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Knowledge, Legitimacy, Efficiency and the Institutionalization of Dispute Settlement Procedures at the World Trade Organization and the World Intellectual Property Organization

Michael P. Ryan^{*}

ABSTRACT

International legal research regarding international economic dispute settlement tends to be a-theoretical. A theoretically-grounded analytic framework is employed in this article which draws from scholarship from political science, sociology, and economics regarding institutions and international governmental organizations. The knowledge-legitimacy-efficiency analytic framework is applied in this article to studies of General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) dispute settlement in order to relate this relevant scholarship to the economic field under primary study, Internet domain names. GATT/WTO knowledge regarding international trade law has thickened through multi-lateral trade negotiations and dispute settlement decisions. The WTO's legitimacy is increasingly questioned by disenchanted members, in particular by those from developing countries, and by outside critics who believe the organization to be undemocratic in process and unfair in outcome. However the WTO's efficiency with respect to quasi-judicial dispute settlement

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procedure is perhaps a model for emulation by other multilateral institutions. Likewise, World Intellectual Property Organization ("WIPO") knowledge regarding trademark law is deep and relevant to Internet-domain-name-dispute settlement. WIPO legitimacy has been earned through the sponsorship of public forums, fair, independent decisions, and by virtue of its United Nations status. WIPO arbitration quickly established itself as a more efficient alternative to national courts. Knowledge, legitimacy, and efficiency account for the rapid increase in the number of users of WIPO Internet domain name arbitration.

I. INTRODUCTION

Karl Marx's analytic framework and his materialist perspective on historical change predicts that change in the technology of production leads to change in the organization of the economy which in turn leads to change in social and political institutions.¹ At the turn of the twentieth century, the growing network of railroad, steamship, telegraph, and telephone users transformed business and economies in ways generally consistent with Marx's predictions. These communication and transportation media enabled a managerial revolution in American business. The new communication infrastructure allowed mass production and distribution, encouraged vertical integration and the corporate form, and entailed hierarchical organizational practice and managerial professionalization.² The historical record shows that American social and political institutions did change in response to the technological and economic changes. Social forces pressed government to change, though not in the way famously predicted by Marx, who predicted the demise of capitalist economic organization and its associated social and political institutions. Government instead grew to regulate the new kinds of economic activity and the American liberal-regulatory state was born.³ Government-as-regulator thereby became cause as well as effect in the economy as the decisions of government influenced the further direction of competition and business practice.

What Marx did not understand sufficiently well was the social embeddedness of technological innovation,⁴ i.e., how social and political institutions are facilitators of economic activity and themselves causal factors in economic change. At the turn of the twenty-first century the growing net-

¹ ALLEN WOOD, KARL MARX 61-122 (1981).

² ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

³ MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 1890-1916 (1988).

⁴ RONALD J. DEIBERT, PARCHMENT, PRINTING, AND HYPERMEDIA: COMMUNICATION IN WORLD ORDER TRANSFORMATION (1997).

work of Internet users is similarly transforming business and economy. The Internet affords instant access to information, it provides interactive capability with information, and it enables communication among an ever-growing network of users and each increase in the number of users increases its value as a medium of communication and exchange.⁵ The invention of the World Wide Web and of Internet browsers enable the creation of an electronic marketplace for the order, purchase, and sometimes even delivery of goods and services.⁶ The arrival of the World Wide Web in 1990 was to the Internet like the arrival of the internal combustion engine to the country lane.⁷ Business-to-consumer, business-to-business, business-to-government, and government-to-consumer transactions are being carried out faster and cheaper online than by telephone, fax, and mail. The new communication medium is bringing new enterprise entrants with innovative products and services into the marketplace and the invigorated competition is encouraging established businesses to introduce new ways of making and distributing products and services and to reform their ways of doing business.⁸ Organizations are seeking to be more flexible in their capabilities, quicker at making decisions, and more global in their perspectives by debureaucratizing, by integrating less and forming alliances more, and by encouraging people at all levels in the organization to be learners and decision-makers.⁹

The pace and trajectory of the Internet revolution within the economy, however, depends upon not only technology adoption, business strategy, and customer decision, but on the capacity of social and political institutions to adapt to, support, and facilitate the new transactions. New social and political institutions have been created to support Internet technology and facilitate its economic potential. For example, Internet domain names allowing Internet users to find their electronic destination with ease are the names with the now familiar suffixes such as .com, .org, and .edu.

The Domain Name System was established in response to the increasing interest among universities and laboratories in the early 1980s in becoming Internet hosts. The number of hosts had grown too large and complex for the routing system then in use, so the United States Defense Advanced Research Projects Agency ("DARPA"), which was guiding and

⁵ CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 13 (1999).

⁶ *THE FUTURE OF THE ELECTRONIC MARKETPLACE* (Derek Leebaert ed., 1999).

⁷ JAMES GILLIES & ROBERT CAILLIAU, *HOW THE WEB WAS BORN: THE STORY OF THE WORLD WIDE WEB I* (2000).

⁸ *GLOBALIZATION, TECHNOLOGY AND COMPETITION: THE FUSION OF COMPUTERS AND TELECOMMUNICATIONS IN THE 1990S* (Stephen P. Bradley et al. eds., 1993).

⁹ *GLOBALIZING MANAGEMENT: CREATING AND LEADING THE COMPETITIVE ORGANIZATION* (Vladimir Pucik et al. eds., 1992).

funding the creation of the Internet, encouraged several computer scientists to take the lead in designing a new system.¹⁰ They designed a hierarchical system based on the model of the post office system and proposed their system to the Internet community in two Requests for Comment ("RFCs") in 1983. Leaders at DARPA persuaded the Internet community, which preferred to make decisions by consensus among its users, to join together in 1985 for a summit meeting with many of the 2000-odd Internet hosts represented. They supported the proposed DNS, and one of its designers, a university-based computer scientist, volunteered to become the administrator of domain names.

When electronic mail and data transfer among academic and laboratory researchers was the communication medium's dominant function, domain names were of little commercial significance. A domain name is like a postal address or a telephone number; yet it is also much more, for it identifies the business enterprise, governmental or nongovernmental organization, or academic institution which operates the Internet site. Domain names facilitate Internet-based, digital electronic commerce by allowing users to locate the electronic source of information, goods, or services. For this reason, domain names have increasingly come to possess commercial value. As the value of domain names has risen, so have the disputes between and among those who would like to register and use particular names. The unique address role of an Internet domain name, that there can be only one, say, *delta.com* or *apple.com*, intensifies the commercial stakes regarding the identification role of the Internet domain name. Disputes arise among enterprises and organizations which want the same domain name, challenging national courts to settle conflicts and fomenting demands for alternative dispute settlement procedures. The WIPO, the Geneva-based United Nations agency, stepped into domain name dispute settlement, offering an alternative to national (especially U.S. federal court) dispute settlement procedures and remedies. What it does, why it came to do it, and how it does so is investigated in this article.

International legal research regarding international economic dispute settlement tends to be a-theoretical, tending to ignore concepts developed in political science, economics, and sociology for the study of institutions in general and of international governmental organizations ("IGOs") in particular. A theoretically-grounded analytic framework is employed in this article, drawing from scholarship regarding institutions and IGOs, and from political science, sociology, and economics.

The three central characteristics of IGO-based dispute settlement are knowledge, legitimacy, and efficiency. Knowledge refers to the law, ideas,

¹⁰ GILLIES & CAILLIAU, *supra* note 7, at 44-45.

causal theories and empirical experience associated with the IGO. Knowledge guides *what* IGOs do with respect to economic dispute settlement. In contrast, legitimacy refers to the fairness, integrity, independence, and responsiveness associated with the behavior of an IGO. Legitimacy guides *why* IGOs conduct economic dispute settlement. Finally, efficiency refers to the costs of transactions associated with the IGO. Efficiency guides *how* IGOs conduct economic dispute settlement. Though an occasional piece of legal scholarship appears devoted to issues of economic dispute settlement regarding, say, foreign direct investment¹¹ or the loss of economic assets during wartime,¹² most of the scholarly research and analysis--and there is a substantial body of it--concerns dispute settlement under the General Agreement on Tariffs and Trade ("GATT") and its reformed World Trade Organization ("WTO") institutional design, procedures, and outcomes.

The knowledge-legitimacy-efficiency analytic framework is applied here to studies of GATT/WTO dispute settlement in order to relate relevant scholarship to the economic field under primary study, Internet domain names. GATT/WTO knowledge is based in a traditional consensus about the utility of trade as a matter of economics and the need for a cooperation-facilitating IGO as a matter of governance. Moreover, its body of laws has continued to thicken through multilateral agreements and dispute settlement decisions. The WTO's legitimacy is increasingly questioned by disenfranchised members, particularly from developing countries, and by external critics who believe the organization to be undemocratic as a matter of governance and unfair as a matter of economics. The WTO's efficiency with respect to quasi-judicial dispute settlement procedure is, nevertheless, perhaps a model for emulation by other multilateral institutions.

WIPO knowledge regarding trademark law is, like that of the WTO, deep and particularly relevant to Internet domain name dispute settlement. WIPO legitimacy is a result of its status as a U.N. agency, its establishment of open public forums regarding domain name governance, and its record of delivering fair, independent dispute settlement decisions. WIPO arbitration quickly established itself as a more efficient alternative to national courts. Knowledge, legitimacy, and efficiency account for the rapid increase in the number of users of WIPO Internet-domain-name arbitration. This article's analytic framework and study of the role of international governmental organizations as governance facilitators in the world economy grounds better than previous analyses of Internet-domain-name governance.¹³

¹¹ Malcolm Richard Wilkey, *Introduction to Dispute Settlement in International Trade and Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 613 (1995).

¹² Norbert Wuhler, *The United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution*, 2 J. INT'L ECON. L. 249 (1999).

¹³ See generally A. Michael Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617 (1999); Laurence R. Helfer and Graeme B. Dinwoodie, *Designing Non-*

II. KNOWLEDGE, LEGITIMACY, EFFICIENCY AND IGOS

Institutions are the humanly devised constraints that structure political, economic, and social interaction. Throughout history, institutions have been devised by human beings to create order and reduce uncertainty in exchange. Institutions provide the incentive structure of an economy; as that structure evolves, it shapes the direction of economic change towards growth, stagnation, or decline.¹⁴ Institutions—social organizations and norms, governments and laws—crucially make markets function well or poorly.¹⁵ Of singular importance to economic change, growth, and stagnation are property institutions.¹⁶ Markets demand credible, enforceable commitments to function properly. Accordingly, property rights and the contract are institutional constructions to reduce the transaction costs of commercial activity; the establishment of such a set of property rights will then allow individuals in highly complex interdependent situations to have confidence in their dealings with individuals of whom they have no personal knowledge and with whom they have no reciprocal or ongoing exchange relationships.¹⁷ Property rights facilitate economic growth because they describe the individual and group incentives in the system.¹⁸ Property rights raise the private rate of return and thereby increase the effective resource base within an economy.¹⁹ As important as the constitutional structure of property rights for economic growth is the credible commitment of government to enforce property rights. The essence of property rights is the right to exclude, and an organization which has a comparative advantage in violence is in the position to specify and enforce property rights.²⁰ Enforcement depends upon the ability of an actor or a group of actors to measure the value of an asset's attributes, claim certain attributes for their own use, and prevent others from capturing those same attributes.²¹ Property right enforcement entails the existence of consensus regarding the definition of property rights, procedures for dispute settlement, and the legitimacy of state enforcement authority.

Political scientists explain that, although only states can grant property

National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy, 43 WM. & MARY L. REV. 141 (2001).

¹⁴ Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991).

¹⁵ DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990).

¹⁶ DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* (1981).

¹⁷ Douglass C. North, *Institutions and Economic Performance: An Historical Introduction*, 17 WORLD DEV. 1319, 1320 (1989).

¹⁸ North, *supra* note 16, at 7.

¹⁹ *Id.* at 67.

²⁰ *Id.* at 21.

²¹ Kathryn Firmin-Sellers, *The Politics of Property Rights*, 4 AM. POL. SCI. REV. 867 (1995).

rights, international institutions exist to reduce the costs of international transactions and frictions of international relations. International institutions make it cheaper for governments to come together to negotiate agreements, reduce transaction costs of legitimate bargains and increase them for illegitimate ones, and organize issue-areas so that productive linkages (those that facilitate agreements consistent with the principles of the regime) are facilitated, while destructive linkages and bargains that are inconsistent with regime principles are discouraged. Furthermore, international institutions reduce the occurrence of information asymmetries, where some actors may know more about a situation than others.²² An international institution, or regime, is a governing arrangement for transnational and interstate relations,²³ i.e., a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.²⁴ Principles are beliefs of fact, causation, and rectitude; norms are standards of behavior defined in terms of rights and obligations; rules are specific prescriptions or proscriptions for action; lastly, decision-making procedures are prevailing practices for making and implementing collective choice.

Political scientists have emphasized the study of the interrelationships between international institutions and domestic politics over the past twenty years, as explained in a previous paper.²⁵ This body of research has produced considerable social scientific progress along several related research lines. Two of the most notable are that international relations are two-level bargaining games conducted simultaneously intrastate as well as interstate²⁶ and that ideas and beliefs animate international relations and political outcomes as much as do national interests.²⁷ However, an unfortunate result for international relations scholarship is that the study of IGOs has ad-

²² ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 90-93 (1984).

²³ ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 5 (1977).

²⁴ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INT'L REGIMES* 1-2 (Stephen D. Krasner ed., 1983). This definition was presented as the product of consensus by the authors of the collection of essays initiated under then editor Robert Keohane and delivered by successor editor Stephen Krasner in volumes 35 and 36 of *International Organization*.

²⁵ Michael P. Ryan, *International Governmental Organization Knowledge Management for Multilateral Trade Lawmaking*, 15 AM. U. INT'L L. REV. 1347, 1356 (2000).

²⁶ See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (Peter B. Evans et al. eds., 1993); HELEN V. MILNER, *INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS* (1997).

²⁷ See generally *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* (Judith Goldstein & Robert O. Keohane eds., 1993).

vanced theoretically and conceptually at a much slower pace than other aspects of international institutions. International governmental organizations have been marginalized apparently because they are understood to be mere forums where the real action of state power, national interests, and ideas plays itself out. The contributions to interstate cooperation of IGOs have been ignored by many in the field. Nevertheless, some political scientists do think of IGOs as independent, purposive actors in international relations. Their studies have shown that state membership in IGOs has changed over time²⁸ and that the number and type of IGOs has also changed over time.²⁹

International law scholarship has devoted considerable energy to international dispute settlement. A useful categorization of the techniques of international dispute settlement is the following:

- Coercion,
- Voluntary relinquishment,
- Chance,
- Voting,
- Negotiation,
- Good offices,
- Mediation,
- Inquiry/conciliation,
- Arbitration,
- Judicial settlement,
- Quasi-judicial tribunal.³⁰

All these techniques of international dispute settlement have been identified in the practice of states and other actors in world politics and the economy in the modern era.

Political scientists had only glancing interest in the role of international institutions in international economic dispute settlement,³¹ though recently a few political scientists have collaborated with legal scholars to suggest that the important dimensions of dispute settlement for study include independence, access, and embeddedness.³² This article incorporates these concepts

²⁸ Harold K. Jacobson et al., *National Entanglements in International Governmental Organization*, 80 INT'L ORG. 141 (1986).

²⁹ Cheryl Shanks et al., *Inertia and Change in the Constellation of International Governmental Organizations: 1981-1992*, 50 INT'L ORG. 493 (1996).

³⁰ Richard B. Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DISP. RESOL. 1 (1986).

³¹ JOSEPH M. GRIECO, COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE (1990).

³² Robert O. Keohane et al. eds., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000). The essay appears in a special issue of the journal under

into an alternative analytic framework by arguing that the three essential characteristics of international governmental organizations with respect to dispute settlement as well as other multilateral cooperation supporting-activities are knowledge, legitimacy, and efficiency.

A. Knowledge

Human knowledge cannot be encompassed in a single technique, discourse, or discipline.³³ Human understanding has over time become differentiated like goods and services in the marketplace, divided into disciplines and sub-disciplines, trans-boundary fields and sub-fields, organized and compartmentalized, not merely for the sake of convenience, but to promote cognition itself. Organization and compartmentalization are not static and fixed, but dynamic and mutable. Marketplace knowledge and learning capabilities tend to become institutionalized as sector-specific knowledge, organizing principles, and governance structures and these patterns of sectoral competitiveness tend to establish path-dependent trajectories.³⁴ Technological innovation similarly tends to be patterned along natural trajectories³⁵ because technological paradigms prescribe directions for further research and development and incremental innovation, excluding other possible paths.³⁶ Knowledge is the stock of concepts, analytic frameworks, causal explanations, and empirical findings which ground policy debates and justify policy outcomes. These ideas influence policy when the principled or causal beliefs they embody provide road maps that increase actors' clarity about goals or ends-means relationships, when they affect outcomes of strategic situations in which there is no unique equilibrium, and when they become embedded in political institutions.³⁷

The cumulation and specialization of knowledge, as the functionalist school of international relations explains, led to the creation of international governmental organizations.³⁸ The capacity of the IGO to manage knowl-

the title of *Legalization and World Politics* (Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, eds.).

³³ STEPHEN TOULMIN, *HUMAN UNDERSTANDING: THE COLLECTIVE USE AND EVOLUTION OF CONCEPTS* (1972).

³⁴ See Herbert Kitschelt, *Industrial Governance Structures, Innovation Strategies, and the Case of Japan: Sectoral or Cross-National Comparative Analysis*, 45 INT'L ORG. 453 (1991).

³⁵ See generally RICHARD R. NELSON AND SIDNEY G. WINTER, *THE EVOLUTIONARY THEORY OF ECONOMIC CHANGE* (1982).

³⁶ See Giovanni Dosi, *Technological Paradigms and Technological Trajectories*, 11 RES. POL'Y 147 (1982).

³⁷ Goldstein & Keohane, *supra* note 27, at 3.

³⁸ See generally ERNST B. HAAS, *BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (1964); HAROLD K. JACOBSON, *NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM*, (2d ed. 1984).

edge determines its life-cycle, which can be stagnation, decline, and possibly even death or growth, learning, adaptation, and renewal.³⁹ Knowledge management, the collection, analysis, and dissemination of information, drives the service capabilities of the international governmental organizations, we might say.⁴⁰ An IGO may provide a forum, administrative support, and research support for international rule creation; it may provide advisory and administrative services or it may provide administrative and legal support for rule-compliance surveillance and dispute settlement. For example, I have argued that, in one area of multilateral trade lawmaking, the IGO decisively contributed to the existence of agreement text and thereby the successful outcome through the application of function-specific knowledge to the treaty-making process.⁴¹ By carrying out its activities, the IGO likely not only disseminates knowledge but also diffuses ideas, norms, and values.⁴² Functionalists explain that IGOs are knowledge-intensive and that expert professional staff are the source of the service capability of IGOs. Many of these professionals are active participants in the transnational epistemic communities which influence international relations.⁴³ The knowledge characteristic of IGOs explain *what* they are capable of doing.

B. Legitimacy

IGOs are neither multi-national corporations ("MNCs") nor non-governmental organizations ("NGOs"). Public organizations exist for wholly different purposes than do for-profit business enterprises and not-for-profit private social organizations. Business enterprises seek to make money by selling goods and services to consumers while nonprofits seek to deliver services on behalf of their stakeholders. In contrast, public organizations seek to create public value by delivering services to citizens. Max Weber explained that public bureaucracy conducting activities according to rule of public law was what separated modern state authority from traditional patrimonial and feudal structures.⁴⁴ Public administrators are accountable to citizens and their elected representatives and must emphasize accountability in the design of organizational structures and processes.

³⁹ See generally ERNST B. HAAS, *WHEN KNOWLEDGE IS POWER: THREE MODELS OF CHANGE IN INTERNATIONAL ORGANIZATIONS* (1990).

⁴⁰ Ryan, *supra* note 25, at 1347-1378.

⁴¹ Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT'L ECON. L. 535 (1998).

⁴² See Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565 (1993).

⁴³ See Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone*, 46 INT'L ORG. 187 (1992).

⁴⁴ MAX WEBER ET AL., *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 239 (1946).

Public organizations value fairness, integrity, independence, and responsiveness⁴⁵ because their legitimacy depends on whether they behave that way. When designing public organizations, political authorities strike a balance between responsiveness to and independence from constituents and themselves. Access measures the range of social and political actors who have legal standing to submit a dispute to be resolved.⁴⁶ Independence measures the extent to which adjudicators for an international authority charged with dispute resolution are able to deliberate and reach legal judgments independently of national governments.⁴⁷ National policymakers consider political transaction costs⁴⁸ when determining whether sub-state actors get access to transnational dispute settlement bodies and how much independence to grant to the body.

It is not that public management theorists and practitioners do not know sometimes how to improve the efficiency of public organizations. Rather, it is that they struggle to do so while preserving the commitment to legitimacy. Moreover, it is not that public management theorists and practitioners do not recognize that a private sector provider might well be able to provide more efficient service; instead, it is that the legitimacy goal is better served by a not-for-profit public organization. Hence IGOs that act with fairness and integrity are independent from national politics, but are responsive to state member-oversight. IGOs can sometimes carry out services with greater legitimacy in the eyes of their stakeholders than can private sector, profit-seeking enterprises. The legitimacy characteristic of IGOs explains *why* they do what they do.

C. Efficiency

An organization is a mechanism of governance, an institution which operate[s] at the level of individual transactions.⁴⁹ Organizations arise because they perform valued tasks more efficiently than markets or alternative institutional structures.⁵⁰ The organization is able to reduce the transaction costs of a needed good or service below the costs which it would find in the marketplace. An IGO similarly arises because it performs services for its stakeholders more efficiently than alternative institutional structures, e.g., more loosely institutionalized transnational epistemic communities. Functionalist political scientists have studied how IGO internal leadership, organizational structure and process, and principal-agent relations with

⁴⁵ See ROBERT C. FRIED, *PERFORMANCE IN AMERICAN BUREAUCRACY* 43 (1976).

⁴⁶ Keohane et al., *supra* note 32, at 462.

⁴⁷ *Id.* at 459.

⁴⁸ *Id.* at 463.

⁴⁹ OLIVER E. WILLIAMSON, *THE MECHANISM OF GOVERNANCE* 4 (1996).

⁵⁰ See William G. Ouchi, *Markets, Bureaucracies, and Clans*, 25 ADMIN. SCI. Q. 129 (1980).

member-states determine their decision-making patterns.⁵¹

A sociological approach to institutions provides the appropriate framework for analysis: characteristics of bureaucracy as a generic cultural form shape international organization behavior and provide a different and broader basis for thinking about how international organizations influence world politics.⁵² International governmental organizations collect, analyze, and disseminate information then turn it into products and services more efficiently than do markets or alternative institutional structures.⁵³ IGOs, like business enterprises, find their ultimate sources of competitive advantage in their knowledge management capacities.⁵⁴ The collective knowledge, know-how, and learning of the organization are the core competencies which drive its organizational strategy.⁵⁵ Knowledge integration is embedded into organizational behaviors, practices, and routines in order to create and sustain capability.⁵⁶ These organizational behaviors, practices, and routines are the day-to-day stuff of activities and these activities may be carried out with higher or lower transaction costs, i.e., with higher or lower levels of efficiency. The efficiency characteristic of the IGO explains *how* they do what they do.

III. TRADE DISPUTES AND THE INSTITUTIONALIZATION OF WTO SETTLEMENT PROCEDURES

Disputes regarding rights and obligations between and among contracting parties within the international trade regime occasionally occur and, when they do, the 1947 GATT treaty specified procedures for dispute settlement. GATT Article XXII offers consultation, that is, bilateral negotiation, as the initial dispute settlement technique. But, the GATT agreement specifies in Article XXIII that

if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time... the matter may be referred to the contracting parties. The contracting parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter as

⁵¹ See generally ROBERT W. COX ET AL., *THE ANATOMY OF INFLUENCE: DECISION MAKING IN INT'L ORG.* (1974).

⁵² Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 700 (1999).

⁵³ See Ouchi, *supra* note 50.

⁵⁴ See Bruce Kogut & Udo Zander, *Knowledge of the Firm, Combinative Capabilities, and the Replication of Technology*, 9 ORG. SCI. 383 (Aug. 1992).

⁵⁵ See C.K. Prahalad & Gary Hamel, *The Core Competence of the Corporation*, 68 HARV. BUS. REV. 79 (1990).

⁵⁶ See Robert M. Grant, *Prospering in Dynamically-Competitive Environments: Organizational Capability as Knowledge Integration*, 7 ORG. SCI. 375 (1996).

appropriate.

GATT did not obligate disputants to take their problems to the GATT for settlement; conflicts could be resolved bilaterally. Nevertheless, GATT developed the practice from the contracting parties, upon request of the disputants, to assist in the resolution of bilateral disputes through the formation of working parties. This emerged by 1948, and panels of experts appeared in 1952⁵⁷ apparently at the recommendation of GATT Director General Eric Wyndham White.⁵⁸ The panel-of-experts technique quickly superseded the working party technique. Three (or occasionally five in the early years) panelists of impartial experts studied the written submissions and listened to the oral arguments of the disputants with assistance of staff from the GATT secretariat, applying GATT rules to the conflict and issuing a decision. Many cases would be withdrawn before a panel decision was announced. A decision concluded a year-long process which might favor the initiator or the respondent, but frequently ended with ambiguous encouragement toward a negotiated settlement.

A legal scholar who studied all of the GATT-era dispute settlement experience explains that fundamental disagreements among the Member-states—and possibly the panelists as well—about the substance of the rules caused the ambiguous outcomes.⁵⁹ He explains that the decline in the use of GATT dispute settlement procedures in the 1960s was due to a loss of confidence in legalization and a perception that the rules were outdated. A long-time serving GATT secretariat official who assisted panelists in many of the cases and who wrote the official public documents regarding dispute settlement concurs that the main problem lay with international trade law and that legalism rose substantially and procedurally after the Tokyo Round multilateral trade negotiations settled many previously unclear areas of GATT law.⁶⁰ In other words, the knowledge at GATT was inadequate to solve the problems at hand.

Many legal scholars and observers of GATT dispute settlement in the 1980s contended, however, that it was the procedures which were diminishing the value of the mechanism and threatening the legitimacy of the whole organization. Critics proposed reforms which would: (1) obligate members to accept the creation of a panel upon request of another member; (2) hasten decisions through internal deadlines; (3) use permanent, not *ad hoc*, panel

⁵⁷ ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 75 (2d ed. 1990).

⁵⁸ See John H. Jackson, *Dispute Settlement and the World Trade Organization: Emerging Problems*, 1 J. INT'L ECON. L. 329, 333 (1998).

⁵⁹ Hudec, *supra* note 57, at 152.

⁶⁰ See HANDBOOK OF GATT DISPUTE SETTLEMENT 21-22 (Pierre Pescatore et al. eds., 1992).

tribunals; (4) conclude with automatic report adoption by the GATT Council (the main governing body of GATT, composed of contracting party representatives); (5) encourage third country participation; (6) streamline disputes by screening out inappropriate disputes; and (7) improve GATT surveillance capability with the expectation that the result would be higher rates of decision implementation and compliance.⁶¹ Other critics contended that unilateral enforcement by the United States under authority of its Section 301 policy threatened the legitimacy of GATT.⁶² However, my empirical study of U.S. behavior showed that GATT rules and dispute settlement decisions were informing and influencing U.S. export policy actions even before the completion of the Uruguay Round.⁶³ Additionally, the legitimacy of IGO dispute settlement mattered to U.S. national policymakers as they carried out integrated unilateral, bilateral, and multilateral diplomacy.⁶⁴

The Uruguay Round multilateral trade negotiations resulted in agreement to reform dispute settlement procedures as they would be carried out under the new World Trade Organization.⁶⁵ A contracting party to the WTO that requests establishment of a dispute settlement panel will get it unless all the members of the Dispute Settlement Body (the WTO General Council acting in its dispute settlement capacity) vote against it. Thus, respondent states cannot block the establishment of a panel. The three-member panel of experts must issue its report to the DSB within six months of its establishment and may be called upon to issue its report within three months if the case is an emergency.⁶⁶ The panel report must be adopted unless all DSB members vote to reject it or unless the report is appealed to the Appellate Body. The Appellate Body—seven eminent scholars and practitioners in international economic relations serving for four-year terms in their personal, not national, capacities—is to hear appeals of panel decisions. Three members of the Appellate Body are assigned to a particular case and must render a decision within two months of their assignment. The DSB must monitor implementation of the panel report and the prevail-

⁶¹ See William J. Davey, *Dispute Settlement in GATT*, 1 FORDHAM INT'L L. J. 51 (1987); see generally Heather A. Hazard, *Resolving Disputes in International Trade* (1988) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University Library); see also Rosine Planck, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53 (1987).

⁶² See generally AGGRESSIVE UNILATERALISM: AMERICAS 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

⁶³ See Michael P. Ryan, *USTR's Implementation of 301 Policy in the Pacific*, 39 INT'L STUDIES Q. 333 (1995).

⁶⁴ See generally MICHAEL P. RYAN, *PLAYING BY THE RULES: AMERICAN TRADE POWER AND DIPLOMACY IN THE PACIFIC* (1995).

⁶⁵ See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS*, 107-08 (2d ed. 1998).

⁶⁶ *Id.*

ing member is entitled to compensation if the losing member does not comply with the demands of the panel report.⁶⁷ That compensation is normally to take the form of suspension of concessions in the same or a closely-related market sector.

The best evidence that the dispute settlement system reforms have been effective and have achieved enhanced efficiency may be that 114 disputes were submitted in the first three years of its operation—a number slightly over half the universe of report-decided cases in the entire 1947-1994 GATT era.⁶⁸ Dispute settlement under the World Trade Organization has been widely praised by scholars and commentators. The procedural reforms have apparently solved the problems which they were intended to solve and the creation of the Appellate Body is contributing to more consistency in dispute settlement panel decisions, thereby enhancing their credibility and the legitimacy of the WTO.⁶⁹ Reformed procedures, notwithstanding, improvements may well owe to the more than 30,000 pages of frequently precise and unconditional international guarantees of freedom, nondiscrimination, and rule of law in WTO law.⁷⁰

This body of law is embedded in more than 50 years of institutionalized commitment to knowledge of the principles of the economic welfare gains from free trade, multilateralism, the reduction of trade barriers, non-discrimination in trade policies, reciprocity in trade relations, fair trade practices, and economic growth and development through liberal trade policies and institutions among many of the governments of the world.⁷¹ Some legal scholars identify lingering ambiguities and newly-emerging weaknesses in WTO law or knowledge as the main challenge for future WTO dispute settlement.⁷² A few scholars caution that national sovereignty and national security continue to challenge WTO competence to decide dis-

⁶⁷ *Id.*

⁶⁸ See Andrew W. Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT'L ECON. L. 277 (1998).

⁶⁹ See Debra P. Steger and Susan M. Hainsworth, *World Trade Organization Dispute Settlement: The First Three Years*, 1 J. INT'L ECON. L. 199 (1998).

⁷⁰ Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law—Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT'L ECON. L. 189, 234 (1999).

⁷¹ See Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, in INT'L REGIMES, *supra* note 24, at 273-314; John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in INT'L REGIMES, *supra* note 24, at 195-232; *see also* Jackson, *supra* note 65, at 1-78.

⁷² *See, e.g.*, Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAW. 619 (1998); Jackson, *supra* note 58, at 343-46; *see also* Symposium, *First Three Years of the WTO Dispute Settlement System*, 32 INT'L LAW. 609 (1998).

putes.⁷³ On the other hand, a growing number of scholars and other observers opine that decision-making at the organization is undemocratic and call into question the legitimacy of the WTO laws which underlie dispute settlement decisions.⁷⁴

In summary, legal scholarship concerning the 50-year GATT/WTO experience with international economic dispute settlement may have identified the following patterns of change with respect to law, or knowledge, and procedures, or efficiency:

- Laws: Ambiguous GATT laws are supplemented with more precise WTO laws.
- Appeals: No possibility is replaced by automatic opportunity to permanent appeals body.
- Decisions: Appellate Body ensures more consistency among decisions.
- Technique: Mediation gives way to quasi-judicial tribunal.
- Formality: Less formal consultations give way to formal panel of experts.
- Participation: Diplomats give way to experts.
- Procedures: Ad hoc become routine.
- Time-lines: Open-ended give way to deadlines.
- Secretariat support: Occasional legal counsel support gives way to regular support.
- Decision adoption: One-state veto is replaced by exceptional rejection if unanimous veto.
- Enforcement: Legitimated but unauthorized action replaced with authorized compensation.

Hence, WTO legitimacy with respect to international dispute settlement is the product of two facts. First, it is the result of a cumulating knowledge base of ideas about trade economics and institutions, of multi-lateral trade negotiation-produced codified rules, and of Dispute Settlement

⁷³ See Hannes L. Schölemann & Stefan Ohlhoff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT'L LAW 424 (1999).

⁷⁴ See Jeffrey Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229 (1998); Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699 (1994); Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996); Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851 (1996); Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587 (1998).

Body and Appellate Body-made decisions. Second, the legitimacy also results from improved, more efficient procedures.

IV. THE INTERNET, THE WWW, AND THE DOMAIN NAME SYSTEM

The Internet owes its existence to the U.S. Department of Defense Advanced Research Planning Agency ("ARPA").⁷⁵ The Department of Defense ("DOD") had begun to computerize their operations by the 1960s but they were using a variety of incompatible information technology systems made by a variety of suppliers. As is often the case during the early phases of the product life cycle, the business of computers and information technology lacked standards for equipment-making, so systems frequently operated independently of each other. However, while private enterprises, such as a General Motors or a General Electric could—in theory if not in practice—purchase all their info-tech equipment from one supplier, government agencies, such as the DOD, purchased equipment according to government procurement regulations which demanded that specifications be set regarding performance and price, with contracts being granted competitively based on the capacity to meet specifications. Thus, the DOD faced what would come to be known as the interoperability problem.

In the early 1960s, computer scientists at ARPA, in a newly-formed unit called the Information Processing Techniques Office, noted that the research laboratories with which they cooperated around the United States (in the Northeast at Harvard and MIT, in the Midwest at Carnegie Mellon, Illinois, and Michigan, and in the west at Berkeley, Stanford, and UCLA) were all seeking funds from ARPA to increase their computing capabilities and that efforts of the funding would be felt over time. The first implication of this funding was that all the labs would want as much equipment as they could get, which would be expensive and duplicative. The second implication is that government procurement rules would cause incompatibility to become worse. Hence, they came up with the idea of a network which would inter-connect the computer capabilities around the United States, allowing individual labs to specialize yet share info tech resources. They contended that interoperability could be achieved through the creation of a network which would integrate differing computer systems,⁷⁶ so ARPA funded basic design work of what would come to be known as AARPANET.

ARPA hired a Boston-based info-tech company to lead the development of the network in cooperation with their labs and computer scientists. One of the developers proposed a particular solution to a technical problem

⁷⁵ KATIE HAFNER & MATTHEW LYON, *WHEN WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* 34-38 (1996).

⁷⁶ *Id.* at 40-49.

by sending a Request for Comment ("RFC") to the participating computer scientists on April 7, 1969. The basic ground rules were that anyone could say anything and that nothing was official. RFCs quickly became the *modus operandi* for the ARPANET crowd.⁷⁷ The language of the RFC was warm and welcoming and the idea was to promote cooperation, not ego. Since then, RFCs have been the principal means of open expression in the computer networking community, the accepted way of recommending, reviewing, and adopting new technical standards.⁷⁸

Their Internet worked and, during the 1970s, an increasing number of universities and research organizations joined the network. In 1983, the Defense Department split off its system from the others, which had grown so large that one of the designers of the system was enlisted by the others to assign a number to each node on the network and to maintain the list.⁷⁹ Members of the user-community recognized a system needed to be designed and established but, for years, sorting this out was among the most troublesome, messiest issues for the Internet.⁸⁰ Several members of the Internet community in late 1983 volunteered to design such a system and, after three months work, they issued two RFCs in 1983 outlining their proposed Domain Name System ("DNS"). The Internet community argued back and forth over what to name the domains, delaying any implementation for about a year.⁸¹ At a January 1986 summit meeting, leaders in the community agreed by consensus on the DNS and settled on seven Top-Level Domain Names ("TLDN"): .edu, .com, .mil., .net, .org, .int, and .gov.⁸² The Domain Name System was supervised by one of the original architects, who was based at the University of Southern California Information Sciences Institute, and his operation would come to be known as the Internet Assigned Numbers Authority ("IANA") by 1988. He personally assigned and recorded domain names until the task became too great. At that point, ARPA signed a contract with the Stanford Research Institute to take over domain name registration under the supervision of IANA, which had the trust of the Internet community. That registration system remained in place until 1992 when ARPA turned over supervision of the non-military Internet to the National Science Foundation.

The National Science Foundation ("NSF") supervised the further development of the Internet by providing institutional support to the Internet community, still largely based at universities and research organizations,

⁷⁷ GILLIES AND CAILLIAU, *supra* note 7, at 29 (quoting Steve Crocker).

⁷⁸ HAFNER AND LYON, *supra* note 75, at 144-45.

⁷⁹ *Id.* at 249-53.

⁸⁰ *Id.* at 252.

⁸¹ *Id.*

⁸² *Id.* at 253.

through grants to Internet technology developers to establish a communication backbone system called NSFNET. The number of registrants of domain names, however, was increasing more rapidly with each passing year, so NSF announced that it would welcome bids from potential successors to IANA and SRI to manage the domain name registration system. In 1992, it awarded the contract to Network Solutions, Inc. ("NSI"), a small information technology services provider based in Herndon, Virginia. Business enterprises, governmental and nongovernmental organizations, and academic institutions would thus henceforth register with Network Solutions their domain names of .com, .gov, .edu, .org, or .net.

At about the same time, Internet developers in Europe and the United States were perfecting the graphical and browser technologies which would enable the World Wide Web. The Internet would no longer be for e-mailing and file transfer of data sets only.⁸³ The Web enabled an electronic marketplace and, consequently, .com domain name registrations took off. Networks Solutions registered 177 domain names in December 1995, 627 in December 1996, 1,541 in December 1997, 3,362 in December 1998, and 8,100 in December 1999 (most of them .com TLDNs).⁸⁴ With their new utility as marketing tools, the market for domain names has been expanding. Websites could be designed which skillfully blended graphics and text to push information at consumers. Thus, NSI has been receiving domain name registrations for one-time events such as www.superbowlxxxv.com, for summer blockbuster movies such as www.matrix.com, and for personal use such as www.smithfamily.com. In September 1995 the National Science Foundation re-wrote the NSI contract so that it could charge fees to registrants in order to manage the flood of applications. They decided on a thirty-five dollar fee to register the domain name and a fifteen-dollar fee to renew the registration.

V. INTERNET DOMAIN NAMES, CYBERSQUATTING, AND TRADEMARKS

Domain names carry value in the electronic marketplace. One venture paid a domain name owner \$7.5 million to acquire the rights to a name.⁸⁵ In that example, the purchaser did not claim to have established any trademark rights associated with the name which had been registered and, hence, simply wanted to acquire rights to the domain name use. In an increasing number of instances, however, trademark owners have complained that other entities have registered domain names which are identical to or confusingly similar to their trademarked names and that this is at minimum

⁸³ See GILLIES AND CAILLIAU, *supra* note 7.

⁸⁴ Telephone interview with Donald Telage, NSI (Nov. 9, 2001).

⁸⁵ Andrew Pollack, *What's in a Cybername? \$7.5 Million for the Right Address*, N.Y. TIMES, Nov. 30, 1999, at C8.

creating confusion in the emerging electronic marketplace. Moreover, they contend that this is most likely an illegitimate taking of trademark rights earned by them through usage in the real marketplace. For example, one man registered dozens of domain names under names such as goldman-sachsdirect.com and jpmorganonline.com.

For the first couple of years of its management of the registration process, NSI responded to applications in a strictly first come, first served manner. Thus, an application would not be rejected. The NSI practice, however, riled the owners of the real-marketplace trademarks. Trademark owners contended that these registrations were bogus attempts to profit by registering the names cheaply by paying the modest registration fee and reselling them to the trademark owners dearly; they cried foul.⁸⁶ Attorneys representing trademark owners such as Coca-Cola, Porsche, and Warner Brothers called it cybersquatting; quick-to-file registrants, on the other hand, called it entrepreneurship.

By identifying a business enterprise, governmental or nongovernmental organization, or academic institution, an Internet domain name serves a role in electronic commerce akin to a trademark in real commerce. A trademark is a word or words, a number or character, a picture or symbol or graphic design, or sound or some combination of them which an enterprise uses to identify its goods or services and distinguish them from those of others.⁸⁷ Trademarks convey information to consumers and provide incentives to producers to establish good will in the marketplace. A trademark strategy is essential to brand management. Trademark law, policy, and public administration is essential to proper functioning of a market economy.

The trademark originated in Roman times when artisans placed upon their works an identifying mark. Medieval guilds in Europe adopted the trademark practice in order to police their membership and prevent competition in local commerce by nonmembers. In fact, the trademark was first codified into law in Renaissance Venice. Trademarks are today codified into the laws of many countries around the world and several international treaties provide sources of international law regarding trademarks, including the Paris Convention for the Protection of Industrial Property, the Madrid Agreement Concerning the International Registration of Marks, and the Trademark Law Treaty. These treaties are administered by WIPO.

⁸⁶ Patrick McGeehan & Matt Richtel, *What's in a Web Address? Maybe a Lawsuit*, N.Y. TIMES, Oct. 22, 1999, at A1.

⁸⁷ For detailed discussion of trademark and unfair competition law and policy, see JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION: CASES AND MATERIALS (2d ed. 1996), as well as the extensive scholarly and analytical literature which can be found in law journals.

The law and policy behind trademarks spring from the law and policy of unfair competition. Government protects the trademarks of enterprises in order to prevent competitors from confusing or deceiving consumers in the marketplace by passing-off their goods and services as those produced by or associated with the trademark owners. Thus, in the United States trademark rights grow out of use, not mere adoption, of the mark and “usage” means placing goods and promoting the sale of these goods in the marketplace. A trademark becomes a registered trademark through a process administered by the U.S. Patent and Trademark Office (“USPTO”). The trademark owner pays an application fee and files an application which identifies the mark, specifies the manner and dates of its first use, and provides drawings and specimens. A USPTO examiner examines the mark for distinctiveness and searches for conflicting marks. The applicant’s mark is then published in the Official Gazette, where competitors have a time-limited opportunity to oppose the registration. If no opposition occurs, the trademark is registered and gains national rights under federal law. In the United States, trademarks may also be established under authority of the common law of the states.

A trademark owner must use the mark in good faith within six months to one year after registration in order to minimize the risk of loss of rights. A trademark owner must continue to take action to maintain trademark rights, including using the mark on a commercial scale, carrying out proper licensing practices, enforcing rights against infringement, and renewing registration every ten years. Not as a matter of law, but as a matter of business strategy, trademark owners are encouraged to strengthen their marks in accordance with a marketing strategy so as to deter conflicts with competitors and succeed when conflicts occur. A trademark is measured by its distinctiveness, and a distinctive trademark is capable of identifying the source of goods. There are four different categories related to trademarks: (1) generic, which earns no trademark rights; (2) descriptive, which can earn trademark rights if sufficiently distinctive; (3) suggestive, which tends to be distinctive; and (4) arbitrary or fanciful, which are presumed to be by nature inherently distinctive.

A distinctive trademark carries secondary meaning, i.e., is established in the minds of consumers through long and exclusive use in commerce an association with a particular producer. Numbers, colors, sounds, smells, and other symbols can acquire secondary meaning. Proper and geographic names can, through the acquisition of secondary meaning, overcome the reluctance in trademark law to grant exclusive use of a proper or geographic name to one entity. Trademarks deemed to be famous earn rights which exceed those associated with trademarks deemed to be merely distinctive. Trademark rights endure indefinitely unless lost, either because the owner has abandoned the mark or because the trademark has become generic in

the minds of the public. A trademark owner abandons rights by discontinuing use of the mark, inadequately enforcing rights against unauthorized users, or insufficiently controlling licensees. A trademark which becomes generic in the minds of the public, whether or not through fault of the owner's actions, is lost.

Trademark owners who conduct their commercial activities in good faith sometimes find themselves in disputes with other trademark owners who have similarly been conducting their commercial activities in good faith. Entry by an enterprise into a different industry sector or geographic market can place one trademark in conflict with another. Since trademarks do not confer exclusive rights (as do patents over innovations and copy-rights over expressions), U.S. courts and tribunals seek equitable or fair settlements of these disputes. Infringement of a trademark occurs when a competitor distributes the same or a confusingly similar product or service in the same or closely-related market sector and, or, same geographic area. Confusion in the minds of consumers is always the main question and depends upon (1) the strength of the mark, (2) degree of similarity between the marks, (3) proximity of the goods/services, (4) distribution strategies of the disputants, (5) evidence of confusion, (6) good faith, (7) quality of goods/services, and (8) sophistication of the buyers.⁸⁸

The law, policy, and public administration of trademark and unfair competition, which has evolved through hundreds of years of practice, contributes concepts, principles, rules and associated institutions to the development of a law, policy, and public administration of Internet domain names, especially with respect to dispute settlement.⁸⁹ This is true, at least in theory, for trademark law was not initially embraced by the computer-science and engineering culture of the inventors of the Internet.⁹⁰

VI. DOMAIN NAME DISPUTE SETTLEMENT, INTERNET GOVERNANCE, AND LEGITIMACY

The flood of domain name registrations led people at NSF and IANA to consider reform of the DNS. The need for unique domain names and the exploding commercial interest in registration suggested that the .com top-level domain name would be inadequate to future electronic commerce. The disputes between domain name owners and trademark owners were common and the latter were complaining about it an increasing number of

⁸⁸ *Id.*

⁸⁹ Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICH. J.L. & TECH. 1 (1995), available at <http://urich.edu/~jolt/v1i1/burk.html> (n.d.).

⁹⁰ Telephone interview with David Maher, Vice President for Public Policy, Internet Society, (Nov. 13, 2001).

public forums. Some users of the DNS registration process questioned why a single, private sector firm (NSI) was allowed to continue as a monopoly provider of registration services. In addition, a new complaint was increasingly being heard in the Internet community: use of the Internet was growing around the world, yet registration was carried out by an American government selected provider. The traditional ways of Internet governance were being called illegitimate by trademark owners, foreign domain name registrants, and even many people within the original community of Internet architects and early adopters.

In September 1996, the International Ad Hoc Committee (IAHC) was established to re-consider the DNS.⁹¹ The IAHC was composed of 11 representatives, including one from NSF, five from the Internet community, a Japanese academic, one representative from International Telecommunications Union, and two lawyers from the International Trademark Association and another lawyer from WIPO. As one participant recalled with some amusement, this group consisted of three lawyers and eight engineers: us versus them.⁹² The IAHC established a process with a series of meetings and opportunities for international public comment and set as its goal a reformed DNS by the summer of 1997.

In February 1997, after receiving some 4,000 comments from interested parties, the IAHC circulated a draft plan for public comment.⁹³ The report recommended that the following goals guide a reformed DNS:

- Entitle every owner of a valid trademark registration to a unique domain name that contains the trademark without alteration;
- Allow registration of domain names corresponding to identical trademarks by different owners of the trademark (e.g., in different goods and services sectors);
- Establish the most efficient registration procedures possible;
- Stop rampant piracy without resorting to extensive litigation;
- Avoid the need for policing of all TLDNs;
- Avoid legal liability regarding trademark-domain disputes for registries;
- Take into consideration the needs of noncommercial domain name owners.

⁹¹ These sections are based on documents obtained at interviews with staff of the World Intellectual Property Organization (1997).

⁹² Telephone interview with David Maher, *supra* note 87.

⁹³ Internet Society, *Seven New Top Level Domain Names are Added For Internet Addresses and Up to 28 New Registrars Planned*, THE ISOC FORUM vol. 3, no. 2 (Feb. 20, 1997), at <http://www.isoc.org/infosvc/forum/970220forum.txt> (n.d.).

The IAHC recommended the creation of new generic top-level domain names, including:

- *.firm* for businesses or firms;
- *.store* for businesses offering goods to purchase;
- *.web* for entities emphasizing activities relating to the World Wide Web;
- *.arts* for entities emphasizing cultural and entertainment activities;
- *.rec* for entities emphasizing recreation and entertainment;
- *.info* for entities providing information services;
- *.nom* for individuals desiring personal nomenclature

The report recommended that an idea that had been talked about in the past be made policy, that national top-level domain names be established to correspond with the International Standard Organization 3166 country code. For example, Switzerland would use *.ch* nomenclature, Japan would use *.jp*, and the United States would use *.us*.

The IAHC proposed that in place of the single registration firm in Virginia, 28 firms be established, four competing in each of seven world regions. It also recommended that an independent, nonprofit Council of Registrars ("CORE") be established in Geneva under the nonprofit organization laws of Switzerland to oversee the registration system. The proposal establishes criteria for selecting registration firms. They must be located in countries that are either members of the Paris Convention for the Protection of Industrial Property (the main trademark treaty administered by the World Intellectual Property Organization) or the World Trade Organization, present a business or marketing plan, comply with standard accounting practices, and have liability insurance, adequate capitalization, experienced staff, customer service measures, reliable online access capabilities, robust backup procedures, disaster recovery plans, and management expertise.

Selected registrars would sign a Memorandum of Understanding regarding operation of registration sites with, pay fees to, and be subject to the oversight of CORE. The entire system would be subject to the oversight of the Policy Oversight Committee, a group with representation in staggered terms from the International Telecommunications Union, International Organization for Standards, World Intellectual Property Organization, and several nongovernmental Internet and trademark organizations. Disputes regarding domain names would be settled through mediation offered by the Arbitration and Mediation Center of the World Intellectual Property Organization. The IAHC recommended adoption of its proposals in 1997 so that the new system could be put in place by 1998, when the

NSF contract with Network Solutions was set to expire.

The proposals were not adopted in 1997, however. Critics, especially Network Solutions, questioned the legitimacy of the IAHC; critics wanted to know the origin of authority granted to this nongovernmental organization to propose such far-reaching changes to the DNS, a vital institutional facilitator of the Internet, the World Wide Web, and the future of electronic commerce. The National Science Foundation had been represented in the IAHC, but the commercialization of the Internet and the proliferation of commercial disputes plunged the National Science Foundation into the deep waters of public controversy about Internet governance and its leaders sought to pull themselves out and return to the safe ground of encouraging science and technology. The Clinton administration moved executive authority over Internet governance and policy from NSF to the Department of Commerce and the proposals of the IAHC were shelved.

The U.S. government established the Internet Corporation for Assigned Names and Numbers ("ICANN") in late 1998 with the mission of taking over the National Science Foundation roles with respect to technical standard-setting, the Internet Protocol System, the Domain Name System, and the Domain Name System root server system. No one has questioned the knowledge-base of the people who have been recruited to serve ICANN. However, ICANN, its source of authority, its mission, its leadership, its membership, its decision-making, its sources of funding—in short, everything about its legitimacy—has been controversial and remains unsettled.⁹⁴ Domain name registration institution-building is on-going, with private, governmental, and nongovernmental stakeholders seeking to design structures and procedures which possess knowledge and efficiency and, perhaps most challenging of all, legitimacy.

ICANN has, however, created competition for registration of domain names: some 80 companies provide registration services. As the competitors started arriving on the scene, NSI's share of the .com domain name registration has declined from a near-monopoly 92% at the end of 1999 to a still-dominant 53% in May 2001.⁹⁵ VeriSign, Inc., the Mountain View, California company that acquired NSI in March 2000 for over \$17 billion

⁹⁴ See Ariana Eunjung Cha, *Losers, Lawmakers Worked Up over Internet Suffixes; Panel's Approval Process Questioned: Why .coop but not .nom?*, WASH. POST, Feb. 9, 2001, at E3; Rajiv Chandrasekaran, *Masters of Internet Domains Go to War; Network Solutions, ICANN in Turf War That Could Destabilize the Net*, WASH. POST, July 22, 1999, at E1; Jeri Clausing, *A Leader in Cyberspace, It Seems, Is No Politician*, N.Y. TIMES, Apr. 10, 2000, at C1; Jeri Clausing, *What's in a Name: Arcane Internal Bickering, Internet Agency Grimly Learns*, N.Y. TIMES, Mar. 13, 2000, at C9; John Schwartz, *NSI Keeps Keys to Internet Domain*, WASH. POST, Sept. 29, 1999, at E1.

⁹⁵ Susan Stellin, *New Economy: New Contract Covering Internet Domain Name Registry Raises Questions About Whether the Address System Is Competitive*, N.Y. TIMES, May 21, 2001, at C4.

(the biggest Internet acquisition until AOL acquired Time Warner) negotiated with ICANN that it will continue to control and manage the master .com registration list until 2007.⁹⁶

Nonetheless, some early domain name disputes involving (alleged) cybersquatting were settled by purchase by the real marketplace trademark owner of the rights to the electronic marketplace domain name. However, trademark owners neither liked the solution as a matter of principle nor the prices which some registrants were seeking to extract. As a result, they filed suit in U.S. federal district courts, claiming that their trademark rights were being infringed. The relationship between the law of trademark and the law of Internet domain names, however, was being tested. Furthermore, because many federal district and circuit courts might issue rival decisions that could take years to be settled by the Supreme Court, some people believed that Congress ought to intervene quickly and decisively to remove uncertainties. In response, Congress passed the Anticybersquatting Consumer Protection Act in 1999, a law which permits trademark owners to take action in federal court when they believe a confusingly-similar domain name has been registered by another entity.

VII. DOMAIN NAME DISPUTE SETTLEMENT AND WIPO ARBITRATION

Litigation, however, consumes cash and many months of time even in the best of circumstances—too long in the judgment of electronic commerce business strategists and policymakers. Too much executive time is misspent and too much uncertainty over outcomes impedes marketing plan implementation and cools the ardor of investors. Thus, trademark owners and electronic commerce policymakers called for alternatives to court litigation, especially when bad faith registration takes place. With the encouragement of ICANN, the WIPO announced that it would sponsor a series of eleven forums to be held around the world in 1998 and 1999 for the purpose of enhancing dialogue among stakeholders and articulating concepts, principles, institutional designs, and rules of law with respect to alternative dispute settlement mechanisms.⁹⁷

WIPO is the IGO most central to the international intellectual property regime.⁹⁸ It is among the most venerable of IGOs, dating its origins to the secretariats established to administer the Paris Convention for the Protec-

⁹⁶ Susan Stelling, *Verisign Wins Internet Address Contract*, N.Y. TIMES, May 19, 2001, at C3.

⁹⁷ See World Intellectual Property Organization, *The Management of Internet Names and Addresses: Intellectual Property Issues: Final Report of the WIPO Internet Domain Name Process*, (April 30, 1999), available at <http://wipo2.wipo.int/process1/report/finalreport.html>, [hereinafter *Final Report*].

⁹⁸ The following sections are drawn from MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 125-39 (1998).

tion of Industrial Property (patents and trademarks) in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886, which were united by the Swiss Federation into a single secretariat in 1893.⁹⁹ Beginning with drafting work in 1962, a diplomatic conference took place in 1967 which resulted in 51 mostly industrial country governments promulgating the Convention Establishing the World Intellectual Property Organization. WIPO joined the United Nations system in 1974 and its mission statement has been durable in the intervening years: help Member States create multilateral norms, help developing countries write and administer national laws, and serve the Member States through administration of the treaties.¹⁰⁰

The organization's activities are many. For some years the staff have provided several hundred one-on-one consulting missions annually, giving advice on subjects such as the use of information technology to improve patent and trademark office operations. Perhaps no other IGO has executed such an ambitious, sustained program of teaching seminars and expert conferences than has WIPO. The organization estimated by 1992 that 23,000 people, most from developing countries, have participated in their training programs.¹⁰¹ The training programs and expert conferences always involve outside academic experts and practicing attorneys in addition to WIPO professional staff. For example, WIPO organized a symposium at Stanford in 1991 that brought together leading technologists and legal specialists.¹⁰² To move along the preparatory work for a 1996 diplomatic conference to amend the Berne Convention on copyrights for digital technologies and the Internet, the organization sponsored major conferences with international experts in 1991 in Cambridge, Massachusetts, in 1994 in Paris, and in 1995 in Mexico City and Naples. Most of the professional staff, who are lawyer-specialists in patent, trademark, copyright, or some other area of intellectual property law and policy, regularly attend conferences in their areas of expertise and communicate with their counterparts in other organizations.

WIPO founded an Arbitration Center in 1994 under the leadership of its general counsel for the purpose of providing intellectual property owners with an alternative to court litigation.¹⁰³ The center was established to serve as an administering body and resource center regarding intellectual property

⁹⁹ ARPAD BOGSCH, BRIEF HISTORY OF THE FIRST 25 YEARS OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION 7-21 (1992).

¹⁰⁰ RYAN, *supra* note 98.

¹⁰¹ *Id.* at 55.

¹⁰² See World Intellectual Property Organization, *WIPO Worldwide Symposium on the Intellectual Property Aspects of Artificial Intelligence*, (1991), available at <http://www.wipo.org>.

¹⁰³ See World Intellectual Property Organization, *The Services of the WPO Arbitration Center* (1995), available at <http://arbiter.wipo.int/center/index.html>.

dispute settlement. The center maintains a list of qualified, approved mediators and arbitrators and assists disputants in the selection of a person to handle their dispute. The center assists intellectual property owners with the drafting of contract clauses regarding dispute settlement. It also produces and distributes educational materials and from time-to-time it organizes conferences regarding intellectual property dispute settlement.

The Internet domain name public forum series sponsored by WIPO has been praised as a model for multilateral governance.¹⁰⁴ WIPO public forums were held over the course of three months in San Francisco, Brussels, Washington, DC,¹⁰⁵ Mexico City, Cape Town, Asuncion, Tokyo, Hyderabad, Budapest, Cairo, and Sydney. The forums were advertised within the Internet, trademark (legal and business), government policy communities as well as generally to the public. Formal presentations were made by all who requested the opportunity and extensive question-and-answer opportunities were presented. After the conclusion of the public forum series, WIPO also carried out its own internal study, which included extensive surveying of domain name users. WIPO released a final report which summarized the public views presented at the forums, contained its findings and analysis, and recommended a role for itself in offering an alternative dispute settlement mechanism.¹⁰⁶ Participants in the WIPO Internet domain name forum series, said the WIPO report, came to consensus that an Internet domain name possesses a trademark function and thus that the system of domain name registration and dispute settlement ought to draw institutional construction from the law and policy of trademark. Participants in the WIPO Internet domain name process also came to consensus that distinction ought to be made between conflicts over domain names owing to bad faith registration versus those owing to good faith registration. A cybersquatter acts in bad faith because the registrant can provide no evidence of having legitimate interest in the domain name. Legitimate conflicts do arise, however, such as in the example of two entities which both want the rights in electronic commerce, to delta.com, for instance.

Participants recommended that improved, efficient, legitimate dispute settlement procedures be institutionalized to deal with bad faith cybersquatting. They recommended that a non-judicial, alternative dispute settlement procedures be established for cases of bad faith domain name registration of distinctive trademarks. Participants expressed the hope that, in about one month's time, an order could be issued to the domain name registry to cancel and reassign domain name registrations. Also, they recommended that

¹⁰⁴ See Frederick M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3 J. INT'L ECON. L. 63 (2000).

¹⁰⁵ The author hosted the Washington public forum at Georgetown University.

¹⁰⁶ See World Intellectual Property Organization, *Final Report*, *supra* note 97.

administrative procedures be established for famous marks which would allow a registry to deny a domain name registration at the time of application or cancel it retroactively.

WIPO requested authorization from ICANN to establish such a new dispute settlement mechanism.¹⁰⁷ The WIPO mechanism would concern only bad-faith domain name registrations. The arbitration aimed to be quick, by limiting discovery, and decisive, by issuing an order to an Internet domain name registrar to take action. Disputes in which the defendant could show a legitimate trademark interest in the domain name would be rejected from the WIPO system and disputants would be expected to take their case before a court. ICANN approved in 1999 the establishment at WIPO of its arbitration mechanism. In January 2000, a trademark owner won back use of a domain name through the expedited, arbitral procedure and another trademark owner successfully revoked domain name registrations.¹⁰⁸ WIPO dispute settlement mechanism regarding Internet domain names was used more than one-thousand times in its first year of operation.

VIII. CONCLUSION

How can we account for the popularity of this new WIPO Internet-domain-name dispute settlement mechanism? How does what we have learned from the GATT/WTO dispute settlement experience inform WIPO dispute settlement? The GATT/WTO experience shows that an IGO's knowledge is critical to its dispute settlement capacity. WIPO's knowledge about trademark law allowed the organization to step forward, first to join the ill-fated International Ad Hoc Committee on the domain name system, then to offer to host a series of public forums regarding domain name dispute settlement. WIPO's legitimacy was earned through fair, independent decisions and by virtue of its U.N. status and, in this regard, WIPO's legitimacy exceeds that of the WTO. WIPO sponsored a series of public forums around the world to reach-out for comments from stakeholders and issued a public report and by doing so legitimized its own role in Internet governance. The WTO, on the other hand, is frequently criticized for being closed to the public and nontransparent in its decision-making. The WIPO decision to provide arbitration services only for cases of bad-faith cyber-squatting was shrewd, for disputes in which both contenders have legitimate

¹⁰⁷ See Francis Gurry, *The Dispute Resolution Services of the World Intellectual Property Organization*, 2 J. INT'L ECON. L. 385 (1999). Francis Gurry is the WIPO general counsel and director of its Arbitration Center.

¹⁰⁸ Jeri Clausing, *New Domain Name Addresses Are Revoked by Internet Name Panel*, N.Y. TIMES, Jan. 6, 2000, at C2; Jeri Clausing, *Wrestling Group Wins Back Use of Its Name on Internet*, N.Y. TIMES, Jan. 17, 2000, at C4.

trademark claims to a particular domain name cannot be settled without extensive discovery and judicial procedure which the WIPO Arbitration Center is not equipped to provide. The relative efficiency of its dispute settlement mechanism, when applied to bad-faith cybersquatting, by contrast with discovery-expensive national court-based litigation further accounts for its rapid adoption as the place of choice for trademark owners.

Domain names facilitate Internet-based, digital electronic commerce by allowing users to locate the electronic source of information, goods, or services and, for this reason, domain names have come increasingly to possess commercial value. As the value of domain names has risen, so have the disputes between and among those who would like to register and use particular names. The unique address role of an Internet domain name, such as the fact that there can be only one, e.g., delta.com, intensifies the commercial stakes regarding the identification role of the Internet domain name. Disputes arise among enterprises and organizations which want the same domain name, challenging national courts to settle conflicts and formulating demands for alternative dispute settlement procedures. A variety of stakeholders have participated in a process, with institutional support provided by the WITO, to establish alternative dispute settlement procedures and there is an emerging global consensus that Internet domain name policy and administration ought build upon concepts developed in the intellectual property law and policy field of trademarks and unfair competition, for Internet domain names are the trademarks of electronic commerce. Stakeholders--business, governmental and nongovernmental organizations, and the public--are challenged to institutionalize knowledgeable, legitimate as well as efficient market-facilitating institutions and to do so despite the fact that technology and commercial strategies of the electronic marketplace will continue to evolve for some years to come. Consequently, their institutions must be built with the capacity to evolve as well.