

MULTILATERAL RESOLUTION OVER UNILATERAL RETALIATION: ADJUDICATING THE USE OF SECTION 301 BEFORE THE WTO

JARED R. SILVERMAN*

1. INTRODUCTION

On May 16, 1995, the Clinton Administration threatened to impose \$5.9 billion in punitive tariffs on thirteen Japanese luxury car models, the largest U.S. tariff ever contemplated against any trading partner.¹ This hardball approach illustrates that although

* J.D. Candidate, 1996, University of Pennsylvania Law School; B.A., 1993, University of Michigan. For the abundance of love, support, and confidence, this Comment is dedicated to my parents, Philip and Barbara Silverman, and my sister Michelle. I am indebted to Professor G. Richard Shell of the Wharton Legal Studies Department for his guidance and invaluable suggestions. Special thanks to Karin Guiduli, Craig Lehner, Eric Bensky, Kirk Wolfe, Matthew Holland, Curt Krasik, Mark Elefante, Jennifer Adams, and my editor Eric McCarthy not only for their assistance and encouragement, but, more importantly, for their enriching friendships. Finally, a thank you to Professor A. Leo Levin, for injecting into my law school experience a healthy dose of inspiration, enlightenment, and laughter.

¹ See David E. Sanger, *100% Tariffs Set on 13 Top Models of Japanese Cars*, N.Y. TIMES, May 17, 1995, at A1. In threatening punitive tariffs on Japanese automobiles, U.S. Trade Representative Mickey Kantor "insist[ed] that the United States is within its rights to act unilaterally against Japanese imports." *Id.* at D4. One bank estimated that the cost of U.S. sanctions against Japanese automobiles would total \$17.5 billion, more than three times the original estimate. See Mark Felsenthal & Toshio Aritake, *U.S. 'Softens' on Auto Talks Date; Meeting Likely Before June 15 Summit*, [Jan.-June] Daily Rep. for Executives (BNA) No. 106, at A-16, A-17 (June 2, 1995).

The automobile dispute eventually settled in the eleventh hour, but only after "American negotiators abandoned key demands." William Drozdiak, *U.S., Japan Reach Trade Deal, Averting Sanctions*, WASH. POST, June 29, 1995, at A1; see also David E. Sanger, *U.S. Settles Trade Dispute, Averting Billions in Tariffs on Japanese Luxury Autos*, N.Y. TIMES, June 29, 1995, at A1 (detailing the events relating to the U.S.-Japanese settlement). Although the Clinton Administration "threatened Tokyo with the biggest U.S. sanctions ever and generat[ed] an international uproar," the trade disagreement followed a familiar pattern: "Washington makes blustery threats and Tokyo grudgingly responds at the last minute with modest concessions that make the Japanese market marginally more open to imports." Paul Blustein, *A Bitter Fight Produces Little Real Change*, WASH. POST, June 29, 1995, at A1. President Clinton cited the agreement as "a great victory for the American people' because it would

nations often pursue peaceful exchange through negotiation and consultation, intense trade disputes will often emerge. Not surprisingly, when trade controversies surface between trading partners, nations respond to protect the economic interests of their citizenry. The crucial question is not whether nations will react, but rather how nations will react to and resolve trade disputes. In the current era of globalized trade and economic interdependence, sovereign states must grapple with a fundamental question: whether to utilize unilateral, self-help mechanisms or multilateral, international fora to resolve inevitable trade confrontations.

In the United States, Congress occasionally delegates its foreign commerce power² to the Executive Branch.³ For example, in the Omnibus Trade and Competitiveness Act of 1988,⁴ Congress

bolster exports to Japan by U.S. automakers and create thousands of new jobs." Drozdiak, *supra*, at A32. Japanese trade minister Ryutaro Hashimoto countered:

[t]he figures Clinton announced . . . for increases in the number of dealerships selling U.S.-made autos, in the number of U.S.-made auto parts to be imported to Japan and in the number of autos produced at the Japanese manufacturers' U.S. production sites — ultimately were nothing more than U.S. estimates, and were not legally binding

Blustein, *supra*, at A32. For a detailed explanation of the issues and settlement of the automobile dispute, see discussion *infra* section 4.

² Congress shall have the power to "regulate Commerce with foreign Nations . . ." U.S. CONST. art. I, § 8, cl. 3. The Executive Branch has no specific authority to regulate foreign trade other than what Congress explicitly delegates to it.

³ Congress frequently delegates broad authority to the President to enter into international agreements because it realizes the difficulty of 535 individuals negotiating an agreement. See, e.g., THOMAS O. BAYARD & KIMBERLY A. ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 25 (1994). Such broad delegation of authority to the President began in 1934, when Congress passed the Reciprocal Trade Agreements Act giving the President "general tariff-setting authority." *Id.* This broad delegation of trade negotiating authority continued until the mid-1970s when Congress began to reassert its power over foreign commerce. See David E. Birenbaum, *The Omnibus Trade Act of 1988: Trade Law Dialectics*, 10 U. PA. J. INT'L BUS. L. 653, 655-57 (1988) (discussing the struggle between Congress and the President for primacy over trade policy).

⁴ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164-68 (1988) (codified as amended at 19 U.S.C. § 2411 [hereinafter 1988 Act]).

sharpened “section 301”⁵ and authorized the United States Trade Representative (“USTR”)⁶ to retaliate unilaterally against any “unjustifiable,”⁷ “unreasonable[,] or discriminatory”⁸ “act, policy, or practice of a foreign country.”⁹ Section 301 thus is the classic embodiment of unilateralism; a self-help mechanism allowing a nation to assert its rights as a sovereign actor within the international system. In stark contrast to unilateral trade measures, sovereign states also enter into multilateral international agreements to capture comparative advantages and maximize the general international welfare.¹⁰ For example, the World Trade

⁵ The original § 301 was passed as part of the Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 2290, 2364-66 (1974). Congress passed amendments to § 301 as part of the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 901, 93 Stat. 144, 295-96 (1979), and the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 301, 98 Stat. 2948, 3000 (1984). After Congress altered, amended, and scattered the § 301 provisions throughout 19 U.S.C. §§ 2411-2420, the title “section 301” disappeared from the official United States Code altogether. Common trade parlance, however, still refers to this retaliation provision as § 301. This Comment will refer to the retaliation provisions embodied in 19 U.S.C. §§ 2411-2420 as § 301 provisions. For an analysis of § 301, and its history, application, and effect, see discussion *infra* section 2.

⁶ The USTR’s authority in this context is “subject to the specific direction, if any, of the President.” 19 U.S.C. § 2411 (a)(1) (1988). Therefore, the President retains the ultimate authority over retaliation, even though the USTR possesses decision making power.

⁷ 19 U.S.C. § 2411(a)(1)(B)(ii). See *infra* note 44 and accompanying text.

⁸ 19 U.S.C. § 2411(b)(1). See *infra* notes 45-46 and accompanying text.

⁹ 19 U.S.C. § 2411(a)(1)(B).

¹⁰ The notion of comparative advantage is based on the neoclassical economic theory of international trade. Under this theory:

[t]he market mechanism dictates that each nation produce the goods and services which it can produce most efficiently, considering quality and cost. Maximum aggregate production is achieved and all products are at their minimal cost. Under a free system, the world’s standard of living is higher than if international trade is nonexistent, restrained, or distorted.

Marjorie A. Minkler, Note, *The Omnibus Trade Act of 1988, Section 301: A Permissible Enforcement Mechanism or a Violation of the United States’ Obligations Under International Law?*, 11 J. L. & COM. 283, 285 (1992); see also MORDECHAI E. KREININ, *INTERNATIONAL ECONOMICS: A POLICY APPROACH* 183-90 (1971) (discussing how international trade maximizes the general welfare); DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 81-82 (1969) (setting forth the original theory of comparative advantage).

Organization ("WTO"),¹¹ and its predecessor, the General Agreement on Tariffs and Trade ("GATT"),¹² seek to liberalize trade¹³ in a multilateral context. Should a contracting party¹⁴

¹¹ GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, reprinted in 33 I.L.M. 1125, 1143 (1994) [hereinafter Final Act]. After "more than seven years of arduous and often bitter bargaining, ministers from 109 countries signed a far-reaching trade liberalization agreement" which created the WTO as the successor to the GATT. Alan Riding, *109 Nations Sign Trade Agreement: Seven Years of Struggle to Reduce Tariffs*, N.Y. TIMES, Apr. 16, 1994, at 35. Emerging from the Uruguay Round accords, the eighth and most ambitious round of GATT trade agreements since World War II, the WTO joins "the International Monetary Fund and the World Bank as the main watchdogs of the global economy." *Id.* at 48. The WTO commenced operation on January 1, 1995. See David E. Sanger, *U.S. Threatens \$2.8 Billion of Tariffs on China Exports*, N.Y. TIMES, Jan. 1, 1995, at 14. For a comprehensive discussion of the Uruguay Round Agreements, the formation of the WTO, and the creation of the WTO "legalist" dispute resolution process, see *infra* section 3.

¹² The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]. Although the WTO supplants the GATT as the foremost "watchdog" of world trade, the GATT still exists as a provisional trade agreement with its authority grounded in the President's treaty making powers. See Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 479 (1994). For a discussion of the history of the GATT and its dispute resolution process, see *infra* section 3.

¹³ The Preamble to the GATT clearly contemplates trade liberalization by stating that all trade relations "should be conducted with a view to raising standards of living, . . . developing the full use of the resources of the world and expanding the production and exchange of goods . . ." GATT, *supra* note 12, pmb., 61 Stat. at A11, 55 U.N.T.S. at 194. Furthermore, the GATT is dedicated "to the substantial reduction of tariffs and other trade barriers . . ." *Id.* 61 Stat. at A7, 55 U.N.T.S. at 188; see also JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 8-17 (1989) (detailing the assumptions of the international economic system) [hereinafter JACKSON, THE WORLD TRADING SYSTEM]; Tycho H.E. Stahl, *Liberalizing International Trade in Services: The Case for Sidestepping the GATT*, 19 YALE J. INT'L L. 405, 413-15 (1994) (summarizing the goals and benefits of liberalized trade).

Two primary vehicles for trade liberalization under the GATT and the WTO are the "most favored nation" ("MFN") and "national treatment" principles. MFN treatment dictates that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 12, art. I, 61 Stat. at A12, 55 U.N.T.S. at 196. National treatment as set forth in the GATT requires, for example, that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and

“nullify or impair”¹⁵ the trade rights of another nation bound under a WTO agreement, a neutral dispute resolution process ensues.¹⁶ Sovereign nations join the WTO to reap the benefits of international trade and to maximize global wealth.¹⁷ With 111

other internal charges of any kind in excess of those applied . . . to like products of national origin.” *Id.* art. III, 61 Stat. at A18, 55 U.N.T.S. at 204.

¹⁴ The term “contracting parties” in the GATT refers to all sovereign states that have acceded to the GATT agreements. Originally, 23 sovereign nations acceded to the basic agreement in 1947. See JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 5 (1990) (detailing the history and development of the GATT membership) [hereinafter JACKSON, RESTRUCTURING GATT].

¹⁵ See GATT, *supra* note 12, art. XXXIII, 61 Stat. at A64, 55 U.N.T.S. at 266. The original GATT agreement states:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired . . . 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

Id.

¹⁶ The predecessor to the WTO dispute resolution process was the GATT multilateral dispute resolution process. See *infra* text accompanying notes 98-99. The GATT process evolved from Articles XXII and XXIII of the original GATT Agreement and later was codified and approved in 1979. See *infra* notes 116-117 and accompanying text. In 1993, the creation of the WTO set forth an entirely new dispute resolution process, one based on a legalist model. See *infra* notes 100, 133, & 136-37 and accompanying text. The dispute resolution provisions of the Uruguay Round are included in the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, Apr. 15, 1994, reprinted in 33 I.L.M. at 1226-44 [hereinafter Understanding]. For a detailed account of the evolution of the GATT dispute resolution process into the WTO model, see discussion *infra* section 3.

¹⁷ Described as “truly momentous” by Vice President Al Gore, the agreement creating the WTO — totalling 22,000 pages and weighing 385 pounds — is expected to reduce import tariffs by 40% and increase global income by \$235 billion per year. See Riding, *supra* note 11, at 35, 48. The Clinton Administration estimates that “[w]hen fully implemented the Uruguay Round Agreements will add \$100-\$200 billion to the U.S. economy each year[,] create hundreds of thousands of new, well-paying American jobs[,] and] provide for a reduction in worldwide tariffs of \$744 billion, the largest global tax cut in history.” MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 316, 103d Cong., 2d Sess. 1 (1994) [hereinafter MESSAGE FROM THE PRESIDENT].

The GATT contributed “to the biggest increase in prosperity that the West had ever known.” Panel, *Can the GATT Resolve International Trade Disputes?*,

executing members,¹⁸ the WTO exists as a noble paradigm of multilateralism; a model series of trade pacts that both delineates substantive trade agreements and establishes an international forum for dispute resolution.

Because the unilateral domestic actions of any nation necessarily impact the rights and obligations of the multilateral international system, a fundamental tension exists between the theories of realism and of free trade. Realism views sovereign states as autonomous entities maintaining the need to act as independent nations in pursuit of self-defined interests.¹⁹ Free trade theory, however, holds that sovereign states are components of an overarching international system requiring cooperation, coordination, and mutual trust in order to deliver the recognized benefits of liberalized trade.²⁰ Thus, the free trade-realist tension crystallizes as such: only by acting as a unified whole can the international system maximize global welfare, but only by acting autonomously can a nation assert and maintain its need and desire for true sovereignty. In this respect, the notions of sovereignty and global trade are mutually exclusive forces dividing national

77 AM SOC'Y INT'L L. PROC. 287, 287 (1983) (quoting Sir Roy Denman, Head of Delegation for the Commission of the European Communities). Specifically, the GATT successfully slashed tariffs, removed many quantitative restrictions to trade, and eliminated a host of nontariff barriers. See Gardner Patterson & Eliza Patterson, *The Road from GATT to MTO*, 3 MINN. J. GLOBAL TRADE 35, 39-40 (1994) (discussing the GATT's success in liberalizing trade).

¹⁸ Although GATT membership stood at 125 upon completion of the Uruguay Round Agreements, only 109 nations executed the agreement creating the WTO on April 15, 1994. See Riding, *supra* note 11, at 48. For a list of the 112 nations admitted to the WTO, as well as the 27 nations on the "waiting list," including Russia and China, see *Knock, Knock*, ECONOMIST, Jan. 13, 1996, at 72.

¹⁹ The foreign relations theory of realism suggests that all states are "autonomous, self-interested, and animated by the single-minded pursuit of power." G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 855 (1995) (discussing the general background against which all trade legalism has developed). Realism dominates international relations theory and is an important influence in contemporary political science and rhetoric. *Id.* at 855-56; see also Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 485 (1988) (arguing that realism presents a pessimistic analysis of the prospects for international cooperation).

²⁰ Proponents of free trade theory use the concept of comparative advantage to trumpet the benefits of liberalized trade. For a concise explanation of free trade theory, see Shell, *supra* note 19, at 854-55.

pursuits. Moreover, as a result of economic interdependence, there is “an ever *increasing* domain for international law and a constantly *shrinking* sphere for autonomous government action.”²¹ Although sovereign nations will grapple with this uncomfortable conclusion, the trade-off is worthwhile — a world of truly liberalized trade where every nation’s citizens reap the benefits of global production and consumption, thereby improving the collective quality of life.

Section 301 and the WTO dispute resolution process respectively epitomize the unilateral and the multilateral responses to economic disputes in an interdependent world. Section 2 of this Comment summarizes the history and application of section 301. Section 3 explores the evolution of the WTO dispute settlement process from a “pragmatic model” to a “legalist model” of dispute resolution. Section 4 details the recent and notorious use of section 301 in escalating the U.S.-Japanese automobile dispute. Section 5 ventures beyond the automobile dispute settlement and analyzes how the Japanese and the United States would have hypothetically litigated the case before the WTO. Finally, section 6 explores how the WTO should have ruled on a Japanese challenge to the use of section 301 sanctions in the automobile dispute. This Comment concludes that as the domain of multilateralism overtakes the shrinking sphere of unilateralism, the WTO should strongly rebuke any use of unilateral sanctions by a GATT signatory, including the United States’ use of section 301 in the automobile dispute. The manner in which the WTO judges approach this task of adjudication is not merely a theoretical exercise, for “as global trade accelerates, billions of dollars and thousands of jobs may hang on the way this discussion evolves.”²²

²¹ Victoria C. Price, *New Institutional Developments in GATT*, 1 MINN. J. GLOBAL TRADE 87, 109 (1992) (describing the need for an international economic order) (emphasis added).

²² Shell, *supra* note 19, at 834.

2. THE UNILATERAL PARADIGM: SECTION 301

2.1. *Purposes, Origins, and History of Section 301*

2.1.1. *Objective of Section 301*

The broad objective behind section 301 is straightforward: to “pry open foreign markets and thus further liberalize trade.”²³ Section 301 seeks to open foreign markets for U.S. goods, services, and investment opportunities through a credible threat of retaliation.²⁴ In common economic parlance, section 301 is a “stick that, in combination with the carrot of an open U.S. market,”²⁵ can liberalize trade and reduce foreign tariff and nontariff barriers.²⁶ While the United States uses section 301 in conjunction with other trade statutes protecting domestic industries,²⁷ it remains “the sole trade remedy aimed principally at facilitating U.S. export of goods and services”²⁸ Because

²³ Alan F. Holmer & Judith H. Bello, *The 1988 Trade Bill: Savior or Scourge of the International Trading System?*, 23 INT'L LAW. 523, 527 (1989) (discussing how the United States never viewed retaliation as the objective of § 301) [hereinafter Holmer & Bello, *Savior or Scourge*]. Alan F. Holmer served as Deputy USTR and Judith H. Bello served as Acting General Counsel at the Office of the USTR under the second Reagan Administration.

²⁴ *See id.*

²⁵ *Id.*

²⁶ Nontariff barriers (“NTBs”) are nonmonetary practices that restrict market access. NTBs, “as the name suggests, are easier to define by what they are not than what they are.” Andrzej Olechowski, *Nontariff Barriers to Trade*, in THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 121, 121 (J. Michael Finger & Andrzej Olechowski eds., 1987). NTBs constitute the single most important obstacle to the growth of international trade. *See id.* Examples of NTBs include: quota restrictions, licensing requirements, absence of uniform international standards, state-sanctioned monopolies, certification restrictions, and limits on the repatriation of profits. *See Stahl, supra* note 13, at 419-20, 443-45. Many of the new challenges surrounding trade policy involve combating these nonmonetary barriers to trade. *See id.*

²⁷ The most commonly used trade tools to protect domestic industries are antidumping laws and countervailing duty provisions. For an example of an antidumping law, see 15 U.S.C. §§ 71-77 (1988) (repealed 1994). For an example of a countervailing duties law, see 19 U.S.C. § 1303 (1988).

²⁸ Judith H. Bello & Alan F. Holmer, *Section 301 Recent Developments and Proposed Amendments*, 35 FED. B. NEWS & J. 68, 68 (1988) (describing § 301 and illustrating some of its recent uses) [hereinafter Bello & Holmer, *Recent Developments*].

of this ability to promote U.S. exports, section 301 truly functions as a unique weapon in the United States' trade arsenal.²⁹

2.1.2. *History of Section 301: A Series of Amendments*

The history of section 301 is as complicated as the objective of section 301 is straightforward. The legislative path to the most recently adopted section 301 began with Congress' passage of the Trade Expansion Act of 1962 ("1962 Act").³⁰ Historians recognize section 252(c) of the 1962 Act as the "immediate predecessor"³¹ to section 301 because it provided the President with the authority to impose tariff or import restrictions upon those nations obstructing U.S. trade in violation of an international agreement.³² Twelve years later, Congress repealed section 252 of the 1962 Act and replaced it with section 301 of the Trade Act of 1974, a bolder, more specific provision.³³ Disturbed by the

²⁹ See K. Blake Thatcher, Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. U. L. REV. 492, 493. (1987) (noting § 301's unique ability to promote U.S. exports and to break down foreign trade barriers).

³⁰ Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 872, 879-80 (1962) (repealed 1974) [hereinafter 1962 Act]. For the legislative history surrounding the passage of the 1962 Act, see S. REP. NO. 2059, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.A.N. 3110.

A few scholars claim that the history of § 301 dates back more than 200 years to the 1794 congressional act that gave President Washington the statutory authority to restrict imports from foreign nations that he determined were discriminating against U.S. exports. See Thatcher, *supra* note 29, at 495 (citing to 1 Stat. 372 (1794)). The 1934 amendments to the 1930 Tariff Act later provided authority "quite analogous to that granted by section 301." Bart S. Fisher & Ralph G. Steinhardt, III, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital*, 14 LAW & POL'Y INT'L BUS. 569, 573-74 (1982) (tracing § 301's lineage to the Trade Expansion Act of 1962 and the Trade Agreements Act of 1934). Because § 252 of the 1962 Act is recognized as not merely analogous to, but rather the predecessor of § 301, this historical account begins at that point.

³¹ Thatcher, *supra* note 29, at 495.

³² The 1962 Act primarily targeted "unjustifiable" agricultural barriers, although the Act provided limited authority to retaliate against nonagricultural barriers. See BAYARD & ELLIOTT, *supra* note 3, at 24, 26. The United States used § 252 only twice: to retaliate against EEC levies on poultry imports and to challenge Canadian export restrictions on U.S. cattle and meat. See *id.* at 26; see also Julia C. Bliss, *The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response*, 20 LAW & POL'Y INT'L BUS. 501, 504-05 (1989) (describing the 1962 Act) [hereinafter Bliss, *Suggested Strategies*].

³³ Trade Expansion Act of 1962, repealed by Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43 (1974) (codified as amended at 19 U.S.C.

"time-consuming and politically oriented GATT decision-making process,"³⁴ Congress authorized the President in section 301 to institute retaliatory action against foreign practices that are "unjustifiable or unreasonable and which burden or restrict [U.S.] commerce."³⁵ By passing the new provision strengthening the President's authority, Congress "initiated the trend toward unilateral action in disregard of international rules."³⁶

The Trade Agreements Act of 1979 ("1979 Act")³⁷ modified section 301 in at least four ways. These amendments: (1) clarified the President's authority to enforce U.S. rights under any applicable trade agreement;³⁸ (2) imposed time limits on section 301 investigations;³⁹ (3) required the Special Trade Representative⁴⁰ to consult immediately with any foreign government accused of an unfair trade practice;⁴¹ and (4) authorized the acceptance of private petitions.⁴² Similarly, the Trade and Tariff Act of 1984 ("1984 Act")⁴³ amended section 301 in an additional

§§ 2411-2420 (1988)).

³⁴ Kenneth J. Ashman, Note, *The Omnibus Trade and Competitiveness Act of 1988 — The Section 301 Amendments: Insignificant Changes from Prior Law?*, 7 B.U. INT'L L.J. 115, 120 (1989) (discussing HOUSE COMM. ON WAYS AND MEANS REP. ON THE TRADE REFORM ACT OF 1973, H.R. REP. NO. 571, 93d Cong., 1st Sess. 66-67 (1973)).

³⁵ Trade Act of 1974, § 301(a)(2), 88 Stat. at 2041 (codified as amended at § 19 U.S.C. § 2411 (1988)). Between January 1975 and December 1979, the President issued a determination in only one § 301 case. See, e.g., BAYARD & ELLIOTT, *supra* note 3, at 27.

³⁶ Bliss, *Suggested Strategies*, *supra* note 32, at 505.

³⁷ See Trade Agreements Act of 1979 § 901, 93 Stat. at 144, 295 (codified as amended at 19 U.S.C. §§ 2411-2416 (1988)). For the legislative history surrounding the 1979 amendments to § 301, see S. REP. NO. 249, 96th Cong., 1st Sess. 234-42 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 620-28. For a summary of the 1979 amendments, see BAYARD & ELLIOTT, *supra* note 3, at 27.

³⁸ See Trade Agreements Act of 1979, § 901, 93 Stat. at 296 (codified as amended at 19 U.S.C. § 2411(a)(1)).

³⁹ See *id.* at 297.

⁴⁰ The Special Trade Representative was the predecessor to the USTR. The 1988 amendments to § 301 vastly expanded the USTR's responsibilities. See *infra* notes 53-59 and accompanying text.

⁴¹ See Trade Agreements Act of 1979, § 901, 93 Stat. at 297 (codified as amended at 19 U.S.C. § 2413).

⁴² See *id.* (codified as amended at 19 U.S.C. § 2412(b)).

⁴³ See Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 301-307, 98 Stat. 2948, 3000-13 (1984) (codified as amended in scattered sections of 19 U.S.C.). For the legislative history surrounding the passage of the 1984 Act,

four ways. The 1984 Act: (1) defined the previously ambiguous terms “unjustifiable,”⁴⁴ “unreasonable,”⁴⁵ and “discriminatory;”⁴⁶ (2) mandated the showing of an injury in conjunction with the unfair trade practice;⁴⁷ (3) loosened the deadline by which the USTR must initiate consultations with a foreign government accused of an unfair trade practice;⁴⁸ and (4) authorized the USTR to initiate investigations without waiting for a private petition or a presidential order.⁴⁹ In addition to substantively

see S. REP. NO. 308, 98th Cong., 1st Sess. 40-51 (1983).

⁴⁴ An “unjustifiable” trade practice is defined as “any act, policy, or practice which is in violation of, or inconsistent with, the international legal rights of the United States.” Trade and Tariff Act of 1984, sec. 304, § 301(e)(4), 98 Stat. at 3005 (codified as amended at 19 U.S.C. § 2411(d)(4)(A) (1988)). Unjustifiable practices “include, but are not limited to” the denial of GATT MFN rights, GATT national treatment, the right of enterprise establishment, and the protection of intellectual property rights. 19 U.S.C. § 2411(d)(4)(B). Essentially, an unjustifiable act includes any violation of an existing trade agreement or the denial of an expected benefit based on an international legal norm. These unjustifiable acts by foreign nations are, under the 1988 amendments to § 301, grounds for mandatory USTR retaliation. See discussion *infra* section 2.2.1.

⁴⁵ An “unreasonable” trade practice is defined as “any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable.” Trade and Tariff Act of 1984, sec. 304, § 301(3)(3), 98 Stat. at 3005 (codified as amended in 19 U.S.C. § 2411(d)(3) (1988)). These unreasonable trade practices are, under the 1988 amendments to § 301, grounds for discretionary USTR retaliation. See discussion *infra* section 2.2.2.

⁴⁶ A “discriminatory” trade practice is defined as “any act, policy, or practice which denies national or MFN treatment to [U.S.] goods, services, or investment.” Trade and Tariff Act of 1984, sec. 304, § 301(e)(5), 98 Stat. at 3006 (codified as amended at 19 U.S.C. § 2411(d)(5) (1988)). These discriminatory practices are, under the 1988 amendments to § 301, grounds for discretionary USTR retaliation. See discussion *infra* section 2.2.2.

⁴⁷ Under this “injury” test, the petitioner must show that the unfair trading practice “burdens or restricts [U.S.] commerce.” Trade and Tariff Act of 1984, sec. 304(a), § 301(a)(1)(B)(ii), 98 Stat. at 3003 (codified as amended at 19 U.S.C. § 2411(a)(1)(B)(ii) (1988)). This injury test is considered “more lenient than those found in other U.S. trade laws” Ashman, *supra* note 34, at 127.

⁴⁸ This amendment allowed the USTR to delay his request to consult with the accused government for up to 90 days. See Trade and Tariff Act of 1984, sec. 304(e), § 303(b), 98 Stat. at 3005 (codified as amended at 19 U.S.C. § 2413(b)(1)(A) (1988)).

⁴⁹ See Trade and Tariff Act of 1984, sec. 304(d)(1), § 302(c), 98 Stat. at 3004 (codified as amended at 19 U.S.C. § 2412(b) (1988)). By authorizing the USTR to initiate investigations without prompting, Congress hoped the President would more aggressively prosecute cases. See BAYARD & ELLIOTT, *supra* note 3, at 27-28.

altering the section 301 process, the 1984 Act required the USTR to prepare an annual National Trade Estimate ("NTE") highlighting significant barriers to U.S. trade and investment.⁵⁰

Congress passed yet another series of major amendments in the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act").⁵¹ Unlike prior amendments to section 301 that only slightly modified existing practices, the 1988 Act significantly altered

⁵⁰ Trade and Tariff Act of 1984, sec. 303(a), § 181, 98 Stat. at 3001-02 (codified as amended at 19 U.S.C. § 2241 (1988)).

⁵¹ See Omnibus Trade and Competitiveness Act of 1988, § 1301, 102 Stat. at 1107 (codified as amended at 19 U.S.C. § 2411 (1988)). Conceived in 1985, the Omnibus Trade and Competitiveness Act numbered more than 1,000 pages in length, was assigned to 17 separate subcommittees, and "may have been the largest, most complicated legislative effort undertaken." Alan F. Holmer & Judith H. Bello, *The Promise and Peril of Unilateralism*, in TRADE LAW AND POLICY INSTITUTE, at 187, 187-95 (PLI Com. L. & Practice Course Handbook Series No. 510, 1989) [hereinafter Holmer & Bello, *Promise and Peril*]. This Act covers diverse areas such as trade negotiating authority, a harmonized system of tariff nomenclature, and provisions for trade adjustment assistance, as well as the § 301 amendments. See Ashman, *supra* note 34, at 129. For the legislative history surrounding the passage of the 1988 Omnibus Trade and Competitiveness Act, see H.R. REP. NO. 40, 100th Cong., 1st Sess. 59 (1987), reprinted in 1988 U.S.C.C.A.N. 1547.

section 301 in several respects.⁵² Among other changes,⁵³ the 1988 Act: (1) created two outgrowths of section 301;⁵⁴ (2) officially transferred authority to enforce U.S. rights to the USTR;⁵⁵ (3) defined specific “unreasonable” practices;⁵⁶ and (4)

⁵² While the 1988 amendments significantly altered § 301 in form, the question many scholars have posed is whether the 1988 amendments altered its substance and application. For a careful analysis of the 1988 amendments’ substantive effect on § 301 application, see Ashman, *supra* note 34, at 152-53 (arguing that the 1988 amendments to § 301 as a whole provide insignificant change from prior law); Alan F. Holmer & Judith H. Bello, *The 1988 Trade Bill: Is It Protectionist?*, 5 Int’l Trade Rep. (BNA) 1347, 1347 (Oct. 5, 1988) (concluding that the 1988 Act “continues rather than contorts traditional U.S. trade policy . . .”) [hereinafter Holmer & Bello, *Is It Protectionist?*].

⁵³ The 1988 Act amended § 301 in at least nine different ways. The amendments: (1) transferred authority from the President to the USTR; (2) detailed denial of worker’s rights, export targeting, and restrictions on market access as “unreasonable” practices; (3) placed time limits on USTR unfairness determinations; (4) imposed time constraints on retaliatory action once the USTR identified an unfair practice; (5) prompted an investigation of Japanese barriers to U.S. trade; (6) amended the NTE filed by the USTR to include the value of lost commerce due to trade barriers; (7) created “Special 301,” a provision requiring the identification of nations and practices that infringe upon intellectual property rights; (8) created “Super 301,” a provision requiring the USTR to announce and publish a list of the most egregious trade offenders and their unfair trade practices; and (9) separated “mandatory” retaliation from “discretionary” retaliation. See Omnibus Trade and Competitiveness Act of 1988, §§ 1301-04, 102 Stat. at 1164-82. For comprehensive commentary on each amendment from the 1988 Act, see Ashman, *supra* note 34, at 130-51 and Bliss, *Suggested Strategies*, *supra* note 32, at 512-24.

⁵⁴ The two outgrowths are commonly referred to as “Special 301” and “Super 301.” Special 301 provides additional protection for intellectual property rights and is codified at 19 U.S.C. § 2242. See generally Judith H. Bello & Alan F. Holmer, “Special 301”: *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT’L L.J. 259 (1989-90) (discussing Special 301’s aim to promote the adequate and effective protection of intellectual property rights in foreign countries). Super 301, codified at 19 U.S.C. § 2420, requires the USTR to identify and publish the most egregious trade offenders and practices. See generally Elizabeth K. King, Comment, *The Omnibus Trade Bill of 1988: “Super 301” and Its Effects on the Multilateral Trade System Under the GATT*, 12 U. PA. J. INT’L BUS. L. 245 (1991) (noting that Super 301 is used to accuse countries of a broad range of unfair trade practices). Although, the original Super 301 provision expired in 1990, President Clinton reauthorized the provision by executive order. See Exec. Order No. 12,901, 59 Fed. Reg. 10,727 (1994). Some commentators have labelled President Clinton’s Super 301 “a kinder and gentler [S]uper 301” because it neither requires nor encourages the labeling of entire countries as unfair traders. BAYARD & ELLIOTT, *supra* note 3, at 45. These two outgrowths of § 301, while controversial, are beyond the scope of this Comment.

⁵⁵ See 19 U.S.C. § 2411 (1988).

imposed extremely rigid time constraints on the section 301 process.⁵⁷ The major structural change, however, was the establishment of two distinct categories of unfair trade practices — those prompting “mandatory” retaliation (section 301(a))⁵⁸ and those giving rise to “discretionary” retaliation (section 301(b)).⁵⁹

With the creation of these rigid categories, the implementation of section 301 became a more elaborate process with substantially restricted governmental discretion.⁶⁰ Although mandatory section 301(a) retaliations are subject to several exceptions,⁶¹ the 1988 Act illustrates the evolution of section 301 “from a diplomatic, flexible means of solving market access problems to a more rigid, procedural trade remedy statute.”⁶² Thus, by 1988, the

⁵⁶ See *id.* § 2411(d)(3)(B).

⁵⁷ See *id.* §§ 2412, 2413.

⁵⁸ See *id.* § 2411(a) (delineating § 301(a)).

⁵⁹ See *id.* § 2411(b) (delineating § 301(b)).

⁶⁰ See N. David Palmeter, *Section 301: The Privatization of Retaliation*, 3 *TRANSNAT'L LAW* 101, 103 (1990) (noting today's § 301 contains procedures that are almost formal).

⁶¹ For the exceptions to the application of § 301, see 19 U.S.C. § 2411(a)(2) (1988). Commentators have criticized the statutory construction of § 301. One scholar concludes that § 301 presents “an intricate maze of mandatory commands in one place and extremely wide loopholes in the other.” Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 113, 122 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter *AGGRESSIVE UNILATERALISM*]. He continues: “[o]ne needs a wiring diagram to trace whether mandatory commands given in one part will actually reach their final target without passing through at least one discretionary exitpoint.” *Id.*; see also BAYARD & ELLIOTT, *supra* note 3, at 32 (describing one Senator's description of Super 301 as “mandatory but not compulsory”); Ashman, *supra* note 34, at 141 (arguing that the USTR can “avoid mandatory retaliation” whenever desired); Daniel G. Partan, *Retaliation in United States and European Community Trade Law*, 8 *B.U. INT'L L.J.* 333, 334 (1990) (noting the wide authority that the statute confers upon the USTR to avoid retaliation in mandatory action cases).

Since the mandatory retaliation provisions appear largely illusory, this Comment does not distinguish between the discretionary and mandatory uses of § 301, but rather identifies them generally as “section 301” actions.

⁶² Bliss, *Suggested Strategies*, *supra* note 32, at 502. In comparison to many congressional proposals, such as the infamous “Gephardt Amendment,” the 1988 amendments to § 301 actually appear benign. The Gephardt Amendment, proposed by Representative Richard Gephardt, provided for mandatory § 301 action against any nation with “an excessive and unwarranted” trade surplus that did not reduce this trade surplus by 10% annually. *Id.* at 522 n.91. Congress eventually rejected the “Gephardt blunderbuss” in favor of Super 301 because “it was a more controlled, less scattershot policy instrument” which

United States had fashioned its foremost unilateral “trade remedy” in the form of section 301.

The most current form of section 301 finally emerged when Congress passed the Uruguay Round Agreements in late 1994.⁶³ These most recent section 301 amendments, found in the Uruguay Round Agreements Act (“1994 Amendments”), addressed “the conduct of section 301 investigations and the authority of the Trade Representative to respond to unfair trade practices by foreign governments.”⁶⁴ Most notably, the 1994 amendments explicitly reserved the ability to use section 301 to combat problematic trade issues outside the scope of the Uruguay Round Agreements.⁶⁵ Furthermore, the 1994 amendments gave the USTR the express right to use section 301 against “anticompetitive practices that restrict the sale of U.S. goods or services to a foreign market, not just to foreign firms that engage in such practices.”⁶⁶ By virtue of these “clarifying” amendments, Congress indicated its intent to use the force of unilateral sanctions in situations where a trade area or practice is outside the scope of the WTO.⁶⁷

Instead of providing the President with broad authority and

“sent a strong message about trade priorities to the [P]resident while allowing him more latitude in implementation than [the] Gephardt [Amendment] did.” BAYARD & ELLIOTT, *supra* note 3, at 37.

⁶³ See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314, 108 Stat. 4809 (1994). In a “lame duck” session and as the last act of the 103d Congress, both the House of Representatives and the Senate approved implementing legislation for the Uruguay Round trade pact with broad, bipartisan majorities. See David E. Sanger, *Senate Approves Pact To Ease Trade Curbs; A Victory for Clinton*, N.Y. TIMES, Dec. 2, 1994, at A1, A22. A joint compromise creating “a mechanism to involve Congress in abandoning the agreement if the [WTO] acts unreasonably in actions against the United States” assured passage of the implementing legislation. *Id.*

⁶⁴ MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1027. The 1994 amendments to § 301 fall into four categories: amendments to the authority under § 301, amendments to unreasonable practices related to intellectual property or anticompetitive practices, amendments to the protection of intellectual property, and amendments to the time limits for investigations. See *id.* at 1027-29.

⁶⁵ See Uruguay Round Agreements Act § 314(a)(1), 108 Stat. at 4939; see also MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1027 (noting the Clinton Administration’s intent to expand the focus of potential action under § 301).

⁶⁶ MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1028 (codified at Uruguay Round Agreements Act § 314(c)(1), 108 Stat. at 4940).

⁶⁷ See discussion *infra* section 5.2.1 for the U.S. position on its use of § 301 to combat trade practices or issues outside the “four corners” or, in other words, outside the scope of the WTO.

wide discretion to retaliate against foreign practices, section 301 explicitly defines unreasonable trade practices,⁶⁸ reduces the influence of wider policy considerations,⁶⁹ and forces unilateral action.⁷⁰ In theory, the Executive Branch no longer has complete discretion to determine either the severity of an unfair trade practice or the appropriate retaliatory response,⁷¹ but rather is “handcuffed” by tighter procedures and deadlines.⁷² Prior to the creation of the WTO, section 301 had carried the day as the dominant U.S. response to trade disputes because it was a quick, politically-safe reaction to an increasingly competitive economic world. Over time, the “aggressive unilateralism”⁷³ of section 301 has resonated deeply with officials in the global political arena.

⁶⁸ See 19 U.S.C. § 2411(d)(3)(B) (1988).

⁶⁹ Traditionally, trade policy formation has been an interagency process. With the passage of the 1988 amendments to § 301, Congress clarified its intent that “the delegation . . . of its [c]onstitutional power to regulate foreign commerce in many areas is meant to be exercised by the [USTR] . . . , not by other Cabinet officers.” H.R. REP. NO. 40, 100th Cong., 1st Sess. 166 (1987). Under the § 301 structure, a lower, sub-Cabinet level within the USTR’s office, rather than at the Cabinet Secretary level, will isolate, analyze, and decide complex issues of trade policy that implicate national defense and foreign policy. See Bliss, *Suggested Strategies*, *supra* note 32, at 514. Removing trade policy from broader considerations, such as national defense and foreign policy, however, may further politicize trade decisions.

⁷⁰ See Bliss, *Suggested Strategies*, *supra* note 32, at 502.

⁷¹ See Ashman, *supra* note 34, at 130-32. One Senator characterized efforts to amend § 301 as a way “to transform a sporadic, unpredictable, occasional, [and] ad hoc use of [§] 301 . . . into a systematic attempt” to solve intractable trade problems. Judith H. Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, in *AGGRESSIVE UNILATERALISM*, *supra* note 61, at 81.

⁷² Hudec, *supra* note 61, at 118.

⁷³ Coined by Professor Jagdish Bhagwati, the term “aggressive unilateralism” refers to a bilateral trade negotiation situation where “unilateral demands for liberalization are backed by threats of retaliation.” BAYARD & ELLIOTT, *supra* note 3, at 19. In fact, aggressive unilateralism as enacted by § 301 denotes “a double dose of unilateralism: the United States unilaterally determines what is unfair and then demands unilateral trade concessions to rectify the alleged ‘cheating.’” *Id.* In addition to § 301, other U.S. trade policy tools embodying an aggressively unilateral approach are sections of the Merchant Marine Act of 1920, the Department of Agriculture’s Export Enhancement Program, the Telecommunications Trade Act of 1988, the Buy American Act of 1988, and the Primary Dealers Act of 1988. See *id.* at 22.

2.2. *Application of Section 301*

2.2.1. *Mandatory Action*

Pursuant to both the 1988 Act and the 1994 Amendments, the USTR must retaliate against foreign nations in three specified situations: (1) whenever “the rights of the United States under any trade agreement” have been denied;⁷⁴ (2) whenever a foreign practice “otherwise denies” likely benefits to the United States under any trade agreement;⁷⁵ and (3) whenever an “unjustifiable” act of a foreign government “burdens or restricts” U.S. commerce.⁷⁶ Essentially, section 301 compels domestic retaliation when a foreign nation violates a trade agreement or when a foreign act nullifies or impairs an expected international benefit, such as MFN status.

2.2.2. *Discretionary Action*

Under section 301(b), retaliation is discretionary in response to an “unreasonable”⁷⁷ or “discriminatory”⁷⁸ foreign practice that “burdens or restricts”⁷⁹ U.S. commerce.⁸⁰ Whereas the violation of a formal or informal agreement encourages mandatory retaliation, discretionary retaliation, by definition, responds to actions independent of any explicit or implicit international agreement, norm, or custom. Once a section 301 petition is filed with the USTR, however, the investigative and fact-finding procedures are identical, regardless of whether the allegation triggers mandatory or discretionary retaliation.⁸¹

⁷⁴ 19 U.S.C. § 2411(a)(1)(A) (1988).

⁷⁵ *Id.* § 2411(a)(1)(B)(i).

⁷⁶ *Id.* § 2411(a)(1)(B)(ii).

⁷⁷ See *supra* note 45 and accompanying text.

⁷⁸ See *supra* note 46 and accompanying text.

⁷⁹ See *supra* note 47 and accompanying text.

⁸⁰ 19 U.S.C. § 2411(b)(1) (1988).

⁸¹ The investigative and factfinding process of § 301 is as follows: when conducting either a self-initiated or a requested investigation, the USTR is subject to a strict timeline and shall request consultations with the accused foreign nation. Prior to determining if the complaint actually violates § 301(a) or § 301(b), the USTR shall provide an opportunity for presentation of views and seek advice from the International Trade Commission. Once the USTR identifies an act subject to mandatory or discretionary retaliation, he must

2.3. Results of Section 301

Because the "concern for reputation is not enough to induce nations to honor their commitments,"⁸² proponents of unilateralism present a strong case in support of section 301. In theory, if section 301 regularly succeeds in prying open closed markets, both the United States and the entire world reap the benefits of liberalized trade and efficient allocation of resources.⁸³ Provided that opportunism⁸⁴ is disabled and the threat of sanction is credible, the use of section 301 is intuitively sensible.⁸⁵

Section 301 thus appears quite efficacious, both on a theoretical and empirical level. One scholar even described section 301 as "one of the rare successes among U.S. trade statutes, uncharacteristic in its commitment to opening markets rather than protecting them."⁸⁶ For example, according to one study, section 301 yielded a trade liberalizing outcome in fifty-eight of the eighty-three cases filed, or seventy percent of the time.⁸⁷ Of the

publish the determination in the Federal Register. The USTR possesses authority to withdraw benefits, impose duties, and restrict market access for violating either § 301(a) or § 301(b). The penalty, however, shall be equivalent to the harm inflicted. Implementation of these retaliatory measures is subject to rigid time constraints. The USTR shall monitor the situation and terminate all penalties when they cease to be appropriate. See 19 U.S.C. §§ 2411-2419 (1988). See generally Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM*, *supra* note 61, at 1, 39-43 (summarizing this § 301 process).

⁸² Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y INT'L BUS. 263, 266 (1992) [hereinafter Sykes, *The Limited Case*].

⁸³ See *id.*

⁸⁴ Opportunism refers to the United States "cheating" or using the power of § 301 for protectionist purposes — purposes other than prying open foreign markets. See *id.* at 282 (discussing the dangers of opportunism when sanctions are contemplated); see also Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 321 (1990) (concluding that § 301 rules out massive retaliation and discourages opportunism) [hereinafter Sykes, *The Strategic Design*].

⁸⁵ Not only does intuition support the use of § 301, but game theory analysis also demonstrates the theoretical success of § 301, assuming the game is one of unfixed duration and the threat of sanction is credible. For an analysis of § 301 based on the "Prisoner's Dilemma," see Sykes, *The Strategic Design*, *supra* note 84, at 309-23.

⁸⁶ Sykes, *The Limited Case*, *supra* note 82, at 317.

⁸⁷ See *id.* at 309-16. For a complete list of § 301 cases between 1975 and 1991, see *id.* at n.144, n.165 & Appendix. A more recent exploration of § 301

twenty-five remaining cases, only two, or eight percent of the cases, were considered “clear failures,” while the rest either remain unsettled or, alternatively, were withdrawn, dismissed, or modified.⁸⁸ In conclusion, it appears as if threat strategies have succeeded in prying open foreign markets. Perhaps the success of section 301 demonstrates that “might does make right”⁸⁹ in U.S. trade policy.

2.4. *International Response to Section 301*

Despite its apparent success in liberalizing world trade, section 301 elicits more international condemnation than any other U.S. trade provision.⁹⁰ According to one academic, section 301 “is probably the most criticized piece of U.S. foreign trade legislation since the Hawley-Smoot Tariff Act of 1930.”⁹¹ Sovereign states unite in opposition to section 301 regardless of their global economic standing.⁹² The European Union’s enactment of a

cases appears in BAYARD & ELLIOTT, *supra* note 3, at 355-465. The Bayard & Elliott study explores 91 § 301 cases from 1975 to 1994. Bayard & Elliott conclude that § 301 is most effective when (1) there is domestic political support for reform in the target country and (2) the target barrier is transparent and readily identified. *See id.* at 332. Thus, U.S. pressure through § 301 is far more likely to overcome readily identified barriers, such as tariffs or quotas, than less easily defined and more subjective barriers, such as administrative or regulatory impediments to trade. *See id.* at 332-33.

⁸⁸ *See* Sykes, *The Limited Case*, *supra* note 82, at 309-16.

⁸⁹ Thomas O. Bayard, *Comment on Alan Sykes’ “Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301”*, 8 B.U. INT’L L.J. 325, 325 (1990) (noting U.S. retaliatory threats are often effective in prying open foreign markets). Indeed, one scholar has called § 301 the “Arnold Schwarzenegger of U.S. trade law.” Warren Maruyama, *Section 301 and the Appearance of Unilateralism*, 11 MICH. J. INT’L L. 394, 397 (1990) (discussing how the Omnibus Trade and Competitiveness Act of 1988 tightened § 301 procedures).

⁹⁰ *See* Sykes, *The Strategic Design*, *supra* note 84, at 301.

⁹¹ Hudec, *supra* note 61, at 113.

⁹² As one commentator remarked: “[w]henver you want to increase the blood pressure of the negotiators of the Third World countries, just whisper the word ‘301’ in their ears and they are out of tune in no time.” Thomas J. Trendl, *Self-Help in International Trade Disputes*, 84 AM. SOC’Y INT’L L. PROC. 32, 48 (1990) (quoting Professor Yogesh Tyagi of the School of International Studies, Nehru University, New Delhi). Japanese commentary is equally critical of § 301. For example, a former Japanese Ambassador stated: “to be judge, jury and executioner at the same time is not acceptable.” Holmer & Bello, *Promise and Peril*, *supra*, note 51, at 188 (quoting Ambassador Yoshio Hatano of Japan). For further examples of foreign criticism, see Ashman, *supra*

counterpart to section 301 is possibly the most forceful example of such opposition to this U.S. statute.⁹³ While the European Union does not utilize its counterpart with the same voracity as the United States uses section 301,⁹⁴ the mere adoption of a mirror statute reflects international frustration with a "totally one-sided affair in which the United States plays both prosecutor and judge, in which defendants are tried in absentia, and in which Congress has ordained certain guilty verdicts in advance"⁹⁵

Put simply, the international community and an ever-increasing number of academics⁹⁶ criticize section 301's departure from multilateralism in favor of bilateral "initiatives based on bullying smaller trading partners."⁹⁷ Despite its ability to liberalize trade, section 301 is a massively unpopular market opening mechanism. This disfavor could lead to retaliatory action by U.S. trading partners, which, in turn, could produce a global economic slowdown. In light of international distaste for aggressive unilateralism, the international community designed a less reactionary trade resolution mechanism in the WTO.

note 34, at 115 n.5 (quoting officials from Brazil, France, Korea, Japan, and Australia). Section 301 particularly upsets the Europeans because nearly one quarter of all § 301 action is directed at Europe. See Wolfgang W. Leirer, *Retaliatory Action in United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84*, 20 N.C. J. INT'L L. & COM. REG. 41, 44-45 (1994).

⁹³ See Council Regulation 2641/84 on the Strengthening of the Common Commercial Policy with Regard in Particular to Protection Against Illicit Commercial Practices, 1984 O.J. (L 252) 1. For the differences between the E.U. provision and § 301, see Miquel Montaña i Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 133 n.128 (1993) (noting important differences between Council Regulation 2641/84 and § 301).

⁹⁴ See Montaña i Mora, *supra* note 93, at 132-33. For a discussion of how the E.U. utilizes its § 301 counterpart, see Leirer, *supra* note 92, at 69-89.

⁹⁵ Hudec, *supra* note 61, at 114.

⁹⁶ Forty of the most prominent U.S. economists signed a statement drafted by Professor Bhagwati that condemns § 301. See Hudec, *supra* note 61, at 114 n.2.

⁹⁷ *Id.* at 114.

3. THE MULTILATERAL PARADIGM: WTO DISPUTE RESOLUTION

3.1. *GATT Dispute Resolution or GATT Dispute Avoidance?*

Described as a “unique phenomenon among the major instruments of world order,” the GATT is an institution without true identity.⁹⁸ Since its inception, commentators have described the GATT in several ways: as a powerful supranational body acting as a court, as a pragmatic series of multilateral trade agreements, and even as a mere negotiating forum to facilitate bilateral resolution.⁹⁹ The Uruguay Round¹⁰⁰ created the WTO,¹⁰¹ not as an addendum to the GATT, but rather as a

⁹⁸ Price, *supra* note 21, at 87 (describing the organic development of the GATT over 50 years).

⁹⁹ See *Can the GATT Resolve International Trade Disputes*, *supra* note 17, at 290 (quoting Robert C. Cassidy, Jr., a Washington D.C. attorney and former General Counsel to the USTR).

¹⁰⁰ The Uruguay Round of negotiations was launched on September 20, 1986, in Punta del Este, Uruguay, and concluded on December 15, 1993. See Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, BISD 33rd Supp. 19-28 (1987); *The Road to Marrakesh*, FOCUS: GATT NEWSLETTER, Dec. 1993, at 3. It was the eighth such negotiation session under the auspices of the GATT. See Lisa S. Klaiman, *Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed With Caution*, 11 U. PA. J. INT'L BUS. L. 657, 658 (1990) (discussing the hopes of the contracting parties present at the Uruguay Round). The previous Rounds were: Geneva, Switzerland (1947) (establishing the GATT); Annency, France (1949); Torquay, Great Britain (1950-51); Geneva (1955-56); the “Dillon Round” in Geneva (1961-62); the “Kennedy Round” in Geneva (1964-67); and the “Tokyo Multilateral Trade Negotiations Round” (“MTN” or “Tokyo Round”) in Geneva (1973-79). See *id.* at 658 n.8

The Uruguay Round was “by far the most ambitious trade negotiation ever.” for it included discussions about diverse topics such as goods and services, intellectual property, investment, subsidies, dumping, and agriculture. See Lowenfeld, *supra* note 12, at 477; Riding, *supra* note 11, at 35 (stating that the Uruguay Round embraced “for the first time such areas as agriculture, textiles and financial services”). For a summary of all agreements finalized under the Uruguay Round, see *The Final Act of the Uruguay Round: A Summary*, FOCUS: GATT NEWSLETTER, *supra*, at 5-15.

For an in-depth discussion of the history of the GATT, see ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990); see also JOHN H. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 13, at 30-39 (discussing the flawed constitutional beginnings of the GATT).

¹⁰¹ During the negotiation sessions, the proposed new organization was entitled the “Multilateral Trade Organization.” At the last moment, however, negotiators replaced “multilateral” with “world,” despite U.S. objections to this

legally distinct organization in place of the GATT.¹⁰² The WTO provides the firm identity absent from the GATT and fulfills the institutional framework originally envisioned by the Bretton Woods economic system.¹⁰³

change. See Lowenfeld, *supra* note 12, at 478 n.1. The WTO, by requiring adherence of all members to all but four GATT agreements, reinjects uniformity into international trade law. See *id.* at 478-79. The only side agreements outside the scope of the WTO concern civil aircraft, government procurement, dairy products, and bovine meat. See *id.* at 479. All other agreements, including the operation of the WTO's Dispute Settlement Body ("DSB"), are binding. See Final Act, *supra* note 11, at 33 I.L.M. 1153.

¹⁰² See *The Road to Marrakesh*, *supra* note 100, at 3. Unlike the GATT, the WTO is an umbrella institution with a firm constitutional basis whose duties include administering all relevant GATT codes, agreements, and understandings. See Final Act, *supra* note 11, 33 I.L.M. at 1144-45. For example, the WTO will oversee the GATT itself, agreements related to trade in services, and treaties regarding intellectual property rights. See *id.* Annexes 1A-1C, at 1154-1225.

The WTO is headed by a Ministerial Council that meets every two years. See Final Act, *supra* note 11, at 1145. A General Council meets regularly to supervise all WTO operations. See *id.* The General Council governs three subsidiary Councils: a Goods Council, a Services Council, and a Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Council. See *id.* at 1145-46. Finally, the WTO oversees two additional "bodies" — the DSB and the Trade Policy Review Mechanism. See Patterson & Patterson, *supra* note 17, at 46.

For a history of the forces leading to the creation of the WTO, see *id.* at 39-43. See generally JACKSON, RESTRUCTURING GATT, *supra* note 14, at 93-100 (analyzing the problems associated with the original GATT system and arguing for the creation of the WTO).

¹⁰³ See *Success! The Most Comprehensive Round Ever Is Concluded*, FOCUS: GATT NEWSLETTER, *supra* note 100, at 1, 2. "Bretton Woods" refers to the international economic system that emerged following World War II. See JACKSON, THE WORLD TRADING SYSTEM, *supra* note 13, at 4. The system contemplated three institutional pillars: (1) the International Monetary Fund ("IMF"); (2) the International Bank for Reconstruction and Development ("World Bank"); and (3) the International Trade Organization ("ITO"). See *id.* Both the IMF and World Bank received international approval, but the ITO did not — largely due to the United States' failure to ratify the Havana Charter, the founding document of the ITO. See generally *id.* at 31-37 (describing the Bretton Woods framework and the ITO); RICHARD N. GARDNER, STERLING-DOLLAR DIPLOMACY: ANGLO-AMERICAN COLLABORATION IN THE RECONSTRUCTION OF MULTILATERAL TRADE (1956) (detailing the fate of the Havana Charter). One of the explicit functions of the WTO is to "cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." Final Act, *supra* note 11, 33 I.L.M. at 1145.

In the wake of the ITO's failure, all that remained to fill the institutional vacuum of international trade was the GATT agreement. See Montañá i Mora, *supra* note 93, at 107. Although it was not an official international entity, the GATT nevertheless built up a staff, occupied a building, hired a Director-General, developed committees, budgets and agreements, and acquired many

Once referred to as “a network of loopholes held together by waivers,”¹⁰⁴ the original GATT agreement was far from neat or orderly, especially in the area of international dispute resolution.¹⁰⁵ As the GATT grew in size and scope, it “informally developed the institutions that it need[ed] to run the multilateral trading system.”¹⁰⁶ In addition to the piecemeal development of the dispute resolution process, the entire GATT system rested on the notions of pragmatism and tolerance¹⁰⁷ as opposed to legalism or “rigorous adherence to legal norms.”¹⁰⁸ The ad hoc, pragmatic character of the GATT produced a dispute resolution process primarily “aim[ed] at lowering tensions, defusing conflicts, and promoting compromise.”¹⁰⁹ Indeed, what developed was hardly a dispute settlement process, but rather a dispute avoidance process which sought to prevent the “wrong cases” from entering the system in the first place.¹¹⁰

other attributes of an official international organization. See Lowenfeld, *supra*, note 12, at 478. Not only did the GATT look like an organization, but it also became the “most important multilateral economic treaty in history, both in terms of contracting parties and in terms of the volume of trade regulated by it.” Montaña i Mora, *supra* note 93, at 107. Over 100 protocols, arrangements, side agreements, understandings, and other instruments have resulted from the GATT foundation. See *id.* at 108.

¹⁰⁴ Patterson & Patterson, *supra* note 17, at 35 (referring to a flippant statement made by Eric Wyndham White, the first Secretary-General of the GATT).

¹⁰⁵ Prior to the Uruguay Round, more than 30 separate dispute resolution procedures existed, all of varying degrees of formal authority to bind nations to a given decision. See JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT* 332-34 (1986); see also Patricia Kalla, *The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go from Here?*, 5 DICK. J. INT’L L. 82, 92 (1986) (noting that the former GATT dispute resolution process involved procedures under six disparate dispute mechanisms adopted by nine codes at the Tokyo Round); Montaña i Mora, *supra* note 93, at 122-27 (discussing the “diversification” or “balkanization” of GATT dispute procedures).

¹⁰⁶ Price, *supra* note 21, at 88.

¹⁰⁷ See Patterson & Patterson, *supra* note 17, at 37. The first two Secretary-Generals of the GATT, Eric Wyndham White and Oliver Long, both believed in a pragmatic, as opposed to a legalistic management style. Long “believed that ‘legalism’ does not contribute to trade liberalization.” *Id.* at 36.

¹⁰⁸ *Id.*

¹⁰⁹ Lowenfeld, *supra* note 12, at 479.

¹¹⁰ See Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT’L L.J. 145, 159-66 (1980) (discussing the Tokyo Round dispute settling reforms).

3.2. *The Pragmatic Model of the GATT*

Dispute avoidance flourished under the pragmatic model of dispute resolution during the early years of the GATT. The pragmatic model, espoused by many "old GATT hands,"¹¹¹ primarily strives to reach "mutually satisfactory conclusions."¹¹² This model is built on consensus,¹¹³ is skeptical of rules,¹¹⁴ and encourages individual states to find equitable solutions.¹¹⁵ Prior to the Uruguay Round, a pragmatic, diplomatic model of dispute

¹¹¹ Lowenfeld, *supra* note 12, at 479. The European Union traditionally supported the pragmatist model while the legalist model received its support from the United States. See Montaña i Mora, *supra* note 93, at 128-29. This philosophical disagreement between the United States and the European Union reflects a U.S. culture that is comfortable with a strong unifying legal force and a European culture which prefers negotiated, diplomatic solutions. See Shell, *supra* note 19, at 843. Recently, however, the European Union shifted toward the legalist model and began to assume the role of GATT plaintiff, as opposed to GATT defendant. See Montaña i Mora, *supra* note 93, at 128-36 (outlining the traditional and current E.U. and U.S. positions with regard to the pragmatist-legalist debate).

¹¹² Judith H. Bello & Alan F. Holmer, *Settling Disputes in the GATT: The Past, Present, and Future*, 24 INT'L LAW. 519, 521 (1990) (citing GATT Doc. No. L/4907, para. 4) (elaborating on the procedures for consultations) [hereinafter Bello & Holmer, *Past, Present and Future*].

¹¹³ Rule by consensus adopts a lowest common denominator approach. In other words, all parties must agree to a given course of action or decision before such action or decision takes effect. See Patterson & Patterson, *supra* note 17, at 37. One observer has described consensus as "close to unanimity . . . a state of non-objection, a resigned let-it-go." Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, J. INT'L ARB., Mar. 1993, at 35.

¹¹⁴ Pragmatists defend a "power oriented" approach to international relations that emphasizes negotiation based on sheer bargaining strength, as opposed to adjudication based on rules. See John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1571-72 (1984) (setting forth the rule-oriented/power-oriented analytical framework).

¹¹⁵ See Montaña i Mora, *supra* note 93, at 129. Trade pragmatists argue that the GATT's success is due in part to its recognition of politics in the dispute resolution process. See Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 838 (1991) (noting the "relative success of the GATT mechanism has been . . . its recognition of a political role in the process"). Nations will protect their vital interests, even if doing so technically violates international norms. Nations also will accept adverse decisions, however, when they predict that their acquiescence will achieve a greater goal in the future. See *id.*

resolution, based on GATT Articles XXII¹¹⁶ and XXIII,¹¹⁷ prevailed.¹¹⁸

The pragmatic dispute resolution process, codified after the Tokyo Round,¹¹⁹ entailed four stages: (1) notification of a nullification or impairment of benefits followed by bilateral and possibly multilateral consultation;¹²⁰ (2) establishment of an expert panel to investigate the claim;¹²¹ (3) analysis and determination by the panel;¹²² and (4) adoption or dismissal of the panel

¹¹⁶ See GATT, *supra* note 12, art. XXII, 61 Stat. at A64, 55 U.N.T.S. at 266. Article XXII(1) states that “each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to . . . all matters affecting the operation of this Agreement.” *Id.*

¹¹⁷ See *id.* art. XXIII(1), 61 Stat. at A64, A65, 55 U.N.T.S. at 266, 268 (providing for the establishment of a panel of all GATT contracting parties if a contracting party’s rights are nullified or impaired by the action of another contracting party).

¹¹⁸ See Montaña i Mora, *supra* note 93, at 124. For a description of the GATT panel process by a former GATT official, see generally Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, J. INT’L ARB., Dec. 1987, at 53, 56-92. This GATT panel dispute resolution procedure heard 207 complaints from 1948 to 1990. See ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 273 (1993) (providing a statistical profile of GATT dispute settlement cases).

¹¹⁹ Prior to the Uruguay Round, the Tokyo Round was the most important and comprehensive series of negotiations since the 1947 inception of GATT. See Montaña i Mora, *supra* note 93, at 122. Following the Tokyo Round, the “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance” codified the dispute settlement procedures that emerged over time. See GATT Doc. L/4907 (adopted Nov. 28, 1979, as part of the Framework Agreement).

¹²⁰ After notifying a nation of its complaint, the complainant first was to discuss the issue with the alleged violator and, if no satisfactory agreement was reached, then it was to discuss the problem with all contracting parties. This consultation process is set forth in GATT, *supra* note 12, art. XXIII, 61 Stat. at A64-65, 55 U.N.T.S. at 266, 268.

¹²¹ The panel would be comprised of members from countries not involved in the dispute. See Plank, *supra* note 118, at 65. The Chairman of the GATT Council selects a panel with input from the parties and the Secretariat staff. See *id.*

¹²² A panel receives evidence, hears arguments, and issues a written disposition of the complaint. See Lowenfeld, *supra* note 12, at 479-82. Frequently, a panel receives extensive input from the GATT Secretariat and its staff. See *id.* at 485.

report.¹²³

At first blush, this pragmatic process appeared sensible. In practice, however, at least three procedural deficiencies materialized.¹²⁴ First, the composition of the panel became a point of serious contention.¹²⁵ Second, any party could delay resolution at any point in the process.¹²⁶ For example, the losing party could effectively veto an adverse panel decision in order to prevent the decision from becoming binding.¹²⁷ Finally, even if the GATT convened a panel successfully and all parties adopted a report, compliance was inevitably problematic.¹²⁸ Due to massive disobedience, nations felt "no serious obligation to abide by the rules" of dispute resolution.¹²⁹ Because the elaborate system of rights under the GATT meant little absent an effective dispute settlement procedure,¹³⁰ GATT signatories needed a new

¹²³ See Bello & Holmer, *Past, Present, and Future*, *supra* note 112, at 523 (discussing the GATT dispute settlement process).

¹²⁴ For a detailed description of the procedural problems arising under the panel mechanism, see Stahl, *supra* note 13, at 424-26.

¹²⁵ See, e.g., Plank, *supra* note 118, at 65-72 (discussing the difficulty of finding a suitable panel).

¹²⁶ Since all GATT decisionmaking was by "consensus," one party could block the formation of a panel or the adoption of a panel report and bring the entire resolution process grinding to a halt. See *supra* note 113. The popularity of these dilatory tactics flourished dramatically as the diversity of GATT membership increased. See Montaña i Mora, *supra* note 93, at 119-20. Essentially, the core principles underlying the GATT eroded prior to the Tokyo Round as diverse members possessing conflicting economic needs joined the agreement. See *id.* at 118-22.

¹²⁷ See *supra* note 126.

¹²⁸ An egregious example of purposeful delay occurred in the "Canned Fruit" case where, following a U.S. complaint in 1981, the European Community blocked the adoption of a panel report until 1985, at which point the United States withdrew the report from the GATT Council agenda. For a discussion of this case and other examples of the dilatory strategy in GATT dispute resolution, see HUDEC, *supra* note 118, at 155-203; see also Bello & Holmer, *Past, Present and Future*, *supra* note 112, at 525-32 (summarizing seven of the more controversial GATT dispute cases, some of which exemplified the use of the dilatory strategy). But see Partan, *supra* note 61, at 344 ("[C]hances are that the delinquent partner will be ready to conform its conduct to [the] GATT requirements. Hence GATT panel rulings are normally respected.").

¹²⁹ Gardner Patterson & Eliza Patterson, *Objectives of the Uruguay Round*, in THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 7, 7 (J. Michael Finger & Andrzej Olechowski eds., 1987).

¹³⁰ See Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT pts. 2, 3 (1995). In the entire history of the GATT, there was only one recorded in-

dispute settlement system¹³¹ — one based on the legalist model.¹³²

3.3. *The Legalist Model of the WTO*

Unlike the pragmatic model of dispute resolution that emphasizes political diplomacy, the legalist model¹³³ revolves around rules, remedies, and adjudication.¹³⁴ Those supporting this model argue that a more rule-oriented system ensures certainty and predictability in the operation of international affairs.¹³⁵ Because the WTO's Dispute Settlement Understanding ("Understanding")¹³⁶ adopted the legalist model, its creation

stance when the organization formally authorized the withdrawal of trade benefits as a retaliatory measure for a GATT violation. *See id.* pt. 2, at 8 n.7; Netherlands Measures of Suspension of Obligations to the United States, Nov. 8, 1952, GATT BISD 1st Supp. 32 (1953).

¹³¹ One scholar describes "four interests [which] converged to support a proposal for a new WTO system for dispute resolution when the Uruguay Round moved toward its conclusion in the late 1980s and early 1990s." Shell, *supra* note 19, at 845. These four interests were: (1) a general desire by all nations to move away from the threats and trade sanctions which had characterized unilateralism; (2) a series of recommendations by eminent trade scholars and officials which served as a focal point for final discussions; (3) a realization by other GATT signatories, namely European countries, that the dispute resolution process could advance their interests; and (4) a desire by developing nations to level the GATT playing field. *See id.* at 845-48.

¹³² For a discussion of an alternative to the pragmatic-legalistic structure, see Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111, 112-19 (1992) (utilizing a public-private interest model to analyze GATT dispute resolution).

¹³³ Trade legalism is based on neoclassical free trade theory and the foreign relations theory of realism. *See* Shell, *supra* note 19, at 853-56. The post-World War II version of the foreign relations theory of realism followed a half-century of a "legalistic-moralistic" approach to international problems. *See* GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950* 95 (1951). In contrast to the legalistic-moralistic approach, realists believe sovereign nations are self-interested actors engaged in the "single-minded pursuit of power." Shell, *supra* note 19, at 855. As legalism has triumphed over pragmatism, the debate now shifts to which model of legalism will gain currency within the WTO, the Regime Management Model or the Efficient Market Model. For a comprehensive discussion of these two legalist models and the introduction of a third model, the Trade Stakeholder's Model, *see id.* at 858-925.

¹³⁴ *See* Lowenfeld, *supra* note 12, at 479.

¹³⁵ *See* Montaña i Mora, *supra* note 93, at 129.

¹³⁶ For an explanation of how the dispute resolution process works, *see* Understanding, *supra* note 16, 33 I.L.M. at 1226-44.

increasingly judicializes¹³⁷ the entire GATT dispute resolution mechanism. The new dispute resolution procedure covers all WTO agreements, making dispute resolution uniform within the WTO.¹³⁸ The new WTO dispute resolution process makes near-revolutionary¹³⁹ changes in the prehearing, hearing, and posthearing stages. For example, in the prehearing phase, a party has a presumptive right to a panel unless, by consensus, all WTO parties decide *against* the formation of a panel.¹⁴⁰ Thus, the new dispute resolution process effectively grants an "unambiguous right to a panel."¹⁴¹ Additionally, the new WTO process imposes strict timelines on all panel actions in the prehearing phase.¹⁴² Moreover, the legalist model formally authorizes the Director-General to assume an intermediary role.¹⁴³

Additionally, the new process includes three major alterations¹⁴⁴ to the hearing or panel phase and tailors them to

¹³⁷ See Montañà i Mora, *supra* note 93, at 144. The new WTO dispute resolution process centers around the rule of law. See Georg M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT*, 16 N.C. J. INT'L L. & COM. REG. 497, 500 (1991) (declaring that the Uruguay Round Agreements strengthen "the GATT system as a system governed by the rule of law").

¹³⁸ See Understanding, *supra* note 16, art. 1, 33 I.L.M. at 1226.

¹³⁹ See Abbott, *supra* note 132, at 148. Some of the suggestions which were eventually adopted in the Uruguay Round Agreements "turned the old GATT voting system on its head." Shell, *supra* note 19, at 846.

¹⁴⁰ See Understanding, *supra* note 16, art. 6(1), 33 I.L.M. at 1230. This is a reversal of the presumption under the former system of dispute resolution. Under the prior system, essentially there existed a presumption against the creation of a panel unless all parties affirmatively agreed to establish a panel. Reversing this presumption virtually guarantees the right to a panel. In order to deny the formation of a panel, the complaining party would have to vote against establishing a panel — an unlikely occurrence. See *id.*

¹⁴¹ Abbott, *supra* note 132, at 133.

¹⁴² See Understanding, *supra* note 16, arts. 4-16, 33 I.L.M. at 1228-35. Panel time limits include: formation after 60 days from the complaint, see *id.* art. 4(7), 33 I.L.M. at 1229, issuing a report after six months, see *id.* art. 12(9), 33 I.L.M. at 1234, and Council consideration of the report within 60 days, see *id.* art. 16(4), 33 I.L.M. at 1235.

¹⁴³ See *id.* art. 5(6), 33 I.L.M. at 1230. The new dispute resolution process makes the notion of settlement more prominent through the use of good offices, mediation, and conciliation. See *id.* art. 5(1), 33 I.L.M. at 1230. A party may request these services at any time, and the Director-General is affirmatively authorized to assist the settlement. See Abbott, *supra* note 132, at 120.

¹⁴⁴ Minor alterations include the status of third party interventions, an interim review of the panel findings, and a tighter deadline to consider the adoption of panel reports. See Understanding, *supra* note 16, arts. 10, 15, 16,

remedy the problems associated with the pragmatic model. First, the Understanding lists panelist qualifications.¹⁴⁵ Second, a standing Appellate Body will review a panel's legal interpretations.¹⁴⁶ The trade court appellate judges, however, will be unaffiliated with any government.¹⁴⁷ Finally, the WTO pre-

33 I.L.M. at 1232-33, 1235.

¹⁴⁵ See *id.* art. 8(1), (2), 33 I.L.M. at 1231. The Secretariat will nominate panelists (whether from the government or outside the government), and, if the parties cannot agree on the panel's composition, the Director-General will appoint these panelists. See *id.* art. 8(6), (7), 33 I.L.M. at 1231-32. The panel is charged with rendering "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." *Id.* art. 11, 33 I.L.M. at 1233. Towards this end, the "[p]anel should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." *Id.*

¹⁴⁶ See *id.* art. 17(1), 33 I.L.M. at 1236-37. The standing Appellate Body shall consist of seven members appointed by the DSB to serve in rotation. See *id.* art. 17(2), 33 I.L.M. at 1236. The Appellate Body will sit in panels of three and hear all appeals confidentially. The members, appointed to four-year terms, shall broadly represent the WTO membership, and possess demonstrated expertise in law, international trade, and GATT affairs. See *id.* art. 17(3), 33 I.L.M. at 1236. Each judge may be reappointed only once. See *id.* art. 17(2), 33 I.L.M. at 1236. Because the structure of the Appellate Body emphasizes neutrality, independence, and expertise, it is the most legalistic GATT institution to date.

¹⁴⁷ See *id.* art. 17(3), 33 I.L.M. at 1236. The Understanding does not set forth detailed procedures for appointing these appellate judges. In general, however, the members of the DSB shall act by consensus whenever possible. See Final Act, *supra* note 11, art 9(1), 33 I.L.M. at 1148; Understanding, *supra* note 16, art. 2(4), 33 I.L.M. at 1227. Not surprisingly, the appointment process of the Appellate Body encountered political divisiveness. See *Appellate Body Consensus May Be Building*, *Sources Say*, 12 Int'l Trade Rep. (BNA) No. 37, at 1560 (Sept. 20, 1995) (stating the problem "is that the United States and the European Union have until now insisted that each have two of the seven seats, while other countries have balked at . . . an unfair weighting of the body in favor of Washington and Brussels"). Finally, after several months of wrangling, the DSB has announced the new Appellate Body membership. The judges include: James Bacchus, a former U.S. Congressman and former Special Assistant to the USTR, Christopher Beeby, a trade diplomat and former Ambassador from New Zealand, Klaus-Dieter Ehlermann, a German trade lawyer and professor of international economic law, Florentino Feliciano, a Filipino Supreme Court Justice and former trade lawyer, Julio Lacarte Muro, a Uruguayan trade diplomat and participant in all eight GATT negotiation rounds, Said el-Naggar, an Egyptian professor of economics, and Mitsuo Matsushita, a Japanese professor of international economic law with ties to the Japanese Ministry of Finance and Ministry of International Trade and Industry. See *Biographical Notes on Members of World Trade Organization Appeals Body*, [July-Dec.] Daily Rep. for Executives (BNA) No. 230, at M-1 (Nov. 30, 1995). The E.U. envoy, Jean-Pierre Leng, however, warned that the E.U. only

sumptively adopts an appellate report unless it decides by consensus to reject such a report.¹⁴⁸ This consensus to overrule procedure, coupled with a cumbersome legislative mechanism that constrains the ability to override an appellate ruling, will give final judicial decisions lasting force.¹⁴⁹

Finally, in an effort to increase compliance with panel and appellate decisions, the WTO dispute resolution process modifies the implementation, or posthearing, phase in three ways. First, any party that violates a covered agreement is required to report its compliance status to the WTO within thirty days of the adoption of the decision and at regular intervals thereafter.¹⁵⁰ Second, should the guilty party default on its obligation, the WTO may authorize the prevailing party to suspend concessions or other obligations after a short period of negotiations with the defaulting party.¹⁵¹ Finally, if the defaulting party disagrees with the level of sanction imposed or the dispute resolution procedure followed, the issue will proceed to binding arbitration.¹⁵²

These changes embodied in the WTO constitute "a watershed

accepted the Appellate Body slate on an interim basis and would put forth a proposal in December 1996 to reconfigure the Appellate Body in a way "which better reflects the E.U.'s place in the WTO." *WTO Reaches Accord on Membership to New Appellate Body, Picks Members*, [July-Dec.] Daily Rep. for Executives (BNA) No. 230, at A-12 (Nov. 30, 1995).

¹⁴⁸ See Understanding, *supra* note 18, art. 17(14), 33 I.L.M. at 1237. This reverses the former presumption and virtually ensures the adoption of the panel report (if no appeal is taken) or the appellate report (if the right to appeal is exercised) because the winning party or parties would have to reject the report.

¹⁴⁹ See Shell, *supra* note 19, at 850-51. In order to override a final panel or appellate decision, a party must propose a formal amendment to the relevant treaty which, in most cases, requires unanimous consent for passage. See Final Act, *supra* note 11, art. 10, 33 I.L.M. at 1149-50. In the alternative, a party may propose that three-fourths of all treaty members must approve of an "interpretation" of the treaty which effectively overrules the final panel or appellate decision. See *id.* art. 9(2), 33 I.L.M. at 1148. Again, this interpretation alteration approach requiring a supermajority is quite cumbersome. See Shell, *supra* note 19, at 850-51.

¹⁵⁰ See Understanding, *supra* note 16, art. 21(3), (6), 33 I.L.M. at 1238-39.

¹⁵¹ See *id.* art. 22(2), 33 I.L.M. at 1239. The DSB will authorize retaliation if the disputing parties cannot reach an agreement providing for appropriate compensation. See *id.*

¹⁵² See *id.* art. 22(6), 33 I.L.M. at 1240. As an alternative to the entire panel and appellate process, the disputants may elect to proceed directly to binding arbitration. See *id.* art. 25, 33 I.L.M. at 1242 (stating that when arbitration is selected, the parties "shall agree to abide by the arbitration award").

to Japanese auto dealer networks.¹⁵⁷

First, the United States argued that Japan's needless bureaucratic thicket plagued the entry of competitive U.S. auto parts into the Japanese replacement market. The United States demanded measures designed to deregulate Japan's complex auto repair system, a system which channels the bulk of its repair work to a network of Japanese "designated garages." These garages, in turn, only purchase Japanese auto parts.¹⁵⁸ Second, the Clinton Administration claimed that Japan's unique interlocking business relationships, known as "keiretsu,"¹⁵⁹ stifled U.S. sales in the auto component or supplies market.¹⁶⁰ Finally, the United

¹⁵⁷ See *Fact Sheet on U.S.-Japan Auto and Auto Parts Agreement Issued By U.S. Trade Representative's Office June 28, 1995*, [Jan.-June] Daily Rep. for Executives (BNA) No. 125, at M-1 (June 29, 1995) [hereinafter *USTR Fact Sheet*]. Although two of the contentious issues technically involved automobile component parts, this Comment refers collectively to the three issues as the "automobile dispute."

¹⁵⁸ *Id.* The general deregulation issue encompassed several specific complaints. First, Japanese regulations funnel the repair of any "critical part" to certified garages, the only garages authorized to conduct the periodic inspections required by Japanese law. Second, the Japanese impose burdensome and costly requirements in order to be licensed as a "designated" or "certified" garage, including required amounts of minimum floor space, tools, and numbers of certified mechanics. Since a "designated garage" license is difficult to receive and since all "critical part" repairs are directed to those "designated garages," U.S. auto part sales suffer at the hands of a tightly integrated Japanese manufacturing and distribution system. Additionally, Japanese regulations require that once a car is modified, even to a minute degree, the car must be reinspected. This rigorous reinspection process hinders Japanese customers from purchasing and adding accessories to their automobiles. These particulars, to name a few, exclude foreign auto part manufacturers and distributors from the Japanese repair market. *Id.* at M-1-M-2.

¹⁵⁹ "Keiretsu" refers to "unique interlocking relationships between manufacturers, suppliers, distributors and financial institutions." *Id.* at M-1. A keiretsu is a network of firms with financial, managerial, and product market interlinkages. Commentators have identified at least three roles of the keiretsu: financial linkages which facilitate a focus on market share, producer-supplier linkages which allow increased information exchange, and distribution linkages. See C. FRED BERGSTEN & MARCUS NOLAND, RECONCILABLE DIFFERENCES? U.S.-JAPAN ECONOMIC CONFLICT 74-75 (1993).

¹⁶⁰ See *USTR Fact Sheet*, *supra* note 157, at M-1. Over time, Japanese automobile manufacturers have developed close business relationships with their component suppliers to the exclusion of foreign suppliers whose prices may be lower. In order to break these purchasing patterns based on loyalty and not on efficiency, Japanese auto manufacturers have issued voluntary purchasing plans in 1990, 1992, and 1994. Under these "voluntary plans," the Japanese auto producers agree to purchase automotive supplies from sources other than their keiretsu partners. See *id.* at M-2.

in the history of GATT dispute resolution.”¹⁵³ The WTO dispute resolution process holds much promise, for it permits the entry of any claim into the system, processes the claim in a timely manner, grants an unambiguous right of appeal, virtually ensures the adoption of the final judicial result, and pressures the losing party to adjust its practices. Remarkably, the WTO judicial body has “jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk imposition of trade sanctions.”¹⁵⁴

These bold changes signal a victory for law over politics in the international dispute resolution process, a triumph for the trade legalists over the trade pragmatists.¹⁵⁵ As a result of the resurgence of multilateralism in world affairs¹⁵⁶ and the renewed emphasis on the realities of global interdependence, a viable multilateral dispute resolution alternative has emerged. The world trading community has created a broad-based dispute resolution mechanism in the WTO, thus tilting the balance away from unilateralism and toward multilateralism.

4. THE UNILATERAL-MULTILATERAL CLASH: THE U.S.- JAPANESE AUTOMOBILE DISPUTE

In the summer of 1995, the unilateral paradigm, section 301, and the multilateral paradigm, the WTO dispute resolution process, collided over the issue of automobiles and automotive parts. The automobile trade controversy between the United States and Japan focused upon three distinct issues. The Clinton Administration, in exchange for dropping the unilateral section 301 sanctions, demanded: (1) deregulation of the auto part “after-market” or replacement market; (2) increased voluntary purchases of U.S. auto components by the Japanese; and (3) increased access

¹⁵³ Abbott, *supra* note 132, at 141.

¹⁵⁴ Shell, *supra* note 19, at 832 (footnote omitted).

¹⁵⁵ See *id.* at 833-34.

¹⁵⁶ Multilateralism has emerged not just in the world trade arena, but also in the realm of world politics and aid. See John Linarelli, *The European Bank for Reconstruction and Development and the Post-Cold War Era*, 16 U. PA. J. INT’L BUS. L. 343, 374-75 (1995) (“[S]everal positive trends appear to be emerging from the rubble of the Cold War. Significant among these trends is an emphasis on, and optimism among states for, multilateral action.”).

States alleged that the Japanese auto dealership networks frustrated the sales of U.S. automobiles.¹⁶¹ Without progress on these three fronts, the Japanese faced the largest sanctions ever threatened by the United States.

Article 1 of the Understanding defines its scope of application as covering each Uruguay Round agreement, as well as the Understanding itself.¹⁶² Thus, a WTO member may bring a dispute alleging that a WTO signatory violated dispute settlement procedures.¹⁶³ In this sense, the dispute resolution mechanism is a self-enforcing process. Even before the United States threatened unilateral sanctions in the summer of 1995, the Japanese believed that use of section 301 violated the WTO.¹⁶⁴ Not surprisingly, then, the Japanese government immediately filed suit with the WTO to challenge the United States' use of

¹⁶¹ See *id.* Auto dealership start-up costs are very high in Japan, thus forcing most foreign auto manufacturers to sell their vehicles through existing dealerships. Japanese dealers, however, feel pressure not to sell foreign automobiles and fear retribution by Japanese automobile manufacturers should they decide to deal in foreign vehicles. Without joint dealerships or without dealers exclusively selling U.S. automobiles, the quality and cost appeals of U.S. cars will not translate into increased sales. See *id.*

¹⁶² See Understanding, *supra* note 16, art. 1(1), 33 I.L.M. at 1226; see also MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1009 (discussing the dispute settlement proceedings).

¹⁶³ The notion that a disagreement over the dispute resolution process can be brought before a panel or the Appellate Body is uncontroversial. In fact, USTR Mickey Kantor, during a Senate committee hearing, recognized the right of another nation to challenge the United States' use of unilateral tariff sanctions through the dispute resolution process. Kantor stated: "Where [the Japanese] could go against [the United States] . . . is in . . . items where we act unilaterally and we invoke . . . tariff sanctions against [the Japanese]. Then they might challenge us in the GATT . . . They could challenge that [use of unilateral sanctions]." *Overview of the Results of the Uruguay Round: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, S. HRG. NO. 103-989, 103d Cong., 2d Sess. 52 (1994) [hereinafter *Senate Commerce Hearing*]. This situation described by USTR Kantor, where the United States unilaterally invokes tariff sanctions against another party, is precisely what developed in the U.S.-Japanese automobile dispute.

¹⁶⁴ "If the United States investigates Japan and invokes retaliatory measures in violation of the WTO Agreement, Japan should refer the matter immediately to the GATT or DSB under [the] WTO." INDUSTRIAL STRUCTURE COUNCIL OF JAPAN, 1994 REPORT ON UNFAIR TRADE PRACTICES BY MAJOR TRADING PARTNERS 38 (1994) (discussing Japan's increased use of the GATT's dispute settlement procedure since the 1980s) [hereinafter 1994 JAPANESE TRADE REPORT].

unilateral section 301 sanctions in the automobile dispute.¹⁶⁵ The Japanese considered imposing countersanctions against the United States, but “conceded that such a move would undermine Japan’s claim to be abiding by international trading rules.”¹⁶⁶ The proper U.S. response, according to the Japanese, would have been to file its trade grievance with the WTO, rather than unilaterally applying sanctions.¹⁶⁷

With the United States poised to heap billions of dollars of aggressive, unilateral section 301 sanctions upon luxury Japanese automobiles, and with the Japanese challenging those sanctions before the multilateral legalist WTO, the automobile dispute settled in dramatic fashion. After sparring for six weeks and with the credibility of the foremost world trade organization at stake, the United States and Japan signed an agreement which, according to the USTR, “will result in significantly increased market access . . . and structural change in the Japanese automotive sector.”¹⁶⁸ In substance,¹⁶⁹ the settlement deregulates Japan’s auto parts repair market,¹⁷⁰ includes pledges by the major Japanese auto manufacturers to increase North American production and boost

¹⁶⁵ The Japanese government filed suit with the WTO on the same day that the United States announced the billions of dollars in § 301 sanctions. See Andrew Pollack, *Japan Plans Appeal to New Trade Group*, N.Y. TIMES, May 17, 1995, at D4.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*

¹⁶⁸ *USTR Fact Sheet*, *supra* note 157, at M-1.

¹⁶⁹ Aside from resolving the three substantive U.S. complaints, the settlement also provides for monitoring and enforcement for both the United States and Japan. The United States’ monitoring system will use objective data to determine Japanese compliance. Any major problems with compliance “will mean an instant return to the negotiating table,” according to U.S. officials. Mark Falsenthal et al., *U.S., Japan Strike Deal on Auto Trade Addressing Parts, Dealerships, Repairs*, [Jan.-June] Daily Rep. for Executives (BNA) No. 125, at A-47, A-49 (June 29, 1995). The Japanese will increase support for the Japan Free Trade Commission, which will incorporate U.S. suggestions regarding Japan’s competition policy. See *USTR Fact Sheet*, *supra* note 157, at M-2.

¹⁷⁰ The Japanese government agreed to review the list of “critical parts” and remove from the list any parts “not central to health and safety concerns,” including struts, shocks, power steering, and trailer hitches. In efforts to deregulate the auto part repair market, the Japanese government will loosen its definition of what modifications require reinspection, reduce the number of required government approved mechanics, and allow specialty garages to repair critical auto parts without being subject to government inspection. See *USTR Fact Sheet*, *supra* note 157, at M-1-M-2.

purchases of foreign-made automobile supplies,¹⁷¹ and presents a plan both to ease the fears of Japanese dealers wishing to sell U.S. automobiles and to facilitate the creation of joint U.S.-Japanese dealerships in Japan.¹⁷² Following the settlement, WTO Director-General Renato Ruggiero exclaimed: "The WTO dispute settlement system has done its job as a deterrent against conflict and a promoter of agreement."¹⁷³

5. BEYOND SETTLEMENT: LITIGATING A CHALLENGE TO SECTION 301 BEFORE THE WTO

As an alternative to settling with the United States,¹⁷⁴ the

¹⁷¹ Japanese auto manufacturer assurances to increase North American operations and to purchase more U.S. supplies is not an enforceable promise, but rather a "business forecast." The top five Japanese automakers - Toyota, Nissan, Mitsubishi, Honda, and Mazda -specified purchase plan numbers, but stipulated that the plans are "voluntary" and outside the range of government action. See Falsenthal et al., *supra* note 169, at A-50-A-51.

¹⁷² The Japanese Ministry of International Trade and Industry will send a letter to all Japanese auto dealers affirming their freedom to sell foreign cars. See *USTR Fact Sheet*, *supra* note 157, at M-2. Additionally, the government and the auto manufacturers will appoint a "contact person" to address concern about the right to sell foreign cars. See *id.* Finally, the Japanese government will conduct a survey and use the contact persons to determine the best method of facilitating the creation of joint dealerships. See *id.*

¹⁷³ Falsenthal et al., *supra* note 169, at A-49.

¹⁷⁴ The U.S.-Japanese automobile dispute eleventh-hour settlement only delays the day when another challenge to unilateral sanctions ripens and comes before the WTO. Exploring the arguments that could be presented to a panel or an Appellate Body is, therefore, not a mere academic exercise. In fact, a range of high-profile trade disputes which might eventually involve unilateral sanctions are taking shape already in the film, air delivery, banana, horse racing, and peanut butter industries, to name a few.

First, less than a week after the automobile dispute ended, the USTR, stating that "it is critical that U.S. firms achieve full access to Japan's market," announced a § 301 investigation into the practices of Fuji Photo Film. Robert D. Hershey, Jr., *U.S. to Assess Kodak's Case Against Fuji*, N.Y. TIMES, July 4, 1995, at 45. The Eastman Kodak Company, aided by trade experts at the law firm of Dewey Ballantine Bushby Palmer & Wood in Washington D.C., submitted a 250-page § 301 petition to the USTR, described as "part legal brief, part business school casestudy[,] and part crime novel." Clay Chandler & Paul Blustein, *Kodak Sets Out to Prove Japan's Market for Film Is Rigged*, WASH. POST, June 26, 1995, at A1. The petition "depicts an economy in which government planners reshape[d] entire industries" and "worked to help Fuji stamp out price competition among distributors," costing Kodak \$5.6 billion in lost revenues. *Id.* at A1, A12. Clinton Administration officials believe Kodak's claim is much stronger than those mounted by the automobile industry. See *id.* Fuji responded by stating "that it regretted the [U.S.] decision

Japanese could have held firm and challenged the premature use of section 301 before a WTO panel and eventually the Appellate Body.¹⁷⁵ WTO Director-General Ruggiero indicated that the WTO was unlikely “to rule on Japan’s complaint against U.S. sanctions by itself, but would [have] tak[en] both complaints under [simultaneous] consideration.”¹⁷⁶ Litigating a matter of such grave importance, however, should not be approached in a single proceeding. Separating the substantive U.S. grievance from the Japanese procedural challenge to unilateral sanctions is sensible. A bifurcated resolution process would allow the Appellate Body to concentrate fully on the question of unilateral action apart from the substantive specifics of “competition policy” and the detailed regulation of “after markets.” Conflating the

to initiate a [§] 301 action, rather than dealing with Kodak’s charges ‘through more constructive channels’ . . . at the new World Trade Organization in Geneva.” Hershey, *supra*, at 45, 47.

Second, in addition to the dispute over photographic film, the United States threatened sanctions “on Japanese airlines’ all-cargo operations because Japan has not allowed Federal Express Corp. to operate flights through Japan to some other points in Asia.” Don Phillips, *U.S. Plans Cargo Sanctions Against Japanese Airlines*, WASH. POST, June 20, 1995, at D1. Finally, other current disputes include a U.S.-E.U. dispute over bananas, see Martin Crutsinger, *U.S. to File WTO Complaint Over European Banana Trade Barriers*, ASSOC. PRESS, Sept. 27, 1995, available in WESTLAW, Allnews Database, and U.S. complaints of excess Japanese bureaucracy in the peanut butter, race horse, motorcycle, medical supply, financial service, and fresh fruit industries, see *U.S. Urges Japan to Further Open Markets*, ASSOC. PRESS, Nov. 22, 1995, available in WESTLAW, Allnews Database. In any of these disputes, the United States might prematurely invoke unilateral sanctions before the WTO dispute resolution runs its course, thus triggering a challenge to the unilateral use of sanctions by a WTO signatory.

¹⁷⁵ The Appellate Body has the ultimate authority to review “legal findings and conclusions.” See *Understanding*, *supra* note 16, art. 17(13), 33 I.L.M. at 1237. Therefore, this Comment will explore a challenge to the use of unilateral sanctions through the eyes of the Appellate Body. The challenge first will be presented at the panel level. This Comment assumes a panel decision of such importance as the legality of unilateral sanctions likely would be appealed in accordance with the *Understanding*. See *id.*

For the sake of this analysis, this Comment assumes that the parties adhered to the “prelitigation” requirements such as notification of a dispute, consultation between disputants, consideration of mediation and good offices, and request for a panel. This Comment further assumes that all attempts to resolve the dispute proved unsuccessful. Such “prelitigation” requirements are set forth in the *Understanding*. See *Understanding*, *supra* note 16, arts. 4-6, 33 I.L.M. at 1228-30.

¹⁷⁶ Martha M. Hamilton, *WTO Head Hopes for Trade Deal*, WASH. POST, June 15, 1995, at B11.

substantive issues with the procedural complaint would draw attention to results, to the detriment of the procedural issue at stake.

When a nation challenges unilateral sanctions, the Appellate Body must first determine the threshold issue of jurisdiction. In other words, the Appellate Body must decide whether the case presents a colorable WTO claim, thus giving the Appellate Body the authority to hear the case. Next, after resolving the jurisdictional issue, the Appellate Body must address whether the “add to or diminish” clause of Understanding Article 3(2) prevents the WTO from rendering a dispositive ruling on a case.¹⁷⁷ In accordance with the framework established in Article 12 of the Understanding,¹⁷⁸ this Comment analyzes the hypothetical challenge to unilateral sanctions by explaining the Japanese position on the automobile dispute, discussing the U.S. response, and exploring the Japanese reply to the U.S. response.

5.1. *The Japanese Challenge*

5.1.1. *The Jurisdictional Question: Article 23*

The Japanese argument — that the premature use of unilateral sanctions, such as section 301, violates the WTO Agreement — is grounded in Article 23 of the Understanding.¹⁷⁹ Article 23(1),

¹⁷⁷ The Understanding states that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Understanding, *supra* note 16, art. 3(2), 33 I.L.M. at 1227.

¹⁷⁸ Article 12 of the Understanding details the panel hearing process. It states: “The complaining party shall submit its first submission in advance of the responding party’s first submission unless the panel decides . . . that the parties should submit their first submissions simultaneously.” Understanding, *supra* note 16, art. 12(6), 33 I.L.M. at 1233. Moreover, “[a]ny subsequent written submissions shall be submitted simultaneously.” *Id.* While the Understanding explains the panel procedures in detail, it fails to make clear the working procedures of the Appellate Body. These are yet to be determined. Assuming that the Appellate Body will adopt working procedures similar to those of the panels, the presumption of the complaint-response-reply format is an appropriate framework for analysis.

¹⁷⁹ The Japanese challenge to § 301 through Article 23 of the Understanding is only one line of possible argumentation. Another Japanese strategy might be to argue that unilateral § 301 sanctions in the automobile dispute violated Article XI of the GATT. Article XI, entitled *General Elimination of Quantitative Restrictions*, states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export

entitled *Strengthening of the Multilateral System*, states: "When Members seek the redress of a *violation* of obligations or other *nullification or impairment* of benefits under the covered agreements or an *impediment* to the attainment of any objective of the covered agreements, they *shall* have recourse to, and abide by, the rules and procedures of this Understanding."¹⁸⁰ In other words, if either a violation of a WTO obligation, a nullification or impairment of a WTO benefit, or an impediment to a WTO objective occurs, then a colorable WTO claim is implicated and a signatory must channel its complaint through the WTO. In these three situations, the signatory nation may not employ unilateral sanctions at the outset to remedy an alleged WTO violation. The scope of Article 23 is quite broad given the numerous ways in which a WTO signatory could violate an obligation, nullify or impair a benefit, or impede a WTO objective. In essence, Article 23 dictates that the WTO is to have the first attempt at dispute resolution.

In addition to requiring the WTO to be the forum of "first resort," the Understanding limits unilateral action in at least three other ways. First, the WTO signatory "shall not make a determination" that a violation, impairment, or impediment has occurred, except through recourse to the WTO dispute resolution procedure.¹⁸¹ In effect, this mandate delays any domestic action on the trade dispute until the WTO dispute resolution process

licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory or of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 12, art. XI(1), 61 Stat. at A32-33, 55 U.N.T.S. at 224, 226. The argument that § 301 sanctions on automobiles violates this GATT provision is as follows: (1) the Japanese want to sell cars in the United States; (2) a § 301 sanction is not a duty, tax or other charge; (3) § 301 is made effective through "other measures;" and (4) the effect of § 301 sanctions is to restrict, and perhaps prohibit, the ability of the Japanese to sell cars in the United States. Thus, § 301 sanctioning in the automobile dispute violates GATT Article XI(1). Because there are institutional reasons for wanting to derail § 301, the Japanese government would also assert the Article 23 claim in the automobile dispute. This Comment addresses the Article 23 argument because the unilateral-multilateral clash occurs under Article 23.

¹⁸⁰ Understanding, *supra* note 16, art. 23(1), 33 I.L.M. at 1241 (emphasis added).

¹⁸¹ See *id.* art. 23(2)(a), 33 I.L.M. at 1241.

runs its course. Second, if the complaining signatory receives a favorable WTO ruling on an issue, the nation cannot act immediately, but instead must wait for a “reasonable period of time for the Member concerned to implement the recommendations and rulings” of the WTO.¹⁸² Finally, even if a complaining signatory addresses the WTO before taking any action, waits for a WTO ruling, and then allows a reasonable amount of time for compliance, it cannot sanction as it sees fit. The complaining signatory must adhere to the procedures of the Understanding to determine the extent of permissible retaliation.¹⁸³

Thus, in order to bring the automobile dispute within the purview of Article 23, the Japanese must first establish that the underlying U.S. complaint is really a WTO-based complaint which involves the violation of a WTO obligation, the impairment of a WTO benefit, or the impediment of a WTO objective. The dispute is channeled to the WTO for multilateral resolution once the Japanese establish that the U.S. complaint addresses the violation, nullification/impairment, or impediment of a WTO obligation, benefit, or objective.

The Japanese likely would argue that, of all the automobile issues presently disputed, the deregulation of the bureaucratic thicket surrounding the auto part replacement market most clearly states a colorable WTO claim, as excess regulation violates a WTO obligation, impairs a WTO benefit, or impedes a WTO objective.¹⁸⁴ Excess regulation in the form of critical part lists, arbitrary certification and licensing processes, as well as undue inspection costs for minor automotive accessories,¹⁸⁵ involves a WTO claim under at least three GATT provisions: Article XI,

¹⁸² *Id.* art. 23(2)(b), 33 I.L.M. at 1241.

¹⁸³ *See id.* art. 23(2)(c), 33 I.L.M. at 1242.

¹⁸⁴ The Japanese would likely shy away from the dealership access and component supplier issues because these two issues implicate the Japanese network of interlocking business relationships. The Japanese must remain cautious in seeking WTO jurisdiction to hear the § 301 challenge; the Japanese would want to argue that a WTO dispute lies at the heart of the U.S. complaint without acknowledging that the Japanese keiretsu system itself is subject to the WTO dispute resolution process. Arguing that the U.S. complaint about dealerships and component suppliers implicates a WTO agreement invites the United States to adjudicate the entire keiretsu system before the WTO.

¹⁸⁵ *See supra* note 158 for a discussion of the specific regulations at issue in the automobile dispute.

Article XXXIII and the Preamble.

First, excess regulation in the auto part replacement market *violates a WTO obligation* under GATT Article XI(1).¹⁸⁶ By imposing stringent regulations on this market, the Japanese violate a fundamental GATT tenet: no restrictions “other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party on the importation” of another contracting party’s products.¹⁸⁷ This prohibition could very well encompass the licensing and inspection regulations that surround the Japanese auto part replacement market and that are unrelated to safety concerns.

Second, excess regulation in the Japanese auto part replacement market *impairs a WTO benefit* under Article XXIII(1).¹⁸⁸ The heart of the U.S. complaint about excess bureaucracy in this market is that although the United States has successfully negotiated tariff reductions in the area of auto parts, Japanese bureaucratic barriers are measures which indirectly impair these tariff reduction agreements. Thus, while excess regulation of the replacement market does not itself conflict with a negotiated WTO agreement, the excess regulation is inconsistent with and impairs the negotiated tariff reductions in the auto parts industry.

Finally, excess regulation in the auto part replacement market *impedes an objective* stated in the GATT Preamble.¹⁸⁹ Excessive regulation in any market impedes many GATT objectives,

¹⁸⁶ See *supra* note 179 for the language of Article XI.

¹⁸⁷ See GATT, *supra* note 12, art. XI(1), 61 Stat. at A32-A33, 55 U.N.T.S. 224, 226.

¹⁸⁸ Article XXIII(1) states:

If any contracting party should consider that any benefit accruing to it directly or *indirectly* under this Agreement is being nullified or impaired . . . as the result of . . . (b) the application by another contracting party of a *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.

Id. art. XXIII(1), 61 Stat. at A64, 55 U.N.T.S. at 266, 268 (emphasis added).

¹⁸⁹ The second paragraph states the GATT objectives as “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, *developing the full use of the resources of the world and expanding the production and exchange of goods . . .*” *Id.* pmbl., 61 Stat. at A11, 55 U.N.T.S. at 194 (emphasis added).

especially maximizing utilization of the world's resources and expanding the production and exchange of goods. The bureaucratic thicket surrounding the Japanese auto part replacement market is inconsistent with the noble GATT objectives of efficient utilization, effective demand, and maximally beneficial exchange.

After characterizing at least one U.S. complaint — excess regulation in the auto part replacement market — in Article 23 terms, thereby establishing WTO jurisdiction,¹⁹⁰ the United States would be locked into the subsequent Article 23 requirements. These requirements mandate the WTO as the forum of first resort, delay the use of unilateral action until the WTO rules, dictate a reasonable time to implement the ruling, and allow WTO pre-approved retaliation.

5.1.2. *Intent of the Signatories*

The plain language of Article 23 sets forth “a pledge by WTO members to refrain from unilateral action in the global trade arena.”¹⁹¹ Drawing largely upon the plain language of Article 23, European officials have determined:

The GATT does not allow for . . . unilateral action by any one of the contracting parties aimed at inducing another contracting party to bring its trade policies in conformity with [the] GATT. . . . Accordingly, for the United States, this means that section 301 and its hybrids will have to undergo revision in order to ensure compliance with the new WTO dispute settlement structure.¹⁹²

¹⁹⁰ Not only is the scope of Article 23 quite wide, but if the United States has not notified the WTO of its grievance in the first place, the Japanese could construe and articulate the U.S. complaint as it pleases, thus ensuring that the U.S. complaint falls within the scope of Article 23.

¹⁹¹ Shell, *supra* note 19, at 852.

¹⁹² 140 CONG. REC. S15,329 (daily ed. Dec. 1, 1994) (statement of Sen. Hollings, quoting from a European Commission document). Without explaining his legal reasoning or addressing Article 23, USTR Kantor concluded that the WTO does not forbid premature unilateral action. Before a Senate committee, Kantor stated that “just because the European Community puts out a piece of paper indicating they do not think [§] 301 is viable under the new trade agreement does not make it so. Frankly, they are just wrong, and they know they are wrong, and we discussed it in our negotiations.” *Senate Commerce Hearings*, *supra* note 163, at 52. Unless the WTO court is willing to interpret these “negotiations” as legislative history that trumps the plain

Like the Europeans,¹⁹³ the Japanese have reached a similar conclusion that “the threat of sanctions is not compatible with the multilateral trade system of the GATT/WTO.”¹⁹⁴ Many WTO signatories view the intent of Article 23 to stifle unilateral action, including, and perhaps even specifically directed towards, the internationally-dreaded section 301.¹⁹⁵ The plain language of Article 23, as well as its stark title, *Strengthening of the Multilateral System*, embody the intent of the signatories to impede unilateral action, to promote multilateral resolution, and to vest within the WTO a presumptive authority to initially hear any dispute that invokes a colorable WTO claim. Even if the United States construes Article 23 in a manner consistent with the premature use of section 301,¹⁹⁶ there is substantial evidence that other WTO parties intended to hamper, if not foreclose altogether, unilateral action like section 301. From the Japanese standpoint,

language of the agreement, it is difficult to conceive how the Europeans are “wrong” with regard to premature unilateral sanctions when the issue at stake is one involving the violation, nullification/impairment, or impediment of WTO obligations, benefits, or objectives.

¹⁹³ See generally SERVICES OF THE EUROPEAN COMM’N, REPORT ON THE UNITED STATES BARRIERS TO TRADE AND INVESTMENT 7-11 (1994) (explaining further how the Europeans interpret the inconsistency between § 301 and the WTO).

¹⁹⁴ 1994 JAPANESE TRADE REPORT, *supra* note 164, at 259. The Japanese state that “the United States also has a tendency to resort to *policies and measures based on unilateral judgments*. . . . Inconsistency between these [unilateral] provisions and WTO dispute settlement procedures will continue to be a big problem.” *Id.* at 24-25.

¹⁹⁵ See *supra* section 2.4 for a discussion of the international response to the use of § 301.

¹⁹⁶ Any attempt to construe Article 23 to allow the use of premature unilateral sanctions is a formalistic argument which ignores what congressional leaders knew throughout their debates on the Uruguay Round Agreements, namely that “the unilateral action provisions of Section 301 . . . will not survive the WTO’s Dispute Resolution Article 23.” 140 CONG. REC. S15,144 (daily ed. Nov. 30, 1994) (letter from Ralph Nader & Lori Wallach to USTR Michael Kantor). In fact, the Congressional Research Service’s American Legal Division issued an opinion memo “about [§] 301 being effectively gutted by Article 23’s ban on ‘unilateralism.’” *Id.*

Conversely, the shrinking sphere of § 301 use could have nothing whatsoever to do with Article 23, but rather could be the natural result of bringing more substantive areas, like intellectual property and financial services, under the WTO umbrella. The need for § 301 to discipline trade behavior diminishes as the WTO extends to a greater number of substantive trade areas.

the plain language of Article 23 and the intent of the signatories establishes WTO jurisdiction to rule upon the automobile dispute.

5.2. *The U.S. Response*

In defending the unrestricted use of section 301 sanctions, the United States could present at least two arguments. First, the United States could argue a “four corners” jurisdictional defense, stressing that because the automobile dispute is outside the four corners of any WTO agreement, section 301 sanctions are permitted. In the alternative, assuming that the underlying dispute does fall within the four corners of a WTO agreement, the United States could argue the “add to or diminish” affirmative defense. This defense contends that any WTO restriction upon section 301 “add[s] to or diminish[es] the rights and obligations” of the United States in violation of Articles 3 and 19 of the Understanding.¹⁹⁷

5.2.1. *No Jurisdiction: The “Four Corners” Argument*

The first U.S. argument in defense of the use of section 301 is the “four corners” defense. If a WTO agreement does not cover the issue or action prompting the use of unilateral sanctions, the United States is free to utilize the trade mechanism of its choice. In the automobile dispute, the four corners defense alleges that since the three allegations against the Japanese fall outside the WTO agreements, there is no Article 23 violation.

The “four corners” defense contains at least three separate categories: the uncovered party, the uncovered issue, and the

¹⁹⁷ Article 3(2) of the Understanding states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members [of the WTO] recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements.*

Understanding, *supra* note 16, art. 3(2), 33 I.L.M. at 1227 (emphasis added). Article 19(2) further states: “In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.” *Id.* art. 19(2), 33 I.L.M. at 1237.

uncovered practice.¹⁹⁸ In other words, if a unilateral action targets a party that has not acceded to the WTO, an issue not covered by a WTO Agreement, or a trade practice that is not justiciable by the WTO, then Article 23 will not apply. Without Article 23 in the picture, the United States may act unilaterally and unleash the full force of section 301. First, the WTO lacks jurisdiction to hear a case involving a nonsignatory. This branch of the “four corners” defense does not apply to the U.S.-Japanese automobile dispute, since both parties are full signatories to the Uruguay Round Agreements.¹⁹⁹

Second, the United States believes it is not bound by the Understanding “when the Trade Representative considers that an investigation does not involve a Uruguay Round Agreement.”²⁰⁰ As clarified in the President’s Statement of Administrative Action, “[t]he Administration . . . intends to use section 301 to pursue foreign unfair trade barriers that are not covered by [the Uruguay Round] [A]greements.”²⁰¹ The United States would argue under the second prong of the four corners defense that the automobile dispute issues, such as regulation of the replacement part market, access to dealerships, and supplier purchasing relationships, do not, even tangentially, involve WTO covered agreements. Even if Japan could identify a specific WTO provision which covers any of the three automobile dispute issues,²⁰² the United States intends to utilize section 301 in “mixed action” cases where some, but not all, of the issues are covered by a WTO agreement.²⁰³

Third, the WTO does not have jurisdiction to hear certain types of cases, such as anticompetitive practices, that fall outside the organization’s scope of expertise. The President’s Statement of Administrative Action articulates that “[s]hould the Trade Representative elect to investigate the failure by a foreign

¹⁹⁸ See MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1035-36.

¹⁹⁹ See Final Act, *supra* note 11, 33 I.L.M. at 1131.

²⁰⁰ MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1018.

²⁰¹ *Id.* at 1033. Congress provided further evidence of its intent to use § 301 to combat barriers not covered by the WTO Agreements. In the WTO implementing legislation, Congress clearly reserved the right to use § 301 when an issue outside the WTO Agreements was involved. *See id.* at 1027; *see also supra* notes 64-67 and accompanying text (discussing Congress’ role should the WTO act unreasonably in actions against the United States).

²⁰² *See supra* notes 184-89 and accompanying text.

²⁰³ *See* MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1035.

government to take action against systematic, anticompetitive distribution practices, . . . section 301 would remain fully available to challenge such a failure.”²⁰⁴ With respect to these systematic anticompetitive practices, “[t]he United States has expressed the view in the GATT, and will maintain the view in the WTO, that . . . a panel should refrain from opining on complex, unsettled issues of domestic law.”²⁰⁵ In the automobile dispute, the U.S. would argue that at least two of the issues, access to dealerships and supplier purchasing arrangements, fall outside the four corners of the WTO because those issues involve complex issues of domestic competition law. In the context of the automobile dispute, the United States would stand firm in its ability to utilize section 301 sanctions, if desired, arguing that the dispute landed beyond the scope of WTO expertise.

5.2.2. *The Japanese Reply to the “Four Corners” Defense*

Recognizing that “[t]he United States is taking the position that it is entitled to continue invoking . . . [s]ection 301 concerning problems outside the scope of the WTO Agreement,”²⁰⁶ Japan has formulated a response to the “four corners” defense. Concentrating on the targeted market, i.e. the Japanese luxury automobile market, the Japanese argue that “[i]f the *retaliatory* measures fall within the scope of [a] WTO [a]greement, the measures should be recognized as a violation of [a] WTO [a]greement.”²⁰⁷ In other words, if an area of dispute involves issues outside those covered by the WTO agreements, but the WTO covers the *area of targeted retaliation*, then such retaliatory measures would violate the Understanding.²⁰⁸ Retaliation would only be permitted, according to this Japanese view, in a situation where the disputed area was outside the WTO agreements *and* the area targeted for retaliation was also not covered by a WTO

²⁰⁴ *Id.* at 1035. The Statement of Administrative Action cites reciprocal dealing, exclusivity, and tying arrangements as types of anticompetitive actions subject to the unilateral use of § 301. *See id.*

²⁰⁵ *Id.* at 1012. The Statement of Administrative Action admonishes panels for opining on such domestic issues because by doing so, a panel will “risk raising questions about the immediate and continued validity of their reports and may undermine confidence in the dispute settlement process.” *Id.*

²⁰⁶ 1994 JAPANESE TRADE REPORT, *supra* note 164, at 240.

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ *See id.* at 239-40.

agreement.²⁰⁹ In other words, it is not the underlying cause prompting the sanctions which gives the WTO jurisdiction, but rather the nature of the sanctioned target which determines WTO jurisdiction. Targeting automobiles for punitive sanction therefore violates Article 23 regardless of the nature of the underlying U.S. complaint because automobiles are covered under the WTO.

5.2.3. *The "Add To or Diminish" Defense*

The United States could assert the "add to or diminish" affirmative defense should the Appellate Body reject the "four corners" argument. Article 3(2) of the Understanding states the general provision that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."²¹⁰ Similarly, panels and the Appellate Body, in accordance with the general provision of Article 3(2), cannot make findings or recommendations that "add to or diminish the rights and obligations provided in the covered agreements."²¹¹ Therefore, neither the DSB functioning as an institution, nor the Appellate Body serving as adjudicators of specific disputes, may alter the substantive rights and obligations of the parties.²¹² Article 9 of the Final Act directs the WTO

²⁰⁹ *See id.*

²¹⁰ Understanding, *supra* note 16, art. 3(2), 33 I.L.M. at 1227.

²¹¹ *Id.* art. 19(2), 33 I.L.M. at 1237.

²¹² The ambiguity inherent in the "add to or diminish" clause leads to a range of statutory interpretations for which the Appellate Body will have to provide future guidance. First, a literal interpretation concludes that since the clause reads "add to or diminish the rights *and* obligations," the WTO may require the alteration of *both* a right *and* an obligation. Following the literal interpretation, the United States, in order to obtain the protection of Article 19 of the Understanding, would have to argue that any added or diminished U.S. obligation accompanies a commensurately added or diminished U.S. right. For example, the United States would argue that a restriction on the right to use § 301 diminishes its right to use domestic trade laws and increases its obligation to bring all disputes before the WTO.

Second, a looser construction and an easier argument to make could interpret "rights *and* obligations" as rights *or* obligations, thus requiring the United States only to show that a WTO action either adds to or diminishes any U.S. right or obligation. Under this construction, the United States only would have to demonstrate a restriction on domestic trade rights without addressing a commensurately added or diminished obligation or vice versa.

A third construction ties the rights and obligations in question to those "provided in the covered agreements." Thus, the United States, in order to assert the defense, would have to point to a specific right or obligation in the

signatories to act by consensus if a WTO action substantively alters the rights and obligations of signatories.²¹³ Thus, if an Appellate Body decision adds to or diminishes the rights or obligations of a signatory, the affected signatory first must approve such an alteration before the ruling can acquire the force of law.²¹⁴

The United States, in order to protect its unrestricted use of section 301, would argue that any appellate decision constraining the use of section 301 diminishes the substantive rights of the United States in an unacceptable manner by foreclosing access to legitimately adopted domestic trade laws. In joining the WTO, the United States could not possibly have granted the WTO an ability to dictate the scope of its domestic trade laws. Consequently, any restriction on section 301 would be a windfall to Japan in the sense that WTO tinkering with section 301 shifts leverage from the United States to Japan. The United States would argue that when analyzing the section 301 challenge in this manner, the WTO should not undertake to resolve the issue. In response, the Japanese would argue that the “add to or diminish” clause is limited, solely designed to address systematic, repeated instances where a panel or appellate decision either imposes additional obligations or diminishes rights of a substantive nature.

6. THE FUTURE OF THE UNILATERAL PARADIGM: THE RULING ON THE CHALLENGE TO SECTION 301 SANCTIONS

If the function of the Appellate Body is “to act as a kind of ‘Supreme Court’” of the WTO,²¹⁵ then this hypothetical groundbreaking decision, where multilateral resolution triumphs

covered agreement that either is added to or diminished. Such a construction surely will send a defendant scouring through every covered agreement for the golden right or obligation that is added to or diminished by any WTO action.

²¹³ “The WTO shall continue the practice of decision[]making by consensus followed under GATT 1947.” Final Act, *supra* note 11, art. 9(1), 33 I.L.M. at 1148; *see also* MESSAGE FROM THE PRESIDENT, *supra* note 17, at 659 (stating that “there can be no change in U.S. substantive rights and obligations without the agreement of the United States”).

²¹⁴ If the substantive alteration in rights or obligations is profound, such as the prohibition on the use of a domestic legal tool like § 301, it is unlikely that there would be a consensus, as the affected nation is unlikely to repeal voluntarily a national law and in the process sacrifice its sovereignty.

²¹⁵ *GATT/WTO: Chairman Halts Discussions on Appellate Body’s Membership*, 12 Int’l Trade Rep. (BNA) No. 31, at 1310-11 (Aug. 2, 1995).

over unilateral retaliation, might have a John Marshall-like quality to it.²¹⁶ In the words of Justice John Marshall, the Appellate Body essentially should declare that “[i]t is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each.”²¹⁷ Similarly, in the automobile dispute, it is “emphatically the province and duty” of the Appellate Body to say what the WTO law is. When section 301 and Article 23 collide, the WTO must address this collision and resolve it in an unambiguous manner. This section explores the hypothetical ruling, the reasoning behind the Appellate Body’s decision, and the remedies appropriate to redress the violation.

6.1. *The Legal Ruling*

After considering the merits of the challenge to the United States’ use of unilateral sanctions, the Appellate Body must issue a written disposition of the case.²¹⁸ In the hypothetically-litigated automobile dispute, the Appellate Body should rule that (1) the WTO has jurisdiction to hear such a complaint and (2) the use of unilateral sanctions violates the plain language of Article 23 of the Understanding without implicating or affecting the “add to or diminish” clause.

First, the WTO should recognize that the U.S. complaint in the automobile dispute presents a colorable WTO claim. Even if only one of the sub-issues involved — excess regulation of the auto part replacement market — implicates a WTO obligation, benefit, or objective, the WTO should assume jurisdiction under Article

²¹⁶ This momentous Appellate Body decision, which would suppress unilateral action in favor of multilateral resolution, would be similar to John Marshall’s decision in *McCulloch v. Maryland*, 17 U.S. 316, 430 (1819), in that “[w]e are relieved . . . from a repugnancy between a right in one government to pull down what there is an acknowledged right in another government to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve.” By striking down unilateralism in favor of multilateralism, the WTO would send a clear Marshall-like message: the power of a part cannot be allowed to contravene the power of the whole, lest the overarching institution to which all have acceded will collapse. *See id.* at 435-36 (“The difference is that which always exists, and always must exist, between the action of a whole on a part, and the action of a part on the whole. . . .”).

²¹⁷ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²¹⁸ *See Understanding*, *supra* note 16, art. 17(5), 33 I.L.M. at 1236.

23 to hear the dispute and reject the “four corners” defense. After stripping away all legal formalism and political posturing, this battle over jurisdiction digs at the heart of the WTO and asks a basic question: who has the authority to rule? If Article 23 wields any authority, it affirms the multilateral system as the forum of first review. The WTO is free to declare that an issue is outside the scope of its expertise, but only the WTO can make such a determination. A signatory cannot arrest the unanimously approved dispute resolution procedure and aggregate to itself the power to judge the WTO’s paramount position as the forum of first review.

Second, the Appellate Body should rule that the “add to or diminish” clause does not apply to the automobile dispute. The only logical interpretation of “add to or diminish” is to restrict it to the rare situation when a panel or an appellate board repeatedly and systematically subjects a nation to adverse decisions. The clause creates an escape hatch which allows a nation, only in the most extreme situations and after continuous defeat, to refuse to obey a WTO-adopted decision without withdrawing as a signatory. Any other interpretation of the “add to or diminish” clause would frustrate every panel and appellate decision as nations, after losing a case, would invariably argue that the negative decision added to their obligations or diminished their rights.

6.2. *The Policy Reasoning*

The creation of a new global trading entity, such as the WTO, fundamentally alters the functioning of existing institutions and trading rules. Moreover, just as the WTO affects existing trade laws, those same trade laws will shape the evolution and development of the WTO. This interplay between an emerging institution and existing legal structures suggests two basic policy rationales for why the Appellate Body should declare the premature use of unilateral section 301 sanctions as violative of the WTO’s dispute resolution procedure.

First, the emerging WTO dispute resolution process undermines the existing rationale and strategy behind section 301. The world trading system has evolved to the point where unilateral action is largely unnecessary due to the negotiation of comprehensive substantive agreements and the development of a rule-oriented dispute resolution process. Moreover, unilateral action is detrimental to the world trading system in an interdependent

world. Second, the existing legal structure, section 301, may potentially may the world trading system and undermine the effectiveness of the emerging institution, the WTO. The continued premature use of section 301 will emasculate the power of the WTO, an entity whose success will aid in "raising standards of living, ensuring full employment[,] . . . and expanding the production of and trade in goods and services . . ." ²¹⁹ These policy-based reasons justify the Appellate Body striking down section 301 and any other similar unilateral measures.

6.2.1. *The WTO's Effect on Section 301*

The establishment of the WTO's dispute resolution process eliminates the need for section 301 authority. The Understanding addressees both the problems to which section 301 owes its genesis and undermines the fundamental strategy upon which section 301 relies.

6.2.1.1. *Undermining the Origins of Section 301*

The United States should halt its mandatory use of section 301 because the Understanding addresses the concerns and problems which spurred the creation of the statute. The conditions which gave rise to the present-day section 301 were the GATT's painfully slow, ineffective dispute resolution process ²²⁰ and its concomitant inability to combat "the dilatory strategy." ²²¹ These shortcomings in the GATT dispute resolution process motivated Congress to create and subsequently strengthen section 301.

In 1973, the House Ways and Means Committee stated that it was "essential for the United States to be able to act unilaterally in any situation where it [was] *unable* to obtain redress through

²¹⁹ Final Act, *supra* note 11, pmb., 33 I.L.M. at 1144.

²²⁰ One U.S. Senator, frustrated with the pace of not only the GATT dispute resolution mechanism, but also with the entire GATT structure, dubbed the GATT the "Gentleman's Agreement to Talk and Talk." Holmer & Bello, *Savior or Scourge*, *supra* note 23, at 527.

²²¹ The "dilatory strategy" refers to actions taken by a party to delay the GATT dispute resolution process, such as blocking the formation of a panel, refusing the adoption of a report, or avoiding compliance with an order from the panel. See Sykes, *The Strategic Design*, *supra* note 84, at 315-16 (describing delay tactics in the GATT dispute settlement process); see also *supra* notes 126-28 and accompanying text.

the GATT.”²²² Additionally, the House Committee Report accompanying the 1988 amendments to section 301 echoed similar dissatisfaction with GATT, explaining that “[t]he purpose of the [section 301] amendment is to expedite decisions and actions in meritorious section 301 cases Under present law, cases have often continued under discussion for years without a final determination to act or to terminate, *particularly* when GATT proceedings are involved.”²²³ From 1973 to 1988, the drawbacks of GATT provided ample explanation and justification for congressional clamor to adopt tough trade measures to attack the trade practices of other nations.²²⁴

The WTO dispute resolution process will alleviate precisely the congressional concerns that prompted the creation and sharpening of section 301. The Understanding guarantees a party the right to a panel, permits a timely appeal to the Appellate Body, assures the adoption of a final ruling, imposes a rigid timeline for each phase of the dispute process, carefully monitors compliance with decisions, authorizes retaliation for noncompliance, and provides for binding arbitration should monitoring and sanctions fail.²²⁵ Simply put, with the implementation of the WTO’s legalistic, rule-oriented dispute resolution mechanism, the United States will be able to obtain redress without the need for section 301. Therefore, when assessing the legality of unilateral sanctions under Article 23, the Appellate Body should account for this historical reality.

6.2.1.2. *Undermining the Section 301 Strategy*

Not only does the Understanding effectively eliminate the foundation of section 301, but it also undermines the strategic value of section 301. Section 301, according to former officials at the Office of the USTR, “often can be used more effectively when

²²² H.R. REP. NO. 571, 93d Cong., 1st Sess. 67 (1973) (emphasis added).

²²³ H.R. REP. NO. 40, 100th Cong., 1st Sess., pt. 1, at 70-71 (1987) (emphasis added).

²²⁴ See Josh Schein, Comment, *Section 301 and U.S. Trade Law: The Limited Impact of the 1988 Omnibus Trade and Competitiveness Act on American Obligations Under GATT*, PAC. RIM L. & POL’Y J., 105, 129 (1992) (Special Intramural Issue).

²²⁵ See Understanding, *supra* note 17, arts. 6, 17, 20, 21, 22, 33 I.L.M. at 1230-41; discussion *supra* section 3.3.

it is *not* used, but instead credibly threatened.”²²⁶ Just as an inadequate dispute resolution process leads to “the need for unilateral threat strategies to help enforce existing trade agreements,”²²⁷ threat strategies would be unnecessary “if trade agreements afforded cheap, impartial, and expeditious third-party adjudication backed by the coercive authority to induce compliance with the bargain.”²²⁸

The WTO dispute resolution mechanism offers a relatively cheap, clearly impartial, and reasonably expeditious third-party adjudication system, thereby obviating the need for threat strategies like section 301 to enforce trade obligations.²²⁹ Furthermore, “the continued existence of the statutory authority for unilateral action may in fact become counterproductive, as such actions may be perceived as facilitating opportunism while serving no constructive function.”²³⁰ Continued use of aggressively unilateral trade tactics “is likely to be rejected as bullying, pure and simple.”²³¹ Indeed, even maintaining section 301 as a mere option could carry a damaging international perception.²³² In

²²⁶ Bello & Holmer, *Recent Developments*, *supra* note 28, at 70 (emphasis added). In other words, § 301 is a threat strategy; it “works through feints and threats, rather than through formal legal processes.” Fisher & Steinhardt, *supra* note 30, at 578.

²²⁷ Sykes, *The Limited Case*, *supra* note 82, at 289.

²²⁸ *Id.*

²²⁹ Professor Sykes noted prior to the completion of the Uruguay Round that “if the Uruguay Round does produce an effective procedure for third-party dispute resolution, the need for unilateral threat strategies to protect U.S. interests will diminish greatly.” *Id.* at 290.

²³⁰ *Id.* Not only may § 301 use be counterproductive, the statute also may have relevancy problems, as it targets governmental, not private action. See 19 U.S.C. § 2411(a), (b) (1988). This drawback limits the application of § 301 in fundamental ways. For example, while many argue that § 301 can break systematic market barriers in Japan, this argument frequently neglects the fact that private industry, not the government, constructs and maintains many Japanese barriers. Therefore, as one scholar notes: “It does little good to threaten the Japanese government with sanctions if no action by that government would enable the United States to achieve its objectives.” Sykes, *The Limited Case*, *supra* note 82, at 303. That is why in its case against Fuji, Kodak must go to great lengths to tie the Japanese government into Fuji’s market access limiting scheme. See *supra* note 174. Without a connection to government activity, Kodak’s claim cannot be brought under § 301. See *id.*

²³¹ BAYARD & ELLIOTT, *supra* note 3, at 3.

²³² Declaring a unilateral trade war on a trading partner via § 301 “would once again leave the United States isolated in the world . . . [with] Europeans, Latin Americans, and Asians, fearing similar treatment from us in the future

the face of the Understanding and U.S. access to a promising multilateral dispute resolution mechanism, use of section 301, at least as a threat strategy, is no longer necessary, sensible, or valid.²³³

6.2.2. Section 301's Effect on World Trade and the WTO

6.2.2.1. Costs to the World Trading System

With a promising multilateral dispute resolution process in place, the costs of utilizing section 301, in terms of damage to the world trading system, far outweigh the benefits to the United States. Implicit in section 301 use is an assumption that "the U.S. way is the 'fair' way, and that it is up to the rest of the world to follow suit."²³⁴ Pursuing protectionist goals²³⁵ through the use of section 301 and challenging the world to follow suit would produce actual, reputational, and retaliatory costs. The economic ramifications of these three cost categories outweigh any trade liberalizing benefits flowing from section 301.

First, in terms of actual costs, any tariff, quota, or sanction negatively impacts world trade.²³⁶ Unilateral sanctions impose

. . . ." 140 CONG. REC. S6324 (daily ed. May 9, 1995) (statement of Sen. Bradley). This "am I next?" complex will logically motivate U.S. trade partners to rally against the United States.

²³³ The improved WTO dispute resolution procedures, according to two former USTR officials, "further erode the already circumscribed credibility of threats of unilateral action by the United States under [§] 301." Judith H. Bello & Alan F. Holmer, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT'L LAW. 795, 800 (1992) [hereinafter *Internationalization of 301*]. The best role for § 301 in a world where the WTO dispute resolution process reigns supreme is as an investigatory tool or, at most, as "the private sector's insurance policy." *Id.* For a discussion of how to use § 301 in a WTO-consistent manner, see Marc A. Moyer, Comment, *Section 301 of the Omnibus Trade and Competitiveness Act of 1988: A Formidable Weapon in the War Against Economic Espionage*, 15 NW. J. INT'L L. & BUS. 178, 190 (1994) (stating that the overall purpose, historical development, and current statutory language of § 301 make it "a logical choice as a weapon in the fight against economic espionage").

²³⁴ Palmeto, *supra* note 60, at 110.

²³⁵ As even its supporters admit, § 301 can be administered in a protectionist manner. See Holmer & Bello, *Savior or Scourge*, *supra* note 23, at 532.

²³⁶ See Jonathan T. Fried, *Squaring the Circle: Unilateralism, Bilateralism and Multilateralism in U.S. Trade Policy*, 8 B.U. INT'L L.J. 231, 236 (1990) (discussing past U.S. trade actions that were unilateral in nature, often resulting in

a burden on the system of free trade that affects not only the target, but also the instigator of the retaliation. While the detrimental effects on the instigator may not be immediate, an economic backlash in today's interdependent world would surely follow any impediment to free trade, especially if a significant trading partner is implicated.²³⁷

Second, retaliation, if perceived as unjustified, carries a reputational cost.²³⁸ Every action in the international arena either contributes to or detracts from a positive reputation. If the United States retaliates erratically based on its own subjective notions of fair play, its reputation as a reliable trading partner and an economic world leader will falter. Thus, "the mere fear that [s]ection 301 may be used to renege on the bargain may diminish the willingness of other countries to negotiate with the United States,"²³⁹ while leaving other nations wondering whether they are next.²⁴⁰

"managed trade[]" to the detriment of comparative advantage, dynamic efficiency, and consumer welfare"). Not only is there an economic burden associated with unilateral sanctions, but there is also a burden on global trade progress as the discussion and debate over unilateral sanctions inevitably takes center stage, pushing other pressing issues into the background.

²³⁷ Imposition of unilateral sanctions, as demonstrated in the recent automobile dispute, serves as both a punishment to innocent bystanders and as a windfall to arguably undeserving recipients. Innocent bystanders, such as owners and employees of Japanese car dealerships, would be severely affected by the punitive tariffs. See *Witnesses Cite Trade Laws, Fairness in Debate Over Japan Auto Sanctions*, [July-Dec.] Daily Rep. for Executives (BNA) No. 109, at A-26, A-27 (June 7, 1995) (reporting that one owner of a Lexus dealership "predicted the sanctions would force him to lay off 100 workers immediately"). On the other hand, as an example of an arguably undeserved windfall gain, consider that stock prices of the Big Three surged after the trade sanctions against Japanese automobiles were announced. See Bob Davis, *U.S. Launches Trade Offensive Against Japan*, WALL ST. J., May 11, 1995, at A2, A11 ("If the sanctions are put in place over the next six months, each of [the Big Three] could make a dollar or two a share over the next five years. . . .").

²³⁸ Not only is there a reputational cost to the United States from the indiscriminate application of discretionary § 301, but there is also a reputational cost when the United States fails to comply with its own standards. With a great deal of hypocrisy, the United States frequently denounces foreign practices as "unreasonable" while, at the same time, regularly engages in these same "unreasonable" practices. For example, the United States denounced agricultural trade barriers in Europe while imposing strict quotas on dairy products, wheat, cotton, peanuts, and sugar at home. See Palmeto, *supra* note 60, at 110-12.

²³⁹ Sykes, *The Limited Case*, *supra* note 82, at 306.

²⁴⁰ See *supra* note 233.

Finally, and most dauntingly, section 301 action may provoke counterretaliation against the United States.²⁴¹ If misguidedly applied, threats of unilateral retaliation could result in a trade war, especially if used against other economic superpowers.²⁴² Trade wars wreak havoc on the world trading system, affecting consumer prices, credit, and virtually every aspect of the world economy.²⁴³ With section 301 in its arsenal, U.S. trade law “contains the seeds of a major crisis for U.S. and international trade relations.”²⁴⁴

6.2.2.2. *Costs to the WTO*

Unrestrained use of unilateral sanctions could crack the foundation of the WTO as a pillar of free trade. As discussed earlier, nations intent on imposing unilateral sanctions will likely justify unilateral sanctions as targeting issues of a complex nature, outside the scope of the WTO. According to one scholar, section 301 “encompass[es] virtually any trade practice the USTR wishes to attack.”²⁴⁵ With an ability to disguise aggressive unilateralism behind the mask of “complex practices,” unilateral sanctions will become commonplace, thus subverting the WTO’s authority in the area of world trade. Combining a flexible section 301 trade sword with a narrow interpretation of Article 23 will allow nations to circumvent the Understanding under the mantra of “complex practice” and will leave the WTO powerless to shape the future of the global trading system. WTO signatories, however, did not intend to marginalize the power of the WTO after eight years of negotiations and relegate it to an entity whose name sounds prodigious but whose global effect is minuscule.

²⁴¹ See Sykes, *The Strategic Design*, *supra* note 84, at 313.

²⁴² See Bayard, *supra* note 89, at 331. Even if a full fledged trade war does not develop, unilateral retaliation against the Japanese “could threaten the position of the dollar as the international reserve currency. Indeed, Japan is already talking of switching its reserves out of dollars and into deutschmarks.” 141 CONG. REC. S6324 (daily ed. May 9, 1995) (statement of Sen. Bradley).

²⁴³ See Juan P. Morillo, *U.S.-Japanese Trade Dispute*, 25 LAW & POL’Y INT’L BUS. 1205, 1212 (1994) (discussing that both the United States and Japan want to avoid anything approaching a trade war).

²⁴⁴ Fried, *supra* note 236, at 233; see also 141 CONG. REC. S6324 (daily ed. May 9, 1995) (statement of Sen. Bradley) (“Currency markets will react badly. If you think a rate of 80 yen to the dollar is disadvantageous to this country . . . imagine a rate of 75 or even 70.”).

²⁴⁵ Sykes, *The Limited Case*, *supra* note 82, at 306.

Indeed, the United States, as well as every WTO signatory, "must be prepared to live with the international trade rules that it negotiates."²⁴⁶

6.3. *The Remedy*

Because the new dispute settlement process undermines section 301's purpose and strategy and because the potential costs to world trade and the WTO outweigh section 301's benefits, the Appellate Body should sustain a challenge to section 301.²⁴⁷ After declaring that section 301 violates the plain language and intent of the WTO signatories as embodied in Article 23, the Appellate Body must formulate a remedy.²⁴⁸ The range of potential remedies stretches from mere recommendations²⁴⁹ to compensation²⁵⁰ to the authorization of retaliatory sanctions.²⁵¹ For the hypothetically-adjudicated automobile dispute, the Appellate Body's ruling should address a full range of remedies. These remedies include a suggestion as to how the United States can bring section 301 into compliance with the Understanding, a recommendation that the parties arrange appropriate compensation, and an authorization of cross-sectorial retaliation if the parties cannot agree on appropriate compensation.

It is important to note that no decision by the Appellate Body or any WTO panel has the power to infringe on U.S. sovereign-

²⁴⁶ Bello & Holmer, *Internationalization of 301*, *supra* note 233, at 802.

²⁴⁷ Similarly, because "there is less of an argument for aggressive unilateralism" and because the United States "could face more serious consequences in the future than it did in the past," Bayard and Elliott recommend "that the United States move from aggressive unilateralism to aggressive multilateralism, using the improved dispute settlement mechanism to enforce the WTO rules." BAYARD & ELLIOTT, *supra* note 3, at 3.

²⁴⁸ See Understanding, *supra* note 16, art. 19(1), 33 I.L.M. at 1237.

²⁴⁹ Upon finding a violation of a covered agreement, the Appellate Body "shall recommend that the member concerned bring the measure into conformity with that agreement." See *id.*

²⁵⁰ "The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure" *Id.* art. 3(7), at 1227.

²⁵¹ "The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis" *Id.*

ty²⁵² or change its domestic law.²⁵³ That power lies solely with the nation's domestic institution responsible for creating the law in the first place — the Congress, the President, the courts, or the administrative agencies charged with regulation.²⁵⁴ The Appellate Body may only “recommend that the [violating] country begin observing its obligations. . . . It is then up to the disputing countries to decide how they will settle their differenc-

²⁵² The WTO's inability to encroach upon the sovereignty of the United States pervaded the congressional committee and floor debates over the Uruguay Round Agreements' implementing legislation. As one Senator stated:

[s]imply put, the World Trade Organization cannot change U.S. law. . . . A U.S. law can only be changed if the U.S. Congress votes to change the law. A final safeguard to U.S. sovereignty is that if at any time the United States becomes dissatisfied, it can withdraw from the [WTO] after giving 6 months' notice. That is a pretty good escape hatch. In the event the WTO becomes arbitrary or capricious, we get out.

140 CONG. REC. S15,275 (daily ed. Dec. 1, 1994) (statement of Sen. Domenici). In light of this concern for sovereignty, the Clinton Administration promised to introduce legislation which would establish a comprehensive WTO review process. See 140 CONG. REC. S15,341 (daily ed. Dec. 1, 1994) (a letter from USTR Kantor to Senator Robert Dole stating that the Clinton Administration would support legislation to establish a WTO Dispute Settlement Review Commission to review final reports adverse to the United States).

²⁵³ The President's Statement of Administrative Action emphasizes the sovereignty of U.S. law in declaring that “the new WTO dispute settlement system does not give panels any power to order the United States . . . to change [its] laws.” MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1008. Further, the WTO implementing legislation states that “[n]o provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect.” Uruguay Round Agreements Act § 102(a)(1), 108 Stat. at 4815. The implementing legislation also states that “[n]othing in this Act shall be construed . . . to limit any authority conferred under any [trade] law of the United States, including section 301 . . .” *Id.* § 102(a)(2)(B).

²⁵⁴ The Statement of Administrative Action states that

[r]eports issued by panels or the Appellate Body under the Understanding have no binding effect under the law of the United States If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.

MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1032. “[T]he Understanding leaves to the discretion of the United States any change in federal or state law and the manner in which any such change may be implemented — whether through the adoption of legislation, a change in regulation, judicial action, or otherwise.” *Id.* at 1032-33.

es.²⁵⁵

Although the Appellate Body cannot infringe upon national sovereignty, nor alter the language, implementation, or interpretation of domestic law, it is by no means powerless. The Appellate Body may declare a domestic law to be in conflict with the WTO, recommend how the violating nation might resolve the conflict, suggest how the parties might structure an appropriate compensation arrangement if damages have resulted, and, most dramatically, authorize the imposition of retaliatory sanctions by the harmed nation upon the trade violator.²⁵⁶ Thus, although the WTO does not have the ability to force domestic legal change, its ability to pressure a violator to adjust its ways by threat of WTO-authorized sanctions²⁵⁷ and international condemnation denotes significant power. In sum, while nothing in the creation of the Understanding prohibits the use of section 301, "[t]he United States [or any other violator] would simply be more likely to be required to pay for doing so."²⁵⁸

6.3.1. *The Suggestion for Compliance*

As stated in the Understanding:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could

²⁵⁵ *Id.* at 1008. Thus, despite the establishment and celebration of a legalist dispute settlement procedure, much of the ultimate dispute solution depends on good old-fashioned bargaining power politics. Although the Uruguay Round produced a dispute settlement procedure that channels disputes along certain legalist avenues, this procedure cannot change a world where economic powerhouses, if they so choose, can threaten and browbeat trading partners into submission.

²⁵⁶ *See id.* at 1015-16.

²⁵⁷ With regard to the power of the WTO, one commentator stated that the "WTO could force Congress into making a cruel choice: either alter or repeal a law determined to be WTO-illegal or face perpetual trade sanctions against any U.S. industry the winning country chooses." *See* 140 CONG. REC. S15,143 (daily ed. Nov. 30, 1994) (a letter from Ralph Nader & Lori Wallach to USTR Mickey Kantor).

²⁵⁸ Patterson & Patterson, *supra* note 17, at 53.

implement the recommendations.²⁵⁹

The Appellate Body is not required to suggest ways in which the United States can bring section 301 into conformity with Article 23. The goal of dispute resolution, however, “is to secure a positive solution [that is] mutually acceptable to the parties”²⁶⁰ Accordingly, in the automobile dispute, the Appellate Body would have made these suggestions, affirmatively stating how section 301 can be implemented in a manner consistent with the Understanding.

The language of section 301 is not in direct conflict with Article 23, or any other provision of the Understanding for that matter, because when the USTR initiates a section 301 investigation in a case involving a WTO trade agreement, section 303(a)(2) requires the USTR to follow the WTO dispute resolution process.²⁶¹ Therefore, an Appellate Body’s recommendation on how the United States could utilize section 301 in a manner consistent with the Understanding is simple: follow your own rules. If the United States abides by the letter of section 301, it will not threaten unilateral sanctions, but rather will route all grievances regarding a trade agreement through the WTO’s dispute resolution mechanism.²⁶²

²⁵⁹ Understanding, *supra* note 16, art. 19(1), 33 I.L.M. at 1237 (citations omitted).

²⁶⁰ *Id.* art. 3(7), 33 I.L.M. at 1227.

²⁶¹ See MESSAGE FROM THE PRESIDENT, *supra* note 17, at 1018.

²⁶² In analyzing the effect of the Understanding upon § 301, some commentators conclude that the Understanding “complements” or “internationalizes” § 301. In other words, “by providing dramatically more effective international enforcement against unfair traders,” the Understanding will deter GATT offenses, or “at least restore[] a reasonable balance of rights and obligations.” Bello & Holmer, *Internationalization of 301*, *supra* note 233, at 799. Under the “internationalization of 301” theory, § 301 is consistent with the Understanding. Indeed, § 301 stands side-by-side with the Understanding “as the complement in U.S. domestic law to international legal action in the GATT under the dispute settlement procedures.” *Id.* at 800. If the Understanding and § 301 complement each other in a coterminous manner, then § 301 should never be used prematurely and, thus, will never run afoul of the WTO. See Jean H. Grier, *Section 301 and Its Future Use with the Uruguay Round Agreements*, in THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 1994 (PLI Corp. L. & Practice Course Handbook Series No. 863, 1994) available in WESTLAW, PLI Database (stating that the Understanding “complements section 301” and “internationalizes section 301”).

A problem arises when the United States attempts to undermine Article 23 via the “four corners” jurisdictional defense or the “add to or diminish” affirmative defense.²⁶³ Therefore, in addition to demanding that the United States follow its own rules, the Appellate Body must reaffirm a broad interpretation of its jurisdictional grant under Article 23. According to its plain meaning and the intent of the signatories, Article 23 forecloses unilateral action.²⁶⁴ Aside from the plain language of the Article and the intent of the signatories, the historical undermining of section 301’s purpose and strategy, as well as the need for a policy in the best interests of world trade and the WTO, support a ruling that premature use of section 301 violates Article 23.

The United States hypothetically may also present a “mixed motive” case, where some U.S. justification for section 301 falls arguably outside the WTO. In such a scenario, the WTO should construe strictly the allegations and find that if one U.S. complaint involves a WTO covered agreement, even incidentally, then the Appellate Body should rule that Article 23 will govern. The United States thereby would bind itself to the WTO dispute resolution requirements in such cases.

The problem with section 301, therefore, is not its language, drafting, or procedural dictates, but rather the way the United States utilizes it. In order to conform with Article 23 and the entire Understanding, section 301 need not be amended in any way. The United States simply must construe Article 23 according to its plain meaning, the intent of the signatories, and in light of policy considerations which are in the best interest of world trade. Utilizing section 301 in strict accordance with Article 23 and the WTO dispute resolution procedures does not require further amendment, only sound application.

6.3.2. *Compensation and Retaliation: The Issue of Damages*

In the hypothetical automobile dispute ruling, after suggesting how to utilize section 301 in a manner consistent with the Understanding, the Appellate Body must address the issue of

²⁶³ See discussion *supra* section 5.2.1 for an explanation of the “four corners” jurisdictional defense. See discussion *supra* section 5.2.3 for an explanation of the “add to or diminish” affirmative defense.

²⁶⁴ See discussion *supra* section 5.1.2.

damages.²⁶⁵ As seen in the automobile dispute, section 301 sanctions could produce billions of dollars in potential damages.²⁶⁶ With such high stakes, no Appellate Body ruling on a section 301 challenge can ignore the damages issue.

In its opinion, the Appellate Body should order appropriate compensation to the damaged party.²⁶⁷ If the parties cannot agree upon proper compensation, the Appellate Body should authorize cross-sectoral retaliation in proportion to the damages incurred. This retaliation should automatically follow a failure to satisfactorily compensate the damaged party within a strict, but reasonable amount of time. The Appellate Body should provide great latitude to the damaged party when determining how to maximize the effect of retaliation, leaving the damaged nation with the right to retaliate across economic sectors.²⁶⁸ The only limit on retaliation should be proportionality.

7. CONCLUSION

The GATT, the WTO, and world trade have successfully navigated the transition to an indisputably interdependent world. In this globalized world, our hopes of achieving maximum economic growth and prosperity rest with the pursuit of noble ideals — cooperation, mutual trust, and openness. When trade arguments surface, nations must make a fundamental choice either to solve these disputes unilaterally through self-help remedies or to solve them multilaterally through a neutral, third party forum. Before the historic and monumental Uruguay Round accords,

²⁶⁵ This analysis assumes that damages have accumulated since the United States imposed § 301.

²⁶⁶ See *supra* note 1 and accompanying text.

²⁶⁷ Damages would be aimed at making the Japanese whole. With this goal in mind, damages would “consist only of profits lost from cars that the Japanese could not sell elsewhere in the period between” when the sanctions take effect and when the WTO adopts a final Appellate Body decision. G. Richard Shell, *Kantor’s “Sue Me” Diplomacy*, N.Y. TIMES, June 16, 1995, at A27. A detailed discussion of damages is outside the scope of this Comment.

²⁶⁸ The notion of targeting across economic sectors is designed to maximize the retaliatory effect. Thus, if the dispute occurs over trade in goods, the retaliating nation could not only retaliate in the specific area of goods, but also in the areas of intellectual property, financial services, or agriculture. As USTR Kantor stated: “Initially you are confined to the sector [of the dispute], . . . but then you can cross retaliate,” especially “if there was not enough trade in the sector to cover whatever the supposed damages were.” *Senate Commerce Hearing*, *supra* note 163, at 31.

there was no real choice in dispute resolution; the GATT was ineffective and the internationally dreaded section 301 followed. In a truly remarkable display of international cooperation, however, trade liberalization triumphed over protectionism in the Uruguay Round Agreements. The establishment of the WTO and its legalist, rule-oriented dispute resolution process embodied the signatories' hopes for multilateral dispute resolution.

These are formidable times for the WTO and the world trading system, for the post-Uruguay Round world is shifting and unsettled. At the first available opportunity, the Appellate Body of the WTO should reinforce the multilateral trading system by ruling that any nation which imposes unilateral sanctions will violate Article 23 of the Understanding. The Appellate Body should interpret the Understanding according to the plain meaning and intent of the signatories as enlightened by a policy rationale emphasizing the best interests of world trade. Pursuant to such an analysis, the Appellate Body would have sustained the Japanese challenge to section 301 sanctions in the automobile dispute under Article 23, despite the United States' "four corners" and "add to or diminish" defenses. As a remedy, the Appellate Body could have suggested appropriate compensation to the Japanese and authorized Japanese cross-sectoral retaliation against the United States.

Such a bold ruling by the Appellate Body would make a powerful statement by openly declaring that in today's interdependent world it is the province of the WTO to interpret the Uruguay Round Agreements, by declaring what the law is, and by holding the signatories to their voluntary commitments. While such a courageous opinion would entail some loss of national sovereignty, the economic benefits of higher living standards, increased employment, and efficient trade far outweigh the costs to sovereignty.

In a world where the sphere of international law is constantly growing as the sphere of domestic law is continuously shrinking, it might be the destiny of the Appellate Body to become the "John Marshall of international law" and elevate the authority of the whole international system over the power of one sovereign actor. Until the WTO rules as such, unilateral action will continue to arise, frustrating efforts to maximize the standard of living for all citizens of the world.