted from the Tokyo Round. It underscored the significance of reintroducing legal uniformity into international trade obligations by specifically stating that the results of the Uruguay Round "shall be treated as a single undertaking".

G. Institutional Developments During the Uruguay Round

I. Reforms to the Institutional Framework: Towards the World Trade Organization

The 1986 Ministerial Declaration made no specific mention of the objective to create any type of overarching international trade organization.

---

[241]Ministerial Declaration on the Uruguay Round, 20 September 1986 BISD 33S/19-28; (1986) 25 *I.L.M.* 1623.

[242]*Id.*, at 32.

Nevertheless, institutional and constitutional reforms figured prominently on the Uruguay Round agenda. A stated objective of the negotiation was to "strengthen the role of GATT, improve the multilateral trading system based on the principles and rules of GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines". Under the rubric of "Functioning of the GATT System" ("FOGS"), the Declaration stated,

> Negotiations shall aim to develop understandings and arrangements:
> (I) to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system;
> (ii) to improve the overall effectiveness and decision-making of the GATT as an institution, including, *inter alia*, through involvement of Ministers;
> (iii) to increase the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organizations responsible for monetary and financial matters.

At the launching of the Round, the generally-held assumption was that the GATT/ICITO Secretariat and basic *GATT 1947* institutional arrangements should remain the same and continue to administer whatever arrangements would result from the Round. As the negotiations progressed, however, it became clear that agreements would be achieved in sectors other than trade in goods. A new institutional design would be necessary in order to accommodate this new and expanded scope of coverage. As originally conceived, there were 15 negotiating groups in the Uruguay Round, divided

into four main areas. One of these areas dealt with the GATT as an institution, subsuming the groups on issues relating to the functioning of the GATT system (FOGS) (decision-making and trade policy surveillance) and on dispute settlement reform. The negotiating structure for the Round was comprehensively revised in April 1991, and negotiations were then placed under the responsibility of six new groups. One of these groups, "Institutions", assumed the work of the FOGS and dispute settlement groups. Chaired by Ambassador Lacarte-Muro of Uruguay, it had the responsibility of designing the legal and institutional framework for the implementation of the results of the Round.

Some progress had already been made relating to the functioning of the GATT system and dispute settlement by the Montreal Mid-Term Review Ministerial Meeting in December 1988. The CONTRACTING PARTIES adopted these developments in April 1989.[243] The FOGS Negotiating Group fulfilled its first mandate to design a framework for trade policy surveillance through the establishment, on a provisional basis, of the Trade Policy Review Mechanism. The CONTRACTING PARTIES agreed upon greater ministerial involvement in the GATT through ministerial meetings at least once every two years in order to improve the functioning of the GATT system. They also agreed on improvements to the dispute settlement procedures, on a

---

[243]See *infra* sections 2.G.II and 2.G.III for a more detailed account of the Uruguay Round advances in dispute settlement and surveillance, respectively.

trial basis from 1 May 1989 to the end of the Round in respect of complaints brought during that period under Article XXII or XXIII and, eventually, on a permanent basis if found satisfactory at that time.[244] The formation of a trade organization had still not arisen as a formal topic of discussion at this point, although it was agreed that the groups should "continue to explore other means by which to improve the overall effectiveness and decision-making of the GATT".[245] In this period, Professor Jackson published his influential study of institutional reform of the *GATT 1947* and proposed the establishment of a multilateral trade organization as an umbrella organization with a firm constitutional foundation to administer and service the *GATT 1947* and the other legal instruments in the GATT legal system and to provide an integrated dispute settlement mechanism.[246]

Formal proposals for an international trade organization came from Canada and the European Communities in 1990. In April 1990, Canada proposed the creation of a World Trade Organization ("WTO"), to furnish the "institutional architecture capable of meeting the challenges" posed by developments in the

---

[244]See Mid-Term Review Agreements, 21 April 1989, GATT Doc. MTN.TNC/11 (MIN) at 24-31, BISD 36S/61.

[245]GATT, News of the Uruguay Round of Multilateral Trade Negotiations 046 (4 March 1991).

[246]Jackson, *op. cit.*, note 21. See *e.g.* G. Patterson and E. Patterson, "The Road from GATT to MTO" (1994) 3 *Minnesota J. Global Trade* 35.

international trading system.[247] The Canadian proposal called for the creation of an international organization with an integrated institutional structure and legal personality to administer the various substantive legal instruments that would result from the Round. The proposal provided for enhanced transparency and surveillance through the formal and definitive adoption of the TPRM. These institutional developments would be coupled with further improvements to the dispute settlement procedures designed to eliminate the fragmentation of dispute settlement procedures in the *GATT 1947* legal system and the problem of forum shopping by the contracting parties among the GATT and certain Tokyo Round Codes. The dispute settlement proposals included the elimination of the potential for a losing party to block the adoption of a panel report, or to avoid the implementation of panel conclusions, as well as the establishment of an appellate mechanism. In July 1990, the European Communities similarly proposed an exclusively institutional agreement establishing an umbrella institution (the "Multilateral Trade Organization" or "MTO") to oversee the various substantive accords. The European Communities stressed that the creation of an MTO would establish an integrated legal foundation for the effective implementation of the Uruguay Round results, providing a more coherent institutional framework and an integrated dispute

---

[247]Canada , "Canada Proposes Strategy for Creation of a World Trade Organization", Department of Foreign Affairs and International Trade News Release No. 77, April 11, 1990.

settlement system.[248]

Both the Canadian and EC proposals, therefore, envisaged the multilateral trade organization as an umbrella organization based on a purely institutional and procedural agreement providing a common framework for the integrated administration of a number of separate substantive agreements. Uniform decision-making procedures would apply across all of the substantive agreements. The United States and Japan were initially opposed to the idea of an integrated framework, preferring to maintain separate decision-making procedures for each substantive agreement. The Canadian and EC proposals were premised on the assumption that the Uruguay Round would come to a conclusion at the December 1990 Brussels Ministerial Meeting, originally intended as the final session for the Round. However, at Brussels, the negotiators failed to resolve outstanding differences between them on various issues, and the Uruguay Round stalled. The "Brussels Draft" documentation,[249] which had been intended as the concluding agreement for the Round, remained unsigned. The Brussels Draft contained no proposal on overall institutional reform, although it alluded to the "Institutional reinforcement of the GATT" with reference to the April 1989 decision for biannual ministerial meetings in

---

[248]See Communication from the European Community, GATT Doc. MTN.GNG/NG14/W/42 (1 July 1990).

[249]Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35 (26 November 1990) (the "Brussels Draft").

order "to make a further contribution to the direction and content of GATT work".[250] It further acknowledged that the results of the Round would "substantially enlarge the scope of further cooperation" and would require adoption of appropriate institutional arrangements.[251] An annex entitled "Basic elements of an organizational agreement" was empty.

When the negotiations resumed in April 1991, the EC, Canada and Mexico drafted a joint proposal for a multilateral trade organization, which formed the basis for negotiations resulting in the December 1991 draft *Agreement Establishing the Multilateral Trade Organization*, part of the "Dunkel Draft" Final Act.[252] Key institutional elements received their first official iteration in this draft document. The Dunkel Draft was a product of the GATT Secretariat based upon the negotiations, but not a consensus document. It included an agreement establishing a Multilateral Trade Organization, along with basic provisions on its structure, functions and integrated decision-making procedures. The Dunkel Draft also provided for a trade policy review mechanism, and contained provisions substantially reforming the GATT procedures for dispute settlement. Embodying the single undertaking approach, the Multilateral Trade

---

[250]Brussels Draft at 322

[251]Brussels Draft at 323-324.

[252]Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" GATT DOC MTN.TNC/W/FA (20 December 1991 (the "Dunkel Draft").

Organization envisaged in the Dunkel Draft would furnish the common institutional framework -- including integrated decision-making and supervisory procedures -- for all of the substantive and institutional agreements in its annexes that would result from the Round, with the exception of four Tokyo Round Codes.

The United States was the only country to express strong opposition to the Dunkel Draft proposals concerning the establishment of a Multilateral Trade Organization, arguing that the organization should be omitted from final package. The United States was not convinced of the merits of an overarching organization for the administration of all substantive agreements, and feared that such a single integrated institution might encroach upon its sovereignty. The United States' concerns arose primarily from the organizational nature, international legal personality, and decision-making rules of the proposed institution. The United States perceived these as requiring an excessive transfer of sovereignty from the state to the international level that would encroach upon the international legal autonomy of the participant states. Based on this concern, the United States made an alternative proposal that avoided the creation of an organizational infrastructure but maintained the single undertaking approach of an integrated multilateral trading system. This proposal advocated a "protocol" or framework agreement that subsumed all the substantive agreements within one treaty but did not create an international organization to administer the treaty. Decision-making

would be by a Ministerial Trade Committee, by consensus (with accessions of new members requiring a two-thirds majority). This United States' proposal did not receive support from any other delegation.

Subsequently, in December 1993, the United States formally endorsed the establishment of a new organization, and in a tribute to the original Canadian proposal, requested that the name of the new organization be the "World Trade Organization" rather than the "Multilateral Trade Organization". The *WTO Agreement* was signed in April 1994.

II. Reforms to the Dispute Settlement System

1. Negotiating Positions

In the area of dispute settlement, the 1986 Ministerial Declaration stated:

> In order to ensure the prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT-rules and disciplines. Negotiations shall include the development and monitoring of procedures that would facilitate compliance with adopted recommendations.

There was no consensus at the beginning of the Uruguay Round that dispute settlement procedures should become more legalistic. A divergence of views existed among the Uruguay Round participants concerning the nature and role of GATT dispute settlement. Some states, including the United States and Canada, deemed that GATT dispute settlement was a legalistic mechanism, where a complaining party could gain a decision condemning an infringing measure that was legally binding on the losing state. These states advocated increased legalism for the system. They criticized the ability of a losing state to block adoption of a panel report and to resist implementation of a panel ruling. Other contracting parties, such as the EC and Japan, saw the dispute settlement system in more pragmatic terms. They deemed that the primary aim of the system was to overcome a specific trade problem, rather than to deliver quasi-judicial, legally binding, decisions. From their point of view, settlement negotiations at any point in a dispute were important, and the ability of a state to block adoption of a panel report was but an acknowledgement of the stake that state had in the dispute settlement process. For their part, some developing countries (such as Brazil) believed that they should be granted special and differential treatment in the dispute settlement process because of their more limited ability to retaliate, as well as the provisions in *GATT 1947* Part IV requiring them to receive a "higher level of equity". Other developing countries argued that a transition to more legalistic procedures would automatically benefit developing

and smaller countries.[253]

2. The 1989 Decision

Negotiations on dispute settlement preceding the Uruguay Round Mid-term Review in December 1988 led to the adoption in April 1989 of the Decision on Improvements to the dispute settlement system. The CONTRACTING PARTIES adopted these improvements on a provisional basis to the end of the Uruguay Round, and, eventually, on a permanent basis if they proved to be satisfactory.[254] The 1989 Decision recognized that the GATT dispute settlement system was a central element in providing security and predictability to the multilateral trading system that aimed "to ensure prompt and effective resolution of disputes to the benefit of all contracting parties". In contrast to the 1979 Understanding, the 1989 Decision developed panel procedures in certain areas, rather than merely codifying them.

---

[253]See *e.g.* Croome, *op. cit.*, note 141 at 149-150.

[254]With one important exception, the procedures of the 1989 Decision now apply only to disputes which arose between 12 April 1989 and the entrance into force of the *WTO Agreement* on 1 January 1995. The exception is that the provisions of the 1989 Decision still apply with respect to the consideration for adoption, surveillance and implementation of DSB recommendations and rulings dealing with disputes concerning the so-called "situation complaints", referred to in Article XXIII:1(c) of the *GATT 1994*.

The most significant reforms introduced by the 1989 Decision dealt with the procedural elements and time frames for certain stages in the panel process.[255] It contained several innovations to make progress through the panel process more rapid and automatic. These innovations related to the time period for consultations; the establishment of a panel; its terms of reference and composition; and overall deadlines for panel examination.

Concerning consultations, a contracting party had to respond to a request for consultations within 10 days, unless otherwise agreed, and had to enter into consultations within 30 days. Failing this, the complaining party could proceed directly to request the establishment of a panel. A request for a panel could occur after 60 days (30 days in urgent cases) where consultations failed to resolve the dispute. With respect to panel establishment, the 1989 Decision clarified that a panel would be established ordinarily at the GATT Council meeting following the one at which the request was first made, unless the Council decided otherwise. This appeared to establish the complaining party's "right to a panel", although the Council could technically "decide otherwise". It

---

[255]For discussion of the reforms introduced in the 1989 Decision, see: E. Canal-Forgues and R. Ostrihansky, "New developments in the GATT dispute settlement procedures" (April 1990) *J. World Trade* 67; Castel, *op. cit.*, note 123; Davey (1989), *op. cit.*, note 120; Montana I Mora, *op. cit.*, note 43, at 136-141; E.-U. Petersmann, "The Mid-Term Review Agreements of the Uruguay Round and the 1989 improvements to the GATT dispute settlement procedures" (1989) 32 *German Yearbook of Int'l L.* 280.

implied that a panel would be established at the second request.[256] In practice, a panel was always established.

The panel would have standard terms of reference, unless the parties agreed otherwise within 20 days from the establishment of the panel. There were more stringent conditions for determining the composition of panels deadlines to reduce the possibility of delaying the process. Thus, panels were to be composed of three individuals, unless the parties agreed to a panel of five within 10 days from the establishment of the panel. Further, where no agreement on composition was reached within 20 days, the Director-General would decide upon the composition of the panel at the request of a party. The more precise time limits for the work of the panel provided that, as a general rule, the period in which the panel was to conduct its examination, from the time the composition and terms of reference of the panel had been agreed upon, to the time when the final report was provided to the parties to the dispute, was not to exceed six months (three months in urgent cases). In no case was the period from the establishment of the panel to the submission of the report to the contracting parties to exceed nine months.[257] The Decision did not establish precise deadlines for each phase

---

[256]On this issue of the existence or non-existence of a "right to a panel", see Canal-Forgues and Ostrihansky, *op. cit.*, note 255 at 72; Castel, *op. cit.*, note 123 at 844; Davey, *op. cit.*, note 120 at 173. Petersmann believes the 1989 Decision established a right to a panel: Petersmann, *op. cit.*, note 106 at 1211-1212.

[257]1989 Decision., para. 20. This is stronger language than in the 1979 Understanding.

of the panel process, but recommended that panels should follow Suggested Working Procedures,[258] unless the panel agreed otherwise after consulting with the parties. Unless otherwise agreed by the parties, the period from a request for a panel to the release of a panel report was not to exceed fifteen months. The party concerned still had to implement the recommendations and rulings within a "reasonable period of time", a concept which remained undefined.

One of the more interesting reforms in the 1989 Decision was the explicit provision for binding arbitration as an alternative means of dispute settlement. This provided a legalistic procedure that was simpler and more rapid where the issue between the parties is clearly defined. While arbitration has been used occasionally to settle disputes under the *GATT 1947*, its explicit inclusion in the 1989 Decision would provide encouragement for contracting parties to use it.

Despite these reforms, the 1989 Decision left at least four notable lacunae that impeded the effectiveness of dispute settlement. First, it applied only in respect of complaints brought under Article XIII or XXIII of the *GATT 1947*. It therefore did not affect the dispute settlement procedures under the Tokyo Round Codes. The multiplicity of dispute settlement procedures continued, perpetuating the fragmentation of the legal

---

[258]Note of the Office of Legal Affairs of the GATT Secretariat (1985).

system. Second, the 1989 Decision continued the practice of adoption of panel reports by consensus. Therefore, it remained possible for a losing or unwilling party to block a panel report from becoming legally effective, although contracting parties were called upon to avoid "delaying the process of dispute settlement". Third, while the 1989 Decision provided for surveillance of implementation by the GATT Council, it did not introduce any new provisions on enforcement. It did not explicitly address how to determine the "reasonable period of time" for implementation; the possibility of unilateral retaliatory action and the issue of authorization of retaliation; nor the issue of appropriate compensation in case of non-implementation. Furthermore, despite a strong initiative from the EC backed by other states, the 1989 Decision did not contain an explicit ban on unilateral action by a state to redress perceived infringements of the *GATT 1947* and other trade wrongs (this targeted the US Section 301 trade remedy legislation).

The 1989 Decision therefore addressed some of the procedural shortcomings of the 1979 Understanding, and brought some reduction in the autonomy of parties to the dispute. The 1989 Decision was hailed by some critics as a shift toward a more legalistic dispute settlement process,[259] while others believed that "a truly

---

[259]Canal-Forgues and Ostrihansky, *op. cit.*, note 255 at 81.

adjudicative and legalistic system" of dispute settlement had not yet been achieved.[260] The fact that the GATT Council might decide against the establishment of a panel (although in practice, it never did) and that the adoption of a panel report still required a consensus decision meant that a losing party could still block the process and avoid the imposition of a binding legal obligation. The sparse provisions on enforcement meant that even a binding legal obligation might be circumvented. While the stricter procedural safeguards and time limits concerning consultations, terms of reference and panel composition limited state autonomy, the crucial decisions remained within the control of the contracting parties. The views of the pragmatists had prevailed at crucial stages: contracting parties had retained their autonomy for the most fundamental elements of the process.

3. Towards the Dispute Settlement Understanding

After the Mid-Term Review, the dispute settlement negotiations addressed several contentious issues dealing with the adoption of panel reports, the creation of an appellate mechanism and the problem of enforcement of the recommendations in rulings, including the issues of implementation and suspension of

---

[260]Castel, *op. cit.*, note 123 at 848-849.

concessions. Canada, Mexico, and the United States all played a strong role in advocating more legalistic procedures, while the EC and Japan were more hesitant in this regard. The Understanding on Rules and Procedures Governing the Settlement of Disputes under Article XXII and XXIII of the GATT,[261] annexed to the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of 20 December 1991 (the "Draft Final Act")[262] contained further revisions that made the process increasingly legalistic and adjudicatory. The most significant advances envisaged in the Draft Final Act Dispute Settlement Understanding were the creation of a Dispute Settlement Body to administer the Dispute Settlement Understanding and to oversee all disputes; the establishment of an appellate review mechanism to review panel reports, and automaticity in the adoption of panel and Appellate Body reports (that is, a report was adopted unless there was a consensus decision against adoption). Advocated by states including Canada, the US and the EC, the appellate review mechanism was a *quid pro quo* for automaticity in the adoption of panel reports. Key changes to the dispute settlement process were also contemplated with respect to the surveillance and implementation of recommendations and rulings. These included the definition and development of specific procedures concerning the "reasonable period of time" for implementation, and explicit authorization for retaliation failing implementation within

---

[261]MTN.TNC/W/FA, S.1-S.23.

[262]MTN.TNC/W/FA.

the reasonable period of time. In addition, there was an express prohibition on resort to unilateral actions and an obligation to resort exclusively to the dispute settlement procedures for disputes within the scope of the agreement.

The Draft Final Act Dispute Settlement Understanding applied only to disputes arising under Articles XXII and XXIII of the *GATT 1947*. However, it also contained an ambitious proposal to remedy the fragmentation of the *GATT 1947* legal system that had been introduced by the Tokyo Round Codes. This concerned Elements of an Integrated Dispute Settlement System[263] under a Multilateral Trade Organization,[264] which included the right to cross-retaliate if retaliation in the same sector as an impugned measure was not practicable or effective. Subsequently, in concert with the other institutional developments agreed to during the Round, the contracting parties created a unified and integrated dispute settlement to govern any disputes arising out of any of the "covered agreements" that would result in other sectors of the multilateral trade negotiations.

---

[263]*Ibid.*, T.1-T.6.

[264]Agreement Establishing the Multilateral Trade Organization, in the Dunkel Draft, at 91-101.

III. Advances in Surveillance: The Trade Policy Review Mechanism

Major developments in international surveillance in the *GATT 1947* system occurred during the Uruguay Round. Setting out the agenda for the Uruguay Round, the 1986 Punta del Este Ministerial Declaration contained two references to the concept of strengthening surveillance of national trade policies.

The first reference was to the introduction of a multilateral surveillance process for the duration of the Uruguay Round to assess whether countries were meeting their "standstill and rollback" commitments (*i.e.* the obligations not to increase existing trade barriers and not to introduce new restrictions for the duration of the Round). The Ministerial Declaration further provided that, in this review process, "any participant may bring to the attention of the appropriate surveillance mechanism any actions or omissions it believes to be relevant to the fulfilment of these commitments". On the basis of this paragraph in the 1986 Ministerial Declaration, the Uruguay Round Surveillance Body was established in January 1987 to conduct the surveillance of implementation by states of their standstill and rollback commitments. The Surveillance Body conducted its periodic reviews on the basis of notifications of existing (as well as pending or proposed) measures, and assessed these in relation to the international

commitments states had undertaken to observe at the beginning of the Uruguay Round.[265] In this regard, the activities of the Surveillance Body were the first in the *GATT 1947* system to conduct a strict assessment of the compliance of contracting parties with their substantive international legal obligations (as opposed to the more limited procedural inquiry of whether a country had complied with its notification obligations). The activities of the Surveillance Body terminated with the end of the Uruguay Round.

The second reference to multilateral trade policy surveillance contained in the Ministerial Declaration fell under the rubric of the "Functioning of the GATT System" ("FOGS") and contemplated a general substantive surveillance process that would endure beyond the end of the Uruguay Round. It stated:

> Negotiations shall aim to develop understandings and arrangements...to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system.

On the basis of this paragraph, the FOGS negotiating group commenced negotiations to design a regular surveillance mechanism for the GATT 1947 legal system. The result was the TPRM.

---

[265]See Blackhurst, *op. cit*, note 229 at 131.

The introduction of the TPRM was not controversial. It was one of the early results of the Uruguay Round, agreed to at the December 1988 Montreal Mid-Term Review, and subsequently adopted in April 1989.[266] While the Uruguay Round's "single undertaking approach" raised the threat that the TPRM might be eliminated if the rest of the Uruguay Round did not succeed, a GATT Council Decision of 19 July 1989 formally bringing the TPRM into effect, on a provisional basis reduced this threat.[267] This decision, based on the *GATT 1947* Article XXV authority for joint action by the CONTRACTING PARTIES to facilitate the operation of the *GATT 1947* and further its objectives, had the effect of introducing the TPRM into practice under the *GATT 1947*. The first TPRM reviews were held in December 1989, and regular periodic reviews ensued. The TPRM agreement, incorporating practice that had developed under the *GATT 1947* TPRM as well as further provisions negotiated within the FOGS negotiating group, subsequently became Annex 3 to the *WTO Agreement*.

---

[266]"Functioning of the GATT System", adopted 12 April, 1989, BISD 36S/403 (1990)

[267]"Trade Policy Review Mechanism -- 1989 & 1990", 19 July 1989, BISD 36S/406 (1990). See Mavroidis, *op. cit.*, note 100 at 377.

Chapter 3

The WTO Agreement: Legal Order and Institutional Framework

A. Introduction

The legal order of an international organization is based on its constitutive treaty, in which the member states set out their rights and obligations and the legal authority and functions of the organization. The constitutive treaty defines the balance between the international legal autonomy of the member states and the supranational legal authority residing in the organization.

The *WTO Agreement* is the constitution of the international trading system. It creates an integrated legal order and establishes the WTO to furnish a unified institutional framework for the conduct of international trade among WTO Members.

The integrated legal framework of the *WTO Agreement* is a "single undertaking" in international law. The *WTO Agreement* expressly demarcates the legal relationship between the legal order it establishes and the previous *GATT 1947* legal system. It also contains explicit guidance on the legal relationship between the various legal instrument it embraces. These elements promote legal certainty and predictability in the present application and future development of the rules contained in the *WTO Agreement*.

The unified institutional framework of the WTO administers, develops, monitors and enforces all of the substantive and procedural legal norms that regulate the commercial interaction of states. The *WTO Agreement* formally establishes the WTO as a *de jure* international organization, with legal personality and explicit provision for its own organizational infrastructure. It sets out the functions and mandate of the Organization, endowing it with the capacity for rule-creation, rule-application and supervision to ensure compliance with, and enforcement of, the substantive rules contained in the annexed agreements. It also furnishes a platform for the Organization to exercise its international legal personality by developing relationships with other international organizations.

This Chapter will examine the legal order and institutional framework established by the *WTO Agreement.* With respect to the legal order set out in the *WTO Agreement*, the Chapter first outlines the structure of the Agreement. It then examines the nature of the "single undertaking", evident in the structure and certain provisions of the Agreement, as well as in the transitional arrangements from the *GATT 1947* legal system to the *WTO Agreement.* After discussing the composition of the *GATT 1994* and its relationship with the previous *GATT 1947*, the Chapter examines the legal relationships among the *WTO Agreement* and its annexed agreements. With respect to the institutional framework provided by the WTO, the chapter then touches upon the functions and competence of the Organization, its international legal personality and institutional organs. Summary observations, and a diagram of the WTO structure, conclude the Chapter.

B. The *WTO Agreement:* Legal Order

I. Structure

The *WTO Agreement* itself is a brief document consisting of a preamble and sixteen Articles. It establishes the WTO and outlines its functions, institutional structure and procedures. The text of the Agreement does not contain any substantive obligations. Rather, the substantive obligations, as well as certain further institutional obligations, are contained in the four annexes to the Agreement. Article II:1 of the *WTO Agreement* provides that "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement".

Annex I contains the principal substantive agreements. These are the Multilateral Agreements on Trade in Goods, including the *GATT 1994* and twelve other agreements (Annex 1A); the *General Agreement on Trade in Services* (the "*GATS*") (Annex 1B) and the *Agreement on Trade Related Aspects of Intellectual Property* (the "*TRIPs Agreement*") (Annex 1C).

Institutional and procedural agreements for supervision of the obligations set out in Annex 1 follow in Annexes 2 and 3. Annex 2 contains the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), the dispute

settlement rules governing disputes arising between WTO Members under any of the "covered agreements". Annex 3 contains the Trade Policy Review Mechanism (TPRM), providing for the periodic multilateral review of Members' trade policies in order to enhance transparency and promote rule-adherence.

Annex 4 contains four Plurilateral Trade Agreements. These are binding only upon those Members that have accepted them. The subject matter of the two Plurilateral Trade Agreements (the *Agreement on Trade in Civil Aircraft*, and the *Agreement on Government Procurement*) was either too contentious, or specific to an insufficient number of states, to be included in the WTO single undertaking. Two additional agreements -- the *International Dairy Agreement* and the *International Bovine Meat Agreement* -- were originally included in Annex 4. However, in latter years the activities under these agreements were limited to information-gathering and the publication of annual reports. Their signatories deemed that these two agreements were no longer serving a useful purpose, and thus decided to dissolve them on 30 September 1997, with effect from 31 December 1997.

Figure 1 on the following page depicts the legal order of the Agreement, as of 31 December 1997.

Figure 1:
The Legal Order of the *WTO Agreement*

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

ANNEX 1

Annex 1A: Multilateral Agreements on Trade in Goods
General Agreement on Tariffs and Trade 1994
Understanding on the Interpretation of Article II:1(b)
of the General Agreement on Tariffs and Trade 1994
Understanding on the Interpretation of Article XVII
of the General Agreement on Tariffs and Trade 1994
Understanding on Balance-of-Payments Provisions
of the General Agreement on Tariffs and Trade 1994
Understanding on the Interpretation of Article XXIV
of the General Agreement on Tariffs and Trade 1994
Understanding in Respect of Waivers of Obligations
under the General Agreement on Tariffs and Trade 1994
Understanding on the Interpretation of Article XXVIII
of the General Agreement on Tariffs and Trade 1994
Marrakesh Protocol to the General Agreement on Tariffs and
Trade 1994
Agreement on Agriculture
Agreement on the Application of Sanitary and Phytosanitary Measures
Agreement on Textiles and Clothing
Agreement on Technical Barriers to Trade
Agreement on Trade-Related Investment Measures
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Agreement on Preshipment Inspection
Agreement on Rules of Origin
Agreement on Import Licensing Procedures
Agreement on Subsidies and Countervailing Measures
Agreement on Safeguards

Annex 1B: General Agreement on Trade in Services (the "GATS")

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement")

ANNEX 2: Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU")

ANNEX 3: Trade Policy Review Mechanism (the "TPRM")

ANNEX 4: Plurilateral Trade Agreements
Agreement on Trade in Civil Aircraft
Agreement on Government Procurement

II. Single Undertaking

a. In the Structure of the *WTO Agreement*

The *WTO Agreement* is a single undertaking. The WTO furnishes the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in its annexes[268] with a view to developing "an integrated, more viable and durable multilateral trading system encompassing the General Agreements on Tariffs and Trade, the results of past liberalization efforts and all the results of the Uruguay Round of Multilateral Trade Negotiations". The *WTO Agreement* has thus replaced the substantive rights and obligation under the *GATT 1947* and has provided a new institutional umbrella for the administration of its annexed agreements containing the new rights and obligations of WTO Members.

Article II:2 of the *WTO Agreement* articulates the single undertaking. The agreements and associated legal instruments included in Annexes 1, 2 and 3 are "integral parts" of the Agreement. They are mandatory, applicable to, and binding upon, all Members.[269] They are referred to as the "Multilateral Trade Agreements". However, the Plurilateral Trade Agreements in Annex 4 constitute a minor deviation

---

[268] *WTO Agreement*, Article II.1.

[269] *WTO Agreement*, Article II.2.

from the single undertaking. Article II:3 provides that "The agreements and associated legal instruments included in Annex 4.... are also part if this Agreement for those Members who have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them." The Plurilateral Trade Agreements each have a smaller membership than the Multilateral Trade Agreements, and that membership varies from agreement to agreement.

b. In the Provisions of the *WTO Agreement*

The single undertaking is evident in the provisions of the *WTO Agreement* concerning original membership, accessions, and withdrawal from the Agreement. All of these provisions indicate that WTO Members are bound by all of the rights and obligations in the *WTO Agreement* and the Multilateral Trade Agreements in its Annexes 1, 2, and 3. Original membership in the WTO went only to those contracting parties[270] to the *GATT 1947* as of the date of entry into force of the *WTO Agreement* which accepted the *WTO Agreement* -- including the obligations in the Multilateral Trade Agreements in Annexes 1, 2 and 3 -- and which submitted Schedules of their commitments under the *GATT 1994* and the *GATS* before 31

[270]The European Communities also became an original Member of the WTO.

December 1996.[271] There was no possibility to accept only certain sectoral commitments under specific annexed agreements; rather, membership was available in the Organization only by accepting the *WTO Agreement* as a whole. The situation is similar with respect to subsequent accessions. Acceding states must accept the entire package of obligations contained in the *WTO Agreement* and in the Multilateral Trade Agreements.[272] The provision on withdrawal from the Organization demonstrates a similar concern. Members may not select to withdraw from only certain Multilateral Trade Agreements, but must withdraw from the entire *WTO Agreement* and all of the Multilateral Trade Agreements. A similar intent to maintain the integrity of the single undertaking by minimizing derogations from the Agreement is evident in the provision concerning reservations. No reservations are permitted in respect of any provisions of the *WTO Agreement*. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent specifically provided for in those Agreements.[273] Neither the TPRM Agreement nor the *DSU* contain provisions permitting reservations. Therefore, all of the legal and

---

[271] *WTO Agreement*, Articles XI.1 and XIV.1. Least-developed countries are only "required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capacities: *WTO Agreement*, Article XI.2. These countries were given an additional year to submit their schedules under Article XI: *Decision on Measures in Favour of Least-Developed Countries*.

[272] *WTO Agreement*, Article XII.1. Accession to a Plurilateral Trade Agreement is governed by the specific provisions of that Agreement (*WTO Agreement*, Article XII.2).

[273] *WTO Agreement*, Article XVI.5.

institutional agreements (the *WTO Agreement*, the TPRM Agreement and the *DSU*) are binding upon all WTO Members in their entirety.

All of these provisions reinforce the single undertaking approach by maintaining a uniform and coherent set of rights and obligations. Members are required to adhere to, or withdraw from, the whole package of the *WTO Agreement*, and the Multilateral Trade Agreements annexed to it, as a single entity. This remedies the disparity and differentiation of legal obligations that resulted from the fragmentation of the *GATT 1947* legal system.

The WTO therefore administers a unified and integrated set of agreements which apply equally to all Members. This approach overcomes the institutional unwieldiness and the legal incoherence of rights and obligations of the contracting parties in the previous *GATT 1947* system. It moves away from the problems caused by the untidy patchwork of side agreements and other legal instruments -- each having different signatories, administrative organs and dispute settlement mechanisms -- which had resulted in differentiation of legal obligations in the *GATT 1947* legal system. It also secures unified and integrated application to all WTO Members of the supervisory mechanisms of surveillance in the TPRM and of enforcement of the substantive and procedural norms of the *WTO Agreement* through dispute settlement under the *DSU*. A major achievement of the *WTO Agreement* is, therefore, that it terminates the balkanization of the multilateral trading system that

had resulted from the Tokyo Round and reintroduces uniformity of legal obligations to international trade law.

c. In the Transitional Arrangements

The arrangements regulating the transition from the *GATT 1947* system to the *WTO Agreement* also confirmed the single undertaking. Article II:4 of the *WTO Agreement* confirms that *GATT 1947* and *GATT 1994* are "legally distinct". As a result, the possibility existed for the two agreements to co-exist. This could have lead to uncertainty and confusion concerning the applicable law and obligations existing among states at a given point in time. In order to facilitate the transition from the *GATT 1947* system to the *WTO Agreement*, and to clarify the legal relationship between the *GATT 1947* system and the *WTO Agreement*, the Preparatory Committee for the World Trade Organization prepared several decisions relating to institutional and procedural issues arising from the co-existence of the various legal instruments. These decisions were adopted by the GATT CONTRACTING PARTIES or the relevant Tokyo Round Code Committees, and subsequently noted by the relevant WTO Committees during the transitional period.

The *Decision on the Transitional Co-Existence of the GATT 1947 and the WTO Agreement* provided that the *GATT 1947* and the *WTO Agreement* would co-exist for a period of one year after the entry into force of the *WTO Agreement* on 1

January 1995. After this year of co-existence, the *GATT 1947* was legally terminated.[274] States that acceded to the *WTO Agreement* were not under any legal obligation to extend to GATT contracting parties the same rights and privileges they extended to other WTO Members. States that implemented the *WTO Agreement* and did not simultaneously withdraw from the *GATT 1947* Protocol of Provisional Application were therefore bound by two co-existing different sets of legal rights and obligations to two different sets of states for a transitional period of one year. The Tokyo Round Subsidies and Anti-dumping Committees adopted similar decisions providing for the legal termination of the *Tokyo Round SCM Agreement* and the *Tokyo Round Antidumping Agreement* one year after the date of entry into force of the

---

[274]PC/12, L/7583, adopted 8 December 1994. Paragraph 3 of this Decision states:

> The legal instruments through which the contracting parties apply the *GATT 1947* are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.

WTO Agreement.[275] Special transitional arrangements were made for dispute settlement concerning anti-dumping and subsidies.[276]

This transitional period of co-existence of the *GATT 1947* and certain Tokyo Round Codes with the *WTO Agreement* was intended to promote systemic stability. It permitted finalization of the ratification process for the *WTO Agreement* by WTO Members, and allowed an ordered termination of Committee and dispute settlement activity in order to ease the transition.[277] By delimiting the period of co-

---

[275]*Decision on Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization*, SCM/186, adopted 8 December 1994 by the Tokyo Round Committee on Subsidies and Countervailing Measures (PC/15, L/7586, SCM/186), and noted by the CONTRACTING PARTIES (6SS/SR/1) and the WTO Committee on Subsidies and Countervailing Measures (G/SCM/M/1); *Decision on Transitional Co-Existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization*, PC/13, L/7584, ADP/131, adopted by the Tokyo Round Anti-Dumping Committee (ADP/131) and noted by the CONTRACTING PARTIES (6SS/SR/1) and the WTO Committee on Anti-Dumping Practices (G/ADP/M/1).

[276]The transitional arrangements in the areas of subsidies and countervailing duties investigations received close attention from the panel and the Appellate Body in *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R, WT/DS22/AB/R, adopted 20 March 1997. See *Decision on Consequences of Withdrawal from or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*, PC/16, L/7587, SCM/187, adopted 8 December 1994 by the Tokyo Round Committee on Subsidies and Countervailing Measures, and noted by the CONTRACTING PARTIES (6SS/SR/1) and the WTO Committee on Subsidies and Countervailing Measures (G/SCM/M/1); and *Decision on Consequences of Withdrawal from or Termination of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, PC/14, L/7585, ADP/132, adopted 8 December 1994 by the Tokyo Round Anti-Dumping Committee, and noted by the CONTRACTING PARTIES (6SS/SR/1) and the WTO Committee on Anti-Dumping Practices (G/ADP/M/1).

[277]*E.g.* G. Marceau, "Transition from GATT to WTO: A Most Pragmatic Operation" (1995) *J. of World Trade* 147.

existence of the *GATT 1947* and certain Tokyo Round Codes with the *WTO Agreement*, the transitional arrangements avoided the potential difficulties associated with perpetuating the *GATT 1947* legal system indefinitely to accommodate a few contracting parties who had not yet acceded to the *WTO Agreement*.[278] The agreement to terminate the *GATT 1947* one year after the entry into force of the *WTO Agreement* bolstered the WTO single undertaking by providing an incentive for the *GATT 1947* contracting parties to accede promptly to the *WTO Agreement*.

III. Composition of the *GATT 1994* and its Relationship with the *GATT 1947*

The composition of the *GATT 1994* indicates the legal relationship between the *WTO Agreement* and the previous *GATT 1947* system. It represents an attempt to fashion a new legal instrument while maintaining a significant element of consistency with the *GATT 1947* system. The language in Annex 1A incorporating the *GATT 1994* by reference into the *WTO Agreement* demarcates the composition of the *GATT 1994*.[279] It clarifies that the *GATT 1994* consists of the *GATT 1947*, tariff

---

[278]F. Roessler, "The Agreement Establishing the World Trade Organization" in J. Bourgeois, F. Berrod and E. Fournier (eds.), *The Uruguay Round Results: A European Lawyer's Perspective* (Brussels: European Interuniversity Press, 1995) 67 at 81-82.

[279]The language in Annex 1A incorporating the *GATT 1994* by reference into the *WTO Agreement* states:

> 1. The General Agreement on Tariffs and Trade 1994 ("*GATT 1994*") shall consist of:
>
> (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, ..., as rectified,

(continued...)

concession and accession protocols; waiver decisions and other decisions adopted by the CONTRACTING PARTIES prior to the entry into force of the *WTO Agreement*; six Understandings negotiated during the Uruguay Round; and the Marrakesh

---

[279](...continued)

amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

(b) the provisions of the legal instruments set forth below that have entered into force under the *GATT 1947* before the date of entry into force of the WTO Agreement:
  (i) protocols and certifications relating to tariff concessions;
  (ii) protocols of accession [excluding the Protocol of Provisional Application and any rights grandfathered thereunder];
  (iii) decisions on waivers granted under Article XXV of the *GATT 1947* and still in force on the date of entry into force of the WTO Agreement;
  (iv) other decisions of the CONTRACTING PARTIES to the *GATT 1947*;

(c) the Understandings set forth below:
  (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
  (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
  (iii) Understanding on Balance of Payments Provisions of the General Agreement on Tariffs and Trade 1994;
  (iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade;
  (v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;
  (v) Understanding on the Interpretation of Article XVIII of the General Agreement on Tariffs and Trade 1994; and

(d) the Marrakesh Protocol to *GATT 1994*.

Protocol, containing rules on requirements for, and implementation of, schedules annexed to the *GATT 1994*. These schedules deal with tariff and non-tariff concessions granted by each Member, and commitments each Member has undertaken to limit domestic support and export subsidies.

The *GATT 1947* was legally terminated as of 31 December 1995, and Article II:4 of the *WTO Agreement* states that the *GATT 1994* "is legally distinct from" the *GATT 1947* "as subsequently rectified, amended or modified". WTO Members withdrew from the previous *GATT 1947* and accepted the *GATT 1994* as part of the WTO single undertaking. Despite this termination and legal distinctiveness, the provisions of the *GATT 1947* were incorporated by reference into Annex 1A of the *WTO Agreement*. Supplemented and/or modified by the various legal instruments identified in the incorporating language, it was renamed the *GATT 1994*. This direct incorporation of the *GATT 1947* into the *GATT 1994* circumvented the difficulties associated with amending the *GATT 1947*. At the same time, it had the benefit of ensuring a degree of continuity and consistency with the previous system.

Emphasis on legal continuity with the previous system is also evident in other provisions of the *WTO Agreement*. For example, Article XVI:1 of the *WTO Agreement* provides:

> Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to *GATT 1947* and the bodies established in the framework of *GATT 1947*.

Other provisions continue the *GATT 1947* practice of decision-making by consensus;[280] provide that the WTO's financial regulations are to be based, as far as practicable on the regulations and practices of the *GATT 1947*;[281] and provide that the Secretariat of the *GATT 1947* would become the Secretariat of the WTO, to the extent practicable.[282] Furthermore, in the area of dispute settlement, the WTO Members "affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of *GATT 1947*, and the rules and procedures as further modified herein".[283]

The body of legal instruments, practice and experience inherited from the *GATT 1947* legal system is referred to as the "GATT *acquis*". The GATT *acquis* has been incorporated into the *WTO Agreement* by reference. Therefore, the WTO is an institutional rationalization and formalization of the *GATT 1947* legal system,

---

[280] *WTO Agreement*, Article XVI.1.

[281] *WTO Agreement*, Article VII.2.

[282] *WTO Agreement*, Article XVI.2.

[283] *DSU*, Article 3.1.

which also provides the institutional framework for the broader set of substantive obligations resulting from the Uruguay Round.[284]

The significance of the GATT *acquis* has been confirmed in practice under the *WTO Agreement*. The Appellate Body recently affirmed the significance of legal consistency and continuity of the *WTO Agreement* with the previous *GATT 1947* legal system, and the importance of the "GATT *acquis*":

> Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the *GATT 1994* into the *WTO Agreement* bring the legal history and experience under the *GATT 1947* into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the *GATT 1947* system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the *GATT 1947* -- and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*...[285]

Despite the emphasis on continuity with the previous system, one significant aspect of the *GATT 1947* was not carried over into the *GATT 1994*. This was the provisional application of the *GATT 1947*. Recall that contracting parties to the *GATT 1947* did not accept the *GATT 1947* definitively, but rather applied it

---

[284]See generally Roessler, *op. cit.*, note 278.

[285]*Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14.

through the Protocol of Provisional Application (the "PPA"). The PPA grandfathered existing legislation that was inconsistent with Part II of the *GATT 1947*.

The language in Annex 1A incorporating the *GATT 1994* by reference into the *WTO Agreement* expressly excludes the PPA from those provisions of the *GATT 1947* that are brought into the *GATT 1994*.[286] In order to achieve the exclusion of the PPA, a compromise was necessary to accommodate United States concerns relating to its maritime shipping legislation under the *Jones Act*. For this reason, paragraph 3(a) of the *GATT 1994* grants a limited exemption from the obligations of Part II of the *GATT 1994* to "measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone". This permits retention by the United States of the *Jones Act*, subject to certain conditions: (i) the exemption applies to the continuation or prompt renewal of a non-conforming provision of such legislation, and to an amendment to a non-conforming provision as long as the amendment does not decrease the conformity of the provision with Part 2 of the *GATT 1947*; (ii) the United States is subject to fairly onerous statistical notification duties; and (iii) the Ministerial Conference must review the exemption not later than 5 years from the

---

[286]See Paragraph 1(a) of the *GATT 1994*.

entry into force of the *WTO Agreement*, and thereafter every 2 years, for the purposes of examining whether the conditions underlying the exemption still exist. The combined result of Paragraphs 1(a) and 3(a) of the *GATT 1994* is the abolition of all grandfathered rights for all Members, with the exception of the United States exemption concerning the *Jones Act*.

The shift from provisional application of the *GATT 1947* through the PPA to the definitive application of the *GATT 1994* as an annex to the *WTO Agreement* was more than a symbolic formality. The resulting eradication of the grandfather clause demonstrated the intent of WTO Members to minimize derogations from the single undertaking, thereby maximizing the consistency of Members' legal obligations with the obligations in the *WTO Agreement*. The conditions surrounding the maintenance of the United States' limited exemption for its *Jones Act*, including the rather substantial notification requirements and supervision by the Ministerial Conference, indicate the intent of the Members to bring legal uniformity of the application of the *WTO Agreement* by all Members by terminating exemptions from the Agreement as soon as possible.

IV. Legal Relationships among the *WTO Agreement* and its Annexed Agreements

The previous *GATT 1947* legal system consisted of multiple international agreements, each with different membership and legal machinery. The

legal relationships among these various agreements was ambiguous. There were no explicit legal guidelines to aid in clarifying these legal relationships. By contrast, the *WTO Agreement* constitutes a single treaty, embracing a large number of legal instruments. The integrated nature of the legal system created by the *WTO Agreement* does not eradicate the possibility that legal inconsistencies or conflicts will emerge among these instruments. Rather, the co-existence of the multiple legal instruments constituting the *WTO Agreement* raises the distinct possibility that conflicts will arise in the interpretation and application of the various annexed agreements. For this reason, the Members agreed to provide a certain degree of explicit guidance in the *WTO Agreement* concerning the legal relationships among the various instruments.

In particular, two provisions in the *WTO Agreement* provide guidance on the legal relationship between the various agreements in the event that interpretive conflicts should arise: (i) Article XVI.3 of the *WTO Agreement* addresses conflicts between the *WTO Agreement* and any of the Multilateral Trade Agreements in Annexes 1, 2, and 3; and (ii) the *General interpretative note to Annex 1A* deals with conflicts between the *GATT 1994* and the other Multilateral Agreements on Trade in Goods in Annex 1A.

(i) Article XVI.3 of the *WTO Agreement* states:

> In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

Article XVI.3 clarifies that, for the purposes of the interpretation of the *WTO Agreement* and the Multilateral Trade Agreements in the event of a conflict, the *WTO Agreement* prevails over the Multilateral Trade Agreements. This ensures that the provisions in the *WTO Agreement* concerning decision-making and rule-creation (including amendments, waivers, and interpretations) apply comprehensively throughout the entire WTO legal system. Even with respect to matters falling within the scope of the *GATT 1994*, the unified decision-making provisions in the *WTO Agreement* have therefore replaced the rights and obligations on decision-making in the *GATT 1994*, such as Article XXX on amendments (see *WTO Agreement*, Article X); and Article XXV.5 concerning waivers (see *WTO Agreement*, Article IX.3).

(ii) The *General interpretative note to Annex 1A* regulates the legal relationship between the *GATT 1994* and the twelve other Multilateral Agreements on Trade in Goods in Annex 1A in the event of an interpretive conflict. It has no bearing on the legal relationships outside Annex 1A, such as those between the Annex 1A agreements and the *WTO Agreement*, the *GATS*, or the *TRIPS Agreement*. It states:

> 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 to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

The *General interpretative note to Annex 1A* dictates that the other Multilateral Agreements on Trade in Goods prevail over the *GATT 1994* when an interpretive conflict arises. This ensures that the *GATT 1994* applies only to the extent that it has not been modified by the other Multilateral Agreements on Trade in Goods. The legal relationship between the provisions of the *GATT 1994* and the other Annex 1A agreements is neither simple nor uniform, and it is not possible to predict all of the circumstances in which interpretive conflicts may emerge between them. This factor underscores the importance of the interpretative note for the future application and development of the *WTO Agreement*. Although the text of the *GATT 1947* was incorporated unchanged into the *GATT 1994*, the Uruguay Round results made significant modifications to certain of the rights and obligations contained in the *GATT 1994*. As more recent and precise articulations of the intent of WTO Members in a particular area, some of the Annex 1A agreements interpret, supplement or elaborate upon certain articles of the *GATT 1994*. It is important to note that the *General interpretative note to Annex 1A* exists only to resolve conflicts in the application of the *GATT 1994* and the other Annex 1A agreements. Some of the provisions in the other Annex 1A agreements may overlap with the provisions of

GATT 1994 without creating a conflict. Some of these relationships are being clarified through the dispute settlement process.

In some cases, the specific language of the title or the text of a Multilateral Trade Agreement on Trade in Goods in Annex 1A gives guidance on the legal relationship between it and the *GATT 1994*. This is the case, for example, with the titles of the *Agreement on the Implementation of Article VI of the GATT 1994* (the *Antidumping Agreement*) and the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the *Customs Valuation Agreement*). The text of the *Agreement on Textiles and Clothing* and the *Agreement on Agriculture*[287] contain specific provisions outlining their legal relationship with the provisions of the *GATT 1994*. The *Agreement on Safeguards* relates to the safeguards provision in Article XIX of the *GATT 1994*. The *Agreement on Subsidies and Countervailing Measures* relates at least to Articles VI and XVI of the *GATT 1994*. It contains language linking it to Article VI of the *GATT 1994*; however, as it also contains significant innovations and developments with respect to subsidy disciplines, it may have rendered Article XVI of the *GATT 1994* partially or entirely redundant.

---

[287]For example, Article 21.1 of the *Agreement on Agriculture* stipulates that the *GATT 1994* and the other Annex 1A agreements apply subject to the provisions of that Agreement. In addition, Article V of the *Agreement on Agriculture* allows the imposition of safeguard measures that would otherwise be inconsistent with Article XIX of the *GATT 1994* and the *Agreement on Safeguards*. The Appellate Body has ruled that the *Agreement on Agriculture* does not permit a Member to act inconsistently with the requirements of Article XIII of the *GATT 1994* concerning the non-discriminatory imposition of quantitative restrictions. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, p. 71, para. 158.

Other Multilateral Agreements on Trade in Goods, such as the *Agreement on Technical Barriers to Trade*[288] and the *Agreement on Sanitary and Phytosanitary Measures*, contain no provision linking them with any specific *GATT 1994* provision. They do, however, contain language that resembles certain provisions, such as Articles III (national treatment) and XX (general exceptions). In relation to these provisions, they may constitute a *lex specialis* that should be applied first as a more precise and detailed obligation. They may also relate to other *GATT 1994* provisions and may impose additional obligations upon Members.

The *Agreement on Import Licensing Procedures* (the *Licensing Agreement*) also relates to particular *GATT 1994* obligations. For example, Article 1.3 of the *Licensing Agreement* requires that "the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner". Article X:3(a) of the *GATT 1994* provides that each Member shall "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions or rulings of the kind described in [Article X:1]" (which include import licensing procedures). The Appellate Body has ruled that these two provisions have "identical coverage", and that these two phrases are, for all practical purposes,

---

[288]The issue of the legal relationship between the *Agreement on Technical Barriers to Trade* and the *GATT 1994* arose in *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted 20 May 1996. However, because that case was resolved exclusively under the *GATT 1994*, it was not necessary for the panel or the Appellate Body to resolve this issue definitively.

interchangeable.[289] Although these two provisions both apply to certain measures, however, the *Licensing Agreement* constitutes a sort of *lex specialis* that should be applied first by a panel or the Appellate Body in examining the consistency of a measure with the *WTO Agreement*, since it deals specifically and in detail with the administration of import licensing procedures. If a panel or the Appellate Body finds an inconsistency with the more specific provisions of Article 1.3 of the *Licensing Agreement*, there is no need to proceed to a more general inquiry under Article X:3(a) of the *GATT 1994*.

There is no provision regulating the legal relationship between the *GATT 1994* (in Annex 1A) and the *General Agreement on Trade in Services* (the *GATS*, in Annex 1B). It is conceivable that both of these agreements could apply to a particular measure, if that measure involves a service relating to a good or a service supplied in conjunction with a particular good. The Appellate Body has held that the *GATT 1994* and the *GATS* are not mutually exclusive agreements and that they may overlap in application to a particular measure, although the specific aspect of the measure examined may differ under each agreement.[290]

---

[289] *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, p. 88, paras. 203-204.

[290] *Ibid.*, p. 94, paras. 220-222.

C. The World Trade Organization: Institutional Framework

I. Explicit Institutional Functions and Competence

While the *GATT 1947* did not contain any reference to the competences or functions of the "organization" that developed to administer it, the *WTO Agreement* explicitly sets out the mandate of the WTO. The principal function of the WTO is to furnish "the common institutional framework for the conduct of trade relations" among its Members. As such, it provides the legal and institutional framework for the implementation of the substantive obligations contained in the annexed agreements.

Under the *WTO Agreement*, the WTO is also charged with responsibilities that grant it competence for rule-creation, rule-application and supervision to ensure compliance with and enforcement of the international legal norms set out in the Agreement. The five main responsibilities of the Organization are:[291]

i. to facilitate the implementation, administration and operation, and to further the objectives of the *WTO Agreement*, and the Multilateral Trade Agreements. It is

---

[291] *WTO Agreement*, Article III.

also to facilitate the implementation, administration and operation of the Plurilateral Trade Agreements. This permits the WTO to play a role in the application and administration of the rules of the system, and to provide a forum for rule-creation through decision-making;

ii. to provide *the* forum for negotiations among Members concerning their multilateral trade relations in matters dealt with under the annexed agreements, as well as to provide *a* forum concerning their multilateral trade relations in other matters as decided by the Ministerial Conference. This allows the WTO to act as a forum for rule-creation through negotiation. It is essential to note that, while the WTO is the exclusive forum for matters dealt with in the *WTO Agreement*, it is not the exclusive forum for further negotiations dealing with other trade-related matters. Thus, Members retain the option to pursue other trade-related negotiations outside the aegis of the WTO. A prime example of trade-related negotiations occurring outside the WTO aegis is the negotiation of the Multilateral Agreement on Investment, under the auspices of the OECD;

iii. to administer the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"). This gives the WTO a supervisory mandate to assess the consistency of Member conduct with WTO norms and to enforce compliance with Members' legal obligations;

iv. to administer the Trade Policy Review Mechanism. This grants the WTO a supervisory capacity and allows it to conduct periodic surveillance of Members' trade policies to increase transparency and promote compliance with WTO norms; and

v. to cooperate with the IMF and the World Bank in order to achieve greater coherence in global economic policy-making. This provides the WTO with a legal basis on which to act in the international legal order to cooperate with other international organizations.

II. Legal Personality

The *WTO Agreement* established the WTO and confirmed its legal status as an international organization. Like the United Nations family of organizations and other international organizations, the WTO has legal personality and WTO Members must accord it the legal capacity necessary for the exercise of its functions.[292] WTO Members must also accord to it such privileges and immunities as are necessary for the exercise of its functions.[293] Similarly, WTO Members are to accord the officials of the WTO and the representatives of the Members such privileges and immunities as are necessary for the independent exercise of their

---

[292] *WTO Agreement*, Article VIII.1.

[293] *WTO Agreement*, Article VIII.2.

functions in connection with the WTO,[294] which are "similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947".[295] However, the WTO is a *sui generis* organization established outside the United Nations system and without any formal link to the United Nations (although the Secretariat has continued to abide by the staff rules and employment arrangements of the UN Common System pending agreement among the Members on the establishment of an independent Secretariat).

The General Council of the WTO is charged with making appropriate arrangements for effective cooperation with other intergovernmental organizations with responsibilities related to those of the WTO, and for consultation and cooperation with non-governmental organizations concerned with matters relating to the WTO.[296]

The establishment of the WTO with legal personality and an explicit organizational mandate reinforces its status in international law as the chief institution for international trade. It accords the WTO legal and institutional coherence in its external relations with other international organizations, giving it the

---

[294] *WTO Agreement*, Article VIII.3.

[295] *WTO Agreement*, Article VIII.4.

[296] *WTO Agreement*, Article V.

same international legal standing as the International Monetary Fund (the "IMF") and the World Bank. One of the tasks expressly assigned to the WTO is to cooperate with the IMF and the World Bank in order to achieve greater coherence in global economic policy-making.[297] A half-century after it was originally envisaged, the third pillar of the Bretton Woods triad has finally been put in place (although, as noted, the WTO is not formally a part of the United Nations system).

On the basis of its mandate to achieve greater coherence in global economic policy-making, elaborated in the Uruguay Round Ministerial *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking*[298] the Director-General negotiated agreements with the IMF and the World Bank on behalf of the WTO membership. These Agreements were approved by the WTO General Council[299] and signed by the Director-General on behalf of the WTO in December 1996 and April 1997, respectively. The Director-General is responsible for the implementation of the Agreements,[300] which provide for participation of, and cooperation between, the

---

[297]*WTO Agreement*, Article III.5.

[298]This declaration is among the Ministerial Decisions and Declarations adopted by the Trade Negotiations Committee on 15 December 1993. It is reproduced in GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (GATT: Geneva, 1994) 442.

[299]WT/L/195, 18 November 1996. See Minutes of the General Council Meeting on 7, 8 and 13 November 1996, WT/GC/M/16, 6 December 1996.

[300]WTO-IMF Agreement, paragraph 14; WTO-World Bank Agreement, para. 11.

secretariat staffs of the organizations. The Agreements deal principally with improving the exchange of information between the organizations to ensure that each organization is cognizant of the rights and obligations of Members. To this end, they provide for consultations, the exchange of views on matters of mutual interest, and the exchange of information subject to confidentiality concerns. They also provide for observer status in certain of each other's decision-making bodies. Furnishing a formal legal basis for the implementation of the *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking*, these arrangements strengthen and formalize the inter-institutional relationships with the IMF[301] and the World Bank. The legal arrangements concerning the negotiation, finalization and implementation of these Agreements show an unprecedented degree of organizational autonomy for the WTO, consistent with its formal legal personality under international law and its explicit mandate.

The WTO has formalized a relationship with one additional international organization. In December 1995, the WTO concluded an agreement with the World Intellectual Property Organization (WIPO) providing for cooperation between the WTO Secretariat and the international bureau of WIPO concerning

---

[301]Note that the *Uruguay Round Declaration on the Relationship of the World Trade Organization with the International Monetary Fund* states that, unless otherwise provided in the Final Act, the relationship between the WTO and the IMF with regard to the areas covered by the Multilateral Trade Agreements for Trade in Goods in Annex 1A of the *WTO Agreement* are to be based on the provisions that governed the relationship of the CONTRACTING PARTIES to the *GATT 1947* with the IMF.

technical assistance to developing countries, and notification and compilation of intellectual property laws of WTO Members. This agreement entered into force on 1 January 1996.

III. Institutional Organs

With the exception of joint action by the CONTRACTING PARTIES, the *GATT 1947* did not contain any organizational provisions. For the first time, the *WTO Agreement* provides the explicit legal basis in an international treaty for the institutions and bodies that administer the multilateral trading system and carry out the functions of the WTO. The WTO's tasks to facilitate the implementation, administration and operation, and to further the objectives, of the *WTO Agreement* and the Multilateral Trade Agreements, and to provide the framework for the operation of the Plurilateral Trade Agreements, are carried out by the WTO Secretariat and by an array of councils, committees and subsidiary bodies. The chief institutional bodies of the WTO, each composed of the entire WTO membership, are the Ministerial Conference, and the General Council. The General Council also convenes, as appropriate, as the Dispute Settlement Body ("DSB") and the Trade Policy Review Body ("TPRB"). The institutional framework of the Organization is set out in Figure 2, at the end of this Chapter.

a. The Ministerial Conference

The Ministerial Conference, composed of representatives of all Members, meets at least once every two years.[302] It resembles the former (annual) sessions of the *GATT 1947* CONTRACTING PARTIES. It injects high-level political impetus into the WTO system. The Ministerial Council is responsible for executing the functions of the WTO. It has the authority to take decisions on matters not explicitly reserved to other organs; however, on the request of a WTO Member, it may take decisions under *any* of the Multilateral Trade Agreements.[303] The Ministerial Council can delegate authority to the General Council. The Ministerial Conference has the authority to adopt interpretations of the *WTO Agreement* and of the Multilateral Trade Agreements;[304] may grant a waiver of an obligation under the *WTO Agreement* or a Multilateral Trade Agreement,[305] and may also take decisions on amendments to the *WTO Agreement* or the Multilateral Trade Agreements.[306]

---

[302]The Rules of Procedure for Sessions of the Ministerial Conference, WT/L/28, 7 February 1995, adopted by the General Council on 31 January 1995, provide that regular sessions are at least once every two years. Special sessions may, however, be held at another date on the initiative of the Chairperson, at the request of a Member concurred in by a majority of Members, or by a decision of the General Council (Rules 1-2).

[303]*WTO Agreement*, Article IV.1.

[304]*WTO Agreement*, Article IX.2.

[305]*WTO Agreement*, Article IX.3.

[306]*WTO Agreement*, Article X.1.

b. The General Council

The General Council has assumed the functions corresponding to the former *GATT 1947* Council. While the *GATT 1947* Council was based on secondary legislation adopted by the CONTRACTING PARTIES in 1960, the functions and powers of the General Council are now set out in the *WTO Agreement*, the primary legal instrument of the Organization. The General Council is composed of representatives of all the Members. It carries on the functions of the Ministerial Conference and meets "as appropriate" in the intervals between its meetings.[307] In practice, it meets roughly once every two months. It conducts the day-to-day operations of the WTO. For example, the General Council deals with requests for waivers under Article IX of the *WTO Agreement*, and with accessions. It grants observer status to requesting countries; establishes committees and subsidiary bodies as appropriate; provides a forum where Members can express their opinion on matters of concern to them; sets general policy guidelines for the Organization (such as procedures for the circulation and derestriction of WTO documents); and addresses administrative matters, including, for example, matters relating to the staff of the WTO Secretariat, such as salary and pension conditions. In addition, the General Council has the authority to adopt interpretations of the *WTO Agreement*.[308]

---

[307] *WTO Agreement*, Article IV.2.

[308] *WTO Agreement*, Article IX.2.

The General Council also bears the responsibility for making appropriate arrangements with non-governmental and other intergovernmental organizations having mandates overlapping with the WTO.[309] With respect to arrangements for effective cooperation with other intergovernmental organizations, the General Council approved the agreements between the WTO and the IMF and the WTO and the World Bank in late 1996.[310] The General Council also adopted guidelines on observer status for international intergovernmental organizations; [311] and guidelines for arrangements on relations with non-governmental organizations pursuant to Article V:2 of the *WTO Agreement.*[312]

The General Council convenes as appropriate to discharge its duties as the Dispute Settlement Body[313] and the Trade Policy Review Body.[314] This arrangement is a compromise between those Members who wanted the *DSU* and the TPRM to be administered by distinct organs, and those who wanted the central organ

---

[309] *WTO Agreement*, Article V.1-2.

[310] WT/L/195, 18 November 1996. See Minutes of the General Council Meeting on 7, 8 and 13 November 1996, WT/GC/M/16, 6 December 1996.

[311] WT/L/161, Annex 3, 25 July 1996, adopted 18 July 1996, WT/GC/M/13, 28 August 1996.

[312] WT/L/162, 23 July 1996, adopted 18 July 1996, WT/GC/M/13, 28 August 1996.

[313] *WTO Agreement*, Article IV.3.

[314] *WTO Agreement*, Article IV.4.

of the WTO to administer them.[315] The arrangement promotes consistency and uniformity in the three functions. The body nevertheless has a different chairperson for each function.[316] The body also has particular rules of procedure for each function.

c. Subsidiary Bodies

To aid the Ministerial Conference and the General Council in executing their functions, there are three sectoral Councils. These are: the Council for Trade in Goods; the Council for Trade in Services; and the Council for Trade-Related Aspects of Intellectual Property Rights. Each of these three Councils, open to all WTO Members, bear the responsibility for overseeing the pertinent substantive multilateral trade agreements, and have the authority to establish subsidiary bodies as required. While subsidiary bodies have decision-making capabilities, these abilities are curtailed by their rules of procedure. The rules of procedure provide that, where a decision cannot be reached by consensus, the matter at issue is to be referred to the General Council for a decision.

Under the *WTO Agreement*, interpretations of, and waivers of obligations under, a Multilateral Trade Agreement by the Ministerial Conference or

---

[315]Roessler, *op. cit.*, note 278, p. 72.

[316]*WTO Agreement*, Article IV.3 -.4.

the General Council may only be adopted on the basis of a recommendation or report by the Council overseeing that particular agreement. The competent Council may also recommend that the Ministerial Conference make amendments to the relevant Multilateral Trade Agreement.

The Ministerial Conference established a Committee on Trade and Development; a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration. These three permanent committees were carried over from the *GATT 1947* to discharge the functions assigned to them under the *WTO Agreement*[317] and the Multilateral Trade Agreements, and any other functions assigned to them by the General Council. In addition, the Ministerial Conference may establish "any such additional Committees with such functions as it may deem appropriate". The bodies established in the Plurilateral Trade Agreements in Annex 4 of the *WTO Agreement* carry out the functions assigned to them and "operate within the institutional framework of the WTO". They report regularly to the General Council.

---

[317] *WTO Agreement*, Articles VI.7 and VII.1-2.

d. The Secretariat

For the first time, the *WTO Agreement* also provides the formal legal foundation for the Secretariat of the Organization, headed by a Director-General.[318] The *WTO Agreement* provided that the *GATT 1947* Secretariat was to become the WTO Secretariat to the extent practicable.[319] In practice, the anomalous arrangement which had existed under the *GATT 1947* of "borrowing" the services of the ICITO Secretariat persists until the WTO Members take the decision to establish the WTO Secretariat as an independent *sui generis* international organization outside the United Nations Common System.

The Ministerial Conference appoints the Director-General and adopts regulations setting out the powers, duties, conditions and terms of office.[320] The Director-General appoints the staff and sets the duties and conditions of service in accordance with Ministerial Conference regulations.[321] The Agreement stipulates that the responsibilities of the Director-General and Secretariat "shall be exclusively international in character". The Director-General and Secretariat are not to "seek or

---

[318] *WTO Agreement*, Article VI.1.

[319] *WTO Agreement*, Article XVI.2.

[320] *WTO Agreement*, Article VI.2.

[321] *WTO Agreement*, Article VI.3.

accept instructions from any government" or any other external authority.[322] Beyond these provisions, the Agreement does not contain any further conditions concerning the Secretariat. In practice, the WTO Secretariat services and provides support to all WTO committees and councils. It produces a report on an individual Member's trade policies in the Trade Policy Review Mechanism. It also provides technical and legal support to dispute settlement panels, a role that has had extreme importance in promoting the consistent development of GATT/WTO law. A small, institutionally distinct secretariat services the Appellate Body.

D. Summary observations

By establishing an integrated legal order and a common institutional framework to govern the commercial interaction of WTO Members, the *WTO Agreement* remedies many of the systemic weaknesses that existed in the fragmented and unwieldy *GATT 1947* legal system. The *WTO Agreement* promotes certainty and stability by explicitly detailing the organizational infrastructure and functions, as well as the legal relationships among the *WTO Agreement* and its annexes. It creates a more coherent supranational legal framework, the WTO, that has an autonomous supranational identity and supranational legal authority. With its institutional structure, functions and international legal personality explicitly established by its

---

[322] *WTO Agreement*, Article VI.4.

constitutive treaty, the WTO provides a stronger supranational institutional framework for the development, application, monitoring and enforcement of international legal norms in the trade sphere.

The unified institutional framework allows the plenary legislative bodies of the Organization -- the Ministerial Conference and the General Council -- to have decision-making competence in all matters under the annexed agreements, promoting systemic coherence.

Under the *WTO Agreement*, the WTO has a mandate for rule-creation, rule-application and supervision to ensure compliance with the Agreement. The WTO is charged with facilitating the implementation, administration and operation, and furthering the objectives of the *WTO Agreement*, and the Multilateral Trade Agreements; facilitating the implementation, administration and operation of the Plurilateral Trade Agreements; and administering the *Dispute Settlement Understanding* and the Trade Policy Review Mechanism. It also provides the exclusive forum for negotiations among Members concerning their multilateral trade relations in matters dealt with under the annexed agreements, as well as providing a non-exclusive forum concerning their multilateral trade relations in other matters as decided by the Ministerial Conference. Members therefore retain the option to pursue rule-creation through other trade-related negotiations outside the aegis of the WTO with respect to matters not already dealt with in the *WTO Agreement*. An

example of this is the OECD Multilateral Agreement on Investment. This is unfortunate, as it would be optimal to have all international trade-related agreements under one institutional "roof".

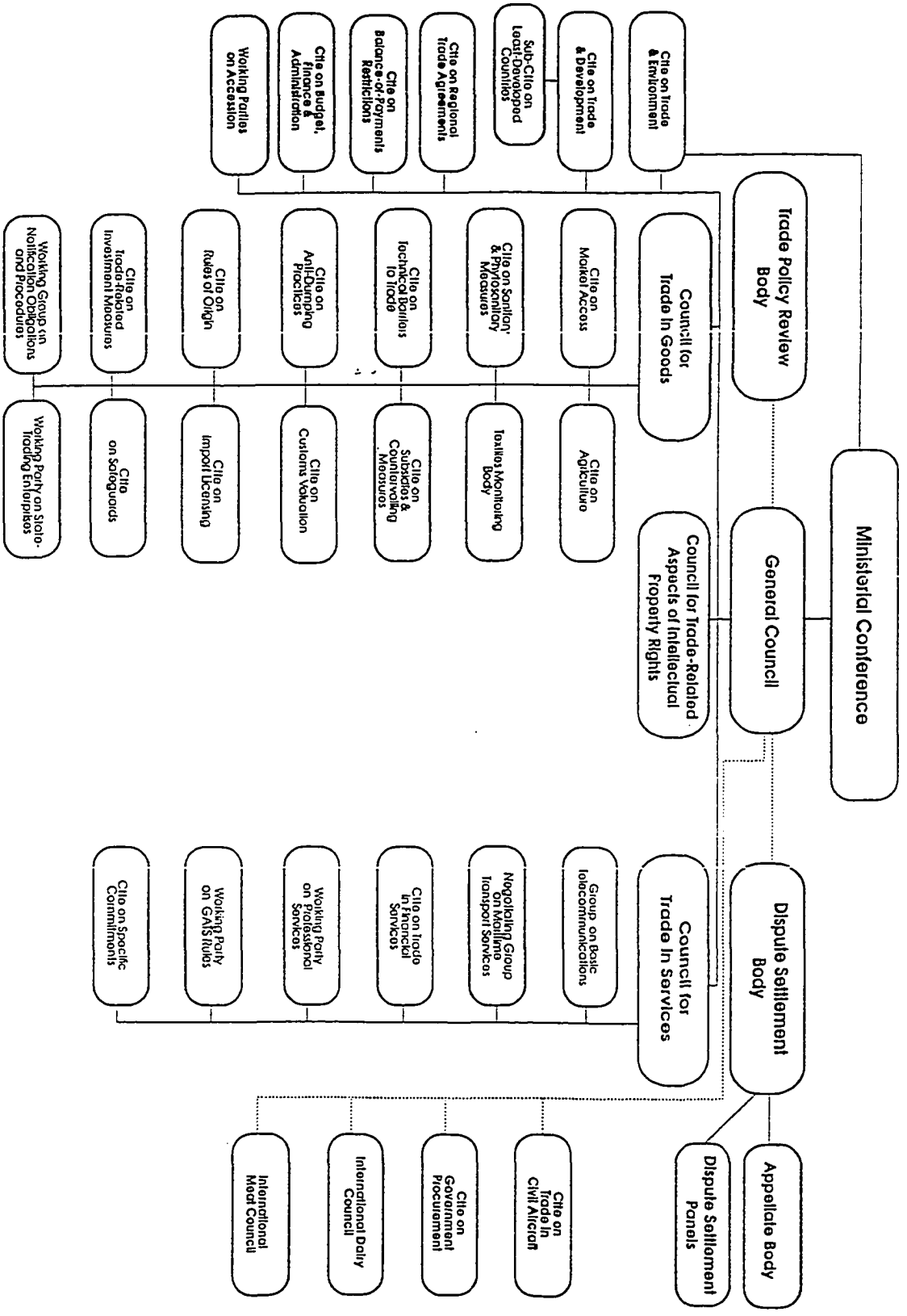
The WTO's international legal personality and specific mandate also give the organization a formal legal platform on which to base its external relations with other international organizations and to act in the international legal order. On the basis of this platform and its mandate to promote greater coherence in global economic policy-making, the WTO has exercised a substantial degree of institutional autonomy in negotiating and concluding agreements with the IMF and the World Bank.

The *WTO Agreement* has several aspects that enhance legal certainty and emphasize legal uniformity and consistency. Ending the legal fragmentation that plagued the previous *GATT 1947* system, the integrated set of agreements under the aegis of the WTO now apply equally to all Members as a single undertaking. This single undertaking is evident in the structure of the Agreement itself, as well as in certain provisions of the Agreement dealing with original membership, accessions and withdrawal. There is a minor deviation in the case of least-developed countries who, although they sign on to the single undertaking, are required only to undertake commitments and concessions to the extent of their individual development, financial and trade needs, or their administrative and institutional capabilities. No similar

general arrangement exists for developing countries, although special and differential treatment in the form of less rigourous obligations or longer transitional periods exist for these countries in some of the annexed agreements. The single undertaking also featured in the transitional arrangements from the *GATT 1947* system of agreements to the *WTO Agreement*.

Unlike the *GATT 1947*, the *WTO Agreement* has definitive application, and has essentially eradicated any "grandfathered" derogations from the obligations in the Agreement. Furthermore, the Agreement gives guidance on its legal relationship with the previous *GATT 1947* legal system. The incorporation by reference of the text of the *GATT 1947* promotes continuity and consistency. The Agreement also provides further guidance concerning the legal relationships among the various legal instruments constituting the Agreement in the event that interpretive conflicts arise among them. All of these features will facilitate the maintenance of coherence and consistency in the future development of the legal order.

Figure 2:
The Structure of the WTO



Chapter 4

The WTO Agreement: Decision-making and Rule-creation

A. Introduction

Decision-making in an international organization is closely intertwined with the issue of sovereignty and the international legal autonomy of the member states. Decision-making is a fundamental activity of international organization, as it permits the creation of additional or altered legal obligations to supplement or modify those contained in the legal instruments of the organization. Where the voting rules of an international organization allow decisions to be taken by majority vote, states have transferred sovereign authority to the organization by undertaking to be bound by a decision without their specific consent to a particular decision. By contrast, where consensus or unanimity prevails, states retain the sovereign authority to determine how and whether the international legal rules administered by the organization will develop.

The *WTO Agreement* contains several provisions on decision-making. Depending upon the context, decisions within the WTO are to be taken by consensus, simple majority, a qualified majority of two-thirds (sometimes with the added requirement of comprising more than half of the Members), a qualified majority of three-quarters; or unanimity. While the practice of decision-making by consensus

followed under the *GATT 1947* has been continued under the WTO, the *WTO Agreement* has also introduced several significant modifications to certain specific decision-making arrangements concerning rule-creation which affect the allocation of sovereign authority among the Members and the Organization. This chapter will first examine the ordinary WTO practice of decision-making by consensus, before proceeding to an examination of the special rules and procedures for decision-making and rule-creation.

B. Consensus

Under the *GATT 1947*, the CONTRACTING PARTIES enjoyed the broad authority to take joint action "with a view to facilitating the operation and furthering the objectives of [the] agreement".[323] Except as otherwise provided for in the Agreement, decisions were to be taken by a simple majority of votes cast[324] with each contracting party entitled to have one vote."[325] Derogations from this simple majority rule existed in the *GATT 1947* for specific situations. For example, a qualified two-thirds majority was required for granting waivers under Article XXV.5; for approving amendments under Article XXX; and for approving accessions under Article XXIII. Despite these explicit provisions on voting in the *GATT 1947*, in

---

[323]*GATT 1947*, Article XXV.1.

[324]*GATT 1947*, Article XXV.4.

[325]*GATT 1947*, Article XXV.3.

practice, voting never occurred unless it was necessary to establish that a special two-thirds majority did indeed exist. Consensus was clearly the preferred course of action, presumably due to the uneasiness of the CONTRACTING PARTIES with the ambiguous wording of Article XXV and the other decision-making provisions contained in the *GATT 1947*.[326] Decision-making arrangements under the Tokyo Round Codes were also ambiguous, as most of the Codes did not contain express decision-making provisions.[327] Therefore, under the *GATT 1947*, while the possibility theoretically existed for a contracting party to be bound without its consent by a simple majority decision, in practice this did not occur because of the entrenched practice of decision-making by consensus. Nevertheless, votes occurred for matters requiring a two-third majority approval, such as waivers.

Decision-making by consensus, as under the *GATT 1947*, persists in the WTO. However, whereas the *GATT 1947* made no mention of "consensus" and decision-making by consensus developed as "practice" under the *GATT 1947*, the *WTO Agreement* has formally and explicitly codified this practice. Article IX.1 of the Agreement states: "The WTO shall continue the practice of decision-making by consensus followed under the *GATT 1947*". The *WTO Agreement* also codifies what

---

[326]Jackson, *op. cit.*, note 233 at 184.

[327]The only Tokyo Round Codes with explicit decision-making provisions were: the *Arrangement on Bovine Meat*, BISD 26S/ 84 and the *International Dairy Arrangement*, BISD 26S/91. These referred to decision-making by consensus. The *Agreement on Implementation of Article VII* , BISD 26S/116 contained a voting provision in Annex II relating to the Technical Committee on Customs Valuation.

constitutes consensus: consensus is deemed to exist where the chairperson of the body in question determines that no Member present at the meeting when the decision is taken formally voices an objection. This is not synonymous with a requirement of unanimity. Whereas absence of a delegation from the relevant meeting, or abstention from voting can block the achievement of unanimity, only a formal objection will prevent the achievement of consensus.

In most situations, except as otherwise provided in the *WTO Agreement*, where no consensus can be reached, the Agreement explicitly calls for recourse to voting. A distinction can, therefore, be made between two areas of consensus decision-making under the *WTO Agreement*: first, those for which the *Agreement* explicitly provides that consensus is a *requirement* with no alternative; and second, those for which consensus remains merely an accepted *practice* and an alternative to voting.[328] Decisions for which consensus is a requirement, with no other decision-making option available are: amendments to the dispute settlement procedures under the *DSU*;[329] decisions taken by the DSB;[330] the granting of a waiver concerning an obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the

---

[328]See, for example, Roessler, *op. cit.*, note 278 at 74.

[329]*WTO Agreement*, Article X.8.

[330]*DSU*, Article 2.4.

relevant period;[331] and the addition of a Plurilateral Trade Agreement to Annex 4.[332] In all other situations, the *WTO Agreement* establishes decision-making by consensus as the ordinary course of proceeding,[333] although voting remains legally available should consensus prove impossible to achieve. If the matter proceeds to a vote, each Member of the WTO has one vote at meetings of the Ministerial Conference and General Council.[334] A simple majority of the Members constitutes a quorum.[335] Except as otherwise provided, decisions are to be taken by a simple majority of the votes cast.[336] It should be noted that the rules of procedure for the subsidiary councils and committees provide that, where a decision cannot be arrived at by consensus, the matter at issue shall be referred to the General Council.[337] Due to the integrated

---

[331] *WTO Agreement*, Article IX.3(a), footnote 4.

[332] *WTO Agreement*, Article X.9.

[333] *WTO Agreement*, Article IX.1.

[334] An exception to this one-vote-per-Member rule is the European Communities (the "EC"). According to *WTO Agreement*, Article IX:1, footnote 2, "[t]he number of votes of the European Communities and their member States shall in no case exceed the number of member States of the European Communities". The EC cannot vote together with all of its Member States. In effect, when the EC exercises its right to vote, the EC Member States no longer have a right to vote. See *e.g.* P. Van den Bossche, "The Establishment of the World Trade Organization: The Dawn of a New Era in International Trade?" (1994) 1 *Maastricht J. of European and Comparative L.* 396 at 415.

[335] Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/28, 7 February 1995, adopted by the General Council on 31 January 1995, Rule 16.

[336] *WTO Agreement*, Article IX.1.

[337] Rules of Procedure for Meetings of the Council for Trade in Goods, G/C/W/2, 24 March 1995, Rule 33; Rules of Procedure for Meetings of the Council for TRIPS, IP/C/1, 28 September 1995, Rule 33; Rules of Procedure for Meetings of the Council for Trade in Services, S/L/15, 19 (continued...)

nature of the WTO single undertaking, the General Council enjoys decision-making authority for all of the Multilateral Trade Agreements. It also has a multisectoral perspective that might help it to resolve difficult issues more readily. The emphasis that these procedures place on consensus decision-making demonstrate the aversion that WTO Members have to submitting contentious matters to a formal vote.

When the General Council convenes as the Dispute Settlement Body, it follows the rules of procedure of the General Council, except as provided in its own Rules of Procedure.[338] The *Dispute Settlement Understanding* stipulates that, where the DSB takes a decision, it shall do so by consensus. When the General Council

---

[337](...continued)
October 1995, Rule 33. Special procedures apply to the Textiles Monitoring Body under the *Agreement on Textiles and Clothing*. Working Procedures for the Textiles Monitoring Body, G/TMB/R/1, Annex.

[338]Rules of Procedure for Meetings of the Dispute Settlement Body, WT/DSB/9, 16 January 1997. In general, the Rules of Procedure for all bodies are not rigidly observed. For example, there is no formal count conducted at each meeting of the General Council to confirm that a quorum of a simple majority of the Members exists. However, observance of the quorum rule arose in the DSB on the occasion of the adoption of the panel and Appellate Body reports in *Japan - Taxes on Alcoholic Beverages* (WT/DS8/R, WT/DS10/R, WT/DS11/R; WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R). On 29 October 1996, prior to the adoption of the agenda for the DSB meeting, the representative of Japan requested a clarification concerning the rule of quorum for the conduct of business. The DSB Chairperson said that the rule on quorum provided for a simple majority of Members, namely 63 delegations under the WTO membership at that time, and that, in practice, the quorum was only verified when a request to this effect was made at the outset of meetings. The Chairperson also noted that this was the first time in the WTO that a request to verify the quorum was made. He requested that the Secretariat take a count of the delegations present. As only 38 delegations were present, he asked the delegation of Japan whether it would agree of not to proceed with the business of the meeting. The representative of Japan said that his delegation would continue to be very flexible in normal meetings devoted to exchanges of views, but when the DSB had to take important decisions that required consensus, he believed that the quorum requirement should be observed. The DSB agreed to the Chairman's proposal to adjourn the meeting and to reconvene it on November 1. See WT/DSB/M/35, 18 July 1997.

convenes as the Trade Policy Review Body (TPRB), it follows the rules of procedure of the General Council, except as provided in its own Rules of Procedure.[339] There is no requirement of quorum to conduct trade policy reviews,[340] and there are no special arrangements for decision-making by the TPRB.

In a limited number of situations, the *WTO Agreement* stipulates a time period within which Members should achieve consensus. This is the case, for example, with respect to certain waivers and amendments. With respect to requests for waivers relating to the *WTO Agreement*, the Ministerial Conference must establish a time-period for consideration of the request. The time period must not exceed 90 days. If consensus is not reached within this established time period, the waiver decision is to be taken by a qualified three-fourths majority vote.[341] With respect to proposals to amend the *WTO Agreement* or any of the Annex 1 agreements, any decision by the Ministerial Conference to submit such proposals to the Members for acceptance must be taken by consensus within 90 days (unless the Ministerial Conference agrees upon a longer period) after the tabling of the proposal for amendment.[342] In other situations where no time period is expressly identified, it is

---

[339]Rules of Procedure for Meetings of the Trade Policy Review Body, WT/TPR/6, 10 August 1995.

[340]*Ibid.*, Rule 9.

[341]*WTO Agreement*, Article IX.3(a).

[342]*WTO Agreement*, Article X.1.

not clear how long the WTO membership must endeavour to reach consensus before putting the matter to a formal vote. As the WTO is to be guided by the "customary practices" of the *GATT 1947*, it is likely that matters other than those falling under special qualified majority decision-making rules, such as waivers, amendments and interpretations, will only very rarely (if ever) be submitted to a formal vote. The risk of proceeding to a simple majority vote on a contentious issue is that decisions will be adopted without the specific endorsement of major trading states. This could lead to non-compliance by these states with decisions of the Organization. Such non-compliance would gravely undermine the effectiveness and credibility of the Organization.[343]

The requirement or practice of consensus preserves the ability of each WTO Member to influence the outcome of a decision. Consensus means that there is no possibility for a Member to be bound to follow a course of action without its consent, unless it is absent from the meeting where the decision is taken. Consensus decision-making therefore does not entail a transfer of any sovereign authority from the Members to the WTO. Where decision-making by consensus persists, each state effectively enjoys a power to block or "veto"a decision. The possibility of a "veto" for each Member could render decision-making in the WTO unwieldy or impossible, particularly in light of the steadily growing number of Members with increasingly

---

[343]*E.g.* Van den Bossche, *op. cit.*, note 334 at 425.

heterogeneous interests. In view of the risks and shortcomings of consensus decision-making, it may prove necessary to adopt other decision-making practices in the future. This issue emerged at the 1996 Singapore Ministerial Conference, where certain delegates and the WTO Director -General acknowledged the need to improve the functioning of the WTO system by streamlining the decision-making process.[344] One possibility that has surfaced is the establishment of a smaller executive committee or "steering group" to guide the work of the organization and establish its future agenda.[345]

The most significant power of rule-creation -- that of the development of entirely new international norms, both within the framework of the existing rules, as well as beyond the scope of the existing rules -- is subject to the practice of decision-making by consensus under the *WTO Agreement*. The *GATT 1947* contained no provisions permitting it to act as a forum for negotiated rule-creation among the contracting parties, but the GATT nevertheless evolved into a forum for negotiations among the Contracting Parties. These negotiations occurred on a multilateral basis in the eight rounds of Multilateral Trade Negotiations. The *WTO Agreement* now expressly grants the WTO a mandate to provide a forum for negotiations and collective rule-creation among its Members. This authority means that the WTO is

---

[344]*Inside U.S. Trade*, 20 December 1996.

[345]See *e.g.* Jackson, *op. cit.*, note 233 at 187; Jackson, *op. cit.*, note 58 at 49; Van den Bossche, *op. cit.*, note 334 at 409.

now the organizational structure and exclusive forum for negotiations concerning multilateral trade relations in matters already dealt with in the Annexes to the *WTO Agreement* (including the so-called "built-in agenda"). It is also a non-exclusive forum for further negotiations on new trade issues, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.[346] This gives new powers to delineate the future agenda of the WTO at the biannual Ministerial Conferences. However, as noted in Chapter 3, Members have also retained the option to conduct rule-creating negotiations on trade-related issues that are not presently within the scope of the *WTO Agreement* outside the WTO aegis. It would be preferable to have all international trade-related instruments residing under one institutional roof, even if such agreements are plurilateral rather than multilateral in nature.

The WTO's "built-in agenda" arises from the *WTO Agreement* and the decisions adopted at Marrakesh with the Final Act. For example, Article 9 of the *TRIMs Agreement* calls for the review of that Agreement and the possible addition of provisions on investment and competition policy. The *TRIPs Agreement* calls for negotiations with a view to increasing the protection of individual geographical indications (Article 24) and for review and amendment of that *Agreement* (Article 71). The *Decision on Review of Article 17.6 of the Agreement on Implementation of*

---

[346] *WTO Agreement*, Article III.2.

Article VI of the General Agreement on Tariffs and Trade 1994 calls for a review of the standard of review set out in the *Antidumping Agreement* after a period of three years of the entry into force of the *WTO Agreement* "with a view to considering whether it is capable of general application". Future negotiations, reviews, or other work are also contemplated on agriculture, customs valuation, import licensing, preshipment inspection, rules of origin, sanitary and phytosanitary measures, safeguards, antidumping, subsidies and countervailing measures, technical barriers to trade, textiles and clothing, and services. The functioning of the TPRM and the *DSU* are also to be reviewed.

The Ministerial Conference has the explicit authority to establish the future agenda for the WTO. At the Singapore Ministerial Meeting in December 1996, new items for discussion on the agenda included the relationship between trade and core labour standards. Strong differences of opinion on this issue exist among WTO Members. The necessity for a consensus agreement on the wording of the Singapore Ministerial Declaration meant that only a limited and carefully-worded statement concerning trade and labour could be achieved. The statement is ambiguous concerning the future ability of the WTO to carry out work and to develop new international rules in this area. While the Members renewed their commitment to the observance of internationally recognized core labour standards, they stated that the International Labour Organization (ILO) was the competent body to set and deal

with these standards, noting at the same time "that the WTO and ILO Secretariats will continue their existing collaboration".

Other controversial topics that were on the agenda for Singapore included the degree of future involvement of the WTO in the areas of investment and competition, including under the *TRIMs Agreement*. No substantive progress was made in these areas at Singapore, nor was any commitment achieved concerning rule-creation by the WTO in these areas. However, the Members agreed by consensus to establish a working group to examine the relationship between trade and investment. The Members also agreed to establish a working group to study issues raised by Members relating to the interaction of trade and competition in order to identify areas that may merit further consideration in the WTO framework.

One market access arrangement negotiated at Singapore demonstrated that some kinds of rule-creation, modifications to tariff concessions, do not require consensus in the Ministerial Conference. This was the Ministerial Declaration on Trade in Information Technology Products (referred to as the "Information Technology Agreement" or "ITA"), agreed among 29 Members at the Conference, conditional upon adherence of other signatories by 1 April 1997. Under this arrangement, a limited number of Members agreed to eliminate customs duties and other duties and charges on information technology products (computers, telecom products, semiconductors, semiconductor manufacturing equipment, software,

scientific instruments) through annual reductions beginning on 1 July 1997 and concluding, in general, on 1 January 2000. The current 43 participants represent about 92.5% of world trade in the covered products. The ITA has its own Committee of Participants that will deal with tasks such as the review and possible expansion of product coverage, achieving common customs classification for covered products, and requests for consultations, and will serve as a forum for meetings required under ITA procedures. This limited-membership arrangement has no formal legal status in the WTO system and is not part of the WTO single undertaking: the signatories have not invoked the procedures for an amendment under Article X of the *WTO Agreement*, and it has not been added as a Plurilateral Trade Agreement in Annex 4 of the *WTO Agreement* by consensus agreement of all Members. It is a modification of Part I of the *GATT 1994* Article II tariff schedules of certain Members for certain products. As with all such tariff concessions, the ITA tariff reductions apply on a most-favoured-nations basis to all WTO Members. The free-rider problem was minimized by the requirement that implementation of the ITA was conditional upon participation covering approximately 90% of world trade in the relevant products. There is a possibility that the ITA will also deal with non-tariff measures.

The fact that rule-creation through negotiation of entirely new international rules in the WTO is subject to the practice of decision-making by consensus means that each Member retains the power to influence the future direction of the organization's agenda and work programme. This shows that Members were

not willing to cede their autonomy in this way, nor to commit themselves in advance to be bound by international norms that have not yet been developed. Each WTO Member has a say in the shaping and development of rules by the Organization that will bind them in the future, both in terms of the broad areas of competence where such norms may be developed, as well as in the precise details of such norms.

One option that circumvents the necessity of gaining consensus approval for a new rule-creating instrument is for a limited number of interested countries to conclude a side agreement. Such side agreements may be valuable because they promote trade liberalization in a specific sector of commercial activity. However, this avenue raises the risk of undermining the single undertaking and returning to a fragmented legal order reminiscent of the *GATT 1947* legal system. On the theory that there should be one international "house" where all trade-related agreements reside, these agreements should be integrated into the existing WTO legal order. There is a possibility to add such a side agreement to Annex 4 of the *WTO Agreement* as a "Plurilateral Trade Agreement", by consensus among WTO Members.[347] The conclusion of a number of such side agreements might create an overly complex and unsustainable legal order, and necessitate a comprehensive overhaul of the WTO legal system, akin to the one that transformed the *GATT 1947* system into the *WTO Agreement*.

---

[347] *WTO Agreement*, Article X.9.

Despite their trade-liberalizing effect, side agreements are therefore not optimal. Using the ITA as an example, while its tariff reductions are applicable to all Members on a most-favoured-nation basis, it still has its own administering infrastructure that is outside the WTO single undertaking (including decision-making and supervision). Where possible, it would be preferable to integrate a side agreement promptly into the WTO single undertaking through the procedures for amending the *WTO Agreement*. This would preserve the WTO single undertaking.

C. Special Decision-Making

Like the *GATT 1947*, the *WTO Agreement* contains special provisions for decision-making with respect to certain rule-creating procedures. Under the *WTO Agreement*, these special provisions relate to amendments, interpretations, and waivers of the *WTO Agreement*, as well as to accessions to the *WTO Agreement*.[348] All of these provisions concern rule-creation as they allow for either the development of additional rights and obligations, or for derogations from existing rights and obligations, among Members. With the exception of the ability to create entirely new international legal norms, the authority to amend an international agreement is the most extensive rule-creating power. Authority for adopting interpretations, waivers and accessions are also fundamental. States have generally been loth to accept

[348]Decisions concerning the Plurilateral Trade Agreements, including those on interpretations and waivers, are to be governed by the relevant agreement (*WTO Agreement*, Article IX.5).

transferring the authority for such rule-creating decisions at the supranational level as this encroaches upon their autonomy and control over the development of their international legal obligations.

The WTO rules on decision-making in these special areas have been strengthened and made more precise in comparison with the corresponding arrangements under the *GATT 1947*. A critical characteristic of these decision-making procedures is that they apply uniformly across all of the legal instruments constituting the WTO single undertaking. These decision-making arrangements are distinctive under international law as they technically move away from the practice of decision-making by consensus. At the same time, they require more than a decision by simple majority due to their more extensive legal consequences for Members. All of these procedures formally require approval by a qualified majority vote of either two-thirds or three-quarters of the Members. Nevertheless, despite their potential for rule-creation, they are not subject to a requirement of unanimous approval. They therefore raise the possibility for a Member to be bound to accept new rights and obligations without its express consent.

On paper, these arrangements appear to constitute a transfer of sovereign authority from the state to the international level, and a ceding of a certain amount of autonomy on the part of the state. At first glance, they seem to demonstrate the willingness of states to develop additional WTO rules and disciplines

through qualified majority voting that will carry the rule-creation process forward more easily than would a requirement of unanimity. Each of these decision-making procedures will be examined individually below to determine whether these formal arrangements do indeed entail an allocation of decision-making power away from the Members to the WTO.

I. Amendments

Under the *GATT 1947*, unanimous consent was required to alter certain obligations: Article I and II (the most-favoured-nation principle), XXIX (the relationship of the agreement to the Havana Charter) and XXX (setting out the requirements for the approval of amendments). Other amendments were effective, but only in respect of those that accepted them, where two-thirds of the contracting parties accepted them.[349]

The *WTO Agreement* provisions on amendments are complex. The requirements for amendments differ depending upon the particular agreement and particular provisions in question, as well as upon the nature of the particular amendment. Depending upon the specific obligations involved, an amendment

---

[349]See Jackson, *op. cit.*, note 6 at 73.

requires either unanimous (Article X .2) or two-thirds majority (Article X.3) acceptance in order to become effective.

There is also a preliminary screening process to determine whether or not a proposal for amendment should even be submitted to the Members for their approval. Any WTO Member can submit an amendment proposal relating to the *WTO Agreement* and the agreements in Annexes 1, 2 and 3 to the Ministerial Conference. Any of the three sectoral Councils can also submit proposals to amend provisions of the Annex 1 agreement(s) they oversee. For 90 days after the proposal has been tabled at the Ministerial Conference (unless the Ministerial Conference decides upon a longer period), a decision by the Ministerial Conference to submit the proposed amendment to the Members is taken by consensus. Where consensus is achieved, the amendment is submitted to the Members. Where consensus is not reached, the issue whether to submit the amendment to the Members is put to a vote, requiring a two-thirds majority of the Members.

Amendments to certain provisions will take effect only upon unanimous acceptance by all Members. Article X.2 of the *WTO Agreement* dictates that unanimous approval is required for amendments to *WTO Agreement*, Articles IX (on decision-making) and X.2 (requiring unanimity required for certain amendments); and to the cornerstone most-favoured-nation (MFN) principle for trade in goods

(*GATT 1994*, Articles I and II); services (*GATS*, Article II:1); and trade-related aspects of intellectual property (*TRIPS Agreement*, Article 4).

Amendments to other provisions of the *WTO Agreement*, the Multilateral Trade Agreements on Trade in Goods (in Annex 1A) and the *TRIPs Agreement* (in Annex 1C) have different decision-making requirements depending on whether they are "of a nature that would alter the rights and obligations of the Members" or "of a nature that would not alter the rights and obligations of the Members". The latter binds all Members upon acceptance by two-thirds of the Members.[350] The former does not bind a Member that has not accepted it. The Ministerial Conference may decide by three-quarters majority an amendment that alters rights and obligations is such that any Member which has not assented to it within a time period set by the Ministerial Conference is free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.[351]

The distinction between amendments that would and would not alter Members' rights and obligations is, therefore, paramount. However, it is unclear how this distinction will be drawn in practice. In keeping with the WTO "single undertaking ", an amendment affecting the institutional or procedural aspects of the

---

[350] *WTO Agreement*, Article X.4.

[351] *WTO Agreement*, Article X.3.

WTO would presumably have to apply to all Members, rather than to just those Members that had accepted it.[352]

Amendments to the *GATS* in Annex 1B take effect for those Members who accept them upon approval by two-thirds of the Members.[353] Here too, the Ministerial Conference may, by three-fourths majority, determine that any amendment to *GATS* Parts I, II and III is of such a nature that any Member which has not accepted it within a time frame set by the Ministerial Conference is free to withdraw from the WTO or to remain a Member with the permission of the Ministerial Conference.[354]

Amendments to the provisions of the *DSU* are made by consensus, and apply to all Members upon approval by the Ministerial Conference.[355] Amendments to the TPRM take effect for all Members once approved by the Ministerial Conference,[356] either by consensus or by a simple majority vote. Amendments to the

---

[352]Roessler, *op. cit.*, note 278 at 75.

[353]Except where unanimity is required (*i.e.* in respect of the MFN principle in Article II:1, by virtue of *WTO Agreement*, Article X.2).

[354]*WTO Agreement*, Article X.5.

[355]*WTO Agreement*, Article X.8.

[356]*WTO Agreement*, Article X.9.

Plurilateral Trade Agreements provisions are governed by those Agreements.[357] Members may decide exclusively by consensus to add a Plurilateral Trade Agreement to Annex 4.

The amendment provisions above all reflect the intent of WTO Members to encourage uniformity of legal obligation as the multilateral trading system evolves, with a view to protecting the integrity of the single undertaking and of the common institutional framework of the WTO. These amendment procedures show that Members have retained some decision-making autonomy at the state level, by refusing to allow the substantive legal design of the international trade rule system to be changed without specific and express consent from each state. The unanimity requirement for the adoption of amendments to a limited number of fundamental provisions safeguards the autonomy of each state to control any changes to the decision-making rules of the Organization, and to the basic most-favoured-nation principle.

Nevertheless, there are at least two indications that states have transferred a certain portion of their decision-making authority and autonomy to the international level in certain areas. First, with a two-thirds majority acceptance level, a procedural or institutional amendment will be imposed even upon an unwilling

---

[357] *WTO Agreement*, Article X.10.

Member. Second, where three-quarters of the Members agree, a Member will be forced to accept certain amendments of a nature that alter rights and obligations, or be faced with the choice of withdrawing from the WTO or of seeking permission of the Ministerial Conference to derogate. This is a clear expression of the will of WTO Members to maintain, to the greatest extent possible, consistency and uniformity of legal obligations applicable to all Members; and to avoid the situation of having different legal obligations for different states in force simultaneously under the *WTO Agreement*. Theoretically, the possibility of expulsion will have some persuasive effect on a recalcitrant Member, and encourage acceptance of amendments that alter rights and obligations. In practice, given that the WTO will follow the largely consensual "customary practices" of the *GATT 1947*, it is hard to imagine that the procedure for forced withdrawal from the Organization will be applied, particularly to a politically powerful state.[358] It is more likely that an unwilling Member will seek permission from the Ministerial Conference to continue its WTO membership without implementing the amendment in question. In practice, there is a strong possibility that this permission would be granted. The practical possibility of two different sets of legal obligations being in force simultaneously for different Members thus remains. The amendment provisions do not entirely eradicate the right of a state to reserve to itself the power to choose whether it wishes to accept new substantive

---

[358]Jackson, *op. cit.*, note 233 at 185.

obligations under the Agreement, although this right is subject to assent of the Ministerial Conference for certain types of amendments.

II. Interpretations

The power to interpret treaty provisions is a fundamental power of rule-creation under international law. General customary international law principles hold that an interpretation of an international legal instrument becomes binding upon a state only when that state signals its acceptance of the interpretation, or when the interpretation becomes a generally accepted principle among states, as indicated by state conduct and *opinio juris*. The *GATT 1947* contained no explicit provision for rule-creation through the adoption of definitive interpretations of the Agreement. However, the authority for joint action under Article XXV with a view to "facilitating the operation and furthering the objectives of the agreement", may have broadly given the CONTRACTING PARTIES the competence to render binding interpretations of the rules.[359] The precise level of voting support required for the approval of an

---

[359]Jackson, *op. cit.*, note 6 at 132 points out that, although it could be argued that there was no specific legal basis for the CONTRACTING PARTIES to interpret the GATT, they did so in practice with little opposition. Also see Jackson, *op. cit.*, note 21 at 57-58, where he expresses some doubt about this power. However, he concedes the possibility "that the practice of GATT in its four decades of existence has itself established an interpretation of the Article XXV powers to include the power to interpret".

interpretation under the *GATT 1947* was never definitively settled, although it was presumably a simple majority requirement.[360]

The *WTO Agreement* formally institutionalizes the power to develop binding interpretations of the *Agreement* at the international level.[361] It explicitly bestows the exclusive authority to adopt binding interpretations of the *WTO Agreement* and the Multilateral Trade Agreements upon the Ministerial Conference and the General Council. Formally, interpretations require approval by a three-quarters majority of the WTO Members. For those Multilateral Trade Agreements in Annex 1, the authority is to be exercised on the basis of a recommendation by the particular Council overseeing the functioning of the particular agreement. The *WTO Agreement* explicitly stipulates that the power to adopt binding interpretations "shall not be used in a manner that would undermine the amendment provisions in Article X". Thus, where an interpretation would amount to an amendment affecting Members' procedural or substantive rights or obligations, the Article X amendment provisions must be respected. Consequently, such an interpretation will not be binding upon a Member without its assent.

The line dividing interpretations which do and do not amount to an amendment is as yet unclear, and will presumably be defined through further practice

---

[360]See Roessler, *op. cit.*, note 27 at 74; Jackson, *op. cit.*, note 6 at 132-136.

[361]*WTO Agreement*, Article IX.2.

and discussion within the General Council. There is no process for resolving disputes among Members concerning whether or not an interpretation constitutes an amendment. The potential therefore exists for lengthy discussions on this issue. It would also be possible for a Member to block any attempt at a consensus decision on whether to treat a matter as an interpretation or an amendment.

A paramount characteristic of rule-creation through interpretation in the WTO legal system is that the authority to interpret resides exclusively in the Ministerial Conference and the General Council. Both of these bodies are political organs composed of all Members. The fact that the power formally to adopt binding interpretations of the underlying treaty instrument has been reserved to the central political organs of the WTO has fundamental consequences for the other activities of the Organization and is critical to the nature of the WTO legal system. It signifies that the supervisory functions of the TPRM and, more importantly, of panels and the Appellate Body in the dispute settlement mechanism, are necessarily of a different nature. These supervisory bodies cannot technically produce interpretations of the same legally binding character as those adopted in the Ministerial Conference and the General Council.[362]

---

[362]See, for example, the decision of the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 13-14, and discussions on the interpretation of the *WTO Agreement* in the context of the *DSU* and the TPRM in Chapters 5 and 6, respectively.

The exclusive authority to adopt legally binding interpretations of the agreement therefore rests with the political decision-making organ, rather than with the surveillance or judicial mechanisms in the WTO legal system. This shows an intention on the part of the Members to retain decisive influence and input concerning the interpretation and development of the rules governing their interaction. Procedurally, it allows for binding interpretations to be developed only through negotiation and pragmatic accommodation among all Members, rather than through adjudicatory procedures in which not all Members participate. Individual Members do not wish to have new legal obligations imposed upon them through processes in which they are not directly involved.

Therefore, the *WTO Agreement* formally institutionalizes the authority of the political organs of the Organization to formulate binding interpretations of the Agreement on the basis of a three-quarters majority vote. While the ceding of autonomy is not as defined as it would be if the authority to develop binding interpretations were transferred exclusively to a judicial mechanism, this arrangement still theoretically represents a transfer of decision-making autonomy from the state to the international level. According to the letter of the *WTO Agreement*, a Member state could be bound by an interpretation to which it did not consent. In practice, as the interpretation process has not yet been used, it is not clear whether interpretation decisions will be based initially on consensus, and will proceed to a vote only if a consensus proves impossible to achieve (the most likely scenario). In addition, the

fact that any interpretation amounting to an amendment will not bind a state unless it gives its assent shows a reticence to transfer sovereignty to the international level, by reserving to the state the final decision to adopt new obligations.

III. Waivers

The power to grant a waiver that permits derogations from an international legal instrument is also a power of rule-creation, as it affects the rights and obligations of Members. Waivers maintain a certain degree of flexibility in a legal system, avoiding a situation where circumstances would leave a participating state no option but to violate the substantive or procedural norms of that system. In effect, waivers provide multilateral endorsement for derogations from the rules. The *GATT 1947* permitted the CONTRACTING PARTIES to grant waivers under Article XXV.5, in exceptional circumstances and with the approval of a two-third majority of votes cast, representing at least half of the Contracting Parties. A 1956 Decision[363] introduced further procedural requirements and safeguards relating to waivers of the obligations in Parts I and II of the *GATT 1947*. Applications for waivers had to be submitted with minimum 30 days notice except in exceptional urgent cases, and during this period the applicant contracting party had to consult with interested contracting parties. The CONTRACTING PARTIES were not to grant a waiver

---

[363]BISD 5S/25.

where they were not satisfied that the legitimate interests of other contracting parties were protected. Any decision granting a waiver had to provide for an annual report, and, where appropriate, annual review of the operation of the waiver. A decision granting a waiver could also allow the suspension of substantially equivalent concessions by other contracting parties.

While the *WTO Agreement* preserves the legal flexibility inherent in the concept of waiver, it contains more stringent and precise provisions on the granting of waivers, covering time limits, supervision, and termination of waivers. The waiver of an obligation of a Member under the *WTO Agreement* or any of the Multilateral Trade Agreements is within the authority of the Ministerial Conference.[364] Requests for waivers of obligations under the *WTO Agreement* are to be submitted to the Ministerial Conference (although, in practice, the General Council deals with waiver requests). The Ministerial Conference (or General Council) is to consider the request within 90 days. Waiver decisions are generally to be taken by three-quarters majority vote, although, under the Agreement and in practice, a consensus is sought before the matter is submitted to a formal vote. If no consensus is reached within the 90-day period, a decision to grant a waiver will be put to a vote.[365] This procedure of initially seeking consensus does not preclude a Member from requesting a vote at the time the decision is taken. In addition, the

---

[364] *WTO Agreement*, Article IX.3.

[365] *WTO Agreement*, Article IX.3(a).

absence of a Member from a meeting where a vote is taken concerning a waiver is assumed to imply that the Member has no comments on, or objections to, the proposed decision.[366]

Waiver requests concerning the Multilateral Trade Agreements in Goods, the *GATS*, or the *TRIPs Agreement* are first to be submitted to their respective sectoral Council for consideration during a period not greater than 90 days. Specific requirements exist for waiver requests concerning the *GATT 1994*: a request for a waiver or extension of an existing waiver of an obligation under the *GATT 1994* must describe the measures that a Member proposes to take, the specific policy objectives which the member seeks to pursue and the reasons that prevent the Member from achieving its policy objectives by measures consistent with its obligations under *GATT 1994*.[367] After consideration, the pertinent Council is to submit a report to the Ministerial Conference.[368]

A Ministerial Conference decision granting a waiver must be accompanied by the circumstances justifying the waiver, its terms and conditions, and

---

[366]WT/L/93, 24 November 1995, "Statement by the Chairman on Decision-Making Procedures under Articles IX and XII of the WTO Agreement". Note that in meetings before this statement was made clarifying the decision-making procedures, certain waivers and requests for extension of waivers were put to a vote by postal ballot: see *e.g.* WT/GC/M/6,20 September 1995

[367]See *Understanding in respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* in Annex 1A to the *WTO Agreement*.

[368]*WTO Agreement*, Article IX.3(b).

its termination date. Where a waiver is granted for more than a year, it must be reviewed by the Ministerial Conference within that year and annually until it terminates. The Ministerial Conference, based on its annual review, can extend, modify or terminate the waiver.[369]

Waivers of obligations under the *GATT 1994* are subject to the possibility of additional supervision, supplementing that conducted by the Ministerial Conference. The subject-matter of waivers of obligations under the *GATT 1994* may still be the object of dispute settlement procedures under Article XXIII of the *GATT 1994* where any Member considers that a benefit accruing to it under *GATT 1994* is being nullified or impaired as a result of: (i) the failure of the Member to whom the waiver was granted to observe the terms of conditions of the waiver, or (ii) the application of a measure consistent with the terms and conditions of the waiver. It is not yet clear how dispute settlement will function with respect to supervising the application of a measure consistent with the terms and conditions of a waiver. The dispute in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*[370] addressed the waiver of the most-favoured-nation obligation in Article I:1 of the *GATT 1994* granted to the European Communities with respect to the Fourth Lome Convention. In this case, the Appellate Body observed

---

[369]*WTO Agreement*, Article IX.4.

[370]WT/DS27/R, WT/DS27/AB/R. Report of the Appellate Body adopted 25 September 1997.

that, in the past, waivers had been construed narrowly, and emphasized the need to construe waivers "with great care". It reversed the panel's finding that the waiver of Article I:1 of the *GATT 1994* also included a waiver of the obligations under Article XI of the *GATT 1994*. The Appellate Body also examined the measures that were "reasonably necessary" to give effect to the relevant provisions of the Lome Convention, in order to determine the scope of activity for which the *GATT 1994* Article I:1 waiver had been granted.

The waiver provisions in the *WTO Agreement* reflect the intent of WTO Members to permit only temporary, justified, closely-supervised waivers from WTO legal norms which terminate as soon as compliance is feasible. This addresses concerns that waivers, including permanent waivers, were granted too easily under the *GATT 1947* and that supervision of waivers was inadequate. The requirement of a three-quarters majority for approval of waivers is more stringent that the two-thirds majority (including half the contracting parties) requirement under the *GATT 1947*. Technically, the three-quarters majority requirement represents a transfer of decision-making authority from the state to the international level. A Member could be bound without its assent by a decision granting a waiver to another Member. This represents a ceding of some sovereign authority, as the Member does not retain the ability to negotiate compensatory concessions on a bilateral basis with the applicant Member. However, in practice, because a consensus is initially sought before the matter proceeds to a majority vote, there is ample time for Members to express their views

and concerns relating to waiver requests. The waiver arrangements curtail the autonomy of the applicant state: only with the permission of either a consensus or a three-quarters majority of the other Members may it derogate from its WTO obligations, and this derogation is subsequently subject to close supervision by the Organization, and to reporting requirements.

IV. Accessions

A decision concerning the accession of a state to an international agreement constitutes a power of rule-creation as it creates new rights and obligations for all signatories of the agreement vis-a-vis an acceding state. Under the *GATT 1947*, accessions technically required approval by a two-thirds majority vote.

Membership in the WTO is open to any State or customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the *WTO Agreement* and the Multilateral Trade Agreements.[371] All contracting parties to the *GATT 1947* automatically became original Members of the WTO when they accepted the *WTO Agreement* and all of the Multilateral Trade Agreements and presented schedules of market access commitments under the *GATT 1994* and the *GATS* by the date of entry into force of

---

[371] *WTO Agreement*, Articles XXII:1 and XIX:1, and Explanatory Notes.

the *WTO Agreement*, 1 January 1995.[372] In addition, original WTO membership could be acquired by contracting parties to the *GATT 1947* if they acceded to the *WTO Agreement* by 31 December 1996.[373]

Original Members were able to accede to the Agreement without further negotiations. By contrast, a state that did not qualify as an original Member must negotiate its terms of accession. The accession procedure itself provides some safeguards for WTO Members against the possibility that they will be forced against their will to accept new undesired obligations, or not gain certain desired concessions, vis-a-vis the applicant state. When a state applies for accession to the WTO, the General Council establishes a working party to examine the accession application. Membership in the working party is open to all interested Members. The terms of reference of the working party are generally "to examine the application of the Government of XXX to accede to the World Trade Organization under Article XII, and to submit to the General Council recommendations which may include a draft Protocol of Accession". An extensive information-gathering exercise then occurs, generally commencing with the submission of a Memorandum on the Foreign Trade Regime and relevant legislative texts by the applicant state. This is followed

---

[372] *WTO Agreement*, Article XI.

[373] Least developed countries only had to "undertake commitments and concessions to the extent consistent with their individual development, financial, and trade needs, or their administrative and institutional capabilities". See *WTO Agreement*, Article XI and annexed *Decision on Measures in Favour of Least Developed Countries*.

by a lengthy and detailed exchange of questions and answers between the applicant state and the working party concerning all aspects of the present and proposed trade-related legislative and administrative framework of the applicant state. On the basis of the information gathered, the working party draws up draft terms of accession. In this process, Members have the opportunity to bring all their concerns to bear against the applicant state, and can make demands concerning market access commitments and concessions they desire on the part of the applicant state in all of the substantive areas covered in the Multilateral Trade Agreements. The working party compiles a report outlining the main points of the accession negotiations, again allowing Members to articulate any concerns they may have with respect to the accession application. The negotiated package of concessions and commitments, in the form of a draft accession protocol, is then presented to the General Council for approval.

Technically, accessions of states to the *WTO Agreement* and the Multilateral Trade Agreements must be approved by a two-thirds majority vote in the Ministerial Conference.[374] If the matter does proceed to a vote, and is approved by a two-thirds majority of the Members, the potential exists for a Member who is opposed to the accession of the acceding state to be bound against its will to extend the treatment required under the *WTO Agreement* to the acceding state. In practice, a consensus is now first sought among the Members concerning the application for

---

[374]*WTO Agreement*, Article XII.2. The Plurilateral Trade Agreements provide for their own accession requirements (*WTO Agreement*, Article XII.3).

accession. If consensus is attained, there is no need to put the matter to a formal vote. However, this procedure does not preclude a Member from requesting a vote at the time the decision is taken. In addition, the absence of a Member from a meeting where a vote is taken concerning an accession is assumed to imply that the Member has no comments on or objections to the proposed decision.[375]

It is possible for a WTO Member to circumvent application of the *WTO Agreement* with respect to an acceding state. In effect, this is an additional mechanism to avoid the situation where a WTO Member is bound by a two-thirds majority vote without its consent. The *WTO Agreement* permits a WTO Member not to apply the *WTO Agreement* or the Multilateral Trade Agreements in Annexes 1 and 2 with respect to another Member.[376] For original Members of the WTO that were contracting parties of the *GATT 1947*, such non-application is possible only where the non-application clause of the *GATT 1947* was in force between them at the time the *WTO Agreement* entered into effect. For acceding Members, the Member not consenting to the application of the *WTO Agreement* to the acceding state must so

---

[375]WT/L/93, 24 November 1995, "Statement by the Chairman on Decision-Making Procedures under Articles IX and XII of the WTO Agreement". Note that before this statement was made clarifying voting procedures, at least one accession decision (concerning the accession of Ecuador) was put to a formal vote by postal ballot. See WT/GC/M/6, 20 September 1995.

[376]*WTO Agreement*, Article XIII. For example, the United States did not consent to the application of the *WTO Agreement* and its Annexes 1 and 2 with respect to Romania. See WT/L/11, 27 January 1995. Non-application of a Plurilateral Trade Agreement between parties to that agreement are governed by the provisions of that agreement (*WTO Agreement*, Article XIII.5).

notify the Ministerial Conference before its approval of the agreement on the terms of accession.[377] A Member may use the threat of invoking the non-application clause in the process of the accession negotiations in order to coerce the applicant state to improve the market access commitments and concessions that it is offering. A Member may also invoke, or threaten to invoke, the non-application clause for non-trade-related reasons.

Therefore, technically, the *WTO Agreement* allows a WTO Member to be bound without its consent by an accession decision approved by a two-thirds majority. This constitutes a formal transfer of decision-making authority to the Organization and a ceding of autonomy by WTO Members. However, in practice, several mechanisms exist to safeguard against a WTO Member being bound by a majority decision on accession which it opposes. First, the accession negotiating process allows ample opportunity for a Member to make its concerns and demands known. Second, in practice, a consensus is sought before putting the matter to a formal vote, allowing a Member to formally voice its objection to the application if it so desires. Third, in certain circumstances, the possibility exists for a Member to invoke the non-application of the Agreement and the agreements in Annexes 1 and 2 before the application for accession is approved.

---

[377] *WTO Agreement*, Art. XIII.1-3.

D. Summary observations

The provisions on decision-making and rule-creation in the *WTO Agreement* are more precise and stringent than under the *GATT 1947*. They eliminate much of the ambiguity concerning the decision-making powers of the Organization, and confirm the existence of certain decision-making powers that were previously unclear (*i.e.* the authority to render binding interpretations of the *Agreement*). Significantly, the decision-making rules apply uniformly to all of the agreements constituting the single undertaking. In the integrated WTO system, the procedures for amendments, waivers, and interpretations are therefore uniform.

The *WTO Agreement* codified the practice of decision-making by consensus that developed under the *GATT 1947*. In most cases, consensus is a practice that is a first alternative to voting: where consensus cannot be achieved, the matter is put to a simple majority vote. In other cases, such as decisions by the DSB and decisions concerning the amendment of the *DSU*, consensus is a requirement with no alternative. In practice, it is likely that most matters will not be submitted to a formal vote, and that consensus will continue to be the preferred course. The emphasis on consensus is evident, *inter alia*, in the rules of procedure of the subsidiary bodies: in the event that a decision cannot be reached within a particular council or committee, the matter at issue is to be referred to the General Council for a decision. With its multisectoral perspective and competence, the General Council is

most likely to be able to reach a consensus decision on even the most thorny issue. In practice, there is rarely a formal insistence on observance of the rules of procedure. One exception occurred in the DSB in the fall of 1996 when a meeting was adjourned at the request of the representative of Japan on the occasion of the adoption of the panel and Appellate Body reports in *Japan - Taxes on Alcoholic Beverages* because quorum did not exist.

A move toward more majority voting might improve the decision-making efficiency of the Organization. However, the perception of Members is that putting a matter to a formal majority vote risks the non-endorsement of politically powerful Members, who may opt not to comply with the decision that results. This would have grave consequences for the credibility of the Organization. In effect, therefore, states have refused to allocate sovereign authority for decision-making to the Organization in an irrevocable manner. As a result, the decision-making powers of the Organization still remain largely dependent upon the will of individual states.

As decisions in the Ministerial Conference are subject to the practice of consensus decision-making, the creation of completely new international trade rules through negotiation in the Ministerial Conference effectively remains subject to the consent (or silent acquiescence) of every WTO Member. This means that Members have retained decisive influence over the future work programme of the Organization, and have not undertaken to bind themselves in advance by international

norms that have yet to be developed. One possibility that circumvents the necessity of gaining consensus approval for a new rule-creating instrument is for a limited number of interested countries to conclude a side agreement. While such side agreements promote sectoral trade liberalization, they raise the spectre of splintering the WTO single undertaking. By consensus among WTO Members, a side agreement may be added to Annex 4 of the *WTO Agreement* as a "Plurilateral Trade Agreement". The conclusion of a number of such side agreements might create an unwieldy legal order necessitating an extensive revision of the *WTO Agreement.* Where possible, it would be best to preserve the WTO single undertaking by integrating a side agreement promptly into the *WTO Agreement* through the amendment procedures.

Given the increase in number and heterogeneity of WTO Members, consensus may become increasingly more difficult to achieve. WTO Members may have to design more streamlined decision-making procedures. A small executive steering group is one possibility. However, it is not clear that Members would be willing to allocate any meaningful degree of sovereign authority to such a select group. It would most likely not have definitive decision-making ability. It could be a consultative body to provide impetus for the WTO's future work.

The Members have put in place specific procedures for development of the Agreement through legislation, in the form of decision-making through

amendments, interpretations, waivers and accessions. The special decision-making rules technically allow a Member to be bound by a decision to which it did not formally consent on the basis of either a two-thirds or three-quarters majority of votes cast. However, procedural safeguards exist -- either in the express provisions of the Agreement or in the practice of Members under the Agreement -- that make it unlikely that a Member will be bound by new or amended obligations to which they do not consent. For example, with respect to waivers and accessions, the practice of seeking consensus before putting a matter to a formal vote acts as a safeguard. An interpretation is limited in scope, as it cannot amount to an amendment. States may be faced with the choice of accepting an amendment or withdrawing from the Organization, although they remain a Member with the assent of the Ministerial Conference even if they do not undertake to be bound by the amendment.

These special decision-making rules for rule-creation reflect the concern of Members to preserve the legal coherence and consistency in the future development of their obligations under the Agreement. Maintaining the integrity of the single undertaking is essential for the effective functioning of the international trade system.

Chapter 5

Supervision Through Dispute Settlement: The Dispute Settlement Mechanism

A. Introduction

By providing accepted procedures for the clarification and enforcement of the applicable legal rules, a credible and effective international dispute settlement mechanism maintains the balance of rights and obligations of state participants and provides legal remedies for violations of the relevant agreed-upon international norms. Such a dispute settlement mechanism is the keystone of a rule-oriented multilateral trade system, essential to maintaining the integrity and credibility of that system. Dispute settlement under the *DSU* is the principle supervisory mechanism to enforce compliance with the legal obligations contained in the *WTO Agreement*.

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (referred to as the "*Dispute Settlement Understanding*" or "*DSU*") stipulates that its dispute settlement procedures are exclusive, and that panels and the Appellate Body have competence to adjudicate disputes arising under the covered agreements. This competence amounts to compulsory jurisdiction. There is no requirement for further consent of a state to be engaged in the WTO dispute settlement process. By signing the *WTO Agreement*, WTO Members have effectively given ongoing consent to subject any dispute arising under the covered agreements to the *DSU* procedures.

The history of the GATT/WTO dispute settlement process reveals a persistent tension between the pragmatic handling of trade tensions through consultations and negotiated settlements on the one hand, and the increasingly legalistic settlement of disputes through international adjudication on the other. This tension has in part been a product of the nature of the substantive norms governing the international trade system: a rigid and legalistic dispute settlement process is simply not viable where the underlying substantive norms do not provide an adequate foundation for adjudication,[378] or where compliance with the substantive rules is not a priority to the participants in the system. With the increased scope and precision of substantive WTO rules and disciplines, a more legalistic dispute settlement system is both more possible and more essential.

The *DSU* reforms and streamlines the system of dispute settlement that developed in the *GATT 1947* legal system. It reflects a continued effort to balance the pragmatic and legalistic elements in the dispute settlement process. There is a marked trend towards legalism and judicialization, and enhanced capacity for supranational rule-enforcement and *de facto* rule-creation. At the same time, pragmatic avenues of bilateral dispute settlement remain available: WTO Members may still negotiate to reach a mutually-agreed solution prior to, and even after, invoking the supranational adjudicative process under the *DSU*.

---

[378]See *e.g.* M. Trebilcock and R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 386*ff*.: "It seems futile to expect the dispute resolution process to succeed in developing and applying predictable rules of international law where political negotiation has failed to enunciate such rules".

This Chapter examines the dispute settlement mechanism of the WTO. After detailing the causes of action available under the *DSU* and the other covered agreements, the chapter turns to the dispute settlement procedures contained in the *DSU*. It then assesses the dispute settlement mechanism as an international supervisory mechanism, and offers some concluding observations on dispute settlement in the WTO legal system.

B. Dispute settlement in the WTO

The WTO procedures for the settlement of disputes build on the procedures developed under the *GATT 1947*. While there is significant continuity with the previous *GATT 1947* dispute settlement procedures, the *DSU* is not merely a codification of *GATT 1947* dispute settlement practice. Portions of the *DSU* represent a significant evolution in dispute settlement procedures.

The general consultation and dispute settlement procedures under the *GATT 1947* were set out in Articles XXII and XXIII. Chapter 2.E.III and 2.G.II *supra.* detail the development and codification of *GATT 1947* dispute settlement practice under Articles XXII and XXIII as supplemented by the 1979 *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (the "1979 Understanding"), negotiated

during the Tokyo Round;[379] and the 1989 Decision on *Improvements to the GATT Dispute Settlement Rules and Procedures* (the "1989 Decision"), resulting from the Mid-Term Review of the Uruguay Round,[380] as well as other codifications or modifications in 1958, [381] 1966,[382] 1982,[383] and 1984.[384] These arrangements supplied the basic rules and procedures for pre-WTO dispute settlement under the *GATT 1947*, and formed the foundation for the significant dispute settlement reforms contained in the *DSU*. In Article 3.1 of the *DSU*, WTO Members "affirm their adherence to the principles for the management of disputes heretofore applied under Article XXII and XXIII of *GATT 1947*, and the rules and procedures as further elaborated and modified" in the *DSU*. Articles XXII and XXIII of the *GATT 1994* still form the basis for disputes which now arise between WTO Members under the *GATT 1994*, most Annex 1A agreements where they have been incorporated *mutatis mutandis*,[385] and the *TRIPS Agreement*.

---

[379]Adopted 28 November 1979, BISD 26S/210.

[380]Decision of 12 April 1989, BISD 36S/61.

[381]Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties, adopted 10 November 1958, BISD 7S/24.

[382]BISD 14S/18.

[383]The 1982 Ministerial Declaration on Dispute Settlement, BISD 29S/9 at 13-16.

[384]Decision of 30 November 1984: Dispute Settlement Procedures, BISD 31S/9.

[385]*Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing* (in accordance with Article 8.10 of that Agreement), *Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures,* and *Agreement on Safeguards*.

Article XXII of the *GATT 1994* sets out consultation procedures. It provides for consultations with respect to any matter affecting the operation of the *GATT 1994*. Members are invited to give sympathetic consideration to representations of another Member and to resolve disputes through resort to bilateral consultations. If consultations fail to resolve the dispute, a Member may request multilateral consultations to conciliate the dispute.

Article XXIII of the *GATT 1994* furnishes the basic principles of dispute settlement. In the *GATT 1947*, it supplied the foundation for action by the CONTRACTING PARTIES. Article XXIII:1 sets out the possible causes of action, while Article XXIII:2 outlines dispute settlement procedures.

I. The Causes of Action

Article XXIII:1 of the *GATT 1994* sets out the causes of action on which a Member may base a complaint. A WTO Member may have recourse to the procedures provided for by Article XXIII when it considers that any benefit accruing to it directly or indirectly is being nullified or impaired or that the attainment of any objective is being impeded as a result of:

(a) the failure of another Member to carry out its obligations under the agreement, or

(b) the application by another Member of any measure, whether or not it conflicts with the provisions of the agreement, or

(c) the existence of any other situation.

Paragraph XXIII:1(a) has formed the basis of almost all disputes under the *GATT 1947* and the *WTO Agreement*. It involves so-called "violation complaints", disputes arising due to the alleged violation or infringement of an obligation. Practice under the *GATT 1947* developed the principle that a violation of the rules creates a *prima facie* presumption of nullification or impairment of benefits accruing to other Members. In such a case, it is up to the Member against which the complaint is made to rebut the charge that the violation has had an adverse impact.[386] This principle has now been codified in Article 3:8 of the *DSU*, which states:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

In practice, there has never been a case where a *GATT 1947* contracting party or WTO Member has successfully rebutted that presumption.[387] Some of the WTO

---

[386] *Uruguayan Recourse to Article XXIII* BISD 11S/95, 100; *United States - Taxes on Petroleum and Certain Imported Substances* BISD 34S/136,154-159. This principle was initially codified in the 1979 Understanding, Annex, para. 5.

[387] The panel in *United States - Taxes on Petroleum and Certain Imported Substances* ("*Superfund*") stated, "while the CONTRACTING PARTIES had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption." BISD 34S/136, 157-158. In *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, pp. 105-106, paras. 249-254, the Appellate Body applied the reasoning in *Superfund* and upheld the finding of the Panel that the European Communities had not successfully rebutted the presumption.

covered agreements now avoid the difficulties caused by the concept of nullification and impairment by excluding it entirely and focusing solely on the violation of an obligation. [388]

Paragraph XXIII:1(b) involves so-called "non-violation complaints". The basis of this cause of action is not necessarily a violation of the rules, but rather the nullification or impairment of a benefit accruing to a WTO Member under the covered agreements. It does not target non-compliance, but rather focuses on the application of certain measures that are technically consistent with the covered agreements. Paragraph XXIII:1(c), covering "situation complaints", has never been the foundation for a recommendation or ruling, although it has formed the basis for parties' arguments before panels in a few cases.

Non-violation complaints are a curious feature of the GATT/WTO legal system.[389] Their inclusion stems from the particular drafting history of the *GATT 1947*.[390]

---

[388]*GATS*, Article XXIII:1; *Agreement on Subsidies and Countervailing Measures*, Article 4.7.

[389]See, in general, E.-U. Petersmann, "Violation Complaints and Non-violation Complaints in International Law" (1991) *German Yearbook Int'l L.*175.

[390]Hudec, *op. cit.*, note 140, at 52-53 points out that Article XXIII:1 was taken almost verbatim from the Geneva Draft of the ITO Charter, before refinements and revisions separating out the concepts of violation and non-violation had occurred. Petersmann, *op. cit*, note 130 at 142 *ff.* notes that the dispute settlement provisions of the ITO Charter could also be invoked with respect to the obligations in Chapters II and II of the Charter, envisaging a situation of unemployment or a drastic supply in demand in the territory of another Member. The non-violation provision could function similar to a *clausula rebus sic stantibus* (Article 62 of the *Vienna Convention on the Law of Treaties*) protecting against fundamental but unforeseen changes in circumstances relative to (continued...)

They are rooted in the *GATT 1947*'s origins as an agreement to protect reciprocal tariff concessions among the contracting parties. In the absence of substantive legal rules in many areas relating to international trade, the non-violation provision aimed to bar contracting parties from using non-tariff barriers or other policy measures to negate the effects of negotiated tariff concessions. If the negotiated balance of concessions between the parties was disturbed by the application of a measure, whether or not this measure was illegal under the *GATT 1947*, a contracting party could bring a non-violation complaint. If this claim did not prevail, and the disturbance in the balance of concessions remained unremedied, an affected contracting party had the option of withdrawing from the agreement, as it no longer represented the arrangement that the contracting party had undertaken upon the negotiation of the agreement. Therefore, although the non-violation provision technically gave *GATT 1947* CONTRACTING PARTIES a rather broad discretionary power to decide on the adjustment of situations even where no legal violation had occurred, a state still maintained the unilateral right to withdraw from the agreement if it deemed that its interests were not being safeguarded by the multilateral dispute settlement process.

---

[390](...continued)
those existing at the time of the conclusion of the treaty. See also A. von Bogdandy, "The Non-violation Procedure of Article XXIII:2 of GATT – Its Operational Rationale" (1992) 26:4 *J. World Trade* 110.

"The concept of 'non-violation complaints' is by its very nature anti-legal".[391] As they contemplate state liability for an act that is technically not wrongful under international law, non-violation complaints are a legal curiousity.[392] The practice that developed under *GATT 1947* had the effect of limiting the application of non-violation complaints to the protection of tariff concessions under certain circumstances. *GATT 1947* practice developed the principle that there was no need to establish actual injury for a non-violation claim to prevail. Rather, a contracting party had to have a reasonable expectation concerning the maintenance of conditions of competition created by a reciprocal tariff concession or binding that must therefore be protected. In practice, panels established under the *GATT 1947* found non-violation nullification of impairment of a benefit accruing under the *GATT 1947* in only four of the 14 cases in which it was alleged.[393] The CONTRACTING PARTIES determined that the non-violation nullification or impairment of a measure did not require the removal of the measure. Rather, it entailed the obligation to negotiate compensation.

---

[391]R. Ostrihansky, "Settlement of Interstate Trade Disputes -- The Role of Law and Legal Procedures" (1991) 22 *Netherlands Yearbook of Int'l L.* 163 at 169.

[392]Pescatore argues that non-violation complaints are a "legal fantasy" that should be left to "speculation of professors fond of legal paradoxes": P. Pescatore, "The GATT Dispute Settlement Mechanism: Its Present Situation and Future Prospects" (1990) 27 *J. World Trade* 5 at 19.

[393]*I.e. Australia- Subsidy on Ammonium Sulphate* BISD II /188; *Germany - Imports of Sardines* BISD IS/53; *Germany - Import Duties on Starch and Potato Flour*, BISD 3S/77; *European Communities - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* BISD 37S/86.

The *WTO Agreement* contains no provision limiting the application of non-violation complaints to the traditional protection of tariff concessions. However, the *DSU* contains specific provisions dealing with the procedural aspects of non-violation cases and the legal remedies available. The principles on remedies developed in *GATT 1947* practice are now evident in *DSU*, Article 26:1(b)-(c). There is no obligation to withdraw a measure that does not violate the covered agreements. Mutually agreed compensation may form part of the settlement of a dispute in a non-violation case. A WTO Member may, however, opt to withdraw the measure, with or without compensation. If the measure remains in place without compensation, the affected WTO Member may suspend the application of the obligations in the covered agreements vis-a-vis the "offending" Member.

Certain of the covered agreements contain specific provisions regulating the application of the non-violation concept. For example, the *GATS*[394] permits resort to non-violation claims under the *DSU* in circumstances that codify practice that evolved under the *GATT 1947* (that is, in circumstances where a reasonably expected benefit flowing from a concession must be protected). However, it specifies that remedies available upon a finding of non-violation nullification and impairment do not include a requirement to remove the measure in question. The *GATS* also escalates the concept of non-violation nullification and impairment to a legal obligation with respect to licensing, qualification requirements and technical standards. It imposes a binding legal obligation on Members

[394]Article XXIII:3.

not to apply such measures that nullify or impair specific commitments with respect to services.[395] For its part, the *TRIPs Agreement* imposes a five-year moratorium (to 1 January 2000) on non-violation and situation complaints, during which time the TRIPs Council is to examine the scope and modalities for these causes of action under that agreement and submit its proposals to the Ministerial Conference.

II. The Dispute Settlement Process: The *Dispute Settlement Understanding*

1. General

The *DSU* governs the resolution of most disputes arising among WTO Members under the covered agreements. It applies with respect to requests for consultations made on or after 1 January 1995.[396] While the *DSU* regulates the lion's share of disputes arising under the covered agreements, certain of the covered agreements also contain provisions which are relevant for disputes arising under those particular agreements. Appendix 2 to the *DSU* enumerates these "Special or Additional Rules and Procedures Contained in the Covered Agreements". These provisions prevail over the provisions of the *DSU* to the extent that there is any difference between them.

---

[395]See *GATS*, Article VI.5.

[396]*DSU*, Article 3.11. The *DSU* applies provided that the subject-matter of the dispute is covered by the *WTO Agreement*. See *e.g. Brazil - Measures Affecting Desiccated Coconut* (WT/DS22/AB/R, adopted 20 March 1997) for an examination of the transitional arrangements from the *GATT 1947* to the *WTO Agreement* in the specific area of countervailing duty investigations.

In general, the WTO is to be "guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to the *GATT 1947* and the bodies established in the framework of *GATT 1947*."[397] In the *DSU*, WTO Members "affirm their adherence to the principles for the management of disputes heretofore applied under Article XXII and XXIII of *GATT 1947*, and the rules and procedures as further elaborated and modified" in the *DSU*.[398] The importance of the accumulated legal experience under the *GATT 1947*, the GATT *acquis*, is therefore also relevant to dispute settlement under the *DSU*. Article XXIII of the *GATT 1994* is referred to as the basic dispute settlement provision in most of the Annex 1A agreements, and in the *TRIPS Agreement*.

WTO Members recognize that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The *DSU* acknowledges that the prompt settlement of disputes "is essential to the proper functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". It also serves to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[399] The *DSU* emphasizes that in their findings and recommendations,

---

[397]*WTO Agreement*, Article XVI.1.

[398]*DSU*, Article 3.1.

[399]*DSU*, Article 3.2. The Appellate Body has affirmed that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* form part of the "customary rules of interpretation of public (continued...)

a panel, the Appellate Body and the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[400]

The *DSU* provides for both pragmatic and legalistic means of dispute settlement. Under the *DSU*, Members retain the choice between the diplomatic means of settlement through negotiations to reach a mutually-agreed solution, or legalistic dispute resolution through third party adjudication by resort to a panel and the Appellate Body, or by resort to binding arbitration, in accordance with the *DSU* rules and procedures.

As under the *GATT 1947*, the fundamental aim of the WTO dispute resolution mechanism remains to reach a positive, and preferably mutually acceptable, solution to a dispute. In the absence of a mutually acceptable solution reached through consultations, resort to a panel or to arbitration is available. The primary objective then becomes the withdrawal of the measure in the event that a panel (and/or Appellate Body) finds the measure to be inconsistent with the covered agreements. Where the removal of the offending measure is not immediately possible, parties may agree upon compensation as a temporary alternative. The last resort envisaged by the *DSU* is the temporary suspension of concessions or other obligations under the covered agreements, subject to

---

[399](...continued)
international law". See *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 adopted 20 May 1996; *Japan -Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R; WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996

[400]*DSU*, Articles 3.2 and 19.2.

DSB authorization and surveillance.[401] Such retaliatory action is taken by the complaining Member with respect to the offending Member; it is bilateral rather than multilateral in nature.

The rules and procedures in the *DSU* build upon the reforms agreed to in the 1989 Decision. The *DSU* modified and enhanced certain of the provisions of the 1989 Decision. The *DSU* also added new provisions concerning the interim review of panel reports; and the appellate review mechanism. In addition to these specific improvements in the dispute settlement process, the *DSU* introduced significant systemic innovations. These include: (a) the establishment of an integrated dispute settlement mechanism; (b) administered by the Dispute Settlement Body (the "DSB"); (c) the requirement of automaticity at certain key stages of the dispute settlement process, including the establishment of a panel and the adoption of panel and Appellate Body reports; and (d) the inclusion of provisions on the strengthening of the multilateral trade system.

a. Integrated Dispute Settlement Mechanism

A significant systemic innovation in the *DSU* is the creation of an integrated dispute settlement mechanism. The WTO now has a single centralized mechanism, administered by the DSB, which has responsibility for all the steps under disputes arising

---

[401] *DSU*, Article 3.7.

under the "covered agreements". This integrated system terminates the previous fragmented patchwork of dispute settlement mechanisms under the *GATT 1947* and the various Tokyo Round Codes, many of which had a different set of signatories and their own institutional infrastructure for administering the agreement and for overseeing the functioning of the dispute settlement mechanism under the specific agreement.

The "covered agreements" are the following:[402]

(A) The Agreement Establishing the World Trade Organization
(B) Multilateral Trade Agreements
- Annex 1A: Multilateral Agreements on Trade in Goods, which include the *GATT 1994*
- Annex 1B: General Agreement on Trade in Services
- Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights
- Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements[403]
- Annex 4: Agreement on Trade in Civil Aircraft
  Agreement on Government Procurement

---

[402]*DSU*, Appendix I. The TPRM agreement is not a "covered agreement".

[403]In respect of the Plurilateral Trade Agreements in Annex 4 to the *WTO Agreement*, the *DSU* only applies to the extent that the parties to each agreement adopt a decision setting out the terms for the application of the *DSU* to the individual agreement, including any special or additional rules or procedures, as notified to the DSB. To date, only the *Agreement on Government Procurement* has been explicitly made subject to the *DSU*. Paragraphs XXII:2-7 of that Agreement have been notified as special or additional dispute settlement procedures under Appendix 2, *DSU*. Where the dispute involves a Plurilateral Agreement, "only those Members that are parties to the Agreement may participate in decisions or actions taken by the DSB with respect to that dispute" (*DSU*, Article 2.1). The *International Dairy Agreement* and the *International Bovine Meat Agreement* were originally Plurilateral Trade Agreements, but were dissolved on 30 September 1997, effective 31 December 1997.

The integrated dispute settlement mechanism is a corollary of the WTO single undertaking, whereby each WTO Member has undertaken to abide by all of the obligations contained in the *WTO Agreement* and in Annexes 1, 2 and 3 of the *WTO Agreement*. The integrated dispute settlement system therefore embraces a broad range of substantive accords, as well as the legal and institutional provisions of the *WTO Agreement* and the *DSU*. All of the relevant provisions in all of the relevant agreements can now be considered in concert with respect to the matter at issue between parties to a particular dispute.[404] The same panel, and the Appellate Body, enjoy the authority to address all of the issues raised under any of the covered agreements. In addition, in the event of non-implementation of DSB recommendations and rulings by an offending Member, the integrated system allows "cross-retaliation". That is, in certain circumstances where retaliation in the same sector is not viable, the affected Member is not limited to retaliation in the same sector as that in which the infringement was found. Rather, that Member may retaliate in any of the other sectors falling under any of the other covered agreements. Thus, if the DSB has authorized retaliatory measures with respect to the non-implementation of the adopted rulings and recommendations that found that a measure infringed one of the Multilateral Agreements on Trade in Goods in Annex 1A, retaliation is not limited to the suspension of concessions with respect to goods, but may occur in

---

[404]See e.g. *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R panel report, adopted 20 March 1997, para 242: "This integrated dispute settlement system avoids the problem of legal and procedural fragmentation that characterized the pre-WTO dispute settlement system, and allows a panel to interpret provisions of covered agreements in the light of the *WTO Agreement* as a whole". The Appellate Body upheld the legal findings and conclusions of the panel.

the areas of intellectual property or services, governed by the agreements in Annex 1B or 1C.

The integrated dispute settlement mechanism, coupled with the WTO single undertaking, eliminates the balkanization of the legal system caused by the Tokyo Round Codes. All of the Tokyo Round Codes have now been superseded by the *WTO Agreement* (or have been dissolved). Those now constituting Multilateral Trade Agreements in Annex 1A to the *WTO Agreement* are subject to the integrated dispute settlement mechanism set out in the *DSU*. This is the case, for example, with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Antidumping Agreement*"), the *Agreement on Subsidies and Countervailing Measures*, and the *Agreement on Technical Barriers to Trade*. The *Agreement on Government Procurement*, as revised, is now a Plurilateral Trade Agreement, in Annex 4 of the *WTO Agreement*, to which the provisions of the *DSU* apply as the result of special provisions in that agreement. The *Agreement on Trade in Civil Aircraft* is also a Plurilateral Trade Agreements in Annex 4. By putting an end to the fragmentation which plagued the legal system of the *GATT 1947*, the integrated dispute settlement system of the *DSU* eliminates the problems associated with forum shopping. Double jeopardy is also no longer a possibility.

To a certain extent, rule-shopping remains a possibility. Certain options will continue to exist for Members with respect to both procedural and substantive norms within the parameters that the *DSU* provides. With respect to procedure, as mentioned,

the *DSU* applies subject to the special or additional rules or procedures on dispute settlement contained in the covered agreements, identified in Annex 2 to the *DSU*. These special or additional rules and procedures prevail over the *DSU* to the extent of any differences. With respect to substantive norms, the rules that are brought to bear in a case will depend upon how parties choose to frame the terms of reference of the panel adjudicating the dispute. The substantive norms applied will also depend upon the manner in which the parties frame their arguments in the panel and Appellate Body process, and upon how a panel or the Appellate Body interprets the rules applicable to a particular dispute. A panel established under the *DSU* has the mandate to examine the relevant provisions in any covered agreements cited by the parties to the dispute. .

The *DSU*[405] establishes the customary rules of interpretation of public international law as an interpretive tool to facilitate the task of panels and the Appellate Body in determining, among other things, the relationship between the provisions in the various covered agreements. The *General interpretive note to Annex 1A* provides some guidance to the relative priority of these agreements: in the event of a conflict between a provision of *GATT 1994* and of another agreement in Annex 1A, the provisions of the other agreement shall prevail to the extent of the conflict. As well, the *WTO Agreement* prevails to the extent of any conflict with any of the Multilateral Trade Agreements.[406]

---

[405] *DSU*, Article 3.2.

[406] *WTO Agreement*, Art XVI.3. See *supra*, Chapter 3.B.IV for a more detailed account of the legal relationships among the *WTO Agreement* and its annexed agreements.

b. The Dispute Settlement Body (DSB)

The DSB administers the rules and procedures of the *DSU* and all of the disputes arising under the covered agreements. As such, it has assumed the dispute settlement functions corresponding to the GATT Council and the Committees of the Tokyo Round Codes under the previous *GATT 1947* system. The DSB exercises the authority of the General Council in its dispute settlement functions, meeting as often as necessary to carry out its functions within the relevant time-frames.[407] In practice, the DSB meets approximately once per month, or more often if necessary. Membership of the DSB is the same as that of the General Council (*i.e.* composed of all WTO Members), but the DSB has its own distinct functions as well as its own Chairperson and rules of procedure.

The DSB is responsible for administering all dispute settlement rules and procedures under the covered agreements, including: establishment of panels, consideration and adoption of panel and appellate reports, surveillance of implementation of rulings and recommendations and authorization of suspension of concessions or other obligations under the covered agreements.[408] The DSB is also responsible for disputes arising under the Plurilateral Trade Agreements in Annex 4 to the *WTO Agreement*, but only to the extent the parties to a particular Plurilateral Trade Agreement agree that the *DSU* will apply. Where the dispute involves a Plurilateral Agreement, "only those Members that are parties

---

[407] *DSU*, Article 2.3.

[408] *DSU*, Article 2.1.

to the Agreement may participate in decisions or actions taken by the DSB with respect to that dispute"[409].

Unlike the pre-WTO *GATT 1947* system, where different bodies had legal authority over the distinct dispute settlement mechanisms contained in the various agreements, under the integrated dispute settlement system contained in the *DSU*, a single body is therefore empowered to deal with all the matters arising between the parties under any of the covered agreements. The DSB has legal authority over all procedural aspects of the dispute settlement process and over all the substantive areas regulated by the covered agreements.

This broad authority residing in the DSB will mean greater coherence and consistency in the procedural and substantive aspects of dispute settlement. It also permits Members to have a comprehensive, multi-sectoral perspective on multilateral trade disputes.

c. Automaticity

The *DSU* provides that the DSB must take its decisions by consensus.[410] Under the *DSU*, there is no possibility to resort to a majority vote if consensus cannot be

---

[409] *DSU*, Article 2.1.

[410] *DSU*, Article 2.4.

achieved. Consensus occurs "if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision".[411]

One of the significant procedural innovations in the *DSU* is the introduction of the requirement of a consensus *against* taking a decision at certain critical junctures in the dispute settlement process. This requirement brings "automaticity" to the dispute settlement process. In effect, at certain key points in the process, a decision is taken automatically, unless there is a consensus against it. This requirement improves the efficacy of the procedures by rendering it virtually impossible for an unwilling defending party to delay or block the dispute settlement proceedings. It requires not only that all the Members present at the DSB meeting that are not directly involved in a dispute be willing to block the process, but also that the complaining party (or parties) that commenced the proceedings be willing to accept a delay or impasse. It is highly unlikely that this will ever happen.

---

[411]See also Article IX.1 of the *WTO Agreement*, codifying the practice of taking decisions by consensus which had developed and was followed under the *GATT 1947*. This provision states that, unless otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.

Automaticity occurs in the DSB for: the establishment of panels;[412] the adoption of panel[413] and Appellate Body reports;[414] and the suspension of obligations.[415] A decision for these events is therefore taken automatically, unless a consensus decision to the contrary exists in the DSB. This procedural evolution has eradicated the ability of an unwilling defendant to block the establishment of a panel, to veto the adoption of a report or to block enforcement of DSB recommendations and rulings resulting from the adoption of a panel or Appellate Body report.

Under the *GATT 1947* dispute settlement process, a positive consensus was required for the establishment of a panel and the adoption of a panel report. This meant that the phase of third party adjudication was flanked on both sides by political acts. The panel's role remained formally "consultative", and jurisdiction formally resided in the CONTRACTING PARTIES. While this technically remains the case under the *DSU*, automaticity in the establishment of a panel and in the adoption of panel and Appellate Body reports means that the political acts are now mere formalities. This significantly increases the judicialization and legalism of the process. There is no requirement for consent of the state concerned in order for the dispute settlement process to proceed. Even an unwilling state can be forced to move to the next stage of the proceedings, and be legally

---

[412] *DSU*, Article 6.1.

[413] *DSU*, Article 16.4.

[414] *DSU*, Article 17.14.

[415] *DSU*, Article 22.6.

bound to implement the resulting DSB recommendations and rulings. Automaticity, therefore, limits the autonomy of the state parties to the dispute decisively, and signals a sizable transfer of sovereign authority from the state to the international level. It enhances the supranational legal authority and effectiveness of the Organization.

d. Strengthening of the Multilateral System

When WTO Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they must have recourse to, and abide by, the rules and procedures of the *DSU*.[416] Thus, the following determinations must be made exclusively through recourse to the procedures set out in the *DSU*: that a violation of the covered agreements has occurred; that benefits have been nullified or impaired, or that attainment of an objective of the covered agreements has been impeded; the determination of the "reasonable period of time" for implementation of recommendations and rulings; and the determination of the level of suspension of concessions.

This requirement of multilateral determination of these elements in the process highlights certain critical aspects of the WTO procedure for the settlement of

---

[416]*DSU*, Article 23.

disputes contained in the *DSU*. First, the dispute settlement procedures are exclusive. Members have undertaken to bring all disputes concerning the covered agreements to the WTO forum (except where an explicit reservation exists in the covered agreements).[417] Second, the dispute settlement procedures are mandatory. The WTO has compulsory jurisdiction over all disputes arising between Members under the covered agreements. Panels and the Appellate Body enjoy the competence to adjudicate disputes arising under the covered agreements. In effect, WTO Members have waived the requirement of consent, or have given their permanent consent, to subject any dispute concerning the covered agreements to the *DSU* procedures. Third, the dispute settlement procedures are comprehensive. Because the *DSU* requires that all solutions to disputes arising under the covered agreements be consistent with WTO law,[418] Members have notably constrained their options in contentious situations. Even bilateral negotiated settlements and arbitration awards must be WTO-consistent and notified to the DSB. All of these elements signal a significant loss of autonomy on the part of WTO Members, and a transferral of sovereignty to the international level.

---

[417]For example, the *Agreement on Sanitary and Phytosanitary Measures* (Article 11:3) explicitly reserves the rights of Members under other international agreements, "including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreements".

[418]*DSU*, Article 3.5.

2. Dispute Settlement Procedures

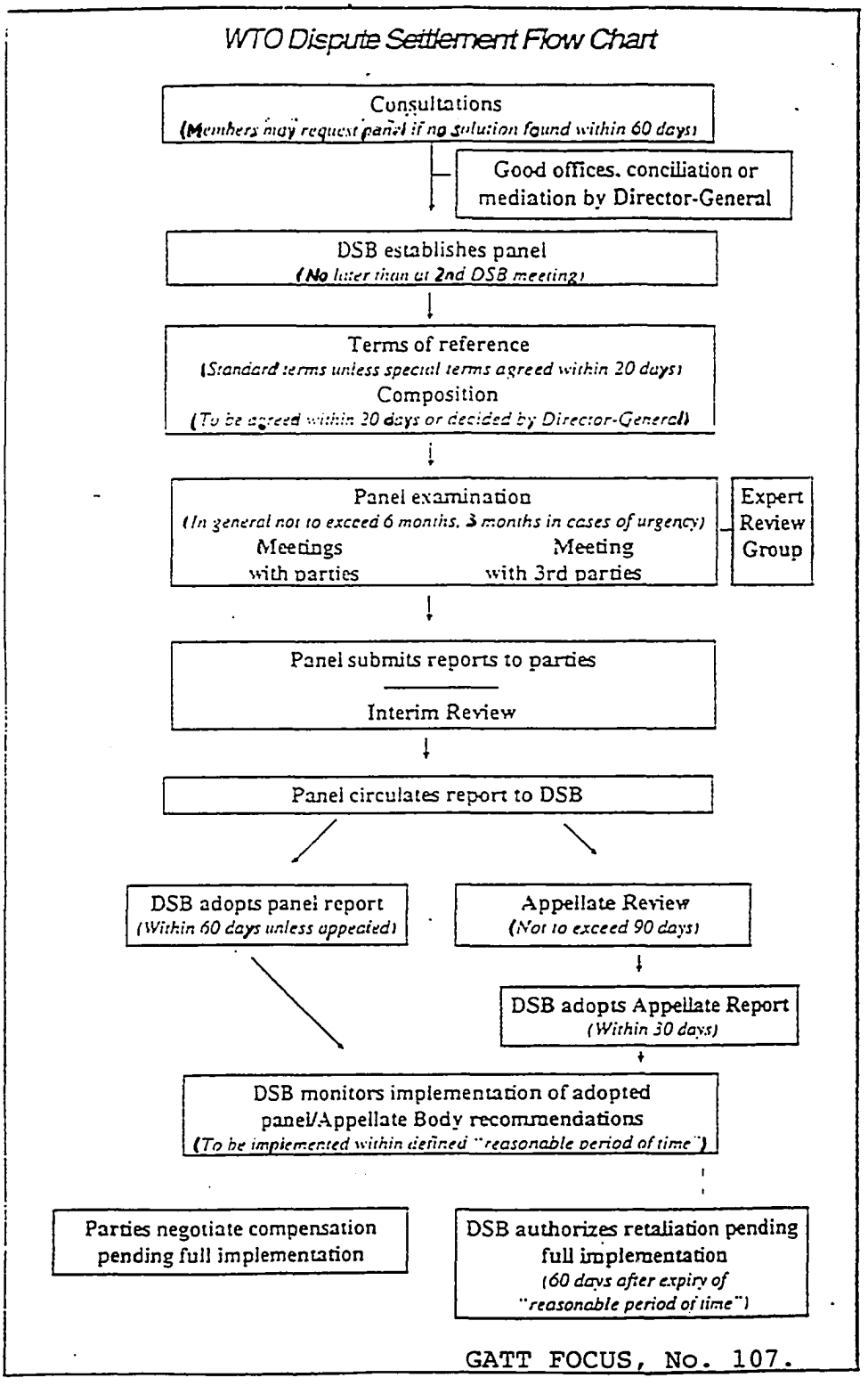
This introduction offers a brief overview of the dispute settlement procedures under the *DSU*. Figure 3 on page 254 depicts the WTO dispute settlement process. The following section examines each stage of the process in detail.

The dispute settlement process under the *DSU* begins when a WTO Member launches a complaint concerning the violation of an obligation contained in the covered agreements, or the nullification or impairment of benefits accruing to it under the covered agreements, by requesting consultations with the Member concerned. If consultations fail to result in a mutually-agreed solution within 60 days, the complaining party may request the establishment of a panel. At the latest at the meeting following that at which a first request for a panel is made, the DSB will establish the panel (unless it decides not to do so by consensus). The panel's terms of reference and composition are then established. The panel examines the matter referred to it and releases its report. The report may either be adopted by the DSB (unless there is a consensus against adoption), or it may be appealed to the Appellate Body. If the report is appealed, the Appellate Body examines the appeal and issues its report. The Appellate Body report, and the panel report as modified by the Appellate Body report, are then adopted by the DSB (unless there is a consensus against adoption). If the report(s) recommend the withdrawal of a measure or make another recommendation, the Member concerned must implement this recommendation within a reasonable period of time. Where a Member does not propose

a "reasonable period of time" for approval by the DSB, or there is no agreement between the parties on what constitutes the reasonable period of time for implementation, binding arbitration is available to determine the reasonable period of time. The DSB keeps the implementation of the recommendations and rulings contained in the report(s) under surveillance. If there is no compliance within a reasonable period of time, the Member concerned may negotiate compensation as a temporary measure. If the negotiations fail to reach an agreement on mutually acceptable compensation, the complaining party may request that the DSB authorize retaliation through the suspension of concessions or other obligations.

Where parties to a dispute agree, binding arbitration is also available as an alternative means of dispute resolution. Procedures for good offices, mediation and conciliation are also contemplated.

FIGURE 3:



a. Consultations

A WTO Member that believes that another Member is violating, or nullifying or impairing benefits accruing to it, under a covered agreement may bring a complaint against that Member. A complaint commences with a request for consultations. The WTO Member requesting consultations must notify the DSB and the relevant Councils and Committees of the request. A request for consultations must be in writing, giving the reasons for the request and identifying the measure at issue and the legal basis for the complaint.[419]

A WTO Member must respond to a request for consultations within 10 days, and enter into consultations within 30 days of the request. If after 60 days of the request, there is no resolution of the dispute, the complaining party may request the establishment of a panel.[420] If any of these deadlines are missed or consultations are denied, the complaining party may then proceed directly to request that a panel be established.

Other WTO Members with a "substantial trade interest" in consultations may participate in them if the requested Member agrees that their claim is well-founded. WTO Members who have joined the consultations in this way may become co-complainants

---

[419] *DSU*, Article 4.4.

[420] Shorter time limits are set in cases of urgency: *DSU*, Article 4.8.

should the dispute progress to the panel phase. Such Members may also request separate consultations.

Consultations serve a dual purpose. On the one hand, they promote the achievement of a mutually-agreed solution by facilitating the exchange of information between the parties. They are, therefore, a pragmatic instrument to encourage transparent negotiation between the parties with the potential to forestall escalation of the dispute to the panel phase. Pre-panel consultations are time-limited to demarcate clearly the period of time available for the achievement of a negotiated solution before a panel is established. On the other hand, consultations also serve to clarify the issues in dispute between the parties. This distillation of claims is essential if the dispute progresses to the panel phase. It ensures that the defending party is aware of the case against it. This latter function is impeded slightly by the lack of any official written records of the consultation phase. This makes it difficult to verify the identity of claims made in the consultations with those made in the request for a panel. This factor may cause difficulty for panels when they are trying to interpret their terms of reference.

The *DSU* stresses the importance of consultations in achieving the resolution of disputes. WTO Members have "affirmed their resolve to strengthen and improve the effectiveness of the consultation procedures"[421] and have undertaken to "accord sympathetic

---

[421] *DSU*, Article 4.1

consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former".[422] Consultations are intended to be a critical component of the dispute settlement process, and not a mere procedural formality preceding the establishment of a panel. This is evident from the emphasis placed upon achieving mutually-agreed solutions. The *DSU* provides that the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute", and that a mutually acceptable solution is clearly to be preferred. Parties may reach a mutually-agreed solution at any point in the dispute settlement procedures. Thus, even after the "adjudication" phase of dispute settlement commences with the establishment of a panel, consultations may continue with a view to achieving a negotiated settlement. Indeed, at the request of the complaining party, a panel may suspend its work at any time for a period not exceeding twelve months[423] in order to promote the achievement of a negotiated settlement.

Consultations, with the possibility of reaching a mutually-agreed solution, are a pragmatic element in the dispute settlement process, allowing state parties to negotiate a resolution to their differences. However, even in this pragmatic phase, there are legalistic elements that recall the multilateral nature of the dispute settlement process. First, all solutions to matters formally raised under the consultation and dispute settlement provisions

---

[422] *DSU*, Article 4.2.

[423] *DSU*, Article 12.12.

of the covered agreements, including mutually agreed solutions and arbitration awards, must be consistent with the *WTO Agreement*. This requirement of consistency ensures the supremacy of WTO law. States have undertaken to restrict the settlements they can achieve by requiring WTO-consistency, thereby limiting their autonomy even in consultations. Second, mutually agreed solutions, as well as WTO arbitration awards,[424] must be notified to the DSB and to the relevant Councils and Committees, where any WTO Member may raise any point relating to them.[425] This procedural obligation is an acknowledgement of multilateralism in the dispute settlement process. Although the consultations are bilateral between the parties, they take place under the aegis of the DSB, and the DSB must be kept abreast of developments. All Members have an interest in ensuring that a dispute proceeds according to the process laid out in the *DSU*. This formality encourages procedural order and consistency. It also ensures that all Members are informed of the matters at issue in dispute and the removal or maintenance of measures that may affect their own trade interests, directly or indirectly.

b. Good Offices, Conciliation and Mediation

Where the parties to the dispute agree, they may voluntarily resort to good offices, conciliation or mediation. This may occur at any time. It is without prejudice

---

[424]*DSU*, Article 25.3.

[425]*DSU*, Article 3.6.

to the rights of either party in any further proceedings.[426] Good offices, conciliation or mediation may also be terminated at any time, after which a complaining party may proceed to request the establishment of a panel.[427] Even after a panel has been established, and the "adjudication" phase is underway, these procedures remain available if the parties to the dispute so agree.[428] The Director-General, acting in an *ex officio* capacity, may offer good offices, conciliation or mediation with a view to assisting WTO Members to settle a dispute.[429] This may be particularly useful when developing countries are involved.

These procedures offer an alternative to the more legalistic and intrusive forms of third party intervention characteristic of the panel/Appellate Body process. As they work only in particular circumstances where the parties to the dispute agree, they are not a coercive mechanism to compel an unwilling state to proceed with dispute settlement. They preserve the autonomy of Members, although, as with mutually agreed solutions, any resolution achieved must be consistent with the covered agreements and must be notified to the DSB.

---

[426]*DSU*, Article 5.2.

[427]*DSU*, Article 5.3-4.

[428]*DSU*, Article 5.3, 5.5.

[429]*DSU*, Article 5.6.

c. Arbitration

The *GATT 1947* legal system did not originally explicitly provide for arbitration, although arbitration appears to have been available even in the absence of a specific provision. Contracting parties resorted only rarely to arbitration in practice under the *GATT 1947*. The concept of arbitration between *GATT 1947* contracting parties was introduced explicitly in the 1989 Decision.[430]

Arbitration now occurs in two contexts under the *DSU*: first, it is available as an alternative avenue of dispute resolution between WTO Members under the *DSU* "subject to mutual agreement of the parties" where issues are "clearly defined by both parties";[431] second, arbitration is also used at certain stages in the panel/appellate review dispute settlement process under the *DSU*.[432] Because the nature of arbitration differs in these two contexts, each is examined individually below. As is the case with other

---

[430]For an arbitral award rendered on the basis of this provision, see *Canada/European Communities – Article XVIII Rights*, 16 October 1990, BISD 37S/80. Also see E.-U. Petersmann, "Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT" in E.-U. Petersmann and M. Hilf, *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, 2nd ed. (Deventer: Kluwer, 1991) 323.

[431]*DSU*, Article 25.1-2.

[432]Arbitration is also available under certain of the covered agreements, for instance, under the *SCM Agreement*, Article 8.5.

WTO dispute settlement procedures, all arbitration under the *WTO Agreement* is state-to-state.[433]

Arbitration as an Alternative to the Panel/Appellate Review Process

Where arbitration is used as an alternative to the panel/appellate review process, the *DSU* does not set out any deadlines for the process. The *DSU* does not spell out any procedures to be followed in the arbitration, and specifies that the parties to the arbitration shall agree on the procedures to be followed. The *DSU* also does not specify what bodies will service arbitral proceedings. Under the *GATT 1947*, the GATT Secretariat serviced arbitrations.

To date, Members have not used the option of arbitration as an alternative avenue of dispute settlement under the *WTO Agreement*. Several observations can nevertheless be made. The availability of arbitration under the *DSU* is a legalistic development. A certain amount of party autonomy is permitted in arbitration proceedings. For instance, parties may agree on the arbitrator and upon the procedures that will govern the arbitration. To a certain degree, however, the provisions on arbitration contained in the *DSU* reflect the legalism and judicialization which is characteristic of the WTO dispute settlement panel and appeal procedures. Party autonomy is limited and the primacy of

---

[433]With the exception of the private arbitration procedures contemplated by Article 4 of the *Agreement on Preshipment Inspection*.

the *WTO Agreement* and consistency and coherence of the WTO legal system is preserved by several means. First, once they have agreed to resort to arbitration, the parties to the arbitration must notify WTO Members "sufficiently in advance of the actual commencement of the arbitration process".[434] This allows other WTO Members to become parties to the arbitration proceeding, although they may become party to the arbitration only upon the agreement of the original parties to that arbitration.[435] Other WTO Members are not affected by the arbitration and retain their rights under the covered agreements. Second, the covered agreements supply the applicable law. Third, the parties must agree to abide by the arbitration award.[436] The award must be consistent with the covered agreements and must not nullify or impair benefits accruing to any Member thereunder or impede the attainment of any objective of the Agreement.[437] There is no appeal available from an arbitration award. Fourth, arbitration awards must be notified to the DSB and to the relevant Council or Committee, where any WTO Member may raise any point relating

---

[434]*DSU*, Article 25.3.

[435]*DSU*, Article 25.2.

[436]*DSU*, Article 25.3.

[437]*DSU*, Article 3.5.

thereto.[438] Fifth, the *DSU* provisions concerning surveillance of implementation[439] and compensation and suspension of concessions[440] apply to arbitration awards.[441]

Arbitration at Certain Stages of the Panel/Appellate Review Process

Within the context of panel and appellate review, arbitration may be used: to determine the reasonable period of time for implementation of DSB recommendations and rulings in the absence of a proposal by a Member approved by the DSB, or of an agreement between the parties;[442] and to consider whether the level of retaliation through suspension of concessions or other obligations is equivalent to the level of nullification or impairment.[443] This type of arbitration is triggered by the request of one party to the dispute. The *DSU* specifies certain deadlines that the parties to the arbitration, as well as the arbitrator, must respect. There are no detailed procedures set out in the *DSU* for

---

[438]*DSU*, Article 25.3.

[439]*DSU*, Article 21. As this arbitration is state-to-state and under WTO auspices, the *DSU* procedures for implementation and enforcement of arbitral awards would apply, whereas an international convention pertaining to the enforcement of international commercial arbitral awards, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 330 *U.N.T.S.* 3, presumably would not.

[440]*DSU*, Article 22.

[441]*DSU*, Article 25.4.

[442]Under *DSU*, Article 21.3(c).

[443]*DSU*, Article 22.6-7

such arbitration. In practice, the parties to the arbitration have agreed upon the procedures they will follow on an *ad hoc* basis.

To date, there has been only one arbitration in the context of the panel/appellate review process under the *WTO Agreement*. It related to the *Japan - Taxes on Alcoholic Beverages*[444] dispute, relating to a complaint against Japanese taxation on imports of alcoholic beverages by the European Communities, Canada and the United States. It occurred under Article 21.3(c) of the *DSU*, concerning the reasonable period of time for implementation of DSB recommendations and rulings. Several interesting procedural elements arose during this arbitration. As the parties failed to reach a mutual agreement concerning the reasonable period of time for implementation, the United States requested binding arbitration with Japan.[445] The parties were unable to agree on an arbitrator within the 10-day period set out in the *DSU*[446], and the United States therefore requested that the Director-General appoint an arbitrator. The Director-General appointed Ambassador Julio Lacarte-Muro of Uruguay, the Chairman of the Appellate Body and the presiding Member of the division of the Appellate Body which had decided the appeal in the dispute. Although only the United States had originally requested the arbitration

---

[444]Award of the Arbitrator issued 14 February 1997, WT/DS8/15, WT/DS10/15, WT/DS11/13.

[445]WT/DS11/9, 13 January 1997.

[446]*DSU*, footnote to Article 21.3(c).

with Japan, it was subsequently determined that all the parties to the original dispute -- which also included the EC and Canada -- could participate in the process.

Due to the particular circumstances in the case, the 90-day period set out in Article 21.3(c) was considered inadequate to allow the arbitrator to produce his award. The parties to the arbitration therefore agreed to extend the time period for the arbitrator to render his award, despite the absence of a provision in the *DSU* for such an extension. They gave written assurances that, despite this unauthorized time extension, they would nevertheless consider the arbitrator's award as "binding arbitration" under Article 21.3(c). This arbitration was serviced by the Appellate Body Secretariat. The parties agreed upon the procedures that would govern the arbitration. These procedures established the timing for the parties' submissions and for the oral hearing. The parties filed their submissions simultaneously and the arbitrator held one oral hearing.

This experience with arbitration under Article 21.3(c) of the *DSU* reveals several notable factors. First, and most importantly, that Members are willing to resort to binding arbitration where it is available in the *DSU* panel/appellate review process. Second, the ability of the Director-General to appoint an arbitrator Members where the parties are unable to agree among themselves is an important tool to prevent delay or blockage. Third, Members will agree to minor derogations from time periods set out in the *DSU* where adherence to these time periods is not practicable. This shows that Members retain a certain degree of autonomy to regulate the arbitration procedures even

in the face of explicit *DSU* provisions. Fourth, Members appear largely to accept the "binding" nature of the arbitral process under the *DSU*. In this case, the parties had to reiterate their willingness to regard the process as binding in light of the alteration in the deadline for the arbitration award that was not contemplated in the *DSU*. It is nevertheless interesting to observe that Japan has introduced legislation that contemplates a 5-year phased-in implementation of the DSB recommendations and rulings in this case. One of the complainants in the dispute, the European Communities, has come to a mutually-agreed solution with Japan that provides for compensation to the European Communities for delay beyond the "reasonable period of time" for implementation. The other complainants, the United States and Canada, did not participate in this arrangement and have expressed concern that Japan's 5-year implementation plan does not comply with the 15-month reasonable period of time set by the Arbitrator.

The strict deadlines and the possibility that the Director-General may appoint the arbitrator if the parties to the arbitration fail to agree on one within a specified period of time ensure that the dispute settlement process will not be blocked by an unwilling Member. These procedural elements represent a cession of some autonomy on the part of WTO Members with a view to enhancing the effectiveness of dispute settlement for the benefit of all Members. In practice, even when Members undertake to consider an arbitral award as "binding", they may still come to agreement among themselves as to modalities for implementation of DSB recommendations and rulings.

d. Establishment of a Panel and Panel Procedures

The panel procedures were the core dispute settlement procedures under the *GATT 1947*. They are the chief repository of practice that evolved under the *GATT 1947* relating to the third-party adjudication of trade disputes. The improvements and innovations made with respect to the panel procedures in the *DSU* have remedied many of the criticisms of past practice, and developed a far more disciplined and streamlined dispute settlement process. The *DSU* furnishes strict time limits and precise rules for each phase in the process. The *DSU* reforms also introduce automaticity. They are designed to increase confidence in the dispute settlement system by lessening the opportunity for an unwilling party to delay or block the process, and to ensure that the complainant secures an effective and enforceable legal remedy. They represent a marked step towards legalism and diminished international legal autonomy, particularly for WTO Members involved as defendants in a dispute.

i. Establishment of a Panel

Where consultations fail to resolve a dispute, the DSB will establish a panel at the request of the complaining party, at the latest at the DSB meeting following that at which the request first appears on the DSB agenda, unless the DSB decides by consensus

not to establish a panel.[447] This provision represents a delicate balance of interests. The wording of the provision implies that the complaining party has a right to a panel, removing the uncertainty that existed in *GATT 1947* dispute settlement practice. It eradicates the ability of an unwilling defendant to block the establishment of a panel, and thereby makes the establishment of a panel virtually automatic, at the complainant's request.

There has been some debate among Members concerning the timing for panel requests under this provision. In practice, the Secretariat has not automatically placed the second request on the agenda of the subsequent DSB meeting. Rather, it has done so only at the request of the complaining party. Questions have arisen about whether it is necessary for the complaining party to make its second request for a panel at the DSB meeting immediately following that at which the request was first made. A literal reading of the provision would lead to this interpretation. However, some Members believe that it is possible for a complaining party to defer a second request for a panel to a later meeting of the DSB if it wants, without forfeiting the first request. These Members argue that, as the complaining party has a right to the establishment of a panel, it also has a right to determine when that panel is established. Such an interpretation would also preserve the flexibility of the complaining party to postpone the second request in the interests of prolonging the search for a negotiated settlement. Other Members counter this position by arguing that there is an element of unfairness to the defending party if a second request

---

[447]*DSU*, Article 6.1.

for the establishment of a panel (which must be allowed, in the absence of a consensus to the contrary) could appear on the agenda of the DSB at any time, thereby catching the defending party by surprise. A pragmatic solution to avoid surprising the defending party would be the requirement that the parties come to an understanding concerning the timing of the second request if it will not appear on the agenda of the DSB meeting immediately following that at which the first request is made. However, this would seem to fetter the right of the complainant to a panel, and would also seem to constitute an amendment to, or interpretation of, the *DSU*. Practice under the *WTO Agreement* and the *GATT 1947* (after the 1989 Decision) reveals that, in complaints where a panel was established, the overwhelming majority of panels were established either at the first meeting at which the request was considered or at the meeting immediately following this meeting. This practice seems likely to continue.

The request for establishment of a panel must identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[448] The request for the establishment of a panel is usually the document cited in the panel's terms of reference, which define the matter at issue before the panel. In the request, it is sufficient for a complaining party to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments. The request must therefore specify all of the *claims*, but not necessarily all of the detailed

---

[448]*DSU*, Article 6.2.

supporting *arguments*.[449] This is essential in order to alert the defending party and any third party of the legal basis for the complaint.

The panel request, therefore, has dual legalistic functions. First, on the procedural level, it will automatically trigger the establishment of a panel in the absence of a DSB consensus against establishment. Second, on the substantive level, it generally sets the legal and factual parameters for panel examination through its incorporation into a panel's terms of reference.

ii. Terms of Reference

The *DSU* sets out specific rules and deadlines for deciding the terms of reference. The parties use standard terms of reference unless they agree otherwise within 20 days from the establishment of the panel.[450]

---

[449]See *e.g. European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, p. 65.

[450]*DSU*, Article 7. The standard terms of reference read as follows:

> To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document...and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

The DSB may authorize its Chairman to draw up special terms of reference in consultation with the parties to the dispute within 20 days of the panel's establishment. Where special terms of reference are agreed, they are circulated to the Members and any Member can comment on them in the DSB. This indicates that, although the parties agree between themselves upon their special terms of reference, multilateralism still pervades the process. The DSB Chairman is involved, and the WTO membership has an interest in ensuring the procedural conformity of the terms of reference.

Terms of reference are of critical importance in the dispute settlement process. They serve two primary functions. First, they give the parties and third parties sufficient information concerning the claims at issue in a dispute in order to allow them adequate time and opportunity to respond. Second, they establish the scope of the dispute, delineating the jurisdiction of the panel by identifying the precise claims at issue in the dispute.[451] They set out the "matter" referred to the panel for consideration, consisting of the specific claims stated by the parties in the documents cited in the terms of reference. Depending upon the specific wording of the terms of reference, the relevant document is usually the request for the establishment of a panel, although the request for consultations and other documents have also been relevant in certain cases. Claims not identified in the documents referred to or contained in the terms of reference are outside the panel's terms of reference, and therefore cannot be properly considered by a panel.

---

[451]See *e.g. Brazil- Measures Affecting Desiccated Coconut,* WT/DS22/AB/R, adopted 20 March 1997, p. 22.

At the same time, a panel is not bound to address each and every issue set out in the terms of reference. Rather, a panel need only address those claims that must be addressed in order to resolve the matter in issue in the dispute, as that matter is set out in the terms of reference.[452] The default provision for standard terms of reference within a specified 20-day time limit is a legalistic feature. It technically eliminates the possibility for a party to stall the process by refusing to agree on a panel's terms of reference. The substantive focus on the terms of reference of panels also signals a judicialization of the dispute settlement procedures.

iii. Composition of Panels[453]

The composition of the body that will initially adjudicate a dispute is a determining factor for the approach that the body will take, that is, whether it will concentrate primarily on WTO law and legalistic considerations, or whether it will focus more on the attainment of a pragmatic solution to the dispute.

---

[452]See *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 19.

[453]*DSU*, Article 8.

The *ad hoc* WTO panels are generally composed of three individuals.[454] Panels are composed of well-qualified governmental and/or non-governmental individuals, including persons with GATT/WTO dispute settlement experience, Secretariat officials, international trade law academics and practitioners.[455] The panelists may be, but are not necessarily, drawn from a roster maintained by the Secretariat. They should be selected with a view to ensuring the independence of the members, a sufficiently diverse background, and a wide spectrum of experience.[456]

The selection of panelists raises many interesting issues, including those of nationality and of affiliation. With respect to nationality, citizens of parties or third parties to the dispute do not serve on a panel concerned with that dispute unless the parties otherwise agree. In addition, in a dispute between a developing country Member and a developed country Member the panel shall, if the developing country so requests, include at least one panelist from a developing country. As most WTO disputes involve the United States, Japan, Canada and the European Communities, there is sometimes a difficulty in finding suitable panelists. Individuals from states such as Switzerland, New Zealand and Singapore are frequent choices. In practice, it is not only nationality that has been important, but also perceived alignments of interest of Members. For example, in a dispute

---

[454]Panels are composed of three unless parties to the dispute agree, within 10 days from the panel's establishment, to a panel composed of five panelists. In practice, all panels established under the *WTO Agreement* have consisted of three panelists.

[455]*DSU*, Article 8.1.

[456]*DSU*, Article 8.2

involving Canada, a citizen of a state signatory of the *North American Free Trade Agreement ("NAFTA")* would most likely not be appointed to serve on the panel. Because of a desire to ensure the neutrality and impartiality of panelists, the *DSU* stresses that they serve in their individual capacities, and that Members shall not give them instructions nor seek to influence them as individuals with regard to matters before a panel.[457]

With respect to affiliation, both governmental and non-governmental individuals may serve on panels. While governmental candidates may be familiar with the issues in a dispute, and with the general system of the WTO, they are often not lawyers. Consequently, their approach to dispute resolution may be imbued with diplomatic and political considerations. On the other hand, the non-governmental individuals that serve on panels are most often trade law practitioners or academics, with a more doctrinal and legalistic approach to the issues in dispute. In practice, while there has been some experimentation with the use of non-governmental panelists in the past, a large number of panelists on panels established under the *DSU* have been delegates and civil servants drawn from the missions in Geneva. Academics and practitioners of international trade law have also served on WTO panels, but to a lesser extent.

Because of these and other considerations, panelist selection is a complex process. The Secretariat proposes nominations for the panel to the parties, who are not

---

[457] *DSU*, Article 8.9.

to oppose the nominations except for compelling reasons.[458] If the parties are unable to agree upon the panelists within 20 days after the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel.[459] This is another procedural safeguard to ensure that the dispute settlement process is not blocked by an unwilling Member. It is a legalistic procedural element. States have undertaken to reduce their autonomy and accept a decision on composition by the Organization in the event they cannot reach an agreement within a stipulated time frame. However, the Director-General does not automatically appoint the panelists once the 20-day time period has lapsed. Rather, the Director-General acts only upon the request of a party to the dispute. In practice, this option has been exercised so far in several disputes under the *DSU*.[460]

iv. Multiple Complainants

An offending measure imposed by a Member often affects more than one other Member. This is a reminder of the multilateral nature of international trade relations. For this reason, the *DSU* contains provisions for multiple complainants. The *DSU* provides

---

[458]*DSU*, Article 8.6.

[459]*DSU*, Article 8.7.

[460]*E.g. European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27; *United States - The Cuban Liberty and Solidarity Act*, WT/DS38.

that, where more than one Member requests the establishment of a panel related to the same matter, a single panel should, whenever possible, be established to examine these complaints.[461] This provision promotes procedural efficiency in the dispute settlement process, and allows a panel to take a broad range of considerations and interests into account in its deliberations, although a panel must organize its work and arrange its findings in such a manner that the rights which disputants would have enjoyed before separate panels are not impaired. Where more than one panel is established to examine complaints relating to the same matter, the same persons serve as panelists and the working schedules are harmonized to the greatest possible extent.[462]

v. Third Parties

Based on practice that developed under the *GATT 1947*, third parties play a significant role in the panel process. However, their participation is generally limited

---

[461] *DSU*, Article 9. While there is no provision for joining cases involving multiple defendants, this effectively occurred in *European Communities - Customs Classification of Certain Computer Equipment*, complaint by the United States, WT/DS62. The United States had also originally held consultations with the United Kingdom concerning the reclassification for tariff purposes of the same computer equipment; and with Ireland, pertaining exclusively to LAN equipment. At the DSB meeting on 20 March 1997, the European Communities agreed to incorporate the requests for establishment of a panel by the United States with respect to the United Kingdom (*United Kingdom - Customs Classification of Certain Computer Equipment*, WT/DS67) and Ireland (*Ireland - Customs Classification of Certain Computer Equipment*, WT/DS68) into this previously established panel and to modify its terms of reference accordingly.

[462] *DSU*, Article 9.3. For example, *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, complaint by the United States, WT/DS26; *European Communities - Measures Affecting Livestock and Meat (Hormones)*, complaint by Canada, WT/DS48.

in comparison with the participation of parties to the dispute.[463] In WTO practice, third parties have been an asset: not only have they been of assistance with respect to a specific issue in dispute; they have also drawn attention to systemic concerns in particular cases. The ability of a Member having a "substantial interest" in a dispute to reserve its third party rights and participate in the panel process serves as a reminder of the multilateral aspect of WTO dispute settlement: clarification of the rights and obligations in the *WTO Agreement* does not affect only the parties to a dispute, but may also affect the interests of other WTO Members.

The *DSU* codified and developed third party practice in the panel process. Third parties having a "substantial interest" in the matter under investigation can be heard

---

[463]For example, in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27, third parties were given broader rights of participation than those generally granted. This was due to the fact that they were the countries most affected by the outcome of the dispute. In that dispute, third parties were given "observer" status and were allowed to observe the whole of the first and second substantive meetings with the panel and to make brief oral statements at the second meeting. In *European Communities - Measures Affecting Livestock and Meat (Hormones)*, complaint by Canada (United States as third party), WT/DS48 the United States was given broader rights of participation than those normally granted to third parties. This was due to the fact that there was a parallel panel dealing simultaneously with the complaint of the United States concerning the same EC measures, *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 (Canada as third party). While the United States was not allowed to be present in the part of the first substantive meeting ordinarily restricted to parties, it was invited to participate in the meeting of the panel with the scientific experts and was permitted to observe the second substantive meeting and to give a brief oral statement. In addition, both Canada and the United States were given access to all of the information submitted under each panel proceeding to the parties in the other panel proceeding, including the parties' second written submissions, written versions of oral statements and questions raised by the panel and the parties, and answers thereto, in each case, as well as scientific documentation submitted by the parties. By so doing, the panel understood that it could consider, where appropriate, materials submitted to the other panel. See WT/DS48/R/CAN, 18 August 1997, pp. 193-195, paras. 8.12-8.20.

before, and make written submissions to, the panel.[464] A "substantial interest" is not limited to being affected by the specific measure at issue, but may also include a general systemic concern. In addition, there is no objective criterion to determine the existence of a "substantial interest". In practice, Members judge this criterion subjectively.

Third party submissions are to be reflected in the panel report.[465] Third parties also receive submissions of the parties to the dispute to the first meeting of the panel.[466] Beyond these basic and limited provisions, third party participation is subject to agreement between the parties. In practice, the parties to the dispute hold an early organizational meeting with the panel at which this, and other matters, are decided. Third parties do not attend that meeting and are therefore not privy to the decisions on panel working procedures. The option remains open for third parties to have recourse to *DSU* procedures where they consider that a measure already subject to a panel proceeding nullifies or impairs benefits accruing to them under the covered agreements. Wherever possible, such a dispute will be referred to the original panel.[467]

Pursuant to Articles 16.4 and 17.4 of the *DSU*, only parties to a dispute, not third parties, have a right to appeal a panel report. Nevertheless, Members who reserve

---

[464] *DSU*, Article 10.2.

[465] *DSU*, Article 10.2.

[466] *DSU*, Article 10.3.

[467] *DSU*, Article 10.4.

their third party rights at the panel stage will have a right to file a third participant's submission and participate in an appeal, should a party to the dispute opt subsequently to appeal from the panel report.

vi. Function of Panels

The function of the panels is to assist the DSB in discharging its responsibilities under the *DSU* and covered agreements. Thus,

> a panel should make an objective assessment of the matter before it, including the facts and the applicability of and conformity with the relevant covered agreements, and such other findings as will assist the DSB in making recommendations or rulings provided for in the covered agreements.[468]

Because of the peculiar history of the *GATT 1947* dispute settlement procedures that developed on the basis of Article XXIII:2 of the *GATT 1947*, it was the GATT CONTRACTING PARTIES that technically enjoyed jurisdiction and authority to settle disputes that arose under that Agreement. Panels were technically a consultative body of experts, established by, and reporting to, the CONTRACTING PARTIES. A panel report did not become legally binding until it was adopted by the CONTRACTING PARTIES. The *DSU* has maintained the technical requirements of panel establishment and the adoption of panel reports by decisions of the DSB. However, now that these events

---

[468] *DSU*, Article 11.

occur virtually automatically, in the absence of consensus against them, the nature of panel examination is adjudicative in all but name. Nominally, the task of panels remains to assist the DSB in executing its functions.

In carrying out this task, a panel is bound by the mandate set out in its terms of reference. Nevertheless, a panel may exercise a degree of legal discretion. While a panel's terms of reference set the outer parameters for panel examination, they do not set out the required minimum scope of panel inquiry. A panel must only address the claims necessary to resolve the particular dispute between the parties.[469] It is not required to go beyond this and address every issue referred to it by the parties. Parties therefore do not have a "right" under the *DSU* to a panel finding on every claim that is made in the dispute. This represents a limitation on party autonomy, as the panel may determine the issues that must be addressed in order to resolve the dispute.

The responsibility of panels in establishing the facts of a case has grown in importance since the addition of the appellate review stage: appeals are limited to issues of law and legal interpretation. A panel's examination of, and findings of, fact are therefore crucial to the effective functioning of dispute settlement. There is no uniform standard of review established for panel examination of measures taken by Member governments. There has been some debate about whether Article 11 of the *DSU* sets out the parameters

---

[469] *United States - Measure Affecting Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997.

of panel review that should be taken into account in the appellate review stage. By this line of argument, the Appellate Body would assess whether a panel has indeed made an "objective assessment" of the matter before it, including the facts, evidence and arguments of the parties.

vii. Panel Procedures

The *DSU* provides guidelines for some features of panel procedures, but is silent on many aspects of the panel process.[470] There are no mandatory standard working procedures for panels. Consequently, in each dispute, the parties to the dispute and the panel decide upon those aspects of the panel working procedures that are not covered by the *DSU* (third parties generally have no input in this regard). In particular, there are no standard procedural rules on the requisite content for parties' submissions, nor on the presentation of evidence throughout the panel phase. This means that the submission of new facts, evidence and economic data may occur late in the process. As panels have no formal rules to filter evidence, in practice, they have often accepted and considered in their deliberations material submitted up the latest possible point. However, there appears to be a movement toward more strictness with respect to accepting evidence.[471]

---

[470]*DSU*, Article 12 and Appendix 3.

[471]For example, in *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, complaint by the United States, WT/DS26 and *European Communities - Measures Affecting Livestock and Meat (Hormones)*, complaint by Canada, WT/DS48, the panel imposed a deadline for the submission of scientific evidence by the parties. This was in order to ensure (continued...)

The *DSU* stipulates that the panel procedures should provide sufficient flexibility so as to ensure high quality panel reports, while not unduly delaying the process.[472] Panels should fix the timetable for the panel process after consulting the parties,[473] and set precise deadlines for written submissions, which the parties should respect.[474] A proposed timetable for panel work, which may be modified, is included in Appendix 3 to the *DSU*. Appendix 3 to the *DSU* also contains guidelines on working procedures for panels.

Once established, a panel must generally complete its work within 6 months. In no case should it take more than 9 months from the date that the panel's composition and terms of reference are set.[475] In WTO practice, panels in all but the least complex cases generally take about 9 months to complete their work. Some panels have exceeded the 9-month period, on agreement by the parties.[476] At the request of the complaining

---

[471](...continued)
that both the parties and the scientific experts advising the panel would get an opportunity to examine the scientific experts before the scheduled meeting with the experts.

[472]*DSU*, Article 12.2.

[473]*DSU*, Article 12.3.

[474]*DSU*, Article 12.5.

[475]*DSU*, Articles 12.9 and 20.

[476]*European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27; *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, complaint by the United States, WT/DS26; *European Communities - Measures Affecting Livestock and Meat (Hormones)*, complaint by Canada, WT/DS48.

party, a panel may suspend its work at any time for a period not exceeding twelve months.[477] Such suspension is usually in order to allow negotiations toward a mutually-agreed solution.

The panel procedures are generally as follows. Parties to the dispute, in conjunction with the panel, hold an organizational meeting to determine the panel working procedures and schedule. Parties and third parties then make written submissions to the panel, outlining the facts of the case and their legal arguments. The panel then holds a first substantive meeting with the parties where the parties present their oral arguments. This is usually followed by a special session with the third parties. The parties then make further written submissions and make formal rebuttals at a second substantive meeting with the panel. Generally, panel meetings are not judicial in character. The questions posed by the panel to the parties, as well as the parties questions to each other, are exchanged before the meetings. The meetings are largely pre-scripted; the parties usually read out prepared responses. The panel may request further written submissions from the parties.

A panel may seek information and technical advice from any individual or body it deems appropriate, but must inform the authorities of a WTO Member if the individual or body is within its territory.[478] A panel may also consult experts and request a written advisory report from an expert review group concerning a scientific or other

---

[477] *DSU*, Article 12.12.

[478] *DSU*, Article 13.1.

technical matter raised by a party to the dispute. The ability of a panel to consult other authorities or experts is not subject to the consent of the parties to the dispute. These consultative provisions are significant as they provide a panel with the authority to go beyond the submissions of the parties and third parties to the dispute in its deliberations. Given the broad range of complex areas that are now governed by the covered agreements, the ability of a panel to benefit from expert advice will facilitate its task and improve the quality of the reports. The ability of panels to supplement their fact-finding through consultation and expert advice is particularly important as panels have the primary responsibility for establishing the facts of a case. Appeals are limited to issues of law and legal interpretation.

On the basis of the oral and written submissions of the parties, and of any technical or expert advice it has sought, the panel drafts its report. Where one or more of the parties to the dispute is a developing country, the panel report must explicitly indicate how account has been taken of relevant provisions of differential and more-favourable treatment for developing countries Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement process.[479]

---

[479] *DSU*, Article 12.11.

The WTO Secretariat assists panels, "especially on the legal, historical and procedural aspects of the matters dealt with".[480] A panel is usually serviced by two officials from the Secretariat: one from the Legal Division, and one from the operational division of the WTO Secretariat dealing with the subject-matter of the dispute. More officials may be involved if the case deals with multiple issues under multiple covered agreements. The officials may be economists or lawyers. They provide an institutional memory for the process, aid panelists in their examination and analysis of the issues, expose panelists to the often broad range of relevant considerations that arise under the covered agreements relating to a dispute, and draft sections of the panel report. The size and role of the Legal Division of the Secretariat has continually expanded since its establishment with a staff of one lawyer in 1981. From a staff of three in the late 1980's, the Legal Division has now grown to house eight lawyers to provide legal expertise to panels, and to aid in the drafting process of panel reports. A more recent trend is the significant and growing number of lawyers in the operational divisions of the Secretariat,[481] attesting to the increased legalism of the subject-matter covered by the *WTO Agreement*. The involvement of the Legal Division and of lawyers from other operational divisions adds an additional legalistic and institutional element to the dispute settlement process. It promotes the more consistent and orderly development of WTO law. The involvement

---

[480]*DSU*, Article 27.1.

[481]For example, the Rules Division (dealing with antidumping, subsidies/countervailing duties, safeguards, state trading and civil aircraft) has three lawyers; Services and Technical Cooperation each have two; Market Access, Intellectual Property, Accessions and Trade and Environment each have one. Development and Agriculture do not have any lawyers.

of lawyers and economists from the operational divisions dealing with the agreements under consideration in a dispute also ensures that the requisite specific substantive expertise is available to the panelists.

The WTO Secretariat further provides legal experts within the technical cooperation service to furnish legal advice and assistance to developing country Members in the dispute settlement process.[482] As the subject-matter of the covered agreements is exceedingly broad, and the dispute settlement process has become more rigourous and legalistic, this service is increasingly valuable.

viii. Interim Review

In order to ensure that a panel is fully aware of all issues and concerns in a dispute, the parties have an opportunity to comment during the panel process upon the sections of the panel report summarizing the facts and arguments of the parties (the "descriptive" section of the report).[483] The parties subsequently receive the panel's "interim report",[484] which includes the descriptive part of the report, in addition to the panel's findings and conclusions. A party may comment upon the interim report and request that the panel review "precise aspects" of it. A party can request that a further meeting with the panel

---

[482]*DSU*, Article 27.2.

[483]*DSU*, Article 15.1.

[484]*DSU*, Article 15.2.

be held on the issues identified. The final report of the panel must include a discussion of the arguments made at the interim review stage.[485] If no party submits comments within a period of time set by the panel, the interim report is considered the final report and is circulated to the WTO Members.[486]

The interim review stage allows the panel, in conjunction with the parties, to clarify issues, rectify errors, and ensure that all relevant considerations have been taken into account. The purpose of the interim review is not to introduce new arguments or evidence, nor to enter into a debate with the panel.[487] Nevertheless, in some cases, the interim review has acted as a kind of "preliminary appeal", in which the parties have submitted formal documents containing new arguments and have "relitigated" the case. Where a panel report is appealed, the interim review arguments of the parties thus often reflect closely the arguments made by the parties on appeal. The interim review stage offers the last possibility for revision of the panel's findings of fact, as appeals to the Appellate Body are technically limited to the consideration of issues of law.

While the final report must discuss the arguments made at the interim review stage, there is no requirement for the panel to give a reasoned response to each concern registered at the interim review stage. In general, panels have acknowledged the arguments

---

[485] *DSU*, Article 15.3.

[486] *E.g. Brazil- Measures Affecting Desiccated Coconut*, WT/DS22.

[487] See *Japan - Taxes on Alcoholic Beverages*, WT/DS8, WT/DS10, WT/DS11.

made by the parties in the interim review phase, indicated how some of these had been taken into account or led to drafting changes in the report, and then simply discarded others without making any alterations to the reasoning or result of the report. In some cases, panels may have made significant modifications to their reports as a result of comments received in the interim review that may have eliminated the need for a party to appeal certain issues. In at least one case, the panel's interim review comments formed part of the subject matter of an appeal.[488]

The addition of the interim review stage is a retreat from the otherwise generally rule-oriented procedures under the *DSU*. As parties may still reach a mutually agreed solution to the dispute even after they have viewed the interim report, it allows an additional opportunity for negotiated settlement between the parties once they have viewed the panel's stance on the issues under consideration. The interim review is an additional pragmatic safeguard to diminish the chances of surprise to disputants in the process should a panel report contain faulty or controversial legal reasoning or an anomalous result. This is particularly important in light of the automaticity in the adoption of panel reports under the *DSU*. However, the utility of the interim review stage may be questioned in light of the increasing tendency for Members to save their major arguments for the appellate review phase.

---

[488]*United States -Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33.

e. Appellate Review

Article 17 of the *DSU* established the Appellate Body to hear appeals from panel cases. It sets out the broad parameters of the appellate review process. An appeal is limited to issues of law covered in a panel report and legal interpretations developed by a panel.[489] The Appellate Body may uphold, modify or reverse the legal findings and conclusions of a panel.[490]

The Appellate Body is composed of seven Members "of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally", and who are "broadly representative of membership in the WTO".[491] A division of three Appellate Body Members sits on each appeal. To accommodate the rather unpredictable timing of appeals, Appellate Body Members must be available at all times on short notice. In November 1995, the DSB appointed the first seven Appellate Body Members. They are: J. Bacchus (U.S.A:); C. Beeby (New Zealand); C.D. Ehlermann (Germany); S. El-Naggar (Egypt); F. Feliciano (Philippines); J. Lacarte-Muro (Uruguay);and M. Matsushita (Japan). The term of the Appellate Body Members is four years (with the exception of three of the first Appellate Body Members to be appointed, who serve two-year

---

[489] *DSU*, Article 17.6.

[490] *DSU*, Article 17.13.

[491] *DSU*, Article 17.3.

terms), with the possibility of one reappointment.[492] In 1997, the DSB agreed to renew the terms of those Appellate Body Members whose first term was two years.[493]

Paragraph 9 of Article 17 of the *DSU* confers upon the Appellate Body the authority to draw up its own working procedures for the conduct of appeals. Pursuant to this provision, the Appellate Body developed its *Working Procedures for Appellate Review*[494] (the "*Working Procedures*") in consultation with the Chairman of the DSB and the WTO Director-General. In conjunction with Article 17.9 of the *DSU*, the *Working Procedures* thus provide the legal parameters for the appellate review procedure.

The *Working Procedures* consist of two parts. Part I (Rules 2-15) deals with internal matters relating to the role and responsibilities of the Appellate Body Members. Part II (Rules 16-32) deals with the rules of procedure for appellate review.

---

[492] *DSU*, Article 17.2.

[493] After consultation with WTO Members, the DSB Chairman announced that the three Appellate Body Members who would serve an initial term of two years would be selected by lot. On 25 June 1997, the DSB Chairman announced that the three Members selected by lot to have two-year terms would be re-appointed for a further term of 4 years. These three Members are: J. Lacarte-Muro; C.D. Ehlermann and F. Feliciano. See WT/DSB/M/35, 18 July 1997.

[494] *Working Procedures for Appellate Review*, WT/AB/WP/1, in effect 15 February 1996 ("*Working Procedures*"). A revised and consolidated version of the *Working Procedures*, WT/AB/WP/3, was issued on 28 February 1997. This latter version replaced WT/AB/WP/1.

i. Internal Matters

A division of three Appellate Body Members is established to hear and decide any one appeal.[495] Divisions are composed on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Appellate Body Members to serve regardless of their national origin.[496] The parties to the dispute have no input or influence concerning the composition of the division that will hear their case. Significantly, they also have no advance notice of a division's composition.[497] The approach of the Appellate Body to the issue of nationality in the composition of divisions therefore contrasts with the approach of the WTO with respect to the composition of panels. With respect to panels, citizens of WTO Members whose governments are parties or third parties to a panel dispute do not to serve on a panel unless the parties to the dispute agree otherwise.[498] The Appellate Body deemed that such an approach would be likely in practice to lead to distortions in the workload of certain Appellate Body Members, and might make it impossible, in certain cases, to establish a division.[499] Therefore, an Appellate Body Member may serve on a division hearing

---

[495]*DSU*, Article 17.1.

[496]*DSU*, Article 17.1 and *Working Procedures*, Rule 6.1-2.

[497]It is interesting to note that "division-shopping" is thus not possible. While this may not be overly significant at present, as the number of appeals increase, strategic considerations such as the composition of a particular division may grow in importance.

[498]*DSU*, Article 8.3.

[499]7 February 1996 letter from the Chairman of the Appellate Body to the Chairman of (continued...)

an appeal involving that Appellate Body Member's own country if the Appellate Body's system of rotation determines that that individual is on a division. This underscores the volition of the Appellate Body to serve as an independent and impartial decision-making body: Appellate Body Members serve as individuals in the interests of the dispute settlement system as a whole, and do not represent the interests of their country or region.

The Appellate Body and its divisions make every effort to take their decisions by consensus. Where a consensus is not possible, a decision is to be taken by majority vote.[500] An interesting element of Appellate Body decision-making is the principle of "collegiality". To ensure consistency and coherence in decision-making, and to benefit from their individual and collective expertise, the Appellate Body Members convene on a regular basis to discuss matters of policy, practice and procedure. In addition, the division of three responsible for deciding an appeal exchanges views with the other four Appellate Body Members before the division finalizes its report. This practice promotes common conceptual approaches to the issues encountered in successive appeals despite the rotation in the composition of divisions. As it will foster the development of consistent interpretations of the covered agreements, the collegiality principle will avoid the problems that might occur with the application of divergent legal approaches, different standards of review, or inconsistent legal analysis over time. Nevertheless, the *Working Procedures*

---

[499](...continued)
the DSB accompanying the transmission of the *Working Procedures* (the "7 February 1996 letter").

[500]*Working Procedures*, Rule 3.2.

stress, "[n]othing in these Rules shall be interpreted as interfering with a division's full authority and freedom to hear and decide an appeal assigned to it..."

The Appellate Body has adopted the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*Rules of Conduct*") to govern matters relating to conflicts of interest.[501] There are also rules governing incapacity,[502] replacement,[503] resignation,[504] and transition[505] of Appellate Body Members.

ii. Procedures for Appellate Review

Within 60 days of the circulation of a panel report, any party to the dispute has the right to appeal "issues of law and legal interpretation" in the panel report to the Appellate Body. Only parties to the dispute, not third parties, are permitted to appeal

---

[501] *Working Procedures*, Rules 8-11 and Annex II. The final version of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* was formally adopted by the DSB on 3 December 1996. Pursuant to Rule 8.2 of the *Working Procedures*, these *Rules of Conduct* were directly incorporated into the Working Procedures and superseded Annex II. They are included in the revised and consolidated version of the *Working Procedures*, WT/AB/WP/3, issued 28 February 1997.

[502] *Working Procedures*, Rule 12.

[503] *Working Procedures*, Rule 13.

[504] *Working Procedures*, Rule 14.

[505] *Working Procedures*, Rule 15.

a panel report.[506] The right to appeal is automatic. There are no limitations or requirements for eligibility, such as obtaining leave to appeal. All parties to the panel dispute may participate in the appeal. In addition, Members that reserved their third party rights in the dispute at the panel level may participate as third participants in the appeal. They may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.[507]

An appeal is not limited to the overall result of a panel report. It is not necessary for a party to be aggrieved by a panel ruling in order to appeal. Rather, a Member whose position prevailed before the panel may opt nevertheless to base an appeal on the legal reasoning and legal interpretations developed in the panel report.[508] It is also possible

---

[506]*DSU*, Article 17.3.

[507]*DSU*, Article 17.3.

[508]This occurred, for example, in *United States - Restriction on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/8, adopted 25 February 1997 (Costa Rica "won" at the panel level, but appealed one aspect of the panel's findings nonetheless); and in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 27 May 1997 (India's position prevailed at the panel level but India appealed three aspects of the panel's findings despite the removal by the United States of the measure in issue during the panel proceedings). In *Japan - Taxes on Alcoholic Beverages*, WT/DS8/11, WT/DS10/11, WT/DS11/8, adopted 1 November 1996, the United States had "won" at the panel level, but made a subsidiary appeal concerning the panel's legal reasoning; in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, WT/DS27/AB/R, adopted 25 September 1997, the position of the five complaining parties prevailed at the panel level but they nevertheless launched a subsidiary appeal on several points of law.

for a Member to participate as both an appellant and an appellee in the same proceeding. [509]

An appeal is launched by notification to the DSB and simultaneous filing of a notice of appeal with the Appellate Body Secretariat. The *Working Procedures* outline the time frames and content requirements for the appellant's, appellee(s), and third party(ies) submissions. The time periods are mandatory, unless a participant in the appeal can demonstrate to the division that strict adherence to a time limit would result in manifest unfairness.[510] The short time frames are necessary due to the time limits for appeals set out in the *DSU*. The date of the filing of the appellant's notice of appeal is Day 0; the appellant's submission is due on Day 10. Given that disputes often involve several countries, there is also a provision on multiple appeals.[511] Within 15 days after the date of filing of the notice of appeal, a party to the dispute other than the original appellant may join in the appeal, or appeal on the basis of other alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel.[512] Later appeals remain possible, under Article 16.4 of the *DSU*.[513] Due to the short time limits for the appellate proceedings, it is not possible to join such later appeals with the original appeal. However, they will be examined by the same division that heard the original appeal.

---

[509]For example, the United States in *Japan - Taxes on Alcoholic* Beverages, WT/DS8/11, WT/DS10/11, WT/DS11/8, adopted 1 November 1996.

[510]*Working Procedures*, Rule 16.2.

[511]*Working Procedures*, Rule 23.

[512]*Working Procedures*, Rule 23.1.

[513]*Working Procedures*, Rule 23.4.

Appellee and third participant's submissions must be filed on Day 25. The distribution of time for the submissions protects the basic rights of all participants in the proceedings.

The *Working Procedures* set out relatively detailed requirements for participants' submissions. For example, an appellant's submission must set out:

> (i) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof;
> (ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and
> (iii) the nature of the decision or ruling sought.

In addition to (ii) and (iii) above, an appellee's submission must counter with:

> (i) a precise statement of the grounds for opposing the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel raised in the appellant's submission, and the legal arguments in support thereof; [and]
> (ii) an acceptance of, or opposition to, each ground set out in the appellant's submission;...

An oral hearing is held in each appeal, taking place, as a general rule, 30 days after the filing of the notice of appeal.[514] Participants in the appeal, including the original appellant, and other appellants, the appellee(s) and third participants, may appear at the hearing to make oral argument presentations. The procedures followed in the oral

---

[514] *Working Procedures*, Rule 27.

hearing contrast with panel meetings. They are more legalistic and court-like. They are spontaneous, rather than pre-scripted, sessions. The questioning deals generally with issues of law and legal interpretation. The participants and third participants receive no advance notice of the content or type of questioning that the division will conduct. The participants do not ask questions of each other. The division hearing the appeal poses all the questions and the presiding member runs the proceedings.

The division may request further written submissions from the participants to the appeal at any time during the appellate proceedings.[515] Written submissions to the Appellate Body, as well as the proceedings of the Appellate Body, are confidential.[516]

The *Working Procedures* allow a division to adopt an appropriate procedure in a specific appeal in the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by the *Working Procedures*. Such a procedure must be consistent with the *DSU*.[517]

The *DSU* sets stringent time limits for appeals. As a general rule, the period between the date that a party to the dispute formally notifies its intention to appeal and the circulation of the Appellate Body report shall not exceed 60 days. Where the Appellate

---

[515] *Working Procedures*, Rule 28.1.

[516] *DSU*, Articles 18.2 and 17.10.

[517] *Working Procedures*, Rule 16.1.

Body considers that it cannot provide its report within the period, it must formally notify the DSB of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case can the appeal process exceed 90 days.[518]

iii. Limitations on Appellate Review

The *DSU* establishes the fundamental principles guiding the appellate review process. However, it is silent on many procedural and substantive issues, which will be resolved as practice develops.

For example, the *DSU* provisions imply certain limits upon the scope of the Appellate Body's authority. An appeal is limited to "issues of law covered in the panel report and legal interpretations developed by the panel".[519] Pure questions of fact thus appear not to fall within the scope of the Appellate Body's mandate. In addition, the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.[520] This implies that there must be at least some relevant legal findings and conclusions in the panel report on which the Appellate Body can base its examination. To a certain extent, those findings and conclusions of a panel that are appealed therefore seem to determine the scope of Appellate Body review. Review *de novo* does not appear

---

[518] *DSU*, Article 17.5.

[519] *DSU*, Article 17.6.

[520] *DSU*, Article 17.13.

to be an option for the Appellate Body according to the explicit provisions of the *DSU.*

A related issue on which the *DSU* is silent is the power to remand a dispute to a panel. The *DSU* does not stipulate what should occur if the Appellate Body overturns the panel on a pivotal issue and the panel report contains insufficient factual and legal findings on which the Appellate Body can base its inquiry. The strict time frames in the *DSU* for the issuance and adoption of the Appellate Body Report and for implementation of the DSB recommendations and rulings do not seem to accommodate a remand. This leaves the Appellate Body in a peculiar position. If it there is no remand authority in the *DSU,* and the Appellate Body is not able to go on to consider *de novo* aspects of the case necessary to resolve the dispute between the parties, what course is available to it?

Obviously, the resolution of such issues will depend upon the particular facts and circumstances of each case. While the gap-filling rule in Rule 16.1 of the *Working Procedures* allows to Appellate Body to adopt special procedures in a specific appeal, these issues of remand and *de novo* review may not qualify as purely procedural matters. Furthermore, Rule 16.1 requires that the particular procedures adopted be consistent with the *DSU.* In the last resort, the parties could agree between themselves to refer their dispute to a panel once again, or to reach a mutually agreed solution.

One possible (but perhaps not desirable) solution to the remand-*de novo* review conundrum would have been for panels to depart from their practice of "judicial

economy" to address and make findings on each of the claims referred to them by the parties to the dispute. However, WTO practice has now established that panels do not need to rule on all claims before them. Rather, they need only rule on claims that are essential to the resolution of the dispute between the parties.[521]

In practice, the Appellate Body has indicated that it is willing, under certain circumstances, to consider *de novo* evidence that was not specifically examined by a panel. The Appellate Body has already confronted on several occasions the problem of what options are available to it where a panel has made no findings and conclusions on a particular issue. The most recent example of this occurred in *Canada - Certain Measures Concerning Periodicals*, with respect to the analysis of the Canadian excise tax under the *GATT 1994*, Article III:2, first and second sentences. In this case, the panel made findings on the issue of "like product" under Article III:2, first sentence. The Appellate Body concluded that, "as a result of the lack of proper legal reasoning based on inadequate factual analysis...the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals are like products". [522] The Appellate Body therefore reversed the panel's findings on "like products", and noted that "due to an absence of adequate analysis in the Panel Report in this respect, it is not possible to

---

[521] *United States - Measure Affecting Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997.

[522] WT/DS31/AB/R, adopted 30 July 1997, p. 22.

proceed to a determination of like products."[523] While the panel made no findings with respect to the issue of "directly competitive or substitutable products" under Article III:2, second sentence, the Appellate Body proceeded to consult the panel record to reconstruct the facts on this issue, to apply the applicable legal rules to these facts, and to reach its own findings and conclusions. In carrying out this analysis, the Appellate Body observed that, "[a]s the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2".[524] Another instance where the Appellate Body was faced with *de novo* review of evidence occurred in *United States -Standards for Reformulated and Conventional Gasoline.*[525] In that case, the Appellate Body proceeded to complete the GATT 1994, Article XX(g) analysis and to consider the requirements of the chapeau to Article XX after reversing the panel's findings on the first part of Article XX(g). The panel had made legal findings and conclusions on Articles XX(b) and (d) sufficient to enable the Appellate Body to complete the legal analysis under this Article and to modify the findings and conclusions of the panel. The absence of an explicit power of remand in effect forced the Appellate Body to take the pragmatic avenue of addressing *de novo* certain facts in order to achieve the resolution of the particular dispute before it. So far, such *de novo* examination has been limited to the same Article as that under which the panel

---

[523]*Ibid.*

[524]*Ibid.* at 23.

[525]WT/DS2/AB/R, adopted 20 May 1996.

made findings and conclusions. It is not clear that the Appellate Body would be willing to launch a *de novo* inquiry under provisions or agreements that the panel had left completely untouched.

The problem of the Appellate Body with respect to evidence that was not addressed at the panel level remains to be resolved by Members at the next review of the *DSU*. An explicit power of remand would be one option to promote the effective operation of the dispute settlement mechanism. However, early practice seems to indicate that the Appellate Body may be willing to accept a broader appellate jurisdiction with the power to make the necessary examinations with respect to mixed questions of law and fact to resolve a dispute. This avenue would be preferable to establishing an explicit remand capability for the Appellate Body, in terms of systemic efficiency and effectiveness. It would avoid the problems associated with reconvening the original panel and re-arguing the case. It would also avoid the protracted procedural difficulties that could occur in the case of multiple remands. Alternatively, a broad approach to the Appellate Body's supervisory jurisdiction, coupled with an explicit remand power, to be used sparingly and limited to a single remand, might best serve the system. Options for future reform are further discussed in the Conclusion to this thesis.

iv. Nature of Appellate Review

The concept of appellate review of panel decisions by a permanent Appellate Body[526] is perhaps the most significant and innovative attribute of the *DSU*. It is a decisive step toward increased legalism and the judicialization of the WTO dispute settlement process. It is also an unprecedented undertaking in international economic law. The appellate review process has significant substantive, institutional and procedural elements that are legalistic and that signal increased authority and responsibility residing at the international level, and corresponding decreased international legal autonomy for Member states.

From a substantive point of view, the Members have given authority to a standing tribunal to adjudicate issues of law and legal interpretation arising from panel reports. The focus on law and legality will lead to the development of a consistent body of decisions that will supplement the underlying treaty norms and create a stronger supranational legal framework for the conduct of international trade.

Institutionally, certain features of the Appellate Body represent a decided transferral of decision-making authority to the international level, and a loss of autonomy for WTO Members. Chief among these are the attribution of competence by WTO

---

[526]*DSU*, Article 17.

Members to the Appellate Body for the development of its own working procedures. The legal content of the *Working Procedures* and the manner in which they were developed is unprecedented[527] in the GATT/WTO system. They were not a product of consensus negotiations among Members. Rather they were finalized by the Appellate Body Members in consultation with the Chairman of the DSB and the WTO Director-General, and then essentially imposed upon the WTO Members. Although Members agreed by consensus on the individuals who would be appointed to the Appellate Body, the Members had no further direct input in developing the rules in the *Working Procedures*. Rather, they delegated this rule-making authority to the Appellate Body, a judicial body. Of course, adjustments to the *Working Procedures* are possible once the functioning of the system is more established and further procedural needs become apparent. The Appellate Body will keep its *Working Procedures* under constant review for this reason. In addition, the gap-filling rule in Rule 16.1 allows a division some flexibility and discretion in adopting special procedures where necessary to accommodate the requirements of Members in a particular appeal. Generally, however, Members are bound to follow the requirements set out in the *Working Procedures*.

Procedurally, numerous aspects of the appellate review procedure contrast with the relative informality and *ad hoc* nature of panel procedures, and signal a decrease

---

[527]D. Steger, "WTO Dispute Settlement: The Role of the Appellate Body", *op. cit.*, note 119, has noted: "The *Working Procedures* are the most comprehensive, detailed and legalistic rules of procedure ever adopted in the GATT/WTO dispute settlement system. They are unique for their procedural technicality, their degree of detail, and the manner in which they were adopted."

in the autonomy of WTO Members that are parties to a dispute. For example: whereas parties may oppose nominations to a panel, participants in an appeal have no say in the composition of the division that will hear the appeal; whereas a panel sets its working procedures and schedule in consultation with the parties on a case-by-case basis, the *Working Procedures* and the division hearing the appeal determine the schedule for the participants' submissions and for the oral hearing; whereas the *DSU* does not set out requirements for parties' submissions to the panel, the *Working Procedures* set out the basic requirements for the contents of appellant and appellee submissions; whereas panel meetings with the parties are informal and prescripted, Appellate Body oral hearings are more legalistic and spontaneous in character; whereas states retain the right to criticize and request changes to the framing of the descriptive section of the panel report, and the interim review permits states to criticize and request modifications of panel findings, the appellate review phase permits no such action on the part of participants; and whereas the descriptive section of a panel report generally records every argument made by parties virtually verbatim, the summary of parties' arguments in an Appellate Body report reflects the use of some legal discretion in streamlining and summarizing the submissions of the parties according to the relevance of the arguments to the appeal.

The establishment of the Appellate Body has been criticized as potentially reducing the authority and prestige of panels[528] because of the concern that the losing

---

[528]P. Pescatore, "The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects", (1993) 10 *J. of Int'l Arbitration* 27.

party will automatically appeal an unfavourable panel report. The creation of the Appellate Body was intended to have the positive effect of encouraging panels to be thorough and accurate in their legal reasoning, and to bring legal certainty and predictability to the WTO system. The addition of an appellate review was a *quid pro quo* for the introduction of the virtually automatic adoption of panel reports due to the requirement of negative consensus in the DSB to block adoption. In effect, legal review by the Appellate Body replaced political consideration of panel reports by the GATT CONTRACTING PARTIES.

Appellate review was originally intended as an additional safeguard to ensure that panel reports were not legally incorrect, in order that faulty legal reasoning could not subsequently be raised by the "losing" party as an excuse for non-compliance. However, in practice, there has been an appeal of every WTO panel report so far. In the first seven appeals, the Appellate Body upheld the legal findings and conclusions of the panel report without modification in two cases,[529] and modified or reversed certain of the panel's legal findings and conclusions in five cases.[530] While there is currently no indication that this trend to appeal every panel report will stop, it is possible that appeals will become less

---

[529]*Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997; *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, W/DS33/AB/R, adopted 23 May 1997.

[530]*United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996; *Japan -Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996; *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997; *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997; *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997.

frequent once the Appellate Body has addressed many of the major issues arising under the covered agreements and has developed a consistent body of decisions. This is particularly important in the new areas such as *GATS* and *TRIPS*, where no such practice yet exists. Appeals would then occur only in truly contentious cases where the panel reasoning is faulty or clearly inconsistent with established practice, or where an issue has not yet been addressed in the dispute settlement process. The Appellate Body will then more clearly serve its intended function of a judicial filter for policing the quality of panel reports and fostering legal certainty.

The major advantage of this new legalistic method of reviewing and rectifying errors of law made by panels is to surmount blockage and delay in the ultimate settlement of a dispute. It provides an additional safeguard against the possibility that a panel report could be faulty in reasoning or in result. Coupled with other improvements to the dispute settlement procedures, this promotes compliance with the recommendations and rulings produced by the dispute settlement mechanism.

f. Adoption of Panel and Appellate Body Reports

In order to provide sufficient time for WTO Members to examine panel reports, such reports must not be considered for adoption by the DSB until 20 days after

the date of their circulation to the WTO Members.[531] During that time, disputants may still seek settlement, as they can at any time in the dispute settlement process. WTO Members having objections to the panel report must circulate their objections in writing at least 10 days prior to the DSB meeting at which the panel report will be considered.[532]

Strict deadlines are imposed for the adoption of panel and appellate reports, lessening the possibility for a losing party to draw out the adoption process. These time limits, coupled with the major innovation of the automaticity rule for the adoption of reports, lead to greater legalism and decreased party autonomy in the adoption procedure. Within 60 days of the circulation of a panel report where no appeal is lodged,[533] the DSB is to adopt the panel report unconditionally unless there is a consensus against adoption. Where a party notifies its intention to appeal, the panel report will not be considered for adoption by the DSB until the appeal has been completed.[534] In practice, where the panel report has been the subject of an appeal, the Appellate Body report is adopted by the DSB together with the panel report as modified by the Appellate Body report.

---

[531]*DSU*, Article 16.1.

[532]*DSU*, Article 16.2.

[533]*DSU*, Article 16.4.

[534]*DSU*, Article 16.4.

An Appellate Body report must be adopted unconditionally by the DSB within 30 days of its circulation to the WTO Members, unless there is a consensus of the DSB against adoption.[535]

The procedures for the adoption of panel and Appellate Body reports are "without prejudice to the right of Members to express their views" on a report.[536] In practice, Members use the DSB meeting where the adoption occurs to either endorse the report(s), or register their concerns and express their disagreement with aspects of the reasoning contained in the report(s), or with the overall result. The status of these statements in the practice of the DSB is not yet clear. The requirement that reports be adopted "unconditionally" implies that such statements have no formal legal force. However, the statements are recorded in the minutes of the DSB meeting for future reference.

The adoption of panel reports (and now Appellate Body reports) has always been at the core of the pragmatic/ legalistic debate over the nature of the GATT/WTO legal system. In GATT/WTO practice, a report only becomes binding upon the parties to the dispute after it has been adopted. An unadopted report has no formal legal effect. These reformed adoption procedures are among the most significant accomplishments of the Uruguay Round. They bring automaticity and increased legalism to the dispute

---

[535]*DSU*, Article 17.14.

[536]*DSU*, Articles 16.4, 17.14.

settlement process. They represent a significant improvement over the adoption procedures under the *GATT 1947*, where the blocking of a panel report by the losing party remained a possibility. This possibility has now virtually disappeared with the requirement of a reverse consensus to block adoption in the DSB. Under the *GATT 1947*, when adoption was subject to the requirement of consensus in the GATT Council, a panel was still technically "consultative" in nature, as its report was dependent upon political endorsement by the CONTRACTING PARTIES in order to become legally effective. While the political endorsement of the DSB remains technically a requirement under the *DSU*, the automatic adoption procedure brings panel examination closer to true adjudication.

Unless agreed to by the parties, the period from the establishment of the panel until the DSB considers the panel or appellate report for adoption must not, as a general rule, exceed nine months where the report is not appealed, or twelve months where the report is appealed.[537] This provision preserves a certain degree of party autonomy, allowing the extension of time frames if the parties so agree.

If an adopted report holds that a challenged measure is inconsistent with a provision in a covered agreement, it may recommend that the offending state bring the measure into conformity with the pertinent agreement. A report can suggest ways in which

---

[537]*DSU*, Article 20.

the Member can implement the recommendations.[538] Once adopted by the DSB, the findings and recommendations of panel and Appellate Body reports become recommendations and rulings of the DSB.

g. Surveillance of Implementation of Recommendations and Rulings

Recognizing that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members",[539] the *DSU* provides for the surveillance of implementation of DSB recommendations and rulings. The *DSU* sets out several mechanisms to promote prompt compliance by WTO Members. These mechanisms reduce state autonomy by limiting the ability of a state to stall implementation or avoid compliance. First, at a DSB meeting within 30 days after the adoption of a panel or Appellate Body report, the Member concerned must inform the DSB of its intentions concerning the implementation of recommendations and rulings. This recalls the multilateral nature of the dispute settlement procedures.

---

[538]*DSU*, Article 19.1.

[539]*DSU*, Article 21.1. More generally, *DSU*, Article 3.3 states: "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Article 3.7 states: "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 the covered agreements".

Second, if immediate compliance is not possible, the Member will have a "reasonable period of time" for implementation of the recommendations and rulings. In a significant departure from past *GATT 1947* practice, the determination of what constitutes a "reasonable period of time" is set out in detail in the *DSU.* The "reasonable period of time" is: (i) the period of time proposed by the Member concerned, provided that this period is approved by the DSB,[540] or, in the absence of such approval; (ii) a period of time mutually agreed by the parties to the dispute within 45 days after the adoption of the report,[541] or in the absence of agreement; (iii) a period of time determined by binding arbitration to take place within 90 days of the issuance of the report.[542] When the "reasonable period of time" is determined by binding arbitration, the arbitrator will be chosen by the parties, or failing agreement, by the Director-General. The *DSU* offers the arbitrator a "guideline" that the "reasonable period of time" should not exceed 15 months from the date of adoption of a panel or Appellate Body report.[543] However, it may be longer or shorter than this "guideline" depending upon the "particular circumstances", a phrase not defined in the *DSU.* In the only arbitration to be conducted under this provision since the establishment of the WTO, in *Japan - Taxes on Alcoholic Beverages,*[544] the arbitrator was not persuaded that the "particular circumstances" advanced by the parties to the

---

[540]*DSU*, Article 21.3(a).

[541]*DSU*, Article 21.3(b).

[542]*DSU*, Article 21.3(c).

[543]*DSU*, Article 21.3(c).

[544]Award of the Arbitrator issued 14 February 1997, WT/DS8/15, WT/DS10/15, WT/DS11/13. See the discussion of arbitration, *supra.* for further details of this arbitration.

arbitration justified a departure from the 15-month "guideline" to either a longer or shorter period of time, and concluded that the "reasonable period of time" in the case was therefore 15 months. Considerations advanced by the parties included: the nature and technical complexity of the measures required for implementation; the consideration of the minimum time for implementation assuming a Member was acting in good faith; the domestic powers of the executive branch of government with respect to the measure in issue; the necessity to introduce formal legislation to implement the recommendations; and the adverse effects implementation would have on domestic consumers and producers.

Third, in addition to providing for methods of determining what constitutes "a reasonable period of time" for implementation, the *DSU* also sets out a time frame within which this should be determined.[545] Thus, where the panel and Appellate Body respect the ordinary time requirements for their work (6 months and 60 days, respectively), the period from the date of the establishment of the panel to the date of the determination of the "reasonable period of time" shall not exceed 15 months, unless the parties agree otherwise. Where the panel or Appellate Body extend the time for their work, this additional time is added to the 15 month limit. Unless the parties agree that there are exceptional circumstances, the total time is not to exceed 18 months.

---

[545] *DSU*, Article 21.4.

Fourth, there is also a mechanism to resolve any disagreement between the parties concerning measures taken to implement the recommendations and rulings. If the parties disagree as to the existence or WTO-consistency of a measure taken to comply with the DSB recommendations and rulings, they may refer the issue to a dispute settlement panel -- if possible the panel that heard the original dispute.[546] The panel must circulate its report on this matter within 90 days, or inform the DSB that it will take more time.

Finally, the DSB keeps the implementation of the report under surveillance. Any Member may raise it at any time following the report's adoption. Unless the DSB decides otherwise, the subject is to be put on the DSB agenda six months after the establishment of the "reasonable period" of time and is to remain on the agenda thereafter until the issue is resolved.[547] The Member concerned must provide the DSB with a status report of its progress concerning implementation prior to each DSB meeting. There is no established format for such status reports. In practice, the status reports on implementation are generally brief and do not contain much detail concerning the domestic implementation process. Nevertheless, surveillance of implementation in the DSB is a reminder of the multilateral nature of the dispute settlement process, and allows the pressure of the WTO membership to be brought to bear on a recalcitrant Member. It ensures that non-implementation does not go undetected or uncriticized.

---

[546]*DSU*, Article 21.5.

[547]*DSU*, Article 21.6.

h. Compensation and Suspension of Concessions

Precise provisions now govern resort to compensation and the suspension of concessions where the losing party fails to comply with DSB recommendations and rulings arising from the adoption of a panel and/or Appellate Body report within a reasonable period of time.[548] Compensation and the suspension of concessions or other obligations are temporary measures. They are available in the event that the recommendations and rulings are not implemented within a reasonable period of time. The *DSU* emphasizes that "neither... is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements".[549] They are applied until the measure found to be inconsistent with the covered agreements has been removed, or agreement has been reached on its phasing out, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits.

If the Member concerned fails to implement the DSB recommendations and rulings within a reasonable period of time, the Member must, if so requested and no later than the expiry of that reasonable period of time, enter into negotiations with any party to the dispute, with a view to developing mutually acceptable compensation. Compensation is voluntary and must be consistent with the covered agreements. If no

---

[548] *DSU*, Article 22.

[549] *DSU*, Article 22.1.

compensation can be agreed upon within twenty days after the expiry of the reasonable period of time, any party to the dispute may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.[550]

The *DSU* contains detailed requirements concerning the type and level of concessions that may be suspended. Retaliation should occur in the sector(s) in which the panel or Appellate Body found violation or nullification or impairment. However, where this is considered not practical or effective, the *DSU* permits cross-retaliation in other sectors under the same agreement; or, in serious circumstances, under another covered agreement.[551] The amount of trade covered by the suspension must be appropriate in the circumstances, equivalent to the level of nullification or impairment caused by the offending measure.[552]

The DSB will authorize the retaliation upon request within 30 days of the expiry of the reasonable period of time, unless there is a consensus to reject it.[553] However, where the Member concerned objects to the level of retaliation proposed, or claims that the principles and procedures dealing with cross-retaliation have not been observed, these

---

[550]*DSU*, Article 22.2.

[551]*DSU*, Article 22.3.

[552]*DSU*, Article 22.4.

[553]*DSU*, Article 22.6.

issues may be referred to arbitration. This arbitration is carried out, where possible, by the panel that originally examined the dispute, or by an arbitrator appointed by the Director-General. The arbitration must be completed within 60 days of the date of expiry of the reasonable period of time. The decision of the panel or of the arbitrator is final. The DSB is to be informed promptly of the arbitral decision and to grant, upon request, authorization to retaliate where the request is consistent with the arbitral decision, unless the DSB decides by consensus to reject the request.[554]

These enforcement procedures technically eliminate the ability of the state against whom DSB recommendations or rulings are directed to avoid implementation with impunity. They provide procedures to enforce compliance with the international legal obligations contained in the DSB recommendations and rulings. The measures contemplated are temporary, to be imposed pending implementation. Implementation therefore remains the only way to comply with DSB recommendations and rulings under international law.

At the same time, these procedures reinforce the necessity for a multilateral approach to enforcement, and signal a transfer of sovereignty from the state to the international organization for the state injured or affected by the non-implementation. A WTO Member must request authorization from the DSB to suspend the application

---

[554]*DSU*, Article 22.7.

to the Member concerned of concessions or other obligations under the covered agreements. In practice, such authorization is virtually automatic. Coupled with the requirement in Article 23 of the *DSU* that Members "have recourse to, and abide by" *DSU* rules and procedures and "obtain DSB authorization in accordance with...[Article 22] before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings...", this prohibits unilateral retaliation by a WTO Member. States have therefore ceded their autonomy to decide unilaterally to retaliate, and to decide what sort of retaliation to impose. International disciplines have been introduced in these areas. WTO Members have transferred the sovereign authority to decide upon retaliation to the international level, and must observe the principles set out in the *DSU* concerning the nature of retaliation permitted.

i. Non-violation Complaints and Situation Complaints

The *DSU* sets out special procedures for so-called "non-violation complaints";[555] that is, complaints concerning the application by another WTO Member of a measure which does not conflict with provisions of a covered agreement, but which nevertheless nullifies or impairs the benefits accruing to a Member under the relevant covered agreement, or frustrates the attainment of any objective of that agreement.

---

[555]See *DSU*, Article 26.1. Non-violation complaints are referred to in *GATT 1994* Article XXIII:1(b), *i.e.* concerning the application by another Member of any measure, whether or not in conflict with the provisions of the covered agreements.

These provisions only relate to those covered agreements which incorporate Article XXIII of the *GATT 1994*. For the time being, this does not include, for example, the *TRIPs Agreement*. The *GATS* contains its own distinct non-violation provisions that allow resort to the *DSU*, but regulate the remedy available where non-violation nullification or impairment is found.

In non-violation complaints under the *DSU*, where a panel or the Appellate Body determines that a measure nullifies or impairs benefits under, or impedes the attainment of objectives of, the relevant covered agreement without violating it, there is no obligation to withdraw the measure. In such cases, the panel or Appellate Body shall recommend that the WTO Member concerned make a mutually satisfactory adjustment, which may include compensation.

Special procedures also apply with respect to so-called "situation" complaints, where a Member considers that any benefit accruing to it under the relevant covered agreement is being nullified or impaired or the attainment of that agreement is being impeded as a result of "the existence of any other situation".[556] The *DSU* procedures only apply to such complaints up to and including the point of the circulation of the report

---

[556]Situation complaints are described in *GATT 1994* Article XXIII:1(c). *i.e.* other than as a result of: a) the failure of another Member to carry out is obligations under the covered agreements (violation complaints); or b) the application by another Member of any measure, whether or not in conflict with the provisions of the covered agreements (non-violation complaints).

to the WTO Members. Thereafter, the provisions of the 1989 Decision[557] apply to consideration and adoption of panel reports, and surveillance of implementation of recommendations and rulings. This conserves the necessity for consensus in the adoption of a report, permitting a losing party to block adoption. It also means the provisions governing surveillance and implementation are less rigourous than those now contained in the *DSU*, consisting merely of surveillance of implementation by the DSB and the requirement on the part of the Member concerned to notify its intentions with respect to implementation and to provide status reports on implementation to the DSB.

Non-violation complaints are non-legalistic by their very nature, as they do not involve the violation of a legal obligation. The availability of the more pragmatic procedures for adoption and enforcement of situation complaints threatens to undermine the generally legalistic bent of the *DSU*. However, in GATT/WTO practice, a situation complaint has never formed the basis for a panel's recommendations or rulings, and it does not appear likely that the number of situation complaints will increase in future practice.

---

[557]BISD 36S/61-67.

III. Experience Since the Establishment of the WTO

The number of disputes in the WTO dispute settlement process has increased markedly in relation to experience under the *GATT 1947*, indicating an enhanced interest in resorting to the new regime to enforce legal obligations on the part of the WTO membership. In the just over two and a half years of the WTO's existence (1 January 1995-15 September 1997), there were 101 separate requests for consultations,[558] involving 70 distinct matters. During this period, appeals of every final panel report were initiated and appeals were completed in seven disputes.[559] Implementation of the DSB recommendations and rulings in these disputes was either completed[560] or underway.[561] The surveillance of implementation of recommendations and rulings in these disputes

---

[558]This includes two requests for the establishment of a panel by India (DS32 and DS33) which were not preceded by requests for consultations, but in which consultations were actually held under the *Agreement on Textiles and Clothing*.

[559]*United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, W/DS11/AB/R, adopted 1 November 1996; *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997; *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997; *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997; *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997; *European Communities - Regime for the Import, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997.

[560]*United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997.

[561]*United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/ AB/R, adopted 20 May 1996; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, W/DS11/AB/R, adopted 1 November 1996.

had occurred in accordance with the *DSU*. One arbitration had been held to determine the reasonable period of time for implementation.[562]

Early WTO practice has revealed at least four identifiable trends that are testimony to the credibility and robustness of the more legalistic dispute settlement procedures of the *DSU*.

First, the marked increase in the number of complaints brought under the *DSU* has not necessarily lead to an equal increase in the number of disputes resolved by adjudication. Among the trends identifiable since the establishment of the WTO has been the increased tendency for parties to reach mutually-agreed solutions to disputes. The enhanced legal and procedural certainty due to automaticity at key stages of the process, strict time frames, and the procedural innovations in the *DSU* strengthening the mechanisms for surveillance and enforcement of rulings provide a strong incentive to achieve settlement at an early stage in the process. The knowledge that both parties are prepared to use the system plays a strong role in reaching a settlement: particularly in politically sensitive cases, Members are hesitant to have a legally binding adverse ruling against them. The more legalistic procedures thus exert a deterrent effect on the parties. In the first 2 1/2 years of the WTO, panels were established in 18 of the 70 distinct matters. First requests for panels were made in 6 of the matters, but the requests were not pursued and no panel

---

[562] *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, W/DS11/AB/R, adopted 1 November 1996. The award of the Arbitrator, WT/DS8/15, WT/DS10/15, W/DS11/13 was circulated to Members on 14 February 1997.

was established in these 6 cases. Nineteen of the 70 distinct matters have either been settled or have ceased, temporarily or permanently, to progress through the system. In 8 of these 19 matters, a mutually-agreed solution was reached between the parties and officially notified to the DSB pursuant to Article 3.6 of the *DSU;* in 3, the request for establishment of a panel was withdrawn; in the remaining 8, no resolution was officially notified.

A prime example of the hesitation of Members to be subject to a legally binding ruling in a politically sensitive case is the dispute in *United States - The Cuban Liberty and Democratic Solidarity Act* ("*Helms-Burton*"), complaint by the European Communities.[563] The institutional steps that this dispute has followed illustrate both the procedural efficiency of the dispute settlement process when a dispute is pressed by a complainant, as well as the ability of an unwilling defendant to forestall or avoid the imposition of a potentially adverse legal ruling in a controversial case by requesting a suspension of the proceedings pending negotiated settlement. The dispute concerns the *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act* of 1996 (commonly known as the "Helms-Burton" Act) and other legislation enacted by the United States' Congress regarding trade sanctions against Cuba. The European Communities claims that United States' trade restrictions on goods of Cuban origin, as well as the possible refusal of visas and the exclusion of non-U.S. nationals from United States territory, are inconsistent with the United States' obligations under the *WTO Agreement.* The European Communities

---

[563]WT/DS38. The political sensitivity of this dispute was reflected in myriad articles in the international press, including, for example, *The Economist*, "Trade, and America's Family Feud", 1 March 1997; *Journal of Commerce*, "Slugging it out at the WTO", 24 February 1997.

alleges violations of Articles I, III, V, XI and XIII of the *GATT 1994*, and Articles I, III, VI, XVI and XVII of the *GATS*, as well as making non-violation claims.[564] In this dispute, a panel was established with standard terms of reference at the DSB meeting on 20 November 1996. Canada and Mexico reserved their third party rights. Because the United States and the EC were unable to agree on the panel's composition, the EC requested the Director-General to determine the composition of the panel pursuant to Article 8.7 of the *DSU* on 3 February 1997. On 12 February, the EC asked the Director-General to postpone for one week the designation of the panel, until 20 February. On 20 February, the Director-General determined the composition of the panel.[565] The United States indicated that it

---

[564]Specifically, the EC alleges that: (a) the extraterritorial application of the U.S. embargo of trade with Cuba, insofar as it restricts trade between the EC and Cuba or between the EC and the U.S., is inconsistent with Article XI of *GATT 1994*; (b) the denial of access to the U.S. tariff rate quota for sugar, prohibiting the allocation of any sugar quota to a country that is a net importer of sugar unless that country certifies that it does not import Cuban sugar that could indirectly find its way to the United States, is inconsistent with Article XIII of *GATT 1994*; (c) the denial of transit (except with special licence) by certain EC goods and vessels of EC Member States through ports in the United States is inconsistent with Article V of *GATT 1994*; (d) the prohibition of the provision of "any loan, credit or other financing" by U.S. persons to any person for the purpose of transactions involving any confiscated property claimed by a U.S. national is inconsistent with Article XI of *GATS*; (e) under Title III of the *Libertad Act*, the creation of a right of action in favour of U.S. citizens to sue EC persons and companies in U.S. courts to obtain compensation for Cuban properties claimed by these U.S. nationals where the EC persons or companies have "trafficked" in such confiscated property, is inconsistent with Articles II, III, VI, XVI and XVII of *GATS*; (f) under Title IV of the *Libertad Act*, the denial of visas and exclusion from the U.S. of persons involved in confiscating or "trafficking" in confiscated property who are corporate officers, principals or shareholders of an entity involved in such "trafficking", is inconsistent with Articles II, III, VI, XVI and XVII of *GATS*, as well as with paragraphs 3 and 4 of the *GATS Annex on the Movement of Natural Persons*. The EC further alleges that the measures in (a) - (f) nullify and impair benefits that the EC could expect to have accrued directly or indirectly under *GATT 1994*. The EC also contends that these measures impede the attainment of an objective of *GATT 1994*. Finally, the EC claims that the measures in (d) - (f) nullify and impair benefits accrued to the EC under the specific commitments of the U.S. and Cuba under *GATS*.

[565]The panel composition was as follows: Chairman: A. Dunkel (Switzerland); T. Koh (Singapore); E. Woodfield (New Zealand).

would not cooperate with the panel, as it did not consider that a WTO panel is competent to adjudicate on issues relating to the United States' national security.[566] Nevertheless, the panel proceeded to set the initial working schedule for panel proceedings. Bilateral negotiations continued between the parties. On 25 April 1997, before the first meeting with the panel, the parties requested the panel to suspend the panel proceedings in accordance with Article 12.12 of the *DSU*. The panel granted this request, which allows the parties time and some flexibility to conduct negotiations for a mutually-agreed solution.

The *DSU* has developed more disciplined and legalistic procedures in which the process and the result is increasingly determined at the supranational level. It furnishes a unique and revolutionary framework in international law for the settlement of disputes. However, the continued availability of negotiated settlement at any stage of the adjudicative process retains some systemic flexibility, without compromising legal and procedural certainty. The number of disputes in which the parties achieve a mutually agreed solution reflects the continued volition of many WTO Members to retain their autonomy and to control the process and outcome of the dispute without invoking supranational adjudicatory procedures. Consultations therefore remain a valuable vehicle for dispute settlement even in the more legalistic system. This pragmatic, cooperative avenue for dispute settlement functions effectively because of the existence of the rigourous legalistic procedures in the background.

---

[566]See, for example, *Business Week*, "Uncle Sam isn't Playing Fair with the WTO", 10 March 1997, p. 34.

The "Quad" (United States, Japan, the EC and Canada[567]) are still the Members most frequently involved in dispute settlement proceedings. The United States, the most frequent complainant, has brought 34 complaints; the EC and its member states have been a complainant in 21 cases; Canada has brought 9 complaints; and Japan has brought five complaints. Nevertheless, a second identifiable trend has been a greater involvement by developing countries in WTO dispute settlement. After the "Quad", Mexico (5 complaints), India (5 complaints) and Thailand (4 complaints) are the leading complainants. Of the 70 distinct matters in the dispute settlement system in the first 21/2

---

[567]For example, with respect to disputes that are, or have already been, in the panel and/or appeal phases, Canada has thus far been a complaining party in 5 disputes (*European Communities - Trade Description of Scallops*, WT/DS7, WT/DS12, WT/DS14 (mutually agreed solution reached; brief panel report circulated in accordance with Article 12.7 of the *DSU* on 5 August 1996); *Japan - Taxes on Alcoholic Beverages*, WT/DS8/11, WT/DS10/11, WT/DS11/8, adopted 1 November 1996; *European Communities - Measures Affecting Meat and Meat Products*, WT/DS48 (panel report released 18 August 1997); *Australia - Measures Affecting the Importation of Salmon*, WT/DS18 (panel established 10 April 1997); *Brazil - Export Financing Programme for Aircraft*, WT/DS46 (first panel request made, but subsequent request withdrawn). Canada has also been a defending party in one dispute. *Canada - Certain Measures Concerning Periodicals*. WT/DS31/R, WT/DS31/AB/R, adopted 30 July 1997. In that case, the panel report, as modified by the Appellate Body report, found that Part V.1 of the *Excise Tax Act*, that imposes an excise tax on split-run periodicals, was within the scope of application of the *GATT 1994*, and was inconsistent with Article III:2 of the *GATT 1994*. In addition, Canada Post was found to grant a funded postal rates scheme that was not justified by Article III:8(b) of the *GATT 1994*. Canada is, or has been, a third party in 4 disputes (*European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, WT/DS27/AB/R, adopted 25 September 1997; *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 (panel report released 18 August 1997); *Guatemala - Antidumping Investigation Regarding Portland Cement from Mexico*, WT/DS60 (panel established 20 March 1997); and *United States - The Cuban Liberty and Democratic Solidarity Act*, WT/DS38 (panel established on 20 February 1997, but procedures suspended in the context of negotiations to reach a mutually agreed solution). With respect to disputes currently in the consultation phase, Canada is a complaining party in one dispute (*India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS92), the defending party with respect to two complaints by Brazil (*Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70 and WT/DS71), and has joined consultations in two further disputes (*Australia - Measures Affecting the Importation of Salmonids*, complaint by the United States WT/DS21; and *Brazil - Certain Automotive Investment Measures*, complaint by Japan, WT/DS51).

years of the WTO's existence, 46 matters (66 requests) have been launched by developed country Members, of which 26 have been against developed countries and 20 have been against developing countries.

Early WTO practice reveals that developing countries are also bringing complaints against developed countries. In addition to the 4 complaints brought by both developed and developing country Members against developed country Members, to date there have been complaints in 20 distinct matters brought by developing country Members alone, of which 13 have been against developed country Members and 7 have been against developing country Members.

The Members most often complained against are: the EC and its member states (in 21 cases), the United States (20 cases), Japan (11 cases), Korea (8 cases), India (8 cases), and Brazil (7 cases).

The increased propensity for developing countries to be involved in dispute settlement, and particularly the increase in disputes brought by developing country Members against developed country Members, is evidence of the credibility and robustness of the system to enforce the rights and obligations of Members under the covered agreements. The more legalistic system means that the rights of countries that are less politically powerful are equally protected under the covered agreements.

A third discernable trend in early WTO dispute settlement is the increased legal complexity of disputes in terms of issues and parties. Numerous disputes have involved multiple issues under one or several of the covered agreements. The increased scope of coverage of the covered agreements means that measures may be challenged in new issue-areas, such as trade-related aspects of intellectual property, services, and trade-related investment measures. The substantive agreements that have been cited most often in disputes, after the *GATT 1994*, are: the *Agreement on the Application of Sanitary and Phytosanitary Measures* and the *Agreement on Technical Barriers to Trade* (20 cases), the *Agreement on Trade-Related Aspects of Intellectual Property* (10 cases), the *Agreement on Agriculture* (9 cases), the *Agreement on Textiles and Clothing* (9 cases): and the *GATS* (4 cases).

Several of the disputes have also involved multiple parties. In terms of issues and parties, the most complex dispute to have wended its way through the panel and appellate phase is *European Communities - Regime for the Importation, Sale and Distribution of Bananas.*[568] This dispute involved claims under several provisions of the *GATT 1994*, the *Agreement on Import Licensing Procedures*, the *Agreement on Agriculture*, the *Agreement on Trade-Related Investment Measures* and the *General Agreement on Trade in Services.* It also involved 6 parties and 21 third parties, and four separate panel reports. Another multiple-party dispute is *United States - Import Prohibition of Certain*

---

[568]WT/DS27.

Shrimp and Shrimp Products.[569] Currently under panel examination, it involves 5 parties and 16 third parties. It deals exclusively with claims under the *GATT 1994*. The procedures for consolidation of panel proceedings where there are multiple complainants initiating a complaint about the same matter have been implemented to promote procedural efficiency in several disputes.[570]

A fourth notable characteristic of WTO dispute settlement has been the substantive interest of WTO Members in bringing or arguing claims involving purely "legal" or "institutional" issues. The outstanding example of this so far was the appeal in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India.*[571] In this case, the measure that gave rise to the dispute was withdrawn after the release of the

---

[569]WT/DS58. This dispute involves a partial ban imposed upon the importation of shrimp and shrimp products from Malaysia, Thailand, Pakistan and India by the United States under Section 609 of U.S. Public Law 101-62 (16 U.S.C. S 1537 note). The complainants allege that the U.S. measures violate Articles I, XI and XIII of the *GATT 1994* and that this violation is not excused by any provision of the *GATT 1994*, including the Article XX exceptions. They also make non-violation claims. The background to the dispute is the United States ban on imports of wild-harvested shrimp to protect sea turtles. Panels were established at the DSB meeting on 25 February with respect to the complaint by Pakistan and the complaints by Malaysia and Thailand. These two panels were consolidated pursuant to Article 9.1 of the *DSU*. A panel was established at the DSB meeting on 10 April 1997 with respect to the complaint by India, and this panel was consolidated with the existing panel.

[570]For *example, United States.- Standards for Reformulated and Conventional Gasoline* (WT/DS2, WT/DS4); *United States - Import Prohibition of Certain Shrimp and Shrimp* (WT/DS58). A single panel is currently also examining the complaints by the United States in *European Communities - Customs Classification of Certain Computer Equipment* (WT/DS62); *United Kingdom - Customs Classification of Certain Computer Equipment* (WT/DS67); and *Ireland - Customs Classification of Certain Computer Equipment* (WT/DS68), although these complaints involve multiple defendants, rather than multiple complainants. There is no provision in the *DSU* for the consolidation of cases on the basis of multiple defendants.

[571]WT/DS33.

interim report of the panel. However, the complainant, India, requested that the panel continue its work and produce a comprehensive report. India then appealed several issues of law arising from the panel report. These issues dealt with: the locus of the burden of proof under Article 6 of the *Agreement on Textiles and Clothing*; the role of the Textiles Monitoring Body in the dispute settlement process under the *DSU*; and the issue of judicial economy (*i.e.* whether a panel may exercise judicial economy in the exercise of its functions and use its discretion in deciding which claims to address to resolve a dispute, or whether a panel is bound to address each of the claims set out in its terms of reference).

Another example of interest in terms of "legal" or "institutional" issues was the dispute in *Brazil - Measures Affecting Desiccated Coconut.* [572]Because of the nature of the issues involved, the panel and Appellate Body decisions in this case did not address the substantive issues in the dispute. Rather, they examined the transitional arrangements from the *GATT 1947* legal system to the *WTO Agreement* to determine which of set of legal obligations applied to the measures complained against. This interest of the WTO membership in such legal and institutional issues, and their willingness to submit such issues to third party adjudication, shows their readiness to resort to dispute settlement to develop the supranational legal and institutional framework of the WTO.

---

[572]WT/DS22.

So far, the dispute settlement system has functioned largely within the disciplines imposed by the *DSU*. Procedural rules and timeframes have been generally respected, although there have been some derogations. For example, some disputes had exceeded the timeframes, by agreement between the parties.[573] In addition, certain parties have failed to meet the requirement of Article 3.6 of the *DSU* to notify to the DSB and other relevant WTO bodies of mutually agreed solutions they have reached. Therefore, some disputes have stopped progressing through the system, but have not been formally resolved. At the appellate level, Members have adhered to the procedural requirements and the working schedule established by the *Working Procedures*. For its part, the Appellate Body has been vigilant in its adherence to the *Working Procedures*, focusing on due process and the concern that all participants have an opportunity to present their case within the strict time frames set out in the *DSU*. The Appellate Body has shown itself to be rigourous in the application of the procedural requirements of the *Working Procedures*.[574]

---

[573]*E.g. European Communities - Measures Affecting Meat and Meat Products (Hormones)*, complaint by the United States (WT/DS26): a panel was established on 20 May 1996 and the panel report was circulated on 18 August 1997; *European Communities - Measures Affecting Livestock and Meat (Hormones)*, complaint by Canada (WT/DS48): a panel was established on 16 October 1996 and the panel report was circulated on 18 August 1997; *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27): a panel was established on 8 May 1996 and the panel report was circulated on 22 May 1997. In the arbitration to determine the reasonable period of time for implementation of the DSB recommendations and rulings in *Japan - Taxes on Alcoholic Beverages*, WT/DS8, WT/DS10, WT/DS11, the parties extended the period of time for the arbitrator to release his report beyond the 90-day deadline mandated in Article 21.3(c) of the *DSU*.

[574]For example, in *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2, WT/DS4, the Appellate Body clarified that claims must be placed properly before it by the participants in order for them to be examined.

C. The Dispute Settlement Mechanism As An International Supervisory Mechanism

I. Review Function

The WTO dispute settlement mechanism was explicitly designed to perform the review function of international supervision, that is, to assess whether the behaviour of WTO Members conforms to the rules contained in the covered agreements. The *DSU* expressly provides that the task of a panel is to "make an objective assessment of the matter before it, including the facts and *the applicability of and conformity with the relevant covered agreements*.." (emphasis added).[575] Because of the peculiar history of the dispute settlement procedures that developed on the basis of Article XXIII:2 of the *GATT 1947*, the task of WTO panels is to assist the DSB in the execution of its functions. It is the DSB that technically has jurisdiction and authority to settle disputes that arise under the covered agreements. The *DSU* has maintained the technical requirements of panel establishment and the adoption of panel reports by decisions of the DSB. However, now that these events occur virtually automatically, in the absence of consensus against them, the review function is conducted by an adjudicative body that only nominally remains dependent upon the political authority of the DSB.

---

[575] *DSU*, Article 11.

The great majority of cases under the *GATT 1947* and the *WTO Agreement* have dealt with violation complaints. These involve claims of inconsistency with a covered agreement.

Some *GATT 1947* and WTO disputes have involved non-violation complaints. These involve nullification or impairment flowing from a measure that is not necessarily inconsistent with the covered agreements. Non-violation complaints are a legal anomaly, as they contemplate state liability for an act that is not illegal. Practice under the *GATT 1947* had the effect of limiting the application of non-violation complaints to the protection of reasonable expectations concerning the maintenance of conditions of competition created by a reciprocal tariff concession or binding . This substantive limitation, coupled with a restricted number of instances in which a claim of non-violation nullification and impairment prevailed, indicated a shift away from the non-legalistic concept of non-violation review towards panel review for violation of legal obligations under the *GATT 1947*.

The emphasis on violation complaints seems likely to continue under the *WTO Agreement*. When the scope of the *GATT 1947* was limited to regulating certain aspects of trade in goods, it was conceivable that the contracting parties could take measures outside the scope of the *GATT 1947* that would nullify or impair benefits flowing from tariff concessions. The far broader scope of substantive WTO law contained in the covered agreements has radically diminished the areas unregulated by international economic law.

In addition, the more legalistic tendency in WTO dispute settlement may lead to reticence to examine an issue not involving consistency or inconsistency with WTO legal obligations. This could mean that there is less scope for non-violation complaints under the *WTO Agreement*.[576] Nevertheless, the increased emphasis on legality and abiding by both the letter and spirit of the rules in the WTO system could encourage Members to bring non-violation cases. It might also lead to a shift in the function of non-violation claims from protecting reasonable expectations concerning competitive conditions arising from tariff concessions to protecting reasonable expectation concerning the conditions arising from substantive rules.[577]

The *GATS* allows non-violation claims under certain circumstances, while the *TRIPS Agreement* imposes a five-year moratorium on such actions. The WTO Members have therefore circumscribed the application of the non-violation concept in the *GATS* context. They have also retained decisive influence over the future of non-violation complaints in the context of the *TRIPs Agreement*, showing an unwillingness to bestow

---

[576]See, for example, P.J. Kuijper, "The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement, or Self-contained System of International Law?" (1994) 25 *Netherlands Yearbook of Int'l L.* 227 at 247-248.

[577]Only one panel report under the *GATT 1947* upheld a non-violation complaint not based on the protection of Article II tariff concessions: *European Community - Citrus*, L/5776 (1984). This decision remained unadopted and has received strong criticism. See *e.g.* F. Roessler, "The concept of nullification and impairment in the legal system of the World Trade Organization" in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (Deventer and Boston: Kluwer, 1997).

on panels or the Appellate Body the authority to review the conduct of Members in the non-violation context, or to create new "law" in this respect.

While the *WTO Agreement* contains no general provision limiting the application of non-violation complaints to the traditional protection of tariff concessions, the *DSU* contains specific provisions dealing with the procedural aspects of non-violation cases and the legal remedies available. These procedures are more pragmatic than the procedures applying to violation complaints. The availability of the less stringent legal remedies in non-violation cases, and of the less rigorous procedures for adoption and surveillance of implementation of cases involving situation complaints. It therefore threatens to undermine a legalistic ruling in such cases. However, given the limited use of non-violation and situation complaints under the *GATT 1947*, it is unlikely that they will figure largely in WTO practice.

In addition to the focus on violation complaints as opposed to non-violation complaints, several other aspects of the WTO legal system place emphasis on the significance of the review function of the dispute settlement system in assessing compliance with the legal norms set out in the covered agreements.

First, there is a possibility for "declaratory" rulings concerning the consistency with the covered agreements of a measure, even where that measure has been withdrawn during the dispute settlement proceedings. The *DSU* contains no definition

of a "dispute", and it is therefore not clear whether there are any limits on the type of dispute that must be involved in order for panels or the Appellate Body to have jurisdiction to review the consistency of a measure imposed by a Member with the covered agreements. In practice under the *GATT 1947*, panels insisted upon the existence of a disagreement between the parties.[578] The *DSU* procedures deal with disputes between Members. This is "contentious litigation" in international legal terms. No procedure exists in the *DSU* concerning a reference for an advisory opinion. When the parties reach a bilateral mutually agreed solution during panel proceedings, panels under the *GATT 1947* and the WTO have usually limited themselves to a brief description of the case.[579] However, where the complaining party did not consider that a satisfactory settlement had been reached (despite withdrawal of the measure originally giving rise to the dispute), or where there was a risk of repetition of the measure at issue in the dispute, panels (and now the Appellate Body) have proceeded to issue a comprehensive report on the matter.[580] Such reports are akin to declaratory rulings. Now that pure questions of law and legal interpretation can be appealed for consideration by the Appellate Body, the possibility for such declaratory

---

[578] *Uruguayan Recourse to Article XXIII* BISD 11S/95 at 100-101.

[579] For example, *European Communities - Trade Description of Scallops*, WT/DS7, WT/DS12, WT/DS14. Reports circulated in accordance with Article 12.7 of the *DSU* on 5 August 1996.

[580] *E.g.* under the *GATT 1947*: *European Economic Community - Restrictions on Imports of Dessert Apples* BISD 36S/93; *United States - Prohibition of Imports of Tuna and Tuna Products* BISD 29S/91. Under the *WTO Agreement*: *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997.

rulings concerning the consistency of withdrawn measures with the covered agreements remains.

Second, there is the possibility to act in the general or systemic interest to have the consistency of a measure with the covered agreements assessed by a supranational legal body (a sort of "*actio popularis*"). Only a Member may initiate a complaint against another Member concerning a violation of the covered agreements. The WTO itself has no authority to act in the general systemic interest as a guardian of the treaty by initiating complaints concerning the violation of the rules in the *WTO Agreement*. Nevertheless, the review function of assessing conformity with the covered agreements can also be initiated in the general or systemic interest by individual Members. A Member may act in the general or systemic interest either by acting as a third party in a dispute launched by another Member, or by bringing a complaint even where it has no direct legal interest in the matter.

Any Member having a "substantial interest in a matter before a panel" that has been notified to the DSB may act as a third party in a dispute. As the criterion of a "substantial interest" is not limited to a direct legal interest in the matter in dispute, third parties often play an important role in bringing systemic concerns to bear in panel and appellate proceedings. However, the procedural rights of third parties are limited, and the potential to intervene as a third party is contingent upon another Member launching a complaint and requesting a panel under the *DSU*. Therefore, acting as a third party in

a proceeding may not be sufficient to protect even an indirect legal interest or successfully to bring a systemic concern to bear in a given dispute.

A Member may also trigger the review function by bringing a complaint concerning a breach of rules even where it has no direct legal interest involved. It may act in the general or systemic interest to have a measure declared inconsistent with the rules. Prior to the entry into force of the *WTO Agreement*, there was no definitive panel statement concerning the possibility of bringing an action for violation or non-violation of the rules where no direct legal interest or right of the complainant was involved. However, several of the seeds for not requiring a direct legal interest were sown in practice under the *GATT 1947*. For example, where a measure was found to be inconsistent with the *GATT 1947*, there was no requirement to demonstrate adverse trade effects flowing from that measure. Rather, violation of the rules established a *prima facie* presumption of nullification or impairment of benefits,[581] a presumption that was never successfully rebutted.[582] In addition, panels consistently interpreted the *GATT 1947* to preserve "competitive opportunities" for imported products in relation to their domestic counterparts, and to protect the reasonable or legitimate expectations of signatories concerning the

---

[581] *Uruguayan Recourse to Article XXIII* BISD 11S/95. This principle is now codified in Article 3.8 of the *DSU*.

[582] *United States -Taxes on Petroleum and Certain Imported Substances* BISD 34S/136.

competitive relationship between like domestic and imported products, rather than to protect actual trade flows.[583]

Building upon this practice, under the *WTO Agreement*, a recent decision has held that a direct legal interest is not necessary to have standing to bring a claim under the *GATT 1994* and to request a panel under the *DSU*.[584] Therefore, any Member that considers that a benefit accruing to it directly or indirectly is being nullified or impaired, or the attainment of any objective of a covered agreement in being impeded, may bring a complaint, provided it deems that such an action would be "fruitful".[585] In this regard, the Appellate Body has stated: "[w]e believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the *GATT 1994* and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'".[586]

---

[583]*Brazilian Internal Taxes*, BISD II/181; *Italian Discrimination against Imported Agricultural Machinery* BISD 7S/60; *United States - Section 337 of the Tariff Act of 1930* BISD 36S/345.

[584]*European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, p. 63.

[585]See *DSU*, Article 3.7.

[586]*European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, released 9 September 1997, p. 63.

While not definitive, among the relevant considerations in this respect are: the potential for the internal market of a Member to be affected by the impact of a Member's policies on world supplies and world prices of the product in question; and a potential export interest. As it is not possible to speculate about the potential of a Member to develop competitive goods or services, every Member may be considered to have a potential interest in a finding that the measures imposed by a Member are inconsistent with the legal rules set out in the *WTO Agreement*. This is particularly true in light of the increasing interdependence of Members' economies. In addition, every WTO Member has a more general systemic interest in promoting adherence with the legal norms governing the multilateral trading system. The ability of Members to bring actions in the general or systemic interest may encourage Members with adequate resources to act as "police" of the international trading system.

Third, the *WTO Agreement* and the *DSU* are covered agreements. It is therefore possible to bring legal or "constitutional" challenges involving the infringement of a party's procedural or substantive rights under one of these agreements. While several disputes have considered legal and institutional issues arising under the *DSU*, there have have not been any disputes concerning the obligations in the *WTO Agreement* itself to date. It is difficult to envisage how a dispute under the *WTO Agreement* would occur in practice: it would not involve the established model of Member-to-Member dispute settlement, but rather a "constitutional" challenge against the organs of the WTO.

The consistent emphasis in *GATT 1947* and WTO practice on violation complaints and the restriction of the scope of application of non-violation claims, the ability of a Member to request a ruling concerning the consistency of a measure that has been withdrawn during the dispute settlement proceedings, the ability of a Member to initiate a complaint without having a direct legal interest involved, and the fact that the *WTO Agreement* and the *DSU* are covered agreements that can give rise to independent claims in a dispute, all place emphasis on the normative force of the supranational legal framework set out by the *WTO Agreement*. These are legalistic developments. They increase the opportunities for promoting compliance with WTO law. These developments acknowledge that the increased economic interdependence of Members means that violations of WTO rules will have more of an effect on the economies and trade of other Members. Because Members are increasingly likely to be affected somehow by deviations from WTO norms, there is a greater stake in ensuring consistency and conformity with these norms. These elements underscore the importance of the review function of supervision in the dispute settlement process.

II. Corrective Function

The dispute settlement mechanism also serves the correction function of supervision, "the function designed to ensure the compliance with international legal

obligations through persuasion or pressure from outside".[587] The *DSU* approach to the traditional problem of enforcement of international legal obligations is aggressive. Its provisions concerning the surveillance and enforcement of the results of the dispute settlement process are unprecedented in scope. The existence of such extensive provisions on surveillance of implementation and enforcement is a marked change in the GATT/WTO legal system. It moves away from the traditional emphasis on "cooperation" in international economic law toward "coercion". However, a number of "cooperative" elements remain. The emphasis in the *DSU* is upon encouragement of implementation, rather than upon punishment for non-implementation. The primary objective of the dispute settlement system, in the absence of a mutually agreed solution between the parties, remains the withdrawal of an infringing measure in violation cases. Compensation is a temporary alternative. Authorized retaliation is the "last resort", and is limited to the level of nullification or impairment. Punitive sanctions are not contemplated.

The *DSU* does not explicitly address the legal status and effect of panel and Appellate Body reports.[588] The original *GATT 1947* dispute settlement provisions were also silent on this question. However, in practice under the *GATT 1947* a panel report became a "binding" international legal obligation upon the parties only after it had been adopted by the GATT Council. An unadopted panel report had no formal legal status.

---

[587]Van Hoof and De Vey Mestdagh, *op. cit.*, note 42 at 733.

[588]This contrasts with, for example, Article 59 of the *Statute of the International Court of Justice.*

Technically, a *GATT 1947* panel report was devoid of direct legal effect and dependent upon political approval for its legal force. As the Appellate Body has recently observed, "[t]he generally-accepted view under GATT 1947 was that *the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case*, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report" (emphasis added).[589]

Despite the lack of an explicit confirmation in the *DSU* of the binding legal nature of adopted panel or Appellate Body reports, a number of *DSU* provisions imply that where an adopted panel or Appellate Body report rules against a Member, that Member is under an international legal obligation to comply with the recommendations and rulings of the report. [590] These provisions include Article 19.1 of the *DSU*, which mandates a remedy of *restituo in integrum*: "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement...". [591] Further, Article

---

[589]*Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 13, referring to *European Economic Community - Restrictions on Imports of Dessert Apples* BISD 36S/93, para. 12.1.

[590]Jackson cites *DSU* Articles 3.4, 3.5, 11, 21.1, 22.2, 3.7, 19.1, 21.6, 22.1, 22.8, 26(b). See Jackson, *op. cit.*, note 118.

[591]It is unclear whether a recommendation of compensation in terms of reimbursement is also permitted. This would introduce difficulties concerning the assessment of the extent of trade damage inflicted, a concept that panels have traditionally avoided.

21.1 acknowledges that "prompt compliance... is essential in order to ensure effective resolution of disputes to the benefit of all Members".

Under the dispute settlement arrangements of the *GATT 1947*, the necessity of consensus in the adoption of panel reports used to function as a political filter to guard against the possibility that a panel report containing faulty or incorrect legal reasoning would be transformed into a binding legal obligation which a contracting party would then be under an international legal obligation to implement. Despite the elimination of the requirement for consensus in the adoption of panel reports, the *DSU* retains several mechanisms to maintain the quality and legal consistency of recommendations and rulings. This removes any excuse that a "losing" party might have concerning non-compliance with the outcome of the process. Chief among these mechanisms are the addition of an interim review phase to allow parties an opportunity to comment on panel findings, and the creation of the Appellate Body for legal review of panel reports. The availability of mechanisms (including binding arbitration) to determine the reasonable period of time for implementation of a decision, avoids uncertainty between the parties and allows the infringing party to be aware of what is expected concerning implementation. It encourages compliance. The same is true of the possibility of recourse to a panel with respect to the existence or conformity of measures taken to implement a ruling.

Ultimately, a WTO Member retains the right to exercise its state sovereignty by opting not to perform the DSB recommendations and ruling. However, non-

implementation is "illegal" and is condemned under the *DSU*. It is also accompanied by certain costs. First, in the absence of implementation within a reasonable period of time, the Member concerned may negotiate compensation. Compensation under the *DSU* is voluntary and is only a temporary alternative, not preferred to full implementation of recommendation to bring the measure into conformity with the covered agreements. It is intended to maintain the balance of concessions between WTO Members until compliance occurs.

Second, a Member may be subject to retaliatory action. The *DSU* contains extensive provisions delineating the level and type of retaliation possible. Like compensation, retaliation is a subsidiary solution, ranking in preference below full implementation of recommendations and rulings. Perhaps most importantly, the provisions on retaliation and cross-retaliation limit the nature of reprisals and, specifically prohibit the imposition of any *punitive* sanctions. There is no potential for the authorization of collective measures by the entire membership of the organization in retaliation for infringement by a Member of its treaty obligations. Rather, retaliation under the *WTO Agreement* is available only to the complaining parties in a dispute and is limited to the suspension of concessions at a level equivalent to the trade opportunities affected by the impugned measure. It is meant to restore the negotiated balance of concessions for the benefit of the complaining state until such time as full implementation of the recommendations and rulings occurs. Retaliation is not intended to punish the infringing state. Practice under the *GATT 1947* reveals the difficulties and limitations inherent in

retaliatory action. Retaliation will frequently be against the interests of the complaining state. This will increasingly be the case as international economic integration progresses.

A radical and unlikely alternative would be for a state to exercise its sovereignty and avoid implementation of a WTO decision by choosing to withdraw completely from the WTO under Article XV of the *WTO Agreement*. As economic interdependence becomes ever more profound, however, the price exacted for a state invoking its sovereignty by withdrawing may become so high that it no longer remains a viable option. Foregone would be the benefits and prosperity associated with participation in the WTO's trade liberalization and integration process, and an international framework of rules designed to protect state interests and promote stability and consistency. The isolated state would then be at the mercy of the world's transnational economic forces without the strengthened discipline and influence which the *DSU*, with the other legal and institutional attributes of the WTO, have introduced in the realm of international trade.

The WTO dispute settlement system, therefore, does not operate on the basis of voluntary compliance by WTO Members. Recommendations and rulings of the DSB create a binding legal obligation under international law that a WTO Member is bound to perform. WTO Members have undertaken to abide by this legal obligation, and to thereby diminish their international legal autonomy, in signing the *WTO Agreement*. In return for this diminution, they gain the corresponding benefits flowing from the enhanced supranational legal authority of the WTO and from all other Members being subject to

the same WTO legal obligations. Recognition by states of advanced international economic interdependence promotes compliance with DSB recommendations and rulings.

III. Creative Function

The dispute settlement mechanism also performs the creation function of supervision, consisting of "the clarification and elaboration of existing rules in order to make them sufficiently specific to be applied in a concrete case".[592]

Unlike the *Statute of the International Court of Justice*,[593] the *DSU* contains no explicit guidance concerning the sources of law that panels and the Appellate Body may interpret and apply. The *WTO Agreement* contains the substantive and procedural norms regulating the conduct of WTO Members and operation of the WTO. It is the primary source of law to be interpreted and applied by panels and the Appellate Body. In addition, *GATT 1947* and WTO practice has made reference to principles of general international law.[594]

---

[592]Van Hoof and De Vey Mestdagh, *op. cit.*, note 42 at 747.

[593]Article 38(1).

[594]*E.g.* Article 28 of the *Vienna Convention* concerning non-retroactivity of treaty application was addressed in *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997. Note that the Appellate Body in *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted 20 May 1996, p. 17 observed that the reference in Article 3.2 of the *DSU* to the "customary rules of interpretation of public international law "... reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law".

Panels and the Appellate Body engage in the creative function in applying the rules of the *WTO Agreement* to the facts of a each dispute. In effect, they "make law" by clarifying the existing provisions of the *WTO Agreement* in the context of resolving a particular dispute.

Members have provided certain principles to guide this interpretive process. Prior to the entry into force of the *DSU*, there was no explicit canon of interpretation for panels to follow. Panels established under the *GATT 1947* frequently interpreted the provisions of the treaty by exclusively or predominantly relying upon the historical background and negotiating history of the particular provision under consideration. This approach was at odds with the customary rules on treaty interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties.*[595] Article 3.2 of the *DSU* now expressly directs panels and the Appellate Body to "clarify" the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". While this does not refer specifically to any rules of interpretation, the Appellate Body has confirmed that this provision is a direction to construe the covered agreements in accordance with the rules in Articles 31 and 32 of the *Vienna Convention.*[596] The *Vienna Convention* limits the use of *travaux preparatoires* to a supplementary interpretive role,

---

[595]This interpretive approach by GATT panels received criticism. See *e.g.* Kuijper, *op. cit.*, note 576 at 229.

[596]See *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 , adopted 20 May 1996; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R; WT/DS11/AB/R, adopted 1 November 1996.

rather than placing them on the same footing as the treaty's text and context. Interpretation in accordance with the principles set out in the *Vienna Convention* is a positive development which should foster certainty and predictability in the development of WTO law. The treatment of *travaux preparatoires* as supplementary instruments of interpretation is particularly welcome in light of the sketchy and largely anecdotal negotiating history of much of the *WTO Agreement*. In addition, interpretation in accordance with the *Vienna Convention* will provide consistency in the absence of a uniform standard of review under the covered agreements concerning the degree of deference to be given to domestic administrative authorities.

Members have provided additional guidance regarding the interpretation of the covered agreements in case of conflicts in the *General interpretative note to annex 1A* and in Article XVI:3 of the *WTO Agreement*.[597]

The function of panels and of the Appellate Body is to aid the DSB in settling individual disputes that arise between WTO Members . The explicit aim of the dispute settlement mechanism is to secure a positive solution to a specific dispute, rather than to create jurisprudential precedent to be applied and further developed in future cases. Article 3:2 of the *DSU* gives the dispute settlement mechanism the mandate to "clarify the existing provisions of [the covered agreements] in accordance with customary rules

---

[597]See *supra*, Chapter III.B.IV.

of interpretation of public international law". The Appellate Body has recently expressed the view that it does not consider that Article 3.2 of the *DSU* is meant to encourage panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving the particular dispute..."[598]

An adopted panel or Appellate Body report only legally binds the parties to the dispute. Nevertheless, it also has broader legal effects within the GATT/WTO system. What is the nature of these legal effects?

Panel and Appellate Body reports do not constitute formal legally binding interpretations of the *WTO Agreement*. Article IX:2 of the *WTO Agreement* reserves to the Ministerial Conference and the General Council "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Such interpretations are to be adopted by a three-quarters majority of the Members. This provision implies that the dispute settlement process cannot produce interpretations of the same legally binding character as those adopted in the Ministerial Conference and the General Council. Article 3.9 of the *DSU* reinforces this view. It states: "The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement".

---

[598] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 19.

Coupled with Article IX.2 of the *WTO Agreement*, this provision technically limits the legal effect of interpretations of provisions of the covered agreements developed by panels and the Appellate Body in the dispute settlement process. The Appellate Body acknowledged this in addressing the legal nature of previous adopted panel reports under the *GATT 1947* and the *WTO Agreement* in *Japan - Taxes on Alcoholic Beverages*:[599]

> We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the *WTO Agreement*. The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in [Article IX:2 of] the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.
> Historically, the decisions to adopt panel reports under Article XXIII of the GATT 1947 were different from joint action by the CONTRACTING PARTIES under Article XXV of the GATT 1947. Today, their nature continues to differ from interpretations of the GATT 1994 and the other Multilateral Trade Agreements under the *WTO Agreement* by the WTO Ministerial Conference or the General Council. This is clear from a reading of Article 3.9 of the *DSU*...

The fact that the power to adopt interpretations resides "exclusively" with the Ministerial Conference and the General Council implies that the interpretations developed and applied in the dispute settlement process cannot possess the same binding legal force. The *DSU* also imposes the critical qualification that the recommendations and rulings of panels, the Appellate Body and the DSB "cannot add to or diminish the

---

[599]WT/DS8/AB/R, W/DS10/AB/R, W/DS11/AB/R, pp. 13-14. Also see *Ibid.*, pp. 19-20.

rights and obligations provided in the covered agreements".[600] These provisions appear to rule out any formal judicial creativity or gap-filling function on the part of panels and the Appellate Body. They cannot create doctrine which has the same normative force as treaty language. Nor do adopted panel reports constitute "subsequent practice" under the treaty within the meaning of Article 31(3) of the *Vienna Convention on the Law of Treaties* which must be taken into account in the interpretation of a treaty provision.[601]

As in international law generally, there is technically no *stare decisis* in the GATT/WTO dispute resolution process. Under the *GATT 1947*, an adopted panel report bound the parties to the particular dispute, but did not constitute a legal precedent which subsequent panels were legally bound to follow. Nevertheless, interpretations developed by panels, and now by the Appellate Body play an important role in the WTO legal system. The ramifications of a decision go beyond the parties to the dispute, as the decision creates legitimate expectations regarding the interpretation and application of the relevant rule in the covered agreements for other WTO Members. Prior adopted reports provide guidance

---

[600]*DSU*, Articles 3.2 and 19.2.

[601]See J. Jackson, "The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections" in N. Blokker and S. Mueller (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers*, Volume I (Deventer: Kluwer, 1994) 149. In this article, Professor Jackson argued that the legal effect of an adopted panel report under the *GATT 1947* was a combination of: (i) an obligation under international law binding on the parties in a particular case; and (ii) subsequent practice in the application of the treaty within the meaning of Article 31(3) of the *Vienna Convention on the Law of Treaties*. More recently, in its report in *Japan- Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, the Appellate Body disagreed with the panel report's finding that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case" as the phrase "subsequent practice" is used in Article 31 of the *Vienna Convention*.

concerning the interpretation and application of GATT/WTO principles. Under the *GATT 1947* panels referred to previous reports as having a guiding or persuasive force akin to binding precedent. Numerous panels explicitly acknowledged they were guided by the work of previous panels,[602] referring to past decisions as "precedent"[603] or "practice".[604] Indeed, the vast majority of panel reports since the mid-1970's have made authoritative reference to prior adopted reports.[605]

In its report on *Japan - Taxes on Alcoholic Beverages*,[606] the Appellate Body stated the following on the role of adopted GATT panel reports in the WTO legal system:

> [a]dopted panel reports are an important part of the 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,

---

[602]*E.g. United States - Measures Affecting Alcoholic and Malt Beverages* BISD 39S/206 at 292: "Having regard for past panel decisions..."

[603]The term "precedent" was used in *e.g. Japan - Trade in Semi-conductors* BISD 35S/116 at 154; *European Community -Refunds on Exports of Sugar* BISD 26S/290 at 298. Also see P. Nichols, "GATT Doctrine" (Winter 1996) 36 *Va. J. Int'l L.* 379 at 432.

[604]The terms "long standing practice" or "established GATT practice" were used in *e.g.. United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* BISD 38S/30 at 44; *European Economic Community - Restrictions on Imports of Dessert Apples* BISD 36S/93 at 117; *European Economic Community - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables* BISD 25S/68 at 106.

[605]See Nichols, *op. cit.*, note 603 at 432-433: "The great majority of reports published after 1973 made some authoritative reference to prior reports, and virtually all reports published after 1985 referred to prior reports as authoritative precedent."

[606]WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.

> except with respect to resolving the particular dispute between the parties to that dispute.

Despite the absence of a doctrine of binding precedent restricting the decision-making discretion of WTO panels and the Appellate Body, in practice, WTO panels and the Appellate Body respect and are guided by the jurisprudential procedural and substantive principles developed by dispute settlement panels established under the *GATT 1947* and the Tokyo Round Codes. A *de facto* system of precedent has developed. In *Japan - Taxes on Alcoholic Beverages*, the Appellate Body acknowledged the possibility that this might occur. It noted that the *Statute of the International Court of Justice*[607] explicitly provides that a decision of the ICJ is binding only upon the parties to a particular dispute, but observed, "this has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible."[608]

Prior adopted panel and Appellate Body reports are therefore a rich accumulation of practice and legal experience. Reliance on this accumulated legal experience promotes certainty and predictability and thereby fosters the stability of the multilateral trading system. Adopted GATT/WTO panel reports, and now WTO Appellate Body reports, are increasingly considered to constitute authoritative pronouncements upon the particular matters in dispute and to form a consistent and evolving body of

---

[607] *ICJ Statute*, Article 59.

[608] WT/DS8/AB/R, WT/DS10/AB/R, W/DS11/AB/R, adopted 1 November 1996, p. 14, note 30.

jurisprudence. The GATT/WTO dispute settlement system has built up a body of caselaw and has developed numerous generally accepted interpretations of the underlying treaty norms to create a more comprehensive legal system. A "tapestry of interpretations or jurisprudence" defining the meaning of the underlying treaty rules has been woven through the dispute settlement process.[609] Panels and the Appellate Body therefore play an important role in the development of WTO law. This progressive development of the law constitutes a type of judicial gap-filling, and performs a creative supervisory function. "Judicial legislation" generally connotes a limitation of state autonomy and pooling of sovereignty at the international level, as the outcome of disputes may be guided by "judicially" created rules that do not form part of the treaty text negotiated among the Members, and the considerations are not taken exclusively from the submissions of the parties to the dispute.

This rule-creation function of panels and the Appellate Body is not officially endorsed in the *WTO Agreement*. It is, nevertheless, a significant one. Despite the lack of explicit acknowledgment or authorization in the *DSU*, the role of the dispute settlement system goes beyond the resolution of specific disputes. Through their decisions, panels and the Appellate Body articulate rules and principles (in effect, create law) which guide

---

[609]Steger, *op. cit.*, note 20 at 141.

and influence the conduct of WTO Members. In this way, much of the behaviour of WTO Members occurs in the "shadow of the law".[610]

The interpretative capacity of the dispute settlement bodies is acknowledged by WTO Members. Recent statements made by Members in the DSB on the occasion of the adoption of panel and Appellate Body reports are one indication of this. These statements, both critical and laudatory, refer to the interpretive guidance afforded by dispute settlement decisions. For example, one Member expressed the view that the recent decisions in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* and *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*[611] provided "valuable guidance" for the future interpretation of Article 6 of the *Agreement on Textiles and Clothing.*[612]

Automaticity in the adoption of panel and Appellate Body reports (in the absence of a consensus in the DSB against adoption) eliminates the possibility of rejecting an interpretation developed in the dispute settlement process even where the interpretation

---

[610]See S. Shatreet, "Judging in Society: The Changing Role of Courts" in S. Shatreet (ed.), *The Role of Courts in Society* (Dordrecht: Martinus Nijhoff, 1988) 467 at 468: "The knowledge of the very existence of the judicial system carries over and influences the conduct of members of society...This impact of the law has been referred to as the shadow of the law. Judicial decisions are thus able to shape societal ideas and mores, to create laws, as well as to resolve specific disputes."

[611]WT/DS24/R, WT/DS24/AB/R, adopted 25 February 1997 and WT/DS33/R, WT/DS33/AB/R, adopted 23 May 1997.

[612]Statement by Hong Kong at the DSB Meeting of 23 May 1997, WT/DSB/M/33, 25 June 1997, p.11.

is controversial.[613] The task of bringing consistency and uniformity to the interpretation of the international norms contained in the *WTO Agreement* resides with panels and the Appellate Body. Concern for coherence and consistency in decisions is apparent in such "safety mechanisms" as the addition of the interim review at the panel stage to allow parties to comment on panel findings before they become definitive. At the appellate level, it is also apparent in the provisions on collegiality in the *Working Procedures for Appellate Review* The precedential value and authority of Appellate Body decisions will be high, and will lead to the development of a body of jurisprudence on questions of law concerning the covered agreements.

D. Summary observations

The dispute settlement arrangements contained in the *DSU* embody an unprecedented degree of legalism and supranational legal authority. This legalistic evolution is evident in the establishment of an integrated dispute settlement system characterized by automaticity in the establishment of panels and the adoption of panel and appellate reports, the strict time limits for each step of the dispute settlement process,

---

[613]For example, at the DSB Meeting of 23 May 1997, Costa Rica stated that the Appellate Body and panel reports in *United States - Measure Affecting Woven Wool Shirts and Blouses from India*, WT/DS33/R, WT/DS33/AB/R, adopted 23 May 1997, departed from practice and jurisprudence under the GATT with respect to the issue of burden of proof and therefore constituted "serious legal error" contrary to the clear language of the Agreement. At the same meeting, India stated that it agreed with the results of the decision, but that the reports erred in dealing with the issue of burden of proof.

and the strengthened procedures for surveillance of implementation and enforcement to ensure compliance with DSB recommendations and rulings. It is also evident in the creation of the Appellate Body to hear appeals from panel reports on issues of law and legal interpretation. Real international economic litigation is occurring. The supranational nature of the system is underscored by the prohibition on the unilateral determination of violation, nullification or impairment, as well as of the reasonable time for implementation of recommendations and rulings and of the level of retaliation.

Even with the more legalistic procedures for panel and Appellate Body adjudication, however, the *DSU* retains the possibility for more pragmatic forms of dispute resolution. Consultations to reach a mutually-agreed solution remain a possibility. Such pragmatic alternatives must still conform to certain supranational legal parameters that safeguard the coherence and supremacy of WTO law: all solutions to disputes must be consistent with the covered agreements, and must be notified to the DSB.

The supranational and legalistic elements of the dispute settlement process increase the normative force of WTO law, and demonstrate that international economic law is moving from "cooperation" towards more "coercive" forms of legal interaction. They reflect a willingness on the part of WTO Members to design and abide by more a more rigorous supranational legal framework WTO Members have transferred some of their sovereign authority in the trade area to the international level by agreeing to abide by these new dispute settlement disciplines which assess the compliance of measures with

the covered agreements, interpret and apply the covered agreements, and enforcement the legal obligations contained in the covered agreements. By the same token, each state has gained influence over the actions of the other Members in the system because of their corresponding identical undertakings.

Early WTO practice indicates that WTO Members are largely adhering to the procedural requirements of the *DSU*. The marked increase in the number of complaints filed under the *DSU* in comparison with those filed under the previous GATT 1947 system is the most convincing evidence of the credibility and viability of the system. The increased tendency for parties to negotiate mutually-agreed solutions to disputes, the greater propensity for developing countries to be involved in dispute settlement, the growing legal complexity of disputes, and the substantive focus on legal and institutional issues are also evidence of the early effectiveness of the more legalistic dispute settlement process under the *DSU*.

Special considerations apply to disputes involving developing countries: the good offices of the Director-General are available; special attention is to be given to developing country interests in consultations, and in the implementation phase; at least one member of a panel must come from a developing country if requested; the panel report must indicate how special and differential provisions for developing countries have been taken into account; and developing countries may use legal assistance provided by the WTO Secretariat in the preparation of their case.

The WTO dispute settlement mechanism has the express mandate to perform the review function of international supervision, by assessing the consistency with the covered agreements of measures imposed by Members. Non-violation complaints, which do not necessarily require an assessment of conformity with the covered agreements, are also possible. However, the scope of application of the non-violation concept has been limited in practice under the *GATT 1947*, and it seems likely that this limited application will continue under the *WTO Agreement*. Other factors that stress the significance of the review function of the WTO dispute settlement system are: the potential for a Member to request a ruling concerning the consistency of a measure that has been withdrawn during the dispute settlement proceedings; the ability of a Member to promote the general or systemic interest by participating as a third party, or by initiating a complaint concerning the WTO-consistency of a measure without having a direct legal interest involved; and the fact that the *WTO Agreement* and the *DSU* are covered agreements that can give rise to independent claims in a dispute. The review function is conducted by court-like bodies that advise and report to the political organ (the DSB), although the automatic establishment of panels and adoption of panel reports renders the review process almost purely adjudicatory.

The dispute settlement mechanism also serves the correction function of international supervision, with an aggressive approach to implementation and enforcement of the outcome of the dispute settlement process. The recommendations and rulings of

an adopted panel/Appellate Body report constitute a binding obligation in international law. Performance of the recommendations and rulings is the only legal avenue for compliance. Compensation and retaliation are temporary alternatives, intended to restore the negotiated balance of concessions between the parties until performance occurs.

Dispute settlement also performs the creative function of international supervision. Panels and the Appellate Body engage in the clarification of the obligations in the covered agreements for application to a specific dispute, guided by the customary international law principles of interpretation set out in Articles 31 and 32 of the *Vienna Convention*, as well as by express guidance in the *WTO Agreement* concerning the legal relationships among the various covered agreements. Beyond creativity in a specific dispute, however, panels and the Appellate Body also perform a significant informal rule-creation function that plays an important role in the WTO legal system. While there is technically no *stare decisis* in the WTO legal system, a *de facto* system of precedent has developed. Panels and the Appellate Body refer to previous relevant reports as persuasive guidance for the interpretation and application of the obligations contained in the covered agreements. Reliance on the accumulation of practice and legal experience embodied in prior panel reports promotes certainty and predictability in the system. Through this "judicial gap-filling", panels and the Appellate Body articulate rules and principles which guide the conduct of WTO Members, so that much of the trade-related behaviour of WTO Members occurs in the "shadow of the law".

Chapter 6

Supervision Through Surveillance: The Trade Policy Review Mechanism

A. Introduction

The effectiveness of international economic law depends upon the transparent administration of laws and policies by states. The exchange of information relating to the trade policies and practices of states is one avenue to increase the security and predictability necessary for the proper flow of international commerce. The non-transparent administration and application of trade policies and practices leads to uncertainty that, in itself, may act as an impediment to trade.[614] Transparency is, therefore, vital to the effective operation of the *WTO Agreement.* It ensures that Members are aware of, and understand, the trade policies of other Members. It also decreases the potential for domestic policies detrimental to the functioning of the international trade system to escape detection.

Until the establishment of the Trade Policy Review Mechanism (the "TPRM") in 1989, there was no general surveillance mechanism focusing on Members' substantive trade policies under the *GATT 1947.* However, the surveillance process introduced by the TPRM finds its roots in earlier efforts to achieve two basic objectives: (i) to enhance international supervision of the operation of the *GATT 1947*; and (ii) to

---

[614]See *e.g.* Jackson, *op. cit.*, note 6 at 461- 464. At 462, Jackson states, "[s]ecrecy of trade rules is itself a nontariff barrier...".

increase trade policy transparency in the administration and application of the *GATT 1947* at the international level and within the domestic orders of the *GATT 1947* contracting parties.

The TPRM is the first permanent institutionalized surveillance mechanism in the GATT/WTO system. Under the WTO, it is the institutional successor to the eponymous trade policy review process created under the *GATT 1947* during the Uruguay Round in 1989. Before the entry into force of the *WTO Agreement*, the legal basis for the TPRM was a *GATT 1947* Council Decision,[615] and the reviews were conducted by the GATT Council. The legal basis for the TPRM is now found in Annex 3 of the *WTO Agreement*, and reviews are conducted by a body expressly designated for that purpose: the General Council meeting as the Trade Policy Review Body (TPRB). As the successor to the TPRM process developed under the *GATT 1947*, the TPRM under the WTO fulfils the same basic objectives and adheres to the same basic principles and procedures. It incorporates practice that had developed in the trade policy review process under the *GATT 1947*. However, as Annex 3 of the *WTO Agreement*, the TPRM now constitutes an integral part of the Agreement, and a component of the WTO single undertaking, applicable to all WTO Members. The administration of the TPRM figures among the five primary functions expressly assigned to the WTO.[616]

---

[615]"Trade Policy Review Mechanism – 1989 & 1990", 19 July 1989, BISD 36S/403 (1990).

[616]*WTO Agreement*, Article III.

The introduction of the TPRM has added a significant new institutional element to the GATT/WTO system. It provides a supervisory mechanism to increase the transparency of Members' trade policies and thereby promote adherence to WTO legal norms. The mere existence of the TPRM is an acknowledgement of the advanced degree of interdependence of the economies of WTO Members, and of the need to facilitate cooperation and promote certainty and predictability through ensuring transparency.

In addition to providing for periodic reviews of individual Members' trade policies, the TPRM Agreement contains further provisions aimed at promoting transparency. It contains a reporting requirement committing Members to provide brief reports, between reviews, of any significant changes in their trade policies. It also requires Members to submit annual updates of statistical information.[617] Another significant task for the TPRB is to undertake an "annual overview of developments in the international trading environment which are having an impact on the multilateral trading system".[618] This Chapter focuses only upon the periodic reviews of individual Members' trade policies.

The origins and antecedents of the TPRM in the *GATT 1947* legal system are addressed in Chapter 2.E.IV and 2.G.III. After providing a brief overview of the TPRM process, this Chapter analyzes the review documentation from two recent trade policy

---

[617]TPRM Agreement, paragraph D.

[618]TPRM Agreement, paragraph G.

reviews (of the United States and Canada) in an attempt to assess the substantive nature of the trade policy review process. The Chapter examines to what extent the international surveillance process of the TPRM promotes the effectiveness of the supranational legal framework set out in the *WTO Agreement*, by inquiring whether the TPRM is a legalistic mechanism that assesses or enforces the WTO-consistency of the trade policy measures of WTO Members. It then analyses the role of the TPRM as an international supervisory mechanism, and concludes with summary observations.

B. The Trade Policy Review Mechanism Process

I. Objectives

The TPRM was not designed as a legalistic mechanism to conduct strict supervision of compliance with GATT/WTO rules. Rather, it has the more general express purpose of monitoring the trade policies and practices of WTO Members. According to the TPRM Agreement, the purpose of the TPRM is,

> ...to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.

With this objective in view, the TPRM aims to enhance transparency at both the international and domestic levels. At the international level, the TPRM provides for the "regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trade system". The TPRM Agreement explicitly points out that this peer review of trade policies "is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members".[619] A TPRM review assesses a Member's trade policies and practices and examines the impact of those policies and practices on the functioning of the multilateral trading system. It takes account of the range of a Member's trade policies and practices against the background of the Member's wider economic and developmental needs, policies and objectives.[620]

At the domestic level, WTO Members have undertaken to promote greater domestic transparency. This is in recognition of "the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system". In this regard, the TPRM stops short of imposing mandatory requirements or concrete obligations concerning institutional arrangements that must be put in place within the domestic orders of WTO Members to achieve greater transparency. Several studies in the early 1980's had recommended that

---

[619]TPRM Agreement, paragraph A(i).

[620]TPRM Agreement, paragraph A(ii).

each Member should establish an independent government "domestic transparency agency" to scrutinize the domestic distribution of the costs and benefits of trade policy actions and to report regularly on trade policy-making within its domestic legal order.[621] However, the Uruguay Round negotiators did not adopt this approach to internal transparency. Rather, the TPRM Agreement takes a non-intrusive approach to domestic transparency. It allows each Member to retain its autonomy in deciding how, and to what extent, greater domestic transparency will be achieved. Acknowledging that states retain some sovereign authority with respect to domestic regulation, the TPRM agreement stipulates that moves to promote openness in Members' domestic systems "must be on a voluntary basis and take account of each Member's legal and political systems."[622]

II. Procedures and Timetable

The TPRM is administered by the General Council meeting as the Trade Policy Review Body (TPRB). When the General Council convenes as the TPRB, it follows the rules of procedure of the General Council, except as provided for in the TPRB Rules

---

[621]See the Leutwiler Report (GATT, *Trade Policies for a Better Future: Proposals for Action*, 1985); and the Long Report (Olivier Long et. al, *Public Scrutiny of Protection: Domestic Policy Transparency and Trade Liberalization*, Special Report No. 7 (London: Gower for the Trade Policy Research Centre, 1983)). On the concept of increasing transparency in the application of the *GATT 1947* at the domestic level, and on the need for a GATT Agreement on Domestic Transparency, see in particular G.R. Banks, "Transparency, Surveillance and the GATT System" in D. Steger and M. Hart (eds.), *In Whose Interest?: Due Process and Transparency in International Trade*, Proceedings of a Conference of the Centre for Trade Policy and Law, Ottawa, May 1990, 55.

[622]TPRM Agreement, paragraph B.

of Procedure.[623] The TPRB Rules of Procedure continue the practice that developed in the trade policy review process under the *GATT 1947*.[624]

TPRM review meetings are open to all WTO Members. There is no requirement of a quorum for the TPRB to conduct trade policy reviews.[625] There is no established practice or rule concerning attendance of observers at trade policy review meetings. However, on the basis of *ad hoc* arrangements, the TPRB may decide to invite representatives of other international organizations to attend review meetings as observers. For example, the most recent trade policy review meeting for the review of the United States was attended by representatives of the EBRD, EFTA, FAO, IMF, OECD, UNCTAD, and the World Bank. All of these international organizations had requested observer status at the meeting. Attendance by such international organizations is part of the overall movement to increase transparency of WTO institutional processes.

The TPRM Agreement sets out the procedures and timetable for the periodic review of individual Members' trade policies. The provisions of the Agreement are supplemented by the TPRB Rules of Procedure. Each Member is regularly examined on

---

[623]"Rules of Procedure for Meetings of the Trade Policy Review Body" (the "TPRB Rules of Procedure"), approved by the TPRB at its meeting on 6 June 1995, WT/TPR/6, 10 August 1995.

[624]The TPRB Rules of Procedure incorporate all relevant elements of the Communication from the Chairman of the *GATT 1947* Council on Procedures for Review Meetings, L/7208, 30 April 1993 and the *GATT 1947* Council Decision on Arrangements for the Continued Operation of the TPRM, L/7458, adopted 10 May 1994.

[625]TPRB Rules of Procedure, Rule 9.

a rotating basis. The determining factor for the frequency of review of a Member's policies is a Member's impact upon the functioning of the international trading system.[626] The timetable is three-tiered.[627] The four Members with the largest impact are subject to review every two years. In practice, these are the members of the "Quad" (United States, Japan, Canada and the EC (with the EC being counted as one Member)). The next sixteen Members are reviewed every 4 years. Other Members will be reviewed every 6 years, with an option for longer periods for least-developed Members.[628] Exceptionally, a Member that implements changes to its trade policies or practices that may have a significant impact on its trading partners may be requested by the TPRB, after consultation, to accelerate its next review. There is continued support for the rhythm of reviews laid out in the TPRM Agreement, although WTO Members have not expressed dissent to a suggestion that, in the case of the Quad, every second review might have more of an "interim" character. However, this should in no way imply a selective agenda for such reviews. There has been no Agreement on any proposal to revise the review schedule by amending the TPRM Agreement, although one delegation has proposed alteration of the review cycle for the Quad so that the reviews would occur every three years.[629]

---

[626] Defined in terms of their share of world trade in a recent representative period. TPRM Agreement, paragraph C(ii).

[627] TPRM Agreement, paragraph C(ii).

[628] Rule 3 of the TPRB Rules of Procedure provides that the cycle of reviews shall be applied with a general flexibility of up to 6 months, and that schedules of subsequent reviews shall be established counting from the date of the previous review meeting; The TPRB adopts a programme of reviews for each year by the middle of the previous calendar year (TPRB Rules of Procedure, Rule 8).

[629] "Procedural Improvements to the TPRM", Note by the Chairperson, WT/TPR/20, 19 July 1996.

The TPRM Agreement provides that each review is based on two reports: a report drawn up by the government of the Member under review (the "Government Report") and a report drawn up by the WTO Secretariat on its own responsibility (the "Secretariat Report").

According to the TPRB Rules of Procedure, Government Reports "shall be in the form of policy statements, whose form and length is essentially to be determined by the Member under review".[630] The Government Report is brief, providing a general overview of the Member's economic situation, ordinarily containing information on the objectives of trade policies, the institutional and regulatory environment, trade policy measures, trends and relevant external economic and trade policy developments. The WTO Secretariat makes technical assistance available to developing and least-developed country Members in order to facilitate the reporting and review process for them.[631]

The Secretariat Report is drawn up on the Secretariat's own responsibility and is based on information available and provided to the Secretariat by the Member under

---

[630]TPRB Rules of Procedure, Rule 10. Originally, in the trade policy review process under the *GATT 1947*, a uniform format for the Government Reports was outlined in a GATT Council Decision ("Trade Policy Review Mechanism: Outline Format for Country Reports", L/ 6552, 21 July 1989, BISD 36S/406). The uniform format aimed to make sure that each Government Report addressed certain fundamental issues, including a description of trade policies and practices including trade policy objectives, and the contracting party's economic and developmental context. A simplified reporting format was available for least-developed countries ("Trade Policy Review Mechanism - Outline Format for Country Reports for Least–Developed Countries", L/6691, 16 May 1990, BISD 37S/263).

[631]TPRM Agreement, paragraph D.

review. This includes responses of the government to a questionnaire sent well in advance of the review, information gathered in meetings with government officials of the Member concerned, and the information provided in the Government Report. Where the Government Report requires clarification, the WTO Secretariat may make the necessary inquiries. The Trade Policy Review Division of the Secretariat allocates a small team of economists to research each Report.

The TPRM Agreement provides that the TPRB "shall establish a basic plan for the conduct of reviews...In consultation with the Member or Members under review, the Chairman may choose discussants who, acting in their personal capacity, shall introduce the discussions in the TPRB". On the basis of practice that had developed under the *GATT 1947*, in WTO practice, the review is conducted at a meeting of the TPRB. It generally occurs in two sessions.

The first session begins with introductory remarks by the Chairperson, followed by a presentation by a representative of the Member concerned. The TPRB Rules of Procedure provide that these initial remarks by the Member under review should be limited to 15 minutes and should provide an overview of policies, noting any new developments since the completion of the Government and Secretariat Reports.[632] Two discussants – both appointed by the Chairperson in consultation with the Member under

---

[632]TPRB Rules of Procedure, Rule 13.

review -- make statements emphasizing certain dominant themes that arise in the Government and Secretariat Reports. The discussants act in their personal capacity and are usually senior government officials from missions in Geneva. The discussants circulate to Members outlines of the main points they intend to raise in the review meeting, at least one week before that meeting. Their full statements, designed to provide specific themes for discussion, should be given to the Member under review shortly before the meeting. [633] The discussants' statements should not exceed in length that by the Member under review, generally 15 minutes.[634] Following their comments, the discussants then open the floor to permit any interested Member to ask questions or to offer comments or criticisms concerning the trade policies and practices of the Member under review.[635]

The second session consists of a discussion, when the Member under review has an opportunity to reply to questions, based on the main themes identified after the first session by the Chairperson, the discussants and the Secretariat, in consultation with the Member. Members may submit written questions to the Member under review in advance of the review meeting to allow time for the preparation of replies. The Chairperson then makes concluding remarks summarizing the main points of discussion. The Chairperson's concluding remarks are made on the Chairperson's own responsibility and

---

[633]TPRB Rules of Procedure, Rule 12.

[634]TPRB Rules of Procedure, Rule 13.

[635]TPRB Rules of Procedure, Rule 13. Such statements from the floor should not exceed 7 minutes.

are not intended to substitute for the collective evaluation and appreciation of a Member's trade policies and practices.

The minutes of the TPRB review meeting, together with the Government and Secretariat Reports, are published promptly after the review. They are also sent to the Ministerial Conference, which takes note of them.

While the delegation of the Member under review responds at the review meeting to oral and written questions to the fullest extent possible, matters may arise on which immediate replies are not possible. In this situation, the Member under review may indicate its intention to provide supplementary information in writing on specific points raised. Where replies cannot be delivered during the meeting, supplementary written answers may be circulated following the meeting.[636] A recent proposal that the WTO Secretariat should make a compilation of issues on which the Member under review has undertaken to provide further information has received wide support. Such issues could include areas where the Member has indicated that domestic action is pending, such as administrative or legislative measures that are to be enacted. This compilation could then be forwarded to the Member, which could provide replies within a reasonable period of time.[637]

---

[636]TPRB Rules of Procedure, Rule 14.

[637]WT/TPR/20, 19 July 1996.

C. The Substantive Nature of the Trade Policy Review Mechanism

As the TPRM reviews each individual WTO Member on a case-by-case basis, it is difficult to make general observations concerning the substantive nature of the trade policy review process based on the documentation resulting from a particular review. The economic conditions and trade-related policies and practices of WTO Members diverge widely. Trade policy reviews may serve different purposes for industrialized, developing and least-developed countries. The amount of information available about the economic situation of various WTO Members also differs. The review documentation will therefore be descriptive, analytical and critical in differing proportions, depending upon the particular Member under review.

Keeping these limitations in mind, a few observations can be made about the substantive nature of the TPRM on the basis of the documentation from the most recent trade policy reviews of Canada[638] and the United States.[639] These observations do not purport to give a comprehensive account of the content of the review documentation. Rather, they endeavour only to indicate the type of information imparted and the character of statements contained in each stage of the review documentation, with a view to assessing the substantive nature of the TPRM process. This section outlines the general format, tone

---

[638]WT/TPR/G/22, 15 October 1996; WT/TPR/S/22, 7 October 1996; WT/TPR/M/22, 21 January 1997. Trade Policy Review Meeting held 18-19 November 1996.

[639]WT/TPR/G/16, 21 October 1996; WT/TPR/S/16, 21 October 1996; WT/TPR/M/16, 30 January 1997. Trade Policy Review Meeting held 11-12 November 1996.

and contents of each of the review documents, that is: (i) the Government Report; (ii) the Secretariat Report; and (iii) the minutes of the Trade Policy Review Meeting. It traces the treatment of several dominant contentious issues that emerged in the most recent reviews of Canada and the United States. As it aims to evaluate the role of law and legal obligation in the trade policy review process, the observations focus in particular on the treatment of the WTO-consistency of measures imposed by the Member under review.

I. The Government Report

The Government Reports are brief. That of Canada is 6 pages; that of the United States is 10 pages. They give an account of the general economic situation of the Member under review, and of the external and internal factors which are shaping their trade policies. In practice, the Government Report is devoted to policy, while the Secretariat Report concentrates upon factual aspects of a Member's trade policy.

The Government Report of Canada contains an executive summary containing laudatory statements that highlight the main directions in Canadian trade policy.[640] The executive summary is followed by an outline of the trade and economic

---

[640] A typical statement reads:

> Canada continues to pursue trade liberalization objectives at the multilateral, regional and bilateral levels. In addition to this fundamental and generally successful overall orientation of the Canadian economy to meet the new international context and challenges, Canada has been fully and effectively implementing

policy environment and an account of trade policy developments since the last review in 1994. A section on future policy directions confirms that "the fundamental underlying economic philosophy of freer and more open markets rooted in internationally-agreed rules and practices will remain the basis of Canadian trade policy".[641] It gives a brief description of Canada's participation in the GATT/WTO, stating in part, "[w]ith the Uruguay Round negotiations and implementation of the results of the Round in the process of being implemented, the effective operation of the World Trade Organization is among the Canadian Government's top trade policy priorities".[642] It also devotes brief paragraphs to NAFTA, the trading relationship with the United States, and other trading arrangements and initiatives in which Canada is involved, such as the Canada-Israel Free Trade Agreement, the Free Trade Agreement of the Americas (FTAA) and the Asia-Pacific Economic Cooperation Forum (APEC). It further addresses the domestic review process of the *Special Import Measures Act (SIMA)*, the legislation that governs domestic trade remedy investigations and reviews. Finally, the Report indicates that Canada views the WTO as the appropriate forum to deal with the new and emerging issues on the international trade agenda, in line with its competence and mandate.

> and taking advantage of its international trade commitments to liberalize. Canada's approach to trade policy management over the past two years has been: managing a large number of trade disputes both in the WTO and NAFTA context and working to expand market access opportunities by reducing or removing barriers to trade in certain instances internally or with respect to certain trading partners. WT/TPR/G/22, p. 1, para. 3.

[641]WT/TPR/G/22, p. 2, para. 8.

[642]WT/TPR/G/22, p. 3, para. 10.

The Government Report of the United States is similar in format, content and tone. The United States Report repeatedly emphasizes the U.S. commitment to an open multilateral trading system and to the full and effective implementation of the *WTO Agreement* by all Members.[643] Along with active participation by the United States in the multiple fora of the WTO, it underlines the aggressive use by the United States of the dispute settlement mechanism to compel compliance with the *WTO Agreement* on the part of other WTO Members.[644] In the introductory section, entitled "The United States in the Multilateral System", it affirms that "[t]he U.S. government is strongly committed to building a world of truly open markets with the World Trade Organization as the centrepiece of the requisite open market disciplines...".[645] The next section, "The United States Economic and Trade Environment", places the U.S. economy in its international context using statistics concerning trade growth and employment. The section on trade policy developments since the last review addresses the Uruguay Round and WTO implementation, asserting, "[t]he most significant demonstration of the competitiveness and openness of the U.S. market lies in its implementation of the Uruguay Round". It also addresses the status and nature of regional trade initiatives in which the U.S. is involved, including NAFTA, FTAA, and APEC. The Report next touches upon domestic regulatory developments affecting trade policy, including agricultural and regulatory reform, and deregulation. It notes, "[t]he pace of the domestic deregulation initiated in the 1970's

---

[643]*e.g.* WT/TPR/G/16, p.1, para. 1; p. 5, para 23; p. 10, para. 51.

[644]WT/TPR/G/16, p. 5, para. 23.

[645]WT/TPR/G/16, p.2, para. 8.

has continued, reinforcing America's free-market orientation and entrepreneurial traditions, and complementing its open trade policy with regulatory changes that enhance markets and promote competition".[646] The final section, on future developments in United States trade policy, cites the challenges posed by rapidly changing technologies in communication, transportation and other areas, and the changes brought by the movement of lower and middle income countries towards less restrictive trade policies.

From this brief account, it is apparent that the Government Reports in question include general statements of policy and an indication of present policy achievements and future policy objectives. They do not contain legal commentary concerning the WTO-consistency of specific measures, and they do not include any undertakings on the part of the Member under review to render specific policies more compatible with WTO obligations. Not surprisingly, the Government Reports are not self-critical in tone. Rather, they are positive and self-affirming, containing a fair amount of rhetorical flourish.

A recent TPR document prescribes that the Government Report should address key issues, be a forward-looking policy statement and avoid any "propagandistic" overtones.[647] Despite this prescription, self-promoting and "propagandistic" overtones seem to be a

---

[646]WT/TPR/G/16, p. 9, para. 43.

[647]WT/TPR/20, 19 July 1996.

primary characteristic of the Government Reports. In a forum where the Government Report is the essentially the only instrument for a government to "blow its own horn" in describing the evolution of its trade policies, this is probably inevitable. Nevertheless, the Government Report serves a sort of "due process" objective. It provides a Member the opportunity to give a concise account of its commercial policies in their domestic legislative and regulatory context before these policies and objectives are opened to the scrutiny of the Secretariat and the collective criticism of the TPRB. It is the government of the Member concerned that will have the best access to the type of policy information that is sought in the reviews, and that will have the best ability to describe the underlying objectives of its policies.

II. The Secretariat Report

As noted, while the Government Report focuses on policy matters, the Secretariat Report concentrates on factual material. According to a recent TPR document, the Secretariat Report "should focus principally on the trade policies and practices of the Member under review, seen, to the extent necessary, in the context of overall macro-economic and structural policies".[648] Consistent with this guideline, the Secretariat Reports in the reviews of Canada and the United States constitute a comprehensive economic assessment of trade policies and practices, and their impact on the international trading

[648]TPRB Rules of Procedure, Rule 10.

system. The Secretariat Reports rely on statistical analysis, charts, tables and graphs to assess the trade policy situation of the Member under review. They are far longer, more detailed, and more objective than the Government Reports (the Secretariat Report on Canada is 137 pages; that on the United States is 224 pages).

The format, content and tone of the Secretariat Reports on Canada and the United States are similar, and they will therefore be discussed together in this section. The tone of the Secretariat Reports is largely descriptive, enumerating the Member's trade measures and providing contextual information for these measures. The Reports generally take a historical perspective, examining policies that have been implemented, rather than extrapolating future policy developments. They examine the elements in the external economic environment which affect the Member's trade policy. This includes the Member's participation in the WTO. In this regard, they note domestic legislative and administrative reforms undertaken to implement the *WTO Agreement* and analyse the Member's participation in the GATT/WTO dispute settlement mechanism during the review period.[649] They also examine the participation of the WTO Member under review in other Agreements and fora that have an impact upon the Member's trade policies. For both the United States and Canada, this includes an overview of their participation in regional arrangements such as NAFTA, APEC, FTAA, and bilateral free trade agreements.

---

[649]WT/TPR/S/16, pp. 28-29 and Table AII.2c; WT/TPR/S/22, pp 18-19, Table II.

Along with the external factors affecting the Member's trade policies, the Secretariat Reports provide general background information on certain relevant aspects of the domestic policy-making and administrative frameworks of the Member concerned. For example, the Secretariat Report on Canada describes in detail the domestic administrative process for anti-dumping investigations and reviews under the pertinent Canadian domestic legislation (*SIMA*).[650] The Secretariat Report on the United States gives an account of the internal trade policy-making process, covering the trade policy competence of the Executive and Administrative branches of government under the U.S. constitution.[651]

The Secretariat Reports give accounts of a Member's trade policies by measure and by sector. This section includes a brief description of the measure (*e.g.* tariffs, quotas, etc.), the context in which the measure has been applied, the country or countries against which the measure has been applied, and any WTO dispute settlement activity that has taken place concerning the measure. The breakdown of the Member's trade by sector addresses the background, regulatory framework, and main features and developments in each major commercial sector.

The Secretariat Reports do not identify specific substantive WTO obligations with which a particular aspect of a Member's trade policies and practices may be

---

[650]WT/TPR/S/22, Annex III.1, pp 59-64.

[651]WT/TPR/S/16, pp. 23*ff*.

inconsistent. However, with respect to procedural notification obligations, the Secretariat Report of Canada notes, "Canada has fulfilled most of its WTO notification obligations but has yet to complete these in some areas of agriculture and subsidies"[652] The Secretariat Reports do, however, discuss measures that have been, or may become, a source of tension between the Member under review and other WTO Members. For example, the United States Secretariat Report notes,

> ...the U.S. has implemented the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (the Helms-Burton Act) and the Iran and Libya Sanctions Act. The former allows U.S. citizens to take private action in U.S. courts to obtain compensation from countries "trafficking" in confiscated property that it [sic] is in Cuba, and claims to which are owned by those U.S. nationals; it also authorizes the State Department to refuse U.S. visas to such companies' executives, their spouses and their minor children. The President had deferred the right to file suit against foreign companies using the expropriated property of U.S. nationals until February 1997. The Iran and Libya Sanctions Act authorizes trade sanctions against foreign companies investing in Iran and Libya. The extra-territorial aspects of these laws have been criticised by U.S. trading partners and cases against the Helms-Burton Act have been filed under NAFTA and in the WTO.[653]

The same Report further asserts,

> ... elements of U.S. trade legislation, even under the WTO, continue to cause concern for certain trading partners. Thus, the backloading of textile and clothing liberalization remains problematic for many developing countries, even

---

[652]WT/TPR/S/22, p. xi, para. 3.

[653]WT/TPR/S/16, p. xi, para. 10; see also p. 25. The complaint filed by the European Communities under the *Dispute Settlement Understanding* is *United States - The Cuban Liberty and Democratic Solidarity Act*, WT/DS38. It is described briefly *supra*, Chapter 5.B.III.

> though conditions of access have improved; access to government procurement remains restricted in various areas; and although the right to file suit under the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 has been deferred and, so far, no sanctions have been announced against companies investing in Iran or Libya, the extraterritorial application of U.S. trade laws has attracted significant attention.[654]

The same Report further notes that the United States continues to use three main tracks in its trade policy-making: multilateral Agreements, regional Agreements, and unilateral pressure to open third country markets, commenting,

> [w]hile there is no doubt that U.S. trade policy is firmly founded in the WTO system, the interaction among these various tracks remains a source of tension within the system.[655]

In a similar vein, the Secretariat Report on Canada touches upon the controversial bilateral settlement reached concerning Canadian exports of softwood lumber to the United States: "[u]nder a recent bilateral arrangement on softwood lumber, Canada undertook to impose an export charge on shipments above certain thresholds to the United States; the arrangement is intended to safeguard exporters from the risks and legal costs, estimated at some US $100 million over the past three years, of trade remedy complaints in the United States".[656] It also notes that Canada has pursued a process of gradual reform

---

[654]WT/TPR/S/16, p. xvi, para. 41.

[655] WT/TPR/S/16, p. xvi, para. 42.

[656]WT/TPR/S/22, pp. xi-xii, para 7.

in the services sector, but that "cultural industries remain largely untouched by reforms...".[657]

From this examination of the Secretariat Reports in the trade policy reviews of Canada and the United States, it is clear that they are primarily an independent and relatively objective economic assessment of the Member's trade policies and practices and an attempt to evaluate how these policies and practices affect the multilateral trading system. The Secretariat Report is not, and does not purport to be, a strict legal assessment of the compatibility of a Member's trade policy with its WTO obligations. The Report provides thorough and authoritative information on, and analysis of, specific trade measures taken by the Member under review. It takes note of areas of a Member's trade policy which are, or may become, sources of friction in the multilateral trading system. It does not assess the WTO-consistency of a Member's substantive trade policy measures and makes no proposals about how to bring potentially inconsistent measures in line with a Member's WTO obligations. The increased transparency afforded by the Secretariat Report is its chief contribution to the TPRM. The information contained in the Secretariat Report provides the basis for the trade policy review meeting.

---

[657]WT/TPR/S/22, p. xiii, para. 18.

III. The Trade Policy Review Meeting

As noted, the Trade Policy Review meeting commences with comments by discussants, followed by observations of Members concerning the policies of the Member under review. The minutes of the Trade Policy Review Meeting reflect that the discussants' comments serve to underline certain dominant themes in the trade policy of the Member under review. The discussants' comments also reveal a concern with the WTO-consistency of Members' trade-related policies and practices. Statements by Members of the TPRB follow the discussants' comments. The statements of the Members pinpoint areas of concern to WTO Members, and include questions pertaining to the Member's trade policy objectives and intentions in areas which cause friction among trading partners. While some comments involve matters of a bilateral nature, others deal with issues of multilateral and systemic interest. Consistent with the single undertaking approach of the *WTO Agreement*, the statements span the gamut of WTO agreements and activities. This leads to a wide-ranging discussion of the Member's participation in the multilateral trading system. In addition to other observations concerning the general economic situation of the Member concerned, the implementation of its Uruguay Round commitments, and participation in regional trading arrangements, the Members' statements demonstrate a concern with the WTO-consistency of certain trade measures imposed by the Member under review.

In the trade policy review of Canada, the discussants emphasized the theme of Canadian federalism and its impact on Canadian international trade policy-making, as well as several Canadian policies that they deemed of questionable compatibility with the *WTO Agreement*. These included the bilateral arrangement between the U.S. and Canada concerning Canadian exports of softwood lumber to the U.S., and local content requirements. The Members picked up on these themes, and others (including geographical indications for wines and spirits; and the reform of *SIMA* provisions concerning antidumping investigations and reviews) in their discussion.

Concerning Canadian federalism, the first discussant queried whether the fact that the federal government had the mandate to negotiate international agreements, while the implementation of such agreements was left to provincial governments in areas falling within their mandate was "impeding or delaying the implementation of internationally negotiated commitments and, if so, what was the Government's response?" He noted the entry into force in 1995 of the Canadian interprovincial *Agreement on Internal Trade* (the "*AIT*") and asked to what extent the *AIT* would facilitate the implementation of international agreements at all levels of government. The discussant observed that the *AIT* "was still incomplete in areas such as government procurement, subsidies and energy, and left a considerable leeway to the provinces. This, in turn, reduced the transparency of the Canadian market for foreign firms".[658] The second discussant showed a similar

---

[658]WT/TPR/M/22, p. 7, para. 23.

concern with Canadian federalism and with lacunae in the *AIT*. In response to a question by the second discussant about "whether the AIT contained provisions regarding WTO-compliance," the Canadian representative stated that international rules applied and that, although the federal government had constitutional power over trade issues, the provinces had always implemented the results of GATT and WTO panels when these had found practices to be in violation of international obligations.[659]

With respect to the bilateral Canada-U.S. softwood lumber arrangement, the second discussant "questioned the compatibility of the recent export tax on wood to the United States with the provisions of the WTO Agreement on Safeguards, which explicitly prohibited managed trade and voluntary export constraints".[660] Switzerland "questioned the WTO-compatibility of the recently imposed export tax on lumber and asked why it had not been notified to the WTO." [661] Japan asked for Canada's view on whether the softwood lumber Agreement with the United States was compatible with the Agreement on Safeguards.[662] Canada responded obliquely that, "it did not believe that the softwood lumber Agreement with the USA would be challenged by its trading partners as being WTO-inconsistent".[663]

---

[659]WT/TPR/M/22, p. 16, para. 67.

[660]WT/TPR/M/22, p. 8, para. 28.

[661]WT/TPR/M/22, p. 8, para. 39.

[662]WT/TPR/M/22, p. 18, para. 77.

[663]WT/TPR/M/22, p. 17, para. 69.

Concerning local content requirements, the second discussant queried, "[h]ow could the local-content requirements maintained by several provinces be considered compatible with GATT Articles III and XI and the [*Agreement on Trade-Related Investment Measures* (the *"TRIMs Agreement"*)]?"[664] Switzerland noted, "[i]n certain provinces, exploitation and marketing of natural resources was conditional on local processing criteria. In Ontario, local grapes had to be purchased in order to import wine. These measures might not be WTO-compatible".[665] Japan "questioned the compatibility of local-content measures for timber, ores and minerals, wine and audio-visual products with the provisions of the TRIMs Agreement".[666] The United States observed that "discriminatory measures" continued to affect, *inter alia*, magazine publishing. A WTO panel was currently investigating these policies.[667] Canada responded to these statements by asserting, "[l]ocal content requirements in the publishing and audio-visual industries concerns services and, hence, were covered by [the *General Agreement on Trade in Services*] rather than the TRIMs Agreement. The provincial requirements regarding timber, ore and minerals, and wine were not inconsistent with the obligation of national treatment and did not impose quantitative restrictions on imports".[668]

---

[664]WT/TPR/M/22, p. 8, para. 29.

[665]WT/TPR/M/22, p. 11, para. 42.

[666]WT/TPR/M/22, p.12, para. 51.

[667]WT/TPR/M/22, p. 13, para. 5. In this dispute (*Canada - Certain Measures Concerning Periodicals*, WT/DS31), the panel report, WT/DS31/R, as modified by the Appellate Body report, WT/DS31/AB/R, was adopted on 30 July 1997. Canada's policies were found to infringe Articles III:2 and XI of the *GATT 1994*.

[668]WT/TPR/M/22, p. 21, para. 96.

The EC considered Canada's use of certain geographical indications of wines and spirits as generic was in contradiction of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the *"TRIPs Agreement")*.[669] In response, Canada stated that its criteria were "in accordance with" the *TRIPs Agreement*, and that the scope of protection was "consistent with" the standstill provision in the *TRIPs Agreement.*[670]

Finally, responding to a question on the reform of *SIMA* regarding anti-dumping investigations and reviews, Canada asserted that certain changes,

> ...were to ensure that the revised requirements of the WTO Agreement on Anti-Dumping were fully reflected and that full details were made available to investigating authorities. The investigations, that had led to the imposition of anti-dumping duties on imports from Korea were quasi-judicial in nature and *in complete conformity with GATT/WTO disciplines*".(emphasis added)[671]

A similar interest in the WTO-consistency of certain trade measures is evident in the comments of the discussants and the statements by the Members in the Trade Policy Review of the United States. The discussion included numerous criticisms of the unilateral use of trade policy instruments for non-trade-policy objectives. In this context, the discussion focused in particular on the "Helms-Burton Act" and the Iran-Libya Trade Sanctions Act (or "D'Amato Act"), as well as on the extra-territorial use of environmental

---

[669]WT/TPR/M/22, pp. 11-12, para. 47.

[670]WT/TPR/M/22, p. 23, paras. 105-107.

[671]WT/TPR/M/22, p. 21, paras. 92-93.

standards applied to impose embargoes on imports of tuna and shrimp.[672] The discussants and Members strongly questioned the WTO-consistency of these measures.

With reference to the Helms-Burton legislation, the first discussant commented that it was a "matter of grave concern for many U.S. trading partners...As the matter had already been raised in the Dispute Settlement Body, the formal and legal discussion of this matter was left to this body".[673] The EU observed that "bilateral relations between the United States and the European Union had recently been soured by the Helms-Burton Act and the D'Amato Act" and that "these developments were unacceptable".[674] The delegate from Cuba "invited the U.S. delegation to comment on the unilateral economic and financial blockage of Cuba for over 35 years as well as the strengthening, deepening and amplification of its extraterritorial measures through the Torricelli Act in 1992, and thereafter by the so-called Helms-Burton Act in early 1996"[675] and "inquired specifically about the WTO compatibility" of the legislation.[676] The representative of Canada stressed that the Helms-Burton legislation was "regarded very seriously" by Canada and other U.S. trading partners and urged the United States to repeal this legislation. Numerous other

---

[672]For the complaint under the *Dispute Settlement Understanding*, see *United States - Import Prohibition of Shrimp and Shrimp Products*, complaint by Malaysia, Thailand, Pakistan and India, WT/DS58. A consolidated panel was established with respect to the complaint by Malaysia and Thailand and the complaint by Pakistan on 25 February 1997. A panel was established with respect to the complaint by India on 10 April 1997, and was consolidated with the existing panel.

[673]WT/TPR/M/16, p. 9, para. 43.

[674]WT/TPR/M/16, p. 14, para 65.

[675]WT/TPR/M/16, p. 15, para. 69.

[676]WT/TPR/M/16, p. 39, para. 204.

delegations[677] expressed their concern with the unilateral and extraterritorial aspects of U.S. legislation. The delegate from Japan, "noted that the extraterritorial aspects of the Helms-Burton Act and the Iran/Libya Sanctions Act were unacceptable under international law and could be inconsistent with commitments undertaken under the WTO...."[678] The representative of Mexico asked the United States about prospects for its elimination or repeal in the short-term "in line with international obligations".[679]

Concerning the United States import embargoes on shrimp and tuna, the first discussant observed,

> Although many acts had been changed by the Uruguay Round Agreements Act, the already noted tuna embargo was still there. Furthermore, environmental standards were unilaterally imposed on countries who wished to export shrimp to the United States and on countries which used large-scale drift nets. Although protection of turtles and other animals was a very laudable aim, the WTO consistency of these measures might be questionable...The discussant encouraged the U.S. Administration to find a solution so as to make these measures acceptable to U.S. trading partners.[680]

In a similar vein, the second discussant "noted the extra-territorial nature of environmental regulations" and "...observed that these regulations might be in violation of GATT/WTO Agreements...He invited the U.S. delegation to comment whether any initiative was foreseen

---

[677]Including Switzerland (p. 28, para. 138), Australia (p. 17, para. 79), Venezuela (p. 21, para.106), and the Slovak Republic (p. 30, para. 152). All references to WT/TPR/M/16.

[678]WT/TPR/M/16, p. 20, para 99.

[679]WT/TPR/M/16, p. 21, para. 105.

[680]WT/TPR/M/16, p. 9, para. 42.

such as an early abolition of measures, which would mitigate the impact of these regulations on the exporting countries."[681] The delegate from Australia "raised concerns about the 1 May 1996 unilateral embargo on the import of wild shrimp from countries that did not require the use of turtle excluder devices".[682] Mexico "invited the U.S. delegation to comment on the current status, and the short-term prospect for a solution in line with international obligations" of several issues, including the lifting of the tuna embargo.[683] Venezuela sought confirmation that the U.S. Administration would support necessary legislative changes to end the embargo on tuna imports.[684]

Responding to these comments and criticisms of Members concerning the Helms-Burton and Iran/Libya legislation, as well as the import embargoes on shrimp and tuna, the United States raised ongoing proceedings in the Dispute Settlement Body as a bar to further discussion of these issues within the TPRB. Thus, "[r]egarding the criticism from other delegations with respect to the so-called extra-territoriality of U.S. trade policy and its perceived application in recent legislation, such as the "Helms-Burton" Act, [the U.S. delegate] mentioned that these matters were the subject of WTO dispute settlement. Therefore he though [*sic*] it was not appropriate for him to discuss them any further in the Trade Policy Review Body".[685] The United States did not want to do anything

---

[681]WT/TPR/M/16, p. 11, para. 50.

[682]WT/TPR/M/16, p.17, para. 79.

[683]WT/TPR/M/16, p. 21, para. 105.

[684]WT/TPR/M/16, p. 21, para. 106.

[685]WT/TPR/M/16, p. 37, para. 191.

that might disturb the process of conciliation under the *DSU*.[686] Similarly, the United States "did not discuss shrimp and turtle policies as they were the subject of dispute settlement and he did not want to do anything to impair that process".[687]

Members addressed several other areas of contention in their review of the United States. For example, numerous delegations expressed concern about U.S. rules of origin in the textiles and clothing sector and their compatibility with the *Agreement on Rules of Origin*.[688] The United States responded to these concerns with a detailed account of its policy reforms in the textiles and clothing sector and an assertion that its system of rules of origin "was completely transparent, and brought the overwhelming majority of its rules into line with those used by other major importing countries".[689]

This examination of the minutes of the trade policy review meetings of Canada and the United States show that the concept of law and legal obligation play a role in the trade policy review process. The minutes reveal a strong concern with the WTO-inconsistency of certain contentious measures on the part of the discussants and the WTO Members. However, the responses to these concerns by the Member under review demonstrate the continued weakness of the TPRM as an instrument for the enforcement of compliance with the *WTO Agreement*. The Member under review generally declined

---

[686]WT/TPR/M/16, p. 40, para. 218.

[687]WT/TPR/M/16, p. 46, para. 252.

[688]WT/TPR/M/16, p. 24, para. 115; and p. 28, para. 137.

[689]WT/TPR/M/16, p. 48, para. 265.

to engage in meaningful legal debate concerning the consistency of a measure with the relevant provision of the *WTO Agreement.* The ordinary response to an allegation of inconsistency was either an unsupported assertion of legal consistency, or a refusal to address the legal intricacies of the measure within the TPRB. The Member under review preferred to deflect any discussion of the WTO-consistency of measures that were the subject of dispute settlement proceedings so as not to interfere with the *DSU* process

D. The TPRM As An International Surveillance Mechanism

As noted,[690] from a legal perspective, the substantive nature of an international supervisory mechanism may be assessed with respect to its performance of three functions: a review function, a corrective function and a creative function.[691] The review function lies in assessing the consistency of a national policy with an international legal norm. The corrective function lies in recommending changes in a national policy when a review exposes inconsistencies between it and an international rule. The creative function consists of supplying supplemental interpretations for a general legal rule so as to apply it to a particular case.

---

[690] *Supra*, Chapter 1.

[691] Van Hoof and De Vey Mestdagh, *op. cit*, note 42 at 11.

I. Review Function

One of the original and primary purposes of the TPRM is to promote the smoother functioning of the multilateral trading system through "improved adherence" by all WTO Members to WTO rules, disciplines and commitments.[692] However, the TPRM Agreement also makes it clear that the TPRM is not to "serve as a basis for the enforcement of specific obligations under the Agreements, or for dispute settlement procedures," or to impose additional policy commitments on Members.

The TPRM performs a limited kind of review function. The standard used in the TPRM's review is not specifically the conformity of national legislation and policies with the *WTO Agreement*, but rather the impact of a Member's trade legislation and practices on the international trading system. The TPRM does not review Member state conduct in relation to a stringent international legal norm, and does not conduct a precise legal assessment of whether a Member is complying with its WTO obligations. Nevertheless, an examination of the impact of policies on the trading system could also include an assessment of the effect of policies that are inconsistent with the *WTO Agreement*.

---

[692]"Functioning of the GATT System" BISD 36S/403 (1990); TPRM Agreement, para. A(i).

The Secretariat Report is sometimes critical in tone, and identifies areas of national legislation or policies which are detrimental to the multilateral trading system. However, the Secretariat Report does not identify the specific aspects of national legislation and policies that are inconsistent with the international legal norms set out in the *WTO Agreement*. Despite its predominantly descriptive nature and the relative deference and lack of intrusiveness of its inquiry, the very existence of a Secretariat Report prepared on the Secretariat's own responsibility nevertheless adds to the credibility and neutrality of the review process. The fact that the review is not based solely on a subjective Government Report of the Member under review introduces a clear supranational and institutional aspect to the review process. It underscores the systemic interest and the common interest of the WTO Membership in enhanced transparency to promote coordination and rule-adherence among WTO Members in the face of increased economic interdependence.

The TPRM serves primarily as an instrument for the economic assessment of the national laws and policies of WTO Members. This is underlined by the composition of the TPR Division of the WTO Secretariat, which is staffed by economists, rather than by lawyers. The criteria underlying the review are predominantly economic, rather than legal.[693] It reviews "policy" rather than "legality". Nevertheless, the statements of Members

---

[693]Blackhurst, *op. cit.*, note 229, at 156. With respect to the application of economic criteria in the TPRM review, Blackhurst has noted: "the correspondence between GATT obligations and "good" economic policies is close enough that surveillance based primarily on economic norms would never stray far from the General Agreement".

in the trade policy review meetings demonstrate their concern with the WTO-consistency of a Member's legislation and policies. The TPRM is therefore a vehicle for the collective assessment of individual Members' trade policies on the basis of both economic and legal considerations. It results in increased transparency by allowing broad discussion and debate of a Member's trade policies and practices on the basis of the Reports of the Government and the Secretariat. While the Government Report is more a general and biased statement which indicates the overall direction of a Member's trade policy, the Secretariat Report gives a thorough overview and economic assessment of a Member's trade policies. To the extent that this increased transparency exposes trade policy conduct that is, or may be, WTO-inconsistent, the TPRM can be considered to perform an indirect "review" function.

II. Corrective Function

The TPRM does not have an explicit corrective mandate. The TPRM Agreement provides that the TPRM is not intended "as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures". Although the Secretariat Report may draw attention to certain aspects of a Member's trade policies that are a source of concern in the trading system, it does not advocate the removal of measures that are (or may be) incompatible with WTO rules. There is no binding legal avenue for enforcement of reforms of any non-compliant policies which may be exposed

during the review, except through subsequent resort to the dispute settlement mechanism by a WTO Member affected by the non-compliant measure.

Nevertheless, the TPRM review process has two additional aspects which may lead to correction of WTO-inconsistencies. First, the TPRM process allows other WTO Members to register their concerns regarding a Member's trade-related conduct, providing a forum to express criticism and to voice opposition to trade policies and actions which they deem WTO-inconsistent or unacceptable. This serves a dual purpose: on the one hand, it opens the trade policy review process to legalistic considerations and permits the exertion of peer pressure for reform within the existing legal framework. On the other hand, it establishes a foundation for future bilateral or multilateral negotiations among WTO Members by revealing policies and practices that are sources of concern. Such negotiations could either result in encouraging conformity of Members' policies with the existing legal framework, or in revising particular legal norms in the *WTO Agreement* in order better to accommodate certain trade policies.

The second corrective aspect of the TPRM lies in the fact that it creates a documentary archive as a permanent written record of the trade-related legislation and practices of each Member under review, as well as of the criticisms of these policies levelled by other Members. Other Members can rely on this written record in future debates and discussions in the various fora of the WTO. The record could also provide information for later use in negotiations among the WTO membership, or in a complaint under the

DSU. The knowledge that a written record of the review will be published, and that a further regular review will arrive as scheduled may encourage a Member towards WTO-compliance or at least towards convergence with the international norms in the *WTO Agreement*. To the extent that the TPRM exerts this kind of influence on the subsequent practice of Members under the *WTO Agreement*, it can be considered to perform a limited kind of corrective function.

What is the relationship between the TPRM and the dispute settlement mechanism? It is clear that the TPRM is intended to be a non-adjudicatory mechanism. It is not intended to serve any kind of direct dispute settlement function. It can, therefore, never be considered as a replacement for the WTO dispute settlement mechanism. Indeed, its specific de-linkage from dispute settlement procedures has consistently been emphasized as an essential feature that must be safeguarded.[694] Nevertheless, through its promotion of transparency, the TPRM can expose undesirable or unacceptable national legislation or policies and, through the exercise of peer pressure, thereby encourage Members to adapt their trade policy measures towards WTO-consistency. In this way, the TPRM furnishes an instrument to supplement the compliance and enforcement role performed by the WTO dispute settlement mechanism. As an institutionalized process for the regular exposure of non-compliance through assessments of individual Members' trade-related policies, the TPRM may decrease pressure on the dispute settlement mechanism. In providing

[694]TPRM Agreement, para. A, and WT/TPR/27, 28 October 1996.

a forum for the discussion of important trade policy issues, it may play a role in conflict avoidance by shedding light on areas of potential trade conflict.

At the same time, the TPRM's role in exposing policies that may be WTO-inconsistent allows Members to register their concern over the existence of such policies and to decide whether to challenge these under the dispute settlement mechanism. The trade policy review process therefore in no way detracts from the utility and effectiveness of the dispute settlement mechanism. On the contrary, it may even have the effect of increasing the tendency to resort to the WTO dispute settlement mechanism by exposing legislation or practices that may otherwise have remained unrecognized. It may also allow Members to gather evidence and supporting information for subsequent use to initiate a complaint under the *DSU*.

With respect to matters that are already the subject of a complaint under the *DSU*, the examination of the trade policy reviews of Canada and the United States shows that other Members may raise such matters and contest the WTO-consistency of such measures in the review meetings. In response, however, the Member under review may invoke the ongoing *DSU* proceedings as a bar to further discussion of such matters within the TPRB, and choose to leave the legal discussion of such matters to the procedures under the *DSU*. There is no obligation on the WTO Member under review to address comprehensively each and every challenge of WTO-inconsistency raised in a TPRM review, nor to undertake to remedy any measure that may be WTO-inconsistent. In its present

form the TPRM is therefore a weak corrective instrument for the discussion of international legal obligations and the enforcement of compliance with WTO obligations.

As Annex 3 to the *WTO Agreement*, the TPRM Agreement is the only Multilateral Trade Agreement that is not a "covered Agreement" as that term is used in the *DSU*. The provisions of the TPRM Agreement therefore cannot give rise to a complaint under the *DSU*. The TPRM can be distinguished from the dispute settlement mechanism in at least two fundamental ways. First, the WTO dispute settlement mechanism is invoked by a complaint of a WTO Member usually[695] alleging the inconsistency with the *WTO Agreement* of specific measures imposed by another WTO Member. By contrast, the TPRM is an institutionalized general multilateral surveillance process conducted by the WTO and its Members on a periodic basis, and is not based on the existence of any specific measure or set of facts. Second, if a complaint progresses all the way through the WTO dispute settlement system, it results in an adopted panel report (and possibly an Appellate Body report) that is legally binding upon the parties to the dispute and subject to specific procedures concerning implementation and enforcement. By contrast, the results of the TPRM – the Government and Secretariat Reports and the minutes of the review meetings – are published, and noted by the Ministerial Conference. The TPRM process stops there. It does not create additional legally binding rights or obligations for the Member concerned.

---

[695]Claims of non-violation nullification and impairment are also permitted under Article XXIII:1(b) and (c) of the *GATT 1994* and the *DSU*, as well as by those Agreements that refer to these provisions. The *GATS* has a special provision concerning non-violation nullification or impairment: Article XXIII:3.

Within the four corners of the TPRM, there is no way to compel a WTO Member to bring any inconsistent policies that may be revealed in the course of a TPRM review into WTO-compliance. Moral suasion is the only available instrument for encouraging compliance within the TPRB. Resort to the WTO dispute settlement mechanism by formally requesting consultations remains the only vehicle for the adjudication of the WTO-consistency of national legislation and practices, and for attaining a legally binding decision on the non-compliance by a WTO Member with provisions of the *WTO Agreement*. True legally binding "correction" within the WTO therefore occurs only under the *DSU*.

III. Creative Function

The TPRM is not explicitly endowed with a creative function. It may, however, give rise to informal interpretations of WTO provisions. Even though the quality of legal debate within the TPRB may not be high, the assertion that a certain policy is or is not consistent with a provision of the *WTO Agreement* connotes an implicit interpretation of that provision.[696] In this way, the Member under review may offer its interpretation of certain WTO rules, and the views of other Members expressed in the review meetings and recorded in the minutes may reveal their understanding concerning the interpretation of certain WTO rules. This exchange may lead to the development of common approaches to certain WTO provisions.

---

[696]Mavroidis, *op.cit.*, note 100 at 409 states: "The mere decision whether to apply a rule to a specific case requires interpreting whether that rule is indeed applicable to the particular case".

However, the WTO Secretariat does not possess the formal authority to develop interpretations of WTO rules in its Report. There is no express authority in the TPRM Agreement for rendering definitive or legally binding interpretations of provisions of the *WTO Agreement*.[697] The fact that the TPRM "is not to impose new policy commitments on Members" can be taken as an additional factor discouraging any interpretive or creative role for the TPRM. By the express terms of the *WTO Agreement*,[698] the competence for adopting authoritative interpretations of the *WTO Agreement* is exclusively reserved to the Ministerial Conference and the General Council. Resort to these decision-making procedures under the *WTO Agreement* remains the only way to attain an authoritative interpretation of the *WTO Agreement*.[699] True *de jure* "creativity" therefore occurs only under the decision-making provision for interpretations by the Ministerial Conference and General Council under Article IX.2 of the *WTO Agreement*; *de facto* creativity occurs in the dispute settlement process. While trade policy review documentation is forwarded to the Ministerial Conference, which "takes note" of it, it is doubtful that the Ministerial Conference would intend this activity to constitute an adoption of a definitive interpretation of a provision of the *WTO Agreement*.

---

[697]Mavroidis takes another view, arguing that the creative function of a surveillance scheme is not to be confused with the enforceability of its suggestions. See Mavroidis, *op. cit.*, note 100 at 393.

[698]*WTO Agreement*, Article IX.2.

[699]Although panels and the Appellate Body "clarify the existing provisions of [the covered Agreements] in accordance with customary rules of interpretation of public international law" (*DSU*, Article 3:2), this activity is not of the same nature as a definitive interpretation within the meaning of Article IX.2 of the *WTO Agreement*. See *e.g. Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, adopted 1 November 1996, p. 13.

E. Summary Observations

The TPRM has now been in operation for over 7 years. In the first 7 years of its existence, 57 Members, accounting for 98% of all Members' trade in goods and services, had their trade policies reviewed (some several times).[700] The TPR process places relatively large demands on the time and resources of the WTO Secretariat. In 1996, the Trade Policy Review Division of the WTO Secretariat had 27 positions (including 17 professionals), accounting for about 10% of the total staff of the Secretariat, and the research and preparation of the reports for trade policy reviews accounted for about 6% of the WTO annual budget.[701] While WTO Members have made proposals for procedural improvements,[702] they have not formally contested the fundamental nature and rationale of the trade policy reviews.

The TPRM produces assessments of developments in Members' trade policies and practices for the benefit of the WTO membership. It provides a pragmatic forum for the peer review, discussion and criticism of the full range of trade policies of a Member. Its primary function is to increase the transparency of a Member's trade policy-making at both the international and domestic levels. At the international level, the increased transparency allows WTO Members to obtain information to keep abreast of

---

[700]WT/TPR/27, 28 October 1996.

[701]WT/TPR/27, 28 October 1996.

[702]See L/7458; WT/TPR/13, 13 December 1995 and WT/TPR/20, 19 July 1996.

pertinent legislative and regulatory developments and their effect on trade policy and allows Members to register their concerns.

At the domestic level, increased transparency of national trade policies improves the quantity and level of information and makes participants in the domestic policy-making process more aware of the costs, benefits and other implications of trade policy measures. The TPR process is valuable for national policy-making, as it offers an independent assessment of trade and economic policies. This "internal audit" [703] function can assist individual Members in the domestic review and consideration of policy options and reforms. This can be particularly valuable for developing and least-developed countries, which may lack the resources to conduct such an assessment independently. The TPRM Agreement stops short of imposing any mandatory requirements concerning institutional arrangements for the promotion of transparency within the domestic orders of WTO Members, leaving Members to implement voluntarily the domestic arrangements they deem appropriate.

Currently, the TPRM is therefore primarily an instrument for the promotion of transparency. Its quasi-legal role in encouraging compliance with the *WTO Agreement* is a weaker, secondary function. As an international surveillance mechanism, it only partially performs a review, corrective or creative function. It would be disappointing

---

[703] WT/TPR/27, 28 October 1996.

to a lawyer searching for a legally effective instrument for enforcing compliance. Nevertheless, it is not completely misguided to examine the TPRM from a legal perspective.

Along with shedding light on domestic policies and practices, the TPRM provides an opportunity for their appraisal in relation to the international norms of the *WTO Agreement*. It does not consist of a rigorous legal review of the legislative or administrative measures against the legal standard of the *WTO Agreement*. It may, however, reveal WTO-inconsistent or unacceptable policies, allowing for the early identification of such measures to provide advance warning of areas of potential trade conflict. This may provide fodder for two actions: (i) subsequent resort to supervision through dispute settlement under the *DSU;* or (ii) subsequent negotiations among WTO Members in order to encourage reform of policies that give rise to concerns, or to achieve revisions of the legal framework in order better to accommodate such policies.

The Government Report is chiefly a rhetorical exercise, giving a general overview of the trade-related policies espoused by the Member under review. It serves a kind of "due process" objective, permitting the Member concerned to describe and promote its trade policies before these policies are placed under scrutiny. The Secretariat Report is descriptive in nature, enumerating trade policies without analyzing the compatibility of a Member's policies with its WTO obligations. The Secretariat Report makes note of policies that are, or may become, the source of tension in the multilateral trading system. The statements of the discussants and of Members in the trade policy review

meeting demonstrate a strong concern with the WTO-inconsistency of certain measures. However, the responses to these concerns by the Member under review show that the TPRM has not yet developed into a forum for profound legal discussion and debate concerning the WTO-consistency of a Member's trade policies or for the enforcement of compliance with the *WTO Agreement*. The Member concerned will often defend its policies by merely asserting their consistency with the relevant provision of the *WTO Agreement*, without providing a reasoned explanation. In addition, the fact that a measure is the subject of a dispute under the *DSU* often cuts short the discussion of the matter within the TPRB, as the formal and legal consideration of the matter is deemed to be more appropriately within the purview of the DSB.

The TPRM process does not produce a legally binding outcome, but rather results in general comments by way of assessment and evaluation. The Secretariat Report does not contain any recommendations or proposals for making policies more WTO-consistent. While Members in the trade policy review meeting ask whether the government concerned intends to withdraw certain measures, or how the government intends to make certain policies more WTO-consistent, the Government Report and the statements by the Member concerned in the trade policy review meeting do not constitute legally binding undertakings to reform or revise policies in response to criticism that may emerge in the TPRM process. Nevertheless, the increased awareness of the positions of other Members, and the exertion of peer pressure to encourage changes to unacceptable or WTO-inconsistent policies, may lead to the voluntary modification of a Member's policies. In encouraging

such modifications, the TPRM plays a quasi-legalistic role in promoting compliance with WTO obligations. Not a direct legalistic vehicle for the *enforcement* of WTO obligations, the TPRM may nevertheless be considered an indirect mechanism to *encourage* compliance by increasing transparency and furnishing a forum for discussion and criticism.

As an additional forum for interaction among Members within the WTO, the TPRM also increases the involvement of Members, particularly developing and least-developed countries, in the institutional processes of the WTO. It encourages them to implement policies that are consistent with WTO disciplines.

The possibility remains that the TPRM could still evolve into a more legalistic surveillance mechanism, with more emphasis on the enforcement of compliance with WTO obligations. A move toward greater legalism would be spearheaded by revisions to the tone and content of the Secretariat Report, which would have to become more critical and analytical, containing more legal commentary and analysis. The Secretariat would have to enjoy greater autonomy and broader powers of research and investigation in preparing its Report. The Secretariat might also be vested with a capacity to develop interpretations of the *WTO Agreement* in order that it might assess the compatibility of Member policies with their international obligations and propose avenues for reform. The standard of review would have to become more clearly one of consistency with the *WTO Agreement*. Members under review would have to engage in legal debate concerning the WTO-consistency of policies. Such legalistic developments are not provided for in

the TPRM Agreement in its current form. However, the TPRB is obligated to appraise the TPRM not more than 5 years after the entry into force of the *WTO Agreement* and to present the results of its appraisal to the Ministerial Conference.[704] Ultimately, any move towards a more legalistic surveillance mechanism will depend upon the willingness of WTO Members to use the trade policy review process aggressively and constructively, and upon the readiness of the Member under review to heed the policy criticism levelled during the review process and to undertake policy reforms in accordance with this criticism. In concert with the other supervisory mechanisms within the WTO, the TPRM could evolve into a more effective tool to cope with the challenges posed by the increasing interdependence of the economies of WTO Members.

[704]TPRM Agreement, paragraph F.

Chapter 7

Conclusion

The *WTO Agreement* is the integrated legal foundation -- the "constitution" -- of the international trading system. It sets out the legal order and institutional framework for the conduct of international trade. It provides decision-making arrangements for creating new or amended rules to supplement the basic treaty rules. It also contains supervisory mechanisms for the development, surveillance and enforcement of the substantive rights and obligations set out in the annexes to the Agreement. Supervision of the operation of the Agreement occurs both through multilateral trade policy surveillance in the Trade Policy Review Mechanism (TPRM) and through dispute settlement under the *DSU*.

The *WTO Agreement* constitutes a legal and institutional response to increasing international economic interdependence. As an expression of the common interest of WTO Members in designing a more robust legal framework to govern their commercial interaction, it is an illustration of the current state and potential of international economic law.

The legal and institutional arrangements that Members have incorporated into the *WTO Agreement* to regulate their trading relations are an articulation of the re-conceptualization of "sovereignty" in international economic law. In certain ways, they manifest the new possibilities in institutionalization and constitutionalization ushered in by the international economic law "revolution".

In international economic law, a new definition of "sovereignty" is emerging. "Sovereignty" can be taken to mean "decision-making authority" or "responsibility". It can be deemed a fungible quality that may be allocated between member states and an international organization. Interdependence has both compelled and enabled states to allocate a degree of decision-making authority to the international level and to conduct decision-making and supervision in a manner that recognizes their common interest in ensuring the effective operation and development of an international organization to regulate their interaction. While this transferral of sovereignty reduces the international legal autonomy of the state, it simultaneously increases the influence of the state over the conduct and policies of other states in the system. In an interdependent international legal order, the costs of diminished legal autonomy are far outweighed by the benefits derived from the enhanced ability to influence the conduct of other states through an international organization. All states benefit from the certainty, predictability and fairness promoted by an effective supranational legal framework. In this sense, a

strong supranational legal order with authority to administer, develop, supervise and enforce the applicable international legal rules is not irreconcilable with sovereignty. Rather, it is the very exercise of the sovereignty that states have jointly allocated and pooled at the supranational level.

In conjunction with this re-conceptualization of sovereignty, international economic law has introduced new possibilities for institutionalization in the international legal order. In particular, it allows the development of supranational institutional mechanisms that are more legalistic in nature. Because such legalistic mechanisms are less dependent upon the will of individual states, they serve to protect and promote the interests of the collective will of the states in the system. This increased legalism has not eradicated more pragmatic forms of state interaction, but rather supplements them in certain specific contexts.

The *WTO Agreement* has introduced a degree of formal supranationalism and legalism that is unprecedented in international law. Law and legal obligation now play a more significant role in the creation, application, surveillance and enforcement of the international legal rules contained in the *WTO Agreement* than ever before in the international trading system. The potential for supranational rule-creation through decision-making and adjudication, and the degree of supranational legal authority for

rule-application and rule-enforcement through the supervisory mechanisms of the Organization, are at the forefront of the international economic law "revolution". The more legalistic international trade order created by the *WTO Agreement* entails a significant transferral of sovereign authority from the state to the supranational level in certain areas. The reforms introduced by the *WTO Agreement* increase the normative force of GATT/WTO law, and demonstrate that, in certain areas, international economic law is moving from "cooperation" towards more "coercive" forms of legal interaction that are less dependent on the consent of states. This is particularly evident in the binding and enforceable supranational adjudication available under the *DSU*.

However, there are varying degrees of supranational legal authority in the WTO system. The high degree of formal legalism and supranationalism is tempered in certain areas, either by the express terms of the Agreement, or by the practice of Members. Thus, pragmatism and cooperation still co-exist with more coercive legal mechanisms. This is evident in decision-making under the Agreement; in surveillance under the TPRM; and in the continued possibility for dispute settlement through consultations and through non-coercive methods of third-party adjudication (such as good offices, conciliation and mediation) under the *DSU*. Still, the cooperative nature of the practice that has developed in certain areas can only function effectively with the assurance of the strong supranational legal framework in the background.

legal order and institutional framework

The *WTO Agreement* creates an integrated legal order and a common institutional framework to regulate trade among WTO Members. It establishes the WTO as the first *de jure* international trade organization. It sets out the relationship between the Members and the organization, and formally establishes the degree to which Members have transferred sovereign powers to the organization. The WTO has a formal supranational identity and supranational legal authority.

The creation of the WTO represents a symbolic break from the previous *GATT 1947* legal system. Beyond this symbolism, however, it also has legal significance and consequences. The *WTO Agreement* superseded the *GATT 1947* and introduced an entire new legal regime with significant innovations remedying many of the systemic defects that plagued the *GATT 1947*. The changes introduced serve legal clarity and institutional certainty through precise and explicit provisions for the institutional structure and functions of the Organization, and the clarification of the relationships between the various legal instruments constituting the WTO *Agreement*.

The WTO now administers an integrated and unified set of legal instruments pertaining to trade in goods and services, and trade-related aspects of

intellectual property, that apply equally to all Members as a single undertaking. This terminates the legal fragmentation of the previous *GATT 1947* legal system. Unlike the *GATT 1947*, the *WTO Agreement* has definitive application. With one limited exception, there are no more grandfathered rights derogating from the obligations in the covered agreements. There is, therefore, an emphasis on legal uniformity and certainty in the supranational legal framework.

The *WTO Agreement* contains explicit provisions indicating its relationship with the previous *GATT 1947* system. The incorporation by reference of the text of the *GATT 1947* stresses consistency and continuity with the past. At the same time, interest in developing the WTO legal system and maintaining its integrity and coherence in the future is evident in the explicit interpretive guidance given in the Article XVI.3 of the *WTO Agreement* and in the *General interpretative note to Annex 1A* concerning the legal relationships among the various legal instruments constituting the Agreement in the event that interpretive conflicts arise. These interpretative guidelines ensure that the provisions in the *WTO Agreement* concerning decision-making and rule-creation (including amendments, waivers, and interpretations) apply throughout the WTO legal system, and that the provisions of the *GATT 1994* apply only to the extent they have not been modified by the provisions of the other Multilateral Trade Agreements. This integrated legal order, bolstered by interpretive rules, provides a

viable legal framework for the application and development of the legal norms contained in the *WTO Agreement*. The crucial feature of this legal order -- the single undertaking -- must be retained as the legal order develops in order to preserve the consistency and coherence of Members' legal obligations.

The WTO is the first full-fledged and permanent international trade organization, with its own secretariat and organizational infrastructure. This is a formal contrast to the *GATT 1947* as a provisionally-applied treaty, surrounded by a network of side agreements and other legal instruments, and supported by a series of *ad hoc* arrangements and a Secretariat borrowed from the Interim Committee for the International Trade Organization (ICITO). With its institutional structure, functions and international legal personality explicitly established by its constitutive treaty, the WTO provides a stronger supranational institutional framework for the development, application, monitoring and enforcement of international legal norms in the trade sphere.

The WTO is competent to act as an international supervisory mechanism through administration of the Trade Policy Review Mechanism and the dispute settlement mechanism. The WTO is also competent to act as the exclusive institutional framework for the implementation of the annexed agreements; and as a non-exclusive forum for further rule-creation through trade-related negotiations among Members on

matters not currently within the scope of the Agreement. This non-exclusivity is unfortunate: it would be better to have all trade-related international agreements that are developed in the future housed under one institutional roof. One international trade-related agreement that is currently being negotiated outside the WTO framework is the Multilateral Agreement on Investment, under the auspices of the OECD (although there appears to be an intention to move this within the WTO eventually).

In addition, the WTO is an autonomous entity in the international legal order to coordinate with other international organizations with a view to achieving greater coherence in global economic policy-making. The WTO's international legal personality and specific mandate give the organization a formal legal platform on which to base its external relations with other international organizations and to act in the international legal order. On the basis of this platform, and of its mandate to promote greater coherence in global economic policy-making, the WTO has negotiated and concluded agreements with the IMF and the World Bank. The manner in which these agreements were negotiated and concluded, and in which they are being implemented, gives a significant degree of supranational institutional autonomy and authority to the WTO Secretariat. The WTO Secretariat has also concluded a cooperation agreement with the international bureau of WIPO.

decision-making and rule-creation

The *WTO Agreement* provisions on decision-making and rule-creation are more precise than those that were contained in the *GATT 1947*, and they clarify the existence of certain decision-making powers (*i.e.* the power of the Organization to adopt binding interpretations of the *WTO Agreement*).

The unified and integrated nature of the WTO legal system means that the executive organs of the Organization -- the Ministerial Conference and the General Council -- have comprehensive decision-making competence spanning all of the matters covered by the *WTO Agreement* and all of the Multilateral Trade Agreements. Each body is composed of all WTO Members. These factors allow consistency and coherence in WTO decision-making and rule-creation. They also allow Members to assume a wider, systemic perspective on multilateral trade issues. The fact that linkage and integration of multiple issues can occur within one decision-making organ is useful in the event that contentious issues cannot be resolved in the specialized subsidiary councils and committees. As the General Council also convenes as the DSB and the TPRB, the comprehensive perspective and integrated approach that characterize the rule-making and executive functions are also carried over to the supervisory functions of the organization. The rules of procedure of subsidiary bodies recognize the utility of this

comprehensive competence, and of the importance of consensus: they provide that, if a decision cannot be made by consensus in one of the bodies, the matter is to be forwarded to the General Council.

The creation and regular convening of the Ministerial Conference ensures the involvement of high-level political representatives from WTO Member states in the WTO decision-making and rule-creation process. This will promote active interaction between domestic political systems and the international process of rule-development. It will encourage prompt and thorough implementation at the domestic level of the decisions and initiatives adopted at the international level.

The practice of decision-making by consensus persists, and has been codified, under the *WTO Agreement*. In most cases, consensus is a practice that is a first alternative to voting: where consensus cannot be achieved, the matter is put to a simple majority vote. In other cases, consensus is a requirement with no alternative. The prevalence of consensus decision-making safeguards the international legal autonomy of WTO Members by ensuring that they retain their ability to influence the outcome of each decision and that they will not be bound by a decision of the Organization which they did not support.

The possibility that most matters will be put to a formal simple majority vote in the event consensus cannot be achieved signals a theoretical readiness on the part of WTO Members to transfer some sovereign authority to the supranational level in order to facilitate rule-development by the Organization. However, as under the *GATT 1947*, in practice, it is likely that most matters will continue to be decided by consensus and not be submitted to a formal vote under the *WTO Agreement*. The supranational decision-making procedures labour under the threat that certain politically powerful states may refuse to comply with a decision that was adopted by majority vote without their specific endorsement. This would deal a grave blow to the effectiveness of the Organization. Law and legal obligation therefore play a secondary role in the ordinary decision-making procedures of the WTO.

One fundamental type of rule-creation that is subject to the practice of consensus decision-making is the development by the Ministerial Conference of entirely new international legal rules, both within the current parameters of the *WTO Agreement* as well as beyond these parameters. Each Member therefore retains the authority to influence the future evolution of the organizations's agenda and work programme. One option that circumvents the requirement of consensus for rule-creation in the Ministerial Conference is the negotiation of a specific sectoral side-agreement among a limited group of interested states, such as the Information Technology Agreement (the "ITA")

recently concluded at the Singapore Ministerial Conference in December 1996. Although it involves modifications to *GATT 1994* tariff schedules for certain Members, the ITA is a limited-membership agreement with no formal legal status under the *WTO Agreement*. It is not part of the single undertaking. While such side agreements offer the possibility for interested states to proceed with trade liberalizing agreements, they also undermine the WTO single undertaking, thereby raising the spectre of fragmentation of the WTO legal system. This should be rigourously avoided. The possibility exists for such agreements to be incorporated as a Plurilateral Trade Agreement into Annex 4 of the *WTO Agreement*, by a consensus decision among all WTO Members. It would be preferable to amend the *WTO Agreement* and integrate them into the existing legal order as a Multilateral Trade Agreement.

The growing number and diversity of WTO Members may eventually render the achievement of consensus impossible, and the Members may have to design new, more streamlined, decision-making procedures. One possibility is the creation of an executive steering group to guide the future work of the Organization. As such a steering group would consist of a small group of states, it could connote a greater transferral of sovereign authority from the Members to the WTO if the body were endowed with definitive powers of rule-creation. However, no concrete proposals have been made, and it is not clear that the WTO membership would be prepared to accept the

establishment of a select steering committee. If it were established, it would most likely not possess final rule-creating competence. It would likely be consultative in nature, with the authority merely to recommend approaches for the future work of the Organization.

In theory, the special decision-making rules existing for certain rule-creating procedures --such as amendments, interpretations, waivers and accessions -- represent a transferral of decision-making authority from the Members to the Organization. They permit a Member to be bound by a decision to which it did not formally consent on the basis of either a two-thirds or three-quarters majority of votes cast. However, in practice, each of the rule-creating procedures examined contain safeguard mechanisms to guard against this eventuality. For example, the amendment provisions do not eliminate the right of a state to choose whether it wishes to accept new substantive obligations under the Agreement, although this right is subject to the assent of the Ministerial Conference for certain types of amendments. An interpretation amounting to an amendment will not bind a state without its consent. In practice, consensus is sought for waivers and accessions before the matter is put to a formal vote. The same practice will presumably apply to interpretations. With respect to accessions, the possibility exists for a Member not to apply the *WTO Agreement* and the agreements in Annexes 1 and 2 with respect to an acceding Member.

These safeguards render it less likely that a WTO Member will be bound by a rule-creating decision taken by the Organization without its assent. In practice, therefore, the special decision-making rules of the Organization do not represent as far-reaching an allocation of sovereignty from the Members to the international level, or as radical a curtailment of the international legal autonomy of the Members as the formal legal arrangements would indicate. While the WTO has broad powers to administer and oversee the process of international trade, and, on paper, to create new legal obligations for all Members on the basis of a qualified majority vote, its powers of decision-making and binding rule-creation in practice reveal that states have retained no small influence over the evolution of their international trading obligations. The benefits of pooling sovereign authority at the international level in the trade sphere in order for each state to gain influence over the activities of other states have clearly been recognized in the establishment and explicit institutional design of the WTO. However, the practice of WTO Members that has evolved with respect to decision-making demonstrates that states are as yet unwilling to cede to the international level their ultimate discretion and autonomy to consent to developing the architecture of the legal system that will govern them.

By the express terms of the *WTO Agreement*,[705] the competence for adopting authoritative interpretations of the *WTO Agreement* is exclusively reserved to the Ministerial Conference and the General Council. Resort to these decision-making procedures under the *WTO Agreement* remains the only way to attain an authoritative interpretation of the *WTO Agreement*. The TPRM "is not to impose new policy commitments on Members". Similarly, under the *DSU*, recommendations and rulings of the panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements". These statements seem to eradicate the possibility for any formal or explicit rule-creation role for the supervisory mechanisms of the WTO. The fact that the exclusive authority to adopt legally binding interpretations of the Agreement rests with the political organs of the WTO, rather than with panels and the Appellate Body, is an additional demonstration of the desire of Members to retain control over the development of WTO rules. Binding interpretations may only be developed through negotiation and decision-making by Members (in practice, first through consensus by all Members), rather than through supranational adjudicatory procedures in which not all Members participate.

Despite the exclusive granting of rule-creating authority to the political organs of the organization, given the difficulties associated with rule-creation through

---

[705] *WTO Agreement*, Article IX.2.

interpretations, amendments, waivers and accessions by way of special decision-making under the *WTO Agreement*, it seems likely that the balance for rule-creation in areas already governed by the covered agreements may shift away from the political organs of the WTO and towards the judicial mechanisms of the *DSU*. Rather than attempting to re-negotiate, amend, or fine-tune the basic treaty rules, Members may prefer to permit the dispute settlement process to place a gloss on particular rules by developing accepted informal interpretations of those rules. The adjudicatory bodies articulate principles that guide and shape the conduct of WTO Members. The "legal fiction" that panel and Appellate Body reports do not constitute legally binding interpretations of the *WTO Agreement* or binding legal precedents that subsequent panels and the Appellate Body must follow is useful. It allows the evolution and development of legal principles that bolster systemic security and predictability by supplementing the basic legal norms. At the same time, it maintains the illusion of flexibility, and of a minimal transferral of Member state decision-making/rule-creation authority to the international level. The express *DSU* stipulation that the results of the dispute settlement process cannot affect the rights and obligations of WTO Members bolsters this perspective, constituting an additional safeguard against definitive "legally binding" rule-creation by panels and the Appellate Body.

Supervision: dispute settlement and trade policy review

Supervision in an international organization promotes compliance by states with the international legal obligations governing the organization. An effective legalistic supervisory mechanism assesses state conduct in relation to the relevant international norms ("review"), enforces compliance with these norms by requiring elimination of inconsistent conduct ("correction") and interprets the basic legal rules so as to apply them to a specific case ("creation").

The *WTO Agreement* contains two institutionalized supervisory mechanisms: multilateral trade policy surveillance occurs under the Trade Policy Review Mechanism, while dispute settlement occurs under the *DSU*. In designing the TPRM, the WTO Members revealed that they are not yet prepared to have a legalistic or coercive supranational surveillance mechanism with an explicit mandate for review, correction and creation. On the other hand, the dispute settlement mechanism serves the review, corrective and creative functions of international supervision. Beyond creativity in a specific dispute, however, panels and the Appellate Body also perform a significant informal rule-creation function that plays a vital role in the WTO legal system. While there is technically no *stare decisis* in the WTO legal system, a *de facto* system of precedent has developed. Panels and the Appellate Body refer to previous relevant

reports as persuasive guidance for the interpretation and application of the obligations contained in the covered agreements. Reliance on the accumulation of practice and legal experience embodied in prior panel reports promotes certainty and predictability in the system. Through this "judicial gap-filling", panels and the Appellate Body articulate rules and principles which guide the conduct of WTO Members, so that much of the trade-related behaviour of WTO Members occurs in the "shadow of the law".

The TPRM is not a legalistic supervisory mechanism that serves to enforce the legal obligations of Members under the *WTO Agreement.* While it may promote rule-adherence and identify problematic areas for future negotiations, the TPRM does not conduct an assessment of the consistency of Members' policies with WTO rules. Nor does it recommend that Members bring potentially inconsistent policies into conformity with the *WTO Agreement.* And although it permits Members to exchange views on their understanding of the meaning of provisions of the *WTO Agreement* and thereby produce informal interpretations of the Agreement, the TPRM process does not produce binding interpretations. Nor does it give rise to any binding legal obligations for WTO Members. It is not intended to serve any kind of dispute settlement function, and was purposely de-linked from the dispute settlement process. It cannot impose any new policy obligations on Members.

Rather, the TPRM is a primarily pragmatic instrument that serves the essential function of increasing transparency to allow WTO Members to obtain information about, and to understand, the trade policies of other Members. This is indispensable to the effective operation of the *WTO Agreement*, as uncertainty and misunderstanding can themselves act as barriers to trade. The TPRM's pragmatic means of increasing transparency has the secondary, quasi-legalistic function of identifying areas of potential trade conflict, exposing inconsistencies, and promoting compliance with the international legal norms in the *WTO Agreement*. While it does not enforce the legal obligations of WTO Members, it encourages compliance.

At first glance, the TPRM does not appear to entail a transferral of sovereignty from the Members to the Organization, or any exercise of supranational legal authority. However, submission to peer review and criticism of trade policies is an acknowledgement of the interdependence of the economies of WTO Members, and of the importance of a secure supranational legal framework for the conduct of international trade. The very existence of an international surveillance mechanism runs counter to the international legal autonomy of the state. Through exposure of domestic policies that may be WTO-inconsistent or that are considered unacceptable by other WTO Members, the TPRM provides a mechanism to encourage adherence to the international legal norms in the *WTO Agreement*. The TPRM is not a strong or intrusive supranational

enforcement mechanism, but the collective monitoring of individual Members' trade policies increases the security of WTO Members about participating in the WTO. It protects and promotes the interests of Members at the supranational level. The implicit focus of the TPRM process is on rendering national legislation and policies more compatible with international norms, thus highlighting the importance of the supranational legal framework.

In its present form, the TPRM is therefore a weak multilateral surveillance mechanism, although the possibility remains that the TPRM could still evolve into a more effective and legalistic surveillance mechanism, with more emphasis on the enforcement of compliance with WTO obligations. From a legal perspective, the TPRM, in its current incarnation, can only supplement the supervisory functions of the dispute settlement mechanism under the *WTO Agreement* by exposing legislation or practices that may otherwise have remained unrecognized. Members may then decide whether to challenge these measures under the *DSU*. The TPRM may also provide a vehicle for Members to gather evidence and supporting information for subsequent use to initiate a complaint under the *DSU*.

It is in the area of supervision through dispute settlement that the most significant advances have been made in international law. It is here that the "revolution"

in international economic law is most apparent. The extensive reforms contained in the *DSU* herald a trend towards legalism and judicialization that is unprecedented in international law. Six key developments, in particular, herald a move toward a more legalistic and robust system for the settlement of international disputes under the *WTO Agreement*. Each of these developments represents a reduction in the international legal autonomy of WTO Members and a transferral of a degree of sovereignty to the international level. At the same time, Members have gained the opportunity to exert more influence over the conduct of other Members through the stronger and more legalistic supervisory procedures under the *DSU*. The increase in the normative force of WTO law they introduce reflects the new direction in international economic law. The reforms achieve enhanced security and predictability that is essential in an interdependent international order.

First, the introduction of an integrated dispute settlement mechanism administered by a single body (the DSB) addresses the legal fragmentation and the jurisdictional problems encountered in the previous *GATT 1947* legal system and eliminates the possibility of forum-shopping. The *WTO Agreement* gives interpretive direction to panels and the Appellate Body to help them to establish the relationships among the covered agreements. They are to engage in the clarification of the covered agreements in accordance with customary international law principles of interpretation

set out in Articles 31 and 32 of the *Vienna Convention*, as well as with express guidance in the *WTO Agreement* concerning the legal relationships among the various covered agreements. These interpretive guidelines promote the consistent and coherent development of the integrated legal framework.

Second, the system introduced by the *DSU* is mandatory in nature. It mandates supranational capacity or authorization at essential points of the dispute settlement process. It explicitly prohibits unilateral determinations of violation and nullification and impairment, as well as of the reasonable period of time for implementation of DSB recommendations and rulings. It also prohibits unilateral decisions to retaliate and unilateral determinations of the level of retaliation.

Third, the *DSU* procedures are compulsory and essentially exclusive. WTO Members have, in effect, given permanent consent to have any dispute arising between them under the covered agreements adjudicated under the *DSU*.

Fourth, the requirement of automaticity in, *inter alia*, the establishment of panels, the adoption of panel and Appellate Body reports, and the surveillance and enforcement of recommendations and rulings, coupled with strict time frames for each step of the process, including the composition of panels and the setting of the terms of

reference, eradicate the ability of an unwilling Member to block the process. Automaticity also has the effect of shifting the supervisory activity from the political organs of the adjudicative machinery of the Organization. Because of the curious history of the WTO dispute settlement procedures that developed on the basis of Article XXIII:2 of the *GATT 1947*, it was the political organ (the CONTRACTING PARTIES) that technically enjoyed jurisdiction and authority to settle disputes that arose under the agreement. Panels were technically an advisory body that reported to the CONTRACTING PARTIES. A panel report did not become legally binding until it was adopted by the CONTRACTING PARTIES. The *DSU* has maintained the technical requirements of panel establishment and the adoption of panel and appellate reports by political decisions of the DSB. However, now that these events occur quasi-automatically (in the absence of consensus against them) supranational adjudication remains only nominally subject to the political authority of the DSB.

Fifth, the strengthened surveillance and enforcement procedures reinforce the implementation of panel and Appellate Body rulings. These aggressive procedures are unique in international law. They include the supranational elements of possible binding arbitration to determine the reasonable period of time for implementation of DSB recommendations and rulings, and resort to a panel to determine the existence and conformity of an implementing measure with the recommendations and rulings. The

recommendations and rulings of an adopted panel/Appellate Body report constitute a binding obligation in international law. Performance of the recommendations and rulings is the only legal avenue for compliance. Compensation and retaliation are temporary alternatives, intended to restore the negotiated balance of concessions between the parties until performance occurs.

Sixth, the establishment of the Appellate Body to hear appeals from panel reports on questions of law and legal interpretation promotes certainty and predictability in the application and development of WTO law. It reflects an unprecedented willingness on the part of states to subject themselves to international economic litigation. The appellate review procedures entail greater restrictions on Member autonomy than traditional panel procedures, by virtue of their legalistic institutional, substantive, and procedural characteristics.

Despite the availability of the more legalistic procedures for panel and Appellate Body adjudication, however, the *DSU* keeps open the possibility for the more pragmatic resolution of disputes which allows Members more international legal autonomy. The supranationalism and legalism that characterize the "coercive" adjudicatory process under the *DSU* have not completely eradicated the more traditional "cooperative" mechanisms of classical international law. Bilateral consultations and

mutually agreed solutions between the parties to a dispute remain possible, as do less intrusive forms of third party intervention such as good offices, conciliation and mediation. Even where Members have embarked on the legalistic path and submitted their dispute to a panel, they may switch to the pragmatic path by negotiating a mutually agreed solution at any point in the panel process. If all parties to a dispute agree, panel procedures may be suspended at any time for a period of up to one year in order to facilitate this outcome. Still, even these pragmatic avenues are subject to certain conditions which recall the supranational nature of the dispute settlement process and ensure the supremacy of WTO law and the integrity of the WTO legal system: all solutions to disputes must be consistent with the covered agreements, and must be notified to the DSB.

The *DSU* contains several significant innovations that did not codify existing customary practices, but rather represented new procedures that had not evolved through time-tested practice. When the WTO was established, it was unclear whether and how the judicialization of the dispute settlement procedures, including the elements of automaticity and strict time limits, would function in practice. Practice in the first two-and-a-half years of the WTO's existence reflects that the dispute settlement system is functioning well, and largely within the procedural parameters established by the *DSU*. In general, time limits have been respected, although they have been exceeded in some

cases by agreement between the parties. One area where practice has been lax is the notification of mutually-agreed solutions to disputes under Article 3.6 of the *DSU*. Procedural requirements concerning the establishment of panels, the adoption of panel and appellate reports, and the surveillance of implementation are being respected. It is too early to assess the effectiveness of the provisions on enforcement and retaliation.

The success of the dispute settlement system is perhaps most evident in the large and growing number of legal complaints filed. The increased resort to the dispute settlement mechanism has been accompanied by acceptance of the increasing judicialization of the process. At least four aspects of early WTO practice provide evidence of the credibility and effectiveness of the more legalistic dispute settlement procedures of the *DSU*. First, the marked increase in the number of complaints brought under the *DSU* in comparison with those brought in the *GATT 1947* system has not led to an equal increase in the number of disputes resolved by adjudication. There is increased tendency for parties to reach mutually-agreed solutions to disputes. The more rigourous and legalistic dispute settlement system furnishes a strong incentive to reach a negotiated settlement early in the process. The continued availability of negotiated settlement as an alternative to adjudication indicates the intent to allow Members the option to retain their autonomy and to settle their dispute without relying on supranational adjudication. However, the pragmatism and cooperativeness characteristic of consultations function

effectively only due to the existence of the strong legalistic dispute settlement procedures that remain available. Second, there is a greater propensity for developing country Members to be involved in dispute settlement, and to bring complaints against developed country Members. Third, disputes have reflected an increased legal complexity, in terms of multiple issues, and/or multiple parties. Fourth, there is a substantive interest among WTO Members in bringing and arguing claims involving "legal" or "institutional" issues, allowing development of the supranational legal and institutional framework of the WTO.

The supranational and legalistic elements of the *DSU* are at the forefront of the international economic law revolution. In some ways, however, the WTO dispute settlement system reflects characteristics of international law that hardly seem revolutionary. For example, WTO dispute settlement remains at the public inter-state level, with governments as the only possible complainants and defendants. Thus, only a state (or autonomous customs territory) that is a Member of the WTO may raise a complaint about the breach of the provisions of any of the "covered agreements" by another Member. Supervision through dispute settlement therefore operates exclusively through Members bringing complaints against each other.

The *WTO Agreement* does not provide for supervision of the implementation and application of the Agreement by the Organization itself. The WTO cannot act on its own initiative to review the WTO-consistency of state measures and enforce compliance with the covered agreements. In the future, it is conceivable that the Secretariat, using its work in the Trade Policy Review Mechanism as a foundation, could identify WTO-inconsistent governmental actions (or inaction), and prosecute Members on its own initiative. However, for now, legally binding supervision can be triggered only by a complaint of a Member.

Nor does the *WTO Agreement* open state conduct up to scrutiny from below. There is no provision for the privatization of international trade disputes. Even arbitration remains strictly state-to-state. There is no option of privatized or mixed litigation or arbitration, even within certain limited sectors. Access for individuals to certain international tribunals already exists in international economic law. The *North American Free Trade Agreement* (the "*NAFTA*"), for instance, provides an example of a type of privatized arbitration procedure for certain kinds of international disputes. In addition to its comprehensive government-to-government dispute settlement procedures, *NAFTA* also provides for mixed investor-state arbitration. This is limited to disputes arising under Chapter 11 of the Agreement dealing with investment matters. Under the procedures, any *NAFTA* private investor alleging breach of investment-related

obligations by a *NAFTA* host country other than his/her own may establish an arbitral panel to hear the dispute.[706] The arbitration may be governed by any one of three sets of arbitration rules.[707]

Currently, the WTO dispute settlement arrangements (coupled with the nature of the substantive obligations in the covered agreements they are designed to enforce) fall short of providing any direct avenue for individuals to pursue claims against WTO-inconsistent measures imposed by Members. The domestic legislation of some states currently permits rights of consultation and information to interested parties prior to and during WTO dispute settlement proceedings.[708] In addition, some states also have domestic procedures that give indirect access to WTO dispute settlement proceedings by permitting companies to request the initiation by their government of an investigation

---

[706]*NAFTA*, Articles 1116 and 1117.

[707]*NAFTA*, Article 1120: (i) the International Centre for the Settlement of Investment Disputes (ICSID) Convention (provided that both the disputing party and the party of the investor are signatories); (ii) the Additional Facility Rules of ICSID (provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention); or (iii) the UNCITRAL Arbitration Rules.

[708]This is the case, for example, in the United States. See H.R. 5110, 103d Cong., 2d. Sess., 127 (1994). Where a complaint filed by an interested person under Section 301 of the Trade Act of 1974, 19 U.S.C. Sections 2411-2416, leads to the initiation of WTO dispute settlement, the United States Trade Representative must, at each stage of the proceedings, consider the views of representatives of the appropriate interested private sector and non-governmental organizations.

into unfair trade practices of another country.[709] However, at present, individuals and corporations cannot be directly involved in the WTO dispute settlement process, and have no standing under the *DSU*. Rather, the legal system created by the *WTO Agreement* preserves the traditional requirement in international law for the state to act as an intermediary between the individual and the international level.[710] By maintaining the requirement for "diplomatic protection", WTO Members have retained the monopoly of initiation of dispute settlement proceedings in the WTO. A company that does not succeed in getting its government to espouse its case currently has no recourse in international law under the WTO.

As an international economic treaty, the *WTO Agreement* has significant effects upon the rights and interests of individuals and corporations conducting international business. WTO-inconsistent measures imposed by foreign state governments directly affect the flow of business. At the moment, not only do private

---

[709]For example, in the United States, Section 301 of the Trade Act of 1974, 19 U.S.C., Sections 2411-2416 permits a U.S. company confronting a trade restriction in another state to initiate administrative procedures, consisting of an investigation by the United States Trade Representative. Where no resolution of the dispute is achieved within a specified period of time, the USTR must initiate formal WTO dispute settlement procedures. In the European Communities, the New Commercial Policy Instrument, Regulation 3286/94, permits a private party acting on behalf of a Community industry or Community entreprise that has suffered adverse trade effects as a result of obstacles to trade to lodge a written complaint with the Commission, petitioning it to commence WTO dispute settlement proceedings.

[710]The notable exception is the private proceedings contemplated by Article 4 of the *Agreement on Preshipment Inspection.*

individuals not enjoy legal standing under the *DSU* to bring a complaint, they also have no right of intervention (written or oral) in the panel or appellate process. Indeed, they are not even permitted to observe the proceedings, which are confidential. The participation of non-governmental actors in the dispute settlement process is a controversial issue which has yet to be resolved. While modest steps have been taken to increase the transparency of the process through the derestriction of documents and the dissemination of documents and information on the Internet, much remains to be done to make the WTO dispute settlement system more responsive to the needs of the international business community. In the short run, the possibility for individuals, companies and non-governmental organizations to submit *amicus curiae* briefs or other information relevant to a dispute settlement proceeding before a panel or the Appellate Body would be an asset.

In the longer run, supplementing the current state-to-state proceedings by permitting affected individuals and businesses a right to initiate WTO dispute settlement proceedings would be beneficial.[711] This proposal would doubtless meet with strong

---

[711]The possibility of a private right of action has been addressed by several commentators, including J. Jackson, *op. cit*, note 58 at 111*ff*; R. Brand, "GATT and the Evolution of United States Trade Law" 18 *Brooklyn J. Int'l L.* 101 at 139; R. Brand, "Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930" (1990) 24 *J. World Trade* 5; Lukas, *op. cit.*, note 163; J. Waincymer, "GATT Dispute Settlement: An Agenda for Evaluation and Reform" (1989) 14 *N.C. J. Int'l L. & Com. Reg.* 113.

resistance from Members, hesitant to erode their monopoly of discretion in dispute settlement. The establishment of a private right of access to WTO dispute settlement could occur in certain sectors, such as investment, if the WTO becomes involved in regulating Member government behaviour in this area. The monopoly enjoyed by states in public international law is fading with the onset of the international economic law revolution. Private participation in dispute settlement would render the enforcement of WTO legal norms more efficient and effective. The focus should be upon the removal of WTO-inconsistent measures, rather than upon the identity or the juridical nature of the complainant. Because of this, there appears to be no reason why, eventually, a national of a Member should be precluded from bringing an action against that Member. Legalism in dispute settlement should mean that no political or foreign policy considerations taint the neutrality of the proceedings. This depoliticization would benefit states by eliminating areas of trade friction, and by decreasing media scrutiny of state action with respect to the complainant. Routine resort to dispute settlement by individuals would also reinforce the credibility of the system.

Allowing complaints by private parties would necessitate some changes to the current panel and appellate proceedings. For example, a filtering mechanism might have to be devised, in order to weed out frivolous or vexatious claims. One possibility is for the Secretariat to act as a screening mechanism, although the expense of participating

in the proceedings might act as its own deterrent upon private sector claims. In addition, because political considerations often underlie the current rationale and method for selecting panelists, a move toward a permanent expert tribunal for hearing complaints brought by private parties might be a viable alternative.

Interesting questions arise with respect to possibilities for subsequent stages in the dispute settlement process where private parties are involved. However, some complexities are avoided because Member state governments would be the only defendants in disputes brought by individuals. Under the current philosophy of the *WTO Agreement*, it would only ever be government conduct that is impugned.[712] For the post-report phases of the process, the government of the company concerned might have to "sponsor" the report (this would, however, be problematic if that Member was the

---

[712]Note that there is currently a non-violation complaint by the United States against Japan concerning restrictive business practices (i.e. private conduct) in the consumer photographic film and paper sector, but this is outside the framework of the *DSU*. The United States made this request for consultations on 13 June 1996 under the 18 November 1960 *Decision on Restrictive Business Practices: Arrangements for Consultations* BISD 9S/28 adopted by the GATT CONTRACTING PARTIES. A request made under this decision does not lead to the dispute settlement process under the DSU. Consultations take place on a government-to-government basis, and the parties may or may not reach a mutually satisfactory conclusion. The Decision requires merely that the Secretariat relay information concerning the consultations to the Members. At present, attacking anticompetitive practices under the *DSU* would require a Member to prove non-violation nullification or impairment of tariff bindings or other benefits accruing under the *WTO Agreement* due to another Member's failure to enforce its competition laws. See *e.g.* P. Mavroidis, *The Application of the GATT/WTO Dispute Resolution System to Competition Issues* (Paris: OECD, 1994); E.-U. Petersmann, "Enforcement of International Competition Rules Through the GATT/WTO Dispute Settlement Procedures?" in EC Commission, *Competition Policy in the New Trade Order: Strengthening Cooperation and Rules* (Brussels: EC Commission, 1995) 52-58.

defendant in the dispute). If the Member government concerned did "sponsor" the report, the rules for adoption of panel and appellate reports, surveillance of implementation, and enforcement of rulings could remain essentially as they are, with the DSB ensuring that a losing government lives up to its obligations under international law. Alternatively, more conventional procedures could be devised for proceedings involving a private complainant: the panel and/or appellate report would be considered binding under international law upon its release, without the involvement of the DSB. A special provision in the *DSU* would compel Member governments to respect their international legal obligations vis-a-vis private sector claimants.

At least three other limitations currently exist with respect to the effectiveness and enforceability of the legal norms in the *WTO Agreement* which could be remedied in the future. First, at present, none of the rules contained in the *WTO Agreement* are yet necessarily[713] directly applicable or directly enforceable by individuals

---

[713]Direct applicability remains a question of the domestic law of each Member. At present, no Member appears to confer direct applicability upon WTO rules. For example, in the EC Council has stated that the WTO Agreement was not capable of being invoked before the European Court of Justice or the courts of the member states: Council Decision Concerning the Conclusion on behalf of the European Community as regards matters within its competence, of Agreements reached in the Uruguay Round Multilateral Trade Negotiations, 1994 O. J. L 336 2. In the United States, the WTO implementing legislation stated that no provision of the *WTO Agreement* that is inconsistent with any U.S. law will have effect. In addition, no individual "shall have any cause if action or defence under any of the Uruguay Round Agreements" or challenge "any action or inaction...on the ground that such action or inaction is inconsistent with one of those agreements". See H.R. 5110 103d Cong. 102(a)(1) and H.R. 5110 103d Cong. 103 C(1)(A)and(B). See *e.g.* D. Leebron, "Implementation of the Uruguay Round Results in the

before domestic courts as an integral part of their state's domestic law. Article XVI:4 of the *WTO Agreement* mandates that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided for in the annexed agreements". It is likely that this provision will be interpreted to continue practice that developed in the *GATT 1947* legal system. This practice would require that Members adopt laws, regulations and procedures that permit -- but do not mandate -- that a Member act in conformity with its legal obligations under the *WTO Agreement*,[714] as long as they are applied in a manner consistent with a government's WTO obligations. This does not require that Members make WTO rules directly applicable in their domestic legal orders so that they can be invoked by citizens before domestic courts.

Secondly, Members have not undertaken to respect the direct legal authority of WTO panels or the Appellate Body over matters and persons within their territory falling within the jurisdiction of the WTO under any of the covered agreements. Dispute settlement recommendations and rulings bind only states, and are not directly applicable to individuals or corporations within the domestic orders of Members.

United States" in J. Jackson and A. Sykes (eds.), *Implementing the Uruguay Round* (Oxford: Clarendon Press, 1997) 175.

[714]BISD 39S/155, 197; BISD 34S/136, 163.

Thirdly, there is no provision for reference to WTO panels or to the Appellate Body for preliminary rulings on matters relating to the interpretation of the *WTO Agreement* (or the national legislation implementing the Agreement in domestic orders) arising before the domestic courts and tribunals of Members.

Notwithstanding these current shortcomings with respect to the effectiveness and enforceability of WTO law, the *WTO Agreement* contains numerous requirements concerning the availability of judicial, arbitral or administrative procedures at the domestic level.[715] Although it is beyond the scope of this paper to deal with the strengthening of the role of national legal orders in the enforcement of WTO law, it can be noted that these requirements reflect an intent to increase the effectiveness of WTO law by linking WTO law to domestic dispute settlement and enforcement mechanisms. Some of these provisions contemplate the application of WTO law by both WTO dispute settlement bodies and by domestic review authorities. For example, the *Agreement on Preshipment Inspection* (Article 4) and the *Agreement on Government Procurement*

---

[715] *E.g. GATT 1994*, Article X; *Antidumping Agreement*, Article 13; *Agreement on Customs Valuation*, Article 4; Agreement on Preshipment Inspection, Article 4; *Agreement on Subsidies and Countervailing Measures*, Article 23; *GATS*, Article VI; *TRIPs Agreement*, Articles 41-50, 59; *Agreement on Government Procurement*, Article XX. See, generally, Petersmann, *op. cit*, note 130 at 194-196, 233- 240. Also see M. Hilf, "The Role of National Courts in International Trade Relations" (1997) 18 *Michigan J. Int'l L.* 321. At 324, Hilf observes the present constraints on this approach: "As examples from the legal systems of the European Community and the United States show, either the national legislature implementing the WTO tends to restrict the role of national courts or these courts themselves tend to show a large degree of judicial self-restraint".

(Article XX) charge both WTO panels and the competent domestic authorities to examine a "breach of the Agreement".

Therefore, despite the unprecedented degree of legalism and supranational legal authority contained in the *DSU*, the WTO dispute settlement procedures still lack many characteristics necessary to transform them into the truly effective international trade court that the present extent of transnational economic activity and interdependence calls for. The WTO system of legal remedies and rule enforcement still has potential for significant development.

A review of the rules and procedures in the *DSU* is to be conducted within four years after the entry into force of the *WTO Agreement*. Following this review, the Ministerial Conference is to take a decision "whether to continue, modify or terminate such dispute settlement rules and procedures".[716] It is unlikely that the Members will undertake a comprehensive overhaul of the dispute settlement mechanism in this review. Fundamental changes, such as the creation of a private right of complaint under the *DSU*, are not contemplated at this juncture. Members are more likely to tinker with the procedures that already exist. Potential areas where reforms to the existing procedures

---

[716]See "Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes in WTO", *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994) at 465.

would be useful include: panel working procedures; the supervisory jurisdiction of the Appellate Body and certain aspects of appellate procedures; and the enhancement of the transparency of the dispute settlement process. Possible reforms in each of these areas will be briefly addressed

With respect to reforms to the panel process and the creation of a standardized set of panel working procedures, several considerations come to mind. First, there is a need to establish firmer time frames for each step of the panel process itself, from the time the panel is established, through the first and subsequent meetings, the interim review period and the release of the final panel report. The ranges provided in Annex 3 to the *DSU* are good indicative guidelines, but even more precision and coerciveness in the form of absolute maximum time limits for these steps should be added to ensure that a dispute proceeds as promptly as possible through the panel system. At the moment, within the overall timeframe of 9 months for panel proceedings set by the *DSU*, the time frames for the steps in the panel phase are subject to agreement by the parties. It may be beneficial to have mandatory non-negotiable timeframes for each step of the panel process, akin to those now included in the Appellate Body's *Working Procedures*. Certain economies may also be possible, such as limiting the number of submissions exchanged between the parties and the panel meetings to one (instead of two or three rounds).

Second, and perhaps more importantly, there is dire need for some rules regulating the panel process, the content of parties' submissions and the permissible timing for the submission of evidence. In this regard, the capacity for a panel to make preliminary rulings on procedural and evidentiary matters seems to be a valuable one that needs explicit confirmation in the *DSU*. Such preliminary matters include standing to bring a claim, and the scope of the panel's terms of reference. This raises the additional query of whether it should be possible to appeal such preliminary rulings to the Appellate Body. Thus far, appeals are only permitted from "panel reports", implying that only a panel's final decision embodied in its report is appealable. Review of preliminary or interlocutory rulings might substantially delay litigation, a drawback that would only be compensated by the advantage of settling a critical issue early on. While many issues are not essential, certain preliminary rulings may have a decisive impact upon a party's rights and the subsequent evolution of the case. Therefore, it would probably be necessary to permit appeals from such rulings. The addition of a filtering mechanism for such interlocutory appeals would forestall abuse. The possibility of petitioning the Appellate Body for leave to appeal might be a solution.

Third, third parties should be given expanded rights of participation in the panel process, beyond those that have traditionally been granted and that are contained in Article 10 and Appendix 3 of the *DSU*. Third parties have contributed to the quality of

argumentation before panels and the Appellate Body. They have manifested a concern with safeguarding the strength and credibility of the international trade system even where they do not have a direct legal interest at stake. Until now, the extent of broader participation by third parties has depended upon agreement between the parties, rather than upon established standards or uniform panel policies. A continuation of this situation risks uncertainty and inequity from case to case.

A fourth aspect of panel working procedures that could be clarified is the possibility for legal representation of governments by private lawyers. In *European Communities - Regime for the Importation, Sale and Distribution of Bananas*,[717] the Appellate Body recently ruled that a WTO Member enjoys the authority to decide the composition of its delegation that appears before the Appellate Body. The Appellate Body based its ruling on the absence in the *WTO Agreement*, the *DSU*, the *Working Procedures* or in customary international law or practice of international tribunals that would bar a WTO Member from deciding who should represent it as members of its delegation in an Appellate Body oral hearing. In addition, it pointed out the well-known fact that many governments rely on private counsel to prepare their written submissions, questions and replies in the panel and appellate process.

---

[717]WT/DS27/AB/R, adopted 25 September 1997.

This Appellate Body ruling means that Appellate Body proceedings, at least, are not limited to permanent government officials, but may also include private lawyers. In the longer run, this ruling could also open up the possibility for industry or interest group representatives to gain access to the proceedings, as long as they are officially part of a Member's delegation. It remains to be seen whether this ruling will also influence the legal representation of governments in the oral proceedings before the panel, although it appears virtually inevitable that representation by private counsel will eventually be permitted at the panel level as well. So far, the issue of representation by private counsel before panels has been settled by agreement between the parties where it has arisen in a dispute. It would be beneficial to have the issue regulated by written, standard procedures. With the increasingly legalistic bent of the dispute settlement process, and the ability to appeal issues of law to the Appellate Body, it seems essential that countries lacking the requisite legal expertise within their governments have adequate legal representation by qualified private counsel.

At the appellate level, there is a need to clarify the supervisory jurisdiction of the Appellate Body. Currently, appeals are limited to issues of law covered in the panel report and legal interpretations conducted by the panel. There is no explicit provision in the *DSU* for full appellate review by the Appellate Body of issues involving questions of law and fact that were not examined by a panel, nor for remanding the

substantive merits of a case to a panel.[718] There are at least three options for redressing this lacuna in the appellate procedures. For example, in the review of the *DSU*, the Members could:

> i. *broaden the basis of the Appellate Body's supervisory jurisdiction to expressly include review de novo of questions of law and fact where this is necessary to resolve the dispute between the parties;*

Such full appellate jurisdiction would promote the prompt and efficient resolution of disputes, favouring the finality of dispute resolution. However, it might also raise some practical difficulties. The ability of the Appellate Body to review *de novo* issues of law and fact would mean that it was essentially capable of repeating the task of the panel and rehearing the case anew. Apart from throwing the authority and role of panels into question, this would also encourage appellants to appeal virtually every factual and legal finding of a panel, rather than confining their appeals to specific points of law as they are presently required to do. The current time-frames for appeal proceedings (60-90 days) are extremely limited for a full consideration of the facts. At the moment, the resources and time of Appellate Body Members and the Appellate Body Secretariat to review the case are probably not sufficient to handle a complex case on a *de novo* basis (for example, the evidence submitted at the panel level in *Japan - Measures Affecting*

---

[718]See *supra.*, Chapter 5.B.II.e.iii for a discussion of the difficulties that these limitations cause.

Consumer Photographic Film and Paper, WT/DS44 is approaching 20,000 pages). Also, there are limitations on the capacity for fact-finding and analysis at the appellate level. Unlike panels, the Appellate Body has no ability to consult experts and to commission expert advisory reports on technical issues. In addition, there is currently no possibility of composing a division with Members experienced in fact-finding in particular matters or with expertise under specific agreements. As well, more specific rules on evidence and procedure would have to be devised in order to ensure due process.

ii. *add an explicit power of remand to a panel to deal with establishing de novo questions of fact that were not initially addressed at first instance;*

The addition of an explicit remand capability would have the advantage of providing an avenue for the establishment of the requisite facts of a dispute at first instance, but might also raise some practical problems. For example, first, the need to re-argue the case imposes an added burden and delay upon the parties, and may run counter to the aim in the *DSU* to resolve disputes promptly. Second, finding and reconstituting the panel may be difficult because of the *ad hoc* nature of the panel system and the other responsibilities that panelists need to juggle. Third, a remand option raises the possibility of protracted ping-pong matches between the Appellate Body and the panel that would impede the resolution of disputes and damage the credibility of the system. Remand might run counter to the need for finality in the dispute settlement process. And

while it would be difficult to fit a single remand within the stringent timeframes set out in paragraphs 5 and 14 of Article 17 of the *DSU* for the completion and adoption of Appellate Body Reports, and in Articles 21 and 22 concerning implementation of recommendations and rulings, it would be virtually impossible to fit in multiple remands. These timeframes are dictated, *inter alia*, by the United States *Section 301* legislation.

iii. *leave the issue unresolved and allow practice to evolve in accordance with the requirements in specific cases.*

Practice to date has revealed that the Appellate Body is willing, in certain circumstances, to consider questions of fact when this is necessary to resolve a dispute.[719] Experience has shown the difficulty of isolating pure questions of fact. Appellate Body practice has shown that issues often involve "questions of mixed fact and law". For this reason, while it should be resisted, it may be necessary for the Appellate Body to make a limited inquiry into the factual aspects of the case in order to complete its legal analysis.

Certain features of the present appellate system might allow for a limited reconsideration of the facts of a case. For example, the panel record is transferred to the

---

[719]See *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997; *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, and Chapter 5.B.II.e.iii above.

Appellate Body as soon as a notice of appeal is filed.[720] The panel record contains all of the written submissions of the parties as well as the questions from the panel and the parties and their responses. This record would allow the Appellate Body to reconstruct a limited set of necessary facts.[721] In addition, the existence of the oral hearing at the appellate level gives Appellate Body Members the opportunity to hear oral evidence from the participants on any issue in the appeal. There is nothing excluding the possibility of holding a second oral hearing, if necessary. In addition, the appellate procedures already contemplate the filing of further submissions by the participants even after the oral hearing is completed. These elements could provide a vehicle for legitimate review *de novo* of certain limited factual aspects in a dispute, ensuring due process to the participants. In the event that the Appellate Body is confronted with a situation that would require it to examine questions of fact and law *de novo*, and in the absence of an explicit ability to do so or to remand the dispute to a panel, the Appellate Body could always leave it up to the parties to determine what they should do next. Under these circumstances, the parties could reach a mutually-agreed solution, agree to return the dispute to the original panel, or recommence the dispute settlement process anew. However, this option risks leaving the dispute unresolved and the parties at an

---

[720]See *Working Procedures*, Rule 25.

[721]The Appellate Body consulted the panel record in *Canada - Certain Measures Affecting Periodicals*, WT/DS31/AB/R, adopted 30 July 1997.

impasse. If the remand-*de novo* issue is left unresolved at the review of the *DSU*, it is most likely that the Appellate Body will continue its current practice of examining issues of law and fact that are necessary to achieve a resolution of the dispute between the parties, even without an explicit legal foundation for this action in the *DSU*.

Upon reflection, the optimal course may be an amalgam of options (ii) and (iii). This would give the Appellate Body a broad supervisory competence on the substantive merits of a dispute with respect to any relevant question of law. The Appellate Body would also have a very limited ability, which it should use sparingly, to delve into the panel record to reconstruct certain facts that are necessary to conclude its legal reasoning in order to resolve the dispute between the parties. At the same time, when there was absolutely no factual basis on which to base its findings and conclusions, the Appellate Body could remand specific questions of fact for panel examination. Of course, the Appellate Body would need to determine on a case- by-case basis when, and on what basis, to address a new issue and when to remand it instead to be decided by a panel at first instance. In domestic jurisdictions, appellate courts have discretionary authority to remand a case to a lower court. A significant factor used by appellate courts in common law jurisdictions in determining when to exercise the discretion to remand is whether there are questions of fact involved, or whether the dispute revolves around questions of law. Where the dispute involves pure questions of law, an appellate court

will often address the issues itself without remand in order to avoid delay and expense to the parties. There is also a tendency for appellate courts to broaden their authority by addressing even mixed questions of fact and law,[722] a category that may be stretched to subsume a wide range of issues. On this basis, the Appellate Body could complete the requisite legal analysis in most cases, thereby serving the objective of finality through prompt and efficient dispute settlement. On the rare occasion where there was absolutely no factual foundation for its inquiry, it could resort to a remand. Remand should be used only sparingly, where absolutely necessary, to avoid delaying the dispute settlement process. It should be limited to a single remand.

Another issue for consideration at the appellate level is the possibility for third parties to bring appeals from panel reports. Currently, Articles 16.4 and 17.4 of the *DSU* permit only parties to the dispute, not third parties, to bring appeals.[723] The ability of third parties to bring appeals would emphasize the interest all Members in the WTO-consistency of each Member's policies, and in the importance of developing a consistent and tenable caselaw through the dispute settlement process.

---

[722]See M. Shapiro, *Courts: A Comparative and Political Analysis*. (Chicago: University of Chicago Press, 1981) at 37*ff*.

[723]Note that in the European Communities, Article 49 of the Statute of the European Court of Justice (the "ECJ") allows other member states and EC institutions that did not intervene in the proceedings before the Court of First Instance to bring appeals to the ECJ.

Another reform that would supplement the systemic interest in the appellate process, and that would also affirm the autonomous institutional nature of the WTO, is the possibility for intervention by an advocate-general in appellate proceedings. An independent advisory authority, charged with aiding the Appellate Body in the execution of its functions, may become increasingly necessary as WTO law develops. The opinion of the advocate-general, presented after receipt of all oral and written submissions, could provide a valuable analysis and synthesis of a dispute having regard to relevant authorities, including previous GATT/WTO cases and other international legal sources. Such an opinion would be particularly valuable as it would be the product of one directing mind presenting a reasoned and authoritative argument that has not been the subject of compromise or collective decision-making.[724] This would constitute a common starting point for Appellate Body discussions and deliberations, although the Appellate Body would be completely free not to follow the reasoning or the result of the opinion. While a legal research and advisory role is presently played by the Appellate Body Secretariat, this advice remains confidential and behind-the-scenes. Publication of the opinion of the advocate-general with the Appellate Body report would have the added benefit of contributing to the understanding of WTO law by all Members and to the evolution of WTO law by providing a valuable source for future arguments.

---

[724]See *e.g.* M. Damon, "The Role of the Advocate General in the Court of Justice of the European Communities" in S. Shatreet (ed.), *The Role of Courts in Society* (Dordrecht: Martinus Nijhoff, 1988) 425 at 434.

The issue of the establishment of a common standard of review by panels and the Appellate Body for measures taken by Member governments under all of the covered agreements may also need to be addressed in the review. Currently, a standard of review is only established in the area of antidumping.[725] It would probably be best, however, to allow a standard of review to evolve through practice rather than to attempt to establish a definitive standard in a vacuum.

With respect to transparency, non-governmental organizations, such as transnational environmental groups, have been advocating the need for greater openness in the dispute settlement process. While the WTO proceedings are more transparent than those under the *GATT 1947*, there is still no contemplation of participation by private parties in the proceedings. Submissions by Members to panels and the Appellate Body

---

[725]Article 17.6 of the *Agreement on Implementation of Article VI of the GATT 1994* states:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if its rests upon one of those permissible interpretations:

remain confidential, although a Member may request that another Member make available a non-confidential summary of its submission that can be circulated to the public. Whereas under the *GATT 1947*, panel reports were not derestricted until they were adopted by the CONTRACTING PARTIES, WTO panel and Appellate Body reports now become derestricted documents after their circulation to WTO Members and are available on the WTO Internet website. A manageable reform might be to supplement the current ability of panels to solicit expert advice by giving non-governmental organizations and other interested entities a right to intervene in writing by submitting *amicus curiae* briefs and information to a panel or to the Appellate Body. The panel and Appellate Body could then determine, on their own initiative, how to use (or not use) such information.

Given the historical tension in the GATT/WTO system between legalism and pragmatism, it is likely that both the pragmatic and legalistic paths for dispute settlement will remain available. Indeed, the availability of both coercive and cooperative mechanisms for the settlement of disputes is an important characteristic of international economic law that should be preserved. The more legalistic procedures in the *DSU* ensure compliance with legal obligations through the strong mechanisms for the surveillance of implementation and enforcement of DSB recommendations and rulings. The existence of these legalistic procedures also provides an incentive for parties to

settle their disputes bilaterally without resorting to third party adjudication. Consultations remain a valuable tool for dispute settlement, with the assurance of a strong legal framework in the background. Supranational supervision by panels and the Appellate Body should not completely eradicate the opportunity for more alternative, more traditional, bilateral dispute settlement arrangements. Despite the express availability of arbitration as an alternative means of dispute resolution between the parties, there have been no such arbitration proceedings since the establishment of the WTO. As explored above, arbitration is a viable, legalistic means of dispute settlement. Less legalistic forms of dispute resolution, such as conciliation, mediation and good offices also remain available, but seem to have fallen into disuse for the moment. A certain degree of flexibility -- within defined supranational legal parameters -- is essential for the continued viability of the system.

Through the integrated legal order and organizational design of the WTO, Members have established a supranational legal framework for the application, development, surveillance and enforcement of the substantive legal norms contained in the *WTO Agreement.* They have acknowledged the utility of transferring their sovereignty to the WTO in certain contexts, in order to protect and promote their interests the international commercial order. Demonstrating the current potential of international economic law, they have introduced an unprecedented degree of

supranational institutionalization and constitutionalization. Along with revolutionary legalistic mechanisms, they have also retained some flexibility and pragmatism within defined supranational parameters.

The *WTO Agreement* reveals varying degrees of legalism and supranational legal authority with respect to the creation, application, surveillance and enforcement of rules. The highest degree of supranational legal authority lies in mechanisms for rule-application, rule-enforcement and informal rule-creation within the dispute settlement mechanism under the *DSU*. The dispute settlement procedures outlined in the *DSU* are supplemented by the more pragmatic multilateral trade policy surveillance conducted within the TPRM, as a forum for multilateral discussion on trade matters that could give rise to disputes among Members. The decision-making arrangements for creating new or amended rules to supplement the basic treaty rules contain reflect that, in theory, WTO Members are willing to cede decision-making sovereignty to the WTO, but that, in practice, procedural safeguards exist that render it unlikely that a state will be bound by a decision against its will. Supranational coercion is therefore not a primary characteristic of rule-creation through decision-making within the Organization. Given the increased legalism and supranational authority residing in the dispute settlement machinery of the Organization to ensure the orderly and effective operation of the multilateral trade system, it is likely that the focus for rule-creation with

respect to matters already falling within the scope of the covered agreements will shift away from decision-making by the political organs and toward the adjudicative mechanisms under the *DSU*.

It is unlikely that a contentious issue will ever proceed to a formal vote in the political organs of the WTO so that a Member would be bound by a decision that it did not specifically endorse. In addition, the Trade Policy Review process does not give rise to any binding legal obligations. Therefore, there is essentially only one instance in which a WTO Member could be legally bound by a supranational legal action of the WTO against its will: where a Member has legally binding adverse ruling against it as a result of the supranational adjudicative process under the *DSU*. Faced with this eventuality, a WTO Member ultimately retains the right to withdraw unilaterally from the *WTO Agreement* after the expiry of six months after written notice has been received by the Director-General.[726] This is a drastic and unlikely option. Nevertheless, it demonstrates that individual states ultimately retain the authority to determine the legal rules that will govern them.

WTO Members, therefore, retain the ultimate prerogative of classical state sovereignty: they can opt to participate in, or withdraw from, the Organization.

---

[726] *WTO Agreement*, Article XV:1

However, this vestige of sovereignty is largely irrelevant. The reality of interdependence is that non-participation in the international trade system is no longer an option for states. The individual state no longer has the jurisdiction or sovereign competence to confront the challenges of contemporary global commerce. The security, predictability and fairness furnished by the supranational legal framework of the WTO is crucial to the conduct of international trade. States thus observe and implement adverse recommendations and rulings produced in the dispute settlement mechanism even against their will in the knowledge that all other states in the system are subject to the same legal disciplines compelling observance. The international economic law revolution has begun.

Bibliography

A. Articles, Chapters, Monographs and Papers

Abbott, K., "International Economic Law: Implications for Scholarship" (1996) 17 *U. Pa. J. Int'l Econ. L.* 505.

Abbott, K., "The Uruguay Round and Dispute Resolution: Building A Private Interests System of Justice" (1992) 1 *Columbia Bus. L. Rev.* 111-149.

Abbott, K., "GATT as a Public Institution: The Uruguay Round and Beyond" (1992) 18 *Brooklyn J. Int'l L.* 31.

Abbott, R., "The Trading Nation's Dilemma: The Functions of the Law of International Trade" (1985) *Harvard Int'l L. J.* 501-532.

Abbott, R., "GATT and the Trade Policy Review Mechanism: Further Reflections on Earlier Reflections" (1993) 27 *J. World Trade* 117.

Alford, L.P., "Why a Private Right of Action against Dumping Would Violate GATT" (1991) 66 *N.Y.U. L. Rev.* 696.

Bello, J.H., "The WTO Dispute Settlement Understanding: Less is More (Editorial Comment)" (1996) 90 *Am. J. Int'l L.* 416.

Bello, J.H. and A.F. Holmer, "Settling Disputes in the GATT: The Past, Present and Future" (1990) 24 *Int'l Lawyer* 519.

Berman, H. J., "World Law" (1995) 18 *Fordham Int'l L. J.* 1617.

Berrisch, G. M., "The Establishment of New Law through Subsequent Practice in GATT" (1991) 16 *North Carolina J. Int'l L. and Comm. Reg.* 497.

Bilder, R., "Perspectives on Sovereignty in the Current Context: An American Viewpoint" (1994) 20 *Canada- U.S. L. J.* 9.

Blackhurst, R., "Strengthening GATT Surveillance of Trade-Related Policies" in E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, second edition. Deventer: Kluwer, 1991 at 123.

Blokker, N. and S. Mueller, "Towards More Effective Supervision by International Organizations: Some Concluding Observations" in N. Blokker and S. Mueller (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers*, Volume I. Dordrecht: Martinus Nijhoff, 1994 at 275.

Brand, R., "Direct Effect of International Economic Law in the United States and the European Union" (1996-97) 17 *Northwestern J. Int'l L. and Bus.* 556.

Brand, R., "External Sovereignty and International Law" (1995) 18 *Fordham Int'l L. J.* 1685.

Brand, R. "GATT and the Evolution of United States Trade Law" (1992) 18 *Brooklyn Int'l L. J.* 101.

Brand, R., "Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act" (1990) 24 *J. World Trade* 5.

Bronckers, M.C., "Non-judicial and Judicial Remedies in International Trade Disputes: Some Reflections at the Close of the Uruguay Round" (1990) 24 *J. World Trade* 121.

Bronz, G., "An International Trade Organization: The Second Attempt" (1956) 69 *Harvard L. Rev.* 440.

Bronz, G., "The International Trade Organization Charter" (1949) 62 *Harvard L. Rev.* 1089.

Camps, M. and W. Diebold, Jr., "The Old Multilateralism and What Became of It" In *The New Multilateralism: Can The World Trading System Be Saved?* New York: Council on Foreign Relations, 1983.

Canal-Forgues, E., "Le Système de Règlement des Différends de l'Organisation Mondiale du Commerce (OMC)" (1994) 98 *Rev. Gén. de Droit Int'l Public* 689.

Cannon, J. R. and K. L. Bland, "GATT Panels Need Restraining Principles" (1993) 24 *L. and Pol. in Int'l Bus.* 1167.

Castel, J.G., "The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures" (1989) 38 *Int'l and Comp. L. Q.* 834.

Castillo de la Torre, F., "The Status of GATT in EEC Law: Some New Developments" (1992) 26 *J. World Trade* 35.

Cheetham, H., "The Federal Government Proposals for Reform of the GATT Dispute Settlement System: Continued Momentum for a Rules-oriented Approach To Dispute Settlement In International Trade Agreements" (1991) 22 *Rev. Gen. de Droit* 431.

Cooper, K. J., "To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level" (1993) 2 *Minnesota J. Global Trade* 142.

Dam, K., "The GATT as an International Organization" (1969) 3 *J. World Trade L.* 374.

Damon, M., "The Role of the Advocate General in the Court of Justice of the European Communities" in S. Shatreet (ed.), *The Role of Courts in Society*. Dordrecht: Martinus Nijhoff, 1988 at 425.

Davey, W., "GATT Dispute Settlement: The 1988 Montreal Reforms" in G. Dearden, M. Hart and D. Steger (eds.), *Living with Free Trade: Canada, the Free Trade Agreement and the GATT*. Ottawa: Institute for Research on Public Policy, 1989 at 167.

Davey, W., "Dispute Settlement in GATT" (1987) 11 *Fordham Int'l L. J.* 51.

Delors, J., "The Future of Free Trade in Europe and the World" (1995) 18 *Fordham Int'l L. J.* 715.

Diebold, W., "The End of the ITO" (October 1952) 16 *Princeton Essays in Int'l Finance.*

Dillon, T. J., "The World Trade Organization: A New Legal Order For World Trade?" (1995) 16 *Michigan J. Int'l L.* 349.

Flory, T,. "Les Accords du Tokyo Round du GATT et la Réforme des Procédures de Règlement des Différends dans le Système Commercial Interétatique" (1982) 86 *R.G.D.I.P.* 235.

Footer, M., "The Role of Consensus in GATT/WTO Decision-making" (1996-97) 17 *Northwestern J. Int'l L. and Bus.* 653.

Fried, J. T., "Two Paradigms for the Rule of International Trade Law" (1994) 20 *Canada-U.S. L.J.* 39.

Friedmann, W., "National Sovereignty, International Co-operation and the Reality of International Law" (1963) 10 *U.C.L.A. L. Rev.* 739.

Gross, L., "The Peace of Westphalia, 1648-1948" (1948) 42 *Am. J. Int'l L.* 20.

Harris, K., "The Post-Tokyo Round GATT Role in International Trade Dispute Settlement" (1983) 1 *Int'l Tax and Bus. Lawyer* 142.

Hart, M. and D. Steger, "Due Process and Transparency: The Changing Context of International Trade Relations" in M. Hart and D. Steger (eds.), *In Whose Interest?: Due Process and Transparency in International Trade*. Proceedings of a Conference of the Centre for Trade Policy and Law, Ottawa, May 1990 at 1.

Henkin, L., "The Mythology of Sovereignty" in R. St. J. MacDonald (ed.), *Essays in Honour of Wang Teiya*. Dordrecht: Martinus Nijhoff, 1994 at 351.

Hilf, M., "The Role of National Courts in International Trade Relations" (1997) 18 *Michigan J. Int'l L.* 321.

Horlick, G.N., "Dispute Resolution Mechanism: Will the United States Play by the Rules?" (1995) 29:2 *J. World Trade* 163.

Horlick, G.N., "Sovereignty and International Trade Regulation" (1994) 20 *Canada-U.S. L. J.* 57.

Hudec, R., "International Economic Law: The Political Theatre Dimension" (1996) *17 U. Pa. J. Int'l Econ. L.* 9.

Hudec, R., "Public International Economic Law: The Academy Must Invest" (1992) 1 *Minnesota J. Global Trade* 5.

Hudec, R., "The Judicialization of GATT Dispute Settlement" in M. Hart and D. Steger (eds.), *In Whose Interest?: Due Process and Transparency in International Trade*. Proceedings of a Conference of the Centre for Trade Policy and Law, Ottawa, May 1990 at 9.

Hudec, R., "GATT Dispute Settlement after the Tokyo Round: An Unfinished Business" (1980) 13 *Cornell Int'l L. J.* 145.

Hudec, R., "GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade" (1971) 80 *Yale L. J.* 1299.

Hudec, R., "The GATT Legal System: A Diplomat's Jurisprudence" (1970) 4 *J. World Trade L.* 615.

Iwasawa, Y., "Settlement of Disputes Concerning the WTO Agreement: Various Means other than Panel Procedures" in M.K. Young and Y. Iwasawa (eds.), *Trilateral Pespectives on International Legal Issues: Relevance of Domestic Law and Policy*. Irvington: Transnational Publishers, 1996 at 377.

Jackson, J., "Misunderstandings on the Nature of Legal Obligation" (1997) 91 *Am. J. Int'l L.* 60.

Jackson, J., "The World Trade Organization and the 'Sovereignty' Question" (1996) 1 *Legal Issues of European Integration* 179.

Jackson, J. and S. Croley, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (1996) 90 *Am. J. Int'l L.*193.

Jackson, J., "Reflections on International Economic Law" (1996) 17 *U. Pa. J. Int'l Econ. L.* 17.

Jackson, J., "The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?" (1995) *World Economy* 11.

Jackson, J., "International Economic Law: The "Boilerroom" of International Relations" (Winter 1995) 10 *Am. U. J. L. and Pol.* 595.

Jackson, J., "The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections" in N. Blokker and S. Muller (eds.), *Towards More Effective Supervision In International Organizations: Essays In Honour Of Henry G. Schermers*, Volume I. Deventer: Kluwer, 1994 at 149.

Jackson, J., "The Uruguay Round, the World Trade Organization and the Problem of Regulating International Economic Behaviour". Hyman Soloway Public Lecture on Business and Trade Law, Ottawa, 30 May 1994.

Jackson, J., "National Constitutions, Transnational Economic Policy and International Economic Law: Some Summary Reflections" in M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law*. Deventer: Kluwer, 1993 at 569.

Jackson, J., "GATT and the Future of International Trade Institutions" (1992) 18 *Brooklyn J. Int'l L.* 11.

Jackson, J., "Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round" in E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, second edition. Deventer: Kluwer, 1991 at 3.

Jackson, J., *The World Trading System: Law and Policy of International Economic Relations*. Toronto: Law and Economics Programme, Faculty of Law, University of Toronto, January 18, 1989.

Jackson, J., "The Birth of the GATT-MTN System: A Constitutional Appraisal" (1980) 12 *L. and Pol. in Int'l Bus.* 21.

Jackson, J., "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT" (1979) 13 *J. World Trade L.* 1.

Jackson, J., "The Crumbling Institutions of the Liberal Trade System" (1978) 12 *J. World Trade L.* 98.

Jackson, J., "The Puzzle of GATT: Legal Aspects of a Surprising Institution" (1967) 1 *J. World Trade L.* 131-161.

Jackson, J., "The General Agreement on Tariffs and Trade in United States Domestic Law" (1967) 66 *Michigan L. Rev.* 249.

Jenks, C., "Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations" in R. Jennings (ed.), *Cambridge Essays in International Law: Essays in Honour of Lord McNair*. Cambridge: Cambridge University Press, 1965 at 48.

Jenks, C., "Some Constitutional Problems of International Organizations" (1945) 22 *British Yearbook of Int'l L.* 11.

Kennedy, P., "The International Style in Postwar Law and Diplomacy: John Jackson and the Field of International Economic Law" (1995) 10 *Am. U. J. Int'l L. and Pol.* 671.

Komuro, N., "The WTO Dispute Settlement Mechanism - Coverage and Procedures of the New Understanding" (1995) 12 *J. Int'l Arbitration* 81

Krasner, S. D., "State Power and the Structure of International Trade" (1976) 28 *World Politics* 317.

Kuijper, P.J., "Dispute Settlement A La Carte". Paper Delivered at the Conference on WTO Dispute Settlement, Brussels, 16 June 1996.

Kuijper, P.J., "The New WTO Dispute Settlement System: The Impact on the European Community" (1995) 29 *J. World Trade* 49.

Kuijper, P.J., "The Conclusion and Implementation of the Uruguay Round Results by the European Community" (1995) 6 *European J. Int'l L.* 222.

Kuijper, P.J., "The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-contained System of International Law" (1994) 25 *Netherlands Yearbook of Int'l Law* 227.

Lafer, C., "The World Trade Organization Dispute Settlement System", *Gilbert Amado Memorial Lecture*, 18 June 1996, Geneva.

Leebron, D., "Implementation of the Uruguay Round Results in the United States" in J. Jackson and A. Sykes (eds.), *Implementing the Uruguay Round.* Oxford: Clarendon Press, 1997 at 175.

Lowenfeld, A. F., "Remedies Along With Rights: Institutional Reform in the New GATT" (1994) 88 *American J. Int'l L.* 477.

Lukas, M., "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 *J. World Trade* 181.

Lutz, J., "GATT Reform or Regime Maintenance: Differing Solutions to World Trade Problems" (1991) 25 *J. World Trade* 107-122.

Marceau, G., "Transition from GATT to WTO: A Most Pragmatic Operation" (1995) 29 *J. World Trade* 147.

Mavroidis, P.C., *The Application of the GATT/WTO Dispute Resolution System to Competition Issues* (Paris: OECD, 1994).

Mavroidis, P.C., "Surveillance Schemes: The GATT's New Trade Policy Review Mechanism" (1992) *Michigan J. Int'l L.* 374.

McRae, D., "From Sovereignty to Jurisdiction: The Implications for States of the WTO". Paper delivered at a Conference on The Asia-Pacific Region and the Expanding Borders of the WTO: Opportunities, Implications and Challenges, Vancouver, 7-8 June 1996.

Mengozzi, P. , "The Marrakesh DSU and its Implications on the International and European Level in J.H.J. Bourgeois, F. Berrod and E. Fournier (eds.), *The Uruguay Round Results: A European Lawyer's Perspective.* Brussels: European Interuniversity Press, 1995 at 115.

Mikesell, R. F., "Antecedents of the ITO Charter and their Relevance for the Uruguay Round" (1994) 14 *Northern Illinois U. L. Rev.* 323.

Montana i Mora, M., "A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes" (1993) 31 *Columbia J. Transnat'l L.* 103.

Montana i Mora, M., "International Law and International Relations Cheek to Cheek: An International Law/International Relations Perspective on the US/EC Agricultural Export Subsidies Dispute" (1993) 19 *North Carolina J. Int'l L. and Comm. Reg.* 1.

Nichols, P.M., "GATT Doctrine" (Winter 1996) 36 *Va. J. Int'l. L.* 379.

Nordgren, I., "The GATT Panels during the Uruguay Round" (1991) 25 *J. World Trade* 87.

Ostrihansky, R., "Settlement of Interstate Trade Disputes -- The Role of Law and Legal Procedures" (1991) 22 *Netherlands Yearbook of Int'l L.* 163.

Ostrihansky, R., "The Future of Dispute Settlement in GATT" (1990) 3 *Leiden J. Int'l L.* 125.

Palmeter, D., "The WTO Appellate Body's First Decision" (1996) 9 *Leiden J. Int'l L.* 337.

Palmeter, D., "International Trade Law in the Twenty-First Century" (1995) 18 *Fordham Int'l L. J.* 1653.

Palmeter, D. and G. J. Spak, "Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict" (1993) 24 *L. and Pol. in Int'l Bus.* 1145.

Patterson, G. and E. Patterson, "The Road from GATT to MTO" (1994) 3 *Minnesota J. Global Trade* 35.

Patterson, G, "The GATT: Categories, Problems and Procedures of Membership" (1992) 1 *Columbia Bus. L. Rev.* 7.

Paul, J. R., "Interdisciplinary Approaches to International Economic Law: The New Movements in International Economic Law" (1995) 10 *Am. U. J. Int'l L. and Pol.* 607.

Pescatore, P., "The New WTO Dispute Settlement Mechanism". Paper delivered at the Liège Conference on Regional Trade Agreements and Multilateral Rules, 3-5 October 1996.

Pescatore, P., "The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects" (1993) 27 *J. World Trade* 5.

Petersmann, E.-U., "Constitutionalism and International Organizations" (1996-97) 17 *Northwestern J. Int'l L. and Bus.* 398.

Petersmann, E.-U., "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization" (1995) 6 *European J. Int'l L.* 161.

Petersmann, E.-U., "Enforcement of International Competition Rules Through the GATT/WTO Dispute Settlement Procedures?" in EC Commission, *Competition Policy in the New Trade Order: Strengthening Cooperation and Rules* (Brussels: EC Commission, 1995).

Petersmann, E.-U., "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948" (1994) 31 *Common Market L. Rev.* 1157-1244.

Petersmann, E.-U., "National Constitutions and International Economic Law" in M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law*. Deventer: Kluwer, 1993.

Petersmann, E.-U., "Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System" in E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, second edition. Deventer: Kluwer, 1991 at 33.

Petersmann, E.-U., "Violation Complaints and Non-violation Complaints in Public International Trade Law" (1991) *German Yearbook of Int'l L.* 175.

Petersmann, E.-U., "The Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlement Procedures" (1989) 32 *German Yearbook of Int'l L.* 290.

Petersmann, E.-U., "Strengthening GATT Procedures for Settling Disputes" (1988) *World Economy* 55.

Petersmann, E.-U., "Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT" in E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*. Deventer: Kluwer, 1988 at 323.

Petersmann, E.-U., "Constitutional Functions of Public International Economic Law" in P. van Dijk et al. (eds.), *Restructuring the International Economic Order: The Role of Law and Lawyers*. Deventer: Kluwer, 1987 at 49.

Petersmann, E-U., "International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order" in R. St. J. MacDonald and D. Johnston (eds.), *The Structure and Process of International Law*. The Hague: Martinus Nijhoff, 1983 at 227.

Pharand, D., "Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint" (1994) 20 *Canada-U.S. L. J.* 19.

Plank, R., "An Unofficial Description of How a GATT Panel Works and Does Not" (1987) 4 *J. Int'l Arbitration* 33.

Price, V. Curzon, "New Institutional Developments in GATT" (1992) 1 *Minnesota J. Global Trade* 87.

Price, V. Curzon, GATT's New Trade Policy Review Mechanism (1991) 14 *World Economy* 229.

Qureshi, A., "The New International Trade Dispute Settlement Framework under the Uruguay Round of Trade Negotiations" (1994) 5 *Int'l Co. and Comm. L. Rev.* 201.

Qureshi, A., "Some Reflections on the GATT TPRM, in light of the Trade Policy Review of the European Communities" (1992) 26 *J. World Trade* 103.

Qureshi, A., "The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or Enforcement?" (1990) 24 *J. World Trade* 3.

Roessler, F., "The Concept of Nullification and Impairment in the Legal System of the World Trade Organization" in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System*. Deventer: Kluwer, 1996.

Roessler, F., "The Agreement Establishing the World Trade Organization" in J.H.J. Bourgeois, F. Berrod and E. Fournier (eds.). *The Uruguay Round Results: A European Lawyer's Perspective*. Brussels: European Interuniversity Press, 1995 at 67.

Roessler, F., "The Constitutional Function of the Multilateral Trade Order" in M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law*. Deventer: Kluwer, 1993.

Roessler, F., "The Competence of GATT" (1987) 21 *J. World Trade L.* 73.

Roessler, F., "The Scope, Limits and Functions of the GATT Legal System" (1985) 8 *World Economy* 287.

Schachter, O., "Sovereignty -- Then and Now" in R. St. J. MacDonald (ed.), *Essays in Honour of Wang Teiya.* Dordrecht: Martinus Nijhoff, 1994.

Schwarzenberger, G., "The Principles and Standards of International Economic Law" (1966-I) 117 *Recueil des Cours* 1.

Schwarzenberger, G., "The Province and Standards of International Economic Law" (1948) 2 *Int'l L.* 401.

Shatreet, S., "Judging in Society: The Changing Role of Courts" in S. Shatreet (ed.), *The Role of Courts in Society.* Dordrecht: Martinus Nijhoff, 1988 at 467.

Seidl-Hohenveldern, I., "Failure of Controls in the Sixth International Tin Agreement" in N. Blokker and S. Mueller (eds.), *Towards More Effective Supervision in International Organizations: Essays in Honour of Henry G. Schermers*, Volume I. Dordrecht: Martinus Nijhoff, 1994 at 255.

Sohn, L., "The Growth of the Science of International Organizations" in K.W. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law: Essays in Honour of Leo Gross.* Cambridge Mass.: Schenkman, 1968 at 251.

Steger, D., "WTO Dispute Settlement: The Role of the Appellate Body". Paper delivered at the Conference on Dispute Resolution in the World Trade Organization, Brussels, 14 June 1996.

Steger, D., "WTO Dispute Settlement: Revitalization of Multilateralism after the Uruguay Round". Paper delivered at the Conference on the Asia Pacific Region and Expanding Borders of the WTO: Implications, Challenges and Opportunities, Vancouver, 7-8 June 1996.

Steger, D., "The Impact of GATT/MTO Rule-making and Rule Interpretation on the Sovereignty of States" in *State Sovereignty: The Challenge of a Changing World*, Proceedings of the 1992 Conference of the Canadian Council on International Law, Ottawa, October 1992.

Stuart, A., "I Tell Ya I Don't Get No Respect!: The Policies underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals" (1992) 23 *L. and Pol. in Int'l Bus.* 749.

Tangney, P., "The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany" (1996) 21 *Yale J. Int'l L.* 395.

Tarullo, D., "Logic, Myth, and International Economic Order" (1985) 26 *Harvard Int'l L. J.* 533.

Thomas, C., "Litigation Process under the GATT Dispute Settlement System: Lessons for the World Trade Organization" (1996) 30 *J. World Trade* 53.

Tita, A., "A Challenge for the World Trade Organization: Towards a True Transnational Law" (1995) 29 *J. World Trade* 83.

Trachtman, J., "The International Economic Law Revolution" (1996) 17 *U. Pa. J. Int'l. Econ. L.* 33.

Trachtman, J., "Reflections on the Nature of the State: Sovereignty, Power and Responsibility" (1994) 20 *Canada-U.S. L. J.* 399.

Trachtman, J., "L"Eat C'est Nous: Sovereignty, Economic Integration and Subsidiarity" (1992) 33 *Harvard Int'l L. J.* 459.

Trimble, P., "International Trade and the "Rule of Law"" (1985) 83 *Michigan L. Rev.* 1016.

Tumlir, J., "International Order and the Decline of Multilateralism". Address to the Australian Economics Society, Canberra, March 1983.

Tumlir, J., "National Sovereignty, Power and Interest" (1981) 31 *ORDO* 1.

Van den Bossche, P. "The Establishment of the World Trade Organization: The Dawn of a New Era in International Trade?" (1994) 1 *Maastricht J. of European and Comp. L.* 396.

van Hoof, G.J.H. and K. De Vey Mestdagh, "Mechanisms of International Supervision" in P. van Dijk (ed.), *Supervisory Mechanisms in International Economic Organizations*. Deventer: Kluwer, 1984.

Vignes, D., "The Impact of International Organizations on the Development and Application of Public International Law" in R. St. J. MacDonald and D. Johnston (eds.), *The Structure and Process of International Law*. The Hague: Martinus Nijhoff, 1983 at 809.

von Bogdandy, A., "The Non-violation Procedure of Article XXIII:2 of GATT -- Its Operational Rationale" (1992) 26 *J. World Trade* 110.

Waincymer, J., "*Reformulated Gasoline* under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?" (1996) 18 *Michigan J. Int'l L.* 141.

Waincymer, J., "Revitalizing GATT Article XXIII -- Issues in the Context of the Uruguay Round" (1989) 12 *World Competition* 5.

Waincymer, J., "GATT Dispute Settlement: An Agenda for Evaluation and Reform" (1989) 14 *North Carolina J. Int'l L. and Com. Reg.*

Wang, L., "Some Observations on the Dispute Settlement System in the World Trade Organization" (1995) 29 *J. World Trade* 163.

Weil, P., "Le Droit International en Quete de Son Identite" (1992-VI) 237 *Recueil des Cours* 90.

Zamora, S., "International Economic Law" (1996) 17 *U. Pa. J. Int'l. Econ. L.* 63.

Zamora, S., "Is there Customary International Economic Law?" (1989) 32 *German Yearbook of Int'l L.* 9.

Zemanek, C., "Majority Rule and Consensus Technique in Law-Making Diplomacy" in R. St. J. MacDonald and D. Johnston (eds.), *The Structure and Process of International Law*. The Hague: Martinus Nijhoff, 1983 at 857.

B. Books

Alexandrowicz, G., *World Economic Agencies: Law and Practice*. London: Stevens, 1962.

Benedek, W., *Die Rechtordnung des GATT aus Voelkerrechtlicher Sicht*. Heidelberg: Max Planck-Institut, 1990.

Bodin, J., *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* (1576), edited and translated by J. H. Franklin. Cambridge: Cambridge University Press, 1992.

Blokker, N., *International Regulation of World Trade in Textiles*. Dordrecht: Martinus Nijhoff, 1989.

Blokker, N. and S. Mueller (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers*, Volume I. Dordrecht: Martinus Nijhoff, 1994.

Brierly, J.L., *The Law of Nations*. Oxford: Oxford University Press, 1963.

Brown, W.A., *The United States and the Restoration of World Trade: An Analysis of the ITO Charter and the GATT*. Washington: Brookings Institution, 1950.

Camps, M., *The Case for a New Global Trade Organization*. New York: Council on Foreign Relations, 1980.

Canal-Forgues, E., *L'institution de la Conciliation dans le cadre du GATT*. Brussels: Bruylant, 1993.

Cappelletti, M., M. Seccombe and J. Weiler (eds), *Political Organizations, Integration Techniques and Judicial Process: Methods, Tools and Institutions*. Berlin: De Gruyter, 1986.

D. Carreau, T. Flory, F. Juillard, *Droit International Economique*, third edition. Paris: LGDJ, 1990.

Colliard, C.-A and L. Dubois, *Institutions Internationales*, 10eme edition. Paris: Dalloz, 1995.

Curzon, G., *Multilateral Commercial Diplomacy: The GATT and its Impact on National Commercial Policies and Techniques*. New York: Praeger, 1966.

Croome, J., *Reshaping the World Trading System: A History of the Uruguay Round*. Geneva: WTO, 1995.

Dam, K., *The GATT: Law and International Economic Organization*. Chicago: Chicago University Press, 1970.

Deardorff, A.V. and R.M. Stern (eds.), *Analytical and Negotiating Issues in the Global Trading System*. Ann Arbor: University of Michigan Press, 1994.

Dicke, D. and E-U. Petersmann (eds.), *Foreign Trade in the Present and in a New International Economic Order*. Fribourg: Fribourg University Press, 1988.

Flory, T., *Le GATT: Droit International et Commerce Mondial*. Paris: LGDJ, R. Pichon & R. Durand-Auzias, 1968.

Friedmann, W., *The Changing Structure of International Law*. New York: Columbia University Press, 1964.

Gardner, R. N., *Sterling-dollar Diplomacy in Current Perspective: The Origins and Prospects of our International Economic Order*. New York: Columbia University Press, 1980.

Gardner, R. N., *Sterling-dollar Diplomacy*. Oxford: Clarendon Press, 1956.

GATT, *Analytical Index: Guide to GATT Law and Practice*. Geneva: GATT, 1994.

Golt, S., *The GATT Negotiations, 1986-90: Origins, Issues and Prospects*. London: British-North American Committee, 1988.

Golt, S., *The GATT Negotiations, 1973-79: The Closing Stage*. London: British-North American Committee, 1978.

Hallstrom, P., *The GATT Panels and the Formation of International Trade Law*. Stockholm: Juristforlaget, 1994.

Hudec, R., *Enforcing International Trade Law: The Evolution of the GATT Legal System*. Salem N.H.: Butterworths, 1993.

Hudec, R., *The GATT Legal System and World Trade Diplomacy*, second edition. Salem, N.H.: Butterworths, 1990.

Hudec, R., *Developing Countries in the GATT Legal System*. London: Gower, 1987.

Jackson, J., *Restructuring the GATT System*. New York, London: Royal Institute of International Affairs, 1990.

Jackson, J., *The World Trading System*. Cambridge: The MIT Press, 1989.

Jackson, J., *World Trade and the Law of GATT*. New York: Bobbs-Merrill Company, 1969.

Jackson, J. and A. Sykes (eds.), *Implementing the Uruguay Round*. Oxford: Clarendon Press, 1997.

Jackson, J., W. Davey and A. Sykes, *Legal Problems of International Economic Relations*, third edition. St. Paul: West Publishing Co., 1995.

Jackson, J., J.-V. Louis, and M. Matsushita, *Implementing the Tokyo Round: National Constitutions and International Economic Rules*. Ann Arbor: University of Michigan Press, 1984.

Jennings, R. and A. Watts (eds.), *Oppenheim's International Law*. London: Longman, 1993.

Jessup, P., *Transnational Law*. New Haven: Yale University Press, 1956.

Klein, R., *Sovereign Equality Among States*. Toronto: University of Toronto Press, 1974.

Kock, K., *International Trade Policy and the GATT, 1947-1967*. Stockholm: Almquist & Wiksell, 1969.

Kolasa, J., *Law-making and Law-enforcing for International Trade: Some Reflections on the GATT Experience*. Princeton: Centre for International Studies, Princeton University, 1976.

Long, O., *Law and its Limitations in the GATT Multilateral Trade System*. Dordrecht: Martinus Nijhoff, 1985.

McGovern, E., *International Trade Regulation*, third edition. Exeter: Globefield Press, 1995.

Merrills, J., *International Dispute Settlement*. Cambridge: Grotius, 1991.

Morgenstern, F., *Legal Problems of International Economic Organizations*. Cambridge: Grotius, 1986.

O'Connor, J.F., *Good Faith in International Law*. Aldershot: Dartmouth, 1991.

Pescatore, P., W. Davey, and A. Lowenfeld, *Handbook of GATT/WTO Dispute Settlement*. Deventer: Kluwer, 1996 (updated).

Petersmann, E.-U. (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System*. Deventer: Kluwer, 1997.

Petersmann, E-U., *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement*. Deventer: Kluwer, 1996.

Petersmann, E.-U. and M. Hilf (eds.), *National Constitutions and International Economic Law*. Deventer: Kluwer, 1993.

Petersmann, E.-U. and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, second edition. Deventer, Boston: Kluwer, 1991.

Petersmann, E.-U., *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland*. Boulder: Westview University Press, 1991.

Rubin, S. J. and M. L. Jones, *Conflict and Resolution in US-EC Trade Relations at the Opening of the Uruguay Round*. New York: Oceana, 1989.

Schermers, H.G. and N. Blokker, *International Institutional Law*, third edition. The Hague: Martinus Nijhoff, 1995.

Shapiro, M., *Courts: A Comparative and Political Analysis*. Chicago: Chicago University Press, 1981.

Seidl-Hohenveldern, I., *International Economic Law*, second edition. Dordrecht: Martinus Nijhoff, 1992.

Shatreet, S. (ed.), *The Role of Courts in Society*. Dordrecht: Martinus Nijhoff, 1988.

Trebilcock, M. J. and R. Howse, *The Regulation of International Trade*. London, New York: Routledge, 1995.

Tumlir, J., *National Interest and International Order*. London: Trade Policy Research Centre, 1978.

United States (International Trade Commission), *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements*. Washington D.C.: U.S. International Trade Commission, 1985.

van Dijk, P. (ed.), *Supervisory Mechanisms in International Economic Organizations*. Deventer: Kluwer, 1984.

VerLoren van Themaat, P., *The Changing Structure of International Economic Law*. The Hague, 1981.

Voitivich, S., *International Economic Organizations in the International Legal Process*. Dordrecht: Martinus Nijhoff, 1995.

White, N.D., *The Law of International Organizations*. Manchester: Manchester University Press, 1996.

Wilcox, C., *A Charter for World Trade*. New York: MacMillan, 1949.

Winham G.R. and K. L. Krizer, *The Uruguay Round Mid-term Review 1988-1989: A Case Study of Multilateral Trade Negotiations*. Foreign Policy Institute, Case Study No. 20. Washington D.C.: Johns Hopkins School of Advanced International Studies, 1993.

Winham, G. R., *The Evolution of International Trade Agreements*. Toronto: University of Toronto Press, 1992.

Winham, G. R., *International Trade and the Tokyo Round Negotiations*. Princeton N.J.: Princeton University Press, 1985.

C. Other

GATT, *Basic Instruments and Selected Documents*

GATT/WTO, FOCUS Newsletter

GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*. Geneva: GATT, 1994.

OECD, *International Investment, 1993*. Paris: OECD, 1993.

WTO, *International Trade: Trends and Statistics, 1995*. Geneva: WTO, 1995.

International Legal Materials