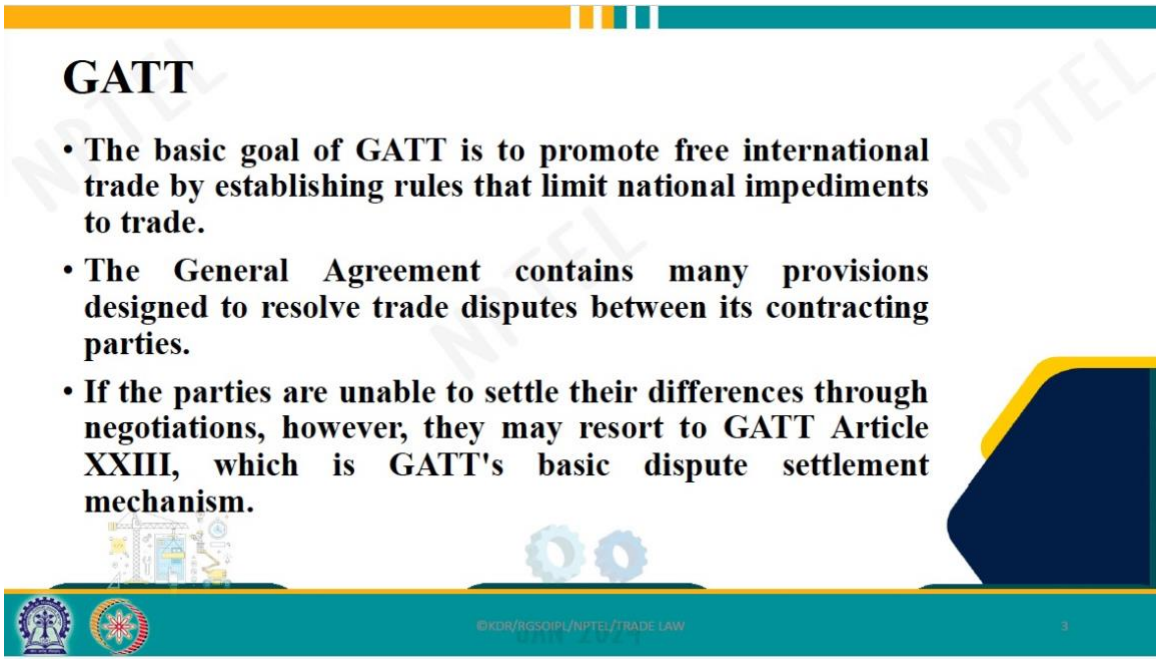
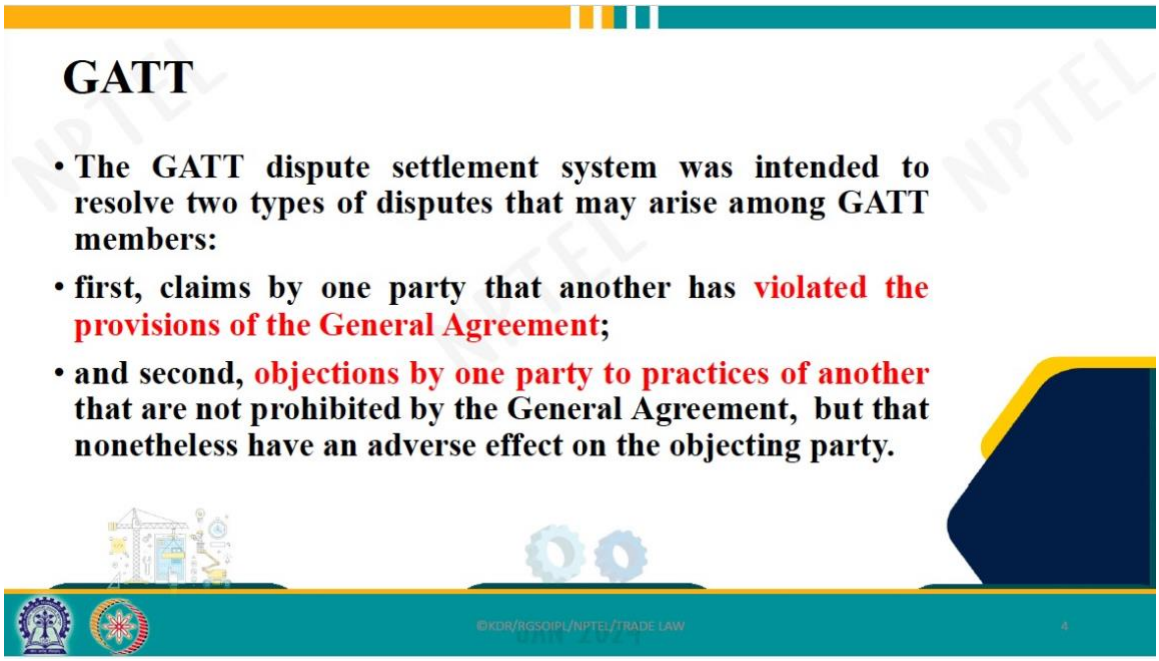
Lecture 31: GATT Dispute Settlement

Dear students and today and in the coming classes, we are going to discuss about the last module of this particular course that is the dispute settlement system. So, the GATT dispute settlement system and the WTO dispute settlement system we are going to discuss in the coming classes. And today we are going to see the GATT dispute settlement system.

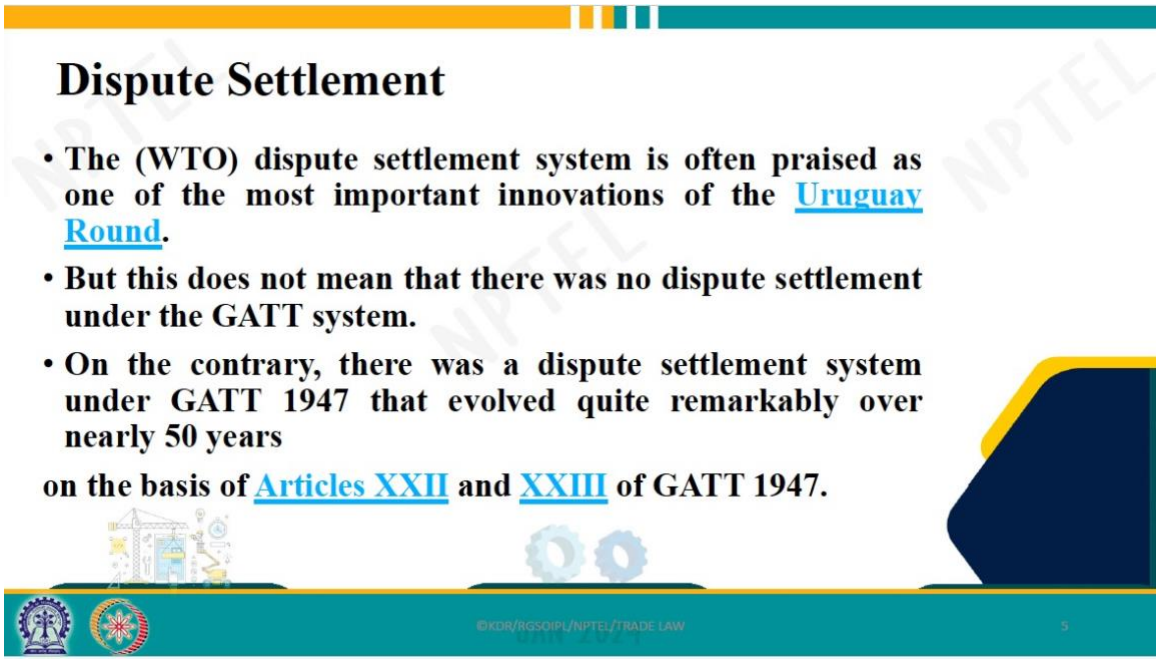
As we know that the dispute settlement system is the cornerstone of every international agreement or arrangement without which and there is if there is no dispute settlement and the parties are going to be not satisfied by this complete system and if the disputes are not resolved then there will be tensions, problems among the members of an international agreement. So, dispute settlement is a necessary mechanism for the amicable resolution of disputes between parties of any agreement. So, today we are going to look into the GATT dispute settlement system and how it is developed from 1947 to Uruguay round of negotiations through the different rounds especially the Kennedy round and Tokyo round and then to the Uruguay round of negotiations.



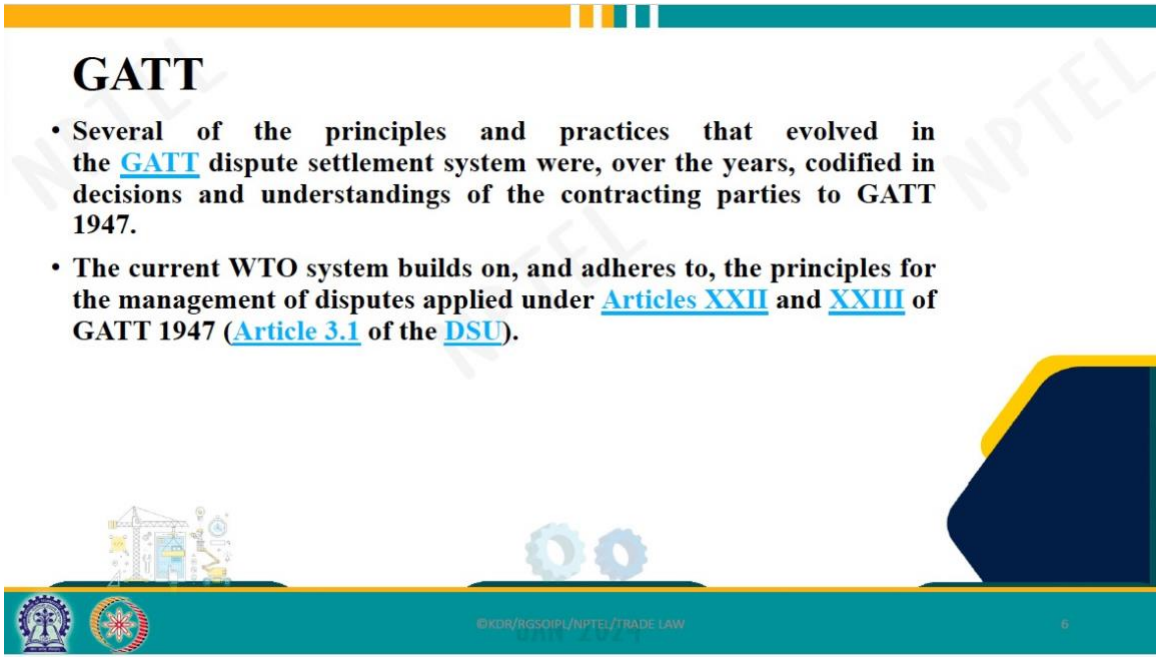
So, the dispute settlement system and which is propounded in GATT was to amicably resolve the disputes between the member countries. The objective of GATT, the single objective was to promote international trade by reducing tariffs and removing impediments to international trade. So, all the tariff and non-tariff measures removal that is happened between the GATT 1947 and the WTO agreement in 1995. So, initially, the GATT was set up as a bundle of agreements to reduce tariffs, and you can see a very rudimentary stage of dispute settlement was provided in the GATT agreement Article 13. So, that was the only provision which talks about dispute settlement and there was no definite mechanism was provided in the GATT dispute settlement system.



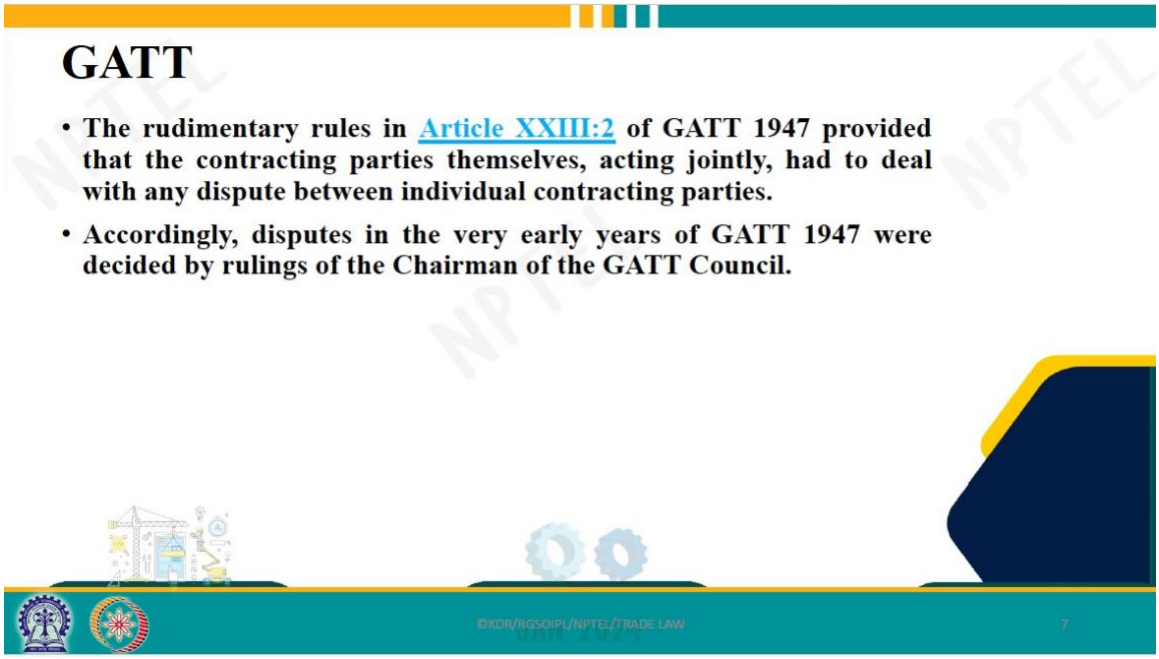
And this basically this particular provision 13 we will see elaborately on article 13, and the basic system was provided to deal with two kinds of disputes among the members and the first was if one party alleges that the other party violated any one of the provisions of the GATT then such parties can complain to the GATT, the GATT council for dispute settlement. And second, if any party, any GATT party made an objection to the practices of another member which was against the GATT agreement or had an adverse effect on the objecting party or the other member, then also they can approach the GATT council for this particular dispute and the GATT council will look into it and will be coming out we will see that are the procedures and mechanisms adopted by the GATT council at that point of time for the dispute resolution mechanism.



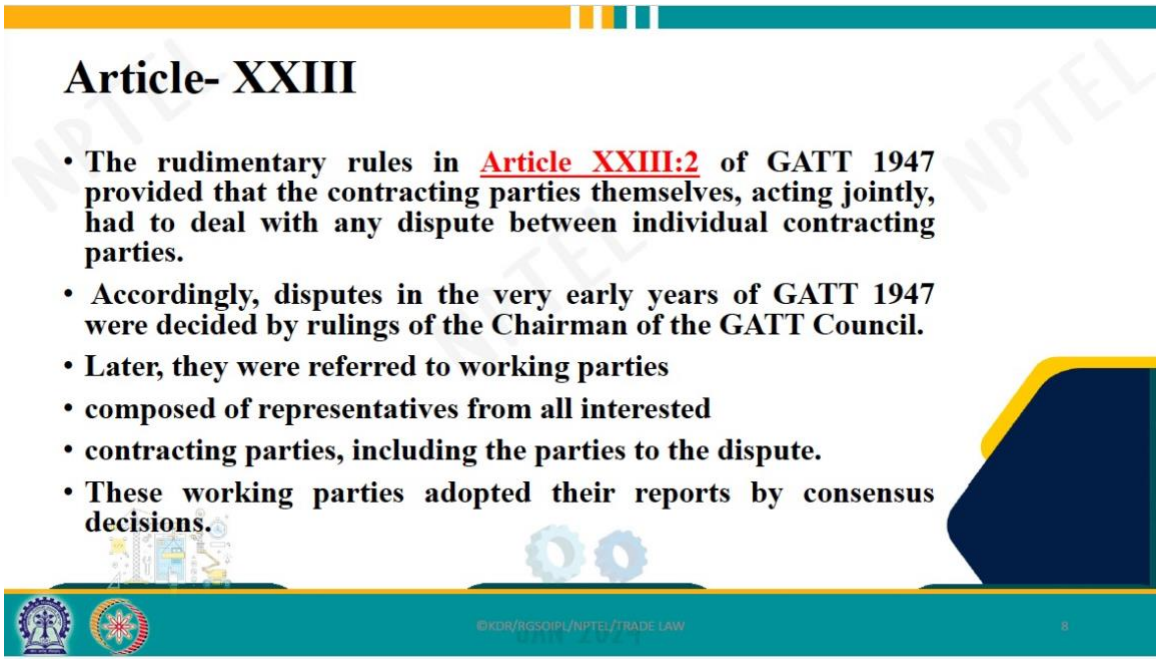
And we can see that dispute settlement, we talked about GATT and WTO there is a lot of differences between these two and the WTO dispute settlement is considered to be very advanced which was developed in the Uruguay Round of Negotiations, the agreement on understanding of the Dispute Settlement Understanding(DSU) which was concluded in the Uruguay Round of Negotiations. So, the GATT system so in the coming classes we will see that how the DSU also works but the GATT system worked for 50 years from the very rudimentary provisions of Article 22 and Article 23. So one provision which you can find.



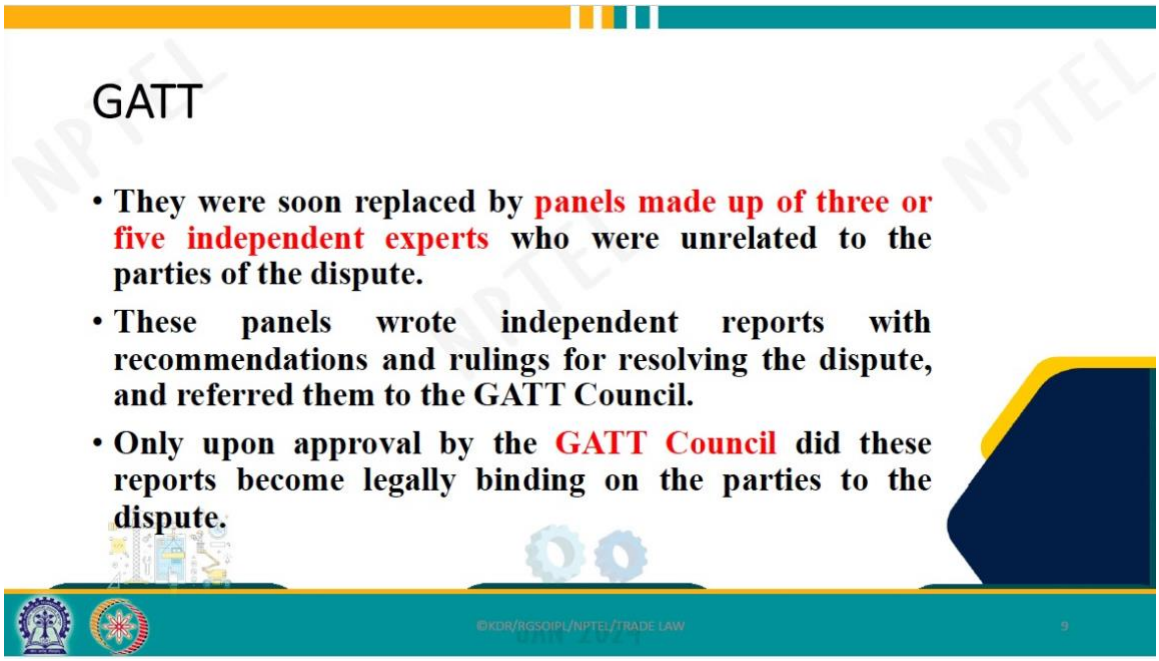
And it is worked for so you can see article 22 and 23. So these provisions which provides clearly the entire management of the dispute settlement under the GATT system and this GATT system was a very simple system of dispute resolution.



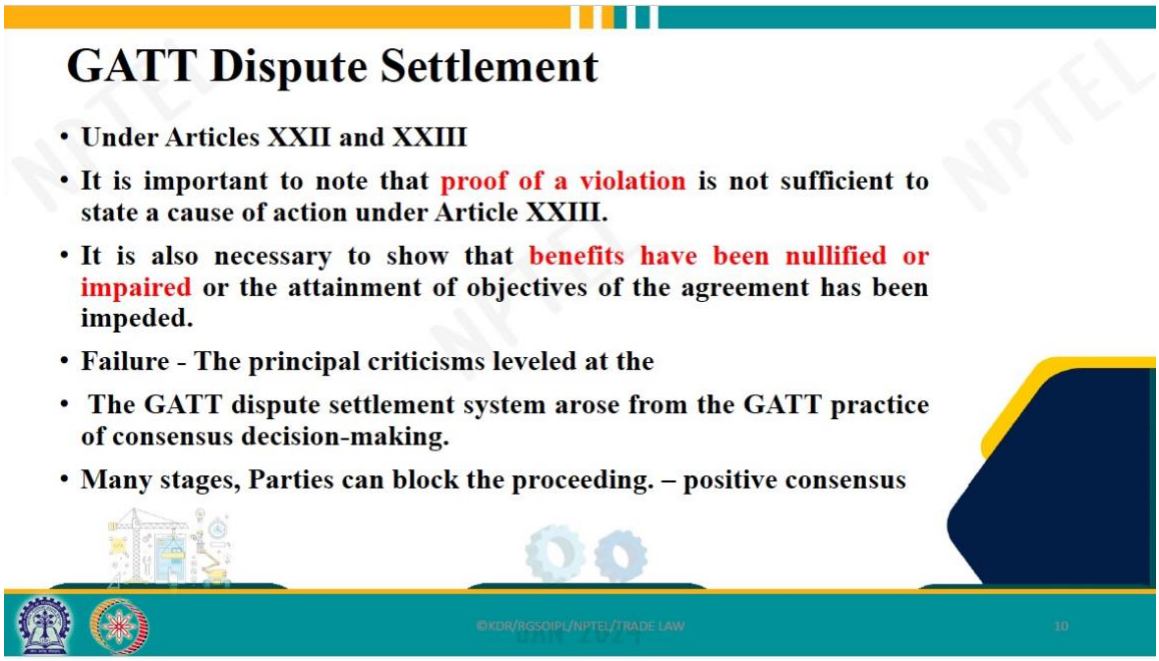
So, Article 23.2 which provides that contracting parties themselves and acting jointly had to deal with any dispute between individual contracting parties. It means that you make a complaint to the GATT council, the members themselves constitute a committee and they will look into the dispute and they decide the case. So that was the preliminary form of dispute settlement, and finally, it will become a ruling by the consent of the chairman of the GATT council. So this was from, 1940 to 1950 and a very rudimentary stage where you sit together and resolve your disputes. That was the method which is adopted up to the 1950s.



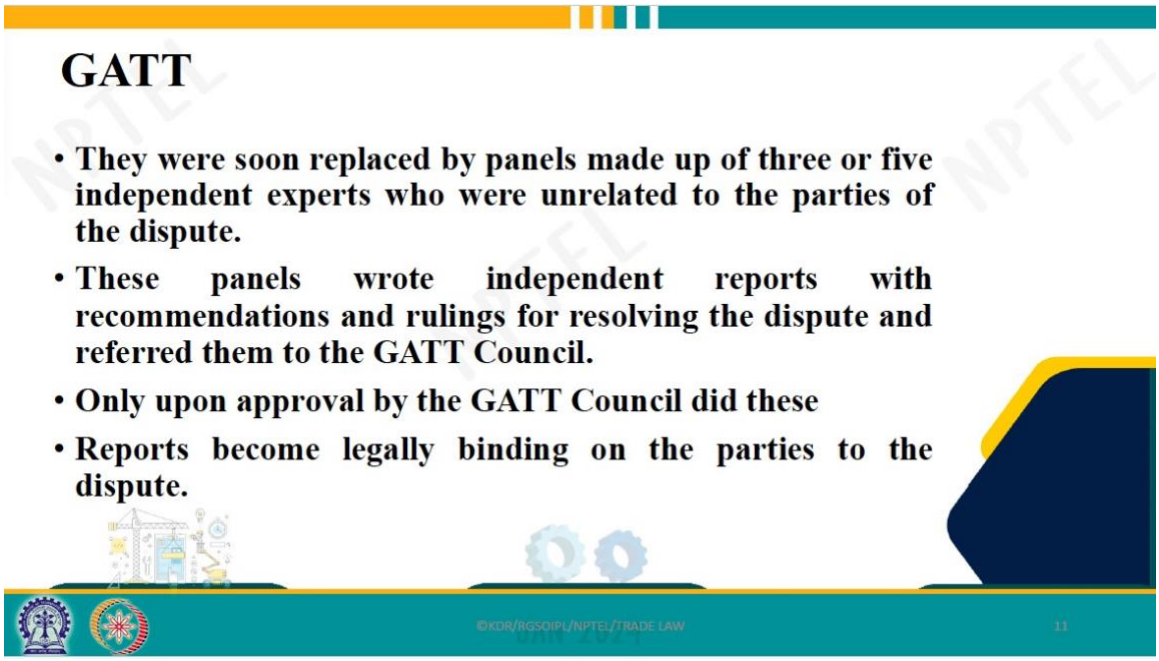
Then again, you can see that, so it means they are acting jointly. I said that the Article 23, and Article 23.2 clearly says about the membership jointly resolving the disputes themselves. So, the GATT council, the chairman of the GATT council played a crucial role in resolving the disputes in the early times and the early days of GATT. Then, later on, the number goes up. These disputes were referred to as working parties, and these working parties consisted of representatives of all interested parties. So, parties to the dispute and other members also were included in these working parties. So, these working parties adopted the reports by consensus, consensus, consensus has a wide meaning under the GATT. So, under the GATT it was positive consensus and we will see elaborately that what you mean by positive consensus and then finally the decisions were taken.



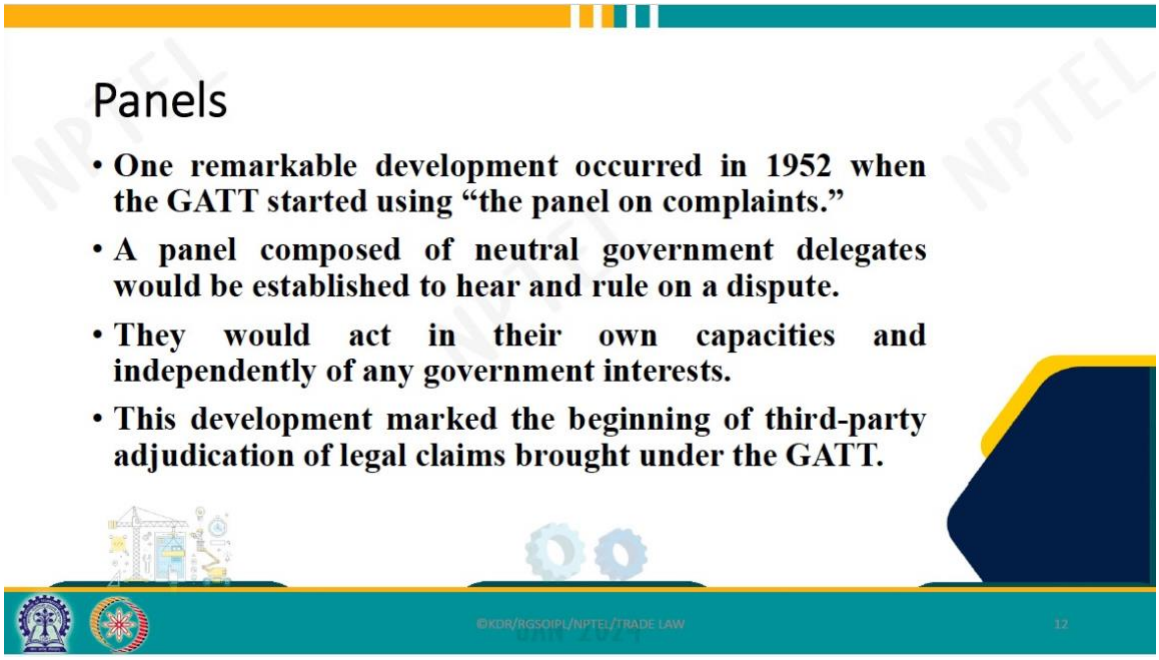
And later on these working parties converted into panels so they were replaced these working parties were replaced with panels. So these panels consist of 3 to 5 independent experts who were definitely were unrelated to the dispute. So they started writing independent reports, and finally, these reports were given to the GATT council. And once the GATT council approves the report and it will become legally binding on the parties. So, from the rudimentary stage to the independent members, the panelists the appointment of independent panelists was happened in a very short period of time. So you can see that before the Kennedy round of negotiations the panels were started forming.



So under Article 22 and 23 so certain requirements are made even though there was no elaborate procedure requirements and what are the requirements? The requirements are that every member has to prove that there is a violation of GATT provisions. And also, the second criterion to be proved by the complaining party was that any benefits have been nullified or impaired accruing to them through the GATT provisions, GATT agreements. And if any benefits are nullified or impaired, or impeded, then the GATT member can complain. And the main criticism we will come to the main criticism. The main criticism was with regard to adoption of the reports. The adoption of the reports by consensus and also this consensus is a positive consensus of all members. This means that every member has to consent to the reports prepared by the panels.

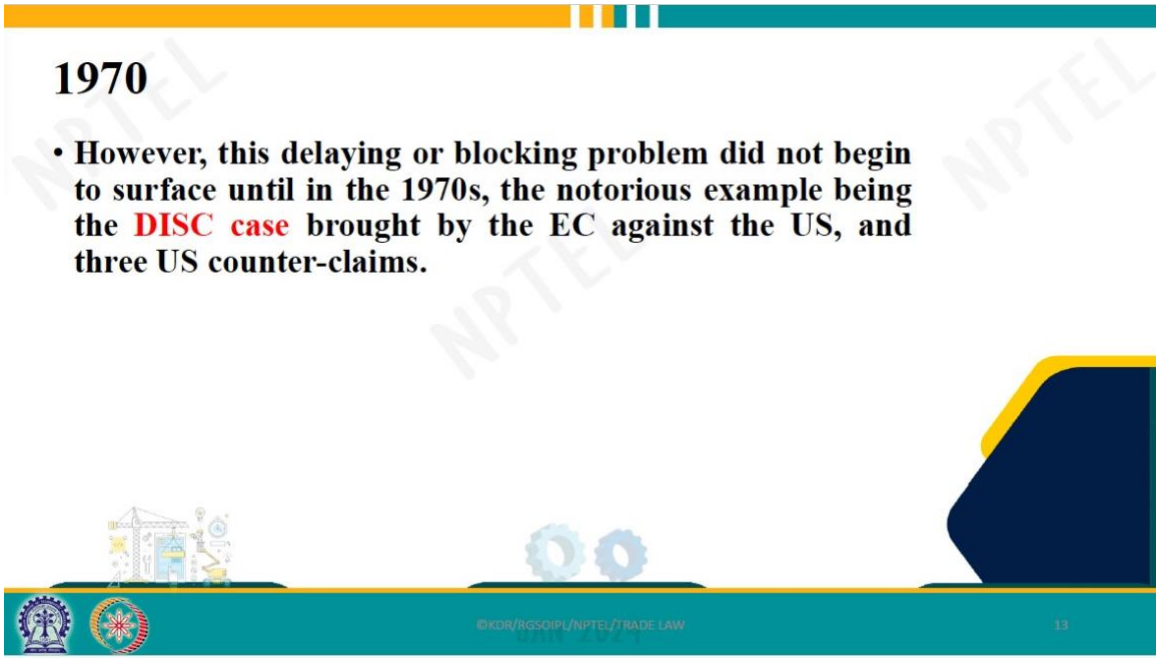


So we said that the working parties were replaced with panels, and then the panels were, wrote the reports, then submitted to the GATT council, and finally the council approves, or the chairman approves, and then it will be circulated to the members, and it becomes the legally binding report.



And then again you can see that in 1952 when we can see that the developments using these panels, these panels started in the 1950s itself. And panels most importantly they are independent persons or government delegates, independent nothing to do with the

parties. So, the evolution started when independent persons became the panel members, and they started independent reports. So, this is actually started the third party adjudication. The earlier system was that the parties were also part of adjudication. So, third-party adjudication was started in 1952 by the constitution of panels.



And most importantly the 1970 so we can see that this positive consensus become a big problem when the US started, EC, the European Union and US started blocking reports. So, the one of the starting point was the *DISC* case brought by the European economic community against the US. And you can see that the counterclaims and claims and, blocking of reports made a lot of problems to the GATT dispute settlement system.

Weakness

- Some key principles, however, remained unchanged up to the Uruguay Round, the most important being the rule of positive consensus that existed under GATT 1947.
- For example, there needed to be a positive consensus in the GATT Council in order to refer a dispute to a panel.
- Positive consensus meant that there had to be no objection from any contracting party to the decision.
- Importantly, the parties to the dispute were not excluded from participation in this decision-making process.

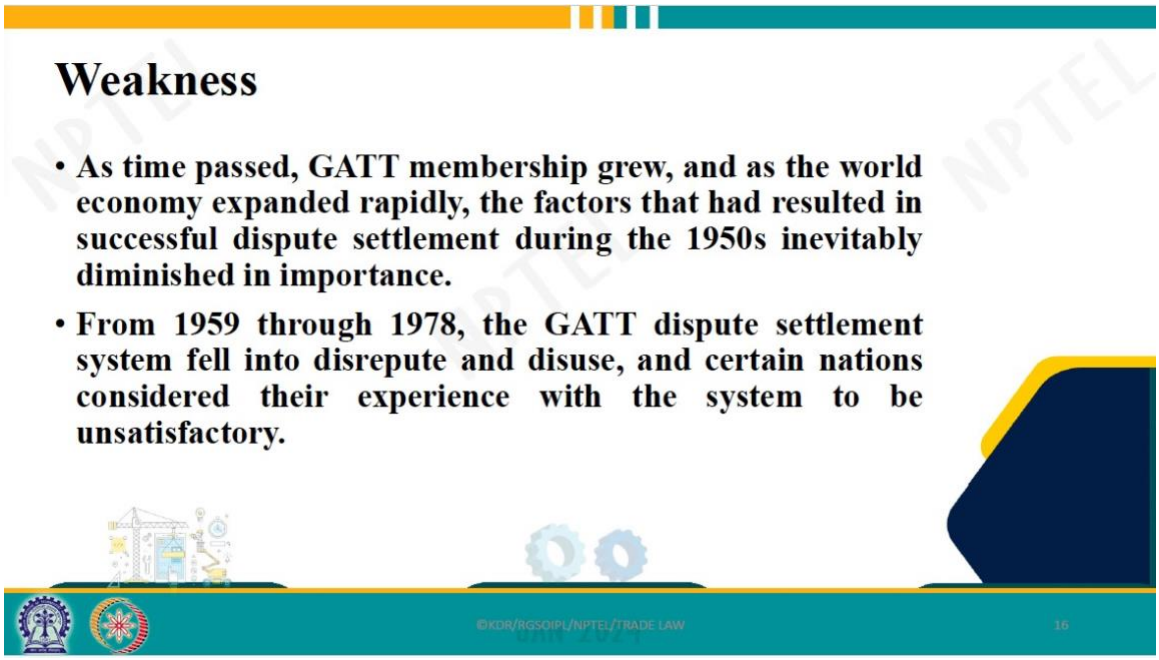
And also we can say that this positive consensus become an impediment to the dispute settlement. So, if you look into the dispute settlement, we said that the decision-making process become very difficult due to this positive consensus.

Positive Consensus

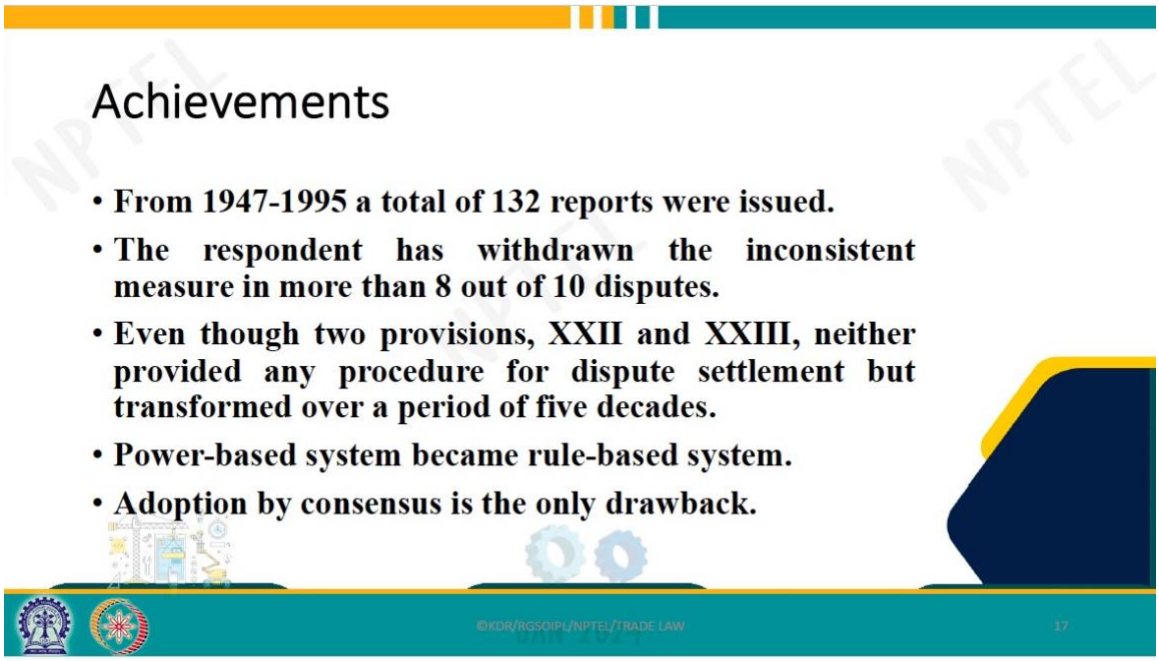
- the rule of positive consensus that existed under GATT 1947.
- For example, there needed to be a positive consensus in the GATT Council in order to refer a dispute to a panel.
- Positive consensus meant that there had to be no objection from any contracting party to the decision.
- Importantly, the parties to the dispute were not excluded from participation in this decision-making process.
- In other words, the respondent could block the establishment of a panel.
- Moreover, the adoption of the panel report also required a positive consensus, and so did the authorization of countermeasures against a non-implementing respondent.
- Such actions could also be blocked by the respondent.

So what is this positive consensus? Positive consensus is nothing but every member of the GATT should agree to such reports. So that means the panel will come out with the report, it will be submitted to the GATT council and every member has to agree to this particular report. So, this is the positive consensus. It means there should not be any

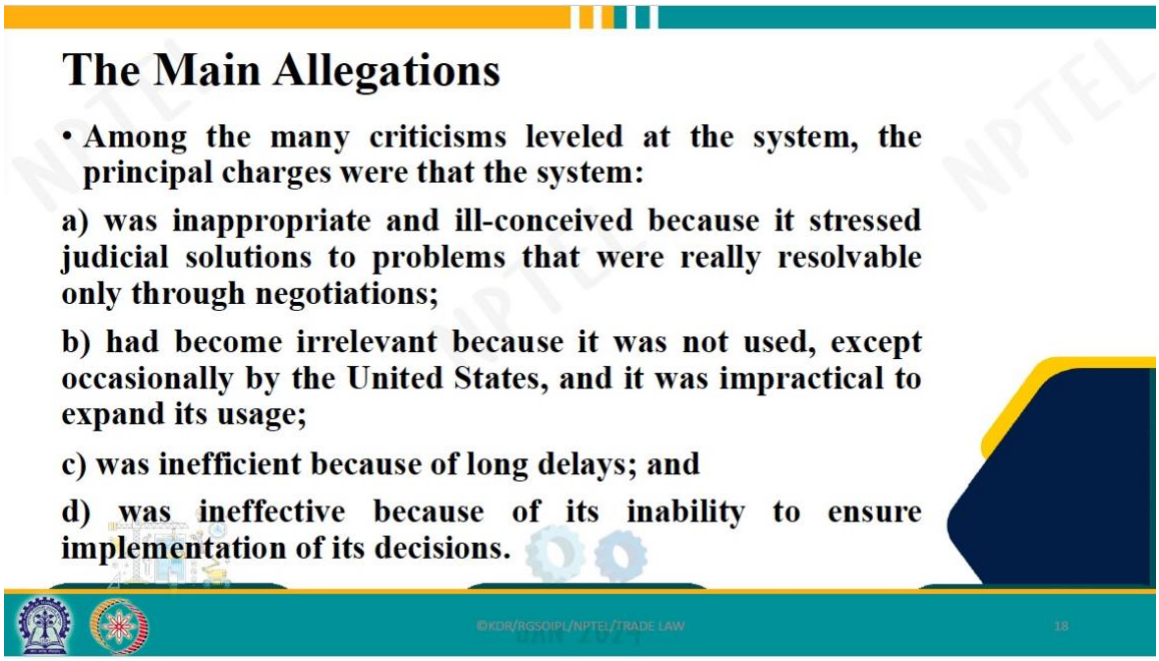
objection from any member including the parties. And also, you can say that the parties, as I said that the parties to the disputes also were included in this last decision-making process. So it means the third party adjudication will be done by the panel and the reports will come to the council and the council includes the parties to the dispute as well. So, any point of time this the last moment when adoption of this particular report, the opposite party can object or veto this particular report. And many times this started blocking the reports. So, this procedural lapse, so you can say that a procedural negative which made it very difficult for a report to adopt this is our perception, but the case was not like that.



In the initial times the system worked very well. So, the GATT membership was very less and the number of disputes also was less and the common decision-making was smooth and many reports were adopted. But when you see that from the disputes so some of the nations felt that this particular system is not good and because it is unsatisfactory because after all the efforts the members to the dispute can block the particular reports.



And you can see that even though you say that this positive consensus has made a stumbling block and lot of reports were blocked. So within the GATT there is sizable number of reports were issued. There are 132 reports that were adopted between 1947 and 1995, and also in 8 out of 10 disputes, the so-called measure which was alleged in the disputes was withdrawn after the dispute. So, it means that the disputes element system was very successful. Even though there are only two articles, that is, 22 and 23, no procedural aspect was prescribed under these two provisions. So, some of the scholars argue that this was a power-based system, and some of the scholars argue that this was a rule-based system, and I would say that the power-based system became a rule-based system. And adoption by positive consensus everybody was pointing out only one point that as a drawback adoption by positive consensus.



And this positive consensus made lot of hurdles this is the argument. Also, you can see that the major you can say that allegations or challenges faced by it were that instead of judicial solutions, it was really the panel solutions, or it was more of a diplomatic solution and negotiated decisions. So that means even though it was panels mostly it is of negotiated decisions. And also the people say that it was not used very strongly like the present WTO system and some of the main users were United States and other countries. But still you can see that there are 132 disputes came before the GATT and 132 reports issued. And another drawback which was pointed out was long delays and implementation was always a problem, there is no procedure for implementation of the reports even though most of the members, 8 out of 10 members were changed their measures.

Adoption of Reports

- Even when panel reports were adopted, the risk of one party blocking adoption must often have influenced the panels' rulings.
- The three panelists knew that their report had also to be accepted by the losing party in order to be adopted.
- Accordingly, there was an incentive to rule not solely on the basis of the legal merits of a complaint, but to aim for a somewhat "diplomatic" solution by crafting a compromise that would be acceptable to both sides.

And then this positive consensus which leads to one party blocking adoption of all the reports even though 3 panelist or 5 panelist, so even the losing party can block which we talked about. So mostly so you say that even though it was not truly a rule based system and even though the panels are decided the cases on merit and it is more of a diplomatic solution which is happened in the GATT dispute settlement system.

GATT

- Veto power
- Blocking panel reports
- Dispute settlement system applicable only to signatories of individual agreements.
- 58% of the disputes under "Codes" were blocked.
- 21% of the other disputes under GATT were blocked.

So one such drawback, the main drawback pointed out about the GATT dispute settlement system, was veto power, blocking of reports and the dispute settlement system

applicable only to the signatories and non-members it is not applicable. But you can see that the numbers, the statistics says that only 21 percent of the disputes were under the GATT system and 58 percent of the disputes were after the Tokyo round of negotiations under different codes like customs valuation code, anti-dumping code and other codes. So it simply says that only 21 percent under the GATT 58 percent of the disputes were under the post Tokyo round of negotiations, it means the GATT system there is very less number of disputes and after the Tokyo round of negotiations the dispute has many times, doubled or tripled. There is lot of disputes after the Tokyo round of negotiations. So the 58 percent was the blocking of reports were found after the Tokyo round of negotiations. So it means that before Tokyo round of negotiations the blocking of reports were not very common and this blocking of reports started with Tokyo round of negotiations.

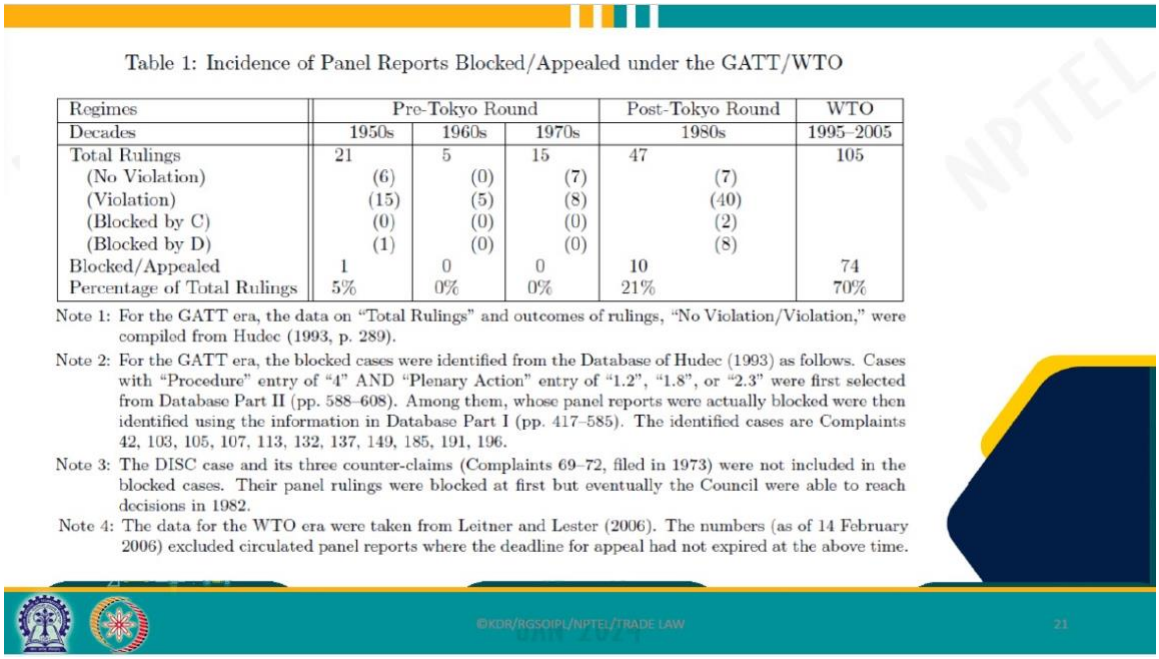


Table 1: Incidence of Panel Reports Blocked/Appealed under the GATT/WTO

Regimes	Pre-Tokyo Round			Post-Tokyo Round	WTO
Decades	1950s	1960s	1970s	1980s	1995–2005
Total Rulings	21	5	15	47	105
(No Violation)	(6)	(0)	(7)	(7)	
(Violation)	(15)	(5)	(8)	(40)	
(Blocked by C)	(0)	(0)	(0)	(2)	
(Blocked by D)	(1)	(0)	(0)	(8)	
Blocked/Appealed	1	0	0	10	74
Percentage of Total Rulings	5%	0%	0%	21%	70%

Note 1: For the GATT era, the data on "Total Rulings" and outcomes of rulings, "No Violation/Violation," were compiled from Hudec (1993, p. 289).

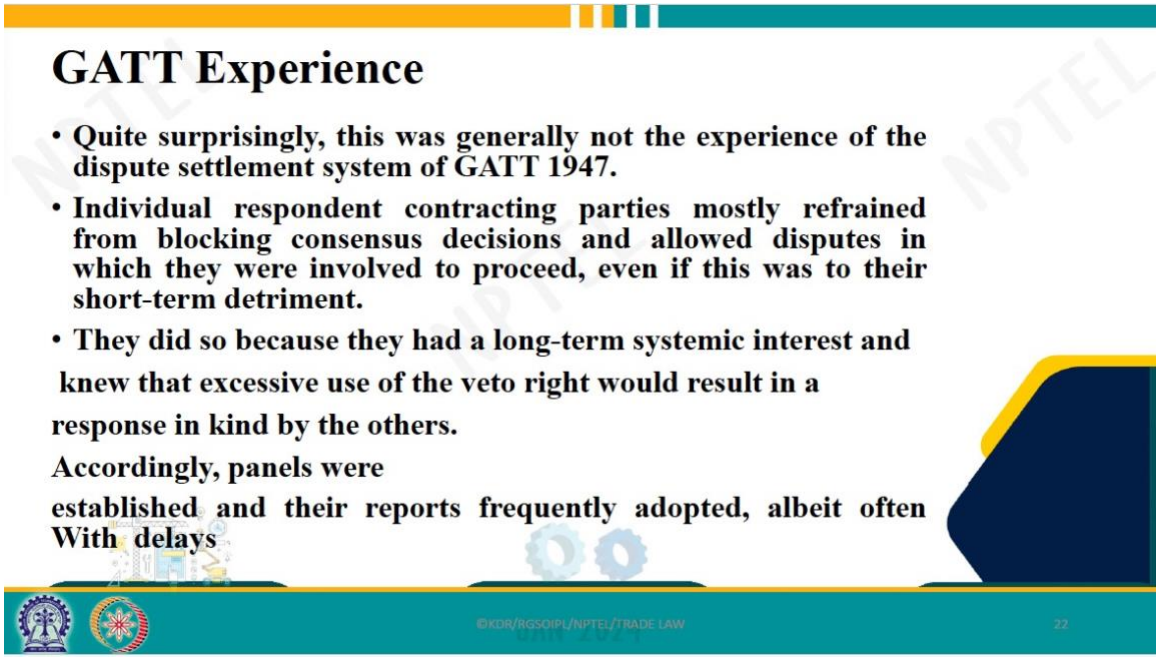
Note 2: For the GATT era, the blocked cases were identified from the Database of Hudec (1993) as follows. Cases with "Procedure" entry of "4" AND "Plenary Action" entry of "1.2", "1.8", or "2.3" were first selected from Database Part II (pp. 588–608). Among them, whose panel reports were actually blocked were then identified using the information in Database Part I (pp. 417–585). The identified cases are Complaints 42, 103, 105, 107, 113, 132, 137, 149, 185, 191, 196.

Note 3: The DISC case and its three counter-claims (Complaints 69–72, filed in 1973) were not included in the blocked cases. Their panel rulings were blocked at first but eventually the Council were able to reach decisions in 1982.

Note 4: The data for the WTO era were taken from Leitner and Lester (2006). The numbers (as of 14 February 2006) excluded circulated panel reports where the deadline for appeal had not expired at the above time.

So in this particular data, the authors, the different authors, they show that the how many reports were blocked in the pre-Tokyo round, post-Tokyo round and in the WTO system' first quarter. So here you can see that 1950s so that means the 50s it is only 21 cases, 60s only 5 disputes, 70s it is 15 disputes and post Tokyo round there are 47 cases. So hardly there is 41 cases before the entire Tokyo round of negotiations and after the 1980s, so 80 to 95 there are 47 disputes total rulings, not dispute, rulings. Then now you see that blocking 1950s 0 blocking and 60s 0 blocking, 70s 0 blocking and post-Tokyo round there are 2 blockings and 2 plus 8 total 10 blocking. So, it means before 1950s there are only 1 blocking of reports 60s 0, 70s 0, and then 1980s the number has rose to 10 disputes, the reports were blocked and 21 percent of the rulings. So, you can see that it is blocked by members 21 per cent of the reports were blocked. When compared to the WTO the blocking provision disappeared and all reports were adopted. So the adoption of the reports was complete, so you can see that there is 70 per cent number of disputes

arose between the first decade of WTO. There are total 74 disputes during the first 10 years and which shows that the number has gone up like 70 percent more disputes in the WTO disputes settlement system when compared to the GATT disputes settlement system. So that is why I said every scholars argued that this positive consensus system made a stumbling block, but actually the data says that it was not because it is clear the percentage of total rulings and appeal blocked only 1 report blocked in the 50s, 0-0 in 60s and 70s and 21 percent only blocked in 90s, the post-Tokyo round. There is a reason because there are individual agreements which provide for dispute settlement, anti-dumping agreement, anti-dumping code which provides for dispute element in the agreement itself, and customs valuation code there is a dispute element provision within the customs valuation code. So the disputes increased. So, I want to say that so the person our perception is that all literature which says that this positive consensus made a stumbling block to the GATT disputes settlement system is not true. That is why I argue based on this particular data.



Then the GATT experience which clearly says that there was no much disputes between the parties and the interest of the parties were protected the veto right was rarely used before the 80s, and after the 80s yes, there are substantial number of there is more number of blockage of the reports and the reports are adopted by the members before the 1980s.

GATT Experience

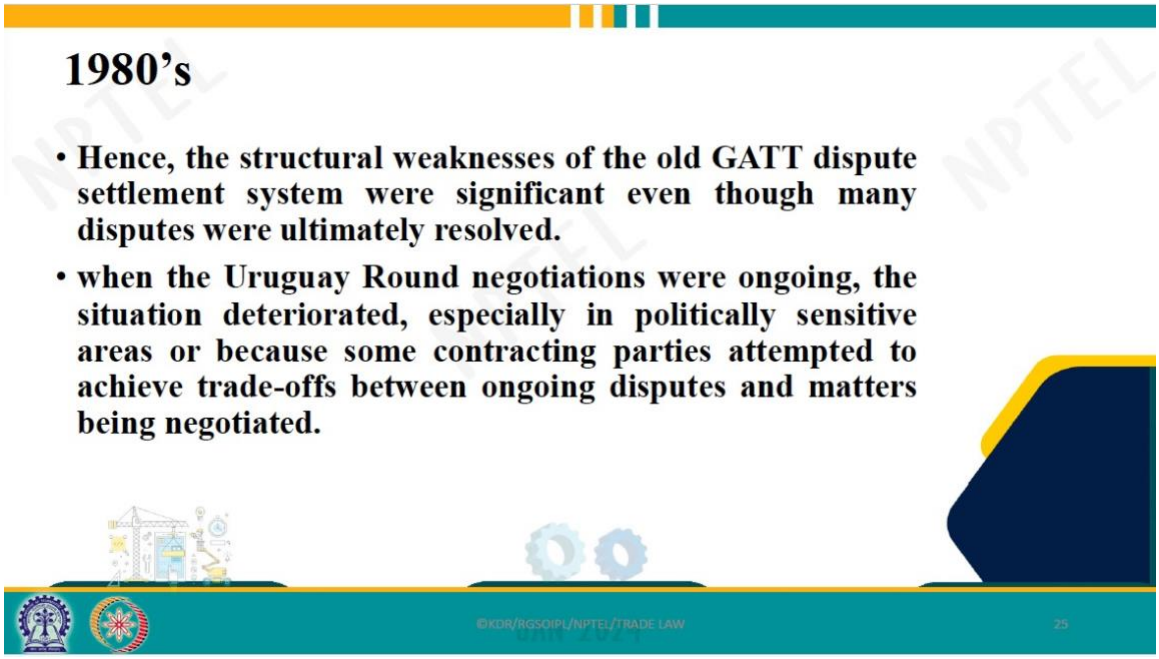
- GATT 1947 dispute settlement system brought about solutions satisfying the parties in a large majority of the cases.
- However, it must be noted that, by their nature, such statistics can only cover complaints that were actually brought.
- Certainly, there were a significant number of disputes that were never brought before the GATT because the complainant suspected that the respondent would exercise its veto.
- Thus, the risk of a veto also weakened the GATT dispute settlement system.

And also you can see that the solutions, I said it was not completely judicial decisions, it was negotiated decisions and diplomatic decisions and negotiated decisions so there was more acceptability to the parties. The implementation was easier even though there was no implementation provision in the GATT disputes settlement system and 8 out of 10 disputes were the measures were withdrawn by the members. So the veto so I said that the veto power was very sparingly used by the members before 1980s.

Tokyo Round Codes – 1973-79

- During the Tokyo Round negotiations conducted in 1973–1979, the GATT dispute settlement mechanism developed on dual tracks.
- On one hand, the negotiating efforts to strengthen the general dispute procedure of Article XXIII did not go very far.
- The resulting document "Understanding" codified the established practices in implementing the procedure, but it was still ambiguous about whether the complainant had an absolute right to a panel process, and it did not take away the veto power of disputing parties in panel adoption.

So we were talking about how the scenario has changed with the Tokyo round of codes. The Tokyo round negotiations happened from 1973 to 1979, and the Tokyo round negotiations came out with individual codes like anti-dumping codes, customs valuation code and SPS measures, TBT measures and all these individual codes have dispute settlement mechanism provided so every member has used these particular provisions for and raised the disputes before the GATT council so the number has gone up. Also, in the Tokyo round of negotiations actually, the members were highly dissatisfied with the GATT system of dispute settlement, and they wanted to come out with an agreement or code or understanding, but it did not happen. As a result, they came out with a document which is known as understanding code. It is a codified practice since 1947 the codified practice of the dispute settlement was, they come out with the document that is understanding. But some of the provisions were ambiguous and whether a complainant have an absolute right of asking for constitution of a panel or not that was not clear and what will happen to the veto power of members, how the panel reports are adopted it was not clear. So that particular understanding agreement, understanding code was not adopted in the Tokyo round of negotiations. But the Tokyo round of negotiations opened up the dispute settlement in each and every agreement.



So during the 80s what we said the number of disputes has gone up and in most of the areas because each and every area is, some of the areas were very politically sensitive and in these areas of contracting parties the parties has gone on with trade off between members and being negotiated, this dispute settlement system was used as a negotiating tool. So you file a case against others so he will come to your negotiating table. So, this was case 1980s and so the number of cases went up like anything.

Uruguay Round of Negotiations – 1986-1994

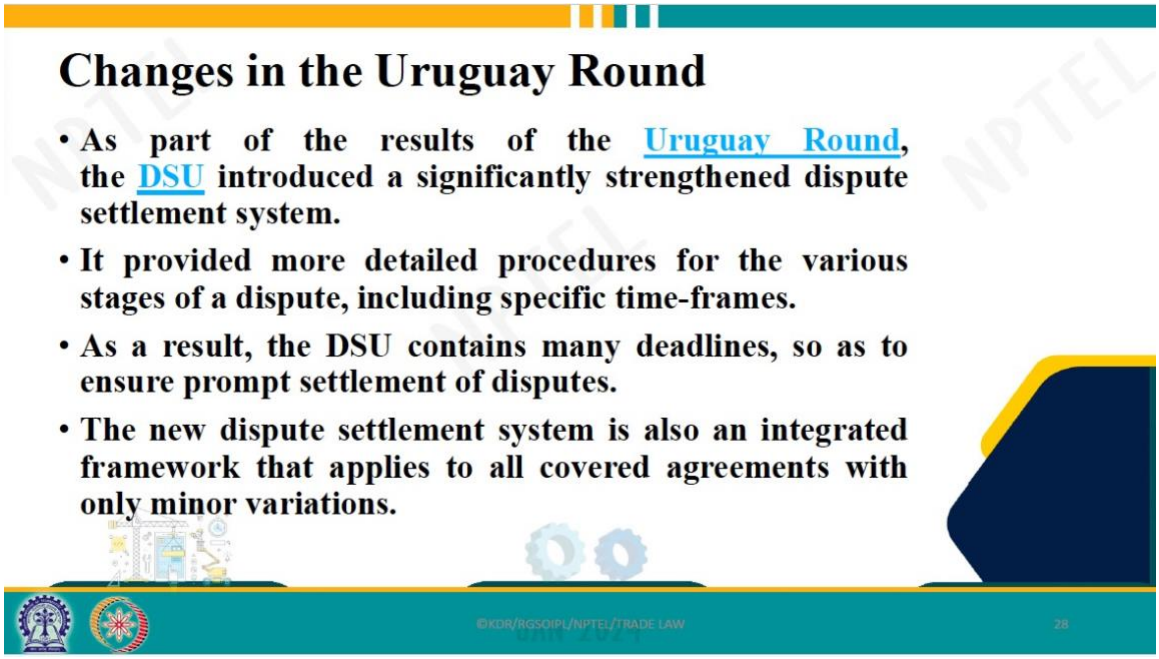
- In 1995, the WTO was established following the completion of the Uruguay Round negotiations.
- The new Dispute Settlement Understanding (DSU) procedure under the WTO significantly renovated several aspects of the GATT mechanism.
- No longer are the separate procedures under the Tokyo Round Codes valid.
- The DSU governs all parts of the GATT/WTO system and serves as the single, unified mechanism for dispute settlement.
- Furthermore, the blocking problem that had plagued the GATT procedure is completely eliminated.

The Uruguay round of negotiations and this was one of the most important discussion points. So the earlier understanding document was again discussed and included the practice or the jurisprudence of the GATT practices and then come out with the new agreement on dispute settlement understanding or the DSC. And there is no separate procedure for each court, only a single procedure, and a single dispute settlement mechanism was provided under the WTO, unlike the Tokyo round of codes. And also the positive consensus mechanism has been abandoned and a negative consensus mechanism was introduced.

Uruguay Round of Negotiations – 1986-1994

- A complaining country is granted an automatic right to have a panel created.
- Thus, blocking is prevented at this early stage. Most importantly, a panel report is deemed automatically adopted by the new Dispute Settlement Body (DSB).
- Nevertheless, an appellate procedure is added as a safeguard against possible legal errors made by the panel.
- Either one of the disputing parties may consider appealing against the panel report to the Appellate Body (AB), whose judgment will be final and likewise adopted automatically unless there is a consensus against adoption.

So, negative consensus means that if the majority of the members are opposed to a particular report, then it is not going to be adopted. It means that whether it is a party or one member or two member and out of 164 member countries even 10 members oppose, nothing is going to happen, and we do not have the experience of non-adoption or rejection of any report in the WTO system. So the blocking stage was eliminated and most importantly all the reports were automatically adopted by the dispute settlement body and there was no appeal provision under the GATT and appellate provision also was made, under the dispute settlement understanding agreement. So under the dispute settlement body it works in two stages that is at the panel stage and the appellate body stage and these reports are automatically adopted. Even though it was with the consensus and that is with the negative consensus.



And you can find number of changes in the Uruguay round of negotiations to the agreement. So DSU have specific deadlines. So one of the most important allegations against the GATT dispute settlement system was its prolongation of procedures. There is no deadlines and this was removed and specific deadlines were given in the dispute settlement understanding of WTO and you can see that dispute settlement and it is applicable to all agreements that is another development innovation which is made in the WTO dispute settlement system is this dispute settlement system is applicable to all covered WTO agreements not individual agreements all agreements.

Changes

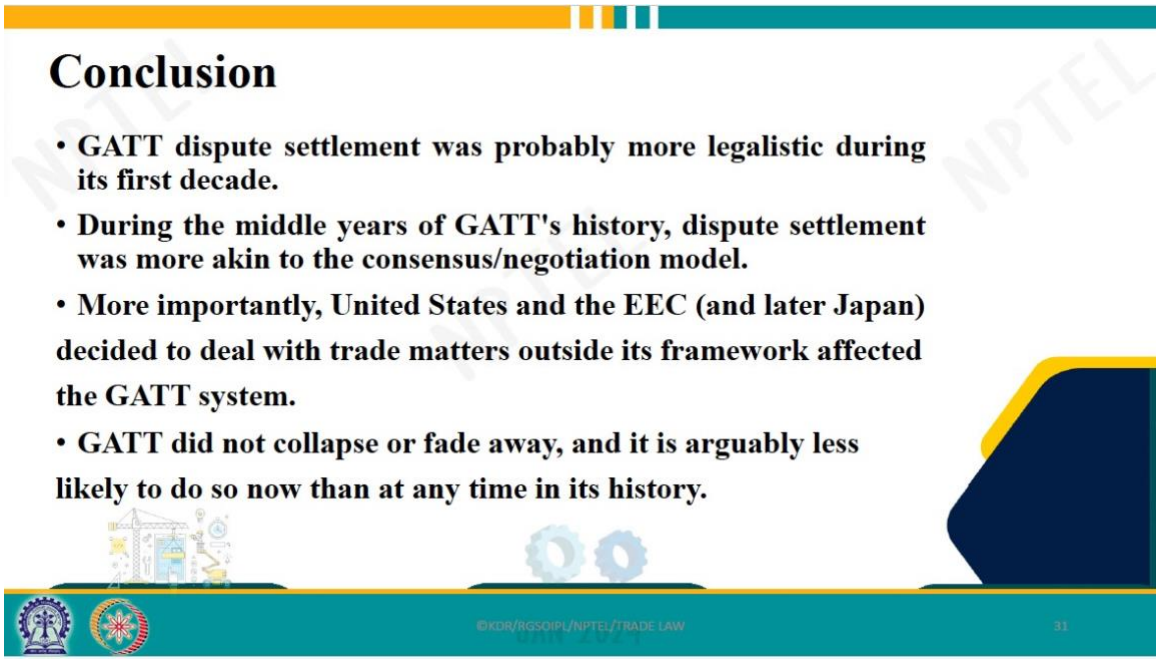
- Most important innovation is that the DSU eliminated the right of individual parties, typically the one whose measure is being challenged, to block the establishment of panels or the adoption of a report.
- Now, the DSB automatically establishes panels and adopts panel and Appellate Body reports unless there is a consensus not to do so.

And the blocking of reports became impossible under the WTO system and the dispute settlement body adopts all panel and appellate body reports and unanimously even though there is an opposition, nothing will be happening. So negative consensus system which was introduced in the WTO dispute settlement system.

AB

- Other important new features of the (WTO) dispute settlement system are the appellate review of panel reports and a formal surveillance of implementation following the adoption of panel (and Appellate Body) reports

Appellate review I said that the appellate body was constituted. So all appeals from panel will go to the appellate body on question of law.



And also the system worked the GATT dispute settlement system worked very well from 1947 to 1995 and also the dispute settlement even though very rudimentary stage no special provisions for procedure, but the system almost handle 130 disputes and come out with rulings in 130 disputes even though there is more number of cases came to the GATT dispute system and it was successfully done mainly because the GATT used alternate dispute settlement mechanisms, negotiations, mediations and finally, the panel reports you can say that it is something like that of arbitrations and finally, adopted by the GATT council. So and mostly the systems was used by the United States, European economic community and Japan also is included. And from the 80s the US and other parties started blocking the reports and which was made a problem to the entire working of the system and the GATT was not collapsed and I would say that it worked very well from 1947 to 1980 it worked very well from 1980 onwards as well, but the number has gone up and the blocking of reports was also increased mainly due to the number of reports against the trading countries. So, in a nutshell, in conclusion, I would say that the GATT dispute settlement system from 1947 to 1995 worked very well even without the procedural formalities. It worked based on consensus, it worked very well based on negotiations, it worked very well on consultations. So, the GATT even though, most of the scholars say that it was not a success, but I would say that it was a highly successful system under the GATT negotiating systems and in the next classes we will see that what is the WTO dispute settlement system and what are the improvements made on to the GATT system and the jurisprudence what is the effect of jurisprudence of the GATT on the WTO system.

Thank you.