University of Miami Law School
Institutional Repository

University of Miami Inter-American Law Review

7-1-1995

Regional Integration and the DisputeResolution System of the World Trade Organization After the Uruguay Round: A Proposal for the Future

Uri Litvak

Follow this and additional works at: http://repository.law.miami.edu/umialr

 Part of the International Trade Commons

Recommended Citation

Uri Litvak, *Regional Integration and the DisputeResolution System of the World Trade Organization After the Uruguay Round: A Proposal for the Future*, 26 U. Miami Inter-Am. L. Rev. 561 (1995)
Available at: http://repository.law.miami.edu/umialr/vol26/iss3/6

This Comment is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENT

REGIONAL INTEGRATION AND THE DISPUTE RESOLUTION SYSTEM OF THE WORLD TRADE ORGANIZATION AFTER THE URUGUAY ROUND: A PROPOSAL FOR THE FUTURE

> The world trading system must have a means of accommodating regional economic integration schemes within the multilateral framework, however contradictory the two systems appear to be.[1]

I. INTRODUCTION

Regional trade agreements are emerging at a rapid pace worldwide.[2] One impetus for this growth has been the expansion and strengthening of the European Union (EU) in the past few decades.[3] The United States' (U.S.) express purpose in completing the North American Free Trade Agreement (NAFTA)[4] was to improve export and investment opportunities for Ameri-

---

1. Jan Tumlir, *Protectionism: Trade Policy in Democratic Societies*, 1985 AM. ENTER. INST. 228, *quoted in* Asif H. Qureshi, *The Role of GATT in the Management of Trade Blocs: An Enforcement Perspective*, J. WORLD TRADE, June 1993, at 101.

2. This comment will focus on the North American Free Trade Agreement (NAFTA) and the European Union (EU). Examples of other regional trade agreements include the Central American Common Market; the Caribbean Community and the Organization of Eastern Caribbean States; Treaty Establishing a Common Market or "Treaty of Asunción;" Andean Common Market; Latin American Integration Association; ASEAN Free Trade Area; Arab Common Market; Economic Cooperation Organization; African Economic Community and The South African Customs Union.

For a comprehensive list of worldwide regional trade agreements and a detailed discussion of their emergence, see Joseph L. Brand, *The New World Order of Regional Trading Blocs*, 8 AM. U. J. INT'L L. & POL'Y 155 (1992). *See also* Heinz G. Preusse, *Regional Integration in the Nineties, Stimulation or Threat to the Multilateral Trading System?*, J. WORLD TRADE, Aug. 1994, at 147. Preusse argues that "contrary to the last wave of regional bloc-building in the 1960s, which has proved to be a transitory phenomenon, this new tide is widely believed to become a lasting phenomenon." He cites as one example the discussions at a 1992 World Bank Conference on "New Dimensions in Regional Integration." *Id.* at n.1.

3. The Treaty on European Union and Final Act (Maastricht Treaty), Feb. 7, 1992, 31 I.L.M. 247. The Treaty established the EU; its goals are political and economic union including a single currency by 1999. Three new members, Austria, Finland, and Sweden joined the EU on January 1, 1995. *See generally* Charles Goldsmith, *EU Decision-Making Process Could Drag Out Conference*, WALL ST. J. EURO., June 6, 1995, at 2; John Arrowsmith, *Economic & Monetary Union in a Multi-tier Europe*, 76 NAT'L INST. ECON. REV., May 1, 1995, *available in* WESTLAW, ALLNEWS database; Rick Atkinson & John Pomfret, *East Looks to NATO to Forge Links to West Series*, WASH. POST, July 6, 1995, at A1; Wilbur G. Landrey, *Danes Vote "Yes" in Referendum on European Unity Series*, ST. PETERSBURG TIMES, May 19, 1993, at 2A.

4. North American Free Trade Agreement (NAFTA), Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (entered into force Jan. 1, 1994). The formation of NAFTA was viewed by many as "a turning point in international trade relations confirming the shift toward regional blocs." Preusse, *supra* note 2, at 148 n.2.

can business enterprises.[5] The U.S., however, also had a hidden agenda: to respond to developments involving the EU.[6]

When Europe moved towards a single European market in the 1980s, much of the world became concerned that the European Community (EC), now known as the European Union, would become a protectionist bloc, a "Fortress Europe."[7] There was also concern that the EU would be less likely to engage in multilateral trade liberalization under the General Agreement on Tariffs and Trade (GATT).[8] Similarly, after the successful completion of the NAFTA, and the corresponding increase in enthusiasm for the Enterprise for Americas Initiative, countries outside the region began to suspect that "U.S. interest in regional trade initiatives reflected a growing disenchantment with ongoing multilateral negotiations under the auspices of the GATT."[9]

Since the GATT's formation, there has been considerable debate as to whether regional integration promotes or hinders free trade.[10] Some commentators have expressed concern that regional protectionism could expand globally and eventually result in world-wide economic warfare,[11] or at least undermine

---

5. *See* Frederick M. Abbott, *NAFTA and the Future of United States — European Community Trade Relations: The Consequences of Asymmetry in an Emerging Era of Regionalism*, 16 HASTINGS INT'L & COMP. L. REV. 489 (1993).

6. *Id.*

7. *See* Preusse, *supra* note 2, at 148 n.5. Preusse notes that Mexican President Salinas pushed NAFTA further after a visit to Europe which "changed [his] views on the reliability of European free trade proclamations." *Id.*

8. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948) [hereinafter GATT 1947]. The GATT 1947 was replaced during the Uruguay Round of multilateral trade negotiations by what is now referred to as the GATT 1994. *See* General Agreement on Tariffs and Trade 1994, 33 I.L.M. 29. [hereinafter GATT 1994]. The GATT 1994 is now subsumed by the World Trade Organization (WTO). For a thorough discussion of this change, as well as the other monumental changes in the organizational structure of the GATT/WTO, see JEFFREY J. SCHOTT, THE URUGUAY ROUND: AN ASSESSMENT (1994); Peter L.H. Van den Bossch, *The Establishment of the World Trade Organization: The Dawn of a New Era in International Trade*, 1 MAASTRICHT J. EURO. & COMP. L. 396 (1994).

9. GARY CLYDE HUFBAUER & JEFFERY J. SCHOTT, WESTERN HEMISPHERE ECONOMIC INTERGRATION 159 (1994).

10. *See* John McMillan, *Does Regional Integration Foster Open Trade? Economic Theory and GATT's Article XXIV*, *in* REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 292 (Kym Anderson & Richard Blackhurst eds., 1993). For an earlier discussion of this issue, see generally PIERRE LORTIE, ECONOMIC INTERGRATION AND THE LAW OF GATT (1975).

11. *See* Brand, *supra* note 2, at 155, 169; Qureshi, *supra* note 1, at 101. *See also Panel Discussion, NAFTA-EFTA: Any Role for NATO?*, 14 N. ILL. U. L. REV.

the progress that has been made in the context of the GATT.[12] While most scholars reject the prophecy of world-wide economic warfare, this debate suggests that in the new era of regionalism, law and legal institutions must play a critical role in international affairs, specifically with regard to the settlement of intergovernmental trade disputes.[13]

505, 530 (1994). One member of the panel, Professor Robert L. McGeorge argued: "I see the possibility that we will have four or five major blocs that are less interdependent with each other, that are more hostile in terms of economic rivalries, and again I look back at the interwar period and I see the same thing possibly happening." *Id.*

For a history of the breakdown of the international trade system during the inter-war period which led to World War II, see GILBERT R. WINHAM, THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS 25-42 (1992). Another author has argued:

> Bluntly put, a series of regional trading blocs would be a recipe for "RIBS," that is, resentment, inefficiency, bureaucracy, and stupid signals. Resentment would be spawned among outsiders. Inefficiency would result from the fragmentation of markets, creating more uncertainty for businesses that operate on a global basis. Bureaucracy would increase because governments and businesses would feel obligated to discover whether countries or blocs had discriminatory policies that affected them. Finally, more regional blocs would send stupid, or at least silly, signals to developing country friends who are proponents of market-oriented solutions and multi-lateralism.

C. Michael Aho, *A Recipe for RIBS — Resentment, Inefficiency, Bureaucracy, and Stupid Signals, in* THE GROWTH OF REGIONAL TRADING BLOCS IN THE GLOBAL ECONOMY 22, 24 (Richard S. Belous & Rebecca S. Hartley eds., 1990).

12. *See* RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, THE UNITED STATES IN THE NEW GLOBAL ECONOMY: A RALLIER OF NATIONS 31 (1992). The committee observed that "U.S. focus on regional economic arrangements, the European Community's progress toward achieving a single regional market, and Japan's increasing investment in Asia have fostered fears that the three major economic powers will devote increased energy to developing integrated regional trading arrangements, at the expense of GATT." *See also Panel Discussion, supra* note 11, at 529-530. One member of the panel, Professor Robert L. McGeorge argued:

> There is an uneasy coexistence in GATT's multilateral system between regional trade agreements and the multilateral trading system . . . . [W]e are at an equilibrium stage, but I think there is a danger that if we start to govern more of our trading relations with regional trade agreements, we upset that balance and we endanger that multilateral system.

Id.; see also GILBERT R. WINHAM, THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS 119 (1992) ("Prima facie, regional groups are a threat to the GATT because they compromise universality and the non-discriminatory treatment of traded products."). *Id.*

13. *See* KEVIN FEATHERSTONE & ROY H. GINSBURG, THE UNITED STATES AND EUROPEAN COMMUNITY IN THE 1990'S 117 (1993). *See also* Preusse, *supra* note 2, at 159. Preusse concludes that "[w]hile traditional trade theory emphasizes the discrimi-

Unlike general international law, which is founded on the concept of state sovereignty, international economic law is based upon the concept of economic interdependence.[14] The GATT has been the forum for managing this interdependence since World War II.[15] The GATT has played a central role in the evolution of international economic law, particularly in the area of intergovernmental trade dispute resolution.[16]

Some have argued that instead of pursuing trade liberalization by way of multilateralism within the World Trade Organization (WTO),[17] that the United States' interests would be best served by focusing on bilateral agreements with other nations outside the WTO context.[18] This argument stems from the misconception that regional integration and the evolution of the mulitilateral trading system are mutually exclusive; that is, if the regional integration agreements (RIAs) continue to widen

---

natory character of regionalization and points out the potential threat for the multilateral trading system, new theoretical and empirical work on the dynamic effects of economic integration supports a more positive view of regional trading arrangements." In their assessment of a potential Western Hemisphere Free Trade Agreement, Professors Hufbauer and Schott concluded that regional economic integration "will complement and reinforce the objectives of the GATT system and will not promote the devolution of the world trading system into competing blocs." HUFBAUER & SCHOTT, *supra* note 9, at 170 (1994).

14. *See* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 2, 1241 (1986) (The problem of international economic law today is largely a problem of managing interdependence.). *See generally* ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977).

15. *See generally* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL SYSTEM 4 (1985) (The GATT is the only system which "provides in legal form a framework of rules and procedures governing international . . . trade relations and which emobodies legal rights and obligations between its member countries."). *Id.*

16. *Id.*; ATLANTIC COUNCIL OF THE UNITED STATES, GATT PLUS — A PROPOSAL FOR TRADE REFORM 5 (1976) (The GATT is presently the only decision-making body of global scope dealing with international trade problems.); LONG, *supra* note 15, at 5 ("[T]he GATT is at the same time a legal framework for the conduct of trade relations between its member countries, a forum for trade negotiations and for the adaptation of its legal framework, and an organ for conciliation and settlement of disputes."). *Id.*

17. The most recent round of global trade negotiations, known as the Uruguay Round of Multilateral Trade Negotiations, concluded with 120 nations signing the treaty creating the WTO. General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994).

18. *See, e.g.*, Jeffrey J. Schott, *More Free Trade Areas?, in* FREE TRADE AREAS AND U.S. TRADE POLICY 1 (Jeffrey J. Schott ed., 1989).

and deepen it will mean the demise of the multilateral trading system embodied in the WTO.[19] However, this comment argues that it is essential for RIAs to emerge within the framework of the world trading system.[20]

Part II of this comment traces the historical development of the GATT/WTO legal system and the underlying philosophical debate that shaped the system's evolution over the past four decades. Part III discusses the WTO's legal system that emerged after the Uruguay Round. Part IV discusses the uneasy relationship between RIAs and Article XXIV of the GATT and makes some suggestions for revisions to Article XXIV.

Part V of this comment argues that the further expansion of RIAs and the greater liberalization of world trade may be entirely compatible, even complimentary. It further argues that the WTO must take a new approach to the management and resolution of disputes;[21] it must adapt its legal system to account for growing world-wide inter-regional relationships.

Part V then proposes a model of conflict management and dispute resolution for the future which may better adapt to global regionalism. This comment uses the relationship between the NAFTA nations and the EU as a model for the proposed theoretical framework. The foundational mechanisms embodied in the NAFTA-EU model may then serve as a basis for a WTO legal system that manages and resolves conflicts between the multilateral entities formed by the RIAs (e.g., the EU and

---

19. *See, e.g.*, Aho, *supra* note 11, at 24 ("Discriminatory [RIAs] are not building blocks that can be stacked to create a stable multinational trading system. No one could put them all together."). *Id.*

20. For purposes of this article, an RIA is a regional trade agreement which espouses internal trade liberalization. RIAs may include free trade areas, customs unions, common markets, and economic unions. *See* Brand, *supra* note 2. For an introduction to the theories of international economic integration and the diferrences between the various regional integration schemes, see generally MIROSLAV N. JOVANOVIC, INTERNATIONAL ECONOMIC INTEGRATION (1992).

21. One article posed the following questions:

1. "[I]s the General Agreement on Tariffs and Trade [GATT], in so far as its enforcement apparatus is concerned, premised merely on the notion of the individual nation state, or is it equipped to deal with groups of States as well?"

2. Does "the new trading order contemplated under the Uruguay Round [take] cognizance of trade blocs as subjects of that order?"

3. "[How] may the blocs be reined effectively to order[?]"

Qureshi, *supra* note 1, at 101. This comment answers the first two queries in the negative and then suggests an answer to the third.

NAFTA) rather than individual member states. This comment further argues that regional integration may result in the creation of about ten regional entities with institutional power, or at least uniform external trade policies. These regional entities would comprise the membership of the WTO, resulting in an organization empowered to implement full trade liberalization.[22]

II. THE EVOLUTION OF DISPUTE RESOLUTION IN THE GATT[23]

A. *Introduction*

The current system of economic interdependence originated in the completion of the Bretton Woods System. The Bretton Woods System includes the International Monetary Fund (IMF), the World Bank, and the GATT.[24] Until the completion of the Uruguay Round, the treaty comprising the GATT had never

---

22. The envisioned WTO framework will not force the creation of RIAs, rather it will adapt to their existence. Within the proposed theoretical framework, there may be nation-states that have not become members of any RIA, yet are still members of the WTO. It is unlikely, however, that too many of these unaffiliated nation-states will remain. As one author puts it, "regionalization is increasingly seen as inevitable because existing arrangements are threatening to separate non-members from the integrated markets." Preusse, *supra* note 2, at 149. This comment's proposed model envisions that RIA members will be able to coexist with any remaining nation-states within the context of the WTO.

23. The ensuing discussion of the development of the GATT legal system is essential, 1) to put into perspective how much the current dispute resolution mechanism has improved from a legal perspective, compared to the DRMs of the past, and 2) to demonstrate that despite the system's substantial evolution over the past forty years, the GATT has never adapted to the unique problems that RIAs pose to the world trading order.

24. The "Bretton Woods System" is a group of institutions and multilateral agreements which are "[a]t the core of contemporary international regulation of economic relations." JACKSON & DAVEY, *supra* note 14, at 281. In July of 1944, the leading nations of the world gathered in Bretton Woods, New Hampshire to reckon with the economic lessons of World War II and the inter-war period. ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 4-8 (1975). The key lesson was that "the policy of trade restriction and discrimination had once and for all been proved wrong." *Id.* At Bretton Woods, the world trading community sought to implement global institutional reform directed at preventing the use of trade restriction and discrimination. *Id.* While the Bretton Woods System does not technically include the GATT, most authors include it. *See* JACKSON & DAVEY, *supra* note 14, at 2. *See also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989); EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE U.S. AND THE EUROPEAN COMMUNITY (1986); LONG, *supra* note 15.

come into force.[25] The GATT was applied by way of a 1947 "Protocol of Provisional Application"[26] which developed into the strongest and most important multilateral economic treaty in history[27] due to the number of contracting parties[28] and the volume of trade regulated.[29]

The GATT was never intended to have institutional power.[30] It was meant to be one trade agreement within the context of the International Trade Organization (ITO) Charter.[31] When the ITO failed to come into existence, the GATT was forced to fill the institutional role originally held for the ITO.[32] This, however, was no easy task because the GATT lacked institutional and constitutional foundations.[33] As a result, the GATT began to develop a number of flaws, many of which persisted throughout its forty-five year existence.[34] Yet, the GATT developed into an international organization[35] serving as a forum for

---

25. *See* JACKSON, *supra* note 15, at 1.

26. *Id.*

27. *See* Miquel Montañà I Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 109 (1993).

28. On April 15, 1994, in Marrakesh, Morocco, more than 120 parties signed the Uruguay Round's Final Act, which embodies the WTO. FIN. POST, Apr. 15, 1994, at 3. The implementation of the various trade agreements concluded in the Final Act is expected to generate $240 million in new economic activity worldwide. *Id.*

29. Four-fifths of all world trade took place within the GATT. LONG, *supra* note 15, at 6.

30. LONG, *supra* note 15, at 44. When it first came into being the General Agreement in no way entailed, nor even implied, the creation of a complex international organization. The "CONTRACTING PARTIES" (or member states acting jointly under the guise of the relevant GATT articles) were the only semi-institutional bodies envisioned when the General Agreement at tha time. *Id.* at 45. *See also* GILBERT R. WINHAM, THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS 43-44 (1992).

31. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 43 (1969); SCHOTT, THE URUGUAY ROUND: AN ASSESSMENT, *supra* note 8, at 133 (The GATT was originally crafted as a reciprocal trade agreement that would eventually be subsumed by the charter of the International Trade Organization).

32. LONG, *supra* note 15, at 11 ("With the failure of the Havana Charter, the General Agreement stood on its own as an independent legal instrument.") *Id.*; SCHOTT, *supra* note 8, at 133 (Because the ITO was never ratified, the GATT has served in its place ever since).

33. SCHOTT, *supra* note 8, at 50-51.

34. A more elaborate discussion of these flaws appears in part II.C. For additional discussion, see John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21, 32 (1980).

35. While some authors have argued that the GATT is not an organization, Professor Jackson, the preeminent scholar in this field, has stated, "look at what the GATT is, what it is doing, and how it goes about its work and I say this is an

multilateral trade negotiations, a dispute settlement body, and the legal framework for the trade relations of its contracting parties.[36]

The procedures established under the GATT for resolving disputes between member nations were known collectively as the Dispute Resolution Mechanism (DRM). The GATT DRM was highly successful in its early years due to the homogeneity of the GATT's initial contracting parties and their support of the GATT rules.[37] As years passed, the membership increased and the original coherence of the post-war years began to dissipate.[38] As a result, decision making became much more cumbersome as parties' contradictory interests came to the forefront.[39] Moreover, parties would often ignore a particular rule because the GATT rules were so difficult to change.[40]

Parties sometimes permitted violations either because the violation caused a relatively small impact on the system or because of a desire to show tolerance toward a developing party.[41] At other times, it was simply impractical to enforce an adverse ruling against a party that enjoyed disproportionate economic or political power.[42] These enforcement aspects led to a debate over the proper method to resolve inter-governmental trade disputes regarding the application or interpretation of GATT rules as well as the general role of law in international trade relations.

---

organization." John H. Jackson, *GATT and Recent International Trade Problems*, 11 MD. J. INT'L L. & TRADE 1, 8 (1987); *See also* Montañà I Mora, *supra* note 27, at 107-108.

36. *See* LONG, *supra* note 15, at 5.

37. Montañà I Mora, *supra* note 27, at 108.

38. *Id.*

39. *Id.*; ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 12 (1993) (The change in the composition of GATT membership and the corresponding change in policy agenda, produced a higher level of conflict which caused a sharp decline in the status of GATT law).

40. *See* JACKSON & DAVEY, *supra* note 14, at 17.

41. *See* Montañà I Mora, *supra* note 27, at 109.

42. JACKSON & DAVEY, *supra* note 14, at 758. One example of this was the GATT waiver of United States agricultural import controls in 1955 which was an apparent effort to bring "law into conformity with practice," that is to eliminate any possible conflict between U.S. domestic law obligations and its obligations under the GATT. *Id.*, *citing* 3 BISD 1955. However, "it was rather clear to all concerned in 1955 that had the waiver not been granted the United States would have continued its practice anyway." *Id.*

B. *The Philosophical Debate: Legalism Versus Pragmatism*

Two conflicting viewpoints emerged in the debate over the GATT DRM and the role of law in the system.[43] On the one hand, the "legalists" argued that the system should be more judicial, centering on adjudication of disputes. They defended a rule-oriented approach in the conduct of international trade relations, arguing that such an approach would promote more precise decisions on the merits of disputes and more effective implementation of decisions.[44]

On the other hand, those more skeptical of rules, the "pragmatists," argued that the system should be used only to facilitate negotiated settlements of trade disputes.[45] They concentrated on the process of consensus and compromise within the general framework of rules which the GATT provided, although the compromises did not have to be technically in accordance with GATT "law." In the 1960s and 1970s, the decline in the use of the GATT system reflected the influence of the pragmatists on leading GATT officials and parties during that time.[46]

In dispute resolution, there is a dichotomy between the power-oriented, anti-legalistic approach, which is based on "settlement by negotiation and agreement with reference (explicitly or implicitly) to the relative power status of the parties,"[47] and the rule-oriented approach which focuses on "settlement by negotiation or decision with reference to norms and rules to which both parties have previously agreed."[48] In practice, the disagreement between the EU, historically a major advocate of the pragmatist approach, and the U.S., a defender of a more rule-

---

43. *See* JACKSON, *supra* note 15, at 49-54.

44. *See, e.g.*, John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1 (1979).

45. *See* Montañà I Mora, *supra* note 27, at 110.

46. *See, e.g.*, LONG, *supra* note 15, at 109 (Mr. Long was Director-General of the GATT from 1968-1980); R. Phan van Phi, *A European View of the GATT*, 14 INT'L BUS. LAW 151 (1986) (Mr. Phan van Phi was formerly in charge of GATT relations for the EU).

47. *See* JACKSON, *supra* note 15, at 51.

48. *Id.* The power-oriented approach assumes that the most powerful parties to a negotiation have an advantage. By contrast, the weaker party will have to consider other factors such as foreign aid, military maneuvers, or import restrictions on other key goods by way of retaliation. *Id.* at 51-52.

oriented philosophy, has been one of the most serious obstacles in the development of the GATT DRM.[49]

In the rule-oriented approach the negotiators argue about the application of a specific rule to their dispute.[50] They negotiate with the knowledge that if their dispute is not resolved, an impartial third-party will make a judgment based on the rules.[51] Their negotiations are affected by their "respective predictions as to the outcome of those judgments and not with reference to potential retaliation or actions exercising power of one of the parties to the dispute."[52]

The arguments for the implementation of a rule-oriented, legalistic approach, versus a pragmatist approach follow. The most convincing argument for the rule-oriented approach is that it causes parties to place "less reliance on raw power and the temptation to exercise it or flex one's muscles, which can get out of hand."[53] A rule-oriented approach also finds support in the context of a prisoner's dilemma paradigm.[54] In situations akin to international trade relations, parties often seek to maximize their gains at the expense of other parties but often find that opposing parties seek to do the same; this results in a loss for both parties.[55] The solution is to agree on a set of rules which will restrain behavior in particular situations to ameliorate this mutual loss.[56] Jan Tumlir, former GATT Chief Economist, expressed his arguments for a 'rule-oriented constitution' for the conduct of parties in trade relations:

> The trade part of the international econom[ic] order can thus be understood as a set of policy commitments exchanges between and among countries in order to minimize policy-generated uncertainty and so to maximize the gains from

---

49. *See* Montañà I Mora, *supra* note 27, at 129.

50. JACKSON, *supra* note 15, at 51.

51. *Id.*

52. *Id.*

53. *Id.* at 53.

54. The prisoner's dilemma game has two players. Each player has two choices, cooperation or defection. Each player makes a choice without any knowledge of the other's decision. Defection yields a higher payoff irrespective of the other player's choice. The dilemma arises because if both players defect, they are both worse off than if they had cooperated. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 7-8, 206-07 (1984) for proof of the theoretical proposition.

55. *Id.* at 7-8.

56. *See* JACKSON, *supra* note 15, at 55.

> trade . . . . Historically, this set of commitments evolved as a series of contractual bargains . . . . Without the judge and bailiff in the background, contracts do not mean much.[57]

Critics of the rule-oriented approach argue that it will "poison the atmosphere."[58] They believe that negotiated solutions to disputes will promote conflict and contentiousness.[59] The need for negotiation exists because parties will inevitably be involved in diplomatic contacts regarding compliance with judgments.[60] The legalist approach therefore is viewed as counterproductive because it "poisons the atmosphere" in which these contacts take place.[61] They maintain that it is much more important to resolve the dispute than to pick the winner.[62]

Another argument made against the rule-oriented approach is that it will result in "wrong cases" being brought into the GATT system.[63] A wrong case has been defined "as a dispute the resolution of which undermines the GATT trading system."[64] One example is the case where a country violates a GATT rule but has done so because of unavoidable domestic pressures.[65] The pragmatists have argued that condemnation of the violating party in this situation is unfair because the government really had no choice in the matter, and is inappropriate because domestic politics will prevent the government from correcting the situation.[66]

---

57. Jan Tumlir, *Gatt Rules and Community Law — A Comparison of Economic and Legal Functions* 6, 20, *in* THE EUROPEAN COMMUNITY AND THE GATT (Meinhard Hilf et al. eds., 1986) *cited in* JACKSON, *supra* note 15, at 55.

58. ROBERT E. HUDEC, ADJUDICATION OF INTERNATIONAL TRADE DISPUTES 11-23 (1978).

59. *Id.*

60. *Id.*

61. *Id.*

62. *See* LONG, *supra* note 15, at 71. This argument is not compelling for several reasons. First, the more the system is utilized, the more the parties will come to realize that the dispute is 'nothing personal' — the dispute is directed at the violation of the rule, not at the country itself. Further, as Jackson has argued, a legalist approach would improve the atmosphere of the GATT by stressing fairness, especially for the smaller, weaker parties. John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98-101 (1978).

63. *See* Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round; An Unfinished Business*, 13 CORNELL INT'L L. J. 145, 159 (1980).

64. *Id.* at 159.

65. *Id.*

66. *Id.* This argument is flawed for two reasons. First, there is nothing inappropriate about putting pressure on a country to correct its violation of GATT rules

Clearly, a power-oriented approach hurts small developing countries the most. The power-oriented approach, however, may also be detrimental to the global trading system. For example, if the EU and U.S. are engaged in a dispute, and both realize that any dispute resolution body decision will not be binding on it, each party might rely on its power position in a particular area. This could result in a virtual game of poker, with each party seeing how far it could bluff. The worst case would be that each party might decide to fold and exit the game, which would presage the demise of the WTO. The WTO's new DRM[67] adopts a fundamentally legalist, rule-based approach to dispute resolution.[68]

Part V of this comment proposes a model whereby each party will lay its "cards" on the table. In the proposed model of conflict management, a combination of both the rule and power oriented approaches will still exist to some extent due to the disparate economic strengths of the actors. Because, in the proposed framework, all or most of the members of the WTO will be RIAs, there will be a greater risk of muscle flexing during and after negotiations exists. Accordingly, under the proposed model, the ramifications of exiting the WTO will be much more serious.

---

and pay compensation to affected parties even if domestic political conditions influenced the decision to violate the rule. Second, if critics of the legalistic system are worried about correction of violations, they should realize that pressuring a violating party will probably result in greater compliance. The violating country's government may be able to ease domestic pressures by acknowledging the ramifications of condemnation and retaliation by the GATT. *See* HUDEC, *supra* note 58, at 35-37.

67. General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing The Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112 (1994) [hereinafter Understanding of 1993] (discussed in depth *infra* part III.B).

68. *See* Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 405 (1995) ("[T]he Understanding decisively moves the GATT dispute resolution process towards a unified, coherent adjudicatory system."). However, within the context of an inter-regional (NAFTA-EU) conflict management system, some members might support a less rule-oriented approach, perhaps on the grounds that negotiating a solution is easier when fewer parties are involved, thus making an adjudicative system unnecessary. Part V of this comment addresses why such an approach should be rejected.

C. *Dispute Resolution Mechanisms Prior to the Uruguay Round*

From the beginning, the question of what constitutes a "GATT dispute" has been unclear.[69] The GATT provides more than thirty articles outlining various procedures used to resolve different types of disputes. For example, activities ranging from consultations to the "joint action power" of Article XXV:1 are within the ambit of "dispute settlement."[70] The Articles traditionally believed to govern the DRM are Articles XXII[71] and XXIII.[72]

---

69. *See* Montañà I Mora, *supra* note 27, at 115.

70. *See* JACKSON, *supra* note 31, at 164-166 (Jackson identifies nineteen clauses that provide for obligatory consultation and seven provisions for compensatory withdrawal or suspension of concessions.).

71. Article XXII reads as follows:

> 1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
>
> 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

72. Article XXIII reads as follows:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
>
> (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
>
> 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING

Article XXII contains a very broad clause that provides for initial bilateral consultation and then multilateral consultation if the former effort fails. The main dispute resolution procedure, however, is developed based upon the provisions of Article XXIII.[73] Under Article XXIII, it is possible to file both violation and nonviolation complaints.[74] The main difference between the two is that a party can bring a violation complaint only if the defending party has actually breached GATT rules.[75]

1. Functioning of the Dispute Resolution Mechanism in the 1950s

Despite its uncertain beginnings, it is generally agreed that the GATT resolved disputes among member states fairly effectively during the 1950s.[76] However, the effectiveness of the procedure during this time is difficult to evaluate since "there are no data on how many complaints were compromised, or dropped, or not even brought, because of anticipated difficulty in securing compliance."[77]

PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

73. *See* Montañà I Mora, *supra* note 27, at 116.

74. *Id.* at 117.

75. *Id.* In practice, from 1948 to July 1991, only ten percent (10%) of complaints formally raised under Article XXIII have been non-violation complaints. *Id.* at 117 n.57.

76. Between 1952 and 1958 forty complaints were filed. Eleven complaints were pursued by the parties to a third party ruling. Thirty six of these forty cases had an identifiable result. In thirty the complainant reported satisfaction. *See* Hudec, *supra* note 63, at 151 n.10.

77. *See* HUDEC, *supra* note 24, at 95.

Articles XXII and XXIII addressed the main steps in the dispute settlement process only in the most general terms. Lack of specific procedural directives forced the GATT to improvise. Consequently, contracting parties created working groups to make recommendations and reports.[78] These working groups consisted of delegations from the parties to the dispute, other interested parties, and other GATT parties.[79] These working groups focused on negotiating a settlement before reporting to the contracting parties.[80]

Later, panels composed of representatives of nations not parties to the dispute investigated each disputed matter and gave recommendations. The panel proceedings were informal, and both the judges and the lawyers acted as diplomats rather than lawyers.[81] Panel rulings "were drafted with an elusive diplomatic vagueness . . . [and] because of policy cohesion within [the GATT] community, the rate of compliance with these vague [decisions] was rather high."[82]

2. The 1960s

The 1960s saw a sharp decline in the status of GATT law. The GATT's membership increased dramatically, moving away from the homogeneity of the previous decade.[83] The change in the international trade environment, coupled with a change in the GATT's policy agenda, created a higher level of conflict and a lower level of effectiveness in dispute resolution.[84]

The GATT made two major changes during the decade: (1) the European Community took over the seats of six original European members and (2) the number of members from devel-

---

78. *Id.* at 84.

79. *Id.*

80. *Id.*

81. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 12 (1993).

82. *Id.*

83. *Id., citing to* GATT BASIC INSTRUMENTS AND DOCUMENTS 99-100 (8th Supp. 1960); GATT BASIC INSTRUMENTS AND DOCUMENTS vii (17th Supp. 1970) ("[T]he number of developing country members expanded more than three-fold, shifting the balance between developed and developing countries from 21-6 in 1960 to 25-52 in 1970.") *Id.*

84. *Id.*

oping countries tripled.[85] As a result, member nations had more difficulty reaching a consensus, something which the GATT had always relied on to guide its operation.

Many of the original GATT rules were inadequate to address the new international trade issues of the 1960s. Rules in the areas of agriculture, import barriers, and most-favored-nation practices lost widespread support in the GATT and were often violated.[86]

At the same time, led by the efforts of the EC and the U.S., the GATT nations began relying on what Hudec called an "anti-legalist" approach to dispute resolution.[87] The U.S. and the EC condemned any legal action taken by other GATT members as "legalistic" and viewed any legal claim brought under GATT as an "unfriendly action."[88] By 1963 the adjudication system fell into complete disuse.[89] "Consultation-style diplomacy . . . [was] glorified as the ideal of regulatory policy."[90]

3. The Tokyo Round and the Road to the Uruguay Round

Increasing concern for the credibility of the GATT and the future of international trade relations inspired an effort to rebuild the GATT legal system. The Tokyo Round of multilateral trade negotiations began in 1971. During these negotiations, increasing concern for the credibility of the GATT and for the future of international relations generally, made it clear that the GATT legal system required renovation. The U.S. — unlike the EC, which continued to support a more diplomatic approach[91] — abandoned its anti-legalistic stance and focused on rebuilding the system. This change on the part of the U.S. was due to domestic pressures which created a need for the enforcement of U.S. trade agreement rights.[92]

---

85. *Id.*
86. Hudec, *supra* note 63, at 160.
87. HUDEC, *supra* note 81, at 12.
88. *Id.* at 13.
89. *Id.*
90. Hudec, *supra* note 63, at 151.
91. *See* Julia C. Bliss, *GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects*, 23 STAN. J. INT'L L. 31, 39 (1987).
92. HUDEC, *supra* note 81, at 13.

By the end of the Tokyo Round, the member states had created for the first time a number of codes directed at the regulation of non-tariff barriers to trade.[93] They also revamped the GATT's general dispute resolution procedure.[94] The revised procedure was codified in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.[95] This codification attempted to overcome the weaknesses in the system illustrated by the DISC case.[96] In that case, the European Community attacked U.S. tax legislation, known as DISC legislation,[97] charging that the U.S. enacted export subsidies in violation of GATT Article XVI:4.[98] The U.S. responded to this complaint by filing three counter-complaints charging that if DISC legislation violated GATT, then the income tax laws of France, Belgium, and the Netherlands did also.[99] It took three years to reach an agreement concerning panel composition, as the dispute seemed to reach an impasse at every step of the procedure.[100]

The Understanding of 1979 provided that complaints and

---

93. The Kennedy Round of Multilateral Trade Negotiations (1963-67), however, produced an anti-dumping code later codified as Article VI of the GATT. KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 174-75 (1970).

94. HUDEC, *supra* note 81, at 13.

95. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT Doc. L/4907 (Nov. 28, 1979) *reprinted in* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 210 (26th Supp. 1980) [hereinafter Understanding of 1979].

96. DISC is an acronym for Domestic International Sales Corporation, the name of the 1971 law granting special tax benefits to U.S. exporters. HUDEC, *supra* note 81, at 59. The original DISC law is Revenue Act of 1971, Pub. L. No. 92-178, §§ 501-507, 85 Stat. 535-53 (1971), (codified as amended in 26 U.S.C. §§ 991-997 (1982)). The DISC legislation was an effort by Congress, using a tax deferral scheme, to encourage exports by lowering income taxes on profits from corporations' exports. *Id.* at 60; *see also* Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443 (1988).

97. *See supra* note 96.

98. HUDEC, *supra* note 81, at 59. In international trade terms a "subsidy" under Article XVI:4 is "any advantage that distorts the market behavior of the recipient in favor of the subsidized transaction." *Id.* at 62.

99. *Id.* at 59.

100. *See* John H. Jackson, *The Jurisprudence of International Trade: The DISC case in GATT*, 72 AM. J. INT'L L. 747, 760-64 (1978). For a more thorough discussion of why the United States may have lost some of its enthusiasm for legalism by the end of the Uruguay Round, see David Palmeter & Gregory J. Spak, *Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role In an Era of Increasing Conflict*, 24 LAW & POL'Y INT'L BUS. 1145 (1993).

counter-complaints that do not concern the same matter should not be linked.[101] It also set guidelines as to the composition of the parties and required that a panel issue a report which should be adopted by the contracting parties within a reasonable period of time.[102] It failed, however, to provide for the enforcement of the panel recommendations, giving the complaining party little recourse if the defendant failed to voluntarily implement the recommendation.[103] The Understanding of 1979 revealed that the views of those favoring a diplomatic approach to dispute resolution prevailed during this period.

After the Tokyo Round, use of the GATT legal system increased.[104] Many problems soon became evident, including delays in the formation of panels because of disputes over panel composition, the term of consultation periods, blockages of panel reports, and non-compliance with recommendations.[105]

In the 1980s, a massive U.S. trade deficit and a general feeling that GATT law was not adequately protecting U.S. interests prompted many U.S. political leaders to advocate a policy of "unilateralism."[106] They argued that the trade imbalance justified the U.S. in "taking the law into its own hands."[107] The U.S. began to confront governments which it believed were maintaining illegal or unreasonable restrictions, demanding elimination of these restrictions by threatening unilateral trade retaliation.[108]

Meanwhile, in September 1986 the parties to the GATT launched a new round of multilateral trade negotiations in Punta del Este, Uruguay.[109] The need for improved and strengthened dispute resolution procedures was one of the main issues addressed in the Uruguay Round Ministerial Declaration.[110]

---

101. Understanding of 1979, *supra* note 95, at 211-12.

102. *Id.* at 212-14.

103. The Understanding of 1979 asked only that the contracting parties find an appropriate solution, which could lead to retaliation. *Id.* at 214.

104. HUDEC, *supra* note 81, at 13.

105. *Id.* at 14.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See Ministerial Declaration on the Uruguay Round*, (Sept. 20, 1986) *reprinted in* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 19 (33d Supp. 1987).

110. *Id.* at 25.

The U.S. Congress expressed its dissatisfaction with the functioning of the GATT DRM by introducing Section 301 of the Trade Act of 1974, which authorized the president to respond to unfair foreign trade practices.[111] Because unilateralism worked so well in removing trade barriers, by 1990 many argued that it should become the new U.S. policy with regard to dispute resolution.[112] Many observers wondered whether the ambitious reform goals set for the Uruguay Round were "out of touch with the realities of governmental legal behavior."[113] The events of 1994, however, put to rest most doubts about the viability of the Uruguay Round.

III. AFTER THE URUGUAY ROUND: THE CURRENT STATUS OF THE LEGAL SYSTEM UNDER THE WORLD TRADE ORGANIZATION

A. Introduction

The Final Act of the Uruguay Round of Multilateral Trade Negotiations[114] (Final Act) was signed by representatives of more than 100 governments in Marrakesh, Morocco on April 15, 1994.[115] At that time the long awaited World Trade Organization was formed by way of an agreement annexed to the Final Act.[116] The WTO actually went into effect on January 1, 1995.[117]

The WTO, which replaced the GATT as an institutional body, was created to facilitate the resolution of disputes among parties and, generally, to enforce rules.[118] The GATT 1994, in-

---

111. *See* Trade Act of 1974, 19 U.S.C. §§ 2411-2416 (1988).

112. HUDEC, *supra* note 81, at 15.

113. *Id.*

114. General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (the Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1 (1994) [hereinafter Final Act].

115. Karel van Wolferen, *Will the New World Trade Organization Work? No Chance — East and West Trade Won't Meet*, WASH. POST, June 26, 1994, at C3.

116. The Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter World Trade Organization Agreement].

117. *Id.*

118. Julius L. Katz, *GATT Is Threatened by the Squeamish . . .* , WALL ST. J., Aug. 30, 1994, at A10. "A key difference between the GATT and the WTO is that the WTO Agreement is a 'single undertaking,' integrating many Uruguay Round and previous GATT agreements into a single legal framework." Judith H. Bello & Mary

cluded under the Agreements on Trade in Goods,[119] replaced the 1947 provisional GATT. The Final Act of the Uruguay Round also included unprecedented agreements on Trade in Services[120] and on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods.[121] These agreements on trade in services and intellectual property were breakthroughs that responded to the criticism that the GATT failed to deal with these crucial areas. Another breakthrough for the WTO is found in the new dispute resolution policy.

B. The 1993 Understanding on Rules and Procedures Governing the Settlement of Disputes

With the WTO came a restructured DRM, the Understanding on Rules and Procedures Governing the Settlement of Disputes,[122] which sought to deal with the ineffectiveness of the previous GATT DRM. The new DRM has several major features. First, the Understanding of 1993 established an "integrated" dispute resolution system[123] in response to complaints about

---

E. Footer, *Symposium: Uruguay Round-GATT/WTO: Preface*, 29 INT'L LAW. 335, 340 (1995). The Ministerial Conference, composed of representatives of all member countries, is the principal organ of the WTO and is required to meet at least once every two years. *Id.* at 341. During the interim periods between such conferences, the General Council (the GATT Council successor) is the governing body. *Id.* The General Council is composed of representatives of all member countries and is assisted by three sub-councils: the Council for Trade in Goods, Council for Trade in Services, and the Council for Trade Related Aspects of Intellectual Property Rights. *Id.*

119. General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (the Uruguay Round): Agreements on Trade in Goods, Dec. 15, 1993, 33 I.L.M. 28 (1994).

120. General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (the Uruguay Round): General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 (1994).

121. General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (the Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994).

122. *See* Understanding of 1993, *supra* note 67, at 112.

123. *See* Montañà I Mora, *supra* note 27, at 142. The Understanding of 1993 will apply to the GATT 1994, the General Agreement on Trade in Services (GATS), and the Agreement on Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs). However, the system is still somewhat diversified in that the Understanding of 1993 will not necessarily apply to disputes regarding the Agreement on Trade in Civil Aircraft, Government Procurement, International Dairy Agreement, and the Arrangement Regarding Bovine Meat. *See* Understanding of 1993, Appendix 1: Agreements Covered By The Understanding, 33 I.L.M. 131 (1994).

the diversification of procedures embodied in the various individual agreements entered into after the Tokyo Round.[124]

Second is the creation of a Dispute Settlement Body (DSB) which will take over certain administrative functions of the DRM, such as the establishment of panels or the adoption of panel reports.[125] Membership in the DSB will be available to all WTO members.[126]

Third, in contrast with the GATT DRM before the Uruguay Round, where a diplomatic, anti-legalist approach prevailed, the Understanding of 1993 has apparently moved toward a rule-based approach.[127] This is evidenced by the creation of a Standing Appellate Body (SAB) whose members must be persons of "recognized authority, with demonstrated expertise in law."[128] While the parties have avoided the use of the term tribunal, "the Appellate Body has all of the characteristics of an international tribunal"[129] in that it adjudicates disputes rather than simply facilitating negotiations.[130] The members are to be unaffiliated with any government and broadly representative of WTO membership.[131] If a panel has issued a report with which a party to the dispute disagrees, the party may appeal to the SAB by formally notifying the DSB of its intention to do so.[132]

Fourth, the Understanding of 1993 modified the traditional consensus rule, which is of great importance for the establishment of panels and the adoption of panel reports. In contrast to the GATT DRM prior to the Uruguay Round, panels are established and reports are considered adopted unless there is consensus to decide against the establishment of a panel[133] or a

---

124. *See, e.g., Can GATT Resolve International Trade Disputes?*, 77 AM. SOC'Y INT'L L. PROC. 287, 288 (1983).

125. *See* Understanding of 1993, *supra* note 67, at 114, § 2.1.

126. *See* Young, *supra* note 68, at 399. Thus, all member countries of the WTO will probably also become members of the DSB.

127. *See id.* at 405.

128. *See* Understanding of 1993, *supra* note 67, at 123, § 17.3.

129. Montañà I Mora, *supra* note 27, at 144.

130. The Body will be composed of seven members, serving in rotation, with three "judges" sitting on each case. *See* Understanding of 1993, *supra* note 67, at 123, § 17.1.

131. *Id.* § 17.3.

132. *Id.* § 16.4.

133. Understanding of 1993, *supra* note 67, § 6.1, provides: "If the complaining party so requests . . . a panel shall be established unless at that meeting, the DSB decides by consensus not to establish the panel."

decision not to adopt a panel report.[134] The same rule applies for the adoption of Appellate Body Reports[135] and the rejection of requests for the suspension of concessions.[136] These changes are very important for the conceptualization of the WTO DRM in that they mark a turning point in favor of a judicial mechanism. Now the Dispute Settlement Body only interferes in very sensitive cases where a strict application of the judicial procedure would lead to undesirable results.

A fifth notable feature of the new rules is that they seem to dictate the exclusivity of the Understanding of 1992 as a source of procedure for the resolution of GATT disputes.[137] In a section of the Understanding of 1993 titled "Strengthening of the Multilateral System," the GATT members indicated the importance of preventing unilateral measures by one member state against another.[138] The Understanding of 1993 makes clear that all disputes arising in connection with the covered agreements[139] shall be settled only "through recourse to dispute settlement in accordance with the rules and procedures of this Understanding."[140] Finally, certain important changes have been made in certain phases of the dispute resolution procedures.[141]

---

134. Understanding of 1993, *supra* note 67, § 16.4, provides: "Within sixty days of the issuance of a panel report to the Members, the report shall be adopted at a DSB meeting unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report." (footnote omitted).

135. *Id.* § 17.14.

136. *Id.* § 22.6.

137. *See* Montañà I Mora, *supra* note 27, at 143 n.179. Montañà I Mora notes that under the old GATT system, parties to a dispute used the GATT DRM simply because it was customary to do so. Theoretically, parties could have resorted to other customary methods of international dispute resolution such as the International Court of Justice or conventional arbitration. According to the new system:

> when contracting parties seek the redress of a violation of obligations or other nullification or impairment of benefits under the GATT or an impediment to the attainment of any objectives of the GATT, they *shall* have recourse to, and abide by, the rules and procedures of this Understanding.

Id. See also Understanding of 1993, *supra* note 67, at 128, § 23.

138. Understanding of 1993, *supra* note 67, at 128, § 23.

139. For a list of agreements covered by the Understanding, see Understanding of 1993, Appendix I: Agreements Covered By the Understanding, 33 I.L.M. 131.

140. Understanding of 1993, *supra* note 67, at 129, § 23.2(a).

141. The least significant changes have been made in pre-panel formation procedures, and consequently the least amount of attention will be dedicated to it in the discussion. The most substantial changes have been made in the panel process as

1. Pre-Panel Stage

Prior to requesting the establishment of a panel, the Understanding of 1993 provides that parties to a dispute must engage in consultations "in good faith within a period of no more than thirty days."[142] If the defending party does not respond to the complaining party's request for consultation, the complaining party may request the establishment of a panel.[143] The only changes implemented by the Understanding of 1993 are the establishment of shorter deadlines in urgent cases[144] and the regulation of third party intervention (a member other than the consulting member).[145] Good offices, conciliation, and mediation, are voluntary and are undertaken only if the parties so agree.[146] The Understanding of 1993 made no significant revisions to the GATT DRM with respect to those procedures.[147]

---

well as in post-panel procedures, which will be the focus of the discussion.

142. Understanding of 1993, *supra* note 67, at 116, § 4.3. This time-controlled consultation process is similar to the 1989 Improvements, which were an agreement on textual revisions to the GATT DRM reached during the mid-term review of the Uruguay Round Negotiations in Montreal on April 12, 1989. *See* Conciliation of Improvements to GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, *reprinted in* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 61 (36th Supp. 1990). The advantage of this process is that the dispute should not get bogged down in the consultation phase.

143. Understanding of 1993, *supra* note 67, at 116, § 4.3.

144. *Id.* at 117, §§ 4.8, 4.9. The Understanding of 1993 cites only one example of an urgent case: those concerning perishable goods. *Id.* § 4.9. The factors which would make a case urgent are probably similar to the necessary criteria for obtaining an injunction or temporary restraining order in the United States Court system: the risk of irreparable harm or injury if an injunction is not granted to the moving party, *inter alia*. *See, e.g.*, Joseph T. McLaughlin & Kevin Rampe, *Preliminary Injunctive Relief in the Federal Courts*, *in* CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 1994, at 473 (PLI Litig. & Admin. Practice Course Handbook Series No. 498, 1994); 43A C.J.S. INJUNCTIONS §§ 41-342 (1978 & Supp. 1995); see also Corrigan Dispatch Co. v. Casa Guzman, S.A., 569 F.2d 300 (5th Cir. 1978) (discussing preliminary injunction issues in cases of perishable commodities).

145. *Id.* at 117, § 4.11.

146. *Id.* at 117, § 5.1. Good offices, conciliation or mediation in the GATT are intended to allow the parties to a dispute to negotiate their differences before a neutral third party, and these procedures actually come closer to a "so-called mediation." *See* Norio Komuru, *The WTO Dispute Settlement Mechanism — Coverage and Procedures of the WTO Understanding*, 29 J. WORLD TRADE, Aug. 1995, at 5, 47 n.148. This differs from the panel process in that the mediator or conciliator does not have the power to impose a ruling as a panel does. *Id.*

147. *See* Palitha T.B. Kohona, *Dispute Resolution Under the World Trade Organization: An Overview*, J. WORLD TRADE, April 1994, at 23, 34 (discussing *The Draft Understanding on Rules and Procedures Governing the Settlement of Disputes*). The provisions regarding these procedures, although a bit more detailed, are very similar

2. Panel Stage

A fundamental procedural reform introduced by the Understanding of 1993 was the express right of the parties to a panel.[148] Recognition of this explicit right was important for two reasons. First, it supported the trend toward a legalistic approach to dispute resolution. Second, it curtailed either an obstructing party or an interested government's ability to delay panel formation.[149] In urgent cases, the complaining party may request that the Dispute Settlement Body convene within fifteen days of the original request to establish a panel.[150] Moreover, a panel will almost always be formed when sought because consensus is now required to oppose establishment of a panel.

A second area of reform at the panel stage involves the panel's composition. The Understanding of 1993 provides that a panel will typically be composed of three members[151] who may be either governmental or non-governmental individuals.[152] The panelists shall be:

> persons who either have served on or presented a case to a panel, served as a representative of a [WTO] Member . . . . or as a representative to a council or committee of any covered agreement or its predecessor agreement; or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.[153]

The panelist requirements are intended to enhance both the "quality and the authority of panel reports."[154]

The Understanding of 1993 further seeks to guarantee the impartiality of the panel and its panelists; it states that panel-

---

to the Improvements of 1989.

148. Understanding of 1993, *supra* note 67, at 118, § 6.1. This provision follows paragraph F(a) of the 1989 Conciliation of Improvements to GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, *reprinted in* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 61 (36th Supp. 1990).

149. *See generally* Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53, 63 (1987).

150. Understanding of 1993, *supra* note 67, at 118 n.5, § 6.1.

151. *Id.* § 8.5.

152. *Id.* § 8.1.

153. *Id.*

154. *See* Montañà I Mora, *supra* note 27, at 148.

ists "should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."[155] In addition, a panelist cannot be a citizen of a Member who is a party to the dispute, unless the parties reach a contrary agreement.[156]

In addition, the Understanding of 1993 sought to remedy one of the traditional problems faced by the GATT DRM — the lack of suitable individuals to serve as panelists. As a result, it mandates the creation of a "superpanel."[157] The superpanel is a list of qualified governmental and non-governmental individuals from which panelists may be drawn as necessary.[158]

The Understanding of 1993 also makes some important innovations in panel procedure. First, it provides for almost automatic adoption of panel reports.[159] If one of the parties to the dispute chooses not to appeal, the DSB will adopt the report unless it reaches a consensus agreement not to.[160] The shift away from adoption by consensus demonstrates the movement towards a judicial approach to dispute resolution.

The second innovation is the creation of the Standing Appellate Body (SAB).[161] Any party to a dispute may appeal a panel decision to the SAB within sixty days of the decision's issuance.[162] The appeal "shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel."[163] Because the SAB may either uphold, modify, or reverse the legal findings and conclusions of the panel,[164] the DSB will not consider the adoption of a panel report until the appellate

---

155. Understanding of 1993, *supra* note 67, at 118, § 8.2.

156. *Id.* § 8.3.

157. This phrase was coined by Professor William Davey. In suggesting the creation of a "superpanel," he argued that this type of selectivity would heighten the panel's status and result in greater respect for its decisions. He concluded that "because the group would stand ready to hear all cases, the problem of staffing panels would disappear." William J. Davey, *Dispute Settlement in the GATT*, 11 FORDHAM INT'L L.J. 51, 104 (1987).

158. Understanding of 1993, *supra* note 67, at 119, § 8.4.

159. *Id.* § 16.4.

160. *Id.*

161. *Id.* § 17.1.

162. *Id.* § 16.4. This provision was strongly supported by the U.S. as well as some other negotiating parties. *See* Kohona, *supra* note 147, at 39.

163. Understanding of 1993, *supra* note 67, at 123, § 17.6. This provision of the Understanding of 1993 illustrates the influence of the common law legal system.

164. *Id.* § 17.13.

phase is completed.[165] Any individual opinions within the SAB's report must be anonymous[166] and may only address the legal issues raised on the appeal.[167] The DSB will adopt the appellate report unless, within thirty days of the report's issuance, the DSB decides not to by consensus.[168]

The creation of the SAB is generally a good development because it marks a dramatic shift toward legalism. There are, however, quite a few problems that may interfere with its operation within the context of the WTO. First, it may be difficult for more than one hundred parties to agree on the composition of a permanent appellate tribunal. Second, there are no defined limits on the subject matter of an appeal. As a result, each "losing" party could appeal any panel decision and overload the SAB. Finally, panels will be forced to move away from their traditional pragmatic approach to dispute resolution because of the Understanding of 1993's failure to define the limits of appellate review.[169] Panelists will now have to draft their decisions in strict accordance with WTO law, because they may be subject to appellate review. This transition, while difficult at first, is a positive long run innovation.

3. Post-Panel Stage

The majority of GATT dispute resolution problems have been related to either non-compliance or non-implementation of GATT Council[170] rulings. The Understanding of 1993 includes regulations which are intended to ensure compliance with DSB decisions. The most important aspects of the new regulations are examined below.

---

165. *Id.* § 16.4.

166. *Id.* § 17.11.

167. *Id.* § 17.12.

168. *Id.* § 17.14.

169. Panels have on several occasions disregarded the rules of interpretation outlined in the Vienna Convention on the Law of Treaties. This use of an *ad hoc* approach prevents the emergence of any sort of coherent jurisprudence. *See* Edmond McGovern, *Dispute Settlement in the GATT — Adjudication or Negotiation*, *in* THE EUROPEAN COMMUNITY AND GATT, *supra* note 57, at 73, 79. GATT panels have often cited earlier panel reports in support of a particular rule interpretation. However, there is no concept of binding precedent in GATT-panel decision making. *Id.*

170. The Council was the predecessor of what is now referred to as the Dispute Settlement Body (DSB) by the Understanding of 1993. Young, *supra* note 68, at 399.

First, the Understanding of 1993 establishes a deadline for the implementation of a panel ruling or recommendation. Within thirty days of DSB's adoption of either a panel or Appellate Body Report, "the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB and [if immediate compliance is impracticable] the Member concerned shall have a reasonable period of time in which to do so."[171] Because the phrase "reasonable period of time" is inherently vague, the Understanding of 1993 requires the period to be be fixed beforehand.[172]

The Understanding of 1993 also attempts to address the recent problems related to the inadequate measures adopted by members while attempting to comply with panel recommendations or rulings.[173] It provides that if "there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" a new dispute resolution procedure will be initiated utilizing the original panel whenever possible.[174] The Understanding of 1993 contains several enforcement provisions.

---

171. Understanding of 1993, *supra* note 67, at 125, § 21.3.

172. *Id.* The prior 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, *reprinted in* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 210, ¶ 22 (26th Supp. 1980), merely provided that if recommendations were "not implemented within a reasonable period of time, the contracting party bringing the case may ask the Contracting Parties to make suitable efforts with a view to finding an appropriate solution." This provision also failed to define a reasonable period of time and did not indicate what measures the Council could take to ensure compliance with its decisions.

173. For example, in 1989 a GATT panel declared that EU subsidies to the oilseed sector were incompatible with the GATT because "benefits accruing to the United States under Article II of the General Agreement were impaired as a result of [EU] production subsidy schemes." James R. Arnold, Note, *The Oilseeds Dispute and the Validity of Unilateralism in a Multilateral Context*, 30 STAN. J. INT'L L. 187, 190 (1994). The U.S., prompted by what it perceived to be a lack of effective implementation by the EU, requested a reconvening of the panel which condemned the EU policy again in 1992. *See* 9 INT'L TRADE REP. 533 (BNA) (Mar. 25, 1992).

As a result of the EU's continued failure to remedy the violation, the United States government took the law into its own hands and threatened to impose duties of up to 200% on European goods imported into the U.S. Arnold, *supra*, at 188. In November of 1992, the EU and the U.S. hovered on the brink of a trade war, but a team of negotiators managed to avoid the disaster. *Id.* at 187-88. After witnessing the potentially disastrous effects of unilateral retaliation, as seen in this dispute, GATT parties entering the Uruguay Round were no longer questioning whether a GATT judiciary was wise, but rather concerned themselves with "how much judicialization it will take to end the threat of unilateral retaliation." *Id.* at 220.

174. Understanding of 1993, *supra* note 67, at 126, § 21.5.

One of the most significant provisions regulates compensation and suspension of concessions. This provision states that "compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time."[175] This wording clearly suggests that specific performance is preferred in the long run to any other alternative. If, however, a defending party fails to implement a panel ruling within a reasonable period of time, a complaining party may request negotiations.[176] The defending party is compelled to participate in any negotiation.[177] If the parties do not reach an agreement on compensation within twenty days, the complaining party may then seek authorization from the DSB to suspend concessions or any other obligations under the covered agreements.[178] The DSB will suspend concessions unless it decides, by consensus, to reject the request.[179] If a dispute arises between the parties as to the fairness of the retaliation, it may be referred to arbitration[180] if either: 1) the losing party objects to the level of proposed suspension; or 2) the party claims that the principles and procedures

175. *Id.* § 22.1.

176. *Id.* § 22.2.

177. *Id.*

178. *Id.* Although this possibility has hardly been invoked in GATT practice, it is likely that parties will use it more frequently in the future because the modified consensus rule applies here as well. If a complaining party decides to request the suspension of concessions or other obligations, the Understanding of 1993 sets out detailed principles and procedures that the party must follow in doing so. *Id.* § 22.3. In general, "the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification and impairment." *Id.* § 22.4. If the defaulting party disagrees with the level of suspension proposed or claims that the set guidelines have not been followed, the matter shall be referred to binding arbitration — carried out by the original panel if possible. *Id.* § 22.6.

179. *Id.* While the provisions discussed seem like a step in the right direction because they address a previously unregulated area of the DRM, certain issues regarding their utilization remain. First, it is unclear whether retaliatory measures will induce a violating party to comply with a panel decision. In contrast to the intent of the Understanding of 1993, such measures could evolve into a permanent substitute for specific performance. Second, the deterrent effect of sanctions are doubtful. *See* JACKSON, *supra* note 15, at 76. Moreover, economic theory dictates that "trade restrictions are, first and foremost, detrimental to the country which introduces them." *See* Ernst-Ulrich Petersmann, *International and European Foreign Trade Law: GATT Dispute Settlement Proceedings Against The EEC*, 22 COMMON MKT. L. REV. 441, 473 (1985).

180. This should not be confused with the provisions on arbitration, as an alternative to the procedures of the Understanding, discussed *infra* part III.B.4.

set forth in Understanding have not been followed where a complaining party has requested authorization to take cross-retaliation.[181] The arbitration should be completed within sixty days and does not suspend concessions or other obligations during that time.[182]

4. Arbitration

The Understanding of 1993 allows the disputing parties to participate in arbitration as an alternative to the formal proceedings outlined above, but only if the parties can clearly delineate the disputed issues.[183] The Understanding of 1993 establishes that arbitration awards are implemented under the same provisions as panel proceedings.[184] Prior to the enactment of the Understanding of 1993, arbitration may have been a better alternative to traditional DRM procedures. Under the consensus rule, however, arbitration has lost its key advantage vis-à-vis the DRM because a defending party can no longer block any rulings of either arbitral panels or a traditional DRM panel.

C. *Preventative Medicine: The Trade Policy Review Mechanism and Its Criticisms*

The Ministerial Declaration of Punta Del Este empowered the Negotiating Group on the Functioning of the GATT system (FOG Negotiating Group) to "develop understandings and arrangements . . . to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the multilateral trading system."[185]

---

181. Understanding of 1993, *supra* note 67, at 128, § 22.6.

182. *Id.* The arbitrator acting under paragraph 22.6:

> shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessioins or other obligations is allowed under the covered agreement.

Id. at 128, § 22.7.

183. Understanding of 1993, *supra* note 67, at 129, § 25.1.

184. *Id.* § 25.4.

185. *See* Ministerial Declaration on the Uruguay Round, *supra* note 24, 109, § E,

The FOG Negotiating Group proposed a trade policy review mechanism (TPRM) as a method of surveilling trade policies and practices.[186] The TPRM would not be used to create new obligations or enforce existing ones, but rather to provide the "highest level of clarity and candor on the part of the contracting party under review" — known as "transparency."[187]

In April of 1989, the GATT Council endorsed the FOG Negotiating Group's TPRM agreement. The key standard for assessment under the TPRM became the "impact a contracting party's trade policies and practices make on the 'multilateral trading order.'"[188] The GATT Council specifically disallowed the TPRM from serving as a basis for the enforcement of GATT obligations, or the creation of new policy obligations, or for dispute settlement procedures.[189] The agreement requires every member country to submit a full report outlining its trade policies and practices when it is under review, based on an agreed format called the Outline Country Format for Country Reports.[190] A full report was to be submitted by all parties within four years of the implementation of the TPRM. The Uruguay Round Final

---

at 147, 148.

186. *Id.* at 148.

187. *Id.* at 147-148.

188. *Id.* at 149.

189. *Id.*

190. Outline Country Format for Country Report, *reprinted in* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 406 (36th Supp. 1989). Members are asked to provide information on the following:

> 1. Trade policy objectives.
> 2. How its import and export system relate to the objectives in 1 above.
> 3. The domestic laws and regulations governing the application of trade policies.
> 4. The process of trade policy formation and review.
> 5. Relevant international agreements.
> 6. Trade policy measures used, e.g. tariffs, tariff quotas and surcharges, quantitative restrictions, non-tariff measures, customs valuation, rules of origin, government procurement, technical barriers, safeguard action, anti-dumping actions, countervailing actions, export taxes and subsidies, free trade zones, export restrictions, State trading enterprises, foreign exchange controls related to import/export, and any other measures covered by the GATT, its annexes and protocols.
> 7. Programs in existence for trade liberalization.
> 8. Prospective changes in trade policy and practice to the extent they can be made known.

Id. at 408.

Act established a Trade Policy Review Body (TPRB) to administer the TPRM, which is accorded permanent status.[191] The TPRB reports to the WTO Ministerial Conference, composed of representatives of all the members, and is responsible for implementing the TPRM and for making annual reports on developments in the international trading system.[192]

The TPRB also serves as the repository of all required notifications.[193] By the Year 2000 — five years after the WTO entered into force — the TPRB must make an appraisal of the TPRM's operations.[194] While the Uruguay Round did extend the TPRM indefinitely and solidified its existing terms of reference and reporting requirements, it made few, if any, improvements on the Interim TPRM established in 1989.[195]

1. Reasons For Current Ineffectiveness

The TPRM is meant to influence state "behavior" *ex ante*. Some scholars refer to it as a "conditioning mechanism,"[196] and one author has analogized it to a psychoanalytical framework. He compares the GATT to the psychoanalyst and the contracting party being reviewed to the patient. The Outline Country Format represents both the couch and the series of revealing questions which the patient must answer.[197] He argues that the process of describing the objectives of trade policy, the process of policy formulation, etc., within the framework of the TPRM, "is not a mere contribution to transparency but rather its proffering has the added consequence of having the potential to engender a degree of sensitivity on the part of the contracting party to the GATT trade ethos."[198]

This analysis depicts perhaps the greatest problem with the

---

191. Final Act, *supra* note 114, at 5; *see also* World Trade Organization Agreement, *supra* note 116, at 16; Peter L.H. Van den Bossch, *supra* note 8, at 421.

192. Trade Policy Review Mechanism, Annex 3 (Uruguay Round Final Act), *in* LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, Booklet 3, at 1-3 (Joseph F. Dennin ed., 1995).

193. *Id.* at 2.

194. *Id.* at 3.

195. SCHOTT, *supra* note 8, at 143.

196. Qureshi, *supra* note 185, at 152.

197. *Id.*

198. *Id.* at 153.

TPRM because it takes a non-rule-based approach to evaluation; even if it identifies a clear violation within a party's trade policies, it is powerless to make the party under review take any corrective action.[199] Psychological pressure cannot be a substitute for a mechanism which would dictate that the contracting party under review must correct any serious problems identified during the review process. Currently, if the party's policies are inconsistent with its desired goals, and the policies are problematic for other parties, the only likely result will be increased "peer pressure" on the party to revise its policy.[200]

The stated objective of the TPRM — to obtain policy transparency — undermines the mechanism within the GATT that seeks to achieve greater compliance with GATT rules. Due to the great number of GATT parties, and consequently to the WTO, the TPRM reviews a party every two years at best.[201] This is not sufficient to achieve full transparency because of the extent of economic change that may occur in a country's trade policy within two years. While contracting parties must provide brief reports when "significant changes" occur in their trade policies,[202] a party which so desires may be able to avoid filing a report on the basis of alleged lack of importance of a political change.

In addition, the criteria for determining how often a particular party should be subject to review is inadequate. It is dependent on the impact the trade of the party has on the multilateral trading system. The party's impact is determined by its share of world trade in a particular period of time, not taking into account potential share of trade.[203]

As Blackhurst argues, however, a party might need to be examined more frequently, specifically because it has a low share of world trade and might be very protectionist.[204] He also noted that the trade share criterion fails to consider the share of

---

199. *See* R. Blackhurst, *Strengthening GATT Surveillance of Trade Related Policies*, *in* THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 123, 147 (Ernst-Ulrich Petersmann & M. Hilf eds., 1988).

200. Qureshi, *supra* note 185, at 147.

201. *Id.* at 151.

202. *Id.* at 150.

203. *Id.* at 151.

204. Blackhurst, *supra* note 199, at 151.

trade in domestic output.[205] The above criticisms suggest that the TPRM, as it stands now within the GATT framework, is unworkable.[206] Although the legal system under the WTO has evolved dramatically since the early days of the GATT, some things have remained fundamentally unchanged. While the Uruguay Round discussions acknowledged the significant growth of RIAs in both number and importance,[207] the parties failed to address the implication of growing global regional integration for the WTO's legal system.

IV. ADMISSIBILITY OF REGIONAL INTEGRATION AGREEMENTS UNDER THE WORLD TRADE ORGANIZATION

A. Introduction

A significant proportion of world trade currently takes place within regional integration agreements such as the EU and NAFTA.[208] New or expanded agreements are continuously being negotiated. Scholars agree, however, that the GATT rules of regional integration are inadequate.[209]

---

205. *Id.*

206. Professor Schott has assessed the mechanism as follows

> In essence the TPRM reviews are seminars on national trade policies, with discussions based on two papers: a full report presented by the country under review, and an independent analysis by the WTO Secretariat based on information provided by the country concerned and on other data available to the TPRM staff. Together the two reports provide a useful trade policy retrospective but offer few comments or criticisms regarding the prospective evolution of those policies . . . In other words, the TPRB debate remains an academic exercise, with little impact on the domestic trade policy debate of member countries.

SCHOTT, *supra* note 8, at 141-142.

207. *See* Understanding On The Interpretation of Article XXIV of The General Agreement on Tariffs and Trade 1994, December 15, 1993, 33 I.L.M. 28, 34 [hereinafter Understanding on Article XXIV]. The Understanding on Article XXIV recognized that "[C]ustoms unions and free trade areas have greatly increased in number and importance since the establishment of the GATT in 1947 and today cover a significant proportion of world trade." *Id.*

208. *Id.*

209. *See* Robert E. Baldwin, *Adapting the GATT to a More Regionalized World: A Political Economy Perspective, in* REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM, *supra* note 10, at 395-96; Richard Blackhurst and David Henderson, *Regional Integration Agreements, World Integration and the GATT, in* REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM, *supra* note 10, at 408.

The original GATT contracting parties acknowledged the future possibility of the emergence of RIAs and included Article XXIV.[210] Article XXIV attempts to regulate RIA admissibility under the GATT. As early as 1950, economist Jacob Viner addressed the question: "[S]hould regional integration be regarded as a step toward global free trade?"[211] Professor McMillan argued that "RIAs are unambiguously a good thing."[212] In his argument, he refers to the Kemp-Vanek theory of customs unions stating that "[i]t is always possible for a regional integration agreement, formed among an arbitrary group of countries, to structure itself in such a way as to make the member countries better off without making any of the non-member countries worse off."[213] However, a less optimistic variation of the Kemp-Vanek theorem concludes that it is also quite possible for RIAs to structure themselves in such a way as to only benefit the member countries, to the detriment of the non-member countries. Non-member countries may also suffer if special interest groups from the member countries are able to persuade their governments to tighten external trade restrictions. This has already happened within the EU's agricultural sector.[214]

Former GATT Director General Arthur Dunkel stated that GATT's rules are "designed to ensure above all that regional

---

210. GATT 1947, *supra* note 8, at 35.

211. *See* JACOB VINER, THE CUSTOMS UNION ISSUE (1950), *discussed in* McMillan, *supra* note 10, at 293. Viner's answer was inconclusive. He posited that:

> A RIA represents freer trade to the extent that it results in trade creation: the shifting of the production of some goods from a less efficient member country to a more efficient member country. A RIA represents more restricted trade to the extent that it results in trade diversion: the shifting of production from an efficient non-member country to a less efficient member country.

Id. Viner concluded that the question of whether trade creation outweighs trade diversion is purely an empirical one. *Id.*

212. McMillan, *supra* note 10, at 293. McMillan's scholarship in the area of international economic law has influenced the work of other authors. Schott and Hufbauer adapted McMillan's suggestions for revised admissability criteria for RIAs under Article XXIV, in proposing their own theory on GATT surveillance of RIA trade diversion. HUFBAUER & SCHOTT, *supra* note 9, at 166.

213. McMillan, *supra* note 10, at 293.

214. Between 1960 and 1985, nearly one-third (33 out of 78) of all GATT complaints were brought against the EU (then the EC) regarding agricultural trade barriers. Robert E. Hudec, *Legal Issues in U.S.-EC Trade Policy: GATT Litigation 1960-1985, in* ISSUES IN U.S.-EC TRADE RELATIONS 17, 19 (R.E. Baldwin et al. eds., 1988).

integration should not be at the expense of third parties."[215] McMillan suggests that if a RIA can be evaluated concerning whether or not it causes harm to non-participating countries, then the best test is whether it is admissible under the Kemp-Vanek analysis: common external tariffs should not cause the total volume of external trade to be lower than before the formation of the RIA.[216] This standard of admissibility is quite different from that provided by Article XXIV.

B. Article XXIV and its Criticisms

GATT Article XXIV covers regional integration agreements.[217] This Article is widely criticized as being imprecise and not sufficiently strict.[218] A former Deputy Director General of GATT, speaking on Article XXIV said:

> [Of] all the GATT articles, this is one of the most abused, and those abuses are among the least noted. Unfortunately, therefore, those framing any new [free trade area] need have little fear that they will be embarrassed by some GATT body finding them in violation of their international obligations and commitments and recommending that they abandon or alter what they are about to do.[219]

The typical working party report,[220] which is supposed to determine RIA compatibility with the GATT, is generally incon-

---

215. *Gatt Chief Backs Regional Packs*, FIN. TIMES, August 22, 1992, at 2.

216. McMillan, *supra* note 10, at 295-296.

217. GATT 1994, *supra* note 8, art. XXIV.

218. McMillan, *supra* note 10, at 297.

219. Gardner Patterson, *Implications for the GATT and the World Trading System, in* FREE TRADE AREAS AND U.S. TRADE POLICY (Jeffrey J. Schott ed., 1989).

220. Working Parties are temporary bodies dealing with important issues when they arise. They were established and guided by the GATT Council, now the Council for Trade In Goods. The Working parties submitted their reports and conclusions to the Council. Any interested member state was able to become a member of a working party. *See* LONG, *supra* note 15, at 49. The Understanding on Article XXIV, *supra* note 207, provides in pertinent part:

> All notifications made under Article XXIV:7(a) shall be examined by a working party in the light of the relevant provisions of the GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

Id.

clusive.[221] For example, a member of a GATT working party on the Canada-United Free Trade Agreement was unable to conclude whether the agreement was consistent with GATT rules. The party stated that "[t]he lack of definitive conclusions in Article XXIV working party reports posed the danger of giving carte blanche to participants in regional trade arrangements."[222]

Article XXIV requires a newly formed or expanding RIA to not merely lower but eliminate substantially all intra-regional trade restrictions between its members.[223] In addition, the tariffs and other regulations imposed upon all non-member states must be no higher than the average level of pre-existing tariff equivalents between the member countries.[224] This rule may be criticized on two grounds.[225]

First, the rule only concentrates on the tariffs which indirectly affect trade volume and individual consumption. It makes more sense to examine the RIA's effect on trade volumes which have a more direct affect on welfare.[226] As a result of its misdirected focus "[i]t is possible for a RIA to be consistent with Article XXIV in not raising average external tariffs, but to be harmful to the rest of the world."[227]

When faced with the decision whether to allow or disallow a RIA, the GATT has always tended to bend the rules or look the other way.[228] As one author noted, "because of this situation, some in the international trading community have joked that almost anything can be made 'GATT-able.'"[229] About one hundred trade agreements have been presented to the GATT pursu-

---

221. John Whalley, *Comments*, *in* FREE TRADE AREAS AND U.S. TRADE POLICY, *supra* note 219, at 366.

222. GATT Focus, Nov.- Dec. 1991, at 5.

223. GATT 1994, *supra* note 8, art. XXIV.

224. *Id.* at 35.

225. McMillan, *supra* note 10, at 298.

226. *See* HUFBAUER & SCHOTT, *supra* note 9, at 166-169. Hufbauer and Schott, drawing on Professor McMillan's suggestions, have developed a four step economic methodology, or test, for assessing trade diversion.

227. McMillan, *supra* note 10, at 299.

228. *See* Richard S. Bellous & Rebecca S. Hartley, *Regional Trading Blocs: An Introduction*, *in* THE GROWTH OF REGIONAL TRADING BLOCS IN THE GLOBAL ECONOMY (Richard S. Bellous & Rebecca S. Hartley eds., 1990).

229. *Id.*

ant to Article XXIV.[230] In 1992 alone, eighteen agreements were presented;[231] Although no agreement has ever been specifically rejected as inconsistent with GATT provisions, "few have [ever] been awarded the GATT seal of approval . . . ."[232]

The second criticism against raising average external tariffs centers on its vagueness. Paragraph 5(a) of Article XXIV states that external trade barriers "shall not on the whole be higher or more restrictive than the *general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union."[233] The section does not, however, specify how the "general incidence" of a set of tariffs ought to be measured. Moreover, it fails to specify how tariff increases are to be weighed against tariff reductions.[234]

This second criticism has been mitigated under the Uruguay Round's revised formulation of Article XXIV. In the Understanding on Article XXIV[235] the Article was redrafted with more precise language.[236] By continuing to focus admissibility criteria on tariffs, however, the revisions do not overcome the first criticism because RIAs are able to conform to GATT requirements yet still considerably divert trade.

As previously suggested, Article XXIV could be more effective by phrasing its admissibility requirements in terms of trade volumes, rather than tariff levels.[237] In order to receive WTO approval, RIAs could not introduce any policies that would lower external trade volumes. If, after some time, the RIA reduced its imports from the rest of the world, then it would be required to adjust its trade restrictions to make up for the fall in im-

230. *See* HUFBAUER & SCHOTT, *supra* note 9, at 162.

231. *Id.*

232. *Id.*

233. GATT 1994, *supra* note 8, art. XXIV (emphasis supplied).

234. "Article XXIV gives no guidance at all . . . on how to calculate whether in net terms the integration has increased the barriers to external trade." McMillan, *supra* note 10, at 298.

235. Understanding on Article XXIV, *supra* note 207, at 34.

236. *Id.*

237. McMillan acknowledges a possible disadvantage of focusing on trade volume rather than on tariff levels. Analysts can only measure trade volumes after the RIA has existed for a few years, while tariff levels are observable in advance. He notes, however, that the potential effect of a RIA on trade volumes can be predicted using an economic model. *See* McMillan, *supra* note 10, at 307 n.9.

ports.[238]

The trade flow admissibility criterion possesses greater advantages for the GATT system than the current Article XXIV criteria. It is simply written — a crucial attribute of international rules — and validated by economic theory.[239] By contrast, the current GATT rule is far more complicated.

The key test for admissibility would focus on whether external trade volumes are lower than they would have been in the absence of the RIA. There are a vast multiplicity of factors which cause trade volumes to change, including long-term economic growth, short-term macro-economic fluctuations, technological change, and consumers' tastes. Analysts must filter out these sources of change when analyzing trade volume.[240] Many econometric techniques are available to determine whether trade policy or other factors caused a change in trade volume.[241] Parties to a dispute concerning admissibility of a RIA can and should be required to support their arguments using statistical estimates of the RIA's effect on trade volume.[242]

C. Relation of the Dispute Resolution Mechanism to Regional Integration Agreements

Paragraph twelve of the Understanding on Article XXIV provides:

> The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free trade areas, or interim agreements leading to the

---

238. *Id.* at 300.

239. *Id.* at 301-302.

240. *Id.* at 302.

241. *Id.*

242. McMillan notes that during the disputes about the enlargement of the EU, "neither the EU nor the U.S. backed up their positions with rigorous, detailed empirical studies." *Id.* at 304. In 1986, when Spain and Portugal joined the common market, the EU argued that U.S. losses in agricultural exports would be fully offset by gains in industrial exports. The EU offered no evidence to support its position. Likewise, the U.S. refused to admit that any of its exports would be increased and did not offer any data in support of its position. *Id.*

formation of a customs union or free trade area.[243]

The paragraph further provides that when a panel decides that a RIA is in violation of Article XXIV, the RIA must take corrective measures. If the RIA fails to do so, then the provisions relating to compensation and suspension of concessions become directly applicable.[244]

The drafters of this Understanding apparently concluded that what may be an effective DRM for disputes among individual nation states may also be an adequate means for resolving disputes among RIAs. This conclusion, however, is flawed for several reasons. First, the internal and external dynamics of RIAs allow them to handle disputes with other RIA's differently than disputes with individual states. As noted earlier, when RIAs are in dispute they are less likely to engage in 'muscle-flexing' because each party has more at stake. Thus, RIAs will be more likely to accept an even stronger, rule-based DRM when dealing with other RIAs that are viewed as fairly equal.[245]

Second, the Understanding of 1993 permits the suspension of concessions or other obligations by the complaining party when the defending party has failed to comply with a panel ruling.[246] One can only imagine the ramifications of the EU suspending concessions in retaliation for a non-compliance with a ruling by the NAFTA, or even worse, by a Western Hemisphere Free Trade Agreement. The consequences of such an action would be devastating for the EU internally[247] and could also have disastrous effects for the global trading order by setting a possible precedent for hemispheric 'tit-for-tat' retaliation. The conflict management system proposed in part V suggests one way to avoid such retaliation.

---

243. Understanding on Article XXIV, *supra* note 207, at 36.

244. *Id. See also* Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 947 (1992).

245. For example, if the EU is engaged in a subsidy dispute with a developing country, the EU has little to fear because of the developing country's inability to effectively retaliate. On the other hand, when faced with the threat of retaliation from a formidable party such as the U.S., the EU may have a great deal more to lose. Similarly, disputes between NAFTA and the EU will take on a different dynamic from nation versus nation disputes.

246. Understanding of 1993, *supra* note 67, at 126, § 22.2.

247. *See* Petersmann, *supra* note 179, at 473.

As argued above, regional integration can not only foster global trade, but can also impede it. Although changing Article XXIV of the GATT, as suggested above or otherwise, will be a good first step, it will not insure that RIAs do not harm the global economy. It is inevitable that the deepening of RIAs will result in criticism and opposition from other regional entities. They will likely claim that the RIA in question is helping its member states by making non-members worse off. A means more effective than the Understanding of 1993 must be designed and adopted to deal with these potential inter-regional disputes.[248] A RIA monitoring system must be put in place which addresses potential disputes before they even reach the DRM.[249]

V. INTER-REGIONAL DISPUTE RESOLUTION

A. *Introduction*

This comment utilizes the European Union and the North American Free Trade Agreement as examples to develop my model of inter-regional cooperation and dispute resolution because they are the two largest and most politically and economically powerful RIAs. While the EU and NAFTA are diverse in terms of their present-day institutional structures[250] they are

---

248. McMillan has argued, "Regardless of what economists think of them, RIAs are here to stay . . . . The relevant issue is not whether RIAs are a good thing per se, but how to design international laws that ensure they are structured so as to avoid harming the global economy." McMillan, *supra* note 10, at 306.

Professor Abbott has stated that the provisions of Article XXIV are "archaic" because they do not "begin to address the more highly evolved forms of integration taking place today" and, in general, do not inform the global community as to the rights and obligations of regional organizations. Frederick M. Abbott, *supra* note 244, at 947.

249. Hufbauer and Schott have suggested that:

> [T]he GATT should institute rigorous multilateral monitoring of preferential trading arrangements both to guard against opaque protectionism hidden within trade rules or transition provisions and to track the implementation of the pacts over time to insure they do not harm the trade interests of third countries.

HUFBAUER AND SCHOTT, *supra* note 9, at 162.

250. While the NAFTA is a free trade area (FTA) the EU is a customs union (CU). NAFTA Article 101 entitled "Establishment of the Free Trade Area" provides: "The parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area." *Id.*

quite similar in terms of global economic importance.

One of the EU's goals is the harmonization of laws as "directly affecting the establishment or functioning of the common market."[251] The EU's accomplishments include the elimination of intra-regional tariff barriers, action directed towards removal of non-tariff barriers, removal of restrictions on movement of persons, and directives effecting harmonization of various regulations.[252] Most importantly for this comment's proposed model, the EU has pursued a common negotiating position with regard to external trade.[253]

The primary goal of the NAFTA on the other hand, is to eventually eliminate tariff and non-tariff barriers to trade in goods and to establish reciprocity requirements regarding trade in services and investment.[254] The agreement does not have as one of its goals the progressive harmonization of internal laws nor does it grant any institution the power to effectuate harmonization.[255] Lack of central regional institutions with supranational authority within the NAFTA is certainly a problem when attempting to create a working conflict management or dispute resolution system between the two regimes. In the short term, this problem can be circumvented by having the NAFTA states themselves represent the NAFTA in the DRM agreement with the EU. In the not-so-long term, NAFTA should develop the central institutional power to conduct a very efficient conflict management system with the EU.[256] "The North American

---

For a good introduction to the theories of international economic integration and the differences between the various regional integration schemes, see generally MIROSLAV N. JOVANOVIC, INTERNATIONAL ECONOMIC INTEGRATION (1992).

251. Treaty Establishing the European Economic Community (Treaty of Rome), March 25, 1957, 298 U.N.T.S. 11, art. 100.

252. *See* Abbott, *supra* note 244, at 947.

253. *Id.* In addition to expressly granted external powers, the EU possesses whatever external powers are necessary in order to implement an internal policy effectively. DAVID O'KEEFE & PATRICK M. TWOMEY, LEGAL ISSUES OF THE MAASTRICHT TREATY 249 (1994). External powers under the EU's common commercial policy may extend beyond the fields expressly mentioned in Article 113 of the EEC Treaty to cover new aspects of commercial policy reflecting changing conditions in World Trade. *Id.*

254. *See* O'KEEFE & TWOMEY, *supra* note 253.

255. *Id.* at 250.

256. The NAFTA Free Trade Commission, a trilateral institution composed of cabinet-level representatives of the Parties or their designees, is vested with broad authority to resolve disputes, function in a supervisory capacity over NAFTA committees, and oversee the implementation and further elaboration of the Agreement.

Free Trade Agreement should . . . evolve toward the [EU] structure as the inadequacies of the more limited structures now envisioned become apparent."[257]

A common assumption is that a customs union such as the EU, because of its deeper level of integration than a free trade area such as the NAFTA, is more likely to become a "fortress" — a trading bloc with high barriers for outsiders.[258] This is not accurate. A FTA is much more likely to be an impediment to external trade than a customs union such as the EU because it is more likely to be trade diverting.[259] The reason for this is that the FTA gives preferences to goods originating within its boundaries, rather than granting the benefit of free circulation once within the tariff wall, as a Customs Union does.[260]

B. NAFTA-EU Model of Conflict Management: A Combined Trade Policy Review and Dispute Resolution Mechanism

A combination of a TPRM and a DRM (TPR-DRM) in the context of NAFTA-EU relations would serve to eliminate many of the current weaknesses of the respective mechanisms. Additionally, it would also enhance the potential of each mechanism's strengths and maximize compliance with WTO rules.

The shortcomings of the TPRM within the GATT would be eliminated in the context of the NAFTA-EU mechanism in several ways. First, review of EU and NAFTA trade policies could be

---

NAFTA, *supra* note 4, art. 2001(1), (2). *See* David S. Huntington, *Settling Disputes under the North American Free Trade Agreement*, 34 HARVARD INT'L L.J. 407, 415 (1993). The Commission may eventually be vested with the power to act as NAFTA's representative to the WTO.

257. Abbott, *Integration Without Institutions*, *supra* note 244, at 919. Professor Abbott labels this phenomenon as "juridical and institutional evolution based on social and technological evolution." *Id.* at 920. He reasons that the lack of a coordinated external trade policy will lead to political tension and a propensity to disintegration. Abbott, *NAFTA and the Future of United States-European Community Trade Relations*, *supra* note 5, at 525. He argues that if the NAFTA parties do not develop a coordinated, external policy, it is very likely that "the United States, Canada, and Mexico will individually seek to attract inward investment and outward market openings through the grant of special incentives applicable to each country's respective territory." *Id.* This sort of competition will result in political strain within NAFTA and threaten the long-term viability of the agreement. *Id.*

258. Abbott, *supra* note 244, at 919.

259. *Id.*

260. *Id.*

conducted bi-annually by, for example, a consortium of the respective RIAs' trade representations mediated by a rotating panel of three individuals chosen from the superpanel.[261] In addition, it would not be difficult to decide how often to conduct the review or to evaluate the criteria for making that decision because schedules would be set in advance. There would be the possibility of calling an emergency session if, for example, a six month delay in the review of a new policy to be implemented immediately would cause undue problems that might be avoided by way of the review process.

The most important aspect of the TPRM in this context is that its goal would be enforcement, not transparency. Transparency would be achieved, but only as a step in the enforcement process. If the NAFTA and the EU engage in the mediated policy review process suggested above, and the panel decides that one of the RIAs is being unreasonable in refusing to compromise on an impending policy clearly violative of WTO rules, the panel may transfer the proceedings to the tribunal discussed below.

Dealing with two parties would greatly facilitate the working of the system and would expedite the entire process. The NAFTA states and the EU would establish a fund to which each RIA would contribute an equal amount to pay for the functioning of this dispute resolution system.

The trade policy review aspect of the mechanism would, at its best, work to nip any potential dispute in the bud. It would allow each party to voice their disapproval with a particular policy objective and allow the possibility of a compromise before actual implementation. If a particular trade policy compromise is reached, it must not to abridge the obligations of the NAFTA states or the EU vis-à-vis other WTO members and could not abridge the rights of other WTO members. For example, if the EU were to complain that a proposed trade policy in furtherance of NAFTA integration has lowered trade volume vis-à-vis the EU, the EU and NAFTA could reach a compromise. This might be accomplished by making a particular sector of trade more accessible to compensate for barriers in another sector. However, any concessions which the NAFTA would make as a result of this compromise would have to be extended to all affected par-

261. Discussed *supra* note 157 and accompanying text.

ties.

As noted above, in contrast with the current TPRM, the goal of this mechanism will not only be transparency, but primarily enforcement. If a particular disputed policy goes into effect because a compromise was not reached on an earlier date, or because the panel did not transfer the dispute directly to the next stage, the complaining party could turn to the dispute resolution aspect of the mechanism. The EU and the NAFTA would agree on the composition of a standing tribunal or adjudicative body at the inception of the mechanism and would also agree on the terms to be served by its judges. They may adopt the Uruguay Round idea of a superpanel,[262] an agreed upon body of suitable judges, from which the new judges could be appointed.

The mechanism would be rule-oriented. It would be based on adjudication for the most part, and to a much lesser extent on negotiation. Negotiation would play a role in the TPRM stage where the two RIAs seek to reach a compromise as to the trade policy to be implemented. The two parties would agree that rulings of the tribunal would be final and the correction of the violation would be implemented within a time frame decided by the tribunal except under the most unusual circumstances, such as a regional emergency. The tribunal would allot time for correction of violations based on relevant factors suggested by both parties. Since the NAFTA and the EU would be operating on the assumption that they are on a fairly equal political-economic footing, each would realize that it is in their own self interest to comply with the ruling of the inter-regional tribunal.

The NAFTA-EU mechanism would also deal with the problem of enforcement differently from the current DRM. It would not put the option of retaliation for non-compliance with tribunal rulings in the hands of the RIA.[263] The ultimate goal of the

---

262. *See* Understanding of 1993, *supra* note 67, at 119, § 8.4.

263. While the Understanding of 1993, § 22.4 provides that "the level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification and impairment," as the EC-U.S. oilseeds dispute demonstrated it is difficult for parties to agree on what exactly the level of impairment is. In addition, although the Understanding of 1993 attempts to set specific guidelines for the determination of what concessions to suspend, it leaves a great deal of room for the exercise of obviously biased discretion by the complaining party. For example, a complaining party must first attempt to suspend concessions in the same sector in which the panel has found a violation. If the complaining party decides that it is

system would be specific performance but, unlike the WTO system, it would require the violating party to pay a heavy fine as soon the tribunal ruled on the dispute. This sum would actually be a bond of sorts, held in escrow. Once the party complied with the ruling, the monies paid would be reimbursed.

After sixty days, the tribunal would hold a surveillance hearing. If it found that the violating RIA unreasonably delayed compliance with the ruling, it would turn the escrowed funds over to the complaining party as compensation. The extremely costly fine would, of course, serve as something akin to a punitive damage award which would arguably have a deterrent effect on non-compliance.

Those who support the anti-legalist approach to dispute resolution may argue that the above enforcement provisions will be unnecessary in the scope of inter-regional conflict management. They might maintain that the use of such drastic sanctions against an RIA would be too risky, chancing the possibility that a RIA will exit the WTO rather than pay the heavy bond.

There is always the possibility that a member RIA will choose to exit the organization rather than conform with a given rule or tribunal decision. In the context of the proposed inter-regional TPR-DRM, however, the price that an RIA will have to pay to exit the WTO will probably be much higher, in the long-run, than paying a heavy fine or conforming its foreign trade policy to WTO rules. In addition, there is a much greater likelihood that parties will not conform to tribunal rulings under an anti-legalist, negotiated approach based strictly on compromise.[264] The slight probability that a member RIA will exit the WTO is a reasonable price to ensure compliance with rules that are essential for the successful functioning of the system.

"not practicable" to do so, then it may suspend concessions in another sector. *See id.* § 22.3(c).

264. In addition, since internal RIA governments are more limited in their discretion with a legalist mechanism, they are better able to insulate themselves from domestic/regional politics. While constituencies will still attempt to pressure their respective governments, "that pressure is likely to be more closely linked to the legal issues involved." Huntington, *supra* note 256, at 427 n.149.

1. Problems of Implementation

Putting aside the problem of attaining a unified NAFTA external trade policy, the main problem with implementing this NAFTA-EU TPR-DRM would arise from the internal politics of each party. In the U.S., policy makers would have to be sold on the idea of giving up further national sovereignty within the context of NAFTA, vis-à-vis the EU. Although Congress approved U.S. membership in the WTO, debates on the issue of sovereignty dominated the Senate floor for twenty hours before the final vote on December 1, 1994.[265]

While gaining congressional approval will be no easy task, the need for inter-regional cooperation for the development of the global trading system, as well as the realization that the TPR-DRM is in the economic self-interest of all parties to the agreement, should prevail over the unwillingness to cede sovereignty. Government policy makers both in the NAFTA states and in the EU will realize that in an interdependent global economy sovereignty is not an us-or-them proposition. Effective intergovernmental institutions will not subvert the achievement of national will. They will promote it through international cooperation.

2. Improvements on the Current Dispute Resolution Mechanism

The current DRM as embodied in the Understanding of 1993[266] makes no distinct reference to inter-regional relationships in the context of dispute resolution. In the most basic sense, it does not offer separate guidelines for the very sensitive disputes which may arise under Article XXIV, as discussed earli-

---

265. Senate Republican leader Robert Dole initially voiced concerns about whether the WTO posed a threat to U.S. sovereignty. He struck a last minute deal with President Clinton, however, that provided for an "escape hatch" for the U.S. to exit the WTO if Congress were to believe that the WTO was treading on U.S. rights. This compromise helped insure Senate approval. Major opposition to the U.S. approval of the new trade organization was voiced by labor unions including the AFL-CIO, especially textile worker unions. *See* Helene Cooper & John Harwood, *The Vote on GATT — The Rules Change*, WALL ST. J., Dec. 2, 1994, at A1; WASH. POST, Dec. 2, 1994, at A1, A26.

266. Understanding of 1993, *supra* note 67, at 112.

er.[267]

The mechanism proposed above will allow disputes to be resolved amicably which might otherwise have transformed into the precursors of inter-regional trade war. Inherent to the review process of the proposed mechanism would be an examination of the recent steps taken by the RIA towards deeper integration in the context of ramifications for the WTO. Such a review might consist of an econometric analysis of the potential effect on external trade.

As the new conflict management system comes into greater use and tribunal rulings are handed down, RIA foreign policy makers would, *sua sponte*, give greater scrutiny to proposed policies. They would realize the futility of introducing foreign policy which would likely be struck down in the process of the TPR-DRM. The adoption of a rule-violative foreign policy provision by a RIA will involve a cost-benefit analysis. Due to the almost prohibitive cost of violating a WTO rule, the countervailing benefit will have to be extremely high for the RIA to adopt the violative provision.

3. Potential Benefit To World Trading Order

The conflict management model proposed within the context of NAFTA-EU relations would obviously not be limited to just those two parties. As regionalism expands, any RIA that would be willing to comply with the stringent rule-based TPR-DRM would be permitted to participate in the mechanism. While there could be multiple complaining parties, there could only be one defending party for each claim that is brought, thus eliminating the potential complications of the proposed TPR-DRM within the context of participation by a greater number of RIAs.

As the regional structuralization of the world continued, the WTO would allow the ten or so parties to which its membership would be reduced[268] to communicate and develop any new rules

---

267. Understanding on Article XXIV, *supra* note 207, at 34. While the Understanding on Article XXIV provides that the Understanding of 1993 applies to disputes regarding RIAs, as argued earlier, it is flawed for precisely this reason.

268. Professor Abbott has similarly suggested that "regionalization could benefit the GATT if the 100 plus contracting parties are reduced to 12 [RIAs] with negotiating authority for their members." *See* Abbott, *supra* note 244, at 947.

which might be necessary to accommodate its new organizational structure.[269] Communication among ten parties is inherently much easier than among the more than one hundred current WTO members.[270] These regional entities would thus become the building blocks of a global free trade system.

In addition, because of the strength of the rule-based mechanism proposed above, as well as the consequences of non-compliance in the inter-regional system, parties would almost always comply with tribunal decisions. This inter-regional organization in its final form will facilitate what the original founders of the GATT had dreamed of: a world market with no boundaries and no frontiers.

URI LITVAK*

269. This does not intend to suggest that regional integration would be forced on any nation-state member of the WTO which did not wish to become part of an RIA. This structure of the WTO would accommodate regionalism rather than force it on the world. The RIA members would be able to coexist with the nation-state members within the new framework of the WTO.

270. One author has argued that "the biggest obstacle to a smoothly functioning [WTO] is the incompatibility of institutions that characterize the economies of main participants." She points to the divergence of Japanese and American/European views regarding the purpose of economic activity including free trade. *See* Karen van Wolferen, *supra* note 115. For a detailed discussion of these fundamental differences and the general U.S.-Japan conflict that threatens the existing multilateral system and would similarly threaten the inter-regional system in the future, see C. FRED BERGSTEN & MARCUS NOLAND, RECONCILABLE DIFFERENCES? UNITED STATES-JAPAN ECONOMIC CONFLICT (1993).

A smaller WTO membership would also serve to ameliorate these problems by allowing the members to compromise as to economic institutional structure.

* J.D. Candidate 1996, University of Miami School of Law. This article is dedicated to my family and to Marianne for always encouraging me to look to the future. The author would also like to thank Professor James D. Wilets of the University of Miami School of Law for his invaluable guidance, support, and advice.