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## Working Paper

# Between law and politics: the judicialization of international dispute settlement in the fields of security, trade and the environment

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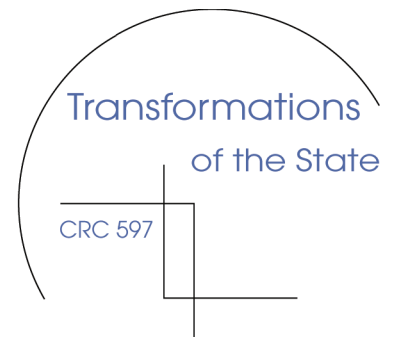
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# TranState Working Papers

BETWEEN LAW AND POLITICS:  
THE JUDICIALIZATION OF  
INTERNATIONAL DISPUTE  
SETTLEMENT IN THE FIELDS  
OF SECURITY, TRADE  
AND THE ENVIRONMENT

Aletta Mondré  
Gerald Neubauer  
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Bernhard Zangl

No. 71

Universität Bremen • University of Bremen  
Jacobs Universität Bremen • Jacobs University Bremen

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Staatlichkeit im Wandel • Transformations of the State  
Sonderforschungsbereich 597 • Collaborative Research Center 597



*Aletta Mondré  
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Achim Helmedach  
Bernhard Zangl*

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The Judicialization of International Dispute Settlement  
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***Between Law and Politics:  
The Judicialization of International Dispute Settlement  
in the Fields of Security, Trade and the Environment***

**ABSTRACT**

Many international treaties regulate a variety of policy fields deeply influencing state's policy options. Moreover, multilateral treaties establishing international organizations and regimes often include provisions how to settle disputes over norm interpretation and treaty application. International dispute settlement mechanisms increasingly install judicial procedures in place of more traditional, diplomatic means. The resulting proliferation of international courts and tribunals has sparked a lively debate about an (emerging) international rule of law. International rule of law would significantly alter the structure of international relations, as law would become an important ordering principle of world politics. However, it is not yet clear whether or how these developments affect actual state behavior.

From our point of view, it is entirely an empirical question what effect – and to what extent – judicialized dispute settlement have on states. Presenting results from a comprehensive research project this paper systematically investigates the behavior of OECD member countries in international disputes. We analyze state behavior in over 100 individual disputes in three issue areas of international relations (trade, security and environmental protection) and across time (1970s/1980s compared to the 1990s).

Our data demonstrates as a general trend that OECD countries do in fact increasingly use and accept internationally agreed dispute settlement procedures. Nevertheless, important differences across issue areas prevail. While in international trade most disputes are indeed dealt with under the World Trade Organization's dispute settlement procedure, in the field of international security many disputes are dealt with outside the relevant procedure of the United Nations Security Council. With regard to environmental protection, the use of the CITES (Convention on International Trade in Endangered Species) dispute settlement mechanism falls in between. We observe an overall trend towards judicialization of state behavior, but to different degrees in the different issue areas.

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***Between Law and Politics:  
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**1 INTRODUCTION**

Today, more and more aspects of international relations are regulated by international legal norms. In issue areas such as security, trade, finance, the environment and communication increasingly dense networks of international legal norms have evolved. In addition, more and more of these legal norms have gradually become embedded in a legal infrastructure aimed to ensure that these norms are respected. Thus, the authority to legislate, to adjudicate and to enforce international legal norms has been delegated to international institutions whose procedures increasingly follow principles of due process. Adjudication procedures in cases of alleged violations of legal norms and enforcement in cases of persistent non-compliance increasingly follow rule-of-law principles such as equal treatment and legal reasoning. The International Criminal Court with its authority to convict those found to have committed war crimes may serve as an example here.

This “legalization of world politics” is a process that has given rise to debates on the effects of international legal norms and their contribution to the functioning of global governance. Is international politics increasingly embedded in international law? Or is international law still dominated by politics? The positions in this debate can be divided into two main camps. One side claims that substantive legalization has taken place and expects this process to continue. In this view, legalization leads to an increasingly dense network of legal norms as well as an increasingly effective legal infrastructure to ensure compliance with these norms. Legalization is seen as imperative for global governance to be effective (Jackson 1998, Petersmann 1997, Zangl/Zürn 2004). In addition, the legalization of world politics is taken to concur with a process of constitutionalization, that is, the international legal order increasingly follows principles of democracy, the rule of law and human rights. Less enthusiastic voices, by contrast, maintain the legalization of world politics is unlikely to go far enough to contribute meaningfully to effective global governance (Alvarez 2003, Goldsmith/Posner 2005). There is doubt that legalization of world politics will bring about a legal infrastructure that can effectively ensure compliance with international law. In this view, attempts to transform the contractual legal order of sovereign states into a constitutional order in which international law supplants power politics are doomed to failure.

In the light of endeavors to enhance the effectiveness of global governance this debate between legalization optimists claiming the rising importance of international law



for politics, and skeptics underlining the continued primacy of international politics over law, is of crucial significance. More often than not, however, the debate resembles an exchange of plausible assumptions rather than an exchange of arguments based on sound empirical research on the effects of legalization, i.e. the relation between law and politics. Admittedly, the debate has produced some empirical research, but the results are still inconclusive. We therefore seek to inform the debate with empirical research on state behavior vis-à-vis international dispute settlement procedures (IDSPs). IDSPs are internationally institutionalized procedures for making decisions on alleged violations of international legal norms. We choose to study IDSPs because they are at the heart of the debate on legalization and add a new focus on state behavior to the debate.

In fact, over the last two decades a judicialization of international dispute settlement procedures has taken place. Judicialization of these procedures means that diplomatic dispute settlement procedures, which depend on political bargaining between the disputing parties themselves, are replaced by court-like procedures in which third parties are given the authority to make decisions based on law (Romano 1999, Keohane et al. 2000). New international courts were recently established like the International Criminal Court and the International Tribunal for the Law of the Sea. Rulings of the European Court of Justice – and of the European Court of Human Rights – enjoy both direct effect and supremacy over domestic legal orders. Newly established international environmental regimes, such as the ozone and the climate regime, have various built-in, quasi-judicial procedures designed to cope with non-compliance. A growing number of long existing IDSPs have become more and more court-like (Helfer/Slaughter 1997). The diplomatic dispute settlement procedures of GATT, for instance, have been replaced by a judicial dispute settlement mechanism under the WTO that is authorized to sentence, and if necessary penalize, states that do not fulfill their commitments.

However, the judicialization of procedures can only be regarded as *one* component of an emergent international rule of law. The mere existence of judicialized procedure is not sufficient for a rule of law in the international realm. Another component is state behavior in relation to IDSPs. Rather than studying the legalization of international dispute settlement procedures in isolation, we primarily study state practices for settling disputes. If states were not to act in accordance with IDSPs, even court-like procedure would not have a regulating effect on international politics. It is an entirely empirical question whether or not complaining states actually use IDSPs to settle disputes, and whether defendants accept the procedures as an instrument of dispute settlement. To answer this question we investigate states' actual dispute settlement behavior and whether changes in state behavior can be observed. We speak of *judicialized* dispute settlement *behavior* when states act in accordance with IDSPs. We focus on the OECD

world because we assume that non-OECD countries are less likely to use and accept IDSPs if OECD states do not use and accept them.

So far, research dealing with this focus on practices rather than on procedures has heavily concentrated on international dispute settlement in the GATT/WTO context, thereby overlooking potential processes of judicialization beyond international trade. Especially in issue areas such as security, the question whether judicialized behavior is nevertheless emerging remains completely open. In this paper we take a broader view. We analyze the practice of dispute settlement across three issue areas in which settlement procedures are judicialized to quite different degrees, namely international trade (WTO), international security (UN Security Council), and international environmental policies (CITES). This gives us the opportunity to compare change in and across issue areas.

First we define our concept for investigating the judicialization of international dispute settlement practices. We developed an analytical framework to capture the degree of judicialization of state behavior. In the following sections we present our results with regard to each issue area. For better orientation each section starts with a brief introduction of the chosen IDSP before assessing state behavior in relation to that IDSP. Summarizing the results, we argue that a judicialization of international dispute settlement – albeit modest – has taken place. Our results show, however, that only in the area of international trade this process is strong while the areas of security and environmental protection are lagging behind. A general trend towards legalization of world politics and by extension to an emergent international rule of law cannot be shown.

## **2 CONCEPTUALIZING STATES' DISPUTE SETTLEMENT BEHAVIOR**

To investigate whether a judicialization of international dispute settlement is taking place among OECD countries, we analyze international dispute settlement practices. State behavior is judicialized when states use IDSPs to settle disputes respecting their procedures and accepting their decisions. As the degree to which states act in accordance with IDSPs can vary we understand judicialized behavior not in binary terms but as something states can display more or less of on a sliding scale. We employ a twofold comparison. Firstly, we compare state usage of IDSPs within specific issue areas during the 1970s and 1980s with that of the 1990s. We investigate and compare around 30 disputes from each of three different issue areas in which states were accused of violating international law. The periods chosen for comparison are the 1970s/1980s and 1990s respectively. To draw samples we first selected specific legal obligations or bundles of legal obligations in each issue area under consideration. In the GATT/WTO context we focus on complaints concerning unauthorized import restrictions on agricultural products and foodstuffs. In the context of the UN Security Council we concentrate on

complaints about threats to peace, breaches of the peace and acts of aggression. In the CITES context we deal with violations of restrictions on trade with endangered species. In order to draw an unbiased sample we identified complaints independently of whether the respective IDSP was invoked or not. Our sources include newspaper research, official documents and NGO publications.

To assess state's dispute settlement behavior we produced a brief, structured description for each dispute. As there are two sides to any dispute, we study the behavior of each side. We are interested in the willingness of the alleged violating state (defendant) to comply with rulings made by the relevant IDSP. Moreover, we include in our analysis whether the party making an allegation (complainant) against a state uses the relevant IDSP rather than taking the law into their own hands. Only if complainants are willing to call on IDSPs is it worthwhile to assume an increased role for judicialized dispute settlement in international politics. Therefore we expand our research design to systematically study the behavior of both sides of a dispute.

We trace the way in which states attempt to settle their disputes in four phases each dispute might pass through: (1) a *complaints phase*, in which one party publicly accuses another party of violating international legal obligations; (2) an *adjudication phase*, in which at least one of the conflicting parties seeks a decision on the respective dispute; (3) an *implementation phase*, in which the conflicting parties have to implement the decision; and (4) an *enforcement phase*, in which sanctions might be employed if one of the conflicting parties refuses to implement the decision.. In each of the four phases states may either choose (1) to *follow* the relevant dispute settlement procedures, (2) to *avoid* the procedures by seeking a settlement negotiated outside the relevant procedure, or (3) to *disregard* the procedures. This way we pay attention to all phases of a dispute and generate a data point in each phase the dispute runs through. We then aggregate the behavior in each phase to distinct patterns describing the entire settlement process. Depending on which behavior parties display in each phase we find different courses. In the empirical case descriptions we identified five different patterns:

- (1) *continuously following*: A party may conform to the relevant dispute settlement procedure throughout the whole dispute. For instance, when Iraq invaded Kuwait in 1990, the United States turned to the UN Security Council early on in the dispute. When Iraq refused to comply with the Security Council resolution demanding its withdrawal from Kuwait, the US turned again to the UN Security Council to request economic enforcement measures. After the failure of economic sanctions to force Iraq into compliance the US again turned to the UN requesting – and receiving – the authorization of military enforcement measures.

- (2) *following, then avoiding*: A party may follow the procedures only in earlier phases of a dispute, but try to avoid them in later phases and negotiate a settlement outside the procedures instead. In the Banana Dispute in the 1990s, for instance, the EU first accepted a WTO dispute settlement panel, but later, after having lost the case in the WTO the EU tried – albeit to no avail – to settle the dispute with the US by negotiations outside the WTO context.
- (3) *continuously avoiding*: In many international dispute settlement procedures the disputing parties are free or even encouraged to resolve a dispute outside the procedure. Parties to a dispute may seek to settle a dispute outside of the relevant procedure without violating the same. In the Airbus dispute in the 1980s, for instance, the US and the EU avoided formal dispute settlement proceedings under GATT by agreeing instead to a mutually acceptable solution outside the GATT procedure.
- (4) *temporarily disregarding*: A party may choose to temporarily disregard the relevant dispute settlement procedure. For instance, Greece and Italy disregarded CITES regulations in the early 1990s. Only when CITES member states implemented trade sanctions as recommended by the Standing Committee did both countries bring their behavior in line with CITES regulations.
- (5) *following, then disregarding*: A party may use or accept the relevant procedures in early phases of a dispute, but then choose to disregard them in later phases, especially in the implementation phase. For instance, in the Banana Dispute, the US first sought to bring the EU to repeal its illegal regime for the import of bananas by invoking WTO dispute settlement proceedings. But after the EU's defiance of a WTO panel report the US itself resorted to not authorized retaliatory measures.

These patterns of behavior are our main analytical tool. We assess whether state behavior in the three issue areas selected for investigation has become increasingly judicialized by comparing the relative frequencies of the specified behavioral patterns in the 1970s/1980s to their frequencies in the 1990s. We use judicialization of behavior mainly as a descriptive concept to capture changes in state behavior. Some patterns indicate strongly that states are willing to use IDSPs and accept IDSP's rulings. If we find an increase in the relative frequency of these behavioral patterns we conclude a judicialization of state practices has occurred. Especially an increase of these patterns at the expense of behavioral patterns that indicate small and inadequate adherence to IDSPs and their rulings would support judicialization. Namely an increase in the first three patterns (*continuously following, following then avoiding* and *continuously avoiding*) at the expense of the latter two patterns (*temporary disregarding* and *following then disre-*

*garding*) is seen as an indication for a judicialization of states' dispute settlement behavior.

### **3 STATES' DISPUTE SETTLEMENT BEHAVIOR UNDER GATT/WTO**

In recent years research on international judicialization has largely focused on the dispute settlement system of GATT/WTO. Most analysts argue that changes in the dispute settlement procedure, most of which came into force in 1995, transformed the WTO dispute settlement system into a highly judicialized procedure, encouraging state behavior that is more compliant with procedures. The noticeable increase in the number of disputes that were brought to the attention of the WTO Dispute Settlement Body (DSB) after 1995 is seen as evidence for this (e.g. Petersmann 1997; Leitner/Lester 2004). Some analysts have disputed that changes in the procedure have led to a corresponding significant change in dispute settlement behavior. Instead they claim the increased caseload since 1995 can – at least partially – be attributed to an increased number of WTO members. In addition, they claim that many disputes that are initially reported to the DSB are settled outside the WTO dispute settlement system, indicating that states are as hesitant as ever to let their disputes be settled by independent third parties (Busch/Reinhardt 2002). Hence, the question arises whether states' dispute settlement behavior is in fact more compliant with the judicial WTO procedures than with the diplomatic GATT mechanism.

Before analyzing the actual state behavior, it is worthwhile to take a brief look at the dispute settlement procedure in question. Here the term judicialization relates to institutional design of the IDSP; assessing to what extent it's set-up is court-like.. The level of judicialization of the GATT dispute settlement procedures was medium at best.<sup>1</sup> To begin with, *access* to the adjudication procedures was limited to states. Furthermore, the whole procedure was hampered by *procedural obstructions* for both disputing and complaining parties. Before a so-called dispute panel could be set up by the GATT council the disputing parties had to engage in consultations to settle the dispute through bilateral negotiations. Even when consultations failed the establishment of panels as well as the approval of panel reports required the unanimous approval of the GATT council, which comprised all GATT members, meaning that both the complainant and the defendant could block procedures. However, the *political independence* of GATT panels was rather high. As a general rule dispute settlement panels were composed of three independent experts, acting in their individual capacities, who were expected to investigate the facts and hear the parties to the dispute. The *mandate* of these experts was to draft

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<sup>1</sup> For the following see Hudec (1993), Petersmann (1997: 70ff - on the evolution of the GATT dispute settlement system and the legal basis); Waynmyer (2002).

panel reports stating whether the dispute at hand implied a breach of GATT rules and to give recommendations on how to settle the dispute. Although they were supposed to reason on the basis of GATT law, their main task was to strike deals compatible with the disputing parties' political interests. In any case, if the recommendations of an approved panel report were not implemented by the defendant, the complainant could request the authorization of *sanctions* which, however, were again subject to unanimous approval by the GATT council and hence could easily be blocked.

With the establishment of the WTO in 1995 the hitherto only partially judicialized GATT procedure became remarkably more judicialized.<sup>2</sup> While *access* is still restricted to states, the procedure underwent fundamental changes. The political *independence* of the dispute settlement system was enhanced through the establishment of a standing Appellate Body (AB) which decides in appeal cases. The AB comprises seven members who are fully qualified lawyers. When one or both parties to the dispute appeal against a panel report, the appeal is reviewed by the AB. This also has implications for the panel's *mandate*. As the AB decides exclusively on the basis of existing WTO law panels (which still comprise independent experts), these have to follow the logic of legal reasoning rather than the logic of political compromise to save their reports from being revised by the AB. Most importantly, however, the WTO procedures now feature very few *procedural obstructions*. Decisions of the newly formed Dispute Settlement Body (DSB) to establish panels and to approve panel and Appellate Body reports can no longer be blocked by either defendants or complainants. Instead of requiring the consensual approval of all members the procedure can now only be blocked by a consensual decision of all members. Moreover, sanctions against defendants that persistently violate WTO reports are now authorized by the DSB more or less automatically.

We study disputes over alleged violations of GATT/WTO restrictions on the import of agricultural or foodstuff products in the period between 1980 and 1986 for GATT and from 1995 to 2000 for the WTO.<sup>3</sup> The disputes were selected independently of whether a complaint was filed with GATT/WTO or not. For that purpose newspapers and other information resources were analyzed to identify cases in which OECD states accused other states, or were accused by other states, of violating GATT/WTO law. We identified a total of eleven cases for the period between 1980 and 1985 and 39 cases for

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<sup>2</sup> For the following see Jackson (1997: 107ff); Petersmann (1997: 177ff); Stone Sweet (1997).

<sup>3</sup> The chosen product group was and still is a highly contended area of international trade, as is evidenced by the high percentage of such cases among all international trade disputes now and in the past. The chosen time periods both follow successful trade negotiations (the Tokyo and Uruguay rounds), ensuring that complaints are not restrained or exploited for tactical reasons. And although the trade in agricultural products has been liberalized over time, basically the same rules still apply for import restrictions.

the period between 1995 and 2000. These cases are analyzed with OECD states in the role of complainants first, and then in the role of defendants.

### **OECD countries as complainants**

For OECD states acting in the role of complainants, a comparison of the behavioral patterns in the period between 1980 and 1985 and in the period between 1995 and 2000 confirms the clear trend towards judicialization (see Figure 1).

The judicialization trend is, however, not obvious when focusing on the *continuously following* pattern only. Both under GATT and the WTO, in roughly one third of the cases OECD states displayed *continuously following* behavior. There is only a small increase in frequency in the 1990s. Those disputes involved trade measures of minor importance, such as South Korea's alleged protection of its milk market against imports from the EC or the highly disputed import of hormone-treated meat from the United States. In the EC vs. South Korea dispute on milk products, the EC first complained to the DSB about South Korean trade measures. Then the EC let the panel and the AB decide on the case<sup>4</sup> and waited until South Korea had implemented the recommendations. And in the hormone case the US, notwithstanding EU non-compliance, strictly followed WTO dispute settlement procedures and refrained from taking the law into its own hands.<sup>5</sup>

The judicialization of OECD states' behavior becomes more obvious when we look at the other behavioral patterns. The number of cases showing the *continuously avoiding* pattern decreases from 3 out of 10 cases to 6 out of 32 cases. Such cases included disputes over citrus products and meat under GATT, when the US abstained from taking Japan before a dispute settlement panel and instead persuaded Japan through bilateral negotiations to open the Japanese market for foreign products,<sup>6</sup> or cases in the 1990s, for instance when Canada resorted to diplomatic means to persuade the EC to alter the rules for the tariffication of durum wheat.<sup>7</sup> A closer look at such cases reveals that they are not always easy to solve or of marginal interest to the disputing parties. For example, the durum wheat case involved products of substantial trade value and lasted nearly four years from the first complaints to a bilateral solution. And although Canada could have brought the case to the attention of the WTO, they achieved concessions without resorting to the DSB in the end.

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<sup>4</sup> WT/DS98/R.

<sup>5</sup> WT/DS26/R, WT/DS26/ARB.

<sup>6</sup> Financial Times, 17.03.1982; Jiji Press English News Service, 04.04.1984; Jiji Press English News Service, 10.04.1984.

<sup>7</sup> Reuters News, 08.10.1997; Dow Jones Commodities Service, 30.10.1998.

The relative frequency of cases with *temporarily disregarding* behavior, which means that a complainant threatens to apply or actually applies illegal sanctioning measures at some point during the dispute, dropped from 3 out of 10 cases to only 1 out of 32 cases. In the 1980s such disregarding behavior happened at different stages of three trade rows, one of which was the dispute over citrus products between the US and the EC. The US and the EC agreed to invoke the GATT procedure in 1983,<sup>8</sup> but the EC refused to accept the panel report in 1985.<sup>9</sup> The US, as complainant, reacted unilaterally by first threatening and eventually imposing sanctions on imports from EC countries. But this conflict escalation was only temporary until the disputing parties agreed on a mutually acceptable solution in 1986, ending the US sanctions.<sup>10</sup> In the 1990s only one case in our sample included disregarding behavior by a complainant. In the infamous dispute on bananas the US threatened to impose sanctions on the EC. The US objected to the delaying tactics and the way in which the EC planned to implement the recommendations of the Appellate Body report. Therefore in March 1999 they imposed sanctions on products from the EC without the authorization of the DSB. The US only returned to following behavior when in April 1999 the DSB authorized sanctions.<sup>11</sup>

The decreasing frequency of these patterns (*temporarily disregarding* and *continuously avoiding*) under the WTO are accompanied by a strong increase in the fourth pattern that was virtually absent under the old GATT but is the dominant pattern in the WTO. This is the *following, then avoiding* pattern. During the late 1990s almost half of the cases were referred to the DSB, but ultimately the complainants tried to and actually solved the dispute bilaterally with the defendant. A number of cases could be cited to illustrate this dominant pattern. They comprise cases in which an agreement had been reached quickly in the mandatory consultation phase, but also cases in which parties continue bilateral negotiations even though a panel has already been established. In one dispute between the EC and New Zealand over spreadable butter, New Zealand complained to the DSB that the EC's regulation on the fat content of butter products was an unfair trade measure that put imports from New Zealand at a disadvantage.<sup>12</sup> The disputing parties entered into unsuccessful bilateral consultations and New Zealand requested the establishment of a dispute panel. Even after the panel had started its work, however, the parties continued negotiations and ultimately arrived at a mutually acceptable solu-

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<sup>8</sup> GATT C/M/160, GATT C/M/162.

<sup>9</sup> New York Times, 18.02.1985; Hudec 1993: 504.

<sup>10</sup> Financial Times, 20.05.1985; Washington Post, 21.06.1985; Zangl 2005: Chapter 8.

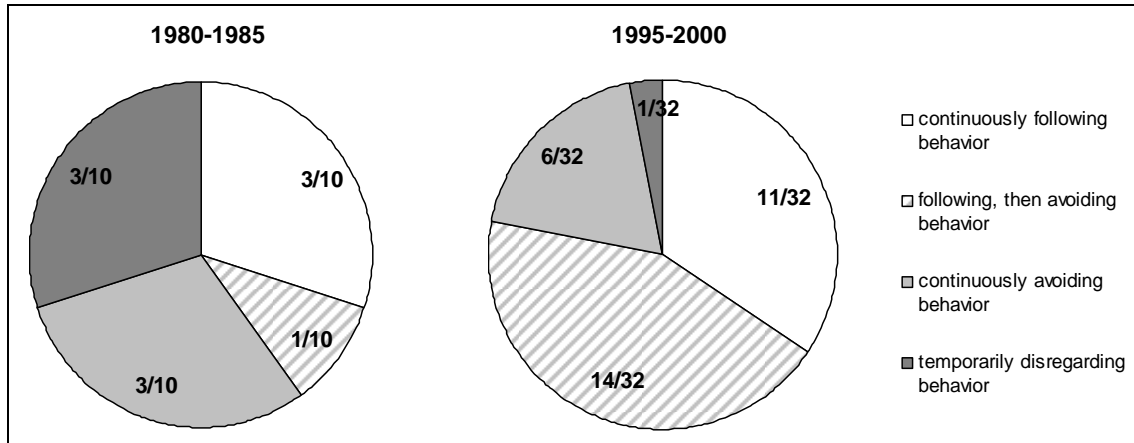
<sup>11</sup> WT/DS27/RW/EEC; WT/DS27/ARB; Journal of Commerce, 29.01.1999; Washington Post, 04.03.1999.

<sup>12</sup> WT/DS72.



tion.<sup>13</sup> This case is typical of cases in the 1990s when mandatory bilateral consultations or the voluntary continuation of such consultations frequently led to the resolution of a conflict.

Figure 1: Patterns of dispute settlement when OECD countries are complainants (GATT/WTO)



In sum, the cases from the late 1990s demonstrate increased judicialized behavior on the part of the complaining parties in international trade disputes. Disputes are almost always settled and disregarding behavior is the rare exception. Obviously, though, the dispute settlement mechanism is only one means for complainants to solve disputes. Very often the complaining party decides that a resolution can best be achieved through diplomatic means. The data for the GATT cases, by contrast, shows a lower degree of judicialization, but also indicates that the behavior of complaining parties under GATT was far better than the comparably weak dispute settlement mechanism with its extensive veto rights would lead one to expect.

### OECD countries as defendants

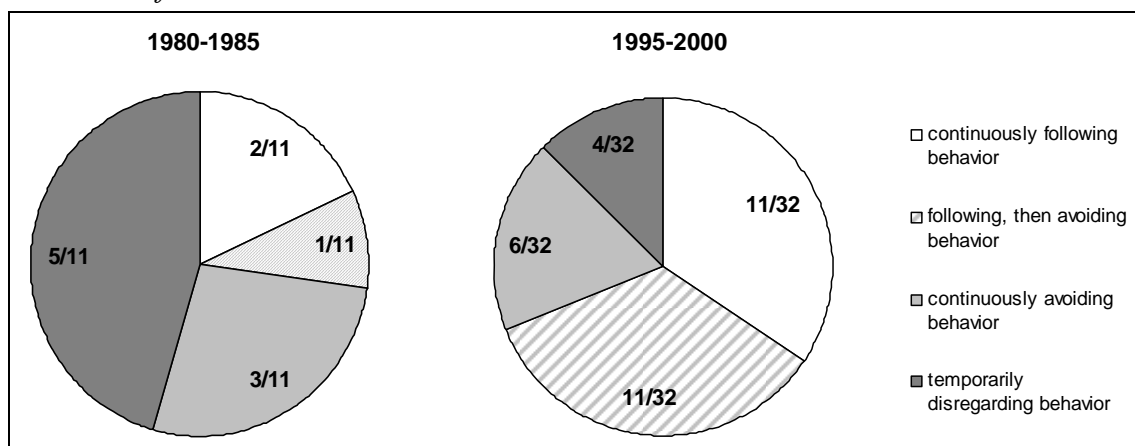
With respect to judicialization, the behavior of OECD countries when confronted with charges against themselves is quite similar to their behavior as complainants (see Figure 3). But here we can also see a strong increase in the pattern of *continuously following* behavior from 2 out of 11 cases to 11 out of 32 cases, which suggests that nowadays in more than one third of all trade disputes defendants are willing to accept third-party decisions. Moreover, in 3 out of 11 cases (GATT) and 6 out of 32 cases (WTO) respectively disputes were resolved without resorting to the GATT/WTO procedures, i.e. *continuously avoiding* behavior occurred. Therefore, as with the complainants' behavior, a decrease in this pattern can be observed. Cases like the above mentioned US-Japanese dispute on citrus products and beef accounted for nearly one third of all cases under

<sup>13</sup> WT/DS72/R; Reuters News, 09.06.1999; National Business Review, 05.11.1999

GATT. Nowadays, under the WTO, cases like the durum wheat conflict between Canada and the EC only account for roughly one fifth of all cases.

The drop in frequency of bilaterally negotiated solutions can be attributed to the remarkable increase in the pattern of *following, then avoiding* behavior. This most interesting shift is reflected by an increase from 1 out of 11 cases to 11 out of 32 cases, which clearly demonstrates that, generally, defendants under the WTO are interested in a mutually acceptable dispute resolution but in many cases prefer not to let a third party decide. The above mentioned dispute between New Zealand and the EC clearly shows that the defendant EC tried to uphold its trade measures on the import of spreadable butter and was not prepared to agree on a mutually acceptable solution to the conflict. But when the EC realized that the DSB was prepared to support the complainant’s position they agreed to change their tariffs on spreadable butter.<sup>14</sup> Clearly this behavioral change occurred in “the shadow of the law”.

Figure 2: Patterns of dispute (GATT/WTO) settlement when OECD countries are defendants



The judicialization of states’ dispute settlement behavior is also reflected in the significant drop in frequency of the *temporarily disregarding* pattern. WTO defendants show remarkably less disregarding behavior than GATT defendants (4 out of 11 cases opposed to 4 out of 32 cases). In the 1980s, nearly half of the defendants displayed temporarily disregarding behavior by not or only partially implementing what had been agreed upon, for instance when the panel requested the US – unsuccessfully – to abolish the import ban for sugar from Nicaragua.<sup>15</sup> In 1986 the US refused to adopt a panel report on certain regulations that affected the import of wine from the EC. They argued that the EC had to adopt other reports on wine and pasta products first.<sup>16</sup> This kind of retali-

<sup>14</sup> The Evening Post, 24.12.1998

<sup>15</sup> GATT L/5607 31 S/67; GATT C/M/188; GATT C/152

<sup>16</sup> GATT SCM/71 39S/436; GATT SCM/M/31

tory action is absent today. From time to time, however, the infamous cases on bananas and hormones being obvious examples, defendants refuse to implement a ruling, or try to implement it in an unacceptable way. This kind of apparently tactical behavior occurs under the WTO less frequently but can still be observed.

These empirical results lead us to the conclusion that in the field of international trade the behavior of OECD member states has become more judicialized over time. While a moderate trend towards judicialization is already noticeable under GATT, nowadays a court-like procedure is mostly accompanied by patterns of *continuously avoiding* and *continuously following* behavior, both of which are in conformity with the rules of international trade. At the same time, *temporarily disregarding* behavior has decreased quite substantially.

#### **4 STATES' DISPUTE SETTLEMENT BEHAVIOR IN THE UN**

Turning now to international security, we investigate whether and to what extent states use the Security Council to settle disputes. Specifically, we are interested in inter-state disputes over alleged threats to peace. The United Nations Charter assigns the UN Security Council the primary responsibility for maintaining international peace and security. The Security Council's role has become much more visible, and more effective, since the end of the Cold War, and indeed, many scholars expected the Council to finally perform its role as envisioned in the UN Charter (Bennett/Lepgold 1993). A prime example was the coordination by the Council of the international response to Iraq's annexation of Kuwait (Hurrell 1992). Striking failures, such as its inability to offer a timely response to the genocide in Rwanda, dampened these expectations as early as the mid-1990s. Today, criticism centers on issues of legitimacy and effectiveness. Moreover, the unilateral US invasion in Iraq in 2003 highlighted the limits of the UN collective security system. So the question of how the Security Council fulfils its function of maintaining international peace by settling disputes is, again, highly relevant.

If conflicting parties are unable or unwilling to reach a settlement, they are called upon to refer the matter to the Security Council.<sup>17</sup> The dispute settlement mechanism provided by the Security Council is by no means court-like but a body based on diplomacy. There has been no formal change in procedure since the UN was founded. *Access*

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<sup>17</sup> The Security Council may also investigate any dispute and make recommendations in its own right at any time. However for the purposes of this study we are only concerned with instances in which a state referred a dispute to the Security Council.

to the adjudication procedures of the Security Council is limited to states only.<sup>18</sup> The Council may then take up the referred matter, but does not have to. The body consists of five permanent members (China, France, Russia, UK, and the USA) and ten additional members elected on a rotating basis. Delegates to the Council are state envoys who represent their respective country's foreign policy. For this reason, the level of the Council's *independence* is low. In fact, it was designed as a political body. Consequently, the Council has also a political *mandate* when it comes to decision making. It is supposed to act with a view to settling disputes by making recommendations or even mandating appropriate measures. Council members have to respect the principles of international law, but their decisions are based on political considerations – not on legal reasoning. The permanent members are vested with veto power, which is the main *procedural obstruction* because it enables some Council members to block unwelcome decisions single-handedly. The Security Council can authorize UN member states to impose *sanc-tions* on states found to be threatening peace. But again, any of the permanent members can obstruct such an authorization.

To analyze judicialization with regard to actual state behavior we identified 29 disputes that states defined as threats to peace in the two time periods under investigation. Fourteen disputes arose between 1974 and 1983, and 15 disputes during the 1990s. There is no formal definition as to what kind of crisis constitutes a situation or dispute in the sense of the UN Charter. Instead, this study is based on complaints by states to either the President of the Security Council or the UN Secretary-General in which states expressed their concern that a situation was threatening international peace and security. We look first at dispute resolution patterns in instances in which OECD countries accused a state of threatening peace, and then at patterns of disputes in which OECD countries were accused of the same. By studying the actual behavior of the states we find some indications of more judicialized behavior in the 1990s as compared to the 1970s/80s. However, we also find significant differences in the behavior of OECD countries depending on the role they take in a particular dispute.

### **OECD countries as complainants**

Between 1974 and 1983, six disputes were referred to the Security Council by at least one OECD country, and in the 1990s nine disputes. We distinguish three patterns of conflict resolution for OECD countries when acting as complainants (see Figure 3). The first pattern features *continuously following* behavior. This pattern, a strong indicator for

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<sup>18</sup> The UN Charter also grants the UN Secretary-General the right to bring any matter which may threaten international peace to the attention of the Security Council. So strictly speaking there is one individual in the world who in his professional capacity has the same right as states.

judicialized dispute settlement, did increase slightly over time. While in the 1970s/80s states continuously followed procedures in only two out of six cases, they did so in four out of nine cases in the 1990s. The best known case is the international opposition to Iraq's annexation of Kuwait in 1990. Under the United States' leadership, the dispute was brought before the Security Council in the complaints phase.<sup>19</sup> In the adjudication phase the complaining parties put their views on the dispute to debate in the Security Council and rallied for support from other states. The Council passed the resolution introduced by the complainants (and other states), demanding Iraq's immediate withdrawal from Kuwait. When in the implementation phase Iraq failed to comply with the demand, the complainants increasingly built up pressure on Iraq through additional Council resolutions. In the enforcement phase, the complainants requested the Security Council to authorize military measures to enforce economic sanctions imposed by the Council against Iraq. Eventually the complainants went again to the Council requesting authorization for a all-out war to oust Iraqi troops from Kuwait. The complainants also displayed following behavior by keeping their subsequent enforcement mission within the given UN mandate.

The second pattern we find is *following, then avoiding* behavior. We observe a decrease in frequency of this pattern over time. Half of all disputes (3/6) between 1974 and 1983 fall into this category, but only one in the 1990s.<sup>20</sup> This pattern is defined by a lack of settlement within the Security Council framework. Some of these disputes were settled by negotiations outside the Security Council. For instance, Iceland complained to the Security Council about British naval operations in its waters in 1975.<sup>21</sup> At a Council meeting both parties exchanged their views on the legitimacy of Iceland's extension of its maritime borders but could not resolve the issue. Both parties negotiated an agreement outside the Security Council which they implemented in late 1976 (Thór 1995).

Finally, we find the *following, then disregarding* pattern. Its frequency has increased over time, occurring once in the 1970s/80s, but three times in the 1990s. The United Kingdom brought the tense situation over the Falkland Islands (Malvinas) between Argentina and itself before the Security Council and introduced a draft resolution to the Council in spring 1982. While following the procedures in the complaints and adjudication phases, the UK showed avoiding behavior in the implementation phase and then disregarding behavior in the enforcement phase. The UK organized multilateral economic sanctions against Argentina outside the Security Council framework (Martin

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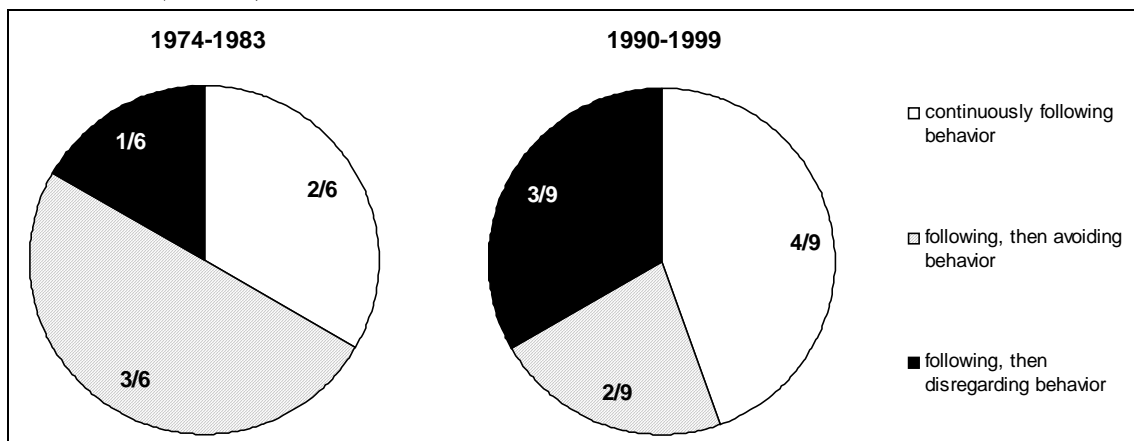
<sup>19</sup> Letter dated 2 August 1990 from the United States of America to the President of the Security Council, S/21424.

<sup>20</sup> Another case from the 1990s is most likely to fall into this category eventually: Greece and Turkey are currently engaged in bilateral negotiations on their Aegean border but have not yet come to an agreement.

<sup>21</sup> Letter dated 12 December 1975 from Iceland to the President of the Security Council, S/11907.

1992). In early April 1982 the United Kingdom dispatched a large task force to the South Atlantic. After several failed attempts at mediation, the UK finally engaged Argentina in war. The UK disregarded the Security Council, using its privileged position as a permanent member to water down resolutions and vetoing a call for a cease-fire. In the three disputes during the 1990s, the OECD countries disregarded procedures at least partially. The enforcement of no-fly zones over Northern and Southern Iraq to protect civilians exceeded the mandate of Security Council Resolution 688. The Western coalition states justified this measure on the grounds of Security Council decisions, but disregarded procedures by not explicitly requesting a mandate. With regard to Bosnia, the OECD countries for the most part acted in accordance with Security Council resolutions and supported UN attempts to end the war. In summer 1995, however, the Western complainants decided to adopt a more interventionist strategy mainly developed outside the Security Council (Weller 1996). In August, they started bombings by NATO forces to pressurize the Bosnian parties into peace talks. In the Kosovo crisis the Western complainants did not seek a UN mandate at all (Heinbecker 2004). Instead they built up military pressure through NATO and eventually started a bombing campaign. In all these disputes the complainants knew they would not be able to secure Russia's support for a military enforcement measure in the Security Council. So rather than flouting a vetoed Council decision, they opted to take their decisions outside the Council.

Figure 3: Patterns of dispute settlement when OECD countries are complainants (UN SC)



Overall, when comparing patterns of conflict resolution by OECD countries as complainants in the 1970/80s to the 1990s we find no clear trend towards judicialization. While there is an increase in frequency of the *continuously following* pattern for OECD countries acting as complainants, this increase does not occur at the expense of disregarding behavior. Still, the increase of the most judicialized pattern *continuously following* indicates some judicialization because OECD states followed procedures in all analytical phases in four out of nine disputes in the second period as compared to two out

of six disputes in the first. From the structured case descriptions we also know that states followed procedures more often in more phases of dispute settlement in the 1990s than they did in the 1970s/80s. Moreover, in the 1990s disputes are dealt with longer within the Security Council framework than in the 1970s/80s. At the same time, there is also an increase in the *following, then disregarding* pattern. Nonetheless, OECD states adhere to the UN Charter with regard to requesting authorization of military enforcement measures at least in some disputes in the post-Cold War environment, which was not at all the case during the Cold War. In two out of five disputes running through the enforcement phase in the 1990s, the complainants followed procedure by first requesting Security Council authorization and keeping the enforcement mission within the given mandate, as the liberation of Kuwait and the attempt to halt the genocide in Rwanda show. Both patterns increased in the 1990s at the expense of the *following, then avoiding* pattern.

### **OECD countries as defendants**

A comparison of the nine disputes between 1974 and 1983 in which charges were made against OECD countries with the six disputes between 1990 and 1999 does not reveal a trend towards more judicialized behavior among OECD countries when in the role of defendant. Interestingly, each of the complaints was directed against one of the permanent Security Council members.

When looking at OECD countries as defendants in the Security Council we find only two patterns (see Figure 4). One pattern features first *following, then avoiding* behavior. The frequency of this pattern is considerably lower in the 1990s. In the 1970s/80s seven out of nine disputes fall into this category as opposed to three out of six disputes in the 1990s. The defendants followed procedure only in the complaints phase. They accepted charges made against them in the sense that they did not make threats or take actions against the respective complainant. However, they always displayed *avoiding* behavior in the subsequent phases. The pattern *following, then avoiding* embraces two possible courses of dispute resolution: either states fail to arrive at any form of settlement, or they negotiate a settlement outside the Security Council. In the first course, the defendants either veto draft resolutions tabled in the Security Council because the draft resolutions denounce their foreign policy actions (four times), or the complaining party fails to introduce a resolution in the first place (three times). The Mayotte question exemplifies this course. This was a dispute over the territory of the newly independent island state Comoros. France had promised independence to the entire archipelago of its colony, but when the inhabitants of one of the islands, namely Mayotte, voted against independence in a referendum, France refused to let Mayotte become part of Comoros.

The Comoros accused France of endangering its territorial integrity and brought the matter to the Security Council in early 1976.<sup>22</sup> France did not obstruct the complaint, but vetoed a draft resolution calling on France to respect the sovereignty, unity, and territorial integrity of the Comoros. The French veto ended all attempts to settle the matter in the Security Council. Such courses occurred five times in the 1970s/80s, but only twice in the 1990s. Moreover, OECD countries used their veto only once in the 1990s. Two disputes from the 1970s/80s and one from the 1990s were dealt with in negotiations outside the Security Council. The Cod War between Iceland and the United Kingdom, a dispute over Iceland's maritime border and related fishing rights, followed the other course. Iceland complained about British naval operations in its (newly extended) coastal waters. The UK accepted Iceland's right to complain to the Security Council and participated actively in the ensuing Council meeting. As the meeting failed to produce any agreement, the parties eventually took up negotiations mediated by Norway and NATO officials. They concluded a bilateral agreement which both sides implemented. One dispute each from the 1970s/80s and the 1990s was dealt with by the United Nations General Assembly (GA). The Security Council can use a procedural vote to refer matters that it cannot decide upon because of a veto to the GA. The GA can then pass a resolution in lieu of the Council. When Nicaragua protested against the US intervention in Grenada in 1983, the United States vetoed a tabled resolution denouncing their action. Within days the GA passed a resolution by an overwhelming majority calling for the withdrawal of US troops from Grenada. The same happened in response to the US intervention in Panama in 1990.

The second type of observed state behavior fits the *continuously avoiding* pattern best. There is a complaints phase in which a state accuses an OECD country of threatening international peace, but there are no subsequent phases. Disputes are neither put on the Security Council agenda nor dealt with outside the Council. This pattern occurred in two out of nine disputes in the 1970s/80s and three out of six disputes in the 1990s. So the proportion of this pattern has increased over time. For instance, Sudan alerted the Security Council to the US bombing of a Sudanese plant in 1998.<sup>23</sup> The United States argued they had bombed the plant to destroy chemical weapons used by terrorists, while Sudan maintained the plant had produced pharmaceutical drugs. This matter was not formally dealt with by the Security Council. One should bear in mind that permanent members wield great influence over the Council agenda (Wallenstein/Johansson 2004: 23). It is very likely that the US used their influence to keep this issue off the agenda

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<sup>22</sup> Telegram dated 28 January 1976 from the Head of State of the Comoros to the President of the Security Council, S/11953.

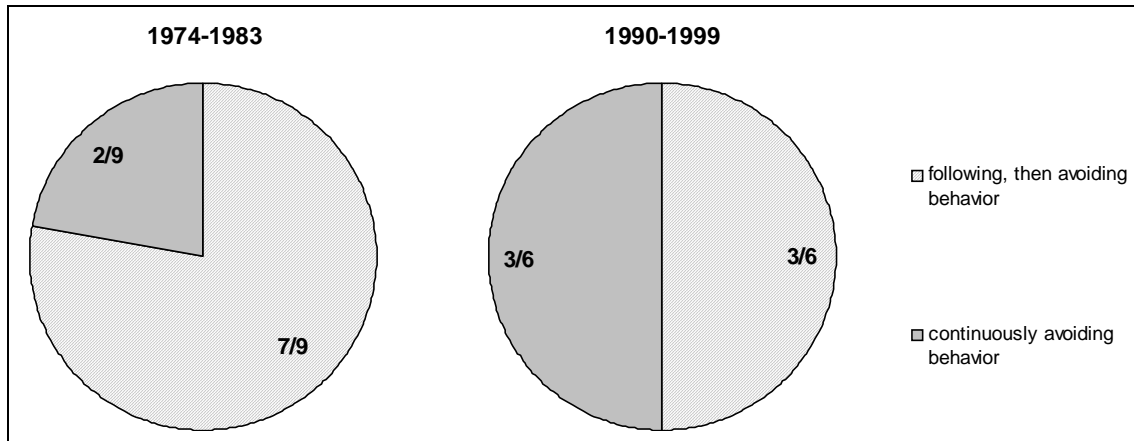
<sup>23</sup> Letter dated 21 August 1998 from Sudan to the President of the Security Council, S/1998/789.



despite repeated complaints by Sudan. In fact, the US as the defendant in this dispute, the US completely avoided dealing with the Sudanese charges. Nor did Sudan and the US enter official bilateral negotiations. In sum, the US displayed avoiding behavior in the complaints phase by ignoring the charges and refusing to settle the issue. All disputes showing this pattern relate to charges made by non-OECD countries against the US.

We find an increase in the *continuously avoiding* pattern in the 1990s as compared to the *following, then avoiding* pattern predominantly followed by OECD countries in the 1970s/80s. This shift does not indicate a judicialization of dispute settlement behavior. In fact, there is not a single instance of dispute settlement in conformity with Security Council procedures. Non-OECD countries were never successful in achieving a Security Council decision against an OECD country. Additionally, less than half of the disputes were settled at all in either period under investigation. The conflicts resolved were dealt with through negotiations outside the Council.

Figure 4: Patterns of dispute settlement when OECD countries are defendants (UN SC)



No formal change has been made to the Security Council procedure. Its framework for adjudicating threats to peace shows only a low degree of judicialization. Summarizing our findings for OECD countries both as defendants and as complainants, we find no move towards judicialization within the realm of international security. Only one pattern of behavior can be identified for both complainants and defendants: *following, then avoiding* behavior. As complainants, OECD countries also display *continuously following* as well as *following, then disregarding* behavior in some instances. As defendants, OECD countries' behavior features only patterns that include *avoiding* behavior.

## 5 STATES' DISPUTE SETTLEMENT BEHAVIOR UNDER CITES

Finally, we analyze states' dispute settlement behavior in international environmental affairs. Many authors claim that the Convention on International Trade in Endangered Species (CITES) provides one of the most effective dispute settlement procedures in

this issue area because it allows trade sanctions in cases of non-compliance (Reeve 2002; Sand 1997; Young 2003). Others, however, point to major shortcomings in the procedure and call for institutional reforms to address these problems (Hutton/Dickson 2000, Curlier/Andresen 2002).

CITES was created in 1975 to regulate problems arising out of the flourishing international trade in endangered species and products such as furs, ivory etc. Member states are bound by the Convention to control the import, export and transit of all species that are listed in three appendices, according to their threat of extinction (Wijnstekers 2003).<sup>24</sup> CITES provides a compliance procedure that can be used by interested actors as a dispute settlement procedure. The procedure features a medium level of judicialization. *Access* is open to anyone, member states as well as NGOs and interested individuals may lodge a complaint to the Secretariat. The procedure is set in motion when the Convention Secretariat receives information that a party is not adequately implementing the Treaty. However, the decision to start investigations is reserved to the Secretariat, which may also investigate on its own initiative. The degree of political *independence* of the dispute settlement body is also comparatively high. The Secretariat is not only responsible for initiating investigations but also for deciding on cases. It is made up of international civil servants who are formally independent of any disputing party. The *mandate* of the CITES procedure is rather weak, since its recommendations are not legally binding and the product of a somewhat opaque procedure. The Secretariat has a large degree of discretion in interpreting the provisions of the treaty, and it is not bound to judicial norm interpretation. In terms of *procedural obstructions* the procedure is judicialized only to a low degree, since disputing parties can obstruct the procedure. If a member state ignores recommendations made by the Secretariat, the latter can bring a case either to the Conference of Parties (CoP) or to the Standing Committee<sup>25</sup>, which decides on the matter from then on. Both the CoP and the Standing Committee are political bodies composed of state representatives. If a defendant state is able to organize a majority in these bodies, it can water down decisions of the Secretariat. In respect of *sanctions*, the procedure features a high degree of judicialization, since the CoP and the Standing Committee may recommend trade sanctions to penalize non-compliance. The

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<sup>24</sup> Currently there are 5,000 animal species and 28,000 plant species listed. To control trade with these species member states have to conduct effective border controls and adequately punish trafficking offences. Additionally they have to designate a Management Authority that issues import/export licenses and a Scientific Authority that monitors trade effects on the status of species. The effectiveness of the whole treaty depends heavily on the implementation of these measures both in producer and consumer countries.

<sup>25</sup> The Standing Committee has existed since 1987. Its forerunner was the Technical Experts Committee, established in 1979 and renamed Technical Committee in 1983.

imposition of sanctions consists of recommending all parties not to accept trade permits for CITES species originating from the sanctioned country.

To analyze changes in the factual behavior of states in respect of this procedure, we selected disputes concerning regular and systematic violations of the treaty. In order to compare state behavior, we selected disputes from two time periods, the first being from 1978-87, and the second (which saw some minor changes to the procedure) from 1988-97. The disputes we selected concerned allegations that states were disregarding their obligations to conduct border controls, punish trafficking and designate a Management and a Scientific Authority. We used newspapers, publications of TRAFFIC (an NGO specialized in monitoring species trade) and reports of the CITES Secretariat to find such allegations. This approach produced a list of 12 cases in the period from 1978 to 1987 and 10 cases from 1988 to 1997.<sup>26</sup> We first look at dispute patterns of OECD countries when they are complainants. Then we analyze dispute patterns of OECD countries accused of violating CITES rules.

### **OECD countries as complainants**

State complaints against other member states are relatively rare in CITES. However, while most complaints are lodged by NGOs, occasionally OECD states support NGO complaints or initiate them on their own. OECD states acted as complainants in 5 cases from the 1970s/80s and in 5 cases from the 1980s/90s. We were not able to observe a change in judicialization from the 1970s/80s to the 1980s/90s. OECD states' behavior as complainants was judicialized to a very high degree over both time periods.

In the majority of our cases complaining states behaved according to the *continuously following* pattern. We observed this pattern in all (5 out of 5) cases in the 1970s/80s and in 4 out of 5 cases in the 1980s/90s. In some cases *continuously following* behavior by complaining states consisted of simply forwarding a complaint to the Secretariat and then refraining from further activities. The dispute between France as complainant and Argentina as defendant may illustrate this behavior. First, complaints concerning inadequate border controls and the forgery of CITES export licenses in Argentina were submitted by TRAFFIC to CITES in 1986.<sup>27</sup> France became involved as complainant by sending forged Argentinean export licenses to the Secretariat (CITES 1989: 555). During the complaints and adjudication phases, however, France did not carry out any further activities. The same holds true when Argentina was judged guilty

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<sup>26</sup> The number of cases is relatively low because allegations often concern state performance in general, so that only one dispute per state results. However, some allegations also concern more specific problems like trade in free ports or the turtle trade, so that some states are on the list more than once.

<sup>27</sup> TRAFFIC (USA), Volume 7, No. 1, June 1986, p. 1, 7-8.

in July 1987 and disregarded the decision to strengthen border controls and clamp down on fraud. Also in the implementation phase France refrained from any activity.

However, complaining states can also show much more determination when *continuously following* CITES procedures. In some cases they employed unilateral trade sanctions which are not ruled out under CITES. In fact, the treaty explicitly allows all member states to impose stricter trade restrictions for CITES species than agreed by the Conference. This provision was used by the European Union (EU) when acting as complainant in a dispute with Indonesia.<sup>28</sup> In early 1990 it was reported that Indonesia exceeded its national export quota and that trafficking was not being adequately punished (CITES 1996: 522). The EU and TRAFFIC followed the procedure in the complaints phase by bringing their allegations to the Secretariat. In the adjudication phase no progress was made and Indonesian authorities ignored several letters from the Secretariat. The EU therefore began to stop the import of Indonesian CITES species in December 1991 (Reeve 2002: 126). The EU's unilateral trade sanctions were imposed before the Secretariat had come to any conclusions on the case. Nevertheless, since unilateral trade restrictions are allowed, the EU still followed the procedure. In 1992 the Secretariat published its decision that Indonesia should stop exceeding its national export quota and punish trafficking more strictly. The EU still followed the procedure and upheld its sanctions in the implementation phase. As Indonesia did not implement the decision the Standing Committee recommended collective trade sanctions in February 1995. Now the EU's sanctions were supported by a large number of CITES member countries which restricted the import of Indonesian species as well. Indonesia implemented all the requested measures some months later, so that the Standing Committee decided to lift the trade sanctions.

While complaining states followed the procedure in almost all disputes, there was one dispute involving *continuously avoiding* behavior in the second time period. In February 1990 the United States accused Japan of illegally importing large quantities of wild turtles from the Caribbean.<sup>29</sup> Although Japan had entered reservations for two contested turtle species,<sup>30</sup> the United States alleged publicly that Japan was violating CITES rules. However, the US avoided the CITES procedure in the complaints phase and demanded directly from Japan that it withdraw the reservation on turtles. As Japan refused, the US Pelly Amendment procedure, which enables the US President to apply trade sanctions, was initiated. In the adjudication phase, Japan and the US entered into

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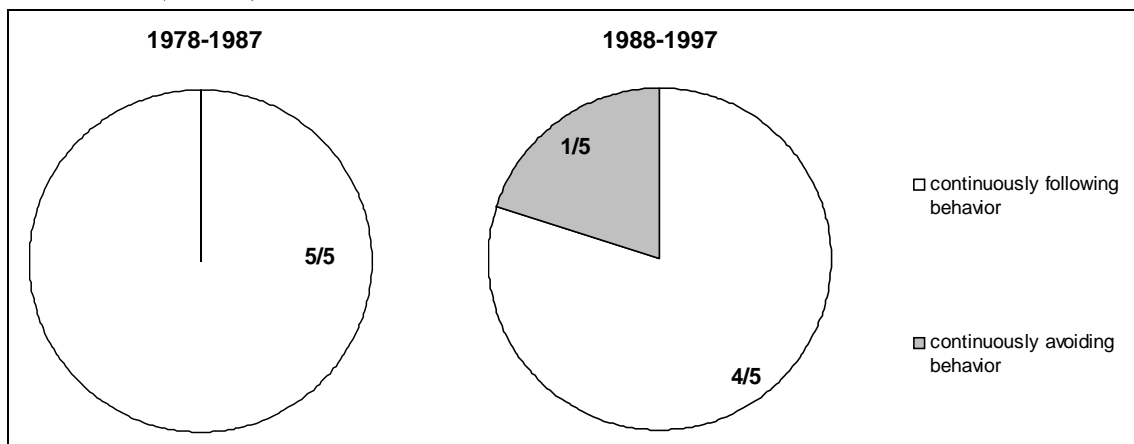
<sup>28</sup> The European Union is not an OECD country, but it was counted as a collective of (mainly) OECD countries.

<sup>29</sup> Washington Post, 18.2.1990.

<sup>30</sup> If a member state has entered a reservation it is formally treated as a non-Party with respect to trade in the species concerned.

bilateral negotiations and thereby further avoided the procedure.<sup>31</sup> This avoidance continued during the implementation phase, when the US decided unilaterally that they would not accept any compromise. In March 1991, the US Department of Commerce issued a certification in accordance with the Pelly amendment procedure, which enabled the President to apply trade sanctions within 60 days.<sup>32</sup> This opened the enforcement phase, in which bilateral negotiations continued until three days before the ultimatum expired. At this point Japan agreed to withdraw its reservation for the two turtle species. The conflict was eventually resolved through *continuously avoiding* behavior.

Figure 5: Patterns of dispute settlement when OECD countries are complainants (CITES)



Overall, the level of judicialization was equally very high over both time periods under examination. There was a slight decrease in the *continuously following* pattern, which represented 5 out of 5 cases in the 1970s/80s and but only 4 out of 5 cases in the 1980s/90s. The *continuously avoiding* pattern increased slightly. However, both patterns indicate judicialized behavior, since *avoiding* behavior does not violate the CITES dispute settlement procedure.

### OECD countries as defendants

Turning to the behavior of OECD countries as defendants, we analyzed 10 cases in the 1970s/80s and 7 cases in the 1980s/90s. In all these cases OECD countries were accused by NGOs or other states of violating CITES rules. Like the behavior of complainants, the dispute behavior of defendants shows no increasing or decreasing tendencies in judicialization. The degree of judicialization for both time periods remains on a comparable level which is, however, much lower than that of complainants.

<sup>31</sup> Los Angeles Times Service, 21.3.1991.

<sup>32</sup> Washington Post, 21.3.1991.

The most frequent pattern of behavior among defendants is the *temporarily disregarding* pattern. We observed this pattern in 6 out of 10 cases in the 1970s/80s and in 4 out of 7 in the 1980s/90s. This constitutes a comparable level in both time periods (60% and 57% respectively). In some of these cases, the defendant state disregarded the procedure only at the beginning of the implementation phase, but eventually followed the procedure by implementing the procedure's decision. In other cases, disregarding behavior occurred already in the implementation phase and extended until the enforcement phase.

The case of French Guyana is an example of *temporarily disregarding* only in the implementation phase. In the early 1980s several Latin American states and NGOs complained about inadequate border controls in French Guyana. France did not react to these allegations in the complaints and adjudication phases. After investigations by the Secretariat the Standing Committee decided in October 1985 that the French CITES management authority had to tighten border controls.<sup>33</sup> Despite a new wildlife law, a Secretariat inspection in 1986 revealed that France had in fact disregarded the procedure (CITES 1989: 567), and no progress had been made. At the Conference of Parties in 1987 there was a heated debate concerning implementation problems in France (as well as Japan and Austria). A proposed resolution against them was diluted because these countries succeeded in removing their names from the resolution (Reeve 2002: 102). However, France reacted to this political pressure and conducted more effective border controls, so that the Secretariat in 1988 acknowledged following behavior.<sup>34</sup>

In another case, Italy already disregarded the procedure in the adjudication phase. After complaints by Canada, Switzerland and TRAFFIC concerning a number of implementation deficits, the Secretariat started investigations in 1989 (CITES 1996: 521). Italy followed the procedure in the complaints phase, since it accepted the complaint without reaction. However, in the adjudication cooperation was demanded, but Italy did not respond to information requests by the Secretariat.<sup>35</sup> This disregarding behavior continued during the implementation phase, when Italy failed to implement the decision from November 1990 that it had to pass new wildlife legislation and tighten border controls. In late 1991 the Standing Committee threatened to recommend trade sanctions. Italy ignored these threats as well and continued its disregarding behavior. Only when trade sanctions were effectively decided, two years later, did Italy react.<sup>36</sup> Italy now switched to following behavior, implementing new wildlife laws and tightening border

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<sup>33</sup> SC/13, p. 6.

<sup>34</sup> Reuters News, 11.8.1988.

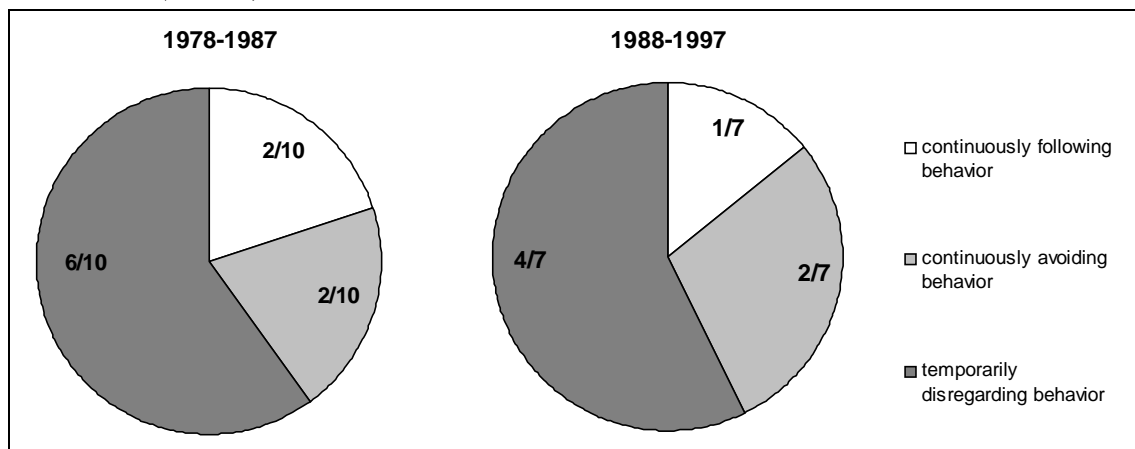
<sup>35</sup> SC.24.7.

<sup>36</sup> SC/28, SC/29.

controls. In response to this progress sanctions were lifted by the Standing Committee in March 1995.

Besides the *temporarily disregarding* pattern we also observed disputes characterized by the *continuously following* pattern. However, only 2 out of 10 disputes in the 1970s/80s and 1 out of 7 disputes in the 1980s/90s fall into that category. This constitutes a slight decline in frequency for this pattern. For example, Germany was accused in 1980 by Uruguay and TRAFFIC of regularly accepting export licenses for wild cat furs which had not been issued by the competent authorities (CITES 1982: 709). The Secretariat investigated the case and Germany followed the procedure by responding to information requests and offering arguments in defense of its practice. However, the Secretariat came to the conclusion that the allegations were true and that Germany had to change its practice. The Secretariat also reported this decision to the Conference of Parties in February 1981. In the implementation phase Germany denied that it had violated the Treaty in the past (CITES 1982: 412). But for the future it approved a list of institutions whose export licenses would henceforward not be accepted, thereby following the procedure correctly.

Figure 6: Patterns of dispute settlement when OECD countries are defendants (CITES)



The incidence of *continuously avoiding* behavior among defendant states increased slightly from 2 out of 10 disputes during the first time period to 2 out of 7 disputes in the second period. To cite an example: New Zealand was accused in April 1997 by TRAFFIC Oceania of being a laundering place for illegally imported birds from Australia.<sup>37</sup> Instead of bringing the case to the CITES Secretariat, TRAFFIC decided to enter into a dialogue with the government. New Zealand's behavior in the complaints and adjudication phase was avoiding as well, since it accepted TRAFFIC as a negotiating

<sup>37</sup> Agence France-Press, 29.4.1997, New Zealand Herald, 30.4.1997.

partner. The government identified legislative shortcomings on the basis of a TRAFFIC report and decided to resolve the problem. In the implementation phase, which started in may 1998, New Zealand implemented this decision and amended the Trade in Endangered Species Act.<sup>38</sup> TRAFFIC was satisfied with this solution, and the whole conflict was thereby resolved through avoiding behavior.

Overall, where OECD states acted as defendants, there is no increasing or decreasing trend in judicialization. The main pattern, *temporarily disregarding* behavior, occurred comparably often in both time periods. The *continuously following* pattern decreased slightly, while the *continuously avoiding* pattern increased slightly. However, these shifts are so negligible that they do not constitute a trend.

Summarizing our analysis of complainants *and* defendants, we can conclude that there is no trend towards judicialization. Rather, we find that judicialization remains at the same level over both time periods. There has been no formal change in the dispute settlement procedure. Complaining states' behavior remained very highly judicialized over both time periods, while defendant states' behavior was only judicialized to a medium degree in the 1970s/80s and in the 1980s/90s. Interestingly, the behavior of complaining states is much more judicialized than the behavior of defendant states. The high degree of judicialization in complaining states is only because unilateral sanctions are not ruled out. Since trade restrictions on CITES species have proven to be highly effective, there is no incentive for the complainant to go beyond that measure and disregard the procedure. By contrast, defendant states' behavior is much less judicialized in both time periods. The high incidence of the *temporarily disregarding* pattern testifies to severe problems in bringing states into compliance with procedural rules.

## 6 CONCLUSION

International trade liberalization, security issues and the protection of endangered species are just three examples of issue areas in international relations in which IDSPs exist. Against the rather general optimism of those who expect legalization to tame international politics as well as of those who do not share this view, a closer look at these examples shows that the judicialization of state behavior varies over issue areas and over time. These findings – discussed in more detail below – expand the debate on legalization. They serve as a reminder to look at the wide range of issues in international politics before jumping to conclusions. While the legalization in the WTO context is truly remarkable it is not necessarily the future of the role of law in international politics. We just started to unveil the bigger picture. We would benefit from more studies on

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<sup>38</sup> Evening Standard, 29.5.1997, Evening Standard, 6.2.1999.



different issue areas and from posing some different questions such as what makes the WTO a special case or why states choose IDSPs sometime but not others.

Our investigation clearly illustrates that there are different patterns of states' dispute settlement behavior in these three issue areas. In comparison, dispute settlement in international trade is at the vanguard of international judicialization. Looking at the issue areas of security and the environment it becomes clear that sometimes OECD countries are hesitant to use IDSPs, especially when their own interests are at stake. While they frequently refer disputes to IDSPs as complainants, after the complaints phase disputing parties often begin to disregard the procedures in subsequent phases. Of course, this also happens in international trade, but only in a minor number of cases. In international security and international trade in endangered species the later phases of a dispute are regularly affected by confrontational, non-judicialized behavior and/or open disrespect for IDSP rulings. This diagnosis is to some extent trivial. Everyone knows that the workings of the UN Security Council often fail and that by and large, dispute settlement in international trade prevents outbreaks of trade wars.

The most interesting result therefore ensues from comparison over time within each issue area. In the 1990s, as compared to the 1970s/80s, there is no uniform trend with regard to the judicialization of dispute settlement behavior – regardless of whether OECD states are complainants or defendants. Under CITES, which gives complainants considerable leeway, complainants almost always act in accordance with the procedures. The *continuously following* pattern is clearly dominant, indicating a constant high degree of judicialized behavior in both time periods. But in the GATT/WTO context a considerable change in complainants' dispute settlement behavior can be observed. Already setting out from a medium level of judicialized behavior in the 1980s, we observe a strong increase in judicialization under the WTO. There is an increase in the *continuously following* pattern and especially in the *following, then avoiding* pattern at the expense of the *temporarily disregarding* pattern. Nowadays, disregarding behavior is virtually non-existent for complainants. By contrast, not much has changed in the UN. Although the overall changes are rather mild, a closer look reveals some interesting changes in complainants' behavior. The *continuously following* pattern increased from the 1970s to the 1990s, which could mean that complainants perceive the procedure of the UN Security Council as a means to lend greater authority to their claims. This is a very inconclusive claim, however, as on the other hand there is a parallel increase in the *following, then disregarding* pattern pointing in the opposite direction. In sum, when comparing the behavior of complainants in different issue areas, OECD countries behave only in the area of international trade more judicialized in the 1990s than in the 1970s/80s, while the degree of judicialization remained high with regard to environmental protection and low with regard to security.

The same is true for OECD countries' behavior as defendants. A remarkable increase in judicialized behavior can be observed for GATT/WTO. There is a strong increase in the *continuously following* pattern and in the *following, then avoiding* pattern at the expense of *temporarily disregarding* pattern. That decrease is not as strong for defendants as it is for complainants, however. With respect to CITES, judicialization remains at the same moderate level in both time periods, showing no trend whatsoever. Comparing the 1970/80s and the 1990s the frequency of *continuously following*, *continuously avoiding* and *temporarily disregarding* patterns remain almost exactly the same. In the area of international security, by contrast, there is some change which could even be described as de-judicialization. Defendants display *avoiding* behavior even sooner in the 1990s than in the 1970s/80s and we never find the *continuously following* pattern. The Security Council hardly plays a role in settling accusations against an OECD country. In terms of defendants' behavior in different issue areas, no clear overall trend towards a more judicialized behavior in international relations can be observed.

This paper has shown that there is no uniform trend towards more judicialized behavior across issue areas, as some voices would want us to believe. But the empirical data confirms there is a clear trend towards judicialization in at least one issue area. What could be the reasons for this mixed trend towards judicialized behavior? And will this trend continue? An informed guess based on evidence from the empirical research undertaken so far leads to three especially plausible explanations and related forecasts.

For GATT/WTO, empirical evidence indicates that states are more willing to use and respect the procedure because in their perception the WTO dispute settlement procedure has become more legitimate and more effective due to institutional changes. In this view the WTO dispute settlement mechanism has gained authority on account of its court-like procedure, which merits more respect than the diplomatic dispute settlement procedure of GATT. If this is indeed the main reason for more judicialized behavior, a constant high degree of judicialized dispute settlement behavior can be expected for the future.

With regard to international security, some analysts have argued the end of the Cold War increased the willingness of states to invoke the UN Security Council. At least the willingness to pursue interests by means of Council rulings is high. But the Council's capacities for restraining unilateral behavior do still not seem very strong. A plausible explanation might be that the cessation of Cold War antagonism strengthened the hegemony of the US and its OECD allies. As hegemon the US and its allies in the OECD world are now able to obtain whatever Security Council decision they want, which increases their incentives to use the Council if it seems helpful. At the same time, however, their hegemonic position allows the US and its allies to ignore the Security Council in cases in which it does not provide their preferred decisions. In this view, as long

as their hegemony lasts OECD states will continue to instrumentalize the Security Council.

Finally, an explanation for the CITES finding could build on an emerging global public. In the face of media attention and active environmental NGOs, states have to at least convey the impression that they are interested in environmental issues. Global public pressure is the most likely explanation for the overall medium level of judicialization in both time periods. However, we were not able to observe increasing judicialization, which is possibly due to the fact that the dispute settlement procedure has not become more judicialized over time. In order to achieve higher levels of judicialization, global public pressure alone is obviously not enough. For the future it can be expected that judicialization in endangered species affairs will remain at the same medium level as long as global public pressure does not go hand in hand with a more judicialized dispute settlement procedure.

In sum, our analysis of dispute settlement behavior reveals a surprisingly differentiated picture of dispute settlement practices. The degree of judicialization varies considerably across issue areas, and initial speculations suggest a trend towards judicialization is not a one-way street in all areas of international relations. Moreover, inferences from one issue area about broader developments in international relations do not seem justified. Whether international law is able to tame politics, as legalization optimists believe, or whether international politics will always dominate the law seems highly dependent on issue-area specific conditions.

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