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The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System

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THE WORLD TRADE ORGANIZATION AND UNITED STATES' SOVEREIGNTY: THE POLITICAL AND PROCEDURAL REALITIES OF THE SYSTEM

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INTRODUCTION

The future of United States sovereignty is perhaps the most contentious issue surrounding United States membership in the World Trade Organization ("WTO"). Emotions run high on all sides of the issue, especially for opponents of the WTO, such as Ralph Nader, who are convinced that the WTO will usurp American sovereignty.¹ Advocates for the WTO, such as former United States Trade Representative ("USTR") Michael Kantor, contend that not only is American sovereignty protected under the Uruguay Round Agreements (the "UR Agreements"), but the UR Agreements will actually open foreign markets to American goods.² Congress gave high priority to United States' membership in the WTO and approved "Fast Track"³ consideration of the UR Agreements. Ultimately, Congress passed the required implementing legislation,⁴ which the President signed, and the United States joined the WTO.⁵

1. See *GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong. 353-69 (1994) (statement of Ralph Nader, Consumer Advocate, Public Citizen) (setting forth the reasons why the WTO will undermine American sovereignty) [hereinafter *GATT Hearing*].

2. See *id.* at 41 (statement of Ambassador Michael Kantor) (testifying that the UR Agreements will require other countries to be as open in their trade practices as the United States).

3. See 19 U.S.C.A. § 2191 (West 1996) (authorizing the expedited consideration of trade implementing legislation). In order to prevent members of Congress from delaying consideration of legislation, Section 2191(d) provides that:

No amendment to an implementing bill or approval resolution shall be in order in either the House of Representatives or the Senate; and no motion to suspend the application of this subsection shall be in order in either House, nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this subsection by unanimous consent.

Id. Under Sections 2191(f) and (g), Congress cannot debate whether or not to consider implementing legislation. See *id.* Debate on the merits of implementing legislation is limited to no more than twenty hours in both the House and the Senate. See *id.*

4. See 19 U.S.C.A. § 2903(a)(1)(B)(i)-(ii) (West 1996) (requiring the President, after entering into a trade agreement, to submit to the House and Senate a final copy of the agreement along with a draft of the implementing bill and a statement of administrative action proposed to implement the trade agreement).

5. See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

Part I of this paper begins by defining sovereignty—comparing the “power” and “rule oriented” approaches to sovereignty—and discussing whether the United States has surrendered its sovereignty by joining the WTO. As part of the analysis, the paper discusses the Helms-Burton Act and the “power” element that exists within the dispute resolution system.

Part II examines the arguments of critics against the WTO, followed by a brief history of dispute settlement from the General Agreement on Tariffs and Trade (“GATT”) to the Uruguay Round. Part III shifts the focus to the WTO’s structure and voting procedure. Part IV addresses United States’ concerns about the new dispute settlement system, emphasizing Section 301 of the 1974 Trade Act. Part V provides an overview of cases decided by the Dispute Settlement Body (“DSB”) in which the United States was a party. The paper concludes with a summation of the reasons why the United States has not surrendered its sovereignty by joining the WTO.

I. WHAT IS SOVEREIGNTY?

Sovereignty is formally defined as the international independence of a state, combined with the right and power of regulating its internal affairs without foreign interference.⁶ Practically speaking, sovereignty is a nation’s independence from other governments and its freedom of choice to act politically.⁷ Definitions notwithstanding, however, sovereignty is becoming more difficult to define as nations become increasingly interdependent.⁸ The public debate over the United States’ membership in the WTO, which reached near hysterical levels, further muddled the waters. One anti-WTO advertisement went so far as to show a policeman in a GATT uniform shattering the Capitol building with a sledgehammer.⁹ Such inflammatory rhetoric

6. See BLACK’S LAW DICTIONARY 1396 (6th ed. 1990).

7. See Joe Cobb, *The Real Threat to U.S. Sovereignty*, THE HERITAGE LECTURES NO. 497, 1, 1-2 (1994) (explaining that the UR Agreements threaten special interest groups and the protectionist legislation they lobby Congress to pass) [hereinafter HERITAGE LECTURES].

8. See John H. Jackson, *The Uruguay Round and the Launch of the WTO: Significance and Challenges*, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 5, 12 (Terence P. Stewart ed., 1996).

made responsible debate difficult and created the false notion that the United States was trading its citizenship interests in favor of its consumer interests.¹⁰ Lost among the sound and fury, however, was the fact that United States membership in the WTO does not diminish Americans' rights as citizens.¹¹

Opponents of the WTO favor a "power oriented" approach to sovereignty that downplays the importance of international agreements and allows nations to maintain their freedom of unilateral action despite their international obligations.¹² What places the critics at odds with the WTO is that it operates under a "rule oriented" system, which is based upon legally binding rules enforced by an effective dispute resolution system.¹³ The primary goal of the rule oriented system is to maximize stability and predictability.¹⁴ Under a rule oriented system, however, nations usually submit to a dispute resolution authority that serves as a referee.¹⁵

The power oriented approach emphasizes unilateral action as a means of dispute resolution. The problem with unilateral action, however, is that international trade does not occur in a vacuum, and the growing interdependence of international economies limits the independence of government action.¹⁶ Consequently, despite its su-

9. See *Jeopardized by GATT 100 U.S. Environmental Laws* (advertisement), N.Y. TIMES, June 27, 1994, at A15.

10. See Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?*, 11 ST. JOHN'S J. LEGAL COMMENT. 307, 329 (1996).

11. See *id.* at 329 (explaining that much of the criticism directed against WTO dispute settlement procedures stems from the fear it will add pressure against special protectionist interests that violate both American consumer and citizenship interests).

12. See Susan Hainsworth, *Sovereignty, Economic Integration and the World Trade Organization*, 33 OSGOODE HALL L.J. 583, 590 (1995) (arguing that economic integration is altering the concept of sovereignty and has made it almost meaningless for an isolated state).

13. See *id.* at 590.

14. See *id.*

15. See *id.* (explaining that a rule oriented system is enforced by an effective and impartial dispute resolution system).

16. See Schaefer, *supra* note 10, at 332 (discussing how the common definition of sovereignty as "a nation's independence from other governments" is changing due to economic interdependence). To illustrate his point, the author emphasizes that the United States economy is affected by interest rates in Europe, savings rates in Japan, and growth rates in Asia and South America. See *id.*

perpower status, the United States does not have *carte blanche* to act unilaterally without considering the consequences. In fact, super-power status confers greater responsibility since the more powerful the nation, the more significant the repercussions of its actions.

Despite being rule oriented, a significant "power politics" element exists within the WTO system. There are times when a nation will act unilaterally, regardless of what the UR Agreements say or what WTO members think, as exemplified by the passage of the Helms-Burton Act ("Helms-Burton") in 1996.¹⁷ Helms-Burton, created to hasten the establishment of democracy in Cuba, is comprised of four titles: Title I strengthens the existing embargo against Cuba, Title II delineates the requirements for lifting sanctions on Cuba, Title III creates a private cause of action in United States district courts for any United States national who had property confiscated in Cuba after January 1, 1959,¹⁸ and Title IV excludes from the United States certain aliens who traffic in confiscated property belonging to United States' nationals.¹⁹

The European Union ("EU") was so angered by passage of Helms-Burton, especially Title III, that its ministers gathered to condemn it and complain about its potential effect upon the international trade system.²⁰ In retaliation, the EU unanimously passed blocking legislation.²¹ On October 29, 1996, the EU passed additional legislation allowing Europeans to sue for the recovery of damages assessed by American courts pursuant to Helms-Burton.²²

Taking a stand against the "extraterritorial" reach of Helms-Burton,²³ the EU pressed for the formation of a DSB investigative

17. 22 U.S.C.A. §§ 6021-6091 (West 1996). The Helms-Burton Act is formally called the "Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996."

18. *See id.* § 6082.

19. *See id.* § 6091.

20. *See* Anthony M. Solis, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709, 727 (1997) (providing an excellent overview of Helms-Burton and its potential effect on both international law and trade).

21. *See id.* at 727 n.110 (citing *EU to Allow Countersuits to Foil U.S. Anti-Cuba Law*, WALL ST. J., Oct. 29, 1996, at A1.).

22. *See id.* at 727.

23. *See* Edward Roussel, *Europe to File Protest Over Helms-Burton Act*, MIAMI HERALD, Oct. 2, 1996 (visited Dec. 4, 1997) <<http://www.fiu.edu/~fcf/europe.protest.helms.html>>.

panel²⁴ and requested consultations with the United States on May 3, 1996.²⁵ The United States originally rejected the formation of a panel but relented on November 20, 1996.²⁶ On February 20, 1997, however, the United States asserted that the newly formed panel did not have the competence to proceed because Helms-Burton was a matter of national security.²⁷ Months of negotiation ensued, with the United States ultimately offering to modify Helms-Burton in exchange for European efforts to discourage investment in Cuba.²⁸ After making its offer, the United States warned the EU that it would not amend Helms-Burton if the EU went forward with its complaint at the DSB.²⁹ Consequently, on April 25, 1997, the EU agreed to suspend its complaint³⁰ but could reinstate the complaint if a settlement is not reached.³¹

If the EU reinstates its complaint, the panel's investigation into Helms-Burton could have significant effects on the United States and international trade.³² If the panel decides that Helms-Burton violates the GATT, then the United States would have to amend Helms-Burton or face sanctions. However, if the panel upholds Helms-Burton and the United States keeps it in place, WTO members will question the United States' commitment both to the WTO and the

24. See Solis, *supra* note 20, at 734 (noting that Canada and Mexico also joined the EU in its request).

25. See World Trade Organization, *Overview of the State-of-Play of WTO Disputes* (visited Nov. 18, 1997) <<http://www.wto.org/wto/dispute/bulletin.htm>> [hereinafter *Dispute Overview*].

26. See Solis, *supra* note 20, at 734 n.152 (citing *WTO Investigation of Helms-Burton on Track: U.S. Accepts Panel Formation*, INT'L TRADE DAILY (BNA) at A-3 (Nov. 21, 1996)).

27. See *id.* at 734 (citing David E. Sanger, *U.S. Rejects Role for World Court in Trade Dispute*, N.Y. TIMES, Feb. 21, 1997, at A1.).

28. See Thomas W. Lippman & Paul Blustein, *Administration Offers Compromise to Europeans Over Helms-Burton Act*, WASH. POST, Apr. 11, 1997, at A23 (noting that under the Administration's offer, it would ask Congress to modify specific parts of Helms-Burton if the EU adopts the principle that corporations should not profit from investing in confiscated property).

29. See Kathleen Kenna, *Deal Avoids Cuba Trade Battle*, TORONTO STAR, Apr. 12, 1997, at A3.

30. See *Dispute Overview*, *supra* note 25.

31. See Kenna, *supra* note 29, at A3 (reminding the reader that Congress will have to approve any deal between the United States and the EU).

32. See Solis, *supra* note 20, at 734-35.

international trading system.³³ Helms-Burton has already provoked the passing of retaliatory legislation by the EU, and it may provoke similar legislation that could threaten the WTO's very existence.

A. SURRENDERING SOVEREIGNTY?

By joining the WTO, the United States made the sovereign decision to abide by the UR Agreements and avoid actions that are inconsistent with them. Thus, one can say that the United States has sacrificed some sovereignty; however, all treaties give up some "sovereignty" in this respect.³⁴ Furthermore, given global economic interdependence and the limits it places on unilateral action, the "surrender" of sovereignty is largely illusory.

Any sovereignty the United States relinquishes can be analogized to the sovereignty an athletic team surrenders when it plays a game judged by a referee. The referee is present to ensure that teams play by the rules and to penalize those who do not. Without a referee, the game would result in chaos as the teams argue whether or not a foul was committed. Likewise, it is difficult for trading partners involved in a dispute to admit discrimination against each other's goods. Even though a team submits to a referee's authority, the team's ability to play the game is not diminished. In fact, the referee "levels the playing field" by enforcing the rules equally. This "leveling of the playing field" is a major reason the United States supported the creation of the WTO.³⁵

In fact, as a member of the WTO, the United States will have more opportunities to influence the actions of its trading partners by bringing complaints to the DSB.³⁶ The DSB offers stability to international trade by providing a neutral forum for dispute resolution. Instead of immediately entering into a confrontation with trading partners, the United States can bring a complaint to the DSB and let it

33. *See id.* at 735.

34. *See* Schaefer, *supra* note 10, at 330.

35. *GATT Hearing*, *supra* note 1, at 39 (statement of Ambassador Michael Kantor) (testifying that the UR Agreements give the United States the level playing field it has sought in trade because for the first time all WTO members must agree to the same set of trade rules).

36. *See* Hainsworth, *supra* note 12, at 591 (explaining that the transfer and pooling of sovereignty at the international level allows a state more authority and opportunity to exercise control over other states' actions).

decide. By bringing a complaint, the United States runs the risk of losing a case, but that is the same risk it would run in a United States court. Unilateral action may seem a more powerful way to respond to GATT violations, but unilateral action, as demonstrated by Helms-Burton, can provoke retaliatory action, which threatens the future of the WTO. Moreover, when the United States brings a successful complaint to the DSB, the panel report carries the weight of WTO members behind it. A member could ignore the panel's recommendations; but would risk being known as a cheat, which could be bad for business.

The very act of acceding to the WTO was an exercise of both American sovereignty and constitutional authority,³⁷ and despite agreeing to use WTO dispute settlement procedures, Congress retains the constitutional authority to disregard the UR Agreements when warranted by national interests.³⁸ Congress has the authority to regulate commerce with foreign nations,³⁹ but it delegated authority to the President to negotiate the UR Agreements.⁴⁰ Because the UR Agreements are neither self-executing executive agreements nor treaties,⁴¹ they required implementing legislation to bring them into force.⁴² Therefore, when Congress drafted the implementing legislation, it took steps to protect American sovereignty. First, Congress

37. See Schaefer, *supra* note 10, at 330.

38. See Judith H. Bello & Alan F. Holmer, *The Post-Uruguay Round Future of Section 301*, 25 LAW & POL'Y INT'L BUS. 1297, 1307 (1994) (stating that the WTO's dispute settlement rules do not limit the sovereignty of the United States or any other member).

39. See U.S. CONST. art. I, § 8.

40. See 19 U.S.C. § 2902(a) (1994) (granting the President authority to negotiate agreements regarding tariff barriers); *id.* § 2902(b)-(c) (authorizing the negotiation of bilateral agreements regarding tariff and non-tariff barriers); *id.* § 2902(d) (providing that before the President enters into agreements under subsection (b) or (c) he must consult with the House Ways and Means Committee as well as other Congressional committees or joint committees that have jurisdiction over areas effected by the legislation).

41. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1223 (1995) (suggesting, in part, that the WTO may be unconstitutional because a bicameral majority of Congress approved the implementing legislation for the WTO instead of a two third's Senate majority as required by the Treaty Clause, Article II, Section 2, of the U.S. Constitution).

42. See 19 U.S.C. § 3511 (1994) (approving the UR Agreements and the Statement of Administrative Action).

provided that in the event of a conflict with the UR Agreements, United States' law would take precedence.⁴³ Second, the implementing bill states that the UR Agreements do not have the power to change United States law.⁴⁴

In addition to the legislative protection of American sovereignty, the Supreme Court has held that Congress can enact legislation inconsistent with preexisting international agreements, and the subsequent legislation supersedes inconsistent provisions of an existing treaty or international agreement.⁴⁵ Thus, Congress, without any approval from the WTO, is free to pass legislation modifying the United States' obligations under the UR Agreements.⁴⁶ Congress also has the authority to withdraw the United States from the WTO.⁴⁷

B. CRITICS' ARGUMENTS AGAINST THE WTO

Whoever said "politics makes strange bedfellows" must have envisioned the forces opposed to the WTO. One would hardly expect Ralph Nader and Pat Buchanan to agree on anything, yet both were vehemently opposed to the WTO. Ralph Nader asserted that the WTO would become a new United Nations and replace the entire GATT system.⁴⁸ Pat Buchanan described the WTO as a "Supreme

43. See *id.* § 3512(a)(1) (requiring that: "No provision of any of the Uruguay Round Agreements nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States, shall have effect.").

44. See *id.* § 3512(a)(2)(A) (providing that nothing in the Act shall be construed to amend or modify any law of the United States, including any law relating to the protection of human, animal, or plant life; or health, the protection of the environment, or worker safety); see also *id.* § 3512(a)(2)(B) (asserting that the Act does not limit "any authority conferred under any law of the United States, including Section 2411 of the title, unless specifically provided for in this Act.")

45. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that "[w]hen the stipulations [of a treaty] are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject"); see also *Botiller v. Dominguez*, 130 U.S. 238, 247 (1889) (holding that when an act of Congress is in conflict with a treaty, the Court must follow the statutory enactments of its own government).

46. See *Whitney*, 124 U.S. at 195 (holding that whether the United States chooses to observe its international obligations is not a matter for judicial determination but one of diplomacy and legislation).

47. See 19 U.S.C. § 3535(b)-(c) (1994).

48. See *GATT Hearing*, *supra* note 1, at 359 (statement of Ralph Nader).

Court of world trade” and made opposition to it a theme of his campaign for the Republican presidential nomination.⁴⁹

State officials were particularly concerned that WTO members would challenge state laws in the DSB instead of challenging them in state court.⁵⁰ As an example, they pointed to the Minnesota microbrewery case as proof that state laws were in danger.⁵¹ State officials were also concerned that the USTR might use state laws as bargaining chips when negotiating with trading partners, thus turning the office of the USTR into a *de facto* enforcement arm of the WTO.⁵² One state official has warned that the first time a state law is challenged based upon a WTO panel decision, “all hell is going to break loose.”⁵³ Ralph Nader issued similar dire warnings.⁵⁴

Various environmental groups also opposed the WTO, arguing that it would create pollution havens throughout the world and stifle innovation in the areas of healthcare and the environment.⁵⁵ Critics also attacked the WTO’s “one nation, one vote” system, expressing

49. Pat Buchanan, Speech Delivered at Spartanburg, S.C. (C-SPAN television broadcast, Feb. 28, 1996).

50. See David S. Cloud, *Critics Fear GATT May Declare Open Season On U.S. Laws*, 52 CONG. WKLY. REP. 2005, 2009 (1994).

51. See *id.* In 1991, Canada challenged a Minnesota law giving a tax break to microbreweries. See *id.* The tax break was intended to assist small beer brewers and was available to foreign and out-of-state microbrewers who sold beer in Minnesota. See *id.* Canada challenged the law on the grounds that it discriminated against larger brewers. See *id.* A GATT panel ruled in Canada’s favor, but Minnesota refused to comply with the decision. See *id.*

52. See *id.* at 2010.

53. *Id.*

54. See *GATT Hearing*, *supra* note 1, at 354 (statement of Ralph Nader) (asserting that under the WTO, members will be able to challenge American state laws in Geneva, and state representatives will be shut out of the process).

55. See *id.* at 209 (statement of Brent Blackwelder, President of Friends of the Earth) (testifying that the “GATT essentially addresses the environment by omission and leaves the strong likelihood that it will foster more pollution havens throughout the world”). Mr. Blackwelder specified the following areas where he thinks environmental laws will conflict with free trade policies: hazardous waste, recycling and waste reduction, pesticides and food safety, air and water pollution, natural resource protection, energy conservation, and wildlife protection. See *id.* at 209-10.

dissatisfaction with the lack of weighted voting⁵⁶ and the disproportionate share of the cost the United States would bear.⁵⁷

The critics paint a bleak picture of the WTO as a monster waiting to wreak havoc on America's economy and laws. At the core of the criticism is the erroneous belief that by joining the WTO, the United States has involuntarily surrendered both the right to act on its own behalf and the power to prevent other states from interfering in its affairs. As previously stated, the UR Agreements do not preempt federal or state laws that are inconsistent with GATT,⁵⁸ and the WTO may not overturn either an act of Congress or any portion of the Constitution. Moreover, the implementing bill protects state laws by requiring that the USTR establish a federal-state consultation process for addressing issues under the UR Agreements that will or may have a direct effect on a state.⁵⁹ Criticisms notwithstanding, the United States will benefit significantly from membership in the WTO.⁶⁰ If the United States did not join the WTO, its "sovereignty" may have been protected, but the United States would be economically isolated from its major trading partners.⁶¹

56. *See id.* at 350 (statement of Ralph Nader) (stating that the United States has never entered into a major international economic agreement without weighted voting or a veto).

57. *See id.* at 122 (statement of Kevin Kearns, President, U.S. Business and Industrial Counsel) (stating that the United States will have to bear most of the cost of the WTO, but will only have one vote).

58. *See* 19 U.S.C. § 3512 (1994).

59. *See id.* § 3512(b)(1)(A)(B). The statute provides that the Federal-State consultation process shall include procedures under which (i) the states are informed of matters under the Uruguay Round Agreements that directly relate to them, (ii) the states can then submit information and advice on those matters to the Trade Representative, and (iii) the Trade Representative will consider this information and advice when formulating official United States' positions. *See id.*

60. *See Results of the Uruguay Round Trade Negotiations, Hearings Before the Senate Comm. on Finance*, 103d Cong. 115 (1994) [hereinafter *Results of the Uruguay Round*] (statement of Professor John H. Jackson). Prof. Jackson lists the following benefits of WTO membership for the United States: first, members must sign on to all the UR Agreements—they cannot pick and choose; second, the WTO serves as an umbrella organization under which the UR Agreements are annexed, so the WTO provides a legal framework; third, the WTO extends the GATT structure to the new areas of intellectual property and services; and fourth, the WTO has a balanced decision making apparatus that will not invade members' sovereignty. *See id.*

61. *See World Trade Organization (WTO) Dispute Settlement Review Commission Act: Hearing Before the Senate Comm. on Finance*, 104th Cong. 14 (1995)

II. A BRIEF HISTORY OF GATT DISPUTE RESOLUTION

In order to understand how far dispute settlement has come under the WTO, one must examine where the GATT dispute settlement began. Since the creation of the GATT, the United States has been the most active user of the dispute settlement system.⁶² Of the 207 panel cases brought before the original GATT, the United States and the EU have been plaintiff or defendant in 190 of them.⁶³

After World War II, the United States, along with its allies, realized that new political and economic institutions were necessary to promote peaceful international relations.⁶⁴ Consequently, in 1944, representatives from the allied nations met at the Bretton Woods Conference in New Hampshire,⁶⁵ which resulted in the charters creating the International Monetary Fund and the World Bank.⁶⁶ During the Conference, the allies agreed that an International Trade Organization ("ITO") should be established, and the task of drafting the charter fell to the U.N.⁶⁷ The allies envisioned that the ITO would govern international trade, enforce the rules against trade barriers and restrictive trade practices, and settle trade disputes between member states.⁶⁸

In 1946, the U.N. adopted a resolution to draft the ITO Charter.⁶⁹ Simultaneously, nations were negotiating for a general agreement on tariffs and trade, which would create reciprocal obligations to reduce tariffs.⁷⁰ In 1947 at the Geneva Conference, both the GATT and the

(statement of Jerry R. Junkins, President and Chief Executive Officer, Texas Instruments Corporation) (explaining that economic isolation is not a viable choice for the United States because it would lead to a shrinking economy and place America's leadership in the world at risk).

62. See Jackson, *supra* note 8, at 14 (stating that the United States was the most frequent applicant for GATT dispute settlement procedures).

63. See Gary N. Horlick, *Dispute Settlement Mechanism: Will the United States Play by the Rules*, 29 J. WORLD TRADE 163, 164 (1994).

64. See 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) at 2670 (Terence P. Stewart ed., 1994) [hereinafter Stewart].

65. See Jackson, *supra* note 8, at 5.

66. See *id.*

67. See *id.*

68. See Stewart, *supra* note 64, at 2670.

69. See *id.* at 2671.

70. See Jackson, *supra* note 8, at 5.

draft ITO Charter were completed.⁷¹ The GATT was supposed to be an interim agreement created to implement multilateral tariff reductions.⁷² The ITO Charter attempted to establish a permanent organization and addressed three phases of dispute resolution: consultations and negotiations, referral of disputes to the ITO, and referral of disputes to the International Court of Justice.⁷³

In 1948, the U.N. finalized the ITO Charter in Havana,⁷⁴ and later that year, the GATT⁷⁵ came provisionally into force. The draft ITO Charter was then submitted to the nations for ratification.⁷⁶ The United States Congress refused to approve it, however, and by 1951, it became apparent that the ITO was moribund.⁷⁷ By default, GATT became the major treaty system for international trade even though it was originally intended to be a temporary organization administered by the ITO.⁷⁸

From its inception the GATT suffered from certain "birth defects" that compromised its effectiveness.⁷⁹ The original GATT contained little guidance for dispute settlement,⁸⁰ providing only for consultations and negotiations among parties involved in a trade dispute. It did not provide for either dispute settlement panels or an appellate body. In 1955, GATT members began referring their disputes to panels of experts, and the use of panels became customary.⁸¹ Panel

71. *See id.* at 5-6.

72. *See* Stewart, *supra* note 64, at 2672.

73. *See id.* at 2671.

74. *See id.*

75. *See generally* General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

76. *See* Jackson, *supra* note 8, at 6.

77. *See id.*

78. *See id.* At the time of its inception, GATT was to be applied provisionally for several years and "then would be put under the umbrella of and conformed to the ITO Charter." *Id.* Since the ITO was never created, however, "the GATT gradually became the focus for international government cooperation on trade matters." *Id.*

79. *See id.* at 7 (explaining that the problems with the GATT included a lack of institutional structure, ambiguity about member states' abilities to make decisions, unclear legal status resulting in confusion by members and the public, and defects in the procedures for dispute settlement).

80. *See id.* at 13.

81. *See* Stewart, *supra* note 64, at 2695.

findings and recommendations, however, were not binding on the disputants.⁸²

In 1955, Article XXII of the GATT was modified to allow contracting parties to intervene in a dispute if the original parties could not come to an agreement.⁸³ Article XXIII was amended in the same year to allow GATT members to suspend concessions or retaliate against each other if justified.⁸⁴ Cooperation among respondent governments resulted in the successful implementation of the early panel decisions.⁸⁵

The years 1952-1958 were the peak years of GATT dispute activity.⁸⁶ The period after 1958, however, was one of decreased dispute

82. See John H. Jackson, *The World Trade Organization, Dispute Settlement, Codes of Conduct*, in *THE NEW GATT, IMPLICATIONS FOR THE UNITED STATES* 60 (S. Collins & B. Bosworth eds., 1994).

83. See GATT, *supra* note 75, art. XXII (stating that each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of this agreement).

84. See *id.* art. XXIII. The GATT provides, in part:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

(a) the failure of another contracting party to carry out its obligations under this agreement, or
(b) the application by another contracting party of any measure whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

Id.

85. See David M. Schwarz, *WTO Dispute Resolution Panels: Failing To Protect Against Conflicts Of Interest*, 10 AM. U. J. INT'L L. & POL'Y 957, 959 (1995) (citing Robert E. Hudec, *Adjudication of International Trade Disputes*, 16 THAMES ESSAY 7, 9-10 (1978)) (noting that "between 1948 and 1959, approximately 80% of the thirteen panel adjudications yielded completely or partially satisfactory results.").

86. See generally ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 235 (1990) (analyzing the GATT dispute settlement procedures from 1959-1970).

settlement activity,⁸⁷ precipitated by an increasingly hostile attitude toward dispute settlement by GATT members.⁸⁸ The situation continued to deteriorate so that by the late 1960s “government representatives were openly challenging the fairness of the [dispute settlement] procedure on the ground that there was no longer any reciprocity of legal obligation.”⁸⁹

During the 1960s, the emerging GATT power structure, comprised of the United States, the European Community (“EC”), and Japan, experienced a series of unresolved disputes.⁹⁰ From 1960-1969, only ten complaints were brought to the GATT, and only three dispute panels were established between 1963-1970.⁹¹ It was obvious that GATT members had lost confidence in the dispute resolution system because it allowed parties to block the formation of panels, reject panelists, and delay a panel’s collection of information.⁹² The most significant problem, however, was that parties could block the adoption of panel reports and recommendations,⁹³ thus vetoing adoption indefinitely. Without an effective means of enforcement, the dispute settlement system was substantially weakened.

Besides problems with dispute resolution, the original GATT was also plagued by institutional weaknesses. The major weakness was the problem of free riders.⁹⁴ Under the original GATT, a member did not have to adhere to all of the GATT agreements, but rather could pick and choose which agreements it wished to sign, thus creating a GATT “*a la carte*.”⁹⁵ The “pick and choose” system created a sce-

87. See *id.* (explaining that from 1959-1961 no GATT complaints were filed). From 1962-1963 only six complaints were filed, and after that no complaints were filed until 1967. See *id.*

88. See *id.*

89. *Id.* (explaining that GATT members described legal proceedings as unfriendly confrontations).

90. See Stewart, *supra* note 64, at 2680 (explaining that the disputes between the United States and the EC led to unilateral retaliation and counter retaliation that “highlighted the substantive and procedural deficiencies of the [dispute settlement] mechanism”).

91. See *id.* at 2679.

92. See *The General Agreement on Tariffs and Trade: Uruguay Round Should Produce Overall U.S. Economic Gains*, United States General Accounting Office, Report to Congress 28 (1994) [hereinafter *GAO Report*].

93. See Jackson, *supra* note 8, at 10.

94. See *GAO Report*, *supra* note 92, at 25.

95. See Jackson, *supra* note 8, at 11.

nario where country X was required to grant most favored nation ("MFN") status to country Y under a GATT agreement, even though country Y did not adhere to the same agreement and did not offer reciprocal MFN status to country X. Thus, country Y was given a "free ride" by receiving benefits from agreements to which it did not adhere. To make matters worse, country X could not "cross retaliate" against country Y by suspending concessions on an agreement to which country Y adhered.⁹⁶

A. THE TOKYO ROUND

In 1973, the Tokyo Round of GATT negotiations commenced in an attempt to resolve some of the problems with the dispute settlement system.⁹⁷ The negotiations specifically addressed panel delays and the importance of creating impartial panels.⁹⁸ The United States hoped that the dispute settlement process could be improved and that notification procedures could be implemented for restrictive trade practices that were either in effect or about to be taken.⁹⁹ The United States proposed an automatic right to establish dispute panels as well as precise time limits for each stage of the dispute settlement process.¹⁰⁰ The United States also wanted panel reports to fully explain their findings in writing and wanted the GATT to maintain a roster of eligible panel experts.¹⁰¹

The resulting document¹⁰² partially modified the dispute resolution procedures.¹⁰³ Nevertheless, the Tokyo Round was ultimately a dis-

96. See *GAO Report*, *supra* note 92, at 26.

97. See Schwarz, *supra* note 85, at 962-64 (providing an excellent history of GATT dispute settlement panels).

98. See *id.* (citing Robert E. Hudec, *GATT Dispute Settlement After The Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 147-48 (1980)) (noting that the weakness of dispute resolution was a primary issue at the Tokyo Round negotiations).

99. See Stewart, *supra* note 64, at 2689.

100. See *id.* at 2689, 2691.

101. See *id.* at 2689-90.

102. See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, *reprinted in* 26 BISD 210 (1980).

103. See Stewart, *supra* note 64, at 2692.

appointment because it did not alter dispute resolution procedures,¹⁰⁴ but only codified existing informal practices.¹⁰⁵

From 1980 to 1981, the dispute settlement system again proved inadequate when the United States brought a series of bitterly contested complaints against the EC, in which the EC blocked the adoption of all panel reports.¹⁰⁶ By this time, the United States was convinced that the continued existence of unresolved disputes challenged both GATT principles and the system itself.¹⁰⁷ Realizing that the dispute settlement system was inadequate, the GATT Secretariat decided to formalize and strengthen it.¹⁰⁸ Panels had limited legal ability to deal with complex trade disputes, and legal mistakes in panel reports were becoming increasingly common.¹⁰⁹

In 1983, the post of Director, Office of Legal Affairs was created with a staff of three attorneys.¹¹⁰ In order to improve the quality of panelists, the Secretariat asked its members to create a roster of qualified panelists from the private sector.¹¹¹ The changes to the system were effective, and by the late 1980s, the quality of panel decisions had improved considerably.¹¹²

104. See Schwarz, *supra* note 85, at 963 n.48 (citing U.S. INT'L TRADE COMM'N, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND TOKYO ROUND AGREEMENTS, Pub. 1793 (Rep. to the Comm. on Finance, U.S. Senate, on Investigation No. 332-212 under Section 332(g) of the Tariff Act of 1930 (1985)).

105. See *id.* at 963 (explaining that the Tokyo Round Understanding failed to provide any "substantive solutions for the delaying tactics in panel procedures, but it did establish a time frame for panel composition").

106. See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 30 (1994) (providing an excellent history of GATT dispute settlement procedures).

107. See GAO Report, *supra* note 92, at 29.

108. See Hudec, *supra* note 106, at 137.

109. See *id.*

110. See *id.* at 138.

111. See *id.* at 168 (explaining that the Secretariat had the authority to name panelists from the roster if the disputants could not agree upon panel membership).

112. See *id.* at 138 (explaining that even though the legal office did well, it never achieved full success).

B. THE URUGUAY ROUND

In 1982, the United States proposed the beginning of another round of multilateral trade negotiations.¹¹³ The suggestion was met with strong resistance from both developed and underdeveloped GATT countries that thought it was too soon for another round of negotiations.¹¹⁴ Nevertheless, in 1988, the GATT Ministerial Conference issued the Punta Del Este Declaration establishing the negotiating framework for the Uruguay Round trade negotiations.¹¹⁵ Among the goals specified for the negotiations were strengthening the dispute settlement system, emphasizing oversight and enforcement, and improving the GATT decision making process.¹¹⁶

In anticipation of the Uruguay Round negotiations, Congress passed the Omnibus Trade and Competitiveness Act ("1988 Trade Act"), which set forth the United States' negotiating objectives at the Uruguay Round.¹¹⁷ The United States' overall negotiating objectives included the creation of foreign market access, the reduction of trade barriers, and the reduction of trade distorting practices.¹¹⁸ Predictably, the principal dispute settlement objectives were for a more effective dispute settlement system and for the more expeditious settlement of disputes.¹¹⁹ The United States also wanted to eliminate the blocking of panel findings and recommendations by making the results binding on the disputants.¹²⁰ Under the old GATT, consensus had to exist among members for panel adoption to occur, which meant that all members had to agree to adoption before a panel report could be implemented.¹²¹

113. See *id.* at 180 (stating that the United States specifically wanted services, intellectual property, and investment covered by the GATT).

114. See Stewart, *supra* note 64, at 2690.

115. See GATT Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, 25 I.L.M. 1623.

116. See GAO Report, *supra* note 92, at 30.

117. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988); see also 19 U.S.C. § 2901 (1994) (delineating the United States trade negotiation objectives).

118. See 19 U.S.C. § 2901(a).

119. See *id.* § 2901(b)(1).

120. See Stewart, *supra* note 64, at 2733.

121. See GAO Report, *supra* note 92, at 27.

III. THE WORLD TRADE ORGANIZATION

The Uruguay Round was the most ambitious and successful trade negotiation ever undertaken,¹²² with much of the effort focused on improving the legal system. In 1991, the GATT Director General prepared and released a draft text of the treaty clauses covering the entire Uruguay Round.¹²³ The draft was circulated to GATT members, and in 1993, the GATT Director General released the final draft of the Uruguay Round Agreements.¹²⁴

The WTO is essentially a mini-charter that facilitates and implements the UR Agreements.¹²⁵ Unlike the ITO proposed in the 1940s, however, the WTO is entirely institutional and procedural in nature, incorporating the UR Agreements into annexes.¹²⁶ Unlike the previous GATT, the WTO charter delineates the legal authority of the Secretariat, Director General, and staff.¹²⁷ The cornerstone "rules" of the WTO are the MFN and National Treatment clauses. The MFN clause requires that the United States treat the products and services of other countries equally under its laws.¹²⁸ National treatment requires that goods and services of other countries receive treatment no less favorable than that given to like products of national origin.¹²⁹

The two governing bodies of the WTO are the Ministerial Conference and the General Council, both of which are composed of representatives from all members.¹³⁰ The Ministerial Conference shall meet at least once every two years and has authority to take action

122. See Jackson, *supra* note 82, at 63.

123. See *id.* at 65.

124. See *id.*

125. See Jackson, *supra* note 8, at 10.

126. See Jackson, *supra* note 82, at 66.

127. See Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M. 13, art. 6 [hereinafter WTO Agreement] (explaining that the Ministerial Conference appoints the Director-General and adopts regulations setting out the powers, duties, conditions of service, and term of office of the Director General, who then heads the Secretariat and appoints its staff).

128. See GATT, *supra* note 75, art. I.

129. See *id.* art. III.

130. See WTO Agreement, *supra* note 127, art. 4 (reporting that the Ministerial Conference meets every two years and is responsible for carrying out the functions of the WTO). The General Council governs the meetings of the Ministerial Conference. See *id.* art. 4.2.

under any of the UR Agreements.¹³¹ In the intervals between meetings of the Ministerial Conference, the General Council will govern the WTO and will meet as required to discharge the duties of the DSB.¹³²

The Dispute Settlement Understanding¹³³ ("DSU") imposes strict time limits on the dispute settlement process. Panels should finish their work in nine months if there is no appeal and in twelve months if there is an appeal.¹³⁴ Moreover, panel reports can no longer be blocked,¹³⁵ and parties now have an automatic right of appeal to the newly created Appellate Body.¹³⁶ Furthermore, a WTO member must accede to all the UR Agreements before it can join, thus, resolving any "free rider" problem.¹³⁷ Additionally, cross-retaliation is authorized, so a member may retaliate under one agreement when a violation has occurred under another.¹³⁸

In comparison to other international institutions, the WTO is a comparatively lean operation with a staff of 454 that is expected to total 491.¹³⁹ WTO officials want additional staff and more operating funds, but their requests have been denied because member govern-

131. See *id.* art. 4.1.

132. See *id.* art. 4.2.

133. Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, *opened for signature* Dec. 15, 1993, 33 I.L.M. 13, Annex 2 [hereinafter DSU].

134. See *id.* art. 20 (declaring that the parties may agree to a different time limit). Absent an agreement, however, "the period from the establishment of the panel by the DSB until the DSB considers the panel or appellate report for adoption shall not as a general rule exceed nine months where the panel report is not appealed or twelve months where the report is appealed." *Id.*

135. See *id.* art. 16.4 (noting that within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report).

136. See generally *id.* art. 17.

137. See WTO Agreement, *supra* note 127, art. 14.1 (stating that the acceptance of membership in the WTO shall apply to this agreement and Multilateral Trade Agreements annexed hereto).

138. See DSU, *supra* note 133, art. 22.2.

139. See Bruce Stokes, *Up and Crawling*, NAT'L J., Mar. 30, 1996, at 710.

ments seem intent on limiting the bureaucratic bloat that has afflicted the U.N.¹⁴⁰

A. WTO VOTING PROCEDURE

Under the previous GATT, voting procedures were based on consensus, which was never formally defined and came to mean unanimity.¹⁴¹ Under the WTO, consensus is formally defined as when the DSB makes a decision and a member who is present at the meeting makes no formal objection.¹⁴² Importantly, consensus no longer means unanimity, and members that are absent from the meeting, or who abstain, cannot block consensus.¹⁴³ Moreover, only the Ministerial Conference and the General Council have authority to adopt authoritative interpretations of the UR Agreements.¹⁴⁴ If WTO members cannot reach consensus on an interpretation, then a three-fourth's majority vote is required to adopt an interpretation.¹⁴⁵ Only the Ministerial Conference and General Council, however, have authority to amend the WTO agreements.¹⁴⁶

Any WTO member may initiate an amendment to one of the UR Agreements by submitting a proposal to the Ministerial Conference.¹⁴⁷ For ninety days after the proposal has been formally tabled, the Ministerial Conference may decide by consensus whether to submit the proposal to the members.¹⁴⁸ If an amendment is submitted to the members that would affect substantive rights and obligations, a two-third's majority is required, and the amendment will be binding

140. *See id.* (explaining that member governments have limited the total staffing, blocked a Secretariat proposal to increase internal economic research, and quashed plans for a major media relations effort).

141. *See* Jackson, *supra* note 82, at 68.

142. *See* DSU, *supra* note 133, art. 2.4

143. *See* Jackson, *supra* note 82, at 68.

144. *See* WTO Agreement, *supra* note 127, art 9.2.

145. *See id.* art. 10.3.

146. *See* GAO Report, *supra* note 92, at 29.

147. *See* WTO Agreement, *supra* note 127, art. 10.1.

148. *See id.* (noting that if a consensus is reached, the Ministerial Conference submits the proposition to the members). If a consensus cannot be reached, a two-thirds majority is needed to submit the amendment to the members. *See id.*

only upon the members who accept it.¹⁴⁹ All members must accept any amendment to MFN or National Treatment.¹⁵⁰

As stated above, the WTO's voting procedure has been criticized because the United States will have only one vote.¹⁵¹ It is thought, therefore, that WTO members will simply "gang up" on the United States. In reality, the complaints about the WTO's voting procedure are a distraction.¹⁵² First, WTO members are prohibited from using the amendment procedure to expand or diminish the rights and obligations of members.¹⁵³ Even if a two-third's consensus is reached on an amendment to a WTO agreement, however, the United States will not be required to accept it. For an amendment to be binding on a member, there must be a second vote taken requiring a three-fourth's majority to force acceptance of the interpretation.¹⁵⁴ It is unlikely that WTO members would attempt to force the United States to accept an interpretation contrary to its interests, however, because they would risk the United States' withdrawal from the WTO.

B. THE DISPUTE SETTLEMENT BODY

The new dispute settlement system is "a central element in providing security and predictability to the multilateral trading system."¹⁵⁵ The newly created DSB is responsible for consultations and dispute settlement and has the "authority to establish panels, adopt panel and Appellate Body reports,"¹⁵⁶ and ensure the implementation

149. See *id.* art 10.3; see also *id.* art. 10.2 and 10.6 (listing the Articles exempted from the amendment procedure).

150. See *id.* art. 10.2.

151. See notes 56-57 and accompanying text (arguing that the granting of one vote to the United States in WTO matters is not fair).

152. See HERITAGE LECTURES, *supra* note 7, at 3-4 (discussing how the WTO Agreements threaten the power of American special interest groups that lobby for protectionist legislation).

153. See GAO Report, *supra* note 92, at 32.

154. See WTO Agreement, *supra* note 127, art. 10.5 (suggesting that in the event that a three-fourth's majority did occur and the United States did not accept the amendment, it would be free to withdraw from the WTO or remain with the consent of the Ministerial Conference).

155. DSU, *supra* note 133, art. 3.2.

156. *Id.* art. 2.1.

of panel rulings.¹⁵⁷ The DSB, however, may not add or diminish the rights and obligations of members.¹⁵⁸

The focus of the dispute settlement procedures is on the resolution of differences through negotiation, not confrontation.¹⁵⁹ Before bringing a case, members should exercise judgment "as to whether action under these [dispute settlement] procedures would be fruitful,"¹⁶⁰ since it is preferable for parties to reach mutually acceptable solutions to their disputes.¹⁶¹ If the parties cannot solve their differences, however, the DSB attempts to effect the withdrawal of the questioned measure if it is inconsistent with a UR Agreement.¹⁶²

1. WTO Panel Procedure

If the United States believes another member has violated the terms of an UR Agreement, the USTR has the right to request consultations¹⁶³ with the offending country, which must respond within ten days.¹⁶⁴ If the requested party responds affirmatively, consultations must begin within thirty days.¹⁶⁵ If the requested party does not respond, or responds negatively, then the United States may request the formation of a panel.¹⁶⁶ The United States must notify the DSB of the request for consultations, and if the parties cannot resolve their dispute within sixty days after consultations begin, the United States may request the establishment of a panel.¹⁶⁷

The DSB operates under a significantly improved panel procedure. For the first time, maximum time limits have been established for

157. *See id.*

158. *See id.* art. 19.2.

159. *See id.* art. 3.3 (noting that the prompt settlement of disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members").

160. *Id.* art. 3.7.

161. *See id.* art. 3.6.

162. *See DSU, supra* note 133, art. 3.7.

163. *See id.* art. 4.4 (explaining that any request for consultations must be in writing, state the reasons for the request, identify the alleged offending measures, and provide the legal basis for the complaint).

164. *See id.* art. 4.3 (noting that the parties may agree to a longer response period than 10 days).

165. *See id.*

166. *See id.* art. 4.7.

167. *See id.*

each stage of the dispute settlement process.¹⁶⁸ In order to improve the quality of decisions, panelists must now have extensive trade experience.¹⁶⁹ A panel consists of three members, unless the parties agree to enlarge it to five,¹⁷⁰ and the panel's function is to make objective assessments and findings that will assist the DSB in adopting the panel report.¹⁷¹

In order to improve the quality of legal decisions, a panel may seek advice from any individual or body it deems appropriate,¹⁷² and the panel has open ended authority to examine the issues brought before it. Panels are also empowered to question, but not overrule, specific uses of applications of domestic law, as well as the law's conformity to the WTO agreements.¹⁷³ Once the parties agree upon panel composition, the panel shall have six months to conclude its work.¹⁷⁴

Prior to the first panel meeting, the parties must present written submissions setting forth their respective cases.¹⁷⁵ At the first panel meeting, the complainant presents its case and the responding party replies. A second panel meeting follows at which the respondent offers rebuttal and the complainant responds.¹⁷⁶ When arguments and rebuttals have concluded, the panel deliberates and submits the fac-

168. See *GAO Report*, *supra* note 92, at 27.

169. See *DSU*, *supra* note 133, art. 8.1.

[P]anels 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 a Member or of a contracting party to GATT 1947 or as a representative to the 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.

Id.

170. See *id.* art. 8.5.

171. See *id.* art. 11.

172. See *id.* art. 13.1 (acknowledging that a panel has "the right to seek information and technical advice from any individual or body it deems appropriate"). The panel must notify the parties, however, if it seeks advice from a person or body within the Member's jurisdiction. See *id.*

173. See *id.* art. 11 (stating that panels should make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.").

174. See *id.* art. 12.8 (requiring that the six-month rule is a general rule).

175. See *DSU*, *supra* note 133, art. 12.6 (noting that the complaining party shall submit its submission before the responding party).

176. See *id.* art. 3.7.

tual and argument portion of its report to the parties, who have a limited time to comment on it.¹⁷⁷

Next, the panel submits an interim report to the parties, containing detailed findings and recommendations to the DSB.¹⁷⁸ The DSB may not consider the panel report for adoption until twenty days after it has been issued to the members,¹⁷⁹ who must register any objections ten days prior to the DSB's consideration of the report.¹⁸⁰ Once consideration of the panel report begins, the disputants may participate fully in the adoption process.¹⁸¹

2. Adoption of Panel Reports

The major change in panel procedure prevents members from blocking the adoption of panel reports. The DSB adopts Panel reports within sixty days after circulation to the members, unless a party to the dispute provides notice of intent to appeal, or there is a consensus not to adopt the panel report.¹⁸² If a party notifies the DSB of its decision to appeal, the DSB does not adopt the panel report until the appeal is complete.¹⁸³

Within thirty days after the adoption of a panel report, the affected party must notify the DSB of its intentions regarding implementation.¹⁸⁴ If immediate compliance is not practical, the DSB provides the affected party with a reasonable time for compliance.¹⁸⁵ A new GATT innovation calls for the permanent monitoring of implementation of adopted recommendations.¹⁸⁶ If a member fails to implement panel recommendations, or provide compensatory benefits

177. *See id.* art. 15.1

178. *See id.* art. 15.2.

179. *See id.* art. 16.1.

180. *See id.* art. 16.2.

181. *See DSU, supra* note 133, art. 16.3.

182. *See id.* art. 16.4.

183. *See id.*

184. *See id.* art. 21.3.

185. *See id.* A reasonable time can be determined in three ways: first, the losing party can propose a time and the DSB may approve it; second, the parties may mutually agree to a time "within 45 days following adoption of the recommendations and rulings"; third, "a period of time can be determined through binding arbitration within 90 days following adoption of the recommendations and rulings." *Id.*

186. *See id.* art. 21.6 (stating that "the DSB shall keep under surveillance the implementation of adopted recommendations or rulings").

within a reasonable time, the DSB automatically sanctions the member.¹⁸⁷ In the event of a disagreement over the amount and duration of sanctions or time for compliance, the member has a right to expedient arbitration.¹⁸⁸

C. THE APPELLATE BODY

The DSU created a standing Appellate Body, consisting of seven members who serve three at a time for four year terms.¹⁸⁹ Only parties to the dispute may appeal panel decisions.¹⁹⁰ Once a party provides written notice to the DSB of its appeal, the entire panel report is sent to the Appellate Body, which must reach a decision within sixty days of receiving the formal notice of appeal.¹⁹¹

An appellate panel only reviews the issues of law covered in the panel report.¹⁹² The appellate panel may uphold, reverse, or modify a panel's findings and conclusions,¹⁹³ but if it finds that a measure is inconsistent with a WTO agreement, the appellate panel will recommend that the offending party bring its trade measure into conformity with the appropriate agreements.¹⁹⁴ Absent consensus not to adopt, the DSB will adopt the Appellate Body's report within thirty days after its circulation to the members.¹⁹⁵

187. See DSU, *supra* note 133, art. 22 (detailing that compensation and sanctions are available if recommendations and rulings are not implemented in a reasonable amount of time).

188. See *id.* art. 25.1 (providing that arbitration is subject to the agreement of the parties, who shall agree upon the procedures).

189. See *id.* arts. 17.1-17.2 (detailing the selection and rotation procedures for Appellate Body members).

190. See *id.* art. 17.4 (stating that third parties do not have a right to appeal, but a third party who has notified the DSB of a substantial interest in the case may make written submissions and be heard by the Appellate Body).

191. See *id.* art. 17.5 (noting that proceedings shall not exceed sixty days from the notice of intention to appeal). If the Appellate Body cannot meet its sixty day deadline, it must notify the parties in writing, but in no case shall the proceedings exceed ninety days. See *id.*

192. See *id.* art. 17.6.

193. See DSU, *supra* note 133, art. 17.13.

194. See *id.* arts. 19-19.1 (stating that the panel or Appellate Body may also suggest ways for the member to implement the recommendations).

195. See *id.* art. 17.14.

IV. UNITED STATES' CONCERNS ABOUT THE DISPUTE SETTLEMENT SYSTEM

Despite the improved dispute settlement system, the system is not perfect, and areas of concern exist for the United States. The quality of panel decisions, especially appellate decisions, is a source of anxiety. Concern exists over the potential lack of qualified judges, the politicization of the judicial selection process, a lack of qualified support staff, and an inability to deal with complex legal issues within short time limits.¹⁹⁶ Furthermore, panel and appellate decisions may conflict with one another because *stare decisis*¹⁹⁷ does not apply.¹⁹⁸

Concern also exists over the secrecy of panel and appellate procedures, which are not as open as the United States would like them.¹⁹⁹ Both panel and Appellate Body deliberations are confidential,²⁰⁰ and the opinions of individual parties remain anonymous.²⁰¹ Furthermore, both groups draft reports without the parties to the dispute present.²⁰² Concerns notwithstanding, the WTO dispute settlement mechanism is more open than its GATT predecessor. The United States has the right to participate in the selection of panelists, thus making it difficult for nations to "pack the court" with anti-American panelists.²⁰³ The parties to the dispute must also submit non-confidential submissions for release to the public prior to the adoption of the report,²⁰⁴ and once a panel report is adopted, it is made available to the public.

196. See GAO Report, *supra* note 92, at 48.

197. See generally BLACK'S LAW DICTIONARY 1404 (6th ed. 1990) (stating that *stare decisis* is the policy of courts to stand by precedent and not to disturb settled points).

198. See Jackson, *supra* note 82, at 70.

199. See GATT Hearing, *supra* note 1, at 42-3 (prepared statement of Ambassador Michael Kantor) (explaining that more needs to be done in the area of transparency).

200. See DSU, *supra* note 133, art. 14.1.

201. See *id.* art. 14.3, 17.11.

202. See *id.* art. 14.2, 17.10.

203. See GATT Hearing, *supra* note 1, at 42 (prepared statement of Ambassador Michael Kantor) (explaining that the notion of America facing panels of "unqualified, biased panelists . . . is simply baseless").

204. See *id.*

The implementing legislation also increases public access to the dispute settlement process.²⁰⁵ The USTR must publish information on each dispute in which the United States is involved and is required to provide the public with an opportunity to submit comments prior to the drafting of the United States' panel submissions.²⁰⁶ Although the DSB is more open than its GATT predecessor, the United States recognizes that much more needs to be done.²⁰⁷

A. SECTION 301

A major area of concern for the United States is the future of Section 301 of the 1974 Trade Act,²⁰⁸ which Congress created to protect American exports against unfair foreign trade practices.²⁰⁹ Section 301 provides "United States' petitioners and the Government with a mechanism to enforce trade agreements, and to obtain the elimination of unfair foreign trade practices."²¹⁰

Under the original version of Section 301, the President had authority to retaliate against trade restraints that were "unjustifiable, unreasonable or discriminatory."²¹¹ If the alleged discriminatory practice did not violate a trade agreement, the petitioner had to prove that the practice burdened or restricted United States commerce.²¹² If the trade practice violated an agreement such as GATT, the petitioner

205. *See id.*

206. *See id.* (noting that the USTR will take comments from the public and Congressional committees into consideration when preparing United States' submissions to each dispute settlement panel).

207. *See id.* (stating that the United States is committed to obtaining greater transparency in the WTO dispute settlement process).

208. *See* Trade Act of 1974, Pub. L. No. 93-618, §§ 301-310, 88 Stat. 1978, 2041-43 (codified as amended at 19 U.S.C. §§ 2411-2421 (1988)).

209. *See* Bello & Holmer, *supra* note 38, at 1300 (explaining that Section 301 is the trade remedy designed to open foreign markets to U.S. exports and to achieve improved protection of intellectual property rights and equitable rules of investment abroad).

210. Steven R. Phillips, *The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets*, 22 VAND. J. TRANSNAT'L L. 491, 503 (1989).

211. *Id.* at 504 (quoting the 1974 Trade Act and adding that it also gave the President authority to take action against foreign countries' imports).

212. *See id.* (citing 19 U.S.C. § 2411(a)(1)(B)(i) (1994)).

only had to prove that the trade practice was inconsistent with GATT, not that actual harm occurred.²¹³

Section 301 is the leading "crowbar" used by the USTR in persuading reluctant trading partners to open their markets.²¹⁴ Under the original Section 301, the President had significant discretion in deciding whether to initiate action against an unfair trade practice,²¹⁵ and this displeased some members of Congress.²¹⁶ Thus, in 1979 Congress amended Section 301 by shortening the time in which the President and the USTR could decide whether to take action.²¹⁷ Congress also inserted provisions for keeping petitioners better informed during the Section 301 process²¹⁸ and for requiring the use of dispute settlement in cases involving trade agreements.²¹⁹

Under the 1974 Section 301, the USTR had forty-five days after receiving a complaint to decide whether to begin an investigation.²²⁰ If an investigation was initiated, the USTR attempted to settle the matter through consultations.²²¹ If the case involved a trade agreement and consultations failed, the USTR was required to seek formal dispute resolution.²²² Then the USTR was required to make a recommendation to the President, who decided whether or not to take action. To the dismay of some petitioners, the USTR seldom used its power to initiate investigations.²²³

213. See 19 U.S.C. § 2411(a)(1) (1994).

214. See Bello & Holmer, *supra* note 38, at 1300 (citing Walter S. Mossberg, *The Outlook: The Crowbar and the Handshake*, WALL ST. J., Feb. 13, 1989, at A1 (quoting Ambassador Carla Hills)).

215. See Phillips, *supra* note 210, at 509 (stating that the President had the power to determine if the elements of Section 301 had been met and whether to take action).

216. See *id.* at 508-09 (explaining that the President did not have to make specific determinations and could let a case die if he so chose).

217. See *id.* at 505 (citing 19 U.S.C. § 2414 (1988)).

218. See *id.* (citing 19 U.S.C. § 2416 (1988) that requires the USTR to monitor implementation of corrective trade measures by foreign governments).

219. See SENATE COMM. ON FINANCE, REPORT ON THE TRADE REFORM ACT OF 1979, S. REP. NO. 249, at 234-35, *reprinted in* 1979 U.S.C.C.A.N. 381, 624.

220. See 19 U.S.C. § 2412 (a)(2) (1988).

221. See Phillips, *supra* note 210, at 507 (referencing 19 U.S.C. § 2413(a) (1988)).

222. See *id.* (referencing 19 U.S.C. § 2413(a)(2) (1988)).

223. See *id.* (explaining that most of the requests for investigations came from private industry).

B. AMENDED SECTION 301

In 1988, prior to the Uruguay Round, Congress amended Section 301 to enable the USTR to address unfair foreign trade practices more forcefully. The major change under the new Section 301 was the transfer of some of the authority to take action from the President to the USTR.²²⁴ By transferring authority, Congress intended to limit the President's discretion, increase the stature of the USTR and make the use of Section 301 mandatory under certain conditions.²²⁵ The transfer of authority involved three areas: deciding whether a practice is actionable or unfair under Section 301,²²⁶ deciding on what action to take,²²⁷ and implementing the chosen action.²²⁸

Under the 1988 Section 301, the USTR must decide, within forty-five days of receiving a petition, whether to begin an investigation of the alleged unfair practice.²²⁹ If the USTR investigates and finds that a foreign trade practice denies the United States its rights under a trade agreement, the USTR must take action.²³⁰ Once the office of the USTR takes action,²³¹ it must implement this action within thirty days, subject to the approval of the President.²³²

The successful use of Section 301 created strong Congressional support for even broader and stronger use of this mechanism to persuade trading partners to open markets.²³³ Consequently, the 1988 Trade Act created two stronger versions of Section 301. "Special" 301 provided greater protection for intellectual property rights by mandating that the USTR identify and investigate countries failing to

224. See 19 U.S.C. § 2411 (1994).

225. See Phillips, *supra* note 210, at 509.

226. See 19 U.S.C. § 2414(a)(1)(A) (1994).

227. See *id.* § 2414(a)(1)(B).

228. See *id.* § 2415(a)(1).

229. See *id.* § 2412(a)(2).

230. See *id.* § 2411(a).

231. See *id.* § 2411(c)(1)(A) and (B) (stating that the USTR may suspend or withdraw trade benefits and impose duties or other import restrictions).

232. See 19 U.S.C. § 2415(a) (1994).

233. See Bello & Holmer, *supra* note 38, at 1301 (explaining Congress' thinking that if Section 301 worked in the past, then new variations of it would work in the future).

provide adequate protection.²³⁴ "Super" 301 required that the USTR annually identify foreign practices—such as import barriers and trade distorting measures—that burden United States' commerce.²³⁵ After identifying the discriminatory practices, the USTR must then choose priority countries where elimination of the measures would have the most significant potential to increase United States' exports.²³⁶ Once countries have been identified, the USTR must seek consultations with the offending nations to eliminate the practice;²³⁷ and if negotiations are not successful, the USTR must initiate dollar for dollar retaliation.²³⁸

America's trading partners widely condemned the creation of Special and Super 301 as examples of aggressive unilateralism that undermined both the United States' commitment to the GATT and the GATT system itself.²³⁹ Attempting to soothe its trading partners, the United States assured them that it would only use Section 301 when its rights were not adequately protected.²⁴⁰ Despite these reassurances, when the United States created Section 301, it sent a strong message that it intends to protect its own trade interests. Because Section 301 is despised by America's trading partners, however, there is the possibility that it will be challenged in the DSB.²⁴¹

The WTO is arguably broader in scope than the GATT and covers more areas of trade. For example, the WTO protects intellectual property rights and, to a certain extent, trade in services, whereas the GATT applies only to products.²⁴² As a consequence, the limitations on unilateral actions by members of the WTO will probably increase.²⁴³ Consequently, the United States' use of Section 301 will

234. See 19 U.S.C. § 2413 (1988)); see also 19 U.S.C. § 2242 (1994) (requiring the USTR to report to Congress annually those countries that deny adequate protection of intellectual property rights).

235. See Bello & Holmer, *supra* note 38 (citing 19 U.S.C. § 2412 (1988)).

236. See 19 U.S.C. § 2420(a)(1)(B) (1994).

237. See *id.* § 2420(c) (stating that the USTR is required to request consultations under 19 U.S.C. § 2413(a)).

238. See 19 U.S.C. § 2411(a).

239. See Stewart, *supra* note 64, at 2761-62 (explaining that the EC and Japan were particularly upset with the mandatory action required by Super 301).

240. See *id.*

241. See *GATT Hearing*, *supra* note 1, at 355 (statement of Ralph Nader) (asserting that America's trading partners cannot wait to challenge Section 301).

242. See Bello & Holmer, *supra* note 38, at 1306.

243. See *id.*

have to be more judicious.²⁴⁴ The key point, however, is that the WTO cannot require the United States to eliminate Section 301, and in the event of a conflict with a UR Agreement, Section 301 takes precedence. Furthermore, in the event the United States wins a panel decision and the loser refuses to comply, the United States could use Section 301 as authorized retaliation.²⁴⁵

Section 301 has not been challenged in the DSB. Nonetheless, even if Section 301 is challenged and found violative of an UR Agreement, the United States cannot be forced to stop using it. Section 301 is too powerful a tool in opening foreign markets²⁴⁶ for the United States to abandon its use.²⁴⁷

V. DISPUTE SETTLEMENT OVERVIEW

America's assessment of the WTO will depend largely on how it fares as a complainant and respondent at the DSB. Thus far, the United States has achieved mixed results as a complainant, winning several panel decisions and losing several, including the "Fuji Film" case.²⁴⁸ On the whole, WTO members have brought three successful complaints against the United States, including the "Dirty Oil" case.²⁴⁹

In the case of "Taxes on Alcoholic Beverages," the United States challenged a Japanese tax law that treated Japanese alcoholic beverages more favorably than imported ones.²⁵⁰ On September 27, 1995,

244. See *id.* at 1308 (explaining that the United States will have to weigh the potential costs and benefits more closely before using Section 301).

245. See *id.* at 1306-07.

246. See *Results of the Uruguay Round*, *supra* note 60, at 133 (prepared statement of Steven Appleton, President and CEO of Microcon Semiconductor) (explaining that the United States gained access to Japanese markets only through the use of Section 301).

247. See Bello & Holmer, *supra* note 38, at 1300 n.24 (explaining that the United States has used Section 301 against Japan (beef, cigarettes, citrus, forest products, processed fruits, satellites, supercomputers, and vegetables); Korea (beef, cigarettes, insurance, and intellectual property protection); the EC (citrus, government procurement, and pasta); and Brazil (computers and patent protection for pharmaceutical products)).

248. See *infra* pt. V.A.

249. See *infra* pt. V.B.

250. See *Dispute Overview*, *supra* note 25. The EC and Canada also brought complaints against Japan. See *id.*

the DSB formed a panel, which circulated its report to the members on July 11, 1996. In its report, the panel agreed with the United States that the challenged Japanese law violated GATT Article III:2. Japan subsequently appealed, and the Appellate Body issued its report on October 4, 1996, upholding the panel's report regarding GATT Article III:2.²⁵¹ On November 1, 1996, the DSB adopted both the Appellate Body report and the panel report, as modified.²⁵² On December 24, 1996, the United States requested binding arbitration to determine a reasonable time for Japan's compliance with the panel's recommendations.²⁵³ The arbitrator issued his report on February 14, 1997, establishing a fifteen-month deadline for compliance.²⁵⁴

In the case of "Certain Measures Concerning Periodicals," the United States brought a complaint against Canada for prohibiting and restricting the importation of periodicals in violation of GATT Article XI.²⁵⁵ The DSB established a panel on June 19, 1996. On March 14, 1997, the panel circulated its report to the members, finding that the measures used by Canada violated the GATT.²⁵⁶ Canada subsequently filed an appeal, and the Appellate Body partially upheld the decision of the panel.²⁵⁷ On July 30, 1997, the DSB adopted both the Appellate Body report and the panel report, as modified.

The United States also brought a successful complaint against the "European Communities—Regime for the Importation, Sale and Distribution of Bananas." In its complaint, the United States alleged, *inter alia*, that the EC's regime for importation, sale, and distribution

251. *See id.* (noting that despite upholding the panel's finding, the Appellate Body did point out several errors in the panel's legal reasoning).

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.* (stating that the United States also alleged that Canadian tax rates on certain periodicals, as well as the application of favorable postage rates, were in violation of GATT Article III).

256. *See Dispute Overview, supra* note 25.

257. *See id.* (stating that "the Appellate Body upheld the panel's findings and conclusions on the applicability of GATT 1994 to Part V.1 of Canada's Excise Tax Act but reversed the panel's finding that Part V.1 of the Excise Act is inconsistent with the first sentence of Article III:2 of GATT 1994"). The Appellate Body also ruled that Part V.1 of Canada's Excise Tax Act was inconsistent with the second sentence of GATT Article III:2 and reversed the panel's decision that Canada's postal rate scheme was justified by GATT Article III:8(b). *See id.*

of bananas was inconsistent with GATT Articles I, II, III, X, XI, and XIII.²⁵⁸ The panel, formed on May 8, 1996, agreed that the EC's regime violated GATT and circulated its report to the members on May 22, 1997.²⁵⁹ The EC appealed the panel's decision, but the Appellate Body upheld most of the panel report.²⁶⁰ The DSB adopted both the Appellate Body report and the panel report, as modified, on September 25, 1997.²⁶¹

As shown by the above-mentioned cases, the United States has achieved success at the DSB. Dispute settlement, however, is a two-way street, and WTO members have brought successful complaints against the United States for its own discriminatory trade practices. In the case of "Restrictions on Imports of Cotton and Man-Made Fibre Underwear," Costa Rica brought a complaint against the United States, alleging that restrictions on textile imports violated the Agreement on Textiles and Clothing.²⁶² The panel agreed with Costa Rica and circulated its report to the members on November 8, 1996.²⁶³ Costa Rica unsuccessfully appealed part of the panel report, and on February 25, 1997, the DSB adopted both the Appellate Body and panel reports.²⁶⁴ Despite losing the complaint, however, the United States' future compliance was moot because the discriminatory measure in question expired and was not renewed.²⁶⁵

In the case of a "Measure Affecting Imports of Woven Wool Shirts and Blouses," India brought a complaint asserting that the United States used a safeguard measure that violated Articles 2, 6, and 8 of the ATC.²⁶⁶ The panel agreed with India and circulated its report on January 6, 1996.²⁶⁷ India appealed part of the panel report,

258. *See id.* (stating that Ecuador, Guatemala, Honduras, and Mexico also brought complaints against the EC).

259. *See id.*

260. *See id.* (stating that the Appellate Body reversed the panel finding that the EC's regime violated both GATT Article X and the Import Licensing Agreement).

261. *See id.*

262. *See Dispute Overview, supra* note 25.

263. *See id.*

264. *See id.* (noting the adoption of the panel report as modified by the appellate report).

265. *See id.*

266. *See id.*

267. *See id.*

but the Appellate Body upheld the panel report.²⁶⁸ The DSB subsequently adopted the Appellate Body and panel reports, as modified, on May 23, 1997.²⁶⁹

Despite the abundance of DSB panels, however, WTO officials do not want the organization characterized as the "international cop on the trade beat."²⁷⁰ The WTO Deputy Director General has stated that the WTO is a negotiation and dispute resolution forum that functions best as a catalyst, not an enforcement mechanism.²⁷¹

A. THE FUJI FILM CASE

To date, the most significant panel loss for the United States has been the "Fuji Film" case. The case was significant for two reasons: it was the first time the United States lost as a complainant, and the case was considered the first real test for the fledgling WTO.²⁷²

The Kodak Corporation had long believed that the Japanese government conspired to keep foreign film out of Japan.²⁷³ In June 1996, the United States requested consultations with Japan regarding its laws on the distribution and sale of imported film and photographic paper.²⁷⁴ The United States ultimately brought a complaint to the DSB, alleging that Japanese laws treated Japanese film more favorably, thus violating GATT Articles III and X.²⁷⁵

The DSB formed a panel on October 16, 1996,²⁷⁶ and on February 20, 1997, the United States submitted its case against Japan, presenting evidence of thirty years of Japanese efforts to exclude foreign film and paper.²⁷⁷ In a decision described as "devastating," the

268. See *Dispute Overview*, *supra* note 25.

269. See *id.*

270. Stokes, *supra* note 139, at 710-11.

271. See *id.*

272. See Lorraine Woellert, *Kodak, U.S. Lose Trade Dispute*, WASH. TIMES, Dec. 6, 1997, at A1.

273. See Frances Williams, *U.S. Takes Kodak-Fuji Film Case to WTO*, FIN. TIMES, Feb. 21, 1997, available in WESTLAW, ALLNEWS File (stating that the United States argued that since the 1960s, Japan has neutralized tariff cuts on photographic film by using laws and regulations to bolster Fuji's position within the domestic market).

274. See generally *Dispute Overview*, *supra* note 25.

275. See *id.*

276. See *id.*

277. See Williams, *supra* note 273.

panel's December 5, 1997 report overwhelmingly rejected every single point of the United States' complaint.²⁷⁸

The loss was especially disappointing to the United States business community, which thought the case had the potential to open Japan's markets to other foreign-made products.²⁷⁹ The panel decision has shaken some of the WTO's most ardent supporters and has revived fears among critics that the WTO is incapable of adjudicating complex cases.²⁸⁰

The United States is considering its options, but will no doubt appeal the panel's decision. The administration is also considering a Section 301 investigation.²⁸¹ Placing sanctions on Japan, however, would send the message that the United States will abide by the WTO's decisions so long as those decisions favor the United States.²⁸² Thus, United States sanctions could cast doubt upon America's commitment to the WTO and could spark a trade war with Japan. Furthermore, applying sanctions would make the United States appear hypocritical because it advocated a stronger dispute resolution system at the Uruguay Round.

B. THE DIRTY OIL CASE

In 1990, Congress amended the Clean Air Act²⁸³ and mandated that the Environmental Protection Agency ("EPA") implement regulations setting acceptable pollution levels for gasoline.²⁸⁴ In 1994, the EPA implemented the required regulations, which came to be known as the "Gasoline Rule."²⁸⁵ On January 23, 1995, Venezuela sent a request for consultations to the United States regarding the "Gasoline Rule."²⁸⁶ The parties consulted on February 24, 1995, and were un-

278. See Woellert, *supra* note 272.

279. See *id.*; see also Evelyn Iritani, *U.S. Kodak Lose Japan Trade Suit*, L.A. TIMES, Dec. 6, 1997, at D1 (noting that American firms hoped the case would be the "crowbar" that hastened the opening of the Japanese market).

280. See Iritani, *supra* note 279.

281. See Woellert, *supra* note 272.

282. See Iritani, *supra* note 279.

283. See 42 U.S.C. § 7545(k) (1994).

284. See Panel Report, United States-Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274, para. 2.1 (Mar. 1996) [hereinafter Panel Report].

285. 40 C.F.R. pt. 80 (1994).

286. See Panel Report, *supra* note 284, para. 1.1.

successful in resolving their differences.²⁸⁷ Consequently, Venezuela requested the establishment of a panel, which the DSB created on April 10, 1995.²⁸⁸ On the same day, Brazil requested consultations with the United States regarding the "Gasoline Rule."²⁸⁹ The parties consulted on May 1, 1995, without a satisfactory result, and Brazil subsequently requested a panel, which the DSB established on May 19, 1995.²⁹⁰

The "Gasoline Rule" required that as of January 1, 1995, each importer's gasoline sold in the United States contain levels of pollutants no higher than the gasoline sold in the United States by that importer in 1990.²⁹¹ The "Gasoline Rule" allowed United States' oil refiners to set their own baseline pollution levels against which to measure gasoline produced in the future.²⁹² Foreign oil refiners, however, were not given the option of establishing an individual baseline.²⁹³ Therefore, gasoline from Venezuela and Brazil was barred from the United States because it contained unacceptable levels of pollutants, while gasoline of the same quality continued to be sold domestically.²⁹⁴

Venezuela²⁹⁵ and Brazil asked that the panel find that the baseline provisions of the "Gasoline Rule" violate Articles I and III of the GATT.²⁹⁶ They also requested the panel to recommend that the

287. *See id.*

288. *See id.*

289. *See id.* para. 1.2.

290. *See id.*

291. *See* Panel Report, *supra* note 284, para. 2.11 (citing 42 U.S.C. § 7545 (1994)).

292. *See id.*

293. *See* Appellate Body Report, United States, Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603, at 610 (May 1996) [hereinafter Appellate Body Report].

294. *See* William F. Buckley Jr., *Has the WTO Threatened Us?*, CONSERVATIVE CHRON., Feb. 7, 1996, at 30.

295. *See* SUMMARY OF SUBMISSIONS OF THE GOVERNMENT OF THE REPUBLIC OF VENEZUELA TO THE WTO DISPUTE SETTLEMENT BODY IN U.S. MEASURES ON GASOLINE 2 (1994) [hereinafter SUMMARY OF SUBMISSIONS] (noting Venezuela's objection to the baseline provisions because they offered American oil refiners three ways to reformulate their gasoline to meet the EPA standards but only offered foreign refiners one of those three options).

296. *See* Panel Report, *supra* note 284, para. 3.1. The complainants also asserted that the baseline provisions of the "Gasoline Rule" were not covered by any exception under GATT Article XX, the general exceptions provision. *See id.*

United States take appropriate action to bring the "Gasoline Rule" into conformity with its GATT obligations.²⁹⁷ The panel met with the parties on July 10-12 and September 13-15, 1995.²⁹⁸ On September 21, 1995, the panel's Chairman told the DSB that the panel could not complete its final report within six months.²⁹⁹ The panel issued an interim report on December 11, 1995³⁰⁰ and issued its final report on January 17, 1996.³⁰¹ In its final report, the panel disagreed with the United States and concluded that the baseline provisions of the "Gasoline Rule" were inconsistent with GATT Article III. The panel also determined that the baseline provisions could not be justified under GATT Article XX (b), (d), or (g).³⁰² The panel thus recommended that the DSB request that the United States bring this part of the "Gasoline Rule" into conformity with GATT provisions.³⁰³

The United States promptly notified the DSB and Appellate Body of its decision to appeal.³⁰⁴ Interestingly, the United States' appeal was sharply limited in scope, challenging only the panel's ruling that the baseline establishment rules were inconsistent with GATT Article XX(g).³⁰⁵ A hearing was held on March 27-28, 1996,³⁰⁶ and the Appellate Body issued its report on April 22, 1996, recommending that the DSB request that the United States bring the baseline portion of the "Gasoline Rule" into conformity with GATT obligations.³⁰⁷

297. *See id.* para. 3.3.

298. *See id.* para. 1.7. On July 11, 1995, the panel met with the interested third parties: Australia, Canada, the EC, and Norway. *See id.* paras. 1.6-1.7.

299. *See id.* para. 1.8

300. *See id.* para. 1.9.

301. *See id.*

302. *See* Panel Report, *supra* note 284, para. 8.1.

303. *See id.* para. 8.2.

304. *See* Appellate Body Report, *supra* note 293, at 606-07.

305. *See id.* at 8. GATT provides that the Agreement does not prevent the adoption or enforcement by any contracting party of measures relating to the conservation of exhaustible natural resources if such measures are taken in conjunction with restrictions on domestic production or consumption. *See* GATT, *supra* note 75, art. XX(g).

306. *See* Appellate Body Report, *supra* note 293, at 607. The participants, as well as third parties, orally argued and responded to questions from the panelists, and both participants and third parties were invited to submit final written statements of their positions. *See id.*

307. *See id.* at 633. The Appellate Body modified the Panel's report by finding that the "Gasoline Rule" fit under GATT Article XX(g) but ruled that Article XX was inapplicable in the case. *See id.*

Once the DSB adopted the Appellate Body Report, the United States had three choices: it could ignore the panel report and accept sanctions,³⁰⁸ amend the "Gasoline Rule," or withdraw from the WTO. On August 27, 1997, the EPA amended the "Gasoline Rule" to allow a foreign refiner to petition the EPA to establish its own individual baseline.³⁰⁹

Despite losing the panel decision and amending the "Gasoline Rule," the United States surrendered none of its ability to implement environmental legislation.³¹⁰ The simple fact is that the original "Gasoline Rule" discriminated against foreign refiners.³¹¹ If the United States intends to use the dispute settlement mechanism to correct discriminatory practices, it must be willing to amend its own discriminatory practices.

CONCLUSION

Regardless of contrary assertions, the United States has not surrendered its sovereignty by joining the WTO. In fact, American sovereignty is protected in several ways. First, Congress passed implementing legislation that ensures United States' law takes precedence in the event of a conflict with one of the UR Agreements. The implementing bill also provides that WTO decisions do not have the power to change United States law. Second, the institutional structure of the WTO protects its members' sovereignty.³¹² For instance, the Ministerial Conference and the General Council may not use voting procedures to diminish America's rights, and if one of the UR

308. See HERITAGE LECTURES, *supra* note 7, at 3-4 (noting that the WTO may impose sanctions on a violating state in order to compensate those states that suffered as a result of the GATT violation).

309. See 62 Fed. Reg. 45,533 (1997) (to be codified at 40 C.F.R. pt. 80). The baseline established must reflect the quality and quantity of gasoline produced at a foreign refinery in 1990 that was shipped to the United States. See *id.*

310. See Appellate Body Report, *supra* note 293, at 633-34. The Appellate Body emphasized that members' ability to protect the environment was not at issue. See *id.*

311. See SUMMARY OF SUBMISSIONS, *supra* note 295, at 2 (stating that Venezuela offered evidence that the United States sold gasoline with the same level of pollutants as the Venezuelan gasoline being barred).

312. See Stokes, *supra* note 139, at 710-11 (explaining that the WTO is to function as a negotiation and dispute resolution forum and not as an "international cop on the trade beat").

Agreements is amended, the United States is not obligated to accept the amendment. Under the DSB, panels may recommend that members change their trade practices but cannot force a member to obey. Finally, if necessary, the United States may withdraw its membership from the WTO.

It is important to remember that the United States advocated for a stronger international dispute resolution system³¹³ and that the DSB is much improved over its GATT predecessor. Under the previous GATT, members could block panel reports indefinitely, panels did not have time limits for deciding cases, and no automatic right of appeal existed. Under the WTO, panel reports will be adopted absent consensus not to adopt, panels and appellate panels must decide cases within set time limits, and there is an automatic right of appeal.

As the most prolific user of the dispute settlement system, the United States has more to gain from the WTO than any other nation.³¹⁴ As Ambassador Michael Kantor stated, for the first time all WTO members must sign on to all the UR Agreements and must play by the same rules.³¹⁵ Moreover, the UR Agreements now extend to services and intellectual property, two areas of great importance to the United States.

However, no system is perfect, and panels will not decide all cases correctly. Panels will make mistakes, and members will lose cases they should win. However, members will also win cases they should lose. Such a situation is similar to bringing a case in American courts. Despite its flaws, "there is a great deal of utility in a creditable and efficient rule oriented dispute settlement system that has integrity, and the United States is an important beneficiary of such a system."³¹⁶

The United States has achieved success at the DSB, as well as disappointments. America was not happy when it lost the "Dirty Oil"

313. See 141 CONG. REC. S176 (daily ed. Jan. 4, 1995) (statement of Sen. Bob Dole) (arguing that an effective dispute resolution system was a major American negotiating objective at the Uruguay Round).

314. See Buckley, *supra* note 294, at 30 (explaining that most trade discrimination occurs against American producers, and therefore, the United States has more to gain than lose from the WTO).

315. See *GATT Hearing*, *supra* note 1, at 39.

316. Jackson, *supra* note 82, at 71.

case, but the panel properly decided that the "Gasoline Rule" was discriminatory. The "Fuji Film" case was a bitter loss, but the United States has an automatic right of appeal and will use it. If the Appellate Body upholds the panel report, the United States can still take action under Section 301 against Japan. Although imposing sanctions would have a negative impact on the WTO, the fact is that the WTO cannot prevent the United States from making the sovereign decision to impose sanctions.

Undoubtedly, complex politically charged cases will continue to challenge the WTO and the DSB, for it is likely that another Helms-Burton case or another "Fuji Film" case lurks somewhere in the future. With such an ambitious purpose, the WTO must anticipate these challenges. Imperfections notwithstanding, the WTO offers stability and a legal order for dispute resolution lacking in the previous GATT, and it offers these things while respecting the sovereignty of its members.