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## The World Trade Organization: A New Legal Order for World Trade?

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# THE WORLD TRADE ORGANIZATION: A NEW LEGAL ORDER FOR WORLD TRADE?

*Thomas J. Dillon, Jr.\**

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The following article is based upon a lecture given by the author before the *Deutsche Forschungsgemeinschaft* (German Research Foundation) under the auspices of the *Sonderforschungsbereich "Internationalisierung der Wirtschaft"* (Special Research Unit "Internationalization of the Economy"). The Article is also based upon the author's doctoral thesis. The World Trade Organization and its accompanying agreements came into force on January 2, 1995, after the submission of this article for publication.

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## INTRODUCTION

The Uruguay Round of multilateral trade negotiations embarked upon at Punta del Este seven and one-half years ago was among the most ambitious and comprehensive sets of trade negotiations ever conducted under the auspices of the General Agreement on Tariffs and Trade (GATT). Negotiations on this scale have not occurred since the post-World War II talks resulting in the ill-fated Havana Charter agreement. The Uruguay Round negotiations have been described as the most extensive and far-reaching talks in the history of international trade relations.<sup>1</sup>

The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act) provides an impressive array of agreements, creating new international obligations in the area of services with the General Agreement on Trade in Services (GATS) and extending GATT's obligations to protection of intellectual property rights with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement). The Final Act both clarifies and extends existing GATT obligations in virtually every facet of its charter, notably in obligations on subsidies and countervailing measures. In one of its most impressive successes, the Final Act of the Uruguay Round provides a unified dispute resolution regime in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU). Perhaps the crowning achievement of the negotiating round, notwithstanding its other notable accomplishments, is the new institutional Charter for the World Trade Organization (World Trade Organization or WTO), designed to help facilitate international cooperation on trade and economic relations.<sup>2</sup>

In their provisional analysis, GATT economists have proposed that the Uruguay Round results on market access will mean substantial world

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1. Warren A. Lavorel, *The World Trade Organization: The Way to the Future*, in WARREN A. LAVOREL & CARSTEN THOMAS EBENROTH, *THE WORLD TRADE ORGANIZATION: THE WAY TO THE FUTURE* 7 (1994).

2. See *Uruguay Round Legislation*, Mar. 23, 1994, *Hearings Before the Senate Finance Committee*, 103d Cong., 2d Sess. 195 (1994) (testimony of John H. Jackson) [hereinafter Jackson Testimony].

income gains of approximately \$235 billion annually and trade gains of \$755 billion annually by the year 2002. GATT economists conclude that a major increase in market access security will be achieved through a higher number of tariff bindings. Security on industrial products will increase from seventy-eight to ninety-nine percent in developed countries and twenty-two to seventy-two percent in developing countries. GATT analysts suggest that there will be 100 percent security for agricultural products because of tariffication and bindings negotiated during the Uruguay Round. Moreover, there is a thirty-eight percent overall cut in developed countries' tariffs on industrial products, from 6.3 to 3.9 percent.<sup>3</sup> Nevertheless it remains controversial whether all WTO Members will share in these benefits. Some commentators suggest that certain developing countries might experience a net detriment following implementation of the obligations of the newly completed round.<sup>4</sup>

This article will describe in some detail the most dramatic modifications within the framework of the multilateral trading system designed to support the projected trade expansion, namely, the new organizational structure under the WTO and the new dispute settlement procedures. The article will evaluate these changes against the backdrop of the Bretton Woods System as originally conceived and will highlight the debate surrounding whether the nature of the trade regulating body ought to be adjudicatory or negotiatory. Finally, the author offers conclusions, perspectives, and comments regarding the future development of the world trading system.

#### *A. Historical Background: The Bretton Woods System and the GATT.*

Approximately forty-seven years ago, the international community made its first concerted attempt at multilateral accord in the arena of international economic relations. Named for the international conference on economic relations which took place shortly after World War II, the Bretton Woods System was originally designed as an integrated effort by the international community to encourage trade liberalization and multilateral economic cooperation. The framers of that system believed that the disastrous tariff and trade policies of the 1930s had contributed to the outbreak of the Second World War. They desired to create a multilateral institutional framework of rules and obligations on economic

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3. The foregoing figures are taken from *Focus*, GATT NEWSL. (May 1994), at 6.

4. See, e.g., Kevin Watkins, *GATT: A Victory for the North*, 59 REV. AFR. POL. ECON. 60 (1994).

relations which would encourage multilateral agreement and avoid economic conflict.<sup>5</sup>

The Bretton Woods System was to consist of three major international organizations designed to administer and harmonize world trade: the International Monetary Fund (IMF); the International Bank for Reconstruction and Development (World Bank or IBRD); and the ill-fated International Trade Organization (ITO). These three organizations were seen as the three legs upon which the new multilateral economic system should rest. They were to cooperate and assist one another in the pursuit of their individual and collective goals. The IMF and the World Bank were to cover the financial side of the international economic equation. The World Bank was originally designed to assist the war-torn developed countries and lesser developed nations to reconstruct or upgrade their economies. The IMF was initially charged with facilitating trade and assisting governments in stabilizing their exchange rates so as to avoid a reversion to 1930s monetary policies which had stifled world trade and abetted tensions leading to the second great war of the twentieth century. At the center of the Bretton Woods plan was, in the words of Richard Gardner, the idea for a "comprehensive code to govern the conduct of world trade" which had been negotiated in the Havana Charter.<sup>6</sup> The ITO, the executive organ provided for in the Havana Charter, would have administered the Charter's agreements and governed disputes arising out of its wide range of obligations. Those obligations encompassed issues related to commercial policy, such as trade and trade barriers, labor and employment, economic development and reconstruction, restrictive business practices, and intergovernmental commodity agreements. The Havana Charter transcended every previous attempt to regulate trade relations. Its nine chapters and 106 articles covered the entire range of trade issues and contained both general statements of principle and definite commitments of national policy dealing primarily with national barriers to trade. The range of commitment to the dismantlement of trade barriers was comprehensive, as illustrated by the Charter's fifty-five articles covering all types of restrictions on trade.<sup>7</sup> Unfortunately, due primarily to a lack of political will in

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5. See generally CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* (1949).

6. RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY: ANGLO-AMERICAN COLLABORATION IN THE RECONSTRUCTION OF MULTILATERAL TRADE* 101 (1956).

7. Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. Doc. E/CONF 2/78, reprinted in U.S. Dep't of State, Pub. No. 3206 (1948). The Havana Charter provided commitments on Tariffs, Preferences, and Internal Taxation and Regulation, *id.* ch. IV, arts. 16-19; Quantitative Restrictions and Related Exchange Matters, *id.* arts. 20-24;

the United States, the Havana Charter was never ratified, and the ITO failed to materialize.

### 1. The General Agreement on Tariffs and Trade

With the failure of the Havana Charter and the ITO, the GATT became the principal international agreement regulating trade between nations.<sup>8</sup> The GATT's beginnings in Geneva, Switzerland in the Spring of 1947 were somewhat inconspicuous as the GATT was overshadowed by events surrounding the reconstruction of a devastated European continent and other more ambitious multilateral efforts to regulate international economic relations such as the Havana Charter. When the President of the United States invited twenty-three nations to participate in the first ever multilateral tariff cutting talks at the Geneva Conference, negotiations over the more comprehensive Havana Charter were already under way. As the little brother to the Havana Charter, the GATT resembled its multifaceted sibling in its basic principles. Like the Havana Charter, the GATT contained most favored nation, nondiscrimination, and national treatment clauses, as well as other obligations, but it was convened for the very specific and limited purpose of tariff reduction. Intended only as a modest component in the broader post-war economic and political plans envisioned at Bretton Woods, the GATT was to play a small but important gap-bridging role until the economic agreements of the Havana Charter came into force. Tariff rates had remained at their high pre-war levels and threatened the desired speedy economic recovery of war-torn Europe. In response, President Truman called for the first multilateral tariff cutting talks in an effort to jump-

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Subsidies, *id.* arts. 25-28; State Trading and Related Matters, *id.* arts. 29-32; General Commercial Provisions on Freedom of Transit, Anti-Dumping and Countervailing Duties, *id.* arts. 33-39; Special Provisions for Free Trade Areas and Customs Unions and Consultation, *id.* arts. 40-45; Restrictive Business Practices, *id.* ch. V, arts. 46-54; and Inter-Governmental Commodity Agreements, *id.* ch. VI, arts. 55-70.

8. The classic work describing the GATT and its legal obligations is JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) [hereinafter *LAW OF GATT*]. Other key works include: KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (Midway reprint, 1977) and ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975) [hereinafter *GATT LEGAL SYSTEM*].

In the Uruguay Round Final Act, the GATT is referred to as the GATT 1947 throughout and is furthermore incorporated, with important exceptions, into the General Agreement on Tariffs and Trade 1994. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, Part II, ann. 1A, para. 1, GATT Doc. No. MTN/FA, \_\_ U.S.T. \_\_, 33 I.L.M. 1130, 1145 (1994) [hereinafter *Final Act*]. For an explanation of the parts of the Final Act, see *infra* part I.A. In conformity with the Final Act's usage, the author will refer to the GATT as the GATT 1947 where appropriate, but will also retain the original designation of GATT when referring to the multilateral trading system as it has evolved under the GATT 1947 obligations.

start European economies through tariff reductions. For good measure many of the Havana Charter obligations just mentioned were added to the mix of tariff concessions. When the Havana Charter failed to enter into force, its organizational institution, the ITO, also perished, leaving the GATT alone to administer matters of trade between nations.

The GATT has scored impressive successes in its forty-seven year history, especially in reducing world tariff levels, but it was clear from its beginnings that it was ill-equipped to handle the broader task of regulating world trade relations without some fundamental improvements.<sup>9</sup> Although it has acquired through the years a quasi-organizational status,<sup>10</sup> the GATT was not originally intended to be an international organization on trade. Creating an organizational charter for the pact had been specifically avoided because it was intended that the GATT should be administered by the ITO as it was to be incorporated into the Havana Charter. It quickly became apparent that the GATT's institutional framework, including its dispute resolution mechanisms, were lacking. Its accession, achieved through the Protocol of Provisional Application, led to GATT's weak application in national law. Additionally, a resurgence of protectionist pressures began to slow the remaining momentum for multilateral trade cooperation and exposed further weaknesses in the GATT regime. The power of the Contracting Parties to amend and interpret the GATT Agreement remained controversial and resulted in the need to amend the accord through subsequent negotiating rounds and side pacts rather than direct reform or interpretation. Thus, the GATT was forced, as John Jackson characterizes it, into a state of "constant improvisation" in order to achieve desired results.<sup>11</sup>

The GATT's weaknesses included its provisional application and grandfather rights exceptions, ambiguity about the powers of the Contracting Parties to make certain decisions and waiver authority, the murky legal status of the GATT as an international institution, problems with dispute settlement, and a lack of constitutional provisions in GATT which have led to the need for continual invention.<sup>12</sup> Analysts have

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9. LAW OF GATT, *supra* note 8, at 49-57.

10. *Id.* at 121; Dam, *supra* note 8, at 335; OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 45 (1985); Miquel Montañà i Mora, *A GATT with Teeth: Law wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. OF TRANSNAT'L L. 105, 107-08 (1993).

11. Jackson Testimony, *supra* note 2, at 196.

12. *See id.*; *see also* ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 221-44 (1991); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 91-103 (1990); JOHN H. JACKSON, THE

pointed to problems of multilateral rights and obligations such as the application of the Tokyo Round Codes, the weakness of the rule of law in GATT,<sup>13</sup> and various other "constitutional" problems of the GATT.<sup>14</sup>

### I. THE WORLD TRADE ORGANIZATION

The framers of the WTO specifically designed it to remedy many of GATT's organizational shortcomings. It has been described as a minimalist institution<sup>15</sup> and is entirely institutional and procedural in character, unlike the ITO which had contained substantive obligations all its own. Although its Charter is somewhat thin in comparison to that of the ITO, the WTO plays the essential role of unifying the existing and new obligations under one administrative roof and further providing an internationally recognized organizational structure which its forerunner, the GATT, had lacked. The Uruguay Round Final Act offers a new GATT 1994 which absorbs the original GATT 1947 and its subsequent side agreements, the results of previous rounds, and many of its decisions and waivers. The administration of the agreements on trade in goods in the GATT 1994 and the new multilateral obligations beyond the scope of trade in goods embodied in the GATS and TRIPs Agreements will be the main function of the WTO, a role the GATT could fulfill only with great difficulty considering its competence extended only to tariffs and trade in goods. Accordingly, in the WTO a unified administrative organ is created for all of the Uruguay Round Agreements. This unification solves two problems. First, the difficulty of incorporating the non-trade-in-goods obligations of protection of intellectual property rights and trade in services into the GATT is resolved by the WTO, which "separates the institutional concepts from the substantive rules."<sup>16</sup> Second, the establishment of the WTO settles the question of institutional status which has hindered GATT in its nearly five decades of history. Despite commentary to the contrary, especially in the U.S. Congress, the WTO presents neither a qualitative change in the scope and functions of GATT nor the advent of a supranational

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WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 299-308 (1991); PATRICK LOW, TRADING FREE: THE GATT AND U.S. TRADE POLICY 242-52 (1993).

13. Pieter VerLoren van Themaat, *Strengthening the International Legal Framework of the GATT MTN System: A Comment*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 26-27 (Ernst-Ulrich Petersmann & Meinhard Hilf eds. 1991) [hereinafter NEW GATT ROUND].

14. See *id.* part I.

15. See Jackson Testimony, *supra* note 2, at 196-99.

16. *Id.* at 197.



trade institution with power and authority to usurp sovereignty from its Member Nations. Rather, the WTO will be guided by the decisions, procedures, and customary practices of the GATT.<sup>17</sup> As Professor Jackson, the author of an earlier draft of what was to become the Agreement Establishing the World Trade Organization (WTO Agreement), stated in his testimony to the Senate Finance Committee about the WTO, it "has no more real power than that which existed for the GATT under the previous agreements."<sup>18</sup>

The controversy surrounding the ratification of the WTO and the Covered Agreements echoed in some respects the circumstances that led to the stillbirth of the ITO. But as we shall see, although there are substantial similarities between the present debate accompanying ratification of the new international trade agreements and that of the ITO, it would be premature to speak of the WTO's demise. In fact, the U.S. Congress voted in December of 1994 to ratify the Uruguay Round Agreement.<sup>19</sup>

The WTO, the agreement establishing it, and the agreements annexed to its Charter seek to reestablish the momentum and scope of the multilateral trading system lost with the failure of the ITO and the Havana Charter. But before the WTO can become operational, it must find acceptance in the European Union (EU) as well as among other future Members. The ITO failed for the very reason that it was not accepted by the U.S. Congress and was, in fact, never brought before it for a vote. Distrust of international organizations such as the United Nations among the U.S. electorate and the U.S. Congress led President Truman to withdraw his request for a Senate vote on the ITO.<sup>20</sup> The chances for acceptance of the WTO, on the other hand, appear at present very good, so that with time and in all likelihood, it will come to fill out the role of its once all but forgotten ancestor. Nevertheless, ominous rumblings coming out of Washington regarding the threat of the WTO to U.S. environmental standards, concerns about U.S. sovereignty over its trade policy, and the present problem of making up budget shortfalls for tariff losses raise questions as to the ultimate status of the WTO and

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17. Final Act, *supra* note 8, part II, art. XVI, para. 1, 33 I.L.M. at 1152.

18. Jackson Testimony, *supra* note 2, at 197.

19. The WTO was approved by Congress in an extraordinary post-election session on December 8, 1994.

20. GERARD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES 15-33 (1965).

its agreements in the national law of the United States, which is so important to the question of its future effectiveness as arbiter of world trade.<sup>21</sup>

In the preamble to the WTO Agreement, the parties to the agreement, or "Members" as they are now called, resolve themselves:

to develop an integrated, more viable and durable multilateral trading system *encompassing* the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all the results of the Uruguay Round of multilateral trade negotiations.<sup>22</sup>

Thus, as we shall see, the General Agreement on Tariffs and Trade, which has heretofore governed issues related to international trade between its contracting parties, is to be superseded by the WTO.

#### *A. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*

The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations includes three main parts: Part I containing the Final Act; Part II comprising the WTO Agreement and its annexes, the Multilateral and Plurilateral Trade Agreements (Uruguay Round Agreements); and Part III consisting of the Ministerial Decisions and Declarations. The Final Act declares that the WTO Agreement will enter into force on January 1, 1995 or no later than "early 1995."<sup>23</sup> Presently, it appears that despite calls for earliest possible implementation on January 1, 1995, the WTO may enter force sometime during the course of 1995 at the earliest.

Under the WTO Agreement, the World Trade Organization is authorized to administer and implement the Multilateral and Plurilateral Trade Agreements and resolve disputes between its Members arising out of the Uruguay Round Agreements. These agreements, comprising the lion's share of the Final Act, include amendments, interpretations, and understandings involving existing GATT agreements and a number of new agreements which dramatically expand the scope of its international

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21. For a thorough discussion of the WTO's obligations and its status in United States and European Union law, see Thomas J. Dillon, Jr., *The New Multilateral Trading System: Diplomacy and the Rule of Law in the International Control of Legal Instruments of Foreign Trade* 198-217 (unpublished manuscript, on file with the *Michigan Journal of International Law*) [hereinafter *New Multilateral Trading System*].

22. Final Act, *supra* note 8, Part II, pmbl., 33 I.L.M. at 1144 (emphasis added).

23. See Final Act, *supra* note 8, Part I, para. 3, 33 I.L.M. at 1143. In Part I, the Final Act declares that Parts II and III "embody the results of [the participants'] negotiations and form an integral part of this Final Act." *Id.* para. 1.

trade obligations. First, the Final Act includes, as one of the annexes to the WTO Agreement, the General Agreement on Tariffs and Trade 1994 (GATT 1994),<sup>24</sup> which incorporates the General Agreement on Tariffs and Trade of 1947 (as incorporated into the GATT 1994, "GATT 1947").<sup>25</sup> The GATT 1947 was incorporated into the GATT 1994 minus the Protocol of Provisional Application, the stipulation which was primarily responsible for limiting the GATT's application in national law. The GATT 1994 and GATT 1947, as modified by the Final Act's WTO Agreement at Annex 1A, are legally distinct agreements.<sup>26</sup> In the event of a conflict between the GATT 1994 and the GATT 1947, the GATT 1947, its waivers, and its decisions, are to control.<sup>27</sup> The GATT 1994 amends, modifies, and expands many existing GATT obligations through new agreements including Agreements on Agriculture, Sanitary and Phytosanitary Measures, Textiles and Clothing, Technical Barriers to Trade, Trade-Related Investment Measures, Agreements on the Implementation of Article VI (antidumping) and on Article VII, Agreements on Preshipment Inspection, Rules of Origin, Import Licensing Procedures, Subsidies and Countervailing Measures, and Safeguards.<sup>28</sup> The Final Act, in the remaining annexes to the WTO Agreement, also expands obligations of the WTO Members beyond those of the GATT Contracting Parties to encompass new agreements on financial services<sup>29</sup> through the GATS accord, intellectual property rights in the TRIPs Agreement, dispute resolution under the Dispute Settlement Understanding, and national trade policy review through the Trade Policy Review Mechanism. All of these agreements, excluding the original GATT, but including the GATT, are called the Multilateral Trade Agreements and

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24. The GATT 1994 consists of the Understandings and Agreements of Annex 1A of the Final Act.

25. Incorporated into the GATT 1994 is the original General Agreement on Tariffs and Trade of October 30, 1947 (GATT 1947) annexed to the Final Act of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The GATT 1994 specifically excludes the Protocol of Provisional Application, but includes the protocols and certifications to tariff concessions, protocols to accession, the listed waivers granted under Article XXV of the GATT 1947 granted before the date the WTO Agreement enters into force, and other decisions of the Contracting Parties of the GATT 1947. Final Act, *supra* note 8, Part II, ann. 1A, para. 1, 33 I.L.M. at 1154-55.

26. *Id.* Part II, art. II, para. 4, 33 I.L.M. at 1145.

27. *Id.* Part II, ann. 1A, 33 I.L.M. at 1154.

28. *See id.* at 1153. The GATT 1994 also embraces several Understandings on the Interpretation of arts. II, para. 1(b), XVII, XXIV, and XXVII of the GATT 1994 as well as Understandings on Balance-of-Payment Provisions and in Respect of Waivers of Obligations under the GATT 1994. *Id.* at 1156-65.

29. For specific obligations, limitations, and exceptions, see *id.*, Understanding on Commitments in Financial Services, 33 I.L.M. at 1260.

are binding upon all WTO Members.<sup>30</sup> The Final Act includes four Plurilateral Trade Agreements covering Trade in Civil Aircraft, Government Procurement, the International Dairy Agreement, and the Arrangement Regarding Bovine Meat,<sup>31</sup> which are binding upon only those WTO Members which have accepted them.<sup>32</sup> Consequently, with reference to the Multilateral Trade Agreements, which comprise all of the results of the Final Act minus the Plurilateral Trade Agreements, the problem in previous rounds of a "GATT à la Carte,"<sup>33</sup> which allowed Contracting Parties to pick and choose which obligations they were bound by and which they were not, is largely avoided.

### B. The WTO Agreement

The World Trade Organization is a creation of the WTO Agreement, the purpose of which is to provide the "common institutional framework" for the Covered Agreements of the Final Act of the Uruguay Round.<sup>34</sup> Thus, all the agreements of the Uruguay Round including the GATT 1994 are placed under the auspices of the WTO.<sup>35</sup>

As discussed in the introduction, the ITO was to be one of three international organizations of the Bretton Woods System accompanying the IMF and the World Bank in the creation of the new "World Order" for international economic relations. At the center of the Bretton Woods System was to be the ITO, the executive organ provided in the multilateral economic agreements of the Havana Charter. Had it been created, the ITO would have administered the Charter agreements and governed disputes arising out of the Charter's wide range of obligations.

The original idea was for the IMF, World Bank, and the ITO to support one another in the pursuit of related goals — ultimately the

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30. *Id.* Part II, art. II, para. 2, 33 I.L.M. at 1144.

31. *Id.* Part II, ann. 4(a)-(d).

32. *Id.* Part II, art. II, para. 3, 33 I.L.M. at 1144.

33. Jackson Testimony, *supra* note 2, at 197.

34. The covered agreements of the Final Act of the Uruguay Round include the Multilateral Trade Agreements. The Multilateral Trade Agreements are: the GATT 1994, which includes with certain exceptions the GATT 1947; its subsequent agreements and many of its decisions and waivers; the GATS Agreement; the TRIPs Agreement; the Dispute Settlement Understanding; and the Trade Policy Review Mechanism [hereinafter occasionally referred to collectively as the Multilateral Agreements]. See *id.* Part II, ann. 1A, 1B, 1C, 2, and 3, 33 I.L.M. at 1154-1247. The Plurilateral Trade Agreements are the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement [hereinafter the Plurilateral Trade Agreements]. *Id.* ann. 4.

35. *Id.* Part II, art. II, paras. 1-3, 33 I.L.M. at 1144. Also, the GATT 1994 is established within the WTO as an agreement legally distinct from the GATT 1947. *Id.* para. 4. Both agreements, as mentioned above, are now administered under the auspices of the WTO and the WTO Agreement.

"restoration of a freer trading system."<sup>36</sup> The type of support imagined was coordinated cooperation between the three organizations on the resolution of specific problems. For instance, at the time it was foreseen that the IMF, with the assistance of the ITO through the enforcement of Havana Charter obligations of quantitative restrictions on trade, could better serve and encourage governments to stabilize their currencies and exchange rates. It had been suggested that the very effectiveness of each organization depended upon the other. Likewise the World Bank was to be supported by the ITO.<sup>37</sup>

Among the responsibilities of the WTO, on the other hand, are the tasks to facilitate the implementation, administration, operation, and *further objectives* of the agreements,<sup>38</sup> provide for future negotiations concerning the Agreements, resolve disputes, review trade policy, and:

[w]ith a view to achieving greater coherence in global policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development . . . .<sup>39</sup>

Thus, after almost half a century, an organization, similar to the ITO but not the same, is brought back. This entity may fulfill Cordell Hull's old dream of "a comprehensive code to govern the conduct of world trade"<sup>40</sup> and in important ways may not.<sup>41</sup> For instance, the IMF and the World Bank are perceived as being more effective in the realization of policy goals within individual countries in part because of their executive powers, which the GATT's successor, the WTO, does not yet possess. Due to the nature and subject matter of their work dealing with currencies and grants of financial assistance, these organizations hold a persuasive power that the GATT does not. Also, the "weighted" voting system gives financially stronger nations more power over the decision-making process than they have in the GATT or in the WTO. Cooperation between the three in the future would certainly be beneficial to the WTO, where the power of the other two organizations could be brought to bear upon wayward Member Nations. However, the Dispute Settle-

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36. WILCOX, *supra* note 5, at 211.

37. *Id.* at 212.

38. This includes the WTO Agreement, the GATT 1994, which includes the Multilateral Agreements and the Plurilateral Agreements, and the GATT 1947.

39. Final Act, *supra* note 8, Part II, art. III, para. 5, 33 I.L.M. at 1145.

40. GARDNER, *supra* note 6, at 101.

41. See Final Act, *supra* note 8, Part II, art. III, paras. 1-5, 33 I.L.M. at 1145.

ment Understanding and the use of retaliation and cross retaliation are intended to be the primary instruments of WTO obligation enforcement, an arguably more effective procedure than that offered by the ITO itself.<sup>42</sup> Nevertheless, the WTO presently lacks executive authority to bring actions on its own initiative against its Member Nations. The question also remains whether the allocation of such authority is a necessary or even a desirable development for the world trading body.

### C. Scope, Functions, and Structure of the WTO

The ambitious plan of the WTO is to encourage world economic and political convergence through comprehensive trade policy surveillance and integrated dispute settlement systems, developmental assistance to less developed nations, and environmental protection. Its task will be "to provide the common institutional framework for the conduct of trade relations among its Members" in relation to the Uruguay Round Agreements.<sup>43</sup> In addition, the organization's function is to facilitate the implementation, administration, operation, and *further objectives* of the WTO Agreement and Covered Agreements, such as providing a forum for the development and negotiation of further agreements on trade and international economic relations.

#### 1. Scope of the WTO

The WTO is to inherit the mantle of world trade relations, negotiations, and dispute resolution which has been embodied in the GATT for the last forty-seven years. It is to provide the "common institutional framework" between its Members for the conduct of trade relations as contemplated by the Covered Agreements and any further trade agreements that its Members may execute.<sup>44</sup> The organization is to take the place of what was to be the ITO, with all the implications for national law that an international organization carries.<sup>45</sup> Interestingly, the problem presented by the Protocol of Provisional Application, namely exempting all national laws on the books as of the adoption of the Protocol, is avoided by its explicit exclusion from the Covered Agreements<sup>46</sup> and its

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42. See *infra* section III.A.4.

43. Final Act, *supra* note 8, Part II, art. II, para. 1, 33 I.L.M. at 1144.

44. *Id.*; see also *id.* art. III, para. 2, 33 I.L.M. at 1145.

45. See *infra* section III.C. for a discussion of the effect WTO decisions may have upon United States law.

46. Final Act, *supra* note 8, Part II, ann. 1A, para. 1(a), 33 I.L.M. at 1154.

prohibition of a broad exemption for existing national law in its provisions.<sup>47</sup>

## 2. Structure and Function of the WTO

The structure of the WTO is surprisingly similar to that proposed for the ITO. The WTO, like the ITO, is to be a three tiered organization. At its head rests the Ministerial Conference, which will consist of representatives of all of the WTO's Members. Next is the executive agency or General Council. Unlike the ITO's Executive Board, the General Council is composed of representatives of all the WTO's Members. Therefore, it will not be a WTO "Security Council" and will not retain the obvious advantages and disadvantages of such a body. The view is that economically smaller nations normally apply international norms rather fully within their domestic legal systems and are more susceptible to pressure from economically larger nations. Accordingly, a "security council" type feature was not needed. The WTO Agreement provides for councils and bodies that are accountable to the General Council and/or the Ministerial Conference.

### a. The Ministerial Conference

The Ministerial Conference sits at the head of the WTO and is charged with the execution of all of its functions and the functions it derives from the Covered Agreements. It has authority to make any decisions necessary to the fulfillment of these functions. It also has authority to make decisions in accordance with the decisionmaking procedure for all appropriate matters put before it by request of a Member concerning the Covered Agreements. It is to establish certain committees on Trade and Development, on Balance of Payment Restrictions, and on Budget, Finance, and Administration, and to grant those committees appropriate authority in order that they may carry out the functions of the Covered Agreements. The Ministerial Conference is to meet biannually. In recess, the functions of the Ministerial Conference are to be performed by the General Council.

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47. A small exemption is allowed for "specific mandatory legislation, enacted by [a] Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone." *Id.* para. 3(a), 33 I.L.M. at 1155. This exemption seems to apply only to the construction of vessels used in international shipping by water. Specifically, it was required by the United States so as to preserve certain provisions of the Jones Act.

## b. The General Council

Certain executive authority and day to day functions of the WTO will rest with the General Council. It will also be composed of representatives of all the WTO's Members and is charged to meet as appropriate in intervals between the biannual meetings of the Conference to perform the Conference's functions. Under the authority of the General Council rest the heart and soul of the WTO organization: the Dispute Settlement Body, the Trade Policy Review Body, and the various councils and committees, including Councils for Trade in Goods, Trade in Services, and TRIPs.

### (i) *The Councils*

Membership in the councils is open to representatives of all Members which will meet when necessary to carry out the councils' functions. The councils are granted authority to create subordinate organizations and to establish rules of procedure for themselves and their subordinates. The Councils and their subsidiaries will operate under the guidance of the General Council.

### (ii) *The DSB and TPRB*

Responsibility for resolution of disputes resides with the Dispute Settlement Body (DSB).<sup>48</sup> The specifics of dispute settlement are discussed at length in Part III. The DSB is simply a special meeting of the General Council in its dispute settlement role and is composed of all General Council Members present at the DSB meeting. The DSB shall have a Chairman at its head and shall establish its own rules of procedure.<sup>49</sup>

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48. *Id.* Part II, art. IV, para. 3, 33 I.L.M. at 1145. In the Uruguay Round Final Draft completed on December 15, 1993, both the WTO Agreement and the DSU only *refer to* the actual creation of the DSB; each agreement assumes the other created the DSB. As with any agreement of such length and scope, there are bound to be a few oversights. The WTO Agreement refers to the DSB twice and the Dispute Settlement Understanding once. The WTO Agreement states: "The General Council shall convene as appropriate to discharge the responsibilities of the [DSB] *provided for* in the [DSU]." Draft Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Part II, art. IV, para. 3, 33 I.L.M. at 16 (emphasis added). The DSU refers to "[t]he [DSB] *established pursuant to* the [WTO Agreement] . . . ." *Id.* ann. 2, para 2, 33 I.L.M. at 114 (emphasis added). Thus, nowhere is the DSB technically created under the Covered Agreements. In the Final Act, the drafters resolved the oversight by stating explicitly that the DSB "is hereby established . . . ." Final Act, *supra* note 8, Part II, ann. 2, para. 2, 33 I.L.M. at 1226 [hereinafter Dispute Settlement Understanding].

49. Final Act, *supra* note 8, Part II, art. IV, para. 1, 33 I.L.M. at 1145.



### 3. Functions of Specific Organs Within the WTO

As previously stated, the functions of the WTO are to facilitate the implementation, administration, and operation of the Covered Agreements; to provide a forum for negotiations between its Members; to settle disputes arising under the Covered Agreements; to administer the Trade Policy Review Mechanism; and to cooperate with the IMF and World Bank for the purpose of achieving "greater coherence in global economic policy-making."<sup>50</sup> The WTO will provide for negotiations over issues arising under the Covered Agreements, for "further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations . . ."<sup>51</sup> This last provision allows for the expansion of its mandate and further evolution of the international system of economic and trade cooperation and dispute resolution found in the Covered Agreements to include new multilateral agreements between its Members.

#### a. Ministerial Conference and the General Council

Specifically, the Ministerial Conference is to be composed of representatives of each Member of its Charter and embodies the ultimate power and decisionmaking organ of the WTO. The Ministerial Conference and the General Council possess authority to adopt interpretations of the Covered Agreements.<sup>52</sup> The Ministerial Conference alone possesses the power to authorize new multilateral negotiations between the WTO's membership and adopt the results of those negotiations. In "exceptional circumstances" and with a three-fourths majority vote of the Member Nations, the Ministerial Conference alone may grant waivers to Members from their obligations under those agreements.<sup>53</sup>

Generally, Article IX provides that the practice of consensus decisionmaking as established under the GATT 1947 will continue in the WTO,<sup>54</sup> but decisions of the Ministerial Conference and General Council, mainly on procedural questions, shall be taken by majority vote, unless otherwise provided.<sup>55</sup> A decision by consensus is made where no

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50. *Id.* art. III, paras. 1-5, 33 I.L.M. at 1145.

51. *Id.* para. 2.

52. *Id.* art. IX, para. 2, 33 I.L.M. at 1148.

53. *Id.* para. 3.

54. *Id.* para. 1.

55. *Id.*

Member present formally objects to the proposed decision.<sup>56</sup> Presumably, consensus decisionmaking applies mainly and most importantly to new negotiations under the auspices of the Covered Agreements or negotiations for new multilateral agreements between the WTO Members. A form of inverted consensus decisionmaking is explicitly provided in cases where the General Council operates as the DSB.

(i) *Article IX: Decisionmaking*

The formulation of the first paragraph of Article IX is perhaps a bit confusing. Article IX, paragraph 1, provides:

The WTO shall continue the practice of decision-making by consensus followed under the GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or the Multilateral Agreements.

First, the paragraph provides that the WTO "shall continue the practice of decisionmaking by consensus followed under the GATT 1947" *unless* and "except as otherwise provided, where a decision cannot be arrived at by consensus" the decision is to be made "by voting." The provision further states that decisions of the Ministerial Conference and the General Council, unless otherwise provided, "shall be taken by a majority of the votes cast." Accordingly, decisions will be made by voting in two cases: (1) where a decision normally to be made by consensus cannot thus be made, excepting, of course, decisions of the General Council in its role as DSB;<sup>57</sup> and (2) in decisions of the Ministerial Conference and the General Council, "except as otherwise provided," that is, in decisions such as those on waivers, interpretations, and amendments.<sup>58</sup>

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56. *Id.* Part II, 33 I.L.M. at 1148 n.1.

57. *Id.* n.3; Dispute Settlement Understanding, *supra* note 48, art. 2, para. 4, 33 I.L.M. at 1227.

58. Amendments of the Multilateral Trade Agreements normally require consensus to be adopted, but where a decision on an amendment cannot be reached by consensus, then it will be taken by a vote equalling two-thirds of the Members. Final Act, *supra* note 8, Part II, art. X, para. 1, 33 I.L.M. at 1149.

Consequently, it is not initially clear from the text whether a general principle of consensus decisionmaking or decisionmaking by voting is to be established in reference to the Ministerial Conference and General Council. Presumably, decisions on procedural matters within the Ministerial Conference and the General Council are to be made by majority vote. Decisions such as the approval of Committee and Council rules and procedures would be one example of such procedural matters.

There remain, nevertheless, uncertainties even where this explanation holds true. Consensus is established as the general rule for decisionmaking on substantive decisions of the WTO. In cases where the decision cannot be reached by consensus, an impasse rule applies, and the decision is then to be made by voting. It is clear that where "otherwise provided," as in special provisions for waivers, interpretations, and amendments, those special provisions apply and not the general rule of consensus. These decisions were singled out for special attention because of their importance. Other decisions, arguably of equal importance, nevertheless have no specific rule and apparently fall within the general rule for consensus decisionmaking to which the impasse rule applies. Accordingly, where a decision on these matters cannot be reached by consensus, the issue will be decided by voting. One such circumstance appears to be the decision on whether to "continue, modify or terminate" the new dispute settlement procedure.<sup>59</sup> Where the Ministerial Conference cannot decide to continue, modify, or terminate the dispute settlement procedure by consensus, it would then make the decision by voting. Would such decisions to modify the procedure be allowed to go so far as to amend or interpret the DSU? The DSU appears amendable only under Article X, paragraph 8, but that provision is silent as to whether it controls in this specific circumstance. The "impasse rule" which allows for voting where consensus fails appears equally applicable to Article X, paragraph 8. Moreover, the impasse rule for consensus decisionmaking does not define the term "by voting." Whether simple majority, two-thirds, three-fourths, or even unanimous margins is meant is left unclear.

(ii) *Interpretations, Amendments, and Waivers*

The Ministerial Conference and the General Council have exclusive authority to rule upon an interpretation or waiver granted in regard to

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59. Final Act, *supra* note 8, part III, Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. at 1261.

the Covered Agreements. The grant of waivers is solely within the competence of the Ministerial Conference. Adoption of amendments is also exclusively within the province of the Ministerial Council but may be recommended by any Member or any Council created under the auspices of the Multilateral Trade Agreements by the Ministerial Conference or the General Council.<sup>60</sup> Amendments of the Multilateral Trade Agreements normally require consensus to be adopted, but where a decision on an amendment cannot be reached by consensus, in certain instances it will be made by a vote equalling two-thirds of the Members.<sup>61</sup>

(iii) *The Councils and Committees*

Virtually every agreement, or set of agreements, has its own specific council or committee charged with Ministerial Conference or General Council type powers and is under the direction of the Ministerial Conference or General Council to administer that agreement. The Councils for Trade in Goods, Trade in Services, and Trade-Related Aspects of Intellectual Property Rights are created directly by the WTO Agreement, while Committees on Trade and Development, on Balance-of-Payment Restrictions, and on Budget, Finance, and Administration (the Committees) are to be established by the Ministerial Conference. Other committees, such as the Committee on Subsidies and Countervailing Duties, are established by particular agreements.<sup>62</sup> Its functions will be assigned to it by its Members and by the Agreement on Subsidies and Countervailing Measures (SCM). A further function of the Committee on SCM is to establish the Permanent Group of Experts, which plays a pivotal role in panel decisions under the dispute settlement process for disputes arising out of the Agreement on SCM.<sup>63</sup>

Generally speaking, the councils and committees are to draft rules and procedures to be approved by the General Council or the Ministerial Conference, whichever the case may be. The General Council is empowered to create any additional committees it deems necessary and may assign to existing or new committees any additional functions it sees fit.

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60. Final Act, *supra* note 8, Part II, art. X, para. 1, 33 I.L.M. at 1149. A list of those Councils which may recommend amendments may be found at Annex 1 to the Multilateral Trade Agreements. *Id.* art. IV, para. 5, 33 I.L.M. at 1146.

61. *Id.* art. X, para. 1, 33 I.L.M. at 1149.

62. Subsidies Code Agreement on Interpretation and Application of Article VI, XVI, and XXIII of the GATT, Apr. 12, 1979, art. 24, para. 1, 31 U.S.T. 513, 1186 U.N.T.S. 204 [hereinafter Subsidies Agreement].

63. *Id.* para. 3.

(iv) *The DSB and TPRB*

The DSB is the central character in the dispute resolution drama, and its role is performed by the General Council. The dispute settlement procedure of the WTO differs somewhat from agreement to agreement, but the essentials of all agreements can be boiled down to the following stages: consultation, panel investigation and report, appellate review, decision adoption, and implementation. A parallel procedure for binding arbitration is also available where both or all parties to a dispute agree to the procedure. Also, during the implementation phase of a decision, the party against whom a decision is implemented may request arbitration as of right to determine whether the retaliatory measure to be implemented is appropriate to the circumstance. In the instance of a dispute concerning the Covered Agreements, the parties may call for consultation,<sup>64</sup> at which time the DSB mechanism is not yet activated. Where consultations fail to produce a mutually satisfactory solution, the DSB decides by reverse or inverted consensus<sup>65</sup> whether to convene a panel or adopt a decision. That is, panel or Appellate Body establishment or decision adoption is achieved automatically *unless* the Members present at the particular meeting of the DSB decide by consensus *not* to do so.<sup>66</sup> The panel, if convened, will investigate the matter and submit a report to the DSB authorizing appropriate action, if any. The report must be adopted by the DSB unless rejected by consensus and without amendment, or in the alternative it may be appealed by either or any party to the dispute to the Appellate Body. Only a party to the dispute may appeal the report to the Appellate Body. An Appellate Body decision shall be unconditionally accepted by the parties unless the DSB vetoes it by consensus, therefore making its rejection difficult or impossible where at least one WTO Member present at the meeting of the DSB at which the decision for adoption is to be made desires adoption of the report.

As discussed at length in Part IV, the DSU and the WTO Agreement provide for a mixture of adjudication and negotiation, a mixture which moves more strongly in the direction of adjudication than the system that evolved under the GATT. Apparently, the DSB is composed of the Members to the General Council present at its meeting, and the

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64. Dispute Settlement Understanding, *supra* note 48, art. 4, 33 I.L.M. at 1228-29. A thorough discussion of Consultation is discussed *infra* section II.A.1.

65. *Id.* art. 2, para. 4, n.1, 33 I.L.M. at 1227.

66. *Id.* arts. 6-16, 33 I.L.M. at 1230-35. Composition, powers, procedures, investigative authority, and adoption of reports are discussed *infra* section III.

General Council is composed of representatives of all WTO Members. But Panels and Appellate Bodies will be more independent from the influence of disputing parties than ever before. Panels may be composed of nongovernmental individuals whose reports must be adopted or rejected without amendment, somewhat shielding the actual formulation of the decision from political interest. It should be noted that the panel may also be composed of governmental officials or a combination thereof, but there is a stated preference against citizens of parties to a dispute sitting on a panel in that dispute. Furthermore, panelists are to be chosen with a view toward ensuring their independence.<sup>67</sup> Also, at the Appellate level, adjudication finds a stronger foothold with Appellate "judges" appointed by the DSB for fixed terms of four years, subject to one reappointment.<sup>68</sup> Appellate decisions may be rejected only by a "consensus veto" of the DSB, assuring adoption in every case where at least one Member favors adoption of the decision.<sup>69</sup>

The ITO, on the other hand, provided a rather different dispute settlement approach. The procedure consisted of similar phases: consultation, Executive Board investigation and decision, arbitration, disposition by the Conference, and, finally, legal issues could be referred to the World Court for a binding determination. Disposition by the Conference, if requested by a party to the dispute, or by the Executive Board where referral to the Conference did not occur, was to be final as to the economic and factual issues of the dispute.<sup>70</sup> The DSB improves upon the process of decision adoption found in the ITO, where the Conference or Executive Board were to approve settlement decisions by *majority vote*

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67. Dispute Settlement Understanding, *supra* note 48, art. 8; paras. 1-3, 33 I.L.M. at 1231. The DSU provides at this juncture:

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of an [W]TO Member or of a contracting party to the GATT 1947 or as a representative to a council or committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments are parties to the dispute or third parties as defined in 10.2 shall not serve on a panel concerned with that dispute unless the parties to the dispute agree otherwise.

*Id.*

68. *Id.* art. 17, paras. 1 and 2, 33 I.L.M. at 1236.

69. *Id.* para. 14, 33 I.L.M. at 1237.

70. Havana Charter, *supra* note 7, ch. VII, art. 95, para. 1.

rather than adopt them automatically if not vetoed by consensus as provided in the DSB. Also, the Security Council quality of the Executive Board not only limited the number of parties who could vote to settle a dispute, but also would have opened the door to political influence or criticisms of bullying by the permanent Members of the Board. Nothing like the Appellate Body was contemplated within the ITO. Its development is perhaps a further significant step forward for adjudication in trade disputes.

The Trade Policy Review Mechanism (TPRM) was originally created in 1989<sup>71</sup> during the Uruguay Round negotiations. The purpose of the Mechanism is to improve adherence of WTO Members to obligations under the Multilateral Trade Agreements and, where applicable, under the Plurilateral Trade Agreements. It is also intended to achieve greater transparency in the trade policies and practices of WTO Members. The Review Mechanism provides for a Trade Policy Review Body (TPRB) which reviews country policy on the basis of Member submitted "Country Reports" and WTO Secretariat reports. The TPRB will not have authority to impose new policy commitments upon countries, nor may it enforce specific obligations under the Covered Agreements for dispute settlement procedures or otherwise. TPRB authority extends to a review of national policy and practice on the basis of Member and Secretariat reports and the making of a final report which is then submitted to the Ministerial Conference. On the basis of the TPRB report, the Ministerial Conference will "evaluate" individual Member's trade policies and practices. A further function of the TPRB is an annual review of developments in the "international trading environment." This report is to consider developments and policy issues affecting the multilateral trading system.

Using the TPRM and TPRB as trade police to effect compliance with international obligations in national trade policy is far from reality and, according to at least some commentators, is not a desirable objective. At present, political sentiment, especially in the United States, is barely, if at all, tolerant of the rather meager allocation of national sovereignty in the WTO and the Covered Agreements. As the WTO and its various subsidiary organs and committees establish a track record of dependability, especially in relation to dispute settlement, perhaps opinion will change in favor of more international control of national trade policy.

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71. Functioning of the GATT System, Decisions of 12 April 1989 arising from action taken by the Uruguay Round Trade Negotiations Committee L/6490, 36 B.I.S.D. 403 (1990).

#### D. The World Trade Organization: Conclusions

The General Agreement on Tariffs and Trade, which has heretofore governed issues related to international trade between its contracting parties, is soon to be superseded by the World Trade Organization. The WTO has been described as the crowning achievement of the Uruguay Round. It was designed as a "minimalist" organization<sup>72</sup> to facilitate international cooperation on trade and economic relations.<sup>73</sup> The WTO is entirely institutional and procedural in character and plays the essential role of unifying the existing and new obligations under one administrative roof. In addition, it provides an internationally recognized organizational structure which its forerunner, the GATT, had lacked. The new obligations under the GATS and TRIPs Agreements, as well as the modified GATT commitments, find a common institutional home in the new World Trade Organization. The administration of the agreements on trade in goods in the GATT 1994 and the new multilateral obligations beyond the scope of trade in goods are to be the work of the WTO, a role the GATT could have fulfilled only with great difficulty considering that its competence extended only to tariffs and trade in goods.

GATT achieved remarkable success in its forty-seven year history. Nevertheless, time and experience exposed certain limitations resulting from the lack of an institutional charter and GATT's provisional application. Several defects had been pointed out within the GATT regime which needed remedy if the multilateral trading system was to function more effectively. Singled out as particularly vexatious were GATT's provisional application and grandfather rights exceptions, ambiguity about waiver authority and the powers of the Contracting Parties to make certain decisions, the murky legal status of the GATT as an international institution, problems with dispute settlement, and a lack of constitutional provisions in GATT which have led to the need for constant improvisation.<sup>74</sup>

Accordingly, the WTO provides a unified administrative organ for all of the Uruguay Round Agreements and overcomes two initial problems. First, the establishment of the WTO resolves the difficulty of incorporating the non-trade-in-goods obligations concerning the protection of intellectual property rights and trade in services into the GATT.

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72. Jackson Testimony, *supra* note 2, at 197.

73. *See id.*

74. *Id.*; see also Petersmann, *supra* note 11, at 221-44; JACKSON, RESTRUCTURING THE GATT, *supra* note 11, at 91-103; JACKSON, WORLD TRADING SYSTEM, *supra* note 11, at 299-308; Low, *supra* note 12, at 242-52.



The creation of a unified organ "separates the institutional concepts from the institutional rules."<sup>75</sup> Second, the establishment of the WTO settles the question of the institutional status of the trade entity, a question which has hindered GATT in its nearly five decades of history.

Further, the agreements to be administered by the WTO are incorporated into the WTO Agreement as Annexes. Importantly, the Protocol of Provisional Application is excepted from these agreements. Because the new Members of the WTO will, in effect, withdraw from the old GATT and become members of the new GATT 1994 minus the Protocol, the old problem of provisional application is solved. Under Article XVI, paragraph 4, of the WTO Agreement, Members may now be obligated under international law to bring existing national law into conformity with the Uruguay Round Agreement obligations.<sup>76</sup> The provision requires all WTO Members to conform their national "laws, regulations and administrative procedures" to the obligations provided in the Uruguay Round Agreements.<sup>77</sup>

As to decisionmaking, dispute settlement is technically removed from the decisionmaking process of the Members and placed within the DSB, where panel and Appellate Body reports are automatically adopted unless rejected by consensus. Consensus is preserved as the basic form of Member decisionmaking except that an impasse rule is created. In cases where the Members fail to reach a decision based on consensus, the matter is to be decided by voting unless otherwise provided. Decisions are reached "by voting," generally, in two cases: (1) where consensus leads to impasse and the decision is not excepted from the impasse rule, such as decisions of the General Council in its role as DSB;<sup>78</sup> and (2) in procedural decisions of the Ministerial Conference and the General Council. Decisions on waivers, amendments, and interpretations have special rules of their own. These rules require a three-fourths majority vote for waivers, consensus for amendments<sup>79</sup> except in certain

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75. Jackson Testimony, *supra* note 2, at 197.

76. The WTO Agreement provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Final Act, *supra* note 8, Part II, art. XVI, para. 4, 33 I.L.M. at 1152.

77. *Id.*

78. *Id.* art. IX, para. 1, 33 I.L.M. at 1148 and n.3; Dispute Settlement Understanding, *supra* note 48, art. 2, para. 4, 33 I.L.M. at 1227.

79. See, e.g., Final Act, *supra* note 8, Part II, art. IX, 33 I.L.M. at 1148; General Agreement on Tariffs and Trade (GATT Agreement), *opened for signature* Oct. 30, 1947, art. II, para. 1, 55 U.N.T.S. 194. The GATS art. II and TRIPs Agreement art. 4 take effect only upon acceptance of all Members. Final Act, *supra* note 8, Part II, art. X, para. 2, 33 I.L.M. at 1149.

circumstances where consensus fails, and three-fourths vote for interpretations.

There are certain difficulties in the decisionmaking articles of the WTO Agreement. Generally, consensus decisionmaking applies to substantive decisions of the WTO, but in specific circumstances, it is clear that special provisions contrary to the general rule of consensus for decisions on waivers, interpretations, and amendments derogate that rule. These decisions were singled out for special treatment because of their importance, while certain decisions of arguably equal importance, nevertheless, have no specific rule and apparently fall within the general rule for consensus decisionmaking to which the impasse rule applies. Accordingly, where a decision on these matters cannot be reached by consensus, the issue will be decided "by voting." It is unclear whether the impasse rule allowing voting on certain decisions applies to renewal or modification of the dispute settlement procedure. The exact meaning of the phrase "by voting" is also unclear.<sup>80</sup>

## II. DISPUTE SETTLEMENT

The Dispute Settlement Understanding presents a significant improvement over the previous GATT dispute resolution system and solves many of its shortcomings. There are three main improvements to the system. First, the DSU creates a "unified" dispute settlement system, which overcomes the problem of uncertainty in determining which procedure should apply. Second, it establishes a new organ, the Appellate Body, for review of legal issues decided by panels. Third, the new system virtually ensures the establishment of panels and Appellate Bodies and adoption of their decisions unmodified through a type of reverse or inverted consensus.<sup>81</sup>

The central provisions for GATT dispute settlement are found at Articles XXII and XXIII. But as there is no general definition provided in GATT determining exactly what constitutes a dispute under its auspices, one may point to perhaps more than thirty separate provisions for multilateral or bilateral consultations which are arguably dispute resolution procedures.<sup>82</sup> Beyond GATT law, other international agreements

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80. See *supra* section I.C.3.a.ii.; see also Final Act, *supra* note 8, Part III, Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. at 1260-1261.

81. See Jackson Testimony, *supra* note 2, at 199.

82. Jackson identified 22 such provisions. He lists GATT articles and paragraphs as follows: II, para. 5; VI, para. 7; VII, para. 1; VIII, para. 2; IX, para. 6; XII, para. 4; XIII, para. 4; XVI, para. 4; XVIII, para. 7; XVIII, para. 12; XVIII, para. 16; XVIII, para. 21; XVIII, para. 22; XIX, para. 2; XXII; XXIII; XXIV, para. 7; XXV, para. 1; XXVII; XXVIII,

provide possibly competing venues and procedures for the settlement of disputes, such as the NAFTA Agreement,<sup>83</sup> which is multilateral in nature, and the Treaty of Friendship, Commerce, and Navigation between the United States and Germany, which is bilateral and is also an independent source of rules for dispute settlement.<sup>84</sup>

The corollary to dispute resolution is interpretation. Without a dispute, real or potential, as to the obligations, concessions, or benefits accruing under a treaty, there would be no need for interpretation. Without an interpretation as to exactly what and how the parties intended to bind themselves, there will be no dispute resolution. Unfortunately, just as there is no definition of dispute provided in the GATT, there is also no explicit grant allowing for formal binding interpretation in any of the pre-Uruguay Round GATT agreements, although as we

para. 1; XXVIX, para. 4; XXXVII, para. 2. LAW OF GATT, *supra* note 8, at 164-65.

Petersmann identifies 30. Ernst-Ulrich Petersmann, *Proposals for Improvements in the GATT Dispute Settlement System*, in FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 340, 340-42 (Detlev Chr. Dicke & Ernst-Ulrich Petersmann eds., 1988) [hereinafter FOREIGN TRADE AND THE NIEO].

Professor Mora points to more than thirty articles covering dispute settlement when employing the definition of dispute proffered by the Permanent Court of International Justice: "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. 1 (ser. A) No. 2, at 11 (Aug. 30); Mora, *supra* note 10, at 115.

83. North American Free Trade Agreement, Dec. 17, 1992, ch. 20, 32 I.L.M. 605, 693 [hereinafter NAFTA].

84. Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, art. XXVII U.S.-F.R.G., 7 U.S.T. 1839, 1867. See Carsten T. Ebenroth & Thomas J. Dillon, Jr., *Gaining the Competitive Edge: Access to the European Market Through Bilateral Commercial Treaties and Taxation Strategies*, 28 TEX. INT'L L. J. 269, 305-06 (1993); Carsten T. Ebenroth, *Gaining Access to Fortress Europe—Recognition of U.S. Corporations in Germany and the Revision of the Seat Rule*, 24 INT'L LAW. 459, 482 (1990). According to art. 113 of the EC Treaty, Treaties of Friendship, Commerce, and Navigation, like the treaty between the U.S. and Germany, are integrated into the common commercial policy of the European Union. TREATY ESTABLISHING THE EUROPEAN COMMUNITY art. 113 [hereinafter EC TREATY]; see also CHRISTIAN VEDDER, *DIE AUSWÄRTIGE GEWALT DES EUROPA DER NEUN 22* (1980); Carsten T. Ebenroth, *Ausländische Investitionen und EG Integration*, in Festschrift für Karl Rebmann (Heinz Eyrich et al. eds., 1989). Art. 234 of the EC Treaty, while stating that previous bilateral treaties are not to be affected, requires all provisions in bilateral treaties that conflict with the Treaty establishing the European Community to be eliminated. EC TREATY art. 234. Furthermore, the EU Commission agreed to prolong the effectiveness of certain friendship, commerce, and navigation treaties in 1987. This agreement to prolong effectiveness lasted only until the end of 1988, at which time no further action was taken.

Regardless of the EC Commission's failure to prolong further the effectiveness of the treaties, there is no effect on the sovereign right of member nations to conclude or adhere to such agreements under international law. IGNAZ SEIDL-HOHENVELDERN, *DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIESSLICH DER SUPRANATIONALEN GEMEINSCHAFTEN* 269 (4th ed. 1984).

Also, the past practice of the European Commission's extension of treaties, coupled with the point that the FCN Treaty contains provisions not contemplated within the jurisdiction of the EU, confirms its continuing validity.

shall see in some specific circumstances, binding "interpretations" of several articles of the original GATT have been agreed upon in the Uruguay Round final agreement.<sup>85</sup>

In the absence of a provision for a formal interpretation procedure, one must resort to international principles of treaty interpretation. The primary treaty source for the interpretation of international agreements is the Vienna Convention on the Interpretation of Treaties.<sup>86</sup> According to the principles of treaty interpretation, some of which are set out in the Vienna Convention, interpretation is to be guided by the ordinary and natural meaning of the words in the agreement, previous and subsequent agreements, subsequent practice, and relevant rules of international law.<sup>87</sup> These principles have been applied to the interpretation of GATT. In addition, subsequent agreements to GATT such as the Tokyo Round agreements and the Uruguay Round agreements have attempted to interpret certain provisions and articles of the original agreement. Despite the assertion in many of these subsequent provisions that they merely interpret the original agreement, commentators claim that the subsequent rounds actually erected new obligations and concessions.<sup>88</sup>

#### A. *Dispute Settlement Under the Auspices of the WTO*

The new dispute resolution mechanism of the WTO presents some promising and perhaps radical innovations over the GATT system, although not without some loopholes. The new system can be divided into four basic phases: consultation, a panel phase, Appellate Body review, and finally, as an optional alternative procedure, arbitration. As stated above, the Dispute Settlement Understanding improves upon the previous GATT dispute resolution system in three major areas. First, the DSU creates a "unified" dispute settlement system which overcomes the problem of uncertainty in determining which procedure should apply. Second, it establishes a new organ, the Appellate Body, for review of

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85. Several "Understanding[s] on the Interpretation of" Articles II, para. 1(b), XVII, XXIV, XXV, XXVIII, and XXXV are included in the GATT 1994.

86. Vienna Convention on the Law of Treaties, Interpretation of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

87. The orthodox view shunned the use of "rules" for the purpose of treaty interpretation, preferring instead a quest for the original intention of the parties to the agreement, not unlike the inquiry in national contract laws. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Part III, at 147 (1987) [hereinafter RESTATEMENT (THIRD)]. Several principles of interpretation employed usefully in that analysis were rules of liberal construction and effectiveness, and the *ejusdem generis* and *expressio unius exclusio alteris* doctrines (general and special words). For an informative and eloquent discussion of these principles, see chs. XXI-XXIX of ARNOLD B. MCNAIR, LAW OF TREATIES (1961).

88. JACKSON, RESTRUCTURING THE GATT SYSTEM, *supra* note 12, at 56-57.

legal issues decided by panels. Third, the new system virtually ensures the establishment of panels and Appellate Bodies and unmodified adoption of their decisions through a type of reverse or inverted consensus.<sup>89</sup> Under the new system, a complaining party will have several potential remedies. First, the respondent party's measures that are found to be in violation may be brought into conformity. Second, where the respondent party does not bring its measures into conformity, the complaining party may receive compensation from the respondent party for the injury caused. Third, where the parties to the dispute fail to reach agreement on compensation, the complaining party may either retaliate against the respondent within the same sector and agreement under which the respondent has been found to be in violation, or, if the complaining party believes retaliation to be insufficient, it may seek authorization to retaliate across sectors and agreements against the respondent party. A further and significant modification is the division between panel and appellate phases, which resembles a legal tribunal of first instance and appeal. The new system is the most detailed dispute resolution mechanism in GATT's history and rivals that of the ITO. The system, first proposed in the Dunkel Draft Dispute Settlement Understanding,<sup>90</sup> is intended as a unified system somewhat modified through special procedures in individual agreements.<sup>91</sup>

Unlike national judicial systems with the power of the executive at its disposal to enforce directly its judgements, the new system must still rely upon less effective and more indirect means to enforce its decisions, such as suspension of concessions and obligations under the Covered Agreements (*i.e.*, higher tariffs, quotas, countervailing duties, or other restrictions on trade). The new system contains no mechanism for direct enforcement, which would require some radical adjustment or forfeiture of national sovereignty. Several commentators have suggested, however, that the new system is the most effective and judicial-type approach for the indirect enforcement and regulation of international trade yet proposed, specifically with respect to cross retaliation. Cross retaliation does have its detractors, however. Some argue that retaliation will rarely, if ever, be used. They point out that retaliation was available under the GATT dispute settlement system from its beginnings and was

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89. See Jackson Testimony, *supra* note 2, at 199-200.

90. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 20, 1991, Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade [hereinafter Draft DSU], GATT Doc. MTN.TNC/W/FA (1991) [hereinafter Dunkel Draft].

91. For a detailed discussion of the special dispute settlement procedures see *New Multilateral Trading System*, *supra* note 21, at 288-97.

imposed only once, with less than satisfactory results, in the U.S. Dairy Quotas Case.<sup>92</sup>

The DSU provides the basic framework for the settlement of disputes under the Covered Agreements.<sup>93</sup> Despite the history and controversial nature of trade disputes, the DSU declares that the utilization of the conciliation and dispute settlement procedures are not to be "intended or considered as contentious acts . . ."<sup>94</sup> Consequently, use of the system as a means to promote individual national trade interests to the detriment of the system is, perhaps, impliedly prohibited. Although the understanding provides quite specific procedures for dispute resolution, there are cases where additional or special rules for dispute settlement are provided in the individual agreements themselves. In those instances, the special provisions control to the extent they are inconsistent with the Dispute Settlement Understanding.<sup>95</sup> The rules and procedures depart somewhat from the basic dictates of the DSU in the Agreements on Anti-Dumping,<sup>96</sup> Technical Barriers to Trade,<sup>97</sup> Subsidies and Countervailing Measures,<sup>98</sup> Customs Valuation,<sup>99</sup> Sanitary and Phytosanitary Regulations,<sup>100</sup> Textiles,<sup>101</sup> GATS,<sup>102</sup> Financial Services,<sup>103</sup>

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92. For a discussion of the U.S. Dairy Quotas Case, see HUDEC, *supra* note 8, at ch. 16; see also *New Multilateral Trading System*, *supra* note 21, at 241-42.

93. Covered Agreements for this subsection include the Multilateral Trade Agreements, excluding the Trade Policy Review Mechanism, the Dispute Settlement Understanding, and the Plurilateral Agreements. See Dispute Settlement Understanding, *supra* note 48, app. 1 (Agreements Covered by the Understanding), 33 I.L.M. at 1244.

94. *Id.* art. 3, para. 10, 33 I.L.M. at 1228.

95. *Id.* art. 1, para. 2, 33 I.L.M. at 1226, and app. 2 (Special or Additional Rules and Procedures), 33 I.L.M. at 1255-45.

96. Final Act, *supra* note 8, Part II, ann. 1A, Agreement on Implementation of Article VI of the GATT 1994, art. 17 and anns. 1-8. It should be noted that the exemption in Appendix 2 to the Dispute Settlement Understanding refers to the "Anti-Dumping" agreement and not to the Agreement on Implementation of Article VI. Nonetheless, it is clear that Appendix 2 is referring to the latter.

97. Agreement on Technical Barriers to Trade, Apr. 12, 1974, art. 14, paras. 2-4 and ann. 2, 26 B.I.S.D 8, 22-26, 31 (1980).

98. Subsidies Agreement, *supra* note 62, arts. 4-8, nn.3, 4, and 6 and ann. V.

99. Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade (Relating to Customs Valuation), Apr. 12, 1979, art. 19, paras. 3-5 and ann. II.2(f), 3, 9, and 21, T.I.A.S. No. 10,402.

100. Final Act, *supra* note 8, Part II, ann. 1A, Agreement on Sanitary and Phytosanitary Measures, para. 36, GATT Doc. MTN/FA-II-A1A-4 (Dec. 15, 1993).

101. Final Act, *supra* note 8, Part II, ann. 1A, Agreement on Textiles and Clothing, art. 2, paras. 14 and 21; art. 4, para 4; art. 5, paras. 2, 4, and 6; art. 6, para. 9; and art. 8, paras. 1-12, GATT Doc. No. MTN/FA II-A1A-5.

102. Final Act, *supra* note 8, Part II, ann. 1B (General Agreement on Trade in Services), art. XXII, para. 3 and art. XXIII, para. 3, 33 I.L.M. 1167, 1182-83 [hereinafter GATS Agreement].

103. *Id.* Annex on Financial Services, para. 4, 33 I.L.M. at 1189.

Air Transport Services,<sup>104</sup> and the Ministerial Decision on Services Disputes.<sup>105</sup>

Some very important innovations bode well for the future of adjudication in the world trading system. The first of these is the creation of a Dispute Settlement Body. The General Council, which is composed of representatives of all the WTO Members, is the organ charged with the administration of consultations and dispute settlement<sup>106</sup> when it sits in its capacity as the DSB.<sup>107</sup> The DSB is authorized to appoint its own chairperson and establish its own rules,<sup>108</sup> and operates on an important inversion of the traditional GATT method of consensus decisionmaking. This inversion is perhaps the most important advantage to dispute resolution decisionmaking in the new system. According to the Understanding, "[t]he Dispute Settlement Body may be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the Dispute Settlement Body when the decision is taken, formally objects to the proposed decision."<sup>109</sup> The DSB must form panels and adopt panel and Appellate Body decisions *unless* it decides by consensus *not* to do so. That is, when the DSB proposes to decide not to form a panel or adopt a report or decision, it will make such a decision only if "no Member present . . . formally objects to the proposed decision."<sup>110</sup> Hence, the ITO's requirement of a simple majority to carry a settlement decision is not revived.<sup>111</sup> This development has already been praised by commentators.<sup>112</sup> Majority vote, it is argued, would have opened the door to politicization of the entire dispute resolution process.<sup>113</sup>

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104. *Id.* Annex on Air Transport Services, para. 4, 33 I.L.M. at 1188.

105. Final Act, *supra* note 8, Part III, Decision on Certain Dispute Settlement Procedures for the GATS, paras. 1-5, 33 I.L.M. at 1254.

106. Dispute Settlement Understanding, *supra* note 46, art. 2, para. 1.

107. The WTO Agreement provides that "[t]he General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding . . ." Final Act, *supra* note 8, Part II, art. 4, para. 3, 33 I.L.M. at 1145.

108. *Id.*

109. Dispute Settlement Understanding, *supra* note 46, art. 2, para. 4, n.1, 33 I.L.M. at 1227.

110. *Id.* and *id.* art. 17, paras. 1, 4, and 14, 33 I.L.M. at 1236-37.

111. See *supra* part I.C.3.a.iv.

112. Mora, *supra* note 10, at 149-50.

113. Jeffrey M. Waincymer, *Revitalizing GATT Article XXIII—Issues in the Context of the Uruguay Round*, WORLD COMPETITION, Sept. 1988, at 5, 42-43 (1988).

Another innovation, the introduction of Appellate Body review, is perhaps the system's most significant step toward the creation of an international legal tribunal on trade. In concert with decisionmaking by consensus, it radically alters the dispute settlement regime.<sup>114</sup> The Appellate Body is to be composed of seven elected members who are recognized authorities with expertise in law, international trade, and the Covered Agreements.<sup>115</sup> Appellate Body members are to be appointed by the DSB for as many as two four year terms. Any three of the seven will sit in review of panel reports, and for each particular case the Appellate Body members are to be chosen by lot.

The introduction of arbitration as an alternative technique of dispute resolution, perhaps yet another cross-over from the failed ITO, adds more of a judicial flavor to WTO dispute settlement. Another positive modification in the direction of adjudication is a new method for the selection of panelists. In the spirit of the 1989 improvements, the DSU reflects a distinct bias in favor of independent, noncitizen panelists. Detailed regulations on implementation overcome one of the main defects of the Tokyo Round changes: the delay in implementation of panel recommendations and rulings of the Contracting Parties.<sup>116</sup> Finally, specific procedures have been introduced for nonviolation complaints. For these complaints, panels and the Appellate Body are limited in their ruling capacity to recommend only "mutually satisfactory adjustment." These recommendations may include compensation but may not require the removal of national measures in conformity with the Covered Agreements which nullify or impair benefits of the complaining party.<sup>117</sup>

Before looking at the specifics of conciliation and dispute settlement more closely, let us briefly outline the basic procedure. At the emergence of a dispute, WTO Members may call for consultations. If consultations fail to produce a mutually satisfactory solution, a party to the dispute may request that the DSB establish a panel. Upon such a request, the DSB must establish the panel, unless it decides not to do so by consensus. Any party to the dispute may appeal a panel report to the

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114. See Mora, *supra* note 10, at 144-45. Professor Mora offers that the Appellate Body "represents the most radical innovation introduced in GATT dispute settlement since the generalization of the panel procedure in 1952." *Id.* at 144.

115. Dispute Settlement Understanding, *supra* note 48, art. 17, para. 2, 33 I.L.M. at 1238.

116. See, e.g., JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 12, at 97; JACKSON, *RESTRUCTURING THE GATT SYSTEM*, *supra* note 12, at 56-80; A. Jane Bradley, *Implementing the Results of GATT Panel Proceedings: An Area for Uruguay Round Consideration*, in *NEW GATT ROUND*, *supra* note 12, at 345; Mora, *supra* note 10, at 143.

117. Dispute Settlement Understanding, *supra* note 48, art. 26, 33 I.L.M. at 1242-43.



Appellate Body unless the DSB vetoes its request by consensus. Panel reports and Appellate Body decisions are automatically adopted without modification by the DSB at its next meeting unless rejected by consensus, or in the case of panel decisions, unless they are appealed to the Appellate Body. In the alternative, if both parties agree, they may seek to resolve their dispute through arbitration. There appears to be no appeal from arbitration, which is characterized as "binding."<sup>118</sup> Even if binding, however, WTO arbitration may have a certain disadvantage.<sup>119</sup> The arbitration provision does not clarify whether a party may pull out of the process once arbitration has begun but before a binding award is handed down. Such a clarification in subsequent practice will help to evaluate the procedure's effectiveness. If a party would be able to withdraw during an arbitration proceeding, the remaining party would presumably be able to call for consultations, panel establishment, and Appellate Body review where necessary. It is also unclear whether a party may pursue its dispute through the dispute settlement procedure in the DSB on the same or similar issue settled in arbitration after arbitration is completed.

Members may bring "cases"<sup>120</sup> against other Members for instances of violation and nonviolation nullification and impairment. A *prima facie* case of nullification and impairment arises where a Member infringes on its "obligations assumed under a covered agreement."<sup>121</sup> Such an infringement creates a presumption against the infringing Member, who must then rebut the charge that the breaching measure has had an adverse effect on the complaining Member.<sup>122</sup> The expressed aim of the dispute settlement rules and procedures is to secure a positive solution to those disputes. The preferred resolutions are, understandably, mutually satisfactory solutions rather than decisions.<sup>123</sup> If a mutually satisfactory solution cannot be reached and a panel or appellate body has established that the infringing measure is "inconsistent with the provisions of any of the covered agreements," several options are available. First, the infringing measure may be removed. Second, where the removal is

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118. The Dispute Settlement provides in relevant part: "The parties to the proceeding shall agree to abide by the arbitration award." *Id.* art 25, para. 3, 33 I.L.M. at 1242.

119. *Id.*

120. The Dispute Settlement Understanding employs the term "case" in reference to instances of disputes brought before the Dispute Settlement Body. *See id.* art. 3, para. 7, 33 I.L.M. at 1227.

121. *Id.* art. 3, para. 8, 33 I.L.M. at 1228.

122. *Id.*

123. *Id.* art. 3, para. 7, 33 I.L.M. at 1227.

impracticable, or is a temporary measure, compensation by the infringing Member may be required. Third, as a "last resort," suspension of concessions or other obligations of the complaining Member *vis-à-vis* the infringing Member (e.g., retaliation or cross retaliation) may be imposed.<sup>124</sup>

### 1. Consultation

When a Member country has reason to believe that another Member has infringed upon the obligations assumed under a Covered Agreement, it may call for consultations.<sup>125</sup> The language of the DSU makes it clear that consultation is intended to play an important role in dispute settlement and not simply exist as a formality before the establishment of a panel. Article 3, paragraph 7 of the DSU makes this point clear:

Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.<sup>126</sup>

The parties to a dispute may at any point during the procedure resolve the dispute by negotiated settlement. If the panel procedure could be construed as adjudication under the modified system, consultation may be regarded as negotiation, which could continue, perhaps informally, even after the commencement of the "judicial" or panel phase of the dispute resolution mechanism.

Once the request for consultation is made by a Member, the respondent will have ten days to reply, or a longer time by mutual agreement, and should enter into consultations no later than thirty days from the date of the request.<sup>127</sup> The request must be made in writing, indicating the "legal basis for the complaint," and should state sufficiently the infringing measures employed by the respondent.<sup>128</sup> Where the respondent fails to reply or enter into consultations within the allotted time, the complainant may proceed to request the formation of a panel.<sup>129</sup>

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124. *Id.* art. 3, paras. 7 and 8, 33 I.L.M. at 1227-28.

125. *Id.* art. 4, para. 3, 33 I.L.M. at 1228-29.

126. *Id.* art. 3, para. 7, 33 I.L.M. at 1227.

127. *Id.* art. 4, para. 3, 33 I.L.M. at 1228-29.

128. *Id.* para. 4, 33 I.L.M. at 1229.

129. *Id.* para. 3, 33 I.L.M. at 1228-29.

During consultations, the Members in dispute are charged to make an attempt to "obtain a satisfactory adjustment of the matter" in confidential negotiations which, in reference to any further proceedings beyond consultations, shall not prejudice the rights of either disputing party.<sup>130</sup> The parties have sixty days, or fewer in urgent cases,<sup>131</sup> to settle their differences. Where after sixty days<sup>132</sup> the consultations are a failure, the complaining party may request a panel.<sup>133</sup> Third party Members believing they have a substantial trade interest in such consultations may participate if the respondent agrees. If the respondent rejects a third party Member's request for inclusion, the third party Member may request separate consultations.<sup>134</sup>

#### a. Good Offices, Conciliation, and Mediation

Unlike consultation, where a complainant has the power to force a respondent to reply and consult or face a panel, but like arbitration, good offices, conciliation, or mediation are employed where both parties to a dispute agree.<sup>135</sup> There are no requirements of form, time, or procedure. Any party to the dispute may initiate them with the other party's or parties' agreement at any time. Any single party may then terminate good offices, conciliation, or mediation at any time.<sup>136</sup> In contrast to consultation, initiation of good offices, conciliation, or mediation requires unanimous agreement of the parties to a dispute but may be recommended by any party. Furthermore, any party may terminate good offices, conciliation, or mediation without unanimous agreement among the parties to a dispute. Once these procedures have been terminated, the complaining party may then request the formation of a panel.<sup>137</sup> Thus, there are technically four or perhaps five avenues by which a complaining party may reach a panel formation: consultation, good offices, conciliation, mediation, and, possibly, during or after arbitration.

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130. *Id.* paras. 5 and 6, 33 I.L.M. at 1229.

131. Along with complying with a provision that requires parties to a dispute in cases of urgency to accelerate the consultation procedure — for example, a dispute involving perishable goods — Members must also enter into consultations in no more than ten days from the consultation request for and must settle within twenty days of that request, or the complaining Member may request the establishment of a panel. *Id.* paras. 7 and 8, 33 I.L.M. at 1229.

132. The parties may jointly agree before sixty days that the consultations are a failure, at which time the complainant may request that a panel be formed. *Id.*

133. *Id.* para. 7.

134. *Id.* para. 11.

135. *Id.* art. 5, para. 1, 33 I.L.M. at 1230.

136. *Id.* para. 3.

137. *Compare id.*

## 2. Panel Phase

Once consultation, good offices, conciliation, or mediation has broken down, and upon the request of a complaining party, the DSB must form a panel *unless* it decides *not* to by consensus.<sup>138</sup> Absent an agreement by the parties to change them, the terms of reference for panels shall be:

To examine, in the light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving rulings provided for in that/those agreement(s).<sup>139</sup>

In a development which may signal a significant step in the direction of adjudication, panels may be composed in normal cases only of well qualified individuals who are not citizens of either of the disputing parties.<sup>140</sup> Panels are to be composed of three, or where the parties agree, five individuals.<sup>141</sup> Panel members are to be selected "with a view to insuring the independence of the members [of the panel]."<sup>142</sup> The strong language preferring noncitizens of disputing parties is mitigated somewhat by a loophole. Where both parties agree to appoint citizens, their citizens may compose members of a panel.<sup>143</sup> Presumably, agreement to appoint citizens would most likely occur between two parties of equal or similar economic strength who may prefer to see their citizens on a panel rather than to leave the decision to dispassionate "neutrals." This possibility opens the panel process to the danger of becoming nothing more than yet another consultation process. From the perspective of the pro-legalists, this loophole should be closed. Citizen panelists, however, have been known to be objective in their deliberations and have found against their own countries in previous panel reports. Moreover, although they make final determinations on the facts of a

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138. *Id.* art. 6, para. 1.

139. *Id.* art. 7, para. 1, 33 I.L.M. at 1230-31.

140. Such persons include governmental or nongovernmental personnel who may have served on a previous panel — as a representative to a WTO Member or a contracting party to the GATT — or have taught or published on international trade law or policy, or have served as a senior trade policy representative of a Member of the WTO. *Id.* art. 8, para. 1, 33 I.L.M. at 1231.

141. *Id.* para. 5.

142. *Id.* para. 2.

143. Disputing party citizens will be allowed only where both parties agree. *Id.* para. 3.

case, panels do not have the last say on legal issues. Until the system has garnered experience, this concern may be somewhat premature. This troubling aspect of panel constitution is considerably alleviated by the Appellate Body phase of dispute settlement. Furthermore, the DSU requires independence of panelists even when they are citizens of disputing parties. The Understanding forbids parties to a dispute who appoint their citizens as panelists from influencing their citizen-panelists or providing them with instructions.<sup>144</sup> Inclusion of a similar provision forbidding influence of noncitizen panelists may also have been prudent.

Of course, guaranteed selection of impartial panelists would be optimal from the perspective of a rule oriented system. The Dispute Settlement Understanding, however, presents a balance between legalists and pragmatists; at least rhetorically, in the text, the legalists seem to have gained an upper hand. What practice will bring is not yet clear. However, early criticism has been positive.<sup>145</sup> The Secretariat is charged with making nominations which the parties may not oppose except for "compelling reasons."<sup>146</sup> The parties must agree on the panelists within twenty days of the establishment of the panel. When they cannot agree, the Director-General in consultation with the Chairman of the DSB and Chairman of a relevant council or committee of a covered agreement shall appoint the panelists.<sup>147</sup>

In addition to the selection process and composition of panels, the key to determining whether panels will arrive at their decisions by a process more akin to negotiation or adjudication is the panel decision-making process itself. Panels are to conduct confidential deliberations,<sup>148</sup> set deadlines, receive "pleadings" and rebuttals, and hear oral arguments from the disputing parties.<sup>149</sup> In a provision that resembles a rudimentary and surprisingly broad discovery rule, they may request information from any appropriate body or source, including experts, and acquire confidential information from a Member Nation's administrative bodies, in some cases without that Member's approval.<sup>150</sup> Moreover, they are

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144. *Id.* para. 9.

145. *See* Mora, *supra* note 10, at 148-49.

146. Dispute Settlement Understanding, *supra* note 48, art. 8, para. 6, 33 I.L.M. at 1231.

147. *Id.* para. 7.

148. *Id.* art. 14, para. 1, 33 I.L.M. at 1235.

149. *Id.* art. 12, paras. 3 and 6, 33 I.L.M. at 1233, and art. 15, para. 1, 33 I.L.M. at 1235.

150. Although they do not require approval for the request, they must inform the Member of the request "before a panel seeks such information." *Id.* art. 13, para. 1, 33 I.L.M. at 1234.

authorized to establish groups of experts to provide reports on factual or scientific issues.<sup>151</sup> After discovery and deliberation, a panel is to submit a written report to the DSB containing its findings of law and fact, a description of the applicability of relevant provisions, and the basic rationale behind its decision.<sup>152</sup> From establishment to submission of the report, a panel should, in normal cases, take no more than six months.<sup>153</sup> In a procedural nod to the pragmatists or rule skeptics, there is an interim review stage where the panel presents an interim report to the parties for their comments. Interestingly, the panel is required only to hold further meetings with the parties. It is not required to modify its findings in any way before submitting the report to the DSB but must only include a discussion of the arguments presented at the interim stage.<sup>154</sup> Once the panel report is submitted to the DSB, the report will be adopted unless the DSB decides by consensus not to adopt the report or unless a party to the dispute appeals for Appellate Body review.<sup>155</sup>

### 3. Appellate Body Review

Since a request for Appellate Body review is granted unless the DSB rejects it by consensus, it is safe to say that losing parties will almost always resort to appellate review where they believe it is in their interests to do so. In most judicial systems, an appeal must attain some minimum threshold to discourage frivolous appeals before it is heard by an appellate tribunal. Under the auspices of the Dispute Settlement Understanding, no such threshold is established even for the clearest cases of violation and impairment.

While the panel submits findings of fact and law, the Appellate Body is limited in its determinations to questions of law and legal interpretation. This limitation adds weight to the view that the new dispute resolution system creates something of a judicial tribunal. Appellate Body "judges" are to be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."<sup>156</sup> Appellate Body proceedings are to be confidential, and the opinions submitted by the Body members are

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151. *Id.* para. 2.

152. *Id.* art. 12, para. 7.

153. Panel deliberation may be extended by three months or in some cases suspended for no more than twelve months. *See id.* art. 12, paras. 8-10 and 12, 33 I.L.M. at 1234; art. 20, 33 I.L.M. at 1237-38; and art. 21, para. 4, 33 I.L.M. at 1238.

154. *Id.* art. 15, 33 I.L.M. at 1235.

155. *Id.* art. 16, para. 4.

156. *Id.* art. 17, para. 3, 33 I.L.M. at 1236.

to be anonymous. Therefore, Appellate Body members will not easily come to be "branded" as possessing a bias in favor of or against a particular Member or group of Members, and passive manipulation of the composition of appellate panels will be avoided. Unlike in the panel phase, parties will have no active role in choosing Appellate Body members. Each case before the body will be chaired by three of the seven appointed members, who will rotate according to a schedule created by the body itself in consultation with the DSB Chairman and the Director-General.<sup>157</sup> Presumably, however, a party would be free to time its appeal, within provided limitations, to coincide with the next rotation of Appellate Body members. This possibility of passive manipulation of the constitution of an appellate panel of "judges" should be no great cause for concern, considering that there is much greater probability of active manipulation of tribunals in national judicial systems through venue changes and forum shopping. Also, passive manipulation may be avoided as Appellate Body members sitting on any one case are to be chosen by lot.

Where a party requests an appeal to the Appellate Body, the deliberations must be completed and a written decision submitted no later than sixty days for normal instances and at most ninety days from the formal request of appeal.<sup>158</sup> Parties to the dispute are required to make written submissions, and no *ex parte* proceedings are allowed.<sup>159</sup> An Appellate Body decision may uphold, modify, or reverse a panel's legal findings and conclusions.<sup>160</sup> As with panel formation and adoption of panel reports, Appellate Body decisions are adopted without amendment unless vetoed by consensus in the DSB.

#### 4. Remedies

If a panel or Appellate Body finds the measure or trade practice of a party to be in violation of the Covered Agreements, there are three possible consequences for the Member in violation. The Member may be required to bring the measure into conformity with the relevant agreement within a "reasonable amount of time,"<sup>161</sup> or the complainant

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157. *Id.* paras. 1 and 9.

158. *Id.* para. 5.

159. *Id.* art. 18, 33 I.L.M. at 1237.

160. *Id.* art. 17, para. 13.

161. The "reasonable amount of time" is (1) proposed by the Member in violation; or where such time period is not approved by the DSB (2) a period of time agreed by the parties to the dispute; or where no agreement can be reached within forty-five days of adoption of the report or decision (3) the period of time will be determined by binding arbitration within 90

may proceed to temporary measures. If the Member fails to comply within the "reasonable amount of time," the complaining party may call for negotiations for compensation.<sup>162</sup> Where no compensation is agreed upon within twenty days after the expiration of the "reasonable amount of time" period, the complainant may request that the DSB authorize retaliation through suspension of the complainant's concessions or other obligations to the Member in violation. At first, retaliation is to be limited to the same sector and agreement. If the complainant believes such retaliation would be insufficient, it may retaliate across sectors and agreements.<sup>163</sup> The DSB must grant suspension within thirty days of expiration of the reasonable period of time unless it vetoes the suspension request by consensus. The Member in violation has one final recourse before implementation of the suspension order: it may object to the level or scope of suspension. In such a case the Appellate Body panel or an appointed arbitrator will examine only the question of whether the level and scope of suspension is appropriate.<sup>164</sup>

#### a. Retaliation and Cross Retaliation

The complainant may suspend concessions or other obligations originating from the same sectors of the same covered agreement the respondent has violated. Where the complainant believes that such suspension would not suffice, the suspension may extend to different sectors of the same covered agreement. If still believed insufficient, it may be extended further to another covered agreement.<sup>165</sup> "Sector" is defined with respect to goods as "all goods." As to services, "sector" is defined as described in the Services Sectoral Classification List.<sup>166</sup> With respect to the definition of "agreement" for this subsection, all agreements listed in Annex 1A of the WTO Agreement are treated as a whole. With respect to services, the GATS Agreement applies; for intellectual property rights, the TRIPs Agreement is applicable.<sup>167</sup> Where

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days of the adoption of the report of decision. *Id.* art. 21, paras. 3(a)-(c), 33 I.L.M. at 1238.

162. Payment of compensation is voluntary on the part of the Member in violation. *Id.* art. 22, para. 1, 33 I.L.M. at 1239.

163. *Id.* para. 3. Cross retaliation is subject to a rather stringent procedure. *Id.* Where the respondent believes that the complainant seeking cross retaliation has violated the provisions of art. 22, the respondent may call for arbitration to determine whether the retaliation sought is appropriate in light of art. 22 procedure. *Id.*

164. *Id.* para. 6, 33 I.L.M. at 1240.

165. *Id.* paras. 3(a)-(c), 33 I.L.M. at 1239.

166. Of GATT Doc. MTN.GNS/W/120 and TRIPS, as described in Sections 1-7 of Part II, or obligations under Part III or Part IV of the TRIPS Agreement. See Dispute Settlement Understanding, *supra* note 48, art 22, para. 3(f), 33 I.L.M. at 1240.

167. *Id.* para. 3(g).



a complaining party requests retaliation or cross retaliation, the respondent has the right of arbitrational review of the appropriateness of the authorized retaliation.<sup>168</sup>

Hence, once a panel is formed, the procedure of the DSB provides a series of decisions which, unless vetoed by a consensus vote of the DSB at either the close of the panel or Appellate Body phases, will result, theoretically, in a decision for the respondent or for the complainant. In the latter instance, the decision may call for removal of the infringing measure, compensation, or suspension of concessions and obligations under the covered agreements. In antidumping and subsidies cases, the DSB may authorize antidumping or countervailing measures. Reports must be adopted *in toto* and without amendment or modification by the DSB. A report or decision is perhaps, as a result, more likely to be adopted even against the objection of an economically strong disputing party. The ultimate consequence for the violating member that refuses to conform is that it may be faced with higher tariffs, quotas, or other restrictions on trade.

### 5. Arbitration

Under the ITO, there were basically three phases of dispute resolution: (1) direct consultation; (2) arbitration; and (3) review of legal issues by the World Court. Arbitration was intended to be the workhorse of the ITO dispute resolution regime. In the WTO system, the panel and Appellate phases are the central forces in the settlement of cases. Nevertheless, arbitration may play an important role in certain circumstances. A respondent may call for arbitration to determine whether the principles and procedures set forth to arrive at a retaliation have been properly followed. Retaliation may not commence until arbitration, which may not last more than sixty days, is completed.

Arbitration is billed as an alternative and binding means to resolve a disagreement without going through the DSB process, but it may only be employed where the disputing parties mutually agree.<sup>169</sup> Apparently, because the parties are charged to "abide by the arbitration award," there may be no recourse to review in the DSB, but the issue may yet be challenged before a panel or Appellate Body for clarification.<sup>170</sup> In the alternative, WTO Members may choose to form an interpretation to clarify the issue.

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168. *Id.* para. 6.

169. *Id.* art. 25, 33 I.L.M. at 1242.

170. *Id.* para. 3.

## 6. Strengthening the Multilateral System

Under Article 23 of the DSU, the WTO, through its panels or Appellate Bodies, becomes the ultimate arbiter of disputes between WTO Members arising under the auspices of the Uruguay Round Agreements. This development promises to be a radical departure from recent history in disputes on international trade. Article 23 of the DSU provides:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of [the DSU].

In such cases, Members shall:

(a) *not make a determination* to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, *except through recourse to dispute settlement* in accordance with the rules and procedures of this Understanding, and *shall make any such determination consistent with the findings contained in the panel or Appellate Body report* adopted by the DSB or an arbitration award rendered under this Understanding . . . . (emphasis added)

Consequently, where Members resort to the WTO dispute settlement regime, they are bound by the results of that procedure. Therefore, where a Member violates a DSB adopted decision, it is also in violation of Article 23(a). Even in disputes arising out of cases where the Uruguay Round Agreements authorize government action, such as under the Agreement on SCM or the Anti-Dumping Agreement, Members may avail themselves of the arbitration or DSB procedure where they believe the Member imposing the duty has not fulfilled its obligations under those agreements.<sup>171</sup>

## 7. Specific Provisions in the Covered Agreements

Generally speaking, where specific agreements depart from the regulations for dispute settlement set down in the Dispute Settlement

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171. Panels and Appellate Bodies are more limited in their review of national procedures in anti-dumping cases than in countervailing duty cases.

Understanding, they do so for the purpose of establishing the specific cause of action giving rise to a case under which a complaint may be brought. They also add some nuances by providing for special expert groups which will assist panels formed by the DSB to arrive at their factual conclusions.

### *C. Application of Dispute Settlement Decisions in United States Law*

Courts of the United States have had occasion to pass on the very question of the force of a GATT Dispute Settlement decision in U.S. law. The determination in the courts usually hinges upon congressional implementation of the trade agreement involved. In *Suramerica de Aleaciones Laminadas, C.A. v. United States*,<sup>172</sup> Argentinean companies, Suramerica and others, had been assessed countervailing and antidumping duties by the Commerce Department. The Commerce Department's decision was based in part upon an interpretation of the words "on behalf of" in the antidumping legislation.<sup>173</sup> Suramerica argued that a GATT panel decision had rejected the Commerce Department's definition of "on behalf of." Because the "legislative history of the [antidumping] statute demonstrates Congress' intent to comply with GATT in formulating these provisions,"<sup>174</sup> it was argued, the court should also reject the Commerce Department's interpretation. The Federal Circuit Court of Appeals declined to overturn the Commerce Department's interpretation on the basis of the GATT panel decision "even if we were convinced that Commerce's interpretation conflicts with the GATT" because, in the court's opinion, the GATT was not controlling. Although the court acknowledged Congress' interest in complying with U.S. international obligations under the GATT, the court was bound not by what it thought Congress "should or perhaps wanted to do, but by what

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172. 966 F.2d 660 (1992). See also *United States v. Guy Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) ("Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone.").

173. The provision at 19 U.S.C.A. § 1671a(b)(1) (1988) provides:

(b) Initiation [of anti-dumping investigation] by petition. (1) Petition requirements.

A countervailing duty proceeding shall be commenced whenever an interested party . . . files a petition with the administering authority, *on behalf of* an industry, which alleges the elements necessary for the imposition of the duty . . . , and which is accompanied by information reasonably available to the petitioner supporting those allegations . . . . (emphasis added).

174. *Suramerica*, 966 F.2d at 667.

Congress in fact did."<sup>175</sup> Absent clear indication from Congress in the implementing legislation, GATT obligations, where they conflict with federal law, will not be given effect under U.S. law.<sup>176</sup>

Considering the tradition of viewing U.S. commercial treaty obligations as non-self-executing obligations of the United States, it is safe to assume that the Uruguay Round Agreements will attain only non-self-executing status. Normally, non-self-executing treaty obligations have precedence only over all prior and future state law.<sup>177</sup> If the North American Free Trade Agreement implementation legislation is taken as a model for the new Uruguay Round Agreements, then even its precedence over state law may be in doubt.<sup>178</sup>

175. *Id.* at 668.

176. See 19 U.S.C.A. § 2504(a)(1993), which provides:

No provision of any trade agreement approved by the Congress under section 2503(a) of this title, nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.

177. See RESTATEMENT (THIRD), *supra* note 87, § 111, cmt. h; see also Robert A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990); Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in *THE EUROPEAN COMMUNITY AND GATT* 187, 199 (Meinhard Hilf, et al. eds., 1986); John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 311-12 (1967); NEW MULTILATERAL TRADING SYSTEM, *supra* note 21, at 202-03, 205-10.

178. NEW MULTILATERAL TRADING SYSTEM, *supra* note 21, at 85-87; NAFTA Implementation Act, Pub. L. No. 103-82, § 102 (1993), which provides in part:

(a) Relationship to United States Law.

(1) United States law to prevail in conflict. — No provision of the Agreement nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

(2) Construction. — Nothing in this Act shall be construed —

(A) to amend or modify any law of the United States, including any law regarding — (i) the protection of human, animal, or plant life or health; (ii) the protection of the environment; (iii) motor carrier or worker safety.

(B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974; unless specifically provided for in this Act.

....

Legal challenge. — No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the [NAFTA] Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.

### D. Dispute Settlement: Conclusions

The Dispute Settlement Understanding presents important procedural and substantive changes within the obligations which existed between the GATT Contracting Parties. The most important procedural innovations in dispute settlement are: (1) the creation of a "unified" dispute settlement system overcoming the problem of uncertainty in determining which procedure should apply; (2) the establishment of a new organ, the Appellate Body, for review of legal issues decided by panels; and (3) the virtually ensured establishment of panels and Appellate Bodies and unmodified adoption of their decisions through a type of reverse or inverted consensus. Substantively, in a radical move, the Members of the WTO have agreed that when they avail themselves of the dispute settlement procedure of the DSU, they will be bound by the arbitration award, or the panel or Appellate Body decision through Article 23(a) of the DSU. Additionally, under WTO Agreement Article XVI, paragraph 4, WTO Members are required to conform their national laws, regulations, and administrative procedures to the obligations of the Uruguay Round Agreements. Where a Member does not do so, it may invite an action before the DSB. As virtually every agreement gives Members the right to appeal to the WTO, even in cases of application of countervailing measures and antidumping duties, the WTO is to be the ultimate arbiter of disputes between its Members and the interpreter of its obligations.

### III. THE WTO SYSTEM — DIPLOMACY OR RULE OF LAW?

It is interesting to note that there exists a great divide among Contracting Parties of the GATT as well as among commentators as to the nature of GATT law and obligations. Over the years it has been argued with some success that GATT dispute settlement has evolved into a judicial system, while others have argued with equal fervor that it is a type of negotiation process. The parties to this debate also have argued, respectively, for an enhancement of GATT's judicial functions or called for a pure negotiating mechanism. Both have argued that the other's proposition would undermine the very nature of the GATT system.<sup>179</sup>

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179. For the Pro-legalists view, see William J. Davey, *An Overview of the General Agreement on Tariffs and Trade*, in PIERRE PESCATORE ET AL., *HANDBOOK OF GATT DISPUTE SETTLEMENT* 5, 70 (1993) [hereinafter *GATT HANDBOOK*]; Andreas F. Lowenfeld, *Preface to GATT HANDBOOK*, *supra*, at xi; Petersmann, *CONSTITUTIONAL FUNCTIONS*, *supra* note 12; JAMES FAWCETT, *LAW AND POWER IN INTERNATIONAL RELATIONS* 87 (1982); JOHN

The debate over the nature of GATT "law" is imbedded in the greater debate over the nature of international law. Professor Mora provides a quite thorough list of categories into which commentators fall with respect to their positions on the nature of international law and GATT law. He writes:

One may draw a somewhat artificial line between those defending a "rule oriented" approach in the conduct of international trade relations and those who defend a "power oriented" approach [Jackson]. In the first category one would find the so-called "legalists" [quoting Trimble] or "rule partisans," [quoting Koh] while the second would contain "pragmatists" [Trimble] or "rule skeptics" [Koh].[] From the first perspective it has been said that "GATT is both in form and practice an illuminating example of law in international relations" [Fawcett]. It is "a model or prototype of a legalistic type system of international regulation" [Jackson & Davey]. According to this view GATT is law and international obligation [Henkin]. For some scholars GATT rules have even "near-divine status" [Tarullo about Petersmann]. Others, although skeptical about the role of law in international trade relations, note that "the international trade system looks more like a legal system than do the areas of international law" [Tarullo].<sup>180</sup>

A country's propensity to be a complainant or a respondent in a dispute under the General Agreement reflects its tendency to align itself with either of the two basic categories, pro-legalist or anti-legalist, respectively. The United States and developing countries have traditionally encouraged the development of GATT as a legal body while the EU and Japan advocate GATT as a negotiating forum, arguing that it is not a code of conduct authorizing penalties and countermeasures against agreement violators but rather a mechanism of persuasion aiding the Contracting Parties in finding mutually agreeable solutions to conflicts in international trade.

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H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 2, 282 (Supp. 1986); Harold H. Koh, *The Legal Markets of International Trade: A Perspective on the Proposed Canada-United States Free Trade Agreement*, 12 *YALE J. INT'L L.* 193, 196-97 (1987).

For the pro-negotiators view, see Long, *supra* note 10, at 88; Philip R. Trimble, *International Trade and the "Rule of Law,"* 83 *MICH. L. REV.* 1016, 1017 (1985); Hiroshi Kitamura, *Japan in the GATT*, in *GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME* 47, 58 (Reinhard Rhode ed., 1990); C.F. Teese, *A View from the Dress Theatre of Trade Disputes*, 5 *WORLD ECONOMICS* 43, 51 (1982); David K. Tarullo, *Logic, Myth and International Economic Order*, 26 *HARV. INT'L L. J.* 533 (1985).

180. Mora, *supra* note 10, at 109-10.

As of 1990, the United States had been involved in far more GATT complaints than all the other Contracting Parties combined: one hundred twenty-five of a total of two hundred seven complaints filed. Of those one hundred twenty-five, the United States was the complainant in seventy-three and the defendant in fifty-two. In contrast, the EEC and EC<sup>181</sup> as a unit filed thirty complaints and was subject to fifty-two. When looking at the EC countries individually from 1948–1973 where they filed complaints individually or were named as defendants individually, they filed twenty-five complaints and were defendants in thirty-nine. Thirteen of the cases were between EEC or EC countries. Japan showed a reluctance to use the GATT dispute settlement regime, filing only four complaints but was the defendant in nineteen disputes. In the thirty-six disputes between the United States and EU, the United States brought twenty-one complaints while the EU brought fifteen.<sup>182</sup> Including actions involving individual EU nations and the United States with those between the entity of the EEC and the EC, thirty-nine were filed by the United States against European countries and the EU and fifteen by EU member states individually and the EU against the United States.<sup>183</sup> Complaints by the United States against Japan counted for eight disputes, while Japan filed only one complaint against the United States. The EU filed four complaints against Japan, and Japan filed two against the EU.

With these statistics in mind, one may see that, traditionally, the United States has the reputation of being the complainant while the EU and Japan tend to be defendants, although the EU has become much more active in the last decade in filing complaints. The EU and Japan have quite often been the lightning rod for the United States' frustration on trade in the U.S. media and the U.S. Congress. That frustration is quite often vented in international trade disputes initiated through the GATT dispute settlement system. Considering the number of cases against them, seventy-six including complaints against the European

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181. The designated name for the EEC and the EC is presently the European Union or EU, which came into existence under the auspices of the Maastricht Treaty on 1st November 1994. The complaints filed by or against the European entity from 1948–1990 were by or against the EEC (1963–1986) and then by or against the EC (1986–1990). The European Union at the time of this writing consists of fifteen Member States: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. On January 1, 1995, Austria, Finland, and Sweden joined the EU.

182. The first dispute between the European Economic Community (now the European Union) and the United States was filed in October of 1963.

183. The last complaint filed by or against European country separately was Portugal against the United States in September 1985.

countries separately, it is understandable that the EU and Japan would be less enthusiastic about the evolution of GATT as a judicial arbiter of international trade disputes.

It is important to note that Article XXIII is silent as to which approach, adjudication or negotiation, might be appropriate. It is argued that the very grant of authority in Article XXIII to determine the soundness of nullification and impairment complaints and to recommend retaliation is judicial in nature. This argument, although perhaps persuasive, is not conclusive considering that the results of negotiations between nations on disputes would and do generate similar results. For example, when negotiations are unsatisfactory, there may be a resort to retaliation or countermeasures. The operative questions for determining whether the GATT system until 1994 was basically one of negotiation or adjudication had been: What form would dispute settlement have taken without the GATT system? Would it have been significantly different?

A grant of authority to determine whether a violation of the GATT exists and approval to retaliate for that violation does resemble a judicial process but is arguably, at its root, negotiation dressed up in court-like proceedings. One could take this reasoning to its extreme and posit, accordingly, that all judicial proceedings from this perspective are simply negotiations. However, effective national judicial proceedings have a significantly different quality in that there is a judgment which is final and both parties are bound to the decision by the power of the state. The state can, through executive order, physically seize the losing party's property or person to enforce a judgment.<sup>184</sup> With GATT, as with other international organizations, even where there is deference to a judicial body, such as the World Court, a party may reject a final decision of the tribunal and refuse to implement it. Recent history has demonstrated that the coordinated persuasion of the international community may be applied to bring wayward or renegade nations into compliance with international norms. United Nations pressure in Desert Storm and the present case of Bosnia present qualified examples. The above is in a sense only a rehashing of the old problem of enforcement of obligations under international law, but it goes further to show the essential political nature, albeit with some elements of legal proceedings, of the GATT dispute settlement system, at least in its first forty-five years of existence. It is yet untested whether the WTO and the Covered

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184. Historically, the power of the state to enforce judgements against powerful defendants has not always been so complete. Thus, even this distinction has its limitations.



Agreements will in reality bring a deeper legal quality to the system or simply another complex and perhaps more effective form of negotiation.

Keeping in mind that a judicial system of sorts was planned in the ruined ITO and that the international community, including the EU states and Japan, was prepared to adopt it but for the United States' failure to do so, the collapse of the ITO is instructive in understanding the dissatisfying results of the GATT dispute resolution system over its four and one-half decades of use. The question that goes to the root of the controversy is which approach, adjudication or negotiation, is most appropriate in resolving international trade disputes?<sup>185</sup> It is essential to establish an assumption upon which the inquiry will revolve. Granted that compliance with international norms is to be preferred over non-compliance, the question becomes which philosophical approach, adjudication or negotiation, will be most effective in securing compliance.<sup>186</sup>

#### A. *The Critics on Adjudication and Negotiation*

Critics of adjudication in GATT dispute settlement argue directly to the point of effectiveness, contending that the dispute system would not be more effective in bringing about compliance simply because all disputes, whether adjudicated or negotiated, ultimately come to negotiations between the Contracting Parties due to the system's inability to enforce compliance. These critics argue that a propensity in GATT to accentuate adjudication may bring about the opposite of its intended effect for three reasons. First, an increased effort to judicialize the proceedings may backfire if losing Members rebuff the WTO's attempts at enforcement of its decisions, thus undermining other Members' confidence in the entire system. Second, adjudication, which is naturally contentious, can lead to a deepening of hostility between the disputing parties because it places nations on two distinct sides of a dispute as opposed to the more traditional method of negotiation and conciliation, which attempts to find common ground on the way to reaching a solu-

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185. See JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 12, at 93; JACKSON, *RESTRUCTURING THE GATT SYSTEM*, *supra* note 12, at 60.

186. There are politicians, commentators, and legal scholars who entertain ideas tantamount to encouraging a retreat from, if not totally scrapping, international norms governing international trade. They propose acquiescence to theories of managed or fair trade: The author does not deal with this issue in this work. Suffice it to say that the author is a convinced "free-rule trader," that is, a free trader who respects the rule of international law. See Laura D'Andrea Tyson, *Who's Bashing Whom? Trade Conflict in High-Technology Industries* (Washington, D.C. Institute for International Economics, 1992) for support of the managed trade view in economic circles.

tion. Third, negotiation between nations, the traditional method of international dispute resolution, could be undermined by adjudication when adjudication proves ineffective. Once proceedings have ended and a party ignores the final decision, an attempt to bring that party back to the negotiating table after unsatisfactory proceedings may be all the more difficult, especially after retaliation is authorized.

The critics of international legalism generally point out that law in the international arena is ephemeral, existing only with the indulgence of nations,<sup>187</sup> and that to speak of international laws as having power beyond the will of nations is a fiction. A basic reason for this state of affairs, they maintain, is that often international obligations conflict with national interest.<sup>188</sup> As a result, an obligation will be discharged only as long as its fulfillment lies within the national interest. Nevertheless, these international rule skeptics insist that international obligations such as those embodied in GATT are valuable because they provide a system "through which trade problems are negotiated and compromised within a general framework of rules."<sup>189</sup>

The legalists, on the other hand, fall into two camps: one practical, the other radical. The practical camp maintains that the international trading system profits from increased adherence to internationally agreed rules and more effective dispute settlement.<sup>190</sup> It is a moderate legalistic view and sustains a conviction that international rules such as GATT are something of a dynamic tension or fusion between obligation and law. The more radical scholars maintain that international rules of law should act to restrain politics and political activity, especially activity that diverts governments away from the pursuit of national or global economic welfare in favor of protectionist and interventionist policies.<sup>191</sup> These visionary scholars realize the inherent need of the international trading system to transcend certain aspects of national sovereignty and protectionist interest in order that it may realize its goals.

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187. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 88-89 (1984); Tarullo, *supra* note 179, at 26.

188. Long, *supra* note 10, at 7.

189. Trimble, *supra* note 179, at 1917.

190. Wolfgang Benedek, *Preferential Treatment of Developing Countries in International Trade—Past Experience and Future Perspectives*, in *FOREIGN TRADE AND THE NIEO*, *supra* note 82, at 71, 98-109; Tarullo, *supra* note 179.

191. Ernst-Ulrich Petersmann, *Proposals for Improvements in the GATT Dispute Settlement System: A Survey and Comparative Analysis*, in *FOREIGN TRADE AND THE NIEO*, *supra* note 82, at 340; Heinz Hauser, *Foreign Trade Policy and the Function of Rules for Trade Policy Making*, in *FOREIGN TRADE AND THE NIEO*, *supra* note 82, at 18, 36-37.

### B. *Conclusions on Diplomacy or Rule of Law*

Despite interesting considerations on both sides as to whether GATT or the WTO should be Mediator, Arbiter, or Judge, it is quite clear in view of the international legal character of the organization that it will continue to depend upon the good will of the parties to the agreement. Members may withdraw from the WTO six months after delivery of written notice to the Director-General. The Uruguay Round has, however, taken significant steps toward the creation of an effective international trade court, for instance through the provision in Article 23 of the DSU. However it may ultimately evolve, the WTO is and will remain for the foreseeable future a hybrid creature, both diplomatic and legal in its constitution. There exists, nonetheless, the danger that if the legal nature of this organization is developed too far too fast, it risks alienating its Member Nations. If the party in violation is one of the economically powerful nations, and, therefore, essential to further effectiveness of the world trading system, it is unlikely that enforcement against such a party where it is unwilling will be effective because the enforcement mechanism relies solely upon cross retaliation in its extreme and might ultimately undermine confidence in the system. Important in this consideration is the provision in Article 23 of the Dispute Settlement Understanding which states:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, *they shall have recourse to*, and abide by, the rules and procedures of [the DSU]. (emphasis added)

Article 23, therefore, does not require WTO Members to seek redress through the dispute settlement procedure in the WTO. It only requires the Members who do so to abide by the decisions reached by its tribunals or, consequently, face retaliation. This formulation provides an escape valve for disputes too sensitive for any party to the dispute to risk before a panel, Appellate Body, or even binding arbitration. Ultimately, therefore, the GATT, and in its newest form, the WTO, will remain for the foreseeable future in some important respects a negotiating institution perhaps moving slowly but steadily in the direction of an international judicial tribunal.

### CONCLUSIONS AND PERSPECTIVES

The Uruguay Round promises dramatic economic results for the world economy in the years ahead once its obligations are faithfully

executed. It is not clear, however, how evenly the expected benefits will fall between the developed and developing world. In fact, some commentators believe that a net economic loss could occur in some developing countries. This consequence is due at least in part to the lower tariff rates required by the agreements. Many developing countries depend upon tariff revenues in lieu of taxes.

The achievement of the Uruguay Round results is to be supported at least in part by significant changes in both the institutional structure of GATT and its dispute settlement procedures. The most significant of these changes brought by the new trade agreements is the replacement of the GATT as an institutional organ by the World Trade Organization. Beyond the very significant institutional improvements made within the WTO in terms of administration and implementation of the agreements under its charter, there is the new dispute settlement process administered by the Dispute Settlement Body and the Trade Policy Review Mechanism administered by the Trade Policy Review Body.

The Dispute Settlement Body is simply a special assembly of the General Council, which is responsible for day to day functions of the WTO and is composed of all WTO Members. Dispute settlement procedures are to be, at least for the time being, initiated only by WTO Members. Thus, the WTO or any of its subsidiary organs do not possess executive authority in terms of enforcing its obligations. It may be suggested, however, that the Trade Policy Review Mechanism, through its administering body, should eventually be given the authority to bring actions against violating Member States to enforce WTO obligations. The Trade Policy Review Body does have authority to monitor trade policies of WTO Member States and make reports to the Ministerial Conference. The evolution of the WTO into a kind of world trade police presents an interesting proposition which might facilitate the fulfillment of the ITO's original role in the Bretton Woods System. Nevertheless such a proposition is not without certain problems. For instance, the method of enforcement created under the Uruguay Round Agreement's Dispute Settlement Understanding is at present dependent upon Member initiative and results in its extreme in "cross retaliation," which may possess certain inherent limitations.

Where a dispute arises, parties first consult. Where consultation fails to bring about a mutually agreeable solution, a party to the dispute may call for the establishment of a panel. Panel reports may be appealed to the Appellate Body for review of legal issues. Both establishment of panels and Appellate Bodies and adoption of their decisions is to be achieved through inverted consensus. Panels or Appellate Bodies are established and their decisions are adopted unless the WTO Members

present at the meeting of the Dispute Settlement Body decide by consensus *not* to establish the body or adopt its decision. Thus, establishment of panels or Appellate Bodies and adoption of decisions are virtually assured in all cases. The remedies available to a complaining country are first, conformity of the violating Member's measures with the Dispute Settlement Body adopted decision. If not achieved within the time required by the decision, then the complaining party may request compensation. If the parties cannot agree on compensation, then the complaining party may request retaliation, and if it believes that retaliation would be unsatisfactory, it may then request retaliation across sectors and agreements.

It is questionable whether cross retaliation would be an effective mechanism for ensuring compliance in all circumstances, especially in cases of disputes where the complainant is a developing country and the defendant a wealthy developed country. Retaliation was also available under the GATT system and was employed only once, with little success, in the U.S. Dairy Quotas Case. Some scholars have argued that retaliation authorized under the new system might also prove ineffective. For instance, in a case between a small, relatively poor country as plaintiff and a large, relatively wealthy country as respondent, where the small country's total imports of the large country's products is a negligible portion of the latter's international trade, retaliation or cross retaliation may have nothing more than the effect of a mosquito biting an elephant; in other words not enough effect to encourage the larger country to bring its violative measures into conformity. Retaliation as it is to be applied in the present agreement is only between the parties to the dispute. However, were the WTO itself to have the power to bring complaints and to enforce them through *multilateral* retaliation or cross retaliation, enforcement against larger and economically powerful Members might prove more effective. Involved in this proposition is the basic philosophy underpinning the multilateral trading system: whether the system should be more legal or diplomatic in orientation. Specifically, the question is whether law or diplomacy best serves the economic goals of the trading system. Granted that compliance to the obligations will serve the economic goals of the system better than noncompliance, which philosophical approach, adjudication or negotiation, will be most effective in securing compliance?

Contracting Parties of the GATT as well as commentators disagree as to what the nature of GATT or the WTO should be. Commentators have argued somewhat successfully, for instance, that GATT, through its dispute resolution system, has evolved into a judicial system. Neverthe-

less, there is little evidence, if any, to support the proposition that dispute settlement under GATT led to better implementation and enforcement of its obligations.

Critics of the legalist approach argue directly to the point of effectiveness, claiming that the dispute system would not be more effective in bringing about compliance simply because all disputes, whether adjudicated or negotiated, ultimately come to negotiations. They maintain that a propensity in GATT to accentuate adjudication may bring about the opposite of its intended effect.

On the other hand, the pragmatic legalists maintain that the international trading system profits from increased adherence to internationally agreed rules and more effective dispute settlement. The radical legalists argue that international rules of law should act to restrain politics and political activity, especially activity that diverts governments away from the pursuit of national or global economic welfare in favor of protectionist and interventionist policies.

The system as proposed under the auspices of the Uruguay Round does bring significant improvements and may lead to more effective enforcement and thus higher efficiency. Nevertheless, for the foreseeable future the international trading system as embodied by the World Trade Organization will remain in important respects a negotiating institution. Because of its new institutional charter, however, it has the potential to develop more quickly and effectively into an international judicial tribunal.

But the question remains to be answered: which philosophy, adjudication or negotiation, best serves the interests of the multilateral trading system as it stands today? And which best serves the interests of the developing world including the economies in transition? It remains controversial whether the new agreements as they now stand can be considered a net benefit for these countries. Were the system to develop some dramatic new powers with multilateral cross retaliation or even multilateral compensation, even countries with relatively small markets may better experience the promised benefits. These powers would be difficult to achieve considering the commensurate loss of national sovereignty they would mean for WTO Member Nations and those Members' reticence, most notably that of the United States, to giving up national powers.

The new institutional framework brought to the world trading system by the WTO is very significant in terms of achieving its future goals. An agreement on competition policy for an increasingly integrated global market is one such goal whose importance cannot be underestimated. An agreement on competition policy under the auspices of the

GATT was all but impossible considering that its competence extended strictly to trade in goods, although certain agreements, such as those on subsidies, antidumping, and countervailing measures, do deal indirectly with competition policy and present a second best solution to the problem. Through the WTO, a negotiation for an agreement on competition policy is considered a priority for the first round of negotiations conducted under its auspices. Further areas of development for the multilateral trading system under the auspices of the WTO may include agreements on social and environmental policy which have recently become fashionable themes in trade talks.<sup>192</sup>

A further development which should not be overlooked is the rejuvenation of the Bretton Woods System through the creation of the WTO. Originally designed as a triumvirate between the International Monetary Fund, the World Bank, and the International Trade Organization, the Bretton Woods System was intended to work as a cooperative effort between the three organizations. The WTO Agreement contains a provision requiring it to cooperate where appropriate with the IMF and the World Bank with a view to achieving greater coherence in global economic policymaking. Originally it was foreseen that the IMF, World Bank, and the ITO would support one another even through their executive powers in pursuit of their separate but complementary goals. Whether the WTO will or should fulfill the ITO's role in Bretton Woods is unclear. A certain degree of increased coordination between the three organizations might be advantageous, but further discussion may be necessary for determining to what degree an integrated effort to achieve each institution's goals is desirable.

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192. See Lavorel, *supra* note 1, at 28, 31.