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## WTO DISPUTE RESOLUTION: THE PROMOTION OF DIPLOMACY WITHIN AN ADJUDICATIVE MODEL

TREVOR LAWSON<sup>†</sup>

In his article, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, Michael K. Young argues that the dispute resolution mechanisms embodied in the Understanding on the Rules and Procedures Governing the Settlement of Disputes<sup>1</sup> are a "decisive, though imperfect step in the direction of a more legalistic, adjudicatory process."<sup>2</sup> Young is not alone among commentators in viewing the movement towards a more legalistic system as a "victory" over those who prefer a system "characterized by consultations, negotiations and diplomatic compromise."<sup>3</sup>

It seems, however, that such an interpretation of the dispute resolution mechanisms produced by the Uruguay Round is only reasonable if one first accepts that adjudication is a distinct and separate instrument from a diplomatic approach. Moreover, one must also accept that it is not only exclusive in its application, but that it is devoid of the traditionally diplomatic exercises of consultation, negotiation and compromise. It is the purpose of this comment to show that the distinction between adjudication and diplomacy is false. The traditional diplomatic concepts of negotiation, consultation and compromise in fact flourish under a properly developed adjudication-based system of dispute resolution.

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<sup>1</sup> Annex 2 of the *Marrakesh Agreement Establishing the World Trade Organization* (WTO), one of three components of the *Final Act Embodying the Results of the Multilateral Trade Negotiations*, (1994), 33 I.L.M. 112 [hereinafter the *Understanding*]. Came into force on January 1, 1995.

<sup>2</sup> M. K. Young, "Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats" (1994) 29 Int'l. Law. 389 at 397.

<sup>3</sup> *Ibid.* at 390.

This comment will initially identify what is generally agreed upon as the goal of dispute resolution within the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) regime. Secondly, the two approaches historically associated with the debate as to how the objectives of dispute resolution within the GATT/WTO are best achieved, that of the legalist and that of the pragmatic or diplomatic approach, will be examined. Thirdly, it will be established that these two positions can be reconciled under a single model which employs adjudication as the ultimate arbiter of disputes, examining the civil justice system and its operation within the United States as an embodiment of the adjudicative model. Finally, it will be established that the *Understanding* reflects many qualities of the American approach to the resolution of domestic disputes. The movement in the *Understanding* toward the establishment of a system of dispute resolution in which the legalist and diplomatic approaches may be reconciled within an adjudicative model, for example, is very similar to the American approach. This movement, when properly understood, is not a victory of legalists over diplomats, but marks the creation of a more efficient and fair system better able to fulfill the long-standing objective of GATT/WTO dispute resolution procedures.

### I. THE OBJECTIVE OF GATT/WTO DISPUTE SETTLEMENT

It is generally agreed that the primary objective of dispute resolution under the GATT/WTO is to facilitate the withdrawal or termination of any measure which serves to compromise the balance of advantage provided by the GATT to its contracting parties. Moreover, it seeks to do so in an expeditious manner which protects and restores this balance.<sup>4</sup> If at all possible, resolution should take place between the principals, through a process of bilateral consultations and conciliation; rather than by retaliation and counter-retaliation. Overall, the underlying objective is the greater goal of continual progress towards liberalization through the

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<sup>4</sup> O. Long, *Law and its Limitations in the GATT Multilateral Trade System* (Dordrecht: Martinus Nijhoff, 1985) at 71.

elimination of barriers to international trade.<sup>5</sup> This objective has remained a consistent feature of GATT dispute resolution since its inception in 1947, and continues to be the underlying premise behind the rules and procedures adopted in the *Understanding*.

Agreement on how best to achieve this primary objective has not remained consistent, however. A fundamental ideological debate among member nations has persisted as to whether the GATT should be "primarily a legal document with provisions for judicial determination and penalties for violations, or a set of guidelines for realizing mutually agreed objectives through consultation and mediation."<sup>6</sup> GATT members are divided into two camps in terms of how the objectives of the dispute resolution process are best achieved: the legalists and the pragmatists or diplomats. As the following section reveals, neither camp has been predominate: instead, "over the forty years of GATT dispute settlement, there has been an ebb and flow between the . . . models."<sup>7</sup>

## II. LEGALISM VERSUS DIPLOMACY: TAKING SIDES IN PURSUIT OF THE OBJECTIVE, 1947-86

### 1. Diplomacy: The Pragmatic Approach

When the GATT was established, it lacked a single, concisely defined general dispute mechanism equivalent to the adjudicative "three-step" process developed under the International Trade Organization (ITO).<sup>8</sup> The vaguely worded Articles XXII (Consultation) and XXIII (Nullification and Impairment) of the GATT were left to serve as the basis of dispute settlement. Article XXII establishes a general commitment to "accord sympathetic consideration" in consultation with another member regarding "such representations as may be made by another contracting

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<sup>5</sup> F. Stone, *Canada, the GATT and the International Trade System*, 2nd ed. (Montreal: Institute for Research on Public Policy, 1992) at 36.

<sup>6</sup> R. F. Mikesell, "Antecedents of the ITO Charter and their Relevance for the Uruguay Round" (1994) 14 N. Ill. U. L. Rev. 323 at 328-329.

<sup>7</sup> A. F. Lowenfeld, "Remedies Along with Rights: Institutional Reform in the New GATT" (1994) 88 Am. J. Int'l L. 477 at 479.

<sup>8</sup> Discussed in greater detail, *infra* note 17, and associated commentary.

party.”<sup>9</sup> Article XXII(2) asserts the competence of the contracting parties to intervene in the matter upon request of the aggrieved party.

Article XXIII applies to both violation and non-violation disputes. Following the failure of bilateral negotiations, the contracting parties, upon request, are required to promptly investigate the dispute. Appropriate recommendations are to be made to the concerned parties. However, the GATT lacked a formalized body to carry out these tasks. In the absence of a solid foundation of rules and procedures to govern the resolution of disputes, the GATT dispute resolution mechanism at its inception was decisively diplomatic in nature, dependent on the co-operation of both principals in the settlement of a dispute.

The diplomatic process is “most clearly in operation when states are negotiating with each other to achieve peaceful settlement of a dispute or agreement on a matter of mutual concern.”<sup>10</sup> What the pragmatic approach to dispute resolution entails in terms of GATT/WTO dispute settlement is addressed by Young:

GATT dispute resolution should not be particularly formal, legal or adjudicatory. Rather, it should be characterized by *consultations, negotiations and diplomatic compromises*. The goal of dispute resolution in the GATT context should not be to create clear-cut, binding rules or rigorous applications of the law. Instead, the process should be designed to end the dispute by ending the violation as soon as possible. Given the sovereign nature of the complainants, this goal is best accomplished through careful negotiations and appropriate compromise. [emphasis added]<sup>11</sup>

At the centre of the pragmatist’s criticism of using legalistic methods lies the concern that a propensity to accentuate adjudication may in fact result in a heightening of conflicts, as

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<sup>9</sup> P. Hallstrom, *The GATT Panels and the Formation of International Trade Law* (Stockholm: Swedish Council for Research in the Humanities and Social Sciences, 1994) at 213.

<sup>10</sup> I. Claude Jr., “Multilateralism” in E. Plischke, ed., *Modern Diplomacy: The Art and the Artisans* (Washington: American Enterprise Institute for Public Policy Research, 1974) at 190.

<sup>11</sup> Young, *supra* note 2 at 390.

opposed to their resolution. There are three arguments underlying this concern.<sup>12</sup> First, it is argued that an increased effort to judicialize a proceeding may backfire if losing members refuse the WTO's attempts to enforce its decisions, thus undermining the other members' faith in the entire system. Secondly, it is argued that negotiation between nations, the traditional method of international dispute resolution, could be undermined by ineffective adjudication. Once proceedings have ended and a party ignores the final decision, an attempt to bring that party back to the negotiating table may be more difficult, especially after retaliation is authorized. Finally, it is argued that adjudication can lead to a deepening of hostility between disputing parties because the process is naturally contentious, firmly placing each nation on opposite sides of the dispute. Pragmatists argue that this is in contrast with the more traditional methods of negotiation and conciliation, which attempt to found a solution on common ground. Hudec suggests that the use of judges and lawyers in the dispute resolution process was consciously avoided from the beginning of the GATT as the "problem with lawyers and judges was their failure to understand the need for compromise in these matters."<sup>13</sup>

## 2. Legalism: The Rule Oriented Approach

The term "legalism" as it is understood in the context of the GATT relates to a theory that disputes between nations are best resolved through the use of a formalistic, rule-oriented approach, in which disputes among member states are resolved through adjudication.<sup>14</sup> Advocates of the theory argue that it serves to lessen an individual nation's reliance on their relative economic and political power—the temptation to "flex one's muscles"<sup>15</sup>—and act unilaterally. As a result, this process provides an advantage to smaller and less-developed countries, who wield little economic and political power, and thus lack the leverage necessary to obtain a favourable

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<sup>12</sup> T. Dillon Jr., "The World Trade Organization: A New Legal Order for World Trade?" (1995) 16 Mich. J. Int'l L. 349 at 396-97.

<sup>13</sup> R. Hudec, *The GATT Legal System and World Trade Diplomacy* (New York: Praeger, 1975) at 21.

<sup>14</sup> Young, *supra* note 2 at 390.

<sup>15</sup> K. Stiles, "The New WTO Regime: The Victory of Pragmatism" (1995) 4 J. Int'l L. and Prac. 3 at 4.

resolution to disputes involving larger, more powerful member states. It is further argued that a legalistic approach to dispute resolution serves to enhance the international trading system through increased adherence to internationally agreed rules and a more effective dispute settlement.

Finally, the legalist perspective holds that the clarity and certainty produced by building a credible body of GATT jurisprudence will increase compliance with GATT standards and assist in staving off protectionist measures, thereby ensuring reciprocity and fair trade.<sup>16</sup>

### 3. The Evolution Toward an Adjudication-Based Model

The *Havana World Trade Charter* establishing the ITO provided for a dispute resolution procedure which entailed a rule-oriented approach. Dispute resolution under the ITO involved a three-step procedure, by which complaints were to be investigated and ruled upon by an eighteen-member Executive Board.<sup>17</sup> Rulings of the Executive Board could be appealed to the ITO's highest political organ, the Conference, which in turn could be appealed to the International Court of Justice. Guided by this system, the ITO could give a non-binding ruling to the principals of the conflict.<sup>18</sup> The effectiveness of this legalistic approach to dispute resolution was never tested, however, due to the failure of the U.S. Congress to ratify the *Havana Charter*.

Although the GATT itself lacked a concise institutional framework for dispute settlement, the practice of referring disputes to working parties was adopted early on, beginning the evolution of the GATT towards an adjudicative model. The working party was comprised of members of the two principal nations to the dispute, representatives of nations interested in the outcome, and representatives from neutral countries. The working parties were never intended to render decisions on legal issues: "they were meant to clarify the issues, to discuss them, and hopefully produce enlightened agreement on the merits."<sup>19</sup> Despite the involvement of third parties, the working parties were decisively diplomatic in the

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<sup>16</sup> Young, *supra* note 2 at 390.

<sup>17</sup> Hallstrom, *supra* note 9 at 28.

<sup>18</sup> *Ibid.* at 28.

<sup>19</sup> Hudec, *supra* note 13 at 69.

sense that there would be no settlement without the agreement of the principals.

In 1952, at the seventh session of the contracting parties, evolution towards an adjudication based system continued. The working party model was replaced by the "panel" process. The term "panel" was seen to evoke "notions of impartial and non-political decisions by individuals acting in their own capacity, chosen for their technical expertise."<sup>20</sup> At the same time, the submissions presented by the principal parties to a dispute also appear to have become more legalized: written arguments were prepared in advance; the meeting room resembled a court room; oral arguments were carefully prepared; and the panels both questioned the parties and rendered a written decision. Despite this appearance, however, the success of the entire process remained dependent on the voluntary co-operation of the parties.<sup>21</sup>

Throughout the first decade of its existence, the GATT made legal rulings on twenty of the fifty-three complaints that were filed under it.<sup>22</sup> However, this highly visible activity subsided after 1958, as only seven complaints were filed, and five rulings made, during the next decade.<sup>23</sup> Several reasons have been advanced to explain why member-nations stopped initiating complaints under the GATT dispute settlement procedures. The main explanations have centered on the inability of the rules and procedures, as they existed at that time, to satisfactorily fulfill the objectives of the GATT dispute settlement process.<sup>24</sup> While initially effective, these procedures were no longer considered adequate to deal with increasingly complex trade issues, which had not been envisioned when the GATT was first established.<sup>25</sup>

Among other things, the consultative phase was viewed as being unproductively long, as the party whose measures were challenged could drag out the bilateral discussions on the selection of panelists, the terms of reference, and the procedures for making submissions

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<sup>20</sup> Hudec, *supra* note 13 at 75.

<sup>21</sup> *Ibid.* at 77.

<sup>22</sup> R. Hudec, "The Judicialization of GATT Dispute Settlement", in M. Hart & D. Steger, eds., *In Whose Interest?: Due Process and Transparency in International Trade* (Ottawa: Centre for Trade Policy and Law, 1992) at 11.

<sup>23</sup> *Ibid.*

<sup>24</sup> Long, *supra* note 4 at 86-87.

<sup>25</sup> Hallstrom, *supra* note 9 at 40.



to the panel.<sup>26</sup> Furthermore, a single contracting party, including the disputant who was adversely affected by a decision, could block the adoption of a report by the GATT Council. Even if a report was adopted, there was no monitoring process in place to ensure that the offending measure was withdrawn, and no guarantee that an adverse party would adhere to the ruling.<sup>27</sup>

The evolution of GATT dispute resolution towards a more legalistic model continued in the 1979 Tokyo Round of negotiations, that led to the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*.<sup>28</sup> The *Understanding of 1979* attempted to respond to some of the perceived weaknesses of the GATT dispute resolution mechanisms by mandating time limits within which a panel was to be formed, formalizing the principles governing the composition of the complaint, and stating that the report of a panel must be adopted within a "reasonable" amount of time.

The *Understanding of 1979* failed, however, to respond to the greatest weakness of the GATT dispute resolution process: the party whose conduct was at issue could impede the process at many stages. As well, the composition and powers of the panel were not clarified in any substantial respect. The language used to modify the existing procedures, such as "reasonable," provided little of the clarity and precision such rules and procedures require if an adjudication-based dispute settlement process is to operate effectively.<sup>29</sup>

Evidence of the failure of the *Understanding of 1979* to accomplish its goals can be found in the continued reliance of the United States on unilateral action throughout the 1980's. In particular, the U.S. relied upon section 301 of the *Trade Act, 1974*, which authorized the imposition of or increase in tariffs, quantitative restrictions, or both, in response to unfair or injurious

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<sup>26</sup> J. Bello & A. Homer, "U.S. Trade Law and Policy Series No.24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits" in H. Applebaum & L. Schlitt, eds., *The Gatt, the WTO and the Uruguay Round Agreements Act: Understanding the Fundamental Changes* (New York: Practising Law Institute, 1995) at 462.

<sup>27</sup> *Ibid.*

<sup>28</sup> (1980), B.I.S.D., 26th Supp. at 210 [hereinafter the *Understanding of 1979*].

<sup>29</sup> See also Article 4, which stated that consultations should proceed expeditiously, but placed no time limits upon them.

trade practices by a foreign government. As such, section 301 provided domestic legal authority for sanctions, even in the absence of a violation of the GATT or nullification and impairment of U.S. GATT benefits.<sup>30</sup> Section 301 was viewed as "a clear certification by the U.S. Congress that the GATT legal system was not working."<sup>31</sup>

In addition to acting unilaterally, the United States engaged in legal "carpet-bombing" techniques when it was involved in a dispute before a GATT panel.<sup>32</sup> These tactics effectively served to overwhelm GATT panels whose members were ill-prepared to respond with a satisfactory legal judgment. Hudec notes that, "the panels decision in the MIPS case showed how inadequate the GATT's legal resources were in the face of aggressive lawyering."<sup>33</sup>

The aggressive use of the *Trade Act, 1974*,<sup>34</sup> by the United States, coupled with several poorly constructed decisions by GATT panels,<sup>35</sup> served as the impetus for the major reassessment of dispute resolution procedures which occurred during the Uruguay Round

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<sup>30</sup> Bello & Homer, *supra* note 26 at 466.

<sup>31</sup> Hudec, *supra* note 22 at 22.

<sup>32</sup> *Ibid.* at 12.

<sup>33</sup> *Ibid.* While Hudec's point is certainly valid, it is perhaps more accurate to say that the inadequacies of the GATT legal process were the *cause* of aggressive lawyering. The term "aggressive" lawyering is used in this sense to mean the employment of arguments and tactics which a qualified tribunal would be capable of identifying as frivolous and vexatious, and would react to arguments of this nature by identifying them as such and/or admonishing counsel who attempted to employ such methods. The presence of a qualified adjudicatory body whose power and authority are clearly defined discourages counsel from putting forth such arguments in an attempt to overwhelm the tribunal. A qualified adjudicatory body would not discourage aggressive lawyering in the sense of a rigorous defence of one's position, but would only ensure that counsel is confined to the use of sound legal argument in their submissions to the tribunal. As such, the entire process achieves a greater degree of clarity, as counsel is better able to gauge their chances for success based on the validity of their legal position, knowing that a capable panel will identify and discard a weak or frivolous legal argument. Further, the adjudication process operates more efficiently, as a better qualified adjudicatory body will demand concise and substantive legal reasoning behind submissions from counsel, and are less likely to be overwhelmed, and more likely to interrupt or redirect counsel who attempts to occupy the tribunal's time addressing issues not germane to the matter at hand, meaning that a party whose behaviour is in question will not be able to temporarily block the process through lengthy, but unsound filibustertype argument.

<sup>34</sup> Bello & Homer, *supra* note 26 at 466-67.

<sup>35</sup> Hudec, *supra* note 22 at 15.

of multilateral trade negotiations, launched by way of the Ministerial Declaration at Punta del Este in 1986. This reassessment lead to the implementation of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, the substance of which will be addressed later.<sup>36</sup>

It has been argued by the advocates of the diplomacy-based approach to dispute settlement that the difficulties endured by the GATT dispute resolution mechanism throughout the 1970s and 1980s were the result of the attempt to apply formalistic legal rules to an agreement which was, and remains, essentially diplomatic in nature.<sup>37</sup> It is equally plausible, however, that the reason GATT's dispute resolution mechanisms began to falter in the 1960s was not due to the evolution of the dispute resolution process away from a diplomacy-based pragmatic model, towards an adjudication-based model, but resulted from that evolution not being carried far enough or fast enough. As a result, the full potential of an adjudication-based system of dispute resolution could not be brought to bear on increasingly complex disputes arising under the GATT.

The examination of the American domestic justice system in the following section reveals that an adjudication-based system, when properly developed, ceases to distance itself from a diplomacy-based system of dispute settlement, and begins to create an environment whereby the traditional diplomatic tools of dispute resolution—negotiation, compromise, mediation and conciliation—flourish and become the focal points of the dispute resolution process.

### III. THE ADJUDICATION MODEL

#### 1. The American Civil Justice System: The Adjudication Model at Work

The United States is often perceived as an excessively litigious nation; "sensitive to small insults and eager to convert them into nasty and expensive lawsuits."<sup>38</sup> One would expect that in a society

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<sup>36</sup> See note 63, *infra*, and associated commentary.

<sup>37</sup> Stiles, *supra* note 15 at 7.

<sup>38</sup> P. Wald, "Litigation in America" (1983) 31 UCLA L. Rev. 1 at 1.

whose ideology as it pertains to the resolution of domestic disputes so closely embraces a legalistic or adjudicatory model, the vast majority of disputes would be resolved by a neutral tribunal rendering a legally binding judgment following written and oral submissions from adverse parties. However, the formal adjudicative process represents a minute, rarely employed aspect of a much broader scheme of dispute resolution in the U.S..

Few cases actually receive the "full adjudicatory treatment," ending with a verdict and a judgment.<sup>39</sup> Recent data collected by the Civil Litigation Research Project from court records indicates that only eight percent of 1,649 sampled state and federal cases went to trial.<sup>40</sup> Of this small percentage of cases that were not settled before trial, many were resolved before a formal ruling was made. It is important to note that these statistics account only for those disputes in which a lawsuit was actually initiated. The number of disputes which arose among parties but were settled without any formal legal action being taken is unknown. Accordingly, it should be remembered that while the eight percent of cases that go to trial represents a mere fraction of all lawsuits filed, the total number of all lawsuits represents a tiny fraction of the total number of all disputes.<sup>41</sup>

The above statistics indicate that much of the work undertaken within this adjudication-based system is accomplished outside the formal adjudication setting. Statistics suggest that mediation, conciliation,<sup>42</sup> arbitration,<sup>43</sup> and negotiation are widely employed in the resolution of disputes in civil matters within this system.

There appear to be two basic ways a court may serve to facilitate the efficient negotiation and settlement of disputes. An adjudicative body, by its very existence, may provide indicia for the settlement of disputes through negotiation and compromise. Such a role is implicit in its nature, as the court plays no active role in the

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<sup>39</sup> H.M. Kritzer, "Adjudication to Settlement: Shading in the Gray" (1986) 70 *Judicature* 161 at 161.

<sup>40</sup> *Ibid.* at 162.

<sup>41</sup> M. Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 *UCLA L. Rev.* 4 at 12.

<sup>42</sup> M. Galanter, "The Emergence of the Judge as a Mediator in Civil Cases" (1986) 69 *Judicature* 257 at 257.

<sup>43</sup> Kritzer, *supra* note 39 at 163.

settlement. As well, the main actors of the adjudication model—judges and lawyers—take on a more direct and explicit role in the resolution of disputes.

*i. The Implicit Impact of an Adjudicatory Body*

A court of law, by its existence as final arbiter (subject to appeal) in the event that the parties fail to resolve the dispute amongst themselves, may serve implicitly as indicia for the parties to come to a compromised solution between themselves.<sup>44</sup> Parties are more satisfied with, and are more likely to honour, solutions they are able to help formulate, and this factor benefits all concerned parties.<sup>45</sup> The fact that a court may intervene and impose a solution is viewed as “profoundly [affecting] . . . what happens at earlier stages by providing cues, symbols, and bargaining counters which the actors use in constructing (and dismantling) disputes.”<sup>46</sup> This implicit effect which the presence of an adjudicative body may have in the inducement of settlement is more fully expanded upon by Galanter, who states:

[T]he impact of litigation cannot be equated with the resolution of those disputes that are fully adjudicated. Adjudication provides the background of norms and procedures against which negotiation and regulation in both private and governmental settings take place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute but possible remedies and estimates of the difficulty, certainty, and cost of securing particular outcomes.<sup>47</sup>

As the power that an adjudicative body may wield in the imposition of a decision, along with the factors that will be considered in the formulation of that judgment become clearer, parties involved in a dispute will be better able to assess the

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<sup>44</sup> Kritzer, *supra* note 39 at 162.

<sup>45</sup> M. Cahill & M. Galanter, “Most Cases Settle: Judicial Promotion and Regulation of Settlements” (1994) 46 Stan. L. Rev. 1339 at 1350-51.

<sup>46</sup> Galanter, *supra* note 41 at 12.

<sup>47</sup> *Ibid.* at 32.

likelihood of obtaining a favourable outcome. In short, the understanding of the legal world has the effect of enhancing the opportunities for compromise.<sup>48</sup> Armed with knowledge of the manner in which tribunals have dealt with past complaints involving similar facts, parties are better able to predict what the outcome of their case would be if brought to the point of adjudication. Such knowledge tends to diffuse disputes, encouraging parties to reach a mutually agreeable settlement which is not only better tailored to meet the particular qualities of their dispute, but which also considers and responds to those factors that would likely be neglected by a formal adjudicative ruling.<sup>49</sup>

*ii. The Explicit Impact of the Adjudicatory Body*

Lawyers and judges, as key players in the adjudicatory process, can and do actively participate in the efficient negotiation and settlement of disputes.

*a. Judges*

Within an adjudication-based system of dispute resolution, the role of the judge is not that of passive listener, or idle observer, remaining aloof while adverse parties do battle. Judges actively intervene in a significant portion of civil cases in American courts.<sup>50</sup> Within the federal judiciary, judges actively seek the promotion of settlements among parties; ranging from the encouragement of negotiations between the parties themselves, to the active

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<sup>48</sup> Cahill & Galanter, *supra* note 45 at 1387.

<sup>49</sup> David Foskett, a barrister practicing in England, suggests that "procedural rules . . . are designed to identify and clarify the issues between the parties and . . . to assist thereby the ultimate resolutions of a particular dispute or disputes from which the litigation arose" The clarity of the rules and procedures lends itself to a predictability of outcome which is conducive, in most cases, to settlement before the trial stage: *The Law and Practice of Compromise* (London: Sweet and Maxwell, 1980) at 3.

<sup>50</sup> Cahill & Galanter, *supra* note 45 at 1342. A nation-wide survey of 2545 Judges in the United States in 1980 revealed that approximately eighty percent of judges were "interventionist" in the dispute settlement process, ranging from subtle intervention through the use of cues and suggestions, to more aggressive intervention through direct pressure on counsel. See also: A. Ryan, *American Trial Judges: Their Work Styles and Performances* (New York: Free Press, 1980).

participation of a judge in arbitration, mediation and conciliation processes.<sup>51</sup>

The use of a judge in a conciliatory capacity is especially beneficial when disputing parties have reached an impasse during their own settlement discussions. Judicial conciliators can encourage the exploration of alternative settlement possibilities in a manner not viewed as threatening the position of either party.<sup>52</sup> Furthermore, a judge can assist parties in clarifying what the core of the dispute entails, weeding out peripheral and collateral issues, thus allowing the parties to be more focused in the settlement process. As well, judges generally reach their position because they, as individuals, have a high degree of expertise and experience in dealing with the law that governs the dispute at hand.<sup>53</sup> While such knowledge serves as the basis for the judge's ultimate decision making power, it is also invaluable at the settlement stage. A judge may, in an informal setting, explain to the parties involved in the dispute some of the finer points of law that they may have overlooked. Such information serves to clarify the issue at hand, and in turn encourages the parties to reach a settlement among themselves.

#### *b. Lawyers*

Those who are supportive of the pragmatic approach to dispute resolution within the GATT/WTO argue that the increased involvement of lawyers in a dispute resolution process that naturally flows from the use of an adjudication-based system serves to create a hostile and combative atmosphere surrounding a dispute. This results in an outcome that is necessarily win-lose for the parties

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<sup>51</sup> Galanter, *supra* note 41 at 261. Active promotion of settlements is now the established position in the federal judiciary. This is formally recognized in Rule 16 of the U.S. Federal Rules of Civil Procedure, (which is authored by a committee of federal justices) and states that judges are allowed to "consider and take action with respect to . . . the possibility of settlement or the use of extra-judicial procedures to resolve the dispute" (Fed. R. Civ. Pro. 16).

<sup>52</sup> C. B. Craver, *Effective Legal Negotiation and Settlement* (Charlottesville: Miche, 1986) at 206.

<sup>53</sup> In Canada, only a lawyer who has been admitted to the bar and practiced law for a period of no less than ten years may be considered for the judiciary. In practice, however, few judges arrive at the bench with less than 15–20 years of experience in the practice of law.

involved.<sup>54</sup> However, based on the experience within the United States, this impression of the impact a lawyer may have on the dispute resolution process represents a somewhat limited and erroneous portrayal of the manner in which lawyers approach dispute resolution.<sup>55</sup>

The over-riding function of the lawyer is that of problem-solver.<sup>56</sup> The experience within the United States is that most, if not all, lawyers sincerely endeavor to settle cases before they get to trial.<sup>57</sup> This is evidenced by the fact that approximately ninety-two percent of all civil cases settle.<sup>58</sup> Thus, the role of the lawyer as advocate within the trial or appellate setting is properly viewed as comprising a minute segment of the duties of a lawyer within the adjudicatory model. Mostly, the lawyer is not acting as court room adversary, but is primarily involved as an advisor on how to prevent and resolve disputes; and as a representative of the parties in various dispute resolution processes, such as arbitration, mediation, or negotiation.<sup>59</sup> In these situations, an attorney can advance the interests of their respective clients most effectively through the bargaining process.<sup>60</sup> When a lawyer is acting in the capacity of negotiator, little emphasis is placed on traditional legal doctrines.

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<sup>54</sup> Hudec, *supra* note 13 at 21.

<sup>55</sup> In a comprehensive study of 1382 lawyers involved in civil litigation in five federal judicial districts, Herbert Kritzer concludes that negotiations in civil cases are marked by an orientation towards achieving a consensus among the parties: *Let's Make a Deal: Understanding the Negotiating Process in Ordinary Litigation* (Madison: University of Wisconsin Press, 1991) at 131. Such a conclusion suggests that lawyers, by their own admission, attempt to facilitate the settlement of disputes. Thus, the fact that "a vast majority of cases settle" (closer to ninety-nine percent by Kritzer's calculations [at 3]) is as a result of, and not in spite of, the presence of attorneys.

<sup>56</sup> L. Risken & J. Westerbrook, *Dispute Resolution and Lawyers* (St. Paul: West Publishing Co., 1987) at 53. See also Menkel-Meadow, "The Transformation of Disputes By Lawyers: What the Dispute Paradigm Does and Does Not Tell Us" (1985) Mo. J. Disp. Resol. 31 at 32, which concludes that a lawyer narrows a dispute "because of the very process and restraints of litigation." Realizing that a court resolution will result in a "binary win/loss ruling," lawyers will seek to resolve the dispute at the negotiation stage, which will better meet the "real needs" of the parties.

<sup>57</sup> Craver, *supra* note 52 at 196.

<sup>58</sup> Kritzer, *supra* note 39 at 162.

<sup>59</sup> Risken & Westerbrook, *supra* note 56 at 53.

<sup>60</sup> Craver, *supra* note 52 at 1.



Rather, the negotiation process is "governed by the same psychological, sociological, and communicational principles which influence other interpersonal relations."<sup>61</sup>

It is evident that the lawyer's main focus revolves around the resolution of disputes in a manner which is governed less by formal, legalist notions than those which emphasize flexibility and compromise. In speaking of diplomacy at the international level, Claude suggests that:

[T]he diplomatic process is most clearly in operation when *states* are negotiating with each other to achieve peaceful settlement of a dispute or agreement on a matter of mutual concern. [emphasis added]<sup>62</sup>

With little difficulty, one could substitute the word "states" in the above passage, with the word "lawyers," and accurately describe the manner in which the majority of the work a lawyer does within an adjudicatory model. The diplomatic process is no less in operation when such negotiations are undertaken by lawyers acting for private parties or on behalf of states engaged in a dispute regarding obligations under the WTO. Both the process, and the goal of that process are the same. The diplomacy aspect of such negotiations lies not in the forum, or in the parties, but in the exercise being carried out by the participants.

What the above examination of the adjudication model as it operates within the United States civil justice system demonstrates is that the strength of an effective adjudication-based model lies in the respect and reverence that the parties to any dispute give the adjudicative body. Such respect and reverence is gained by the courts who provide clear, well-reasoned and enforceable decisions.

The quality of the decisions that courts make on the relatively few matters that come before them in turn provides incentive for the settlement of the vast majority of cases which will never reach this stage. As such, the main players in the adjudicatory model act not to facilitate bringing a matter before an adjudicative body, but primarily to actively encourage adverse parties to settle their dispute through those channels which may be described as diplomatic in nature, such as mediation and conciliation.

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<sup>61</sup> Craver, *supra* note 52 at 2.

<sup>62</sup> Claude Jr., *supra* note 10 at 190.

It is these same underlying principles which were clearly at work in the development of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* during the Uruguay round of trade negotiations. The result of these negotiations is an adjudication-based system in which the functions and powers of the adjudicative bodies are legitimized and clarified to the point where their presence encourages parties to engage in serious attempts to settle disputes through diplomatic channels.

#### IV. THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* upholds the original GATT objective of ensuring prompt settlement of disputes as being "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."<sup>63</sup> However, the rules and procedures embodied in the *Understanding* differ greatly in the manner in which this objective is achieved from the competing codes and dispute settlement arrangements which encumbered GATT dispute resolution following the Tokyo Round of negotiations.<sup>64</sup> The *Understanding* creates a unified dispute settlement system, binding on all members and applying to almost all agreements and subject matter under the WTO.<sup>65</sup> Thus the systems overcome the difficulty of determining which procedure should apply to any given dispute.<sup>66</sup>

As evidenced in the American civil justice system, the effectiveness of an adjudication model is intrinsically linked to the

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<sup>63</sup> Article 3(3) of the *Understanding*. See also, World Trade Organization, *The WTO Dispute Settlement Procedures: A Collection of Legal Texts* (Geneva: World Trade Organization, 1995) at 3.

<sup>64</sup> Stiles, *supra* note 15 at 7.

<sup>65</sup> The *Understanding* applies to disputes brought under the Appendix 1 'covered agreements', which include the WTO Agreement, the multilateral agreement on goods in Annex 1A, the GATS in Annex 1B, the Annex IC Agreement on Trade-Related Aspects of Intellectual Property Rights, and Annex 4 plurilateral rights (applicable only to those Members which have become parties to the relevant plurilateral agreement.)

<sup>66</sup> Dillon Jr., *supra* note 12 at 373.

quality of the adjudicative body which serves as the ultimate arbiter of disputes. An effective adjudicative body, by its very presence, may serve as incentive for the resolution of disputes outside the formal courtroom setting; thus having an implicit top-down effect on the success of the entire model. The *Understanding* takes great strides towards establishing not one, but two adjudicative bodies; the panel and the appellate body, whose combined presence is capable of such an impact.

### 1. Composition and Structure of the Panels and Appellate Body

The two most important qualities which emerge from the *Understanding* with regard to the composition of the panel and appellate body are: first, the impression of independence, neutrality and expertise of the members; and second, the requirement of a seemingly more advanced level of legal expertise for the members of an appellate body. These two factors go to the very heart of an effective adjudication-based model.

If a panel or appellate body appear less than impartial, the weight given the decision of that panel will ultimately be called into question, as will the faith the members put in the system of dispute settlement as a whole.<sup>67</sup> In considering its judgment, the panel or appellate body may not be swayed by special emphasis on factors which a party to the dispute feels to be central to the outcome. In order to ensure that a particular factor is addressed, a party is more likely to negotiate directly with the adverse party, whereby they are better able to direct the focus of the settlement of the disputed matter.

A second important aspect is that panel and appellate body members are to be chosen on the basis of a background which

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<sup>67</sup> Article 8(2) of the *Understanding* requires that panel members are to be chosen with a view to maintaining the impression of independence of the panel. Citizens whose governments are parties to a dispute shall not serve on a panel, unless the parties to the dispute agree otherwise. The importance of the impression of impartiality of panelists is re-emphasized in Article 8(9). The Appellate Body is a standing body (Article 17) whose members are appointed by the Dispute Settlement Body to serve four year terms. The impression of judicial independence is addressed, in so much as those appointed to the Appellate Body are not to be affiliated with any particular government.

entails expertise in the area of international trade or policy.<sup>68</sup> The impact of having such a qualified panel and appellate body structure are less likely to be overwhelmed by aggressive lawyering.<sup>69</sup> Not only will the panels and appellate bodies be better able to respond to and diffuse aggressive legal tactics, but the very presence of qualified adjudicators will discourage parties from relying on such tactics. As the parties move from the panel to the appeal stage, and their arguments become more legally focused, the *Understanding* provides that adjudicators will be able to respond in a manner that ensures control over the proceedings and the competence of these adjudicatory bodies.

In addition to establishing a panel and appeal process which ensures confidence in the composition of these adjudicative bodies themselves, the *Understanding* also provides the means of ensuring actual decisions rendered by these bodies will be of a high calibre.<sup>70</sup> The availability of a wide range of resources ensures that the expertise that panel and appellate body members bring to bear on a decision will be supplemented. A wealth of information pertaining to the issue increases the likelihood that the decision will be logical, well-reasoned and researched. This decreases the likelihood that the Dispute Settlement Body (DSB) will reject the decision, and,

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<sup>68</sup> Under Article 8(1), those who are appointed to panels are to possess a certain degree of expertise in the area of international trade law or policy, having presented a case before a panel, served on a panel, served as representative of a Member, taught or published in the area of international law or policy, or served as a senior trade policy official. While panel members must be 'well-qualified', this does not necessarily entail a legal background. The same cannot be said for those comprising the Appellate Body. The Appellate Body, under Article 17(13) is empowered to uphold, modify or reverse the findings and conclusions of the panel; however, the scope of this power is limited to issues of law covered in the panel report and legal interpretations developed by the panel. Members are to be chosen based on their "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." (Article 17(3)).

<sup>69</sup> For a description of what is meant by "aggressive lawyering," see note 33.

<sup>70</sup> Article 12 of the *Understanding* places emphasis on the importance of ensuring high-quality panel reports. In order to ensure that panel decisions are of a high calibre, the *Understanding* allows the panel, under Article 13, to "seek information and technical advice from any individual or body it deems appropriate", including, under 13(2), expert opinion on certain aspects of the matter at hand. Article 17(7) provides the Appellate body with any administrative or legal support it may require in reaching its decision.

perhaps more importantly, eliminates any reasonable or acceptable rationale that a party might have for non-compliance with a decision.<sup>71</sup>

## 2. Ensuring Compliance with Panel and Appellate Body Decisions

An equally key element in the effective functioning of an adjudicative body is the expeditious enforcement of its decisions.<sup>72</sup> Since consensus is no longer required for the adoption of a panel decision, the panel, in reaching a decision, is free to concentrate on what the underlying law is, what legal conclusions can be drawn, and how it should then apply to the facts of the case.<sup>73</sup> The panel, in order to have their report adopted, need only satisfy the appellate body as to the quality of their decision. Under Article 17(14) of the *Understanding*, a report of the appellate body,

[S]hall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate body report within 30 days following its circulation to the members.

This effectively ensures that, not unlike a panel decision, a ruling of the appellate body will be acted upon by the DSB.

The measures contained Articles 21 and 22 of the *Understanding* are vital to the effective functioning of an adjudication-based model.<sup>74</sup> Central to the authority of any court or adjudicative body is the ability to enforce its judgments. Important to the functioning of the system, is not that the sanction

<sup>71</sup> The Dispute Settlement Body is composed of the entire WTO membership.

<sup>72</sup> As per Article 16(4) the decision of a panel is to be adopted within 60 days of the date of circulation of a panel report to the Members, unless a party has notified its decision to appeal or the DSB decides by consensus not to adopt the report. Such a procedure, in the absence of appeal, all but ensures the adoption of a panel report.

<sup>73</sup> G.D. Aldonas, "The World Trade Organization: Revolution in International Trade Dispute Settlements" (1995) 50 *Disp. Resol. J.* 73 at 79.

<sup>74</sup> Articles 21 and 22 of the *Understanding* provide for, respectively, the surveillance of the implementation of recommendations and rulings of decisions of the panel or appellate body which have been adopted by the DSB and for access to compensation and suspension of concessions where an adopted ruling is not complied with.

is actually employed, but that the threat of sanction itself creates pressure to abide by an adjudicative decision. More importantly, effective sanctions encourage parties to settle such a matter through negotiation. Not unlike a domestic legal system, a clear understanding of the consequences of an adverse decision will serve as incentive within the WTO process for the settlement of disputes.

Under a domestic civil justice system, the predictability of a result that the judiciary brings to bear on the system serves to encourage the parties to engage in a settlement process involving more informal and diplomatic methods. Explicit rules in the *Understanding* regarding the composition and powers of the panel and appellate body, the procedures to ensure compliance with their decisions, and consequences for non-compliance, provide predictability and stability.<sup>75</sup> However, the *Understanding* perhaps goes further than a domestic legal system in that it not only encourages the use of diplomatic solutions to a dispute, but requires that such avenues be pursued prior to resorting to the panel process. The presence of a well-designed adjudicative structure ensures that parties to a dispute will make a serious attempt to use diplomatic remedies to resolve the issue, rather than an attempt to forestall an adverse outcome.

### 3. Guaranteed Access to Diplomatic Remedies

The *Understanding* provides for four separate methods a dispute can be settled prior to proceeding to the panel phase: consultation; good offices; conciliation; and mediation.<sup>76</sup>

#### *i. Consultations*

Article 3(7) of the *Understanding* makes it clear that consultation is intended to play an important role in dispute settlement and not to simply exist as a formality before the establishment of a panel.<sup>77</sup> Article 3(7) states:

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<sup>75</sup> S. Croley & J. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (1996) 90 Am. J. Int'l L. 193 at 193.

<sup>76</sup> Consultation is found in Article 4 while good offices, conciliation and mediation are found in Article 5.

<sup>77</sup> Dillon Jr., *supra* note 12 at 381.

Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.

A substantial improvement to the process of establishing the panel is that a panel must be established unless the DSB agrees by consensus not to do so. This is a change from the situation prevailing prior to the Uruguay Round. The purpose is to ensure that a respondent party does not stall the process.<sup>78</sup> The initial stage of meetings between the parties is the most diplomatic stage because even though the relevant counsels and committees of the WTO must be notified that consultations are being undertaken,<sup>79</sup> there is no provision for the involvement of anyone other than the principals to the dispute. Moreover, there is no provision for the structure or format of consultations, which are to be confidential and without prejudice.<sup>80</sup>

The sum of these provisions is to create an environment that encourages full disclosure between the two parties involved. The parties are accorded vast latitude in coming to a solution at this stage. The only requirement of any settlement is that it be consistent with the provisions of any relevant agreements, and that it not nullify or impair benefits accruing to any member.<sup>81</sup>

## *ii. Good Offices, Conciliation, Mediation*

Unlike the consultation phase, good offices, conciliation and mediation are employed when both parties to a dispute agree to use these methods.<sup>82</sup> Like the consultation process, the use of good offices, conciliation and mediation are intended to promote full

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<sup>78</sup> Under Article 4(3), if a complaining party requests consultations, the respondent party must agree to consult, or the complaining party may proceed directly to a panel. As well, a complaining party may only request the establishment of a panel after 60 days of attempts at consultations have failed (unless both parties agree prior to 60 days that consultations have failed: (Article 4(7))).

<sup>79</sup> Article 4(4).

<sup>80</sup> Article 4(5).

<sup>81</sup> Article 3(5).

<sup>82</sup> Article 5(1).

and frank disclosure and discussion of issues affecting the parties. In order to achieve this objective, any discussions that occur are confidential and without prejudice to any further proceedings. Such confidentiality is conducive to the settlement process as the parties are encouraged to examine every possible avenue that they feel may contribute to a remedy. Like the consultation phase, the only requirement of a settlement is that it comply with Article 5(5).

In the domestic sphere, a court more often than not do not side with one party on all issues. More often, the decision reached is based on some combination of the arguments set forth by both parties. There is little reason to suggest that the decisions of the panels and appellate body would differ in any significant manner. Parties are therefore more likely to come to agreement during the consultation, good offices, mediation and conciliatory phases of the dispute settlement procedure where they can exert the greatest degree of influence over the outcome.

#### 4. Role of Panelists and Legal Counsel in the Settlement of Disputes

##### *i. Panelists*

Like a judge in the domestic sphere, the panelist may play a positive role in the settlement of a dispute. Under Article 5(5), the procedures for good offices, conciliation or mediation may continue while the panel process is proceeding. In this situation, the expertise a panel member brings to the process may be invaluable in providing the parties with a new perspective on the matter at hand.

A further opportunity for interplay between the panel and the parties is contained in Article 15, the Interim Review Stage. At that point, the panel submits to the parties a draft report of its primary findings and conclusions, and the parties are able to respond with any comments they feel are appropriate. Such a process is akin to "communication [by a judge] to prospective litigants of what might transpire if one of them sought a judicial resolution," which is one of the central roles of the court under the adjudicative model.<sup>83</sup> The panel, in its final report, must address any comments made by the parties at the interim stage. Underlying this entire exercise is the possibility that the parties may come to a settlement at any point

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<sup>83</sup> Galanter, *supra* note 42 at 261.



prior to the rendering of a final decision by the panel. As such, the contents of an interim report provided by the panel may serve as an inducement to the negotiation of a settlement by providing the parties with information they previously did not consider relevant or possess.

## *ii. Legal Counsel*

No specific reference is made in the *Understanding* to the use of legal counsel. It has, however, been suggested the quality of both the legal counsel and the legal argument will be substantially improved owing to the time constraints governing the panel and appellate body processes.<sup>84</sup> Those who are supportive of a diplomacy-based pragmatic approach to dispute resolution suggest the involvement of lawyers is naturally contentious, and inconsistent with a diplomatic resolution to a dispute. At the domestic level, however, such an impression of the role a lawyer plays in the resolution of a dispute is decidedly erroneous. There is no reason to believe this impression is any less flawed at the international level.

The main duty of lawyers is to protect the interests of their client, which at the international level is the nation. Protecting the interests of a client, however, does not necessarily entail proceeding to trial or acting aggressively towards an adverse party where such action is inconsistent with a client's interests. This is especially true when that client is involved in an on-going relationship with the opposing party. As in the domestic sphere, the bulk of a lawyer's time is not spent acting as adversary, but acting in a capacity entailing traditionally diplomatic qualities: persuasion; negotiation; and compromise. The lawyer is well suited to play a positive role in the resolution of international disputes without resort to adjudication.

## 5. Conclusion

Similar to settlement proceedings in domestic law, when parties engage in consultation, or take advantage of the opportunity for settlement provided by the good offices, conciliation and mediation provisions of the *Understanding*, they do so in the

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<sup>84</sup> Aldonas, *supra* note 73 at 79.

"shadow of the law."<sup>85</sup> The parties must continually be conscious of and consider the manner in which an adjudicative body will determine the outcome of the case should the parties fail to reach a mutually satisfactory outcome between themselves. Parties are only conscious of the "shadow of the law" where that shadow looms large enough to have an impact in the settlement process. The ultimate outcome of a dispute carried through to full-blown adjudication is only considered at the negotiation process when there is a certain degree of predictability of outcome, and when there is a method that decision can be enforced. The rules and procedures contained in the *Understanding* have, collectively, helped to achieve this end. The combined effect of these measures is to create an adjudication-based system which will facilitate the use of those methods of dispute resolution traditionally viewed as diplomatic. Consultation, negotiation, and compromise are not foreign to this legalistic model, but will be the means most often employed in the settlement of disputes. The *Understanding* provides further assurance that this will be the case by establishing clear rules and procedures as to consultation, conciliation, good offices, mediation and arbitration. The actual process of adjudication, while lingering in the shadow of dispute resolution by these diplomatic means, will serve to resolve only a fraction of all disputes arising under the *Understanding*.

## V. CONCLUSION

The rules and procedures contained in the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* represent an important step in the evolution of the GATT/WTO towards an adjudicatory model of dispute settlement. The question remains, however, whether or not this adjudicatory model has evolved to the point where diplomacy-based, pragmatic methods of dispute resolution such as negotiation and compromise should be rejected, or whether they should be actively pursued in the resolution of disputes. While it is too early to make such a determination, it can at least be concluded the atmosphere the *Understanding* serves to create is one bearing a striking resemblance to the adjudication

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<sup>85</sup> Galanter, *supra* note 42 at 257; Kritzer, *supra* note 39 at 130.

model as it exists within the United States. This is a model with which the vast majority of cases never see a court room. They are settled through such methods as are explicitly provided for in Articles 4 and 5 of the *Understanding*.

Legalists are mistaken in believing the presence of a stronger adjudicative body translates into all cases being adjudicated. Those supportive of the diplomat camp are equally mistaken in believing the presence of a stronger adjudicative body will negate the use of traditional diplomatic methods of dispute settlement. Viewed in its proper light, the movement towards an adjudication-based model cannot be viewed as a victory for legalists and a loss for diplomats. Instead, it should be recognized as a movement towards a better framework for dispute settlement. This movement lends itself to a degree of clarity and predictability which has never existed in the history of GATT; the continued evolution of which will only serve to better guarantee security and predictability in the multilateral trading system.