

The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure

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Robert E. Hudec

1. INTRODUCTION

The dispute settlement procedure established by the World Trade Organization (WTO) represents a decision by the world's major trading nations to grant an unprecedented degree of power to a legal tribunal to enforce the various trade agreement obligations appended to the WTO Agreement. The WTO dispute settlement procedure provides that legal complaints by Members shall have automatic access to a neutral tribunal called a panel; it then sets forth a sophisticated litigation process leading to binding legal rulings by the panel, an appellate tribunal to review panel rulings, and a follow-up procedure ending in retaliatory sanctions for failure to implement such rulings. In the history of international law, it is rare to find a legal institution with this much regulatory power over significant areas of government economic policy.

The legal achievement represented by the WTO disputes procedure was not accomplished overnight. It occurred only after a slow -- sometimes painfully slow -- process of step-by-step developments beginning with the creation of the General Agreement on Tariffs and Trade (GATT) in 1947. It was only after the GATT had spent forty years to construct the basic elements of the present disputes procedure that governments were able to take the final leap to a fully binding procedure in the 1986-93 Uruguay Round negotiations.

Several generations of GATT Secretariat officials played a significant role in bringing GATT Contracting Parties to accept the key elements of that disputes procedure. The story of the Secretariat's contribution is an illuminating example of the difference that international civil servants can make in the evolution of international legal institutions. This monograph presents a brief account of that story, and how it all came out.

2. THE ORIGINAL LEGAL DESIGN

Although modern governments have been negotiating trade agreements for several centuries, the use of third-party adjudication to enforce trade agreement obligations appears not to have received serious consideration until the 1946-48 negotiations that created the GATT. Before then, trade agreements had almost always been bilateral in form, and the two parties to such agreements typically did not look to any outside institution to adjudicate their legal disputes. If consultations failed to secure the conduct expected of the other party, the aggrieved party was left with no further recourse except declining to perform some or all of its own obligations. On the whole, governments seem to have been content with this rather weak form of enforcement, no doubt because experience showed that the mutual interest in trade liberalization was usually strong enough to persuade both governments to live up to what they had agreed to.

The plan for trade agreements after World War II called for the creation of a large international organization called the International Trade Organization (ITO) that would have one subdivision dealing with international trade in goods (the GATT), and several others dealing with employment, economic development, restrictive business practices and inter-governmental commodity agreements. The legal design of the ITO Charter provided for a rather elaborate procedure of third-party adjudication. Legal disputes could be submitted for a legal ruling by the ITO's eighteen-member Executive Board, followed by an appeal to the full membership in the plenary Conference of the ITO, and followed in turn by a further right to seek an advisory opinion from the International Court of Justice.¹ Unfortunately, by the time the Charter was finished and submitted for ratification in 1948, this relatively strong adjudication procedure no longer had very much domestic political support in some of the key member governments. The United States Congress refused to ratify the ITO Charter, and one of the main reasons for its refusal was a growing disenchantment with international legal institutions in the tense and suspicious climate of the early Cold War years.²

The GATT was negotiated in 1947, in the midst of the ITO negotiations, for the purpose of achieving an immediate reduction in tariffs among the twenty-three countries that were conducting the preliminary phases of the ITO negotiations.³ Although the GATT was a separate agreement that came into force immediately, it was intended that GATT would be incorporated into the ITO when the ITO came into force in 1948 or 1949. Thus, the governments that negotiated the GATT in 1947 clearly intended that its obligations would eventually be enforced by the third-party adjudication mechanism of the ITO Charter.

In the GATT itself, however, the hurried character of the tariff-reducing enterprise led governments to fashion a considerably less ambitious dispute settlement procedure for the short period that the GATT was expected to stand alone. Several circumstances created the need to accept this more modest legal design. First,

¹ See Brown, pp 227-234.

² See Gardner, Chapter 17.

³ See Brown, pp. 131-134a.

in order to fit within the rather limited negotiating authority of the United States, GATT had to be presented as a "trade agreement" rather than an international organization, and so it could not incorporate any organizational structures like the elaborate three-tier adjudication procedure of the ITO Charter. Under GATT, legal rulings would have to be made by periodic meetings of the signatory governments, with no further organizational structure provided for. Second, in order to avoid formal ratification procedures that would delay implementation of the tariff reductions, the nature of the legal commitment to GATT obligations was limited to a commitment, in a separate protocol, that governments would apply the obligations provisionally, a term that suggests something less than definitive and final legal commitment.⁴ For the same reason, even this limited commitment was further reduced by granting governments an across-the-board reservation in the protocol for any existing legislation inconsistent with GATT obligations. And finally, because the ITO negotiations had not yet succeeded in defining the legal consequences of various kinds of legal claims that might be brought under a multilateral trade agreement, the GATT's own dispute settlement provision (still in force as GATT Article XXIII) had to be based on a much less precise draft text of the ITO disputes provision as it then stood -- a text that applied to an extremely broad range of potential legal claims and that provided very little guidance as to their respective legal consequences. In sum, these several compromises with expediency left the GATT disputes procedure with hardly any legal foundation at all.

As things turned out, the weakness of the GATT's dispute settlement procedure proved to be something of an advantage in the more hostile political climate that greeted the GATT at the end of the ITO negotiations. GATT survived the demise of the ITO Charter, but it, too, was viewed with considerable suspicion by those domestic political interests opposed to any surrender of sovereignty to international institutions. In this climate, an elaborate and conspicuously legal adjudication procedure could have drawn more attention to GATT and subjected it to more intense opposition. The weakness and ambiguity of the GATT disputes procedure gave it a relatively low profile.

As often happens, however, the trade policy officials who negotiated the GATT and ITO agreements, and their ministries back home, were not willing to surrender their original legal design quite this easily. If an adjudication procedure had been a good policy before, then it was still a good policy, and it was up to trade policy officials to continue trying to achieve that policy in whatever way they could. They would simply have to be more careful, and perhaps a bit more creative, than was originally anticipated.

⁴ Protocol of Provisional Application. GATT, Basic Instruments and Selected Documents (hereinafter BISD), Vol. I, p 77.

3. THE FIRST STEPS TOWARDS THIRD-PARTY ADJUDICATION

Notwithstanding both the hostility of the external political climate and the internal weakness of the GATT adjudication procedure itself, some GATT Contracting Parties started submitting legal claims almost as soon as the GATT opened its doors for business in 1948. The leadership of the early GATT never seems to have contemplated not responding to these early legal claims. They simply set about trying to fashion a way of answering them.

Needless to say, the GATT's flimsy legal structure placed many obstacles in the way of an effective response. First, the GATT's lack of an organizational structure made it impossible for the Contracting Parties to do business on a continuing basis. Business had to be done during periodic gatherings of GATT's membership, called Sessions. These early legal claims had to be disposed of, therefore, in the few weeks or months that the Contracting Parties remained in session.

A more serious obstacle to third-party adjudication was the fact that the GATT did not provide for any kind of neutral tribunal that could rule on legal issues. According to Article XXIII, rulings were to be given by the CONTRACTING PARTIES -- the plenary meeting of all the signatory governments. An assembly of diplomats each representing his own government's interest hardly seems an appropriate forum for rendering an impartial legal decision.

The first few legal rulings overcame both the time pressure and the neutrality problem by the device of a ruling from the chair, which became a ruling of the entire membership when it was tacitly approved by silence.⁵ This device was accepted as sufficiently neutral for two rather special reasons. First, the Chairman of the Contracting Parties during the first four sessions was L. Dana Wilgress, a senior Canadian diplomat who had also been Chairman of the 1946-48 GATT/ITO negotiations. Wilgress' key role in those negotiations lent an unusual degree of authority to his rulings, both because of his expertise as to the meaning of the agreement and because of the reputation for fairness he had earned in his work as chairman of the ITO negotiations. Second, and perhaps more important, in these early years most of the delegates to GATT meetings were also veterans of the GATT/ITO negotiations themselves. As such, they all felt they knew exactly what was meant by all of the provisions in the agreement they had drafted, and consequently saw nothing amiss in voting on authoritative legal interpretations. There was no problem of neutrality, they thought, when everyone in the room very well knew the right answer.⁶

The device of the chairman's ruling got the GATT past the first few legal claims, but it was clear to everyone that this device was not a long-term answer to the need for a neutral tribunal. The first, somewhat cautious step towards such a

⁵ See Hudec(1990), pp 75-76.

⁶ To be sure, not every ruling by the membership came out looking quite so neutral. In 1949, Czechoslovakia brought a complaint against the Cold War trade measures taken by the United States. After a heated debate, the United States insisted on a vote. The vote dismissing the Czech claim was unanimous (except for Czechoslovakia), but there would have been no way to persuade Czechoslovakia that this legal ruling had been made by a neutral body.

tribunal was the decision to refer some of these early legal claims to a working party. In GATT parlance, the term working party refers to a smaller group made up of all those who have a direct interest in the matter, plus a representative cross-section of other governments. The normal function of working parties was to negotiate a political solution acceptable to the key parties with direct interests in the matter. On the face of it, the structure of the working party and the political orientation of its working procedures made it seem no more appropriate for handling legal claims than meetings of the entire GATT membership.

Without any formal changes, however, some of the early working parties to which legal claims were referred began to try to function as neutral fora anyway. The third-party members of the working party would try to arrive at a neutral view of the controversy. And then, contrary to normal working party practice of merely recording differences of position when there was no consensus, these working parties would report in a way that gave prominence to the views of the neutral members, and on that basis would offer a proposed recommendation and/or legal ruling for adoption by the Contracting Parties.⁷ Like the early chairman's rulings, these attempts at third-party rulings by the neutral members tended to earn general acceptance despite their irregular origins. Once again, the main factor underlying their acceptance was the fact that most of the ITO veterans serving as GATT delegates were confident that they knew what the agreement meant. It also helped that most working parties had delegates from the United States, United Kingdom and France -- the three most influential delegations that had not only done most of the actual drafting of the GATT/TTO agreements, but had in fact dictated most of their substance.

4. THE SECRETARIAT'S ROLE IN THE EARLY YEARS

Because the GATT was a trade agreement rather than an international organization, it was unable to create its own secretariat. Instead, GATT member governments borrowed a secretariat from the secretariat that the United Nations had created to administer the ITO negotiations. The secretariat of the ITO negotiations had stayed in existence after the Havana Conference as the secretariat of an ad hoc organization called the Interim Commission for the International Trade Organization (ICITO) that had been created to prepare the ground for the ITO. After the ITO was abandoned in 1950, ICITO ceased to have any substantive function, but it nevertheless continued in existence for the next fifty years solely to provide a legal basis for the existence of the GATT Secretariat. The lending arrangement lasted until the WTO came into existence in 1995 and took over the GATT Secretariat as its own.

The first Executive Director of the GATT Secretariat was Eric Wyndham-White of the United Kingdom. A lawyer by training, White had been the director of the secretariat since the beginning of the ITO negotiations. He stayed on to lead the GATT Secretariat from 1948-68. Jean Royer, a trade diplomat from

⁷ See Hudec (1990), pp 76-80.

France, served as Deputy Executive Secretary from 1948-58. The initial GATT Secretariat was quite small, and its volume of business during this period was small enough that Wyndham-White and Royer were able to participate actively on dispute settlement issues of any significance.

Although there is no record of the Secretariat's role in the plenary meetings that issued the first GATT legal rulings, it is likely that, as with all meetings of the Contracting Parties, the Secretariat in consultation with the Chairman had scripted each item on the agenda -- that is, had consulted the relevant parties on their desires regarding the proper disposition of the matter and then prepared a script for the Chairman to follow in leading the meeting to the proper disposition. Given the extensive experience of the Chairman and the leading delegates, it is probable that they already had strong views on how they wanted these early legal issues to be handled, and would not have required much guidance from the Secretariat on that issue.

The Secretariat would have had a larger role in the working parties that were appointed to deal with some of the early legal claims. In addition to handling all the physical arrangements for meetings of the working party, the Secretariat is normally expected to supply the background information and other documentation needed by the working party. Usually, it also drafts whatever reports are needed to transmit the results achieved by the working party.

Once again, most of the individual delegates serving on the working parties would probably have needed relatively little guidance as to the merits of the legal problems before them. The drafting of the working party's conclusions was not so straightforward, however. Either the chairman of the working party or the Secretariat would probably have had to negotiate a bit with both parties in order to formulate a ruling that both could accept. Often the key was to find a verbal formulation which said enough to indicate the proper legal conclusion, but which did not say it so clearly that it would embarrass the losing government. The actual drafting of the decision was also quite important in protecting the GATT itself from the dangers of adjudication process. Given the uncertain reception that awaited GATT legal obligations in national capitals, it was important not to commit the GATT's full prestige behind rulings that governments might not be able to comply with. GATT would be better served by rather vague legal conclusions that left some room for manoeuvre if such difficulties arose. Finally, diplomatic obfuscation of these early legal rulings would also help to protect the GATT from attacks by hostile political forces in national capitals. Critics could not attack what their lawyers could not understand.

The early GATT legal rulings usually met these needs for kinder, gentler and more obscure legal rulings by resorting to the language of diplomacy rather than law. The art was to suggest the necessary conclusions with impressionistic brush strokes that, upon closer examination, never actually said in print what everyone knew they meant. The technique was particularly effective against lawyers, because under normal standards of legal analysis it was almost impossible to reach a satisfactory legal conclusion about what these decisions actually meant or required. Such vagueness did not cause problems within the halls of GATT, of course, because most of the veteran GATT delegates were accustomed to talking this way all the time, and their shared consensus about the meaning of the GATT

left them in little doubt as to what these decisions meant. Indeed, the strength of this consensus was sometimes so strong that it hardly needed any written ruling at all. In one celebrated decision, the actual text of the working party report had followed the normal working party practice of merely stating the opposing views of the two sides to the legal dispute. In reality, the neutral members of the working party, and most other delegates, were firmly convinced that the complainant's claim of violation was correct. This point of view turned out to be so widely shared that, after about a year, all further GATT discussion of the case had simply assumed that approval of this very bland working party report had been an authoritative ruling of violation.⁸

According to the recollection of participants interviewed by the author many years ago, the Secretariat did most of the drafting of these artfully worded legal rulings in the early working party reports. The principal draftsman of the more important legal rulings was Deputy Executive Secretary Jean Royer, a role that he continued to fulfill until his retirement in 1958. Royer was not a lawyer, but he did have masterful command of the language of nuanced diplomacy. When those writing skills were coupled with his expert knowledge of the agreement, the result was a series of both penetrating and artful legal rulings that laid down some of the most important foundation concepts of present-day GATT law.

5. THE PANEL ON COMPLAINTS

The GATT's procedure for third-party adjudication of legal claims took a significant step forward in 1952 when it was decided to refer all the legal claims on the agenda of the Seventh Session of the Contracting Parties to a body called *a panel on complaints* rather than a conventional working party.⁹ The term panel in GATT parlance came from the term panel of experts -- a term coined long before GATT to describe an ad hoc group of government experts (rather than policy officials) convened to render an expert opinion about some technical question that is capable of being answered objectively. The term thus connoted objective decisions based on expertise rather than political representation of one's government. The move to the panels was a natural next step. The need for a neutral and objective tribunal had been acknowledged from the beginning, and the early forms of decision-making had each tried in its own way to achieve such neutrality and objectivity. But it had to be clear to all participants that political bodies could never achieve the degree of neutrality and objectivity that would command the kind of respect needed for an effective legal system.

In the hostile political climate of the early 1950s, the *panel* initiative was a rather dangerous one. That was evident from the very cautious way the GATT went about it. The first version of the proposal merely called for creation of a single working party to handle all the Seventh Session complaints. When the decision was recapitulated a few days later, the name panel was slipped in without

⁸ Brazilian Internal Taxes, 1 BISD 181-86 (1952). See Hudec (1990), Chapter 12.

⁹ See Hudec (1990), Chapter 9.

explanation. Then, when the Seventh Session panel was appointed its structure was defined in a way to suggest working party practice. Members of the Seventh Session panel were still identified by country, rather than the traditional panel practice of identifying the experts by name. And nothing was said about any changes in working procedure. Most delegations would have known and understood what was really going on here, but all seemed to agree that the less said the better.

The actual working procedure of the Seventh Session panel contained some quite significant changes from the procedure followed by working parties. The disputants were not voting members of the panel. All the panel members were in fact from countries that could be called neutrals. The panel would receive oral and written argument from the parties, but it would meet without the parties present to decide the case. The panel would still consult the disputants about ways to make the ruling more acceptable, but it was clear that the panel would reach its own decision in the end.

The panel ruled on four legal claims during the Seventh Session. In each case the parties accepted the new procedures without complaint, and all four cases were successfully resolved. The panel procedure then gradually came into the open during the next few years. Panel members were eventually appointed by name rather than country. The panel's working procedures were finally explained in GATT published reports, and the fact that panel members were to act in their personal capacity rather than on instruction from their governments was made explicit.

In the years between 1952 and 1963, panels resolved fifteen more legal controversies. The results were generally accepted by the disputants, and all produced some result that could have been called a success. By 1963, it could be said that GATT had succeeded in developing a quiet but effective mechanism for adjudicating legal disputes between members.

The leadership of the GATT Secretariat is generally credited with having initiated and managed the creation of the panel procedure. By 1952, the GATT's first acknowledged leader -- Dana Wilgress of Canada, the first chairman of the GATT Contracting Parties after chairing the GATT/ITO negotiations -- had left the scene and Eric Wyndham-White's leadership of the Secretariat had by then earned him a role of considerable influence. Throughout his long tenure, Wyndham-White was always a staunch supporter of the panel procedure.

The basic elements of the Secretariat's role in panel proceedings were the same as for a working party -- meeting arrangements, background information and documentation, and drafting. But the nature of the panel procedure worked to augment the influence that the Secretariat was able to exert on the content of legal rulings. With the parties out of the room when cases were being decided, the Secretariat would be able to take stronger positions on the merits. Likewise, the Secretariat would be able to use its role as principal draftsman more aggressively. To be sure, panel members would continue to exert an important check on the political viability of panel decisions, and their endorsement of decisions would still be critical to their perceived legitimacy. But as time went on, and particularly as new generations of GATT delegates replaced the original ITO veterans, the Secretariat's

expertise and neutrality would become recognized by governments as the principal influence on the content of panel rulings.

6. THE ANTI-LEGALISM OF THE 1960S

The year 1963 marked a sharp breaking point in the development of the GATT dispute settlement procedure. From 1964 to 1970, the business of adjudicating legal claims simply stopped entirely. Moreover, the GATT's declared policy towards such adjudication took a sharply negative turn.¹⁰

The decline of GATT legal activity in the 1960s can be laid to two major changes that were taking place in GATT at that time. The first was the emergence of the European Economic Community. Though the Community achieved a surprisingly high degree of conformity with GATT legal requirements for creating a customs union, the Community was open to legal challenge in two important areas -- its Common Agricultural Policy, and the preferential trade relationships it had established with former colonies. The Community met legal complaints about these deviations by lecturing the GATT membership about the injudiciousness of trying to solve sensitive economic and political problems by applying legal norms to them -- norms usually referred to as wooden and legalistic. Instead, the Community argued, GATT should adopt flexible and pragmatic approaches to trade problems caused by these Community policies. Since it seemed clear that the Community was prepared to leave GATT rather than give up these important policies, the rest of the GATT members eventually agreed to set aside the adjudication procedure for these problems.

A second and broader reason for the declining use of GATT legal process in the 1960s was the expansion of GATT's membership to embrace a three-fold increase in the number of developing countries. By the mid-1960s developing-country members of GATT outnumbered the developed countries by more than two-to-one. Developing country members moved to make use of this majority power by organizing as a bloc that could present a long list of concerted demands for improved treatment. Many of these demands were presented as calls for enforcement of the legal obligations of developed countries, for in fact many of the latter's trade barriers impeding developing country access to their markets were GATT-illegal. Faced with these sweeping legal demands, most developed countries found that they had been converted to the European Community's philosophy of pragmatism. Even the United States took to lecturing developing countries on the injudiciousness of seeking legalistic solutions to sensitive political and economic problems. By the later years of the decade, observers could well describe the situation as the flowering of an anti-legalist movement within GATT.¹¹

The anti-legalist movement continued in full force until the early 1970s. For the European Community, the anti-legalist position lasted a lot longer, because basic Community policies were still exposed to legal attacks throughout the 1970s.

¹⁰ See Hudec (1990), Chapter 19.

¹¹ See Hudec (1987), Chapters 3-4.

Indeed, the Community's legal exposure became even more uncomfortable in the early 1970s when the United States launched a new round of legal attacks stimulated by trade losses due to the Community's Common Agricultural Policy. The Community continued to adhere to the anti-legalist position throughout the 1970s, and stood as a pillar of resistance to most of the efforts to revive GATT legal process that emerged during that period.

7. THE US EFFORT TO REVIVE THE GATT DISPUTES PROCEDURE

The United States deserted the anti-legalist camp in the early 1970s.¹² Broadly speaking, the change was triggered by growing concern about two parallel strains of increasing protectionism -- the rise of protectionism in the US Congress and also a general increase in non-tariff trade barriers (NTBs) around the world. The US decided to attack this problem by seeking to launch a new round of GATT trade negotiations aimed at the NTB problem. Strengthening GATT's legal machinery became an essential element of that strategy for two reasons. First, the best legal technique for removing NTBs was to write more specific general rules covering the non-tariff measures in question, and such rules would require effective dispute settlement for their enforcement. Second, it was believed that the US Congress would not grant authority to negotiate new commitments on NTBs unless the Executive Branch could demonstrate the will and the ability to enforce those commitments. A visible and successful adjudication procedure was a familiar symbol of effective enforcement, particularly to an American audience.

The campaign for legal reform began with a trickle of US legal complaints in the first few years of the decade. The volume of US complaints gradually increased throughout the decade, and other governments were eventually induced to start using the GATT's legal machinery themselves. Then, towards the end of the decade, the United States used the Tokyo Round trade negotiations to press for a series of reforms that would strengthen the disputes procedure further. The European Community opposed most of the new reforms proposed by the United States and others, but did agree to a lengthy restatement of customary GATT practice.¹³ This restatement had a greater effect than the Community probably anticipated. By codifying and legitimating the core elements of the adjudication procedure, it encouraged governments to employ the dispute settlement procedure even more frequently. The volume of dispute settlement activity continued to increase, and by the end of the 1970s the dispute settlement procedure had been restored to a central place on the GATT's regulatory agenda.

Although the re-emergence of the dispute settlement procedure in the 1970s was clearly based upon the precedent of the relatively successful disputes procedure of the 1950s, the 1970s procedure turned out to be something substantially

¹² See Hudec (1993), Chapter 4.

¹³ Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII: 2), BISD, 26th Supp. pp 215-218, an annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, id, pp 210-215.

different than the 1950s version. GATT had changed a good bit since 1960, with the result that the legal setting of the 1970s was quite different from the conditions that prevailed in the 1950s when the GATT had been a small and cohesive club staffed primarily by veteran trade policy diplomats from the ITO negotiations. The legal business of the 1950s had been a rather cozy affair conducted by this small group of like-minded diplomats. Government lawyers had had relatively little to do with the process. Diplomats had shaped the kind of legal claims presented, they had argued the legal claims with all the courtesy common to ordinary diplomatic discourse, and they had disposed of them with all the artful imprecision that diplomats are wont to employ in reconciling conflicts. The relative success of this diplomatic approach had persuaded most GATT participants of the 1950s that GATT was much better off without any lawyers at all in the GATT Secretariat. This anti-lawyer bias was made explicit Secretariat policy by Eric Wyndham-White himself, who saw to it that, in contrast to most other international organizations, the GATT Secretariat did not in fact have any positions for lawyers as such.¹⁴

By the 1970s, the small and cohesive GATT of the 1950s had been transformed into a much larger collection of countries organized around several strong and frequently antagonistic power centers -- the United States, the European Community, Japan, the developing country bloc, and an assortment of smaller developed countries. Moreover, the GATT delegations of the 1970s were staffed by an entirely different generation of trade policy officials, few of whom had even been on GATT delegations in the 1950s. The change in the United States delegation was particularly marked, for in 1962 the US Congress had taken responsibility for GATT affairs away from the trade policy diplomats of the US State Department and transferred it to a new agency -- the Office of the US Trade Representative (USTR) -- that was charged with undertaking a more aggressive pursuit of national economic interests.

The type of legal claims filed by the United States in the 1970s reflected these differences. The 1970s claims were shaped and prosecuted by lawyers -- specifically, the USTR legal staff. In the tradition of much US domestic litigation, the US legal claims typically presented every legal argument that could be lodged against the trade measure being attacked, occasionally including many of rather dubious merit. In the GATT legal proceedings that followed, each of the many legal arguments was typically pressed as forcefully as possible, obliging panels to work their way through a sometimes bewildering array of not-always-consistent legal theories. The author has sometimes referred to this style of legal argumentation as carpet bombing -- the military term for saturating a target with the largest possible number of bombs that can be dropped on or near it. Although most other delegations were still more disposed to handling legal claims in the old diplomatic

¹⁴ A few staff members of the Secretariat had degrees in law, a university subject that is commonly taken by European students seeking entry into government service, but most had never used their legal training. Wyndham-White was himself a lawyer, a fact which seemed to increase the strength of his conviction that lawyers should have no role in GATT.

fashion, they had little choice but to copy the US legal techniques when facing US lawyers on the other side of a dispute.

The new type of legal claim, coupled with the greater degree of contentiousness among the GATT's Contracting Parties, presented a particularly difficult problem for the GATT's dispute settlement procedure. GATT panels continued to be ad hoc bodies consisting of three to five delegates from neutral countries. Individual panel members would usually have had a certain expertise about GATT policy in general, but were unlikely to have the detailed technical expertise needed to sort through the twenty or more esoteric legal issues raised by the legal debate between the parties. The Secretariat officials servicing the panel would have somewhat greater technical expertise in GATT law owing to longer contact with GATT, but in the absence of trained lawyers in the Secretariat, most Secretariat officials were also likely to be at a considerable disadvantage.

The 1970s Secretariat officials had a further disadvantage as compared with their 1950s predecessors. The 1970s Secretariat was a much larger organization with a much larger business agenda, which meant that the top leadership of the Secretariat were unable to devote the time and attention to panel proceedings that had been given by Wyndham-White or Royer. As a consequence, panel-service assignments were distributed among the subject matter divisions of the Secretariat, the assignment going to the division responsible for the subject matter area involved in the dispute. Distributing the Secretariat's legal work among a large number of different Secretariat officials, many below the level of Division Director, would deprive the Secretariat of the sustained contact with the panel procedure needed to build expertise and consistency. While some of the Secretariat officials assigned to panels were up to the task in some cases, it was inevitable that other panels would be less fortunate.

It was not long before some GATT panels began to experience difficulty in coping with this new and more demanding legal environment. The celebrated group of four DISC cases decided in 1976 produced the first significant failure.¹⁵ These cases had elicited a dazzling display of the new style of tenacious (and tendentious) lawyering on the part of both US and EC lawyers, as both sides waged all-out legal warfare over both the procedures to be followed and the complex tax and subsidy issues in the case. The panel's ruling that the US DISC law was in violation of the GATT Article XVI:4 prohibition against export subsidies seemed correct to most GATT participants, but there was vigorous and widespread criticism of the panel's three companion rulings that the territorial tax systems of France, Belgium and the Netherlands were equally inconsistent with Article XVI:4. Many delegates suspected that the latter three rulings were in part a diplomatic effort to balance the result; if so, it was clear the panel has misjudged the room it had for diplomatic manoeuvre. The three contested DISC rulings became a very prominent black eye for the GATT dispute settlement procedure, because they continued to occupy a position of high visibility on GATT's legal agenda for the next five years, until the entire case was finally resolved by a 1981 settlement

¹⁵ United States: Income Tax Legislation, BISD, 23rd Supp. pp 98-114. France: Income Tax Practices, id, pp 114-127. Belgium: Income Tax Practices, id, pp 127-136. Netherlands: Income Tax Practices, id, pp 137-147. See Hudec (1983), Chapter 5.

that affirmed the European defendants' view of the law and essentially repudiated the panel ruling against them.

As the volume of GATT litigation began to accelerate towards the end of the 1970s so did the number of problematic legal rulings. The next example was 1978 *MIPS* decision in which the panel's effort to answer a long list of esoteric legal claims made by the United States produced several rulings on collateral issues that were clearly in error.¹⁶ Fortunately, criticism of the errors was not pursued when the case became moot due to termination of the challenged measures for other reasons. Next came a pair of related decisions in 1979 and 1980 which ruled that the European Community's export subsidies on sugar could not be found in violation of the qualified prohibition stated in GATT Article XVI:3.¹⁷ Notwithstanding the problems in proving such a complaint, due to both an unsatisfactory legal text and a totally distorted international market, a substantial number of GATT delegations viewed the panel's inability to strike down these egregious export subsidies as a failure of either courage or legal skill or both. The panel did try to generate an alternative form of pressure on the Community's subsidy policy by finding that the Community was obliged to consult about the *serious prejudice* caused by its subsidies -- an effort at a half-a-loaf compromise remedy typical of the 1950s diplomatic approach to difficult cases -- but in the more contentious world of the 1970s this diplomatic attempt at compromise went nowhere. The Community consulted at length, but firmly refused to change anything.

The next problematic decision came in a 1980 panel ruling that European Community restrictions on imports of apples met one of the key requirements of the exception stated in GATT Article XI:2(1)(c).¹⁸ The ruling was vigorously criticized by several governments at the time, and was eventually repudiated in two subsequent panel rulings nine years later.¹⁹ The string of erroneous decisions finally came to a head with a 1981 panel ruling exonerating a series of Spanish internal measures that discriminated against imports of soyabean oil.²⁰ Many delegations suspected that the panel had been trying to fashion a diplomatic solution by cutting a little slack for a developing country, but, if that had been the purpose, it soon became clear that the GATT of the 1980s was no longer interested in diplomatic answers to legal claims. The United States organized a broad-based attack on the ruling in the GATT Council, and the ruling was formally repudiated when the Council voted merely to note the ruling rather than to adopt it. The Soyabean Oil case made it impossible to ignore the problem any longer.

¹⁶ European Community: Program of Minimum Import Prices (MIPS), Licenses Etc for Certain Processed Fruits and Vegetables, BISD, 25th Supp. pp 68-107.

¹⁷ European Community: Refunds on Exports of Sugar, BISD, 26th Supp. pp 290-319; European Community: Refunds on Exports of Sugar, BISD, 27th Supp. pp 69-98.

¹⁸ European Community: Restriction on Imports of Apples from Chile, BISD, 27th Supp. pp 98-117.

¹⁹ European Community: Restriction on Imports of Desert Apples from Chile, BISD, 36th Supp. pp 135-167; European community: Restrictions of imports of Apples, BISD, 36th Supp. pp 135-167.

²⁰ Spain: Measures Concerning Domestic Sale of Soyabean Oil, GATT Docs. L/5142 and L/5142/Corr.1, not reprinted in BISD.

8. THE CREATION OF THE SECRETARIAT'S OFFICE OF LEGAL AFFAIRS

Arthur Dunkel replaced Olivier Long as Director-General of GATT in 1980, just as the number of problematic panel rulings was beginning to draw attention to the Secretariat's lack of legal expertise. To many Secretariat officials and GATT delegates, the answer seemed obvious -- the Secretariat would have to acquire a staff of professional lawyers to advise panels. But it was not that easy. The European Community, which was just then becoming the target of a new barrage of post-Tokyo Round legal claims by the United States, indicated it was strongly opposed to abandonment of the Secretariat's traditional no-lawyers policy.

Dunkel decided that the Secretariat had to move forward anyway. His problem was to find a solution that would improve the Secretariat's legal capacity in a way that would satisfy the Community's concerns as well. Dunkel's response was in the best traditions of the glacial gradualism that is typical of much GATT diplomacy. In January 1981, he created a Secretariat position entitled Director of Legal Affairs. He appointed to that position a very senior Secretariat official, a man widely respected for his archival knowledge of GATT history, and, more important, for the understanding and good judgment he had demonstrated during a long career as an international civil servant. To add further assurance to the safety of this position, the appointment was cast as a two-year experiment, a time limit that was guaranteed by the fact that the official himself was scheduled to retire in two years. Furthermore, the position had no staff assigned to it, limiting the amount of legal work it could do.

The two year experiment with the Director of Legal Affairs apparently caused no major problems for the Community. In the meantime, the volume and complexity of GATT litigation had grown even greater, making it all but essential that the Secretariat retain the position of legal advisor in some form or other. As for the Community, its opposition to legal staff had begun to soften a bit by 1983, but there were still considerable limits upon what it would accept. The search for a successor to the first Director of Legal Affairs brought forth a recommendation that the position be filled by someone with both the training and professional experience of a lawyer, possibly someone from outside the Secretariat. According to the recollection of participants, the Community vetoed the proposed appointment of one such legal candidate. Instead, the Community indicated that the most it could accept would be another very senior and very well respected member of the Secretariat, one who had a university degree in law but who had chosen a career as a diplomat and international civil servant, rather than as a lawyer. In January 1983, that official was appointed to the position.

This time, however, it was possible to take a series of additional steps over the next six months that eventually strengthened the position considerably. First, the position lost its temporary character. The title of the position was changed to Director, Office of Legal Affairs, with the Office being a permanent part of the Secretariat. Soon afterwards, additional staff was added -- first a secretary, then a young lawyer that had been hired by another division for archival work, and a few months later another young lawyer who had been hired by another division as a trade policy counselor. The two additional lawyers had both the training and

experience needed to cope with the kind of legal problems confronting the Secretariat. By mid-1983, therefore, a three-member Secretariat legal office with the requisite kind of legal expertise was up and running.

The Office of Legal Affairs did not bring about an error-free legal system. Panelists occasionally rejected Secretariat advice, and sometimes the panels were confronted with conflicting advice -- one view from the Office of Legal Affairs and another view from the subject-matter Division assigned to the panel. And the Office of Legal Affairs itself stumbled a few times as well. In addition to these occasional legal errors, the dispute settlement process also produced a few other decisions that the losing governments simply refused to accept, and which, because of the requirement that rulings must be adopted by consensus, were never adopted.

Each time it suffered a disappointing outcome of one kind or another, however, the GATT dispute settlement process was able to pick itself off the floor and handle the next series of cases successfully. Eventually, the number of sound rulings and successful outcomes substantially outnumbered the disappointing results, and over the next ten years governments gradually acquired greater and greater confidence in the soundness and high legal quality of the GATT's dispute settlement process.²¹ The Office of Legal Affairs was given most of the credit for these qualities.

The improved legal quality of the GATT's dispute settlement rulings had a major impact on the role of the disputes procedure in GATT affairs generally. The more confidence governments had in the procedure, the more they were willing to use it, and the more they were willing to submit difficult and sensitive cases to it. By the end of the 1980s, the dispute settlement procedure was handling the greatest volume of litigation in its history, and much of that work involved issues at the very center of GATT's policy agenda. The ultimate measure of government confidence in the GATT disputes procedure, of course, was their willingness to accept a major strengthening and enlargement of that procedure when transforming it into the WTO disputes procedure in the Uruguay Round. It is impossible to conceive of governments committing themselves to such a powerful disputes procedure without first having acquired a well-grounded confidence in the legal quality of the GATT procedure that came before it.

One must be careful not to overstate this last point, however. While governments did have confidence in the GATT procedure, they had not forgotten the errors and failures that had occurred on the long and difficult road to general acceptance. Also, it had to be recognized that the Secretariat's legal staff, however strong its influence in practice, did not have the legal or institutional power to control what panels actually did. Therefore, before governments would agree to grant the new WTO procedure power to issue legally binding rulings, they insisted on more solid institutionalized protection against legal error, and to this end they created the Appellate Body -- a free-standing appellate tribunal with seven permanent judges appointed for renewable terms of four-plus-four years. Needless to say, the creation of the Appellate Body would inevitably dilute the dominant

²¹ For a detailed analysis of the many cases that both advanced and retarded the success of the dispute settlement process during this period, see Hudec (1993), Chapters 8 and 10.

influence that the Secretariat legal staff had acquired over the legal content of GATT disputes procedure. Notwithstanding the critically important role it had played in bringing the GATT dispute settlement procedure to this point, it would now be necessary for the Secretariat legal staff to step back and let a more formal institution take over some of its responsibilities.

9. THE SECRETARIAT'S ROLE TODAY: LAWYERS, LAWYERS, EVERYWHERE

The GATT/WTO Secretariat has been almost unique among international secretariats in its commitment to a lean-and-mean personnel policy -- a commitment to remaining as small as possible despite its increasing workload. The Secretariat's recent policy towards hiring additional lawyers stands out as an important exception to this policy.

The success of the three-person Office of Legal Affairs that began to operate in mid-1983 was eventually recognized in the form of increased staff. By the end of the Uruguay Round negotiations, the Office had grown to five lawyers. The growth of the Office has accelerated under the WTO. According to the June 1997 edition of the WTO telephone directory, the WTO's Office of Legal Affairs now numbers eight lawyers and one depositary officer.

The same telephone Directory testifies to a creeping invasion of lawyers into other, subject-matter, Divisions of the Secretariat. Starting with a base of zero throughout the 1980s, the following is the present roster of legal affairs officers in those other Divisions:

Division	Lawyers
Market Access	1
Rules ²²	3
Intellectual Property	1
Services	2
Agriculture	0
Trade and Environment	0
Technical Cooperation ²³	2
Development	0
Accessions	1

²² The Rules division covers the Antidumping and Subsidies/Countervail Codes, the Safeguards Code, State Trading and Civil Aircraft. A few years before the WTO was created, the Rules Division took over the responsibilities of the Office of Legal Affairs in supplying legal advice to panel proceedings involving Antidumping or Subsidy/Countervail measures.

²³ The Technical Cooperation Division is charged with advising and training developing country delegations, including supplying legal advice for dispute settlement proceedings.

Finally, of course, the Appellate Body created by the Uruguay Round reforms has its own separate legal staff, which, while not officially part of the Secretariat numbers three more lawyers plus one Counselor.

The growing number of lawyers working in the Secretariat's Office of Legal Affairs and on the staff of the Appellate Body represents a major commitment of Secretariat resources to the process of dispute settlement. The resource commitment might be viewed as a measure of the importance that is accorded to dispute settlement in the WTO, but that interpretation could be a bit misleading. Whether or not WTO Members would have been willing to invest this much in order to reap the positive benefits of the new dispute settlement procedure the fact is that they were pretty much compelled to make that investment to protect against the serious harm that poor quality legal decisions can cause now that the disputes procedure wields such power.

The addition of ten legal officers to the staffs of several subject-matter Divisions testifies to the growing share of WTO business that involves working with legal instruments of one kind or another. In the view of these Divisions they cannot do the work expected of them unless they have access to their own legal counsel. One could venture a generalization about this increasing legalization of the WTO's business. It is said that societal institutions tend to follow a pattern of maturation according to which they progress from informal processes based on negotiation and accommodation of interests (diplomacy) to more formal processes based on settled norms (law). That clearly seems to be the case with regard to the evolution of GATT into the WTO. The changing character of the Secretariat is merely reflecting this larger tendency.

What role will the lawyer-ridden WTO Secretariat play in the WTO's new dispute settlement procedure? It has already been noted that the creation of the Appellate Body must necessarily diminish the influence of the Secretariat over the content of legal decisions. Neither the Office of Legal Affairs nor any other part of the WTO Secretariat legal staff is allowed to advise the Appellate Body directly. The Appellate Body's own three-person legal staff will undoubtedly have some influence over the work of the Appellate Body, and the relatively senior rank of the Director of that staff will probably insure a careful hearing for their views. But that legal staff will clearly not have the kind of dominant influence that the Office of Legal Affairs wielded over GATT panels in the 1980s and early 1990s. The institutional structure of the Appellate Body is designed to assure that the seven Judges of the Appellate Body will develop their own legal expertise to the degree necessary to render independent judgments. All will have the professional framing and experience needed to function as independent judges. They will normally serve for eight years, and their compensation indicates an expectation that they will devote at least half of their time to Appellate Body work. The Appellate Body has already decided to intensify the educational process built into its workload by having all judges consult on every case.

The legal officers of the WTO Secretariat will have an opportunity to influence Appellate Body decisions indirectly through their work advising the ordinary panels that will render the first decision in the WTO's new two-tier dispute settlement procedure. A sound legal ruling by the panel, explained persuasively can shape the way the legal issues will be presented on appeal, and the panel's legal

reasoning will always have to be studied very carefully by the Appellate Body before it makes any decision of its own.

How much influence are Secretariat lawyers likely to have on the content of first-tier panel decisions? As long as panel members are drawn primarily from national delegations resident in Geneva, the relatively greater legal expertise of Secretariat legal officers is likely to continue to give them a considerable advantage in dealing with less expert panel members. A few recent WTO panels have shown a tendency to reach out for relatively more expert panelists, such as law professors or very well regarded former delegates with extensive panel experience. Panels composed of more expert panelists are likely to act with greater independence from their legal advisors. But such more expert panels are likely to be the exception rather than the rule, because of resource constraints. Resident Geneva delegates cost the Secretariat nothing, whereas the travel expenses of outside panel members from other parts of the world tend to be quite costly.

A factor that is more likely to dilute the influence of the Secretariat's legal advisers on first-tier panel decisions is what might be called the balkanization of the Secretariat's legal advising functions. Because of the growing number of legal officers in subject-matter Divisions, the Office of Legal Affairs will now have to share its own advising function with lawyers in the subject-matter Division appointed to service the panel. Legal advice emanating from a number of different parts of the Secretariat, each with its own institutional or subject-oriented perspective of GATT/WTO policy, and each with its own clientele of government ministries, is likely to lead to conflicting advice in a number of cases. When the two sets of advising lawyers are in conflict, several different kinds of results are possible. In some cases, one set of advisors may prevail over the other; when this happens, the panel decisions will probably have legal coherence, but they may well be inconsistent with each other as different decisions represent different approaches WTO to legal policy. In other cases, it is possible that the two conflicting sets of legal advice may cancel out each other's influence. In such a situation, some panels will just fall back on their own good judgment, but there could well be other cases in which the panel is so confused by the conflicting advice that they produce decisions that lack coherence altogether. On the whole, the sum of the different possible responses to conflicting advice will probably be that none of the Secretariat's legal staff will be able to exert a consistent influence on the content of first-tier panel rulings.

If the content of first-tier panel rulings does evolve as suggested, it will be up to the Appellate Body to do most of the work in pulling together a consistent legal policy for the WTO. This is not an impossible task, but it would obviously be better if the Secretariat's legal talent devoted to the first tier of the process were making a more systematic contribution to the development of that legal policy. At a minimum, some kind of procedure for coordinating legal advice to panels should be considered. Most governments have concluded that coordination alone is not enough, and that important issues of legal policy have to be controlled by a central ministry of justice that is separate from, and independent of, the subject-matter concerns of lawyers in other ministries. Whether the WTO Secretariat would be able to impose such a solution on its various subject-matter Divisions can be doubted.

The overall conclusion suggested by these observations is something of a paradox. We see that, not counting the Appellate Body, the number of legal positions on the WTO Secretariat has multiplied six-fold over the three lawyers in the 1980s Office of Legal Affairs. The result of this expansion, however, seems to be that the once-dominant influence of the Secretariat over the legal content of the dispute settlement process has declined. Part of this decline is due to the quite deliberate choice to create an Appellate Body to perform the error-control functions that had theretofore been exercised informally by the Secretariat's Office of Legal Affairs. But even the dispute settlement role that remains for Secretariat legal officials -- advising first-tier panels -- would seem to be diminishing in influence, due to the dispersion (balkanization) of the many new legal positions throughout the Secretariat. In this case, more seems to have meant less. The overall decline of the Secretariat's influence is undoubtedly a disappointing conclusion to a story of important achievement, particularly after the critically important role that the Secretariat played in bringing the GATT disputes procedure to the point where the present WTO disputes procedure could be built upon it. But such disappointments are often the fate of agents of change. Change agents are often the very first victims of the changes they have triggered.

What will happen to the Secretariat's role in WTO dispute settlement in the future? One possibility, mentioned above, is that the Secretariat will regain some of the lost ground by better coordination of its legal advising function, and perhaps even more ground by a greater centralization of the advising function under the Office of Legal Affairs. In the author's view, however, the resistance to this sort of coordination will probably be stronger than the desire to do it.

A more interesting scenario would unfold if the WTO were to contemplate making some more basic changes in the dispute settlement process. The present two-tier model, under which decisions by first-tier panels are reviewed by an Appellate Body, is somewhat awkward, and may prove even more awkward if conflict among the various legal advisers to first-tier panels begins to produce a significant number of inconsistent and otherwise unsatisfactory first-tier rulings. Strengthening the legal capacity of panel members themselves would be one way to avoid such a problem, but the resource cost of doing so would probably be prohibitive. And it would probably also be unnecessary. The same result could be achieved with a considerably smaller investment by turning the Appellate Body into a full time court that would handle all dispute settlement cases from beginning to end in a one-tier process. The workload is not so great -- so far, anyway -- that a single full-time tribunal could not handle it. Such a change would solve many of the other problems that are beginning to emerge with the two-tier process, such as the problem of time pressure that has already forced the Appellate Body on several occasions to function like a court of first instance in order to finish off cases within the time deadlines established by the new disputes procedure.

The choice to establish the present two-tier model was not really a choice based on a full and thorough examination of all possible models. In this case, as in all cases of GATT institutional reform, the political resistance to change forced governments to proceed in an incremental fashion -- taking the existing model of the panel process that governments were comfortable with and making just enough changes to it to get the desired result. Once governments have lived with the new

system for a few years, and particularly once they have become comfortable with the Appellate Body as a permanent and authoritative tribunal, they should be willing to entertain the kind of consolidation and simplification suggested in the previous paragraph.

What would be the consequences of such a change for the various elements of the WTO legal staff? The legal staff of the Appellate Body (which would probably have another name by then) would obviously grow. The large staff of the Office of Legal Affairs would no longer have any panels to advise, and so would have to concentrate on its other function of giving general legal advice to national delegations and to other branches of the Secretariat. At this point, someone might re-introduce the idea of creating an office of Avocat General in the Secretariat. Such an office would prepare an independent analysis of the legal issues in every dispute settlement proceeding from the viewpoint of overall WTO policy (as distinct from the necessarily parochial perspectives of the actual litigants), and would present that position to the tribunal. Many other legal systems, including the European Court of Justice, have found the institution of Avocat General to be a useful instrument for achieving highest quality results. It would be natural step at this point in the evolution of WTO law.

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