

LEVEL UP: A HISTORY OF REGIME-BUILDING AT GATT CLUB

SUPERANDO FASE: HISTORIA DE LA FORMACION DE UN REGIMEN EN EL CLUB DEL GATT

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Abstract: Almost from the weak inception of the General Agreement on Trade and Tariffs (GATT) in 1947, the community of trade delegates and representatives that negotiated its provisions began to carefully reinforce it, with considerable creativity. From a so-called “accidental organization”, without proper institutional structure and under provisional application for decades, old-school trade diplomats, and trade lawyers subsequently, managed to progressively devise a powerful treaty-based regime and thus a critical infrastructure for international economic interdependence. The history of the GATT and now the WTO can be better understood by exploring the changing roles granted to diplomacy and law within.

Keywords: Regime-building, Havana Charter, ITO, ICITO, GATT, MTN rounds, world trade history, trade diplomacy, WTO.

Resumen: Tras la creación del fragil Acuerdo General de Aranceles y Comercio (GATT) en 1947, la comunidad de delegados y representantes comerciales empezó a reforzarlo cuidadosamente, con creatividad. Desde la denominada “organización accidental”, sin una estructura institucional apropiada y bajo aplicación provisional durante décadas, los diplomáticos del comercio de la vieja escuela, y los juristas comerciales posteriormente, se las arreglaron para dar forma progresivamente a un poderoso régimen convencional y, por tanto, una infraestructura crítica de la interdependencia económica global. La historia del GATT y ahora la OMC puede entenderse mejor explorando los cambiantes roles que ha tenido en su interior, a lo largo del tiempo, la diplomacia y el derecho.

Palabras clave: Carta de la Habana, ITO, ICITO, GATT, Rondas comerciales, historia del comercio mundial, diplomacia commercial, OMC.

Summary: I. Diplomacy by design. II. The rule-based system. III. Inventing adjudication. IV. The “legal barbarians”. V. The Quest for hard-law.

I. Diplomacy by design

1. The building of an international regime for world trade took a long and somewhat tortuous path, beginning in the summer of 1944, as the Second World War was finally coming to an end. It was at that time that the Charters of the International Monetary Fund (IMF) and the International Reconstruction and Development Bank (the World Bank) were designed in order to create an institutional structure for economic relations in the post-war period (Bretton Woods Conference). At the time, the negotiators

hoped to establish an international organization which would progressively eliminate trade barriers.¹ The initiative was a reaction against the protectionism of the interwar period, and thus the impact of so-called beggar-my-neighbor policies.²

2. The first policy proposal on the need for regime-building in the area of world trade was a United States government report issued in February 1945 (*Proposals for Expansion of World Trade and Employment*), which formally placed on the global public agenda the idea of creating an international organization specifically focused on reducing protectionism.³ By October of the following year, the United States had already submitted a detailed proposal for the constitution of this new organization to the United Nations Economic and Social Council (ECOSOC). At its first meeting in February 1946, the ECOSOC brought up the idea of this ‘Suggested Charter for an International Trade Organization of the United Nations’,⁴ and unanimously adopted a resolution to convene a United Nations Conference on Trade and Employment. The conference, finally held in Havana between November 1947 and March 1948, would begin diplomatic negotiations to create an International Trade Organization (ITO).⁵

3. As a result, three preparatory conferences were held in London, New York and Geneva. During the London meetings (October and November 1946), a draft Charter was debated and drawn up, based on the original proposal by the US. At the same time, it was agreed to negotiate tariff reductions at the next meeting and a specific treaty framework was planned to safeguard these results. In the New York meeting, early in 1947, that instrument building on provisions in the draft Charter was drawn up under the title of ‘General Agreement on Tariffs and Trade’ (GATT).⁶

4. Thus, the preparatory conference in Geneva continued to work on the draft Charter (also known as Havana Charter) while pursuing the tariff negotiations at the same time. The reasons for this strategy were basically dependent on domestic US politics; at that time, the viability of the ITO as an international organization faced obstacles due to the internal political tensions between the US executive and legislative branches. Under the US Reciprocal Trade Agreements Act of 1934, in essence, Roosevelt’s government was authorized by Congress to conclude trade agreements, but not to set up international organizations. Thus, as the Havana Charter faced an uncertain future,⁷ the GATT text was envisioned as an interim arrangement in the wake of the uncertain ITO ratification, but had to exclude all organizational elements from its provisions.

5. Finally, 23 founding contracting parties endorsed the GATT in 30 October 1947, together with schedules containing the tariff reductions and tariff bindings. These schedules covered some 45,000 tariff concessions and about \$10 billion in trade. Both the form and substance of the GATT also drew heavily on the US bilateral trade agreements, particularly post-1935 trade agreements.⁸ The GATT entered into force through a protocol of provisional application even before the United Nations Conference had ended, in 1 January 1948. The Protocol of Provisional Application contained a clause that provided

¹ R. GARDNER, *Sterling-Dollar Diplomacy* (Clarendon Press) at 31.

² T. FLORY, *Le GATT. Droit International et commerce mondial*, LGDJ, 1968, at 2–3.

³ W. Diebold, ‘The End of the ITO’, *Essays in International Finance*, n.16,1952, 3.

⁴ Doc U.N. EPCT/CII/1-66 (1946).^{<30>} Doc U.N. EPCT/CII/1-66 (1946).^{<0>}

⁵ J. VINER, ‘Conflicts of Principle in Drafting a Trade Charter’, 25 *Foreign Affairs* (1947): 612–628.

⁶ J. JACKSON, *World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade* (The Boobs-Merrills Company Inc 1969) at 43.

⁷ For a detailed account of the ITO negotiations see, in particular, S. Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (University Press of Kentucky 1996). For the specific diplomatic history within ITO negotiations giving rise to the GATT (and precise explanations on why it took its particular shape and form) see D. Irving, P. Mavroidis & A. Sykes, *The Genesis of the GATT* (Cambridge University Press 2008).

⁸ CURZON & V. CURZON, ‘GATT: “Traders’ Club”’, *The Anatomy of Influence. Decision Making in International Organization* (Yale University Press 1974) at 313.

⁸ R. HUDEC. ‘The GATT legal system, op.cit.p.616.

for Part II to be applied ‘to the fullest extent not inconsistent with existing legislation’.⁹ The underlying reason for this haste was again due to domestic US politics, as the Reciprocal Trade Agreements Act granted the executive a congressional authorization to negotiate trade agreements (renewable for three year periods) which was about to expire.

6. The Final Act authenticating the text of the Havana Charter was signed in March 1948 by 53 countries,¹⁰ covering a wide range of issues that had never before been tackled by any previous economic diplomatic conference.¹¹ However, unlike the trade policy provisions, the chapters on employment policy, economic development, commodity agreements and restrictive business practices, were relatively new matters and, paraphrasing Robert Hudec, did not rest on the same degree of consensus.¹² In any case, while waiting for the subsequent and unclear ratification of the Charter, an Interim Commission for the International Trade Organization (ICITO) was created, as an ad hoc secretariat for the weak new trade scheme, moving from Lake Placid (New York) to Geneva. This interim UN subsidiary body, based at the Palais des Nations in Geneva, would play a crucial role in GATT regime-building, under the critical leadership of Eric Wyndham White (1947-1968),¹³ its first ‘Executive Director’.¹⁴ The ICITO was to be a cornerstone of the GATT from the moment that trade delegates and diplomats realized that ratifications of the Charter were not going to materialize. In practice, the project of a rule-based multi-lateral trade regime was kept alive thanks to that minimal institutional structure and the notable individuals working within it. Thus, with the passing of years, the ICITO staff ended up becoming de facto the GATT secretariat.¹⁵ With the help of the people from the ICITO, in fact, the GATT Contracting Parties went on to organize their first two rounds of tariff negotiations in the following two years (Annecy 1949 and Torquay 1950), inaugurating the famous GATT MTN Rounds,

7. In December 1950, the US government finally made public its decision not to submit the ITO Charter to the US Congress for ratification. The decision paralyzed the ratification processes in a context in which the United States had become the major political and economic power of the post-war international order. Consequently, pragmatic solutions were sought to give the GATT a certain institutional structure somehow. Making a virtue of necessity, article XXV entitled ‘Joint Action of the Contracting Parties’ became the focus around which a minimum organic structure would be cautiously built for the GATT to function. Interestingly, this provision enabled trade representatives to create an organization from almost nothing. In practice, a new body was invented, under the noun ‘CONTRACTING PARTIES’, written in capital letters to differentiate from the Contracting Parties taken as individuals. The open wording of Article XXV transformed the provision into the ideal legal basis for progressively shaping a wide institutional structure:

‘The 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’.

⁹ For the efforts of the GATT Secretariat in 1965 to propose that governments undertake ‘definitive’ instead of ‘provisional’ acceptance but with reservation from pre-existing legislation see GATT Doc L/2375 (5 March 1965).

¹⁰ See UN Doc E/Conf2/78, *Final Act of the United Nations Conference on Trade and Employment* (24 March 1948).

¹¹ W. CLAYTON, ‘Foreword’, in C. Wilcox, *A Charter for World Trade*, op.cit.p.vii.

¹² R. HUDEC, ‘The GATT legal system, op.cit.p.620.

¹³ Following Francine McKenzie, there can be few heads of international organizations who rival Wyndham White for the widespread high regard in which he was held. See F. McKenzie, IO BIO, *Biographical Dictionary of Secretaries-General of International Organizations* (13 March 2012).

¹⁴ White became the first Executive-Secretary for the ICITO. The title for the position progressively changed as the non-organization developed, under his leadership. Thus, in 1957, White became Executive Secretary to the Contracting Parties of GATT in 1957. A few years later, in 1960, the title would change again to Director General of the Contracting Parties of the GATT. See J. Jackson, *World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade* (The Boobs-Merrills Company Inc 1969) at 148–150.

¹⁵ J. JACKSON, *World Trading System: Law and policy of international economic relations* (MIT Press 1989) at 37.

8. Paradoxically, clinging to this raft, the Contracting Parties acting jointly as CONTRACTING PARTIES would manage to intelligently overcome a weak institutional framework.¹⁶ Not surprisingly, the project led by the ICITO Secretariat faced a complicated and drawn out process. In any case, however, the regular meetings of trade representatives (the so-called ‘Sessions’) were able to slowly and consensually set up the minimum structure for managing the GATT, and thus for keeping regime-building going. This was a period of great uncertainty, a time of cautious and careful experimentation in filling in the gaps in the institutional deficiencies of the GATT regime.

9. It would take some time for the US Congress to legitimize the GATT. At the 1951 extension of the Reciprocal Trade Agreements Act, a section read as follows: ‘The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade’. In these difficult circumstances, the ICITO Secretariat *de facto* became the GATT ‘Secretariat’ and provided the strategic impetus for developing its basic organic structure.¹⁷

10. Given this state of affairs, the CONTRACTING PARTIES created the Ad hoc Committee for Agenda and Inter-Sessional Business in its ninth session of 1951.¹⁸ The Committee met some weeks (from four to six) prior to the meetings of the former in order to compose the collective agenda. For the purpose of regime-building, interestingly, joint decisions were adopted and a voting system was allowed whereby the voters’ presence was not required, as mail and telegraph were permitted as a means of voting. At last, once it was certain that the ITO Charter would never enter into force, all that remained for trade delegates was to push for institutionalization by progressively developing the Ad Hoc Committee. In practice, the Committee would become the ‘guardian’ of the GATT in subsequent decades and, in fact, it led to the establishment in 1960 of the GATT Council of Representatives, as the permanent GATT body to undertake work between the regular sessions of the Contracting Parties.¹⁹

11. However, the trade diplomats who negotiated in Havana did not give up their efforts to obtain full international legal personality for the GATT. Thus, these trade representatives renegotiated and drew up a second Charter proposal for an Organization for Trade Cooperation (OTC) in the ninth meeting period from October 1954 to March 1955.²⁰ This initiative also fell by the wayside; and it therefore became clear to the GATT community that the only viable strategy for slowly extending the organizational fabric was to create a highly professional Secretariat, and begin operations by establishing some working groups and committees under a common agenda. As a result, the post of Executive Secretary was finally created in 1955, an office that was already being informally held in any case by Wyndham White since his early days at the ICITO. The game played under his leadership remained focused on slow and cautious regime-building,²¹ in a complex policy context in which ECOSOC had become a forum for GATT’s detractors in a widely endorsed resolution aiming at studying alternatives to GATT which would be adopted a year later.²²

¹⁶ See J. JACKSON, *The World Trade and the law*, op.cit.pp.132-136, J. Jackson, *The World Trading System*, op.cit.p.90 and J. Jackson, *The World Trade Organization: Constitution and jurisprudence* (RIIA 1998) at 83-84.

¹⁷ See R. HUDEC, ‘The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure’, *The Uruguay Round and Beyond. Essays in Honour of Arthur Dunkel* (Springer 1998) at 105 and J. Jackson, *The World Trading System*, op.cit.p.37.

¹⁸ BISD II (1952) p.205.

¹⁹ BISD 9S /17-20 (1961).

²⁰ See K. Dam, *The GATT: law and international economic organization* (1970) at 337–338.

²¹ See W. ECKES, ‘In Globalization, People Matter: Eight who shaped the World Trading System’, *4 Global Economy Journal* (2000): 303–314.

²² See *World Economic Situation: Measures for the Development of Trade Co-operation*, 22nd Session, UN Doc E/AC.6/L160 (28 July 1956) as well as Summary Record of 206th Meeting of the Economic Committee, ECOSOC Doc E/AC.6/SR.206 (30 July 1956), in particular.

12. The Executive Secretary was to play a critical role in building bridges among delegations, in order to progressively build up the whole infrastructure, mandate and legitimacy of the accidental organization.²³ As Kenneth Dam portrays him, ‘at every major turning point and in every major success in GATT history has figured an imaginative compromise, an unexpected initiative, or a face-saving formula originated by Wyndham White’. In the words of Braithwaite and Drahos, by the time he retired in 1968, with the title of DG of the GATT, ‘he had forged an unconstitutional, temporary GATT into the most powerful, entrenched non-organization the world had seen’.²⁴ Illustratively, right at the beginning of the 60s, Wyndham White was framing the GATT in the following terms:

‘The General Agreement on Tariffs and Trade, as its name clearly indicates, is, juridically 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’.²⁵

13. Thus, a workable GATT regime was already in place, and would be carefully nurtured by a small community of trade diplomats and technocrats. From there to the signing of the WTO agreement in April 1994, four fascinating decades of regime-building would get underway. To paraphrase Kenneth Dam, the GATT was the humblest if not the neediest of the many international bodies on the world scene; yet in terms of success it ranks among the highest achievers: this initial disadvantage was largely overcome thanks to the persistence of a dedicated and pragmatic Secretariat, with the remarkable help, political will and leadership of key Contracting Parties such as the US.²⁶ In practice, despite the fact that it was not an international organization at the outset, the GATT gradually evolved to become a strong regime in its own terms.

14. In the interim, it operated precariously for almost half a century. In order for GATT to have entered into force, the instruments of ratification or acceptance should have represented 85% of the external trade of the territories included in Annex H. However, only Haiti accepted the GATT (7 March 1952) in conformance with article XVI (*Acceptance, entry in force and registration*).²⁷ Therefore, the GATT did not technically enter into force: under the 1947 *Protocol of Provisional Application and subsequent Protocols of Accession*, the GATT was in fact to be under provisional application for the following decades.²⁸ Paraphrasing Jackson, the GATT had a ‘dubious legal status’ which has inevitably led to misunderstandings both by the general public and the media, and even by government officials.²⁹ Logically, this could have led to a variety of challenging legal issues and questions. However, interestingly, the constitutional and international legal literature rarely raised this issue in detail.

15. Provisional application did not bring into question the legal nature of this instrument,³⁰ but rather the way of going about things, given that parliamentary democracies did not take much part in developing this critical node of global exchange until the mid-90s!! Half a century of provisional application, without parliamentary ratifications, is a rather long process and, as such, an interesting issue for

²³ For a fine biographical sketch of this ‘towering figure’ in GATT history see, in particular, R. De Souza Farias, ‘Mr GATT: Eric Wyndham White and the quest for trade liberalization’, 3 *World Trade Review* (2013): 463–485.

²⁴ See J. BRAITHWAITE/ P. DRAHOS, *Global Business Regulation*, op.cit.p.177.

²⁵ See E. Wyndham White, ‘GATT as an International Trade Organization’ (public speech), *Polish Institute of International Affairs* (Warsaw, 6 June 1961).

²⁶ K. DAM, *The GATT Law and International*, op.cit.p.335.

²⁷ Liberia also accepted the GATT on 17 May 1950, but withdrew on 13 June 1953. See *Analytical Index of the GATT: Guide to GATT law and practice*, at 924.

²⁸ See J. Jackson, ‘The Puzzle of GATT’, 1 *Journal of World Trade Law* 2 (1967):133, note.14 and E. Petersmann, ‘The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948’, 31 *Common Market Law Review* (1994):1162.

²⁹ J. JACKSON, ‘Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects’, *The WTO as an International Organization* (University of Chicago Press 1998) at 163.

³⁰ See article 25 of the Vienna Convention of the Law of the Treaties (provisional application).

analysis. As such, Jan Klabbers chose the GATT as the most famous example of how provisions on the entry into force of treaties is not the best indicator of the binding nature of such treaties.³¹ Nevertheless, this situation influenced the way that things were done within GATT during that long period. In this respect, for example, it is quite illustrative that the initials of the ICITO were formally displayed at the GATT headquarters for many years.³² Equally interesting is the fact the United States Congress authorized its annual contributions to the GATT in the budgetary section of ‘international conferences and ancillary costs’ until 1968. Hence, during their early years, the building of the post-war legal infrastructures for open markets basically advanced keeping the organization’s head above water.

16. John Jackson refers to the ‘fiction’ that the GATT was not an ‘organization’ but had generally avoided the adjective ‘international’, whenever he referred to it in his early legal writings. In line with this, the section on this matter in his classic work *The World Trading System* (1989) is indicatively entitled ‘the GATT as organization’.³³ In his words, the General Agreement did not establish an organization ‘in theory’, although ‘in practice’ operated as one³⁴. In turn, other scholars maintain that the GATT was neither a treaty nor an international organization³⁵. Similar differences of approach regarding this issue permeate the legal literature. In Spanish scholarship, for example, Remiro Brotons contends that it was understandable that, for international legal experts, the GATT was a clumsy instrument due to its evident inability to survive in defiance of the most basic legal standards and forms; ‘it is understood that for internationalist legal doctrinaires the GATT was a cumbersome case given its evident incapacity to survive despite the most basic standards and legal forms’ furthermore, Brotons goes so far to state that the GATT lacked international subjectivity.³⁶ For other scholars, such as Liñán Noguerras, the GATT operated ‘on the basis of a somewhat conventional provisionality and with an organic element that was far from formal constructions’.³⁷ By contrast, Pastor Ridruejo holds that the CONTRACTING PARTIES of the GATT ‘empirically created’ an international organization.³⁸

17. The international legal literature exploring these questions offers diverse legal interpretations regarding this very issue. Certainly, the GATT was a curious experiment, both unusual and innovative, which was to progressively grow in strength despite its serious ‘birth defects’. The old-school GATT diplomacy managed to progressively develop one of the most effective and powerful regulatory regimes in contemporary world history. As mentioned, the success of GATT ‘as an organization’ was due to the efforts of a very small community of trade diplomats who managed intelligently to sustain and reinforce its originally precarious set of rules against the odds of its flawed origins. In the words of Hudec, a ‘slow incremental development’ was the secret to the GATT’s legal success over all these decades.³⁹ As a result, the GATT community ended up organizing eight MTN Rounds, until finally an international organization with a remarkable institutional design and fully fledged international legal personality came into being, when WTO burst onto the scene of global governance on 1 January 1995.⁴⁰ In short, the success of GATT’s regime-building is an unprecedented experience in the history of global governance. It vividly illustrates how the strong political will of a minor group of peoples -mainly comprising trade diplomats and officials- was able to keep the flame of open markets alive in a precarious and provisional context, for decades. The peculiar and tortuous path towards its institutional consolidation since its weak inception after the Second World War has in fact led some literature to qualify the

³¹ J. KLABBERS, *The Concept of Treaty in International Law* (Kluwer Law International 1996), pp.75–76.

³² P. NICHOLS, ‘GATT Doctrine’, 36 *Virginia Journal of International Law* 2 (1996): 390, note 57.

³³ J. JACKSON, *The World Trading System*, op.cit.p.37 and 41.

³⁴ J. JACKSON, *Legal Problems of International Economic Relations. Cases, Materials and Text* (West Publishers 1995) at 289.

³⁵ P. NICHOLS, ‘GATT Doctrine’, op.cit.p.390.

³⁶ A. Remiro Brotons, ‘Pelagattos y Aristogattos de la Comunidad Europea ante el Reino de la OMC’, 26 *Gaceta Juridica de la Comunidad Europea* (1996):17–18.

³⁷ D. LIÑÁN NOGUERAS, in M. Díez de Velasco, *Instituciones de Derecho Internacional Público* (Tecnos 2011) at 615.

³⁸ J. A. PASTOR RIDRUEJO, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (Tecnos 1996) at 823.

³⁹ R. HUDEC, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers 1993) at 364.

⁴⁰ R. HUDEC, *Enforcing International Trade Law*, op.cit.p.364.

GATT as an ‘historic accident’, and these observers are not far wrong,⁴¹ as the so-called GATT club successfully challenged all traditional legal standards of its era.

II. The rule-based system

18. The development of the world trading system is a landmark in contemporary world history. In order to understand how this regime came about, transforming itself into WTO, it is particularly illustrative to focus on the community of professionals that ‘chipped away’ tenaciously over decades to construct a dispute settlement mechanism within a regime under provisional application. The first by-product of their collective effort was the invention of GATT panels, which with the passage of time gradually became formalized, until its final transformation into a first ever and brand new world tribunal in January 1 1995; a mechanism that is sometimes portrayed, in its own rights, as the jewel in the crown of the WTO.

19. Law, lawyers and adjudication have played a changing role in the world trading system from the earliest days of its precarious inception. In this regard, one of the most interesting phenomena arising from the experience of regime-building in the GATT is the diverse and changing uses of law and adjudication within the body. In fact, the history of world trade liberalization since the end of the Second World War -and thus the origins and foundations for global economic interdependence- cannot be effectively grasped without paying attention to this phenomenon. In essence, the world trading system has passed through five main stages with regard to rule-based adjudication. Basically, these stages have defined and redefined half a century of global economic interdependence, first with regard to trade in goods (GATT 1947-1994) and finally also in terms of services (GATS 1995) as well as propertization of intangibles (TRIPS 1995):

- *Phase 1*: a first ‘legalist’ stage, which dominated the drafting of the GATT and its amendments at the end of the nineteen forties (1946-1947);⁴²
- *Phase 2*: a long ‘pragmatic’ stage (focused on consensus-building), which governs its administration and the interpretation of legal texts over the next twenty years (1947-1970s);
- *Phase 3*: a third stage of relative inactivity regarding rule-based adjudication, which covers the decade of the 70s, and concluding in 1979 with the new rules resulting from the Tokyo Round;
- *Phase 4*: a following stage which began in the 80s when the focus returned again to law as the preferential technique to develop solutions for trade disputes.
- *Phase 5*: a current fifth stage characterized by fully-fledged hyper-legalization.

20. In the beginning, the evolution of GATT starts out with a markedly diplomatic approach. Initially, the first delegations considered that diplomacy (not law) should be the main tool for resolving inter-state differences in GATT. The collective attitude was best summarized by John Jackson, as leaving ‘legal technicalities’ to one side.⁴³ By that time, the legal approach was viewed with criticism and even certain mistrust. The reason is simple: as explained, the GATT of 1947 was basically a tariff-liberalization agreement lacking appropriate institutional structures. Since the ITO Charter failed to pass through the US Congress, the agreement was under provisional application and, in consequence, in a precarious situation for playing the hard-law game. Therefore, the Contracting Parties administered the GATT under consensus, and stayed focused on consensus-building for a long period, as a means of surviving while awaiting better days: at that time, consensus-building was the name of the game, built around a loose but intelligently administered article XXV.

⁴¹ T. Flory, *Le GATT. Droit International*, op.cit.pp.4-5 and G. Curzon & V. Curzon, “‘GATT: Traders’ Club, op.cit. p.31.

⁴² K. Dam, *The GATT Law*, op.cit.p.4.

⁴³ J. JACKSON, ‘The Puzzle of GATT’, 1 *Journal of World Trade Law* 2 (1967): 132.

21. In this way, during the first few decades of the GATT, an eminently diplomatic approach governed the administration of GATT rules. As Robert Hudec portrayed it, the GATT of this period operated as a diplomatic instrument.⁴⁴ In the words of the last Director General of the GATT of 47, Olivier Long (1968-1980), emphasizing the importance of the diplomatic approach at that time: ‘legalism does not contribute to trade liberalization’. For this former Director General, the primary objective of the dispute settlement procedures was not to decide who is right and who is wrong but to proceed in such a way that even significant violations ‘are only temporary and are terminated as quickly as possible’.⁴⁵ This policy vision, however, slowly lost support as the GATT became more firmly entrenched as an organization.

22. Thus, the strong consensus-building culture in the GATT’s epistemic community developed, expanded and reinforced the bits and pieces of an originally weak instrument (under purely provisional application) to incrementally construct one of the most highly effective nodal regimes of global economic governance. Only after the trade diplomats managed to deliver six consecutive tariff Rounds, the GATT regime was basically consolidated, and a more legalist approach (based on state rights and obligations) gradually begun gaining credence. As a result, legal compliance slowly moved centre stage, as the preferred approach to trade disputes.

23. Literally, diplomacy died by success. By regularly lowering tariffs, the consensus-based former GATT was ready to jump to a compliance-based hard-law regime. However, the triumph of law over diplomacy was not achieved without strong policy tensions. The debate over the relative weight of legal rules vis-à-vis diplomacy within the world trading system not only would involve discussions on the most effective methods and techniques to solve trade disputes but also, and inevitably, cultural clashes with regard to the best professional qualifications to participate in the new policy era.

24. The debate over balancing diplomacy and law inside GATT decision-making, as Jackson recalls, has a long history.⁴⁶ However, it was during the nineteen eighties that these two main philosophies –diplomacy and law- came into conflict, both in respect of the GATT dispute settlement mechanism (*panels*) and, by logical extension, with respect to the inner functioning and development of the world trading system.⁴⁷ The competing perceptions with regard to the direction of the mechanics of dispute settlement (and GATT as a *functional* regime itself) were often encapsulated in a basic and clear-cut dichotomy: (1) legalism vs pragmatism or, in other words, (2) rule-based approaches vs diplomatic approaches.

25. Recalling that period, for example, William Davey, the first Director of the WTO legal service (1995-1999) attributed greater emphasis on negotiation and consensus as opposed to the ‘anti-legalist’ approach, and an accentuation of adjudication (dispute settlement by third parties) to the ‘legalist’ approach.⁴⁸ This policy battle had a critical importance for the world trading system from a functional perspective. However, as mentioned, the battle was not only over defining the preferential techniques for administering the evolution of the GATT but also inevitably over the professional qualifications of those individuals best suited to do the job. Ultimately, legalism and the increasing influence of both the legal profession and trade law scholars would shift the power-relations inside the GATT community towards the so-called ‘rule-based approach’.⁴⁹

26. The inauguration of the *Journal of World Trade Law* in 1967 was also a meaningful sign of the times, by mainstreaming world trade law into academia. But more significantly, it is no coincidence

⁴⁴ R. HUDEC, ‘The GATT Legal System: A Diplomat’s Jurisprudence’, 4 *Journal of World Trade* (1970): 615.

⁴⁵ O. LONG, *Law and Its Limitations in the GATT Multilateral System* (Martinus Nijhoff 1987) at 71 and 73.

⁴⁶ See J. JACKSON, *The World Trade Organization*, op.cit.p.63.

⁴⁷ See ‘Review of the Effectiveness of Trade Dispute Settlement under The GATT and the Tokyo Round Agreements’, *Report to the Committee on Finance, U.S. Senate, on Investigation N°332-212 Under Section 332 (g) of the Tariff Act of 1930*, USITC Publication 1793 (December 1985) at 68.

⁴⁸ W. DAVEY, ‘Dispute Settlement in GATT’, 11 *Fordham International Law Journal* 1 (1987): 66 and 97.

⁴⁹ See R. SHELL, ‘Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization’, 44 *Duke Law Journal* 5 (1995): 846 and note 81.

that one of the leading intellectual figures behind the idea of creating a brand new rule-based international organization at the Uruguay Round, John Jackson, also distinguished between a ‘diplomatic approach’ and ‘rule-based approach’ in GATT.⁵⁰ In fact, this academic authored the first legal monograph on GATT, as early as 1969.⁵¹ It goes without saying that what he coined as ‘rule-based approach’ meant a primary role for law in practice, with a few subtle pragmatic considerations. As Jackson explains, the tension was therefore a question of degree, of preponderance of one element over another, more than an extreme confrontation in the sense of a zero-sum game.⁵²

27. In the earlier stages of the GATT, even the legal nature of its rules was questioned. Hudec’s comments regarding the characterization of the GATT rules in 1978,⁵³ as well as those on the GATT legal system a few years before (1970), are particularly apposite reflections on this theme:

‘The key to understanding the GATT legal system is to recognize that GATT’s law has been designed and operated as an instrument of diplomacy. Although the GATT legal system has many points in common with domestic models, the thing which sets it apart from others is the overriding concern for ‘flexibility’ –the insistence that the law’s coercive pressures be applied in a controlled fashion which allow room for maneuver at every stage of the process.⁵⁴

28. In short, the rule-based approach was a critical development in modern history of economic interdependence. Interestingly, some observers also attributed the diplomatic and rule-based approach to the behavior of some key GATT Contracting Parties. Thus, the US-originated literature tended to define the general attitude of the United States as ‘a legalist approach’ and that of Japan and the European Community as a diplomatic one.⁵⁵ Similarly, a report on the dispute settlement mechanism drawn up by the US Senate in 1985 identified the United States, New Zealand, Hong Kong and Australia as Contracting Parties which perceive GATT as a set of binding obligations; conversely, Japan and the European Community were characterized as favoring a ‘flexible approach’, based on negotiation and consensus: “For the European Communities the GATT philosophy has been diplomacy rather than adjudication, and so it was not perceived that adjudication by third parties required a change in policies”. Therefore from this ‘to the [European Communities], diplomacy rather than adjudication is argued to be the intended GATT philosophy, and third-party adjudication was not conceived of as requiring policy changes’. From that perspective, as the report added, the nature of GATT as an instrument regulating rights and obligations would be de-emphasized.⁵⁶

29. Also the more legalist approach attributed to the United States in that period was occasionally associated with an alleged traditional higher reliance of Americans on law and litigation. In line with this thesis, greater adhesion of the US administration to legal tools in the GATT would be more a cultural issue than a question of interests.⁵⁷ However, this approach was arguably more influenced by the fact that the GATT was drafted under the indisputable leadership of the United States following the Second World War; and thus was also better adapted to its basic policy vision and economic interests. Reasonably, the more legalist approach of the European Union in WTO today could be explained by the same token: following the Uruguay Round, the rules of the game better reflect its aggregate interests; as a result, legalism also makes greater sense for Europeans.

⁵⁰ See J. JACKSON, *Restructuring the GATT System* (Council on Foreign Relations Press 1990).

⁵¹ See J. JACKSON, *World Trade*, op.cit.p.43.

⁵² J. JACKSON, *Restructuring*, op.cit.p.59.

⁵³ R. HUDEC, ‘Adjudication of International Trade Disputes’, *Thames Essay n°1* (Trade Policy Research Centre 1978) at 31-33.

⁵⁴ R. HUDEC, ‘The GATT legal system, op.cit.p.665.

⁵⁵ See for example, *inter alia*, W. Davey ‘The WTO/GATT World Trading System: An Overview’, *Handbook of WTO/GATT Dispute Settlement* (Kluwer law international 1997) at 75.

⁵⁶ See *Review of*, op.cit.p.68.

⁵⁷ R. OSTRIHANSKY, ‘Settlement of Interstate Trade Disputes: The Role of Law and Legal Procedures’, *Netherlands Yearbook of International Law* (1991): 180.

30. Last but not least, legalism is naturally connected to general perceptions among world trade experts and practitioners with regard to the aggregate benefits resulting from participating in an open trading system. The greater or lesser legalist behaviour of trading nations with regard to the WTO can be probably best explained as such. At the present time, the rule-based approach is the overarching pattern that defines the functioning of the WTO in most of its disciplines, excepting those regarding PTAs. Therefore, looking back, ‘legalism’ has not produced a ‘poisoning of the atmosphere’ of the multilateral trading system but quite the contrary; it has also strengthened it for a long time.⁵⁸ Currently, the vast majority of the world trade community defends the benefits of a strong WTO legal system and a rule-based approach in settling disputes⁵⁹. The almost 70 years of the world trading system have ended up by persuading the many critics that such an approach is the most effective one for all. As Hudec recalled, social institutions tend to follow a pattern of maturing from informal processes involving accommodating interests, to formal processes based on pre-established norms. This is clearly the case of the rules within the GATT/WTO regime. In essence, the key to success in the long term was considered to be the progressive circumventing of power politics by promoting increased compliance with the rules of the game. Under that approach, however, multilateral negotiations of new rules have become increasingly complex. Evidently, a binding dispute settlement mechanism with teeth to authorize the suspension of trade concessions not only operates as a powerful lever for obtaining compliance with pre-existing commitments but also raises the stakes for negotiating new law.

III. Inventing adjudication

31. Historically, the use of dispute settlement mechanisms in free trade agreements was not seriously considered until the ITO was drafted,⁶⁰ although the establishment of a world trade tribunal is obviously an older idea. In fact, Huston Thompson –a US prominent government official under Woodrow Wilson’s policy orbit– already suggested in 1919 the creation of an international trade tribunal to be incorporated into the Versailles Treaty, and advocated its development for several years.⁶¹ Aside from the proposals of visionary individuals, the first serious diplomatic moves in this policy direction were the ITO negotiations. Originally, it was agreed that the Charter rules would be justiciable in the United Nations International Court of Justice (ICJ). However, the idea of adjudication that prevailed at that time among some key trade delegates was at odds with such a development. Notwithstanding the final wording of the Charter, a memorandum on the issue of the ICJ sent by the UK Delegation after the first drafting session of the Charter (London, 1946), captures the idea about law within some key delegations:

‘The making of rulings under the Charter should [...], we feel, be the function of the International Trade Organization itself and not of an outside body such as the International Court whose proper function is to determine questions of law and not to appraise economic facts... In almost every conceivable case arising under the Charter, the issues will of their nature involve the element of economic appraisal and assessment and will not be purely legal in character, and it will be impossible to say where economic judgment ends and legal argument begins’.⁶²

32. Nonetheless, it is reasonable to argue that the GATT regime could not have achieved its long term success if a series of innovations from its earliest years had not made it possible to effectively settle disputes between its Contracting Parties. The failed Havana Charter contained a detailed dispute

⁵⁸ W. DAVEY, ‘Dispute Settlement in GATT’, op.cit.pp.70-72.

⁵⁹ See for example, M. YOUNG, ‘Dispute Settlement in the Uruguay Round: Lawyers Triumph over Diplomats’, 29 *The International Lawyer* 2 (1995): 389-409.

⁶⁰ R. HUDEC, ‘The Role of the GATT Secretariat’, op.cit.p.102.

⁶¹ See eg. H. Thompson, ‘Reconstruction of International Good Will’, 102 *Annals of the American Academy of Policy and Society* 162 (1922), ‘World Held in Need of Trade Tribunal’, *Washington Post*, (June 11, 1931) at 5 and H. Thompson, ‘An international trade tribunal’, 34 *ASIL Proceedings* 1(1940): 3-4.

⁶² See E/PC/T/C6/W77 (14 February 1947).

settlement procedure in articles 93, 94 and 95 (Chapter IV).⁶³ However, acknowledging the uncertainties of the ratification process explained above, the provisions from Chapter IV were reworded in the interim, giving rise to articles XXII and XXIII of the GATT. These two articles provide the legal basis for the progressive construction of a dispute settlement mechanism within the GATT regime. From the very early days, and on the basis of these scant provisions, the GATT diplomats set in motion a series of informal dispute settlement practices which were progressively developed during the first two decades, and finally were codified during the 1973-1979 Tokyo Round.⁶⁴ Later on, those codified practices were to become the building blocks for designing the effective and innovative WTO dispute settlement mechanism at the 1986-1994 Uruguay Round.⁶⁵

Certainly, the transformation of those minimum provisions into the current WTO dispute settlement mechanism is, paraphrasing Pescatore, ‘one of the most remarkable and pragmatic achievements of international law’.⁶⁶

33. And again, this institutional development was the direct result of joint efforts and experimentation by a small group of GATT insiders. These trade representatives, officials and experts provided the impetus for such a complex endeavor by sharing a global policy vision regarding world trade (as public good). Understandably, for these people, dispute settlement was a prominent item on the agenda from the first meetings of the CONTRACTING PARTIES. The GATT community was fully aware that regime-building required settling disputes within the regime in one way or another, and thus some sort of dispute settlement mechanism had to be developed, even if such a device was to be a highly simplified one, at first.

34. As a result, the early years of GATT show a low profile and cautious experimentation by some contracting parties and the Secretariat, having embarked on a sustained strategy to develop a dispute settlement mechanism almost from scratch. A series of effective policy moves in the early years, which bear their stamp –and particularly that of Eric Wydham’s Secretariat– became key institutional developments in pursuing this objective. As Hudec explains, the people who negotiated the ITO were not prepared to abandon their original legal design easily.⁶⁷ The original participants saw themselves as keepers of a flame,⁶⁸ and managed to progressively develop their own way of doing things.

35. As explained, a global epistemic regime had born during the Havana negotiations. The invention of the so-called GATT panels is a significantly defining example, as these are in fact one of the most recognizable institutional features of GATT.⁶⁹ The origin of the idea took shape during the early meetings of the CONTRACTING PARTIES. From then on, they gradually became the vehicle to settle disputes within the GATT. In particular, the process began in the first period of sessions in Geneva, when Cuba and the Benelux requested a qualified opinion from the Chairman of the meeting of the CONTRACTING PARTIES regarding a dispute on discriminatory taxes.⁷⁰ Following some consultations, the Chairman proposed a decision, which was adopted without opposition from any of the GATT contracting parties: ‘the meeting agreed...’;⁷¹ Cuba subsequently withdrew the measure which had led to the dispute. However, the formula of a single adjudicator would be subsequently abandoned, probably foreseeing the complexity of future claims and the concentration of power that such formula could gene-

⁶³ For a comment see W. Brown, *The United States and the Restoration of World Trade: An Analysis and Appraisal of ITO Charter and the General Agreement on Tariffs and Trade* (Brookings Institution 1950), pp.227 and subsequent pages.

⁶⁴ A. LIGUSTRO, *Le controversie tra stati nel diritto del commercio internazionale: del GATT all’OMC* (Cedam 1996) at 94.

⁶⁵ On the model and preliminary proposals for reform of the mechanism see, in particular, R. Hudec, *Adjudication of International Trade Disputes*, Thames Essay n°16 (Trade Policy Research Centre 1978) and W. Davey, ‘Dispute Settlement in GATT’, 11 *Fordham International Law Journal* 1 (1987): 51-106.

⁶⁶ P. PESCATORE, ‘Drafting and Analyzing Decisions on Dispute Settlement’, *Handbook of WTO/GATT Dispute Settlement*, op.cit.p.7.

⁶⁷ R. HUDEC, ‘The Role of the GATT Secretariat’, op.cit.p.103.

⁶⁸ A. CHAYES/ A. HANDLER CHAYES, *The new sovereignty*, op.cit. p.279.

⁶⁹ O. LONG, *Law and Its Limitations in the GATT Multilateral System* (Martinus Nijhoff 1985), p.77.

⁷⁰ See GATT/CP.2/9 (19 July 1948), Appendix A, Item 1.

⁷¹ See GATT/CP.2/SR.11 (24 August 1948), p.8.

rate. Thus, there was only one other case on Indian taxes on products with export rebates, between India and Pakistan, which would be later settled bilaterally,⁷² as India made reservations to the Chairman's ruling in that second session of the CONTRACTING PARTIES.⁷³ In this way, working groups began to be used after that session. These working groups would be focused on seeking a 'practical solution'.⁷⁴

36. Interestingly, embedded in these original practices, conciliation is highly visible throughout the progressive development of the GATT dispute settlement system. The main feature of these ad hoc bodies, composed by representatives of contracting parties, was that the conflicting parties within the working group were also involved in the diplomatic process of finding practical solutions. However, this formula was also soon to reveal its limitations. In this regard, the working group hearing a dispute between France and Brazil on discriminatory internal taxes on imported products, in the second Session, was to remain on the GATT agenda from April 1949 to November 1957.⁷⁵ Thus, as the difficulties of a strictly conciliatory model became clear, working groups would soon evolve to more adjudicative forms and mechanics. This institutional development came about with the *Australian Subsidy on Ammonium Sulphate* case:⁷⁶ in this case, five state representatives discussed the issues at stake within the working group; however, this time only third parties made the final decision (United States, Norway and the United Kingdom).⁷⁷ This critical development was the turning point for the progressive deploying of a dispute settlement infrastructure within the GATT. As Hudec suggests, the change was so significant that it can only be explained as part of a deliberate plan.⁷⁸

37. From then on, it would be necessary to wait for the seventh GATT session (1952) to see how this transformation evolved. As the agenda for that session formally included 12 pending cases, the President, the Norwegian Johan Melander, proposed setting up a single working group to resolve them all. The list of possible members for that working group, finally proposed to the CONTRACTING PARTIES by the Secretariat, inaugurated the now traditional 'shortlist' of so-called 'GATT panelists'. It was at that time that the term 'panel' was first formally used by Melander himself to define the new formula; moreover, there were no representatives of major trading powers among the chosen panel members. The emphasis was placed on the technical expertise of those involved with dispute settlement, and thus on reducing power-politics within the procedures. Also the disputing parties did not object to the final proposal delivered by the panel, lending support to the argument that the parties had been consulted beforehand to facilitate dispute settlement regime-building: as Robert Hudec explains, the first step was to propose a single working group; and a few days later, the term 'panel' was slipped in without actually explaining what form it would take. The structure was the same as previous working groups; however, it was agreed that disputing parties would not be allowed to vote, and they were also not permitted to be present when the decision was discussed and finally adopted.⁷⁹ The panel's mandate, becoming a short of template for later cases, reads as follows:

'To consider, in consultation with the representatives of the countries directly concerned and of other interested countries, complaints referred to the CONTRACTING PARTIES under Article XXIII and such other complaints as the CONTRACTING PARTIES may expressly refer to the Panel and to submit findings and recommendations to the CONTRACTING PARTIES'.⁸⁰

⁷² GATT/CP.3/6 (21 February 1948), p.2.

⁷³ See GATT/CP.2/9 (19 July 1948), Appendix A, Item 2.

⁷⁴ See GATT/CP.4/SR.21 (3 April 1950), p.8.

⁷⁵ On this interesting case see, in particular, R. Hudec, *The GATT Legal System*, op.cit.p.110-120.

⁷⁶ See GATT/CP.4/39, *Australian Subsidy on Ammonium Sulphate* (31 March 1950).

⁷⁷ The Report, drafted by the Secretariat, was adopted by the CONTRACTING PARTIES on 3 April 1950 and is accompanied by an appendix or memorandum from Australia stating its disagreement.

⁷⁸ R. HUDEC, *The GATT Legal System*, op.cit.p.70.

⁷⁹ R. HUDEC, 'The Role of the GATT Secretariat', op.cit.p.108.

⁸⁰ See SR7/7 (14 October 1952) and R. Hudec, *The GATT Legal System*, op.cit.p.75.

38. Rosine Plank provides a detail that highlights the phenomenon: ‘the panel procedure was an invention-almost a conspiracy-devised by the secretariat to loosen the hold of the bigger powers which dominated the working parties at that time, and to re-enforce the secretariat's role in guiding and drafting rulings or recommendations to be submitted to the plenary session’.⁸¹ The Executive Secretary declared in a note written in 1955 that ‘the primary function of the panel is to prepare an objective analysis for consideration by the contracting parties, in which the special interests of individual governments are subordinated to the basic objective of applying the Agreement impartially and for the benefit of the contracting parties in general’.⁸²

39. The organizational mechanics were relatively simple: the disputing parties explained their arguments to the panel, providing information and documentation in support of their claim; on occasion, this was complemented with information that other interested parties deemed it appropriate to submit. In the following step, the panel drew up a draft report behind closed doors and, as mentioned, excluding the disputing parties. The disputing parties were then given the opportunity to discuss the draft report with panel members, a practice still present in WTO dispute settlement procedures. From then on, the final report was drafted taking into account their positions, and adopted by consensus; thus excluding dissenting opinions. Following this, the report was issued to the CONTRACTING PARTIES for final decision (read approval or dismissal). The GATT Secretariat under the leadership of Wynham White increased its role within these new practices, by drafting documents, organizing meetings, and providing information and documentation to the panel members. Also, according to Robert Hudec's interviews with participants, it was the Secretariat which drew up most of the reports in this first stage of the GATT.⁸³ From then on, dispute settlement procedures would be subject to gradual formalization, taking shape as a hybrid adjudicative form in no-man's land from the perspective of comparative international law.

40. Regime-building required subtle experimentation. In this regard, the use of panels also involved the spatial rearrangement of the room where the differences were addressed. Thus, a strategic and gradual transformation from the debating round table to the ‘courtroom’ took place, with the panel members and the disputing parties ending seated at separate tables. With this innovation, formal yet imbued with symbolism, the appearance and flavor of judicial practice was incorporated at no political cost. Taking into consideration the traditional difficulties of formally pursuing the creation of any international tribunal, a subtle move of this kind was remarkable; again, as mentioned above, the GATT was under provisional application, and lacked any formal treaty-based organ aside from Article XV (Joint action by the contracting parties).

41. The contracting parties soon began recognizing the *auctoritas* of the GATT panels. The four reports submitted in the seventh session, for example, required no debate prior to their approval. At this stage, the panelists began to be formally appointed in their role as trade law experts. By taking such step, dispute settlement activities were consensually framed as a professional activity, and thus would soon nurture its own culture and procedures. Dispute settlement was slowly beginning to be drawn towards professional practice, as a means not only of increasing technical refinement but also institutional legitimacy. In fact, when making an assessment of how GATT was operating in the ninth session, several delegates formally voiced their positive opinions in respect of the way the panels were working: the Danish delegate even formally proposed using the panel technique in other areas which had been the province of working groups until that time (ie: import restrictions for balance of payments difficulties); and,

⁸¹ R. PLANK, ‘An Unofficial Description of How a GATT Panel Works and Does Not’, 4 *Journal of International Arbitration* 4 (1987): 55 (emphasis added).

⁸² R. Plank, ‘An Unofficial Description’, op.cit.

⁸³ See R. Hudec, ‘The Role of the Secretariat’, op.cit. p.107, R.Hudec, *The GATT Legal System*, op.cit.p.78 and R. Plank, ‘An Unofficial Description’, op.cit. pp.74-77.

in fact, in the next session the Secretariat submitted a report proposing the experimental use of the panel technique in such areas.⁸⁴ Nevertheless, the delegations finally agreed to leave things as they were.⁸⁵

42. This first decade of the GATT regime was a period in which trade diplomats -many of whom were seasoned veterans- governed the day to day operation of the organization in the group spirit arising from the ITO negotiations. The GATT's rather precarious status led them to emphasize a diplomatic approach to dispute settlement. Thus, diplomatic skills were highly appreciated by many GATT practitioners. However, the triumph of the diplomatic approach within the panels during this period would inevitably make their reports rife with ambiguities and generalities. In Hudec's rationalization of this period, given the uncertain perception that awaited the GATT legal obligations in the capitals, it was important not to undermine all the prestige that GATT had gained with decisions that governments might well not be capable of fulfilling. Thus, as this fine scholar explains, the first GATT decisions were generally adjusted to this need for pleasant, smooth and more obscure legal decisions, using the language of diplomacy rather than legal jargon: in his words, the skills laid in suggesting the requisite conclusions by using impressionist brushstrokes which, when closely examined 'never actually stated on paper their real meaning, despite everyone being fully aware of their significance'. By using this technique, it was impossible to reach a satisfactory legal conclusion (at least using normal standards of legal analysis) as to what the decisions really mean or what they actually required.⁸⁶ This stage is often characterized by referring to the indecipherable nature of the reports.

43. Certainly, the impressionist practices of that era raised serious criticism.⁸⁷ However, it should also be emphasized that this approach was in all probability the only option open to GATT dispute settlement at that time, given the context in which it found itself in the nineteen fifties, hampered as it was not only by its precarious status but its institutional weaknesses. In this respect, the strategy of GATT diplomats was completely rational, and probably the only means available at the time for keeping the regime on track. In short, at that time, the cryptic, almost artistic nature of those first reports fulfilled a pertinent function at the time, namely, to resolve inter-state disputes *sotto voce*. This pragmatic strategy helped to preserve the unstable institutional structure of the GATT regime from major political tensions, while awaiting better times ahead. Thus, a cooperative and conciliatory atmosphere was at the fore during this period. Curzon depicted this atmosphere by framing the GATT as a club. The discussions within four walls, the attempts at conciliation rather than head-on conflicts, the private meetings 'to talk things over' were all features of this club-like atmosphere; indeed, the GATT club.⁸⁸

IV. The "legal barbarians"

44. The club-like atmosphere would have a critical significance for regime-building within GATT, both in the short and long term, as it allowed the incumbents not only to construct common understandings on key issues but also to get comfortably involved in a controlled experimentation which would lay the foundations within the regime for an increased formal use of law, legal procedures and lawyers, with the passing of time. Hudec frames this first period in similar lines by stating that the GATT had to get along with 'whatever low-visibility procedures could be developed consistently with the presence of not being an organization': 'the GATT would be a 'club', a place where like-minded officials

⁸⁴ See GATT L/392/Rev.1, *Considerations concerning the Extended Use of Panels* (6 October 1955).

⁸⁵ R. HUDEC, *The GATT Legal System*, op.cit.p.81.

⁸⁶ R. HUDEC, 'The Role of the Secretariat', op.cit.p.106.

⁸⁷ See *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements*. Report to the Committee on Finance, U.S. Senate, On Investigation N°332-212 Under Section 332 (g) of the Tariff Act of 1930, USITC Publication 1793 (December 1985) at 78.

⁸⁸ G. CURZON, *Multilateral Commercial Diplomacy: The General Agreement of Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (Michael Joseph Books 1965) at 52-53.

could communicate without having to spell things out in confrontation-producing clarity'.⁸⁹ In other words, as Weiler explains, the GATT operatives became a classical network:

‘A very dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the "outside" world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships’⁹⁰

45. Within this context, the dispute settlement mechanism managed to solve more than twenty disputes, functioning regularly until 1963. From then on, however, the panels system fell into disuse from 1964 to 1970. One of the basic reasons was the entry on the scene of the European Economic Community’s (EEC) in 1958; and particularly its Common Agricultural Policy and preferential trade relations with overseas territories. These policies led EEC members to play the flexibility card within the GATT. Added to this were the trade claims from developing countries, recently incorporated in the GATT, who were demanding more effective access for their exports to the markets of developed countries.⁹¹ Thus, paraphrasing Ernst-Ullrich Petersmann, the decade of the 60s was characterized by the pragmatic attempt to accommodate the GATT ‘without undue legalism’ to the project of European integration and the new majority of developing countries in the world trading system.⁹²

46. Given this state of affairs, the activity of panels was brought to a halt. However, this situation soon changed, as the increase in non-tariff barriers, which affected the consolidated tariff concessions within GATT, led the US administration to put heavy pressure on its trading partners to open a seventh MTN Round in 1973. The Tokyo Round (1973-1979) intended to address these policy tensions as well as improve some procedural issues in GATT dispute settlement, among other matters. During the Round, the EEC opposed any reform to the dispute settlement mechanism but agreed to its customary practices being codified. As a result, the negotiating parties adopted the so-called 1979 Understanding –consisting of 25 articles in 4 sections regulating notifications, consultations, dispute settlement and the monitoring of compliance– in an Annex under the title ‘Agreed Description of the Customary Practice of the GATT’.⁹³ Interestingly, the provisions of the Understanding were also complemented by multiple special provisions on dispute settlement contained in diverse Tokyo Round Codes, which overshadowed the new rules by fragmenting adjudicative procedures and authorities.⁹⁴ In any case, the 1979 Understanding facilitated the return of activity to the panels system.

47. However, making GATT panels once again a core mechanism of the world trading system would also facilitate a turning point in the GATT regime, as the decade of the 70s veered in the direction of increasingly litigious and legalist attitudes, and thus a significant structural change in cultural and institutional terms. There were two basic motives underlying this change of direction. The first of these was a generational takeover of the delegations. As mentioned above, the original delegations had a strong diplomatic focus, given the provisional application of GATT and its original lack of any institutional structures. However, the new generations of delegates had inherited a relatively established ‘organization’ and therefore their sensibilities were different to those of the old school trade diplomats,

⁸⁹ R. HUDEC, ‘The GATT legal system, op.cit.p.635.

⁹⁰ J. WEILER, ‘The rule of law and the ethos of diplomats’, *Efficiency, equity and legitimacy: the multilateral trading system at the Millennium* (Brooklin Institution Press 2001): 334–336.

⁹¹ R. HUDEC, ‘The Role of the Secretariat’, op.cit.pp.108-109.

⁹² E. PETERSMANN, *The GATT/WTO*, op.cit.p.84.

⁹³ See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD S26/210 (1980).

⁹⁴ See *Ministerial Declaration 1982*, Doc BISD S29/9-23 (1983), *Decision of the CONTRACTING PARTIES* Doc BISD 31S/9-10 (1985) *Decision of the GATT Council 1988*, Doc BISD S35/382 (1989) and *Decision of the CONTRACTING PARTIES 1989*, Doc BISD 36/66 and subsequent pages (1989).

particularly in terms of the relative emphasis given to the roles of diplomacy and litigation in the world trading system. In their eyes, rules (read law) should prevail in GATT dispute settlement.

48. The second motive was the entry on the scene of the United States Trade Representative (USTR): a brand new specialized trade agency in the United States, which assumed the trade policy functions formerly attributed to the Department of State. This new administrative body, from its creation, operated an openly litigious policy within the GATT, and thus developed extremely technical legal arguments, using teams of lawyers for this purpose. Inevitably, the aggressive new policy of the USTR—in which claims were loaded with drawn out baroque style legal arguments and esoteric legal claims⁹⁵ forced the panels to redirect the way in which they approached cases. Attitudes and expectations changed, and the panels felt pushed to amend their well established *lex artis diplomatica*. At the same time, the change forced all counterparts who were in dispute with the USTR to employ similar techniques.⁹⁶

49. The days of traditional GATT diplomacy were numbered and the legalist approach gradually began to gain credence. Thus, a phase was coming to an end. However, inevitably, the GATT regime was not adapted to the emerging culture; in fact, there were few experts familiar with the technicalities required by this new approach to disputes not only among the state delegates who normally made up the panels, but in the GATT Secretariat as well. In this context, the pressure on the panels system for further technical legal refinement ended by precipitating a crisis. In essence, the system was unable to withstand the contradicting pressures: the panel members endeavored to reconcile the old and new cultures without success, seeking impossible balances between diplomacy and legalism to keep both sides happy.

50. The basic feature of the most contentious cases of this period was the questioning of the technical legal quality of reports as well as decision-making procedures within the procedures of the panels. Under the new rules of the 1979 Understanding, disputing parties and the most legally-oriented delegations, in general, tended to play hard against the supposed ‘low legal standards’ of some reports as well as other procedural decisions of GATT panels. In this context, some controversial cases exacerbated the tensions between the US and European countries, such as the so-called DISC cases on corporate tax practices and export subsidies.⁹⁷ In essence, a new culture arose in the GATT with force and momentum. At this stage of regime-building, a new legal culture, winning positions within the GATT claimed that disputes could be best resolved using technical criteria, namely world trade law. The policy vision behind such positioning was constructing an ‘expert legal system’ within the GATT regime;⁹⁸ in other words, building a specialized system of international law.⁹⁹

51. In the early days of this new phase, John Jackson published *World Trade and the Law of GATT* (1969) with the indicative subtitle ‘A legal Analysis of the General Agreement on Tariffs and Trade’.¹⁰⁰ The policy vision contained in this work—informally referred to by many as the GATT ‘bible’—sent a strong message across the board for perfecting legal techniques within the world trading

⁹⁵ R. HUDEC, *The GATT Legal System*, op.cit.pp.112-113.

⁹⁶ For a detailed account and insights on the impact of this US agency in framing the evolution of world trade law and policy since its inception see, in particular, S. Dryden, *Trade Warriors: USTR and the American Crusade for Free Trade* (Oxford University Press 1995).

⁹⁷ See *United States Tax Legislation (DISC), Report of the Panel presented to the Council of Representatives on 12 November 1976*, BISD S23/98 (1977); *Income Tax Practices Maintained by Belgium*, BISD S23/127 (1977); *Income Tax Practices Maintained by France*, BISD S23/114 (1977); and *Income Tax Practices Maintained by the Netherlands*, BISD S23/114 (1977).

⁹⁸ For a fine reflection on the need to construct GATT as a ‘legal system’ (taking the DISC cases as case study) see J. Jackson, ‘The jurisprudence of International Trade: The DISC Case in GATT’, *72 American Journal of International Law* (1978): 747–781.

⁹⁹ See P. ZAPATERO, ‘Modern international law, op.cit.

¹⁰⁰ See J. JACKSON, *World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade* (The Boobs-Merrills Company Inc 1969).

system in order to upgrade its institutional efficiencies.¹⁰¹ **56.** The stance taken by this fine academic was highly visible and influential in GATT circles, helping to legitimize policy change towards the so-called ‘rule-based approach’. As David Kennedy recalls, ‘it was Jackson who largely invented the field [of trade law], transforming his experiences with the United Trade Representative’s office from a narrowing regulatory specialty into a recognized subject of legal study’.¹⁰² The policy vision coined within that monograph as the ‘rule-based approach’ was to later expand into multiple influential academic articles, and it was finally to become mainstreamed in GATT lingua two decades later with the help of *The World Trading System: Law and Policy of International Economic Relations* (1989),¹⁰³ published right in the middle of the Uruguay Round Negotiations (1986-1994).

52. The emerging new culture of the world trading system required different expertise and technologies. The GATT was changing, and not only from within the delegations but from within the Secretariat itself. Thus, when the Swiss Arthur Dunkel (1980-1993) succeeded Olivier Long (1968-1980) as Director of the GATT Secretariat, a final blow was dealt to the embattled old and new cultures. Indeed, Olivier Long was the last great proponent of the diplomatic approach within the Secretariat. In fact, it was he who proposed the idea of legally-controlled pragmatism in his *Law and its Limitations in the GATT Multilateral Trade System* (1985): according to the former Director General, ‘the General Agreement offers many possibilities for a legally controlled pragmatism, and throughout the history of GATT, contracting parties have responded constructively and positively to international economic and political conditions, without having undue regard to legal technicalities’.¹⁰⁴ However, a new era had begun. The diplomatic approach –which was the direct legacy of those who had negotiated the Havana Charter and kept the GATT afloat during its early years– was now also withdrawing from the Secretariat. In fact, Dunkel was to promote, not without some hardship, the creation of a legal service within the Secretariat itself; the new Director General’s aim was to guarantee against any ‘legal errors’ made by the panels, by assisting them in improving quality and technical accuracy of their decisions.¹⁰⁵

53. The increase in the legal quality of the panel reports in the eighties was definitely attributable to this initiative. From then on, the GATT had fairly well structured procedures in place (the 79 Understanding and other Tokyo Codes) and a growing number of delegates and experts were in favor of upgrading the position of legal rules in dispute settlement activities. Therefore, in order to close the circle of rule-based adjudication, the last big pitfall to avoid was the so-called ‘positive consensus’: the requirement for panels to be established as well as panel reports to be adopted by consensus at the GATT General Council. As a result, any contracting party could block the establishment of a panel or the adoption of a given report. Thus, the functioning of panels could be easily obstructed. For decades, the ‘positive consensus’ was entrenched in both culture and practices of the old trade diplomats, as a rational way of securing the survival of an originally weak GATT under provisional application.¹⁰⁶ However, new militancies and interests achieved reforms that hitherto would have been unthinkable. In essence, the GATT Contracting Parties were fully aware of the benefits to be gained by generally honoring the rules of the game contained in world trade law. At the same time, the growing *auctoritas* of panels –as a result of their increased legal expertise– helped to pursue a stronger rule-based policy approach which would close the circle of world trade law.

¹⁰¹ For his current approach to world trade law after the inception of WTO see J. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press 2000) as well as, in particular, J. Jackson, *Sovereignty, the WTO, and the Changing fundamentals of international law* (Cambridge University Press 2006).

¹⁰² See D.KENNEDY, ‘The international style in postwar law and policy: John Jackson and the field of international economic law’, 2 *American Journal of International Law and Policy* 10 (1995): 672.

¹⁰³ J. JACKSON, *World Trading System: Law and Policy of International Economic Relations* (The MIT Press 1989).

¹⁰⁴ O. LONG, *Law and its Limitations in the GATT Multilateral Trade System* (Martinus Nijhoff 1985) at 35–36 and 62.

¹⁰⁵ R. HUDEC, ‘The Role of the Secretariat’ op.cit. pp.114–115.

¹⁰⁶ See *Review of the Effectiveness*, op.cit.p.79.

54. These developments, together with the pressure of US trade unilateralism,¹⁰⁷ led the GATT Contracting Parties to finally eliminate the ‘positive consensus’ rule from the provisions of the new WTO Dispute Settlement Understanding under negotiation during the Uruguay Round. Paradoxically, in this regard, such change towards automatic and fully binding legal adjudication within the world trading system came about partly as a result of trade unilateralism. During the Uruguay Round, the USTR managed to obtain a mandate from the US Congress to combat outside GATT procedures the supposed ‘unfair’ practices of other contracting parties. From its earliest days, the world trading system has traditionally functioned in line with US trade legislation.¹⁰⁸ In this case, US unilateralism was seeking more market access but also a more effective dispute settlement mechanism, which was already in the negotiating mandate of the Uruguay Round. Leaving aside the dubious international legality of such unilateral practices, the strategy paradoxically paid off for regime-building, as less powerful countries saw the strengthening of the dispute settlement mechanism as a means of helping to restrain US unilateralism: ironically, the law of the jungle pursued through the so-called US Section 301 and Super 301 promoted the consolidation of the rule of law in multilateral trade relations. Indeed, regime-building in this area would not have taken place probably without it. In fact, Arthur Dunkel is generally attributed with saying that this piece of domestic legislation was the best thing that ever happened to the GATT.¹⁰⁹

V. The quest for hard-law

55. To paraphrase Pescatore, the panel system has managed to produce useful reasoned legal solutions to the often thorny inter-state tensions regarding world trade.¹¹⁰ The history of the invention of the GATT *panels* evidences the importance of the ‘human factor’ in regime-building generally. As mentioned, the negotiations of the Havana Charter laid the foundations for a small global epistemic community, highly specialized in nature, with its own and increasingly complex practices as well as cultural references and values. In essence, the GATT people basically kept the flame of the world trading regime alive, against all odds, for more than half a century. Being aware of this phenomenon allows a better understanding of how the GATT has gone from a totally provisional and anemic trade agreement to a highly powerful, efficient and sophisticated global regime under the form of WTO.

56. The invention of GATT *panels* has a starring role in the process, as these had a resounding long term success by allowing settling and/or mitigating multiple trade disputes within the four corners of the GATT. In doing so, the availability of panels helped not only to reduce trade tensions but also made it easier for the GATT community to advance a common rulemaking agenda in the medium and long term. As a result, the progressive development of the panels system culminated in the incorporation of a brand new and unprecedented dispute settlement mechanism in the Final Act of the Uruguay Round. To paraphrase Silvia Ostry, this mechanism is ‘the strongest dispute settlement mechanism in the history of international law’.¹¹¹ The negotiations for the instrument began when 92 Contracting Parties would formally adopt the Punta del Este Declaration which formally opened negotiations of the Uruguay Round (20 September 1986),¹¹² among the 14 negotiating groups, one was concerned exclusively with the dispute settlement mechanism.¹¹³

¹⁰⁷ See in particular R. Hudec, ‘Thinking about the New Section 301: Beyond Good and Evil’, *Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System* (University of Michigan Press 1990) at 113-159.

¹⁰⁸ G. CURZON/V. CURZON, ‘GATT: “Traders’ Club”’, *The Anatomy of Influence. Decision Making in International Organization* (Yale University Press 1974) at 313.

¹⁰⁹ J. BHAGWATI, ‘The Diminished Giant Syndrome’, *72 Foreign Affairs* 2 (1993): 22–26.

¹¹⁰ P. PESCATORE, ‘The GATT Dispute Settlement Mechanism’, *op.cit.*p.35.

¹¹¹ S. OSTRY, ‘The Uruguay Round North-South Grand Bargain: Implications for future negotiations’, *The political economy of international trade law: Essays in honor of Robert. E. Hudec* (Cambridge University Press 2002) at 287

¹¹² Doc GATT/1396 (25 September 1986).

¹¹³ T. STEWARD & C. CALLAHAN, *The GATT Uruguay Round: A Negotiating History (1986-1992), Dispute Settlement Mechanism* (Kluwer Law and Taxation Publishers 1993).

57. The Final Act incorporating the results of the Round, signed on 15 April 1994, is the most successful of all MTNs held to date. Its advances regarding new disciplines and coverage as well as the creation of the WTO are presided over by the Dispute Settlement Understanding (DSU); a highly technical instrument that amply exceeded the expectations of the negotiators by incorporating key innovations: mainly, (1) the elimination of the positive consensus, (2) the integration of procedures and (3) the establishment of a permanent Appellate Body. These changes have been a large step forward in the strengthening of world trade governance.

58. The dispute settlement mechanism today is, to paraphrase the first WTO Director General, the heart of the WTO system.¹¹⁴ In almost two decades since its inception, the new mechanism has gained a structural position in global governance by producing highly technical legal decisions, which are adopted by the WTO General Council –formally acting as Dispute Settlement Body– almost automatically. Interestingly, however, one critical issue remained somewhat vague in the wording of the Understanding, namely the compulsory nature of the reports. Under the GATT of 47, the requirement for positive consensus could leave reports in a legal limbo if at least one of the contracting parties did not agree with adopting the report.¹¹⁵ On the contrary, under WTO law, panel and Appellate Body reports are to be adopted unless the Dispute Settlement Body decides not to do so by consensus. Hence, the requirement has been subtly reversed, from positive... to negative consensus.¹¹⁶ In other words, as Komuro puts it, non-adoption of reports has turned into a mere intellectual curiosity.¹¹⁷ In short, adoption of reports is *de facto* automatic.

59. Notwithstanding the above, some legal literature questioned the compulsory nature of reports right after the adoption of the Final Act of the Uruguay Round.

For example, US academics writing in legal journals such as the influential *American Journal of International Law* (AJIL) contended that the Understanding permits a generalized option of either compliance or compensation.¹¹⁸ These positions were strongly contested with celerity in that same journal by John Jackson himself, who argued that there is certainly a WTO legal obligation to comply with the reports, as well as that compensation is as mere fallback in the event of non-compliance.¹¹⁹ Obviously, whether or not this is legally so was a capital question for the nascent WTO regime, and therefore its most recognizable academic expressed himself in an unflinching and categorical manner.¹²⁰ According to Jackson, framing the reports as mere recommendations is a misunderstanding, as the practice of the original GATT contracting parties assumes that there was an obligation to comply with the terms of panel reports.¹²¹ His words in the editorial comment written for the occasion -under the illustrative title ‘The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation’- are the following:

‘So what does the DSU language itself say? Here we can examine a good number of clauses, and I would suggest that the overall list of those clauses, in the light of the practice of GATT, and perhaps

¹¹⁴ *WTO Focus. Newsletter*, August-September (1996) at 7.

¹¹⁵ J. JACKSON, ‘The World Trade Organization, op.cit.p.87.

¹¹⁶ See article 16.4 and 17.14 of the Understanding. The literature uses various terms to refer to this amendment: ‘negative consensus’, ‘reverse consensus’, etc.

¹¹⁷ N. KOMURO, ‘The WTO Dispute Settlement Mechanism. Coverage and Procedures of the WTO Understanding’ 29 *Journal of World Trade* 4 (1994): 41.

¹¹⁸ J. BELLO, ‘The WTO Dispute Settlement Understanding: Less is more’, 90 *American Journal of International Law* 4 (1996): 416 and subsequent pages and J. Bello & A. Holmer, ‘Dispute Resolution in the World Trade Organization Concerns and Net Benefits’, 28 *International Lawyer* 4 (1994): 1103 (compensation as an option for replacing compliance).

¹¹⁹ J. JACKSON, ‘The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of a Legal Obligation’, 91 *American Journal of International Law* 1 (1997): 60-61. For further criticism on the editorial comments of Judith Bello see Roessler’s view, as former Director of the GATT Legal Affairs Division, in F. Roessler, ‘Comments: Performance of the System IV: Implementation’, 32 *International Lawyer* (1998): 789-790.

¹²⁰ It should be emphasized in any case that compensation in place of compliance is expressly provided for in the specific case of non-violation complaints of GATT Article XXIII.b. See Article 26.1.d of the DSU.

¹²¹ J. JACKSON, *The World Trade Organization*, op.cit.p.83.

supplemented by the preparatory work of the negotiators (unfortunately not well documented), strongly suggests that the legal effect of an adopted panel report' is the international law obligation to perform the recommendation of the panel report'.¹²²

60. In consequence, the obligation to comply is basically derived from several articles of the understanding (namely, articles 3.7, 19.1, 21.6, 22.8 and 26.b):¹²³

'Thus, the DSU clearly establishes a preference for an obligation to perform the recommendation; notes that the matter shall be kept under surveillance until performance has occurred; indicates that compensation shall be resorted to only if the immediate withdrawal of the measure is impracticable; and provides that in non-violation cases, there is no obligation to withdraw an offending measure, which strongly implies that in cases of violation there is an obligation to perform'.¹²⁴

61. Notwithstanding these fine arguments, the text of the understanding does not allude in any way to the binding nature of the reports; and Jackson himself recognizes this fact: '[w]hat can we say about the new DSU? Unfortunately, the language of the DSU does not solidly "nail down" this issue'; and the scholar later adds:

'Oddly enough, some diplomats who assisted in the negotiation of the DSU told me that they thought they had nailed it down'.¹²⁵

The literal meaning of provisions such as Article 19 (under the heading 'Panel and Appellate Body Recommendations'), for example, are crystal clear: in principle,^{the} reports contain recommendations. However, the established practice has confirmed that such recommendations became binding decisions once they had been adopted by the General Council acting as Dispute Settlement Body (DSB). In practice, the originally debatable nature of panel and Appellate Body reports has been closed in favor of their binding nature, once these have been adopted by the DSB.¹²⁶ Hence, at the end of the day, the mechanics of international customary law came to the rescue of WTO regime-building for the occasion.

62. In fact, international legal literature is currently pacific regarding the binding nature of reports adopted by the DSB.¹²⁷

Today, the highly consolidated interplay between practice and *opinio iuris* on this issue allows WTO Members to frame DSB adopted reports as legally binding. However, any person unfamiliar with these intricacies (including lawyers) would have serious difficulties in understanding this development, as she/he could always read the word 'recommendation' in the legal texts. Hence, it would certainly have been desirable for the Understanding to nail down such a critical issue, provided that binding nature appeared to be the intention of the negotiators.

63. In any case, after decades of consensual practices within the panels system, the negotiating working group on dispute settlement in the Uruguay Round (presided over by Julio Lacarte-Muró) managed to go far beyond this by completing the drafting of the WTO Dispute Settlement Understand-

¹²² J. JACKSON, 'The WTO Dispute Settlement', op.cit.p.62-63.

¹²³ In a later text, Jackson reinforces his argument adding new provisions to the list (article 3.4, 3.5, 3.7, 11, 19.1, 21.1, 21.6, 22.1, 22.2, 22.8 y 26.1b). See J. Jackson, *The World Trade Organization*, op.cit.p.87, note 82. -01

¹²⁴ See J. JACKSON, 'The WTO Dispute Settlement Understanding-Misunderstandings', op.cit.p.62.

¹²⁵ Ibid: 62.

¹²⁶ See Article 20 of the DSU (Time-frame for DSB Decisions)

¹²⁷ See, for example, R. HUDEC, 'Broadening the Scope of Remedies in the WTO Dispute Settlement', *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals*, (Cameron May 2000) at 345-376 or A. Sykes, 'The Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding: Damages or Specific Performance?' *New Directions in International Economic Law: Essays in Honor of John H. Jackson* (Kluwer Law International 2000) at 347-51.

ding.¹²⁸ To paraphrase Shell, the new system represented a resounding victory for the legalists in the debate over the dispute settlement model for multilateral trade.¹²⁹ In fact, as a result of that, nowadays, the transition from the GATT to the WTO is seen by many observers as a full shift from soft-law to hard-law. For Abbott, for example, evidence of this trend is clearly perceptible in two areas: ‘The first area is progressive refinement of the rules from the general to the specific. The second is the transformation from a system for resolving differences to one based on a quasi-judicial system of consensus’.¹³⁰

64 Today, the functioning of panels and the Appellate Body is governed by strict application of WTO law. The strong diplomatic approach of some panels from the GATT era has been left behind. The legal approach has won over those critics identifying law and legal institutions with rigidity and inflexibility and, in consequence, as tools unsuitable for the institutional specificities of progressive trade liberalization.¹³¹ In the early years of the diplomatic approach, as Jackson recalls, the GATT was merely a ‘negotiating forum’ designed substantially to retain a balance of concessions and advantages between the Contracting Parties.¹³² Nowadays, the world trading system builds upon such forum to go beyond, by establishing a dynamic regulatory forum which rules are justiciable in practice.

65. However some elements of the diplomatic approach still continue to hold sway when resolving disputes. In fact, some remain in the current provisions of the Dispute Settlement Understanding itself. Thus, even though today the mechanism is hyper-formalized, it preserves some diplomatic elements that pay tribute to the tradition and old-school culture of world trade diplomacy. In this way, the DSU maintains diplomatic elements which are considered useful.¹³³ For example, the terms of reference for panels are defined by bilateral negotiation. At the same time, the parties engage in a re-examination phase prior to obtain a final decision on the cases. Also the DSU still contains the old GATT provisions relating to obtaining a ‘mutually acceptable’ solution as well as the maintenance of a ‘balance of rights and obligations’. These elements, as Pescatore suggests, are very close to conciliation.¹³⁴ In this regard, conciliation was the privileged mode of resolving disputes in the world trading system in the pre-WTO phase,¹³⁵ and that culture certainly did not vanished in the WTO legal texts. In consequence, several formulas related to conciliation have been retained.¹³⁶ In short, regime-building in the area of dispute settlement advanced towards hyper-legalism without dispensing with at least some functional elements of its diplomatic inheritance.

66. Today, the WTO dispute settlement mechanism is not strictly speaking a judicial instrument, given that it comprises a number of *ad hoc* bodies together with one permanent body –panels and Appellate Body respectively– the reports of which require, as explained, approval by the DSB. In this regard, although the establishment of panels and the approval of reports is now automatic in practice –rejection requiring collective negative consensus–, both decisions still require adoption by the General Council, acting as DSB. However, the Appellate Body has imprinted a strong judicial orientation in its procedures and

¹²⁸ T. STEWART/ C. CALLAHAN, *The GATT Uruguay Round: A Negotiating History (1986-1992)*. Dispute Settlement Mechanism (Kluwer Law and Taxation Publishers 1993).

¹²⁹ R. SHELL, ‘Trade legalism’, *op.cit.* p.833.

¹³⁰ F. ABBOTT, ‘Incomplete Rule Systems, System Incompatibilities and Suboptimal Solutions: Changing the Dynamic of Dispute Settlement and Avoidance in Trade Relations Between Japan and the United States’, 16 *Arizona Journal of International and Comparative Law* (1999): 195-196.

¹³¹ In defence of this perception see, specially, O. Long, *Law and its Limitations*, *op.cit.* p.21 and 73 and K. Dam, *The GATT Law*, *op.cit.* p.358.

¹³² J. Jackson, *The World Trading System: Law and Policy of international economic relations* (MIT Press 1997) at 93.

¹³³ Evidently, this is not exclusive of the WTO. On this, see in particular M. Shapiro, *Courts: A Comparative and Institutional Analysis* (University of Chicago Press 1981) at 8 and 15.

¹³⁴ P. PESCATORE, ‘The GATT Dispute Settlement Mechanism’, *op.cit.* pp.37-38.

¹³⁵ E. CANAL FORGUES, *L’Institution de la conciliation dans le cadre du GATT: Contributions a l’étude de la structuration d’une mecanisme de reglement des differends* (Bruylant 1993).

¹³⁶ See E. CANAL FORGUES, ‘Le système de règlement des différends de l’OMC’, *La réorganisation mondiale des échanges* (Pedone 1996) at 285.

rulings since the very first case was appealed in 1995. Thus, there is a wide consensus among world trade experts on the judicialization of world trade dispute settlement.¹³⁷ As a result, the policy space for diplomacy/negotiation under such terms is not only inside but outside the mechanism, as WTO dispute settlement functions by default. Therefore, it would be reasonable to argue that diplomacy was not annulled but transformed by the current rule-based approach into rule-based diplomacy. That is, in practice, WTO rules and decisions have become strong arguments in bilateral trade relations nowadays, as the shadow of the WTO dispute settlement mechanism facilitates finding mutually acceptable solutions and arrangements.

¹³⁷ For some first reflections on this issue with regard to the GATT regime, see G. MALINVERNI, *Les Reglements des differends dans les organisations internationales economiques*, (IHHEI 1974) at 171.