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BRINGING LAW AND ORDER TO INTERNATIONAL TRADE: ADMINISTRATIVE LAW PRINCIPLES AND THE GATT/WTO

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The Uruguay Round¹ of the General Agreement on Tariffs and Trade (GATT)² established new dispute settlement procedures to be enforced by the World Trade Organization (WTO).³ These new procedures represent a two-level move towards a rule of law. On the first level, the procedures establish general principles that

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¹ Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, *opened for signature* Dec. 15, 1993, 33 I.L.M. 1125, 1143 (1994) [hereinafter GATT/WTO]. The adoption of the Uruguay Round of GATT marked the culmination of eight years of negotiations. See THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 7 (Terence P. Stewart ed., 1993). The Uruguay Round Negotiations opened in Punta del Este, Uruguay, on September 22, 1986. *Id.* at 1. See generally Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 555 (1996). The Uruguay Round Agreements cover intellectual property rights, foreign direct investment and trade in services.

² General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 35 U.N.T.S. 187 [hereinafter GATT] [the GATT also may refer to the institutional framework which implemented the General Agreement. Hence the distinction between GATT and GATT/WTO references]. See generally ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 193-94 (1993) (noting dispute settlement procedures had place at "head" of Uruguay Round agenda); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 65-111 (2d ed. 1990) (outlining historical development of GATT); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 9-35 (1990) (discussing historical role of GATT and examining institutional and constitutional changes).

³ Agreement Establishing the Multilateral Trade Organization, *opened for signature* Dec. 15, 1993, 33 I.L.M. 1144 (1994) (entered into force Jan. 1, 1995) [hereinafter WTO]. "Multilateral Trade Organization" (MTO) was changed to "World Trade Organization" (WTO) in all Uruguay Round documents. *Id.* The text of the WTO reads in part that the parties to the agreement resolve to "develop integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all the results of the Uruguay Round of multilateral trade negotiations . . ." *Id.* at pmb. See generally Raymond Vernon, *World Trade Organization: A New Stage in International Trade and Development*, 36 HARV. INT'L L.J. 329, 330 (1995) (discussing recent creation of WTO).

provide for processes of dispute resolution in a clear, prospective, and rational manner. On the second level, the process adopts administrative law principles significantly clarifying the process of GATT/WTO disputes. Despite this move towards rule orientation, however, the GATT/WTO dispute settlement procedures do not follow a strictly "legal" model. Under a formal legalistic system,⁴ an adjudicatory body ascertains the relevant law, applies the facts, weighs selected policy issues, and rules in favor of one of the disputing parties.⁵ The parties then implement the adjudicatory body's decision. Instead, the GATT/WTO legal system is, by its very nature, a mixture of law and diplomacy,⁶ primarily because it actively encourages conciliation, and secondarily because disputes of law intermesh with the reality of power politics.⁷ Such inherent intermingling is not unique to trade regulation; law can never be

⁴ We note, of course, that there is no universal definition of a truly legalistic system. Those who write about the nature and role of international law argue about what features of the system are necessary to define it as a legal system. See Heather L. Drake, *The Impact of the Trade Wars Between the United States and Japan on the Future Success of the WTO*, 3 TULSA J. COMP. AND INT'L L. 277, 278 (1996) (defining purpose of WTO as "encourag[ing] world economic and political convergence through comprehensive trade policy surveillance and integrated dispute settlement systems, developmental assistance to less developed nations and environmental protection"); see also John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1576 (1984) (describing legalistic system as one including hearings, statutory criteria, and judicial review; contrasting legalistic system to system of broad government discretion); cf. Benjamin Rozwood & Andrew R. Walker, Note, *Side Agreements, Sidesteps, and Sideshows: Protecting Labor from Free Trade in North America*, 34 HARV. INT'L L.J. 333, 347 n.92 (1993) (stating that legalistic system in some European Community States permits government regulation).

⁵ See generally JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 14-36 (1949) (describing adjudicatory process with formula stating rule combined with facts equals decision).

⁶ See William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L. L.J. 427, 446 (1995). In response to the Uruguay Round Agreements, the Congress authorized the president and the appropriate officers to review the procedure of the WTO and its potential effect on United States obligations. *Id.*; see also Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review and Deference to National Governments*, 90 AM. J. INT'L L. 193, 193 (1996). The dispute settlement process "treads on the delicate and confusing issue of national 'sovereignty.'" *Id.*; Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE 615, 665 (1970). In an early article on GATT jurisprudence, Hudec described the GATT legal system as one "designed and operated as an instrument of diplomacy." *Id.*

⁷ See Miguel Montaña i Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 108 (1993) (noting violations are ignored when "parties at fault have sufficient economic or political power that it is impracticable to obtain compliance"). See generally Frieder Roessler, *The Scope, Limits and Function of the GATT Legal System*, in TRADE POLICIES FOR A BETTER FUTURE: THE LEUTWILER REPORT, "THE GATT AND THE URUGUAY ROUND" 71 (1987) (analyzing GATT/WTO legal system).

separated from the political environment within which it operates.⁸

I. THE RULE OF LAW AND ADMINISTRATIVE LAW

This article will examine the GATT/WTO move towards a rule of law in two senses: first, in the traditional, liberal sense,⁹ where the rule of law represents the supreme code of conduct for society,¹⁰ and second, as an extension of the first, where the rule of law subjects the members of society, including the government, to its principle.¹¹ Administrative law fits into this latter framework as a representation of the rule of law governing government action.

In this century, the rule of law has become an important influence upon the international legal framework, especially in the

⁸ See Phillip A. Akakwan, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, 50 MINN. J. GLOBAL TRADE 277, 296 (1996) (noting that GATT dispute settlement has incorporated political factors); see also Mora, *supra* note 7, at 103, 161 (1993) (noting that "trade rules that are consistently enforced . . . minimize political conflict"). See generally THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1-9 (David Kairys ed., rev. ed. 1990) (explaining law is not separate from and "above" politics, economics, culture, and judicial preference).

⁹ Note the term "liberal legal systems" is a description that is not intended to cover the legal systems of all WTO members. See Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INT'L L.J. 291, 315 (1988) (noting that "GATT promotes the principles of . . . trade liberalism"); see also G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 836 (1995) (defining "liberalism" in international law context as doctrine wherein nations seek to promote own interests and thus are essential players in international society); Loretta F. Smith, *The GATT and International Trade*, 39 BUFF. L. REV. 919, 933 (1991) (discussing GATT's philosophy, which centers on liberalism and "grounds GATT in laissez-faire economics").

¹⁰ See generally M. ALLARS, *AUSTRALIAN ADMINISTRATIVE LAW* 14-18 (1990) (providing extensive discussion of natural justice in Commonwealth common law countries); LON. L. FULLER, *THE MORALITY OF LAW* 157-59 (rev. ed. 1969) (explaining link between rule of law and liberty); JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971) (same); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210-229 (1979) (analyzing relationship between law and morality and questioning authority of law); SIR WILLIAM WADE AND CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 24, 301, 737 (7th ed. 1994) (comparing United States and Parliamentary systems).

"The rule of law" is also discussed in more general terms, as a set of principles that underpin the legal system. Basic notions of justice, equality before the law, legal entitlement, and the rationality of law underlie the notion. The principles include prospective, clear, and open legal norms that are fairly stable and that embody rules capable of being followed. In terms of general principles and administrative law principles, the rule of law provides a framework to guide individuals and government. The academic discussion of "the rule of law" is extensive.

¹¹ See generally A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 114 (Liberty Classics 1982) (8th ed. 1915) (discussing nature and application of rule of law).

area of trade regulation.¹² As a result, international administrative law principles often influence the rules that govern international law organizations, such as the United Nations or the WTO.¹³ These rules govern the way such organizations interact with employees and fulfill legal obligations.¹⁴

Throughout the world, international administrative law also includes an emerging jurisprudence of common administrative law principles.¹⁵ Some difficulties arise associated with the desire to identify these general principles, however, especially because administrative law is directly linked to the governmental system of individual countries.¹⁶ For instance, the strong separation of powers principle in the United States system of government has influenced America's principles of administrative law,¹⁷ whereas, the

¹² See George M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT*, 16 N.C. J. INT'L L. AND COMM. REG., 497, 500 (1991) (declaring that Uruguay Round Agreements strengthen "GATT System governed by rule of law"); see also Mora, *supra* note 7, at 109 (offering a discussion of different philosophies towards GATT law); Louis B. Sohn et al., WORKING GROUP ON IMPROVING THE EFFECTIVENESS OF THE UNITED NATIONS, *Report on Improving the Effectiveness of the United Nations in Advancing the Rule of law in the World*, 29 INT'L LAW. 293, 294 (1995) (providing discussions of rule of law in international law context).

¹³ See Daniel G. Partan, Note, *International Administrative Law*, 75 AM. J. INT'L L. 639, 639 (1981) (explaining national officials often look to United Nations agencies for rules and standards to guide their work); see also Shell, *supra* note 9, at 923 n.406 (analogizing WTO's rulemaking processes to litigation processes in United States administrative law).

¹⁴ See generally C.F. AMERASINGHE, 1 THE LAW OF THE INTERNATIONAL CIVIL SERVICE 257-402 (2d rev. ed. 1994) (discussing decisions of international administrative tribunals on myriad of legal issues arising between international organizations and their staff members); DOCUMENTS OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS 1-4 (C.F. Amerasinghe ed., 1989) (presenting collection of documents on international administrative tribunals).

¹⁵ See LAWRENCE BAXTER, ADMINISTRATIVE LAW 36 (1984) (discussing how general principles of administrative law have now gained international currency). See generally H.B. JACOBINI, AN INTRODUCTION TO COMPARATIVE ADMINISTRATIVE LAW 1-22 (1991) (comparing American Administrative law with procedure in other countries and cultures); JURGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 3-10 (1992) (tracing origins and development of corpus of European Administrative law).

¹⁶ See SCHWARZE, *supra* note 15, at 87-88 (discussing link between administrative law and governmental systems in European Community); see also Timothy M. Reif, *Coming of Age in Geneva: Guiding the GATT Dispute Settlement System on Review of Antidumping and Countervailing Duty Proceeding*, 24 LAW & POL'Y INT'L BUS. 1185, 1185-89 (1993) (noting difficulty in applying international law to matters of governmental administrative law). But see Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 199 (1996) (recalling that some government representatives believed U.S. administrative law jurisprudence provided useful model for GATT standard of review).

¹⁷ See Pieter M. Scherklan, *When and How Should Texas Courts Review Agency Rules?*, 47 BAYLOR L. REV. 989, 1025 (1995). The courts "have long been sympathetic . . . to separation of powers concerns about administrative agencies." *Id.*; see also Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 325 (1989). "Congress can and does restrict presidential control of administrative officials." *Id.*; Timothy E. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model*

parliamentary system utilized by many Commonwealth countries likewise has molded the administrative law principles of those nations.¹⁸ Remarkably, despite these differences in government structure, many similar principles exist.¹⁹

Administrative law is the context within which domestic trade regulation often occurs.²⁰ It fits comfortably within an analysis of the move towards the rule of law in the GATT/WTO dispute resolution system.²¹ Some of the administrative law principles that comprise the domestic context will be examined in the context of the GATT/WTO²² where they guide the move towards a rule of law.²³

for the Congress Agency Relationship, 63 GEO. WASH. L. REV. 479, 526 (1995). There is a "traditional separation-of-powers-rooted thinking in administrative law." *Id.*

¹⁸ See Brian Levy & Pablo T. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 L.J. ECON. & ORG. 201, 206 (1994) (noting in parliamentary system where executive has strong legislative powers, administrative law will not constrain the executive); see also William A. Tilleman, *Environmental Appeals Board: A Comparative Look at the United States, Canada, and England*, 21 COLUM. J. ENVTL. L. 1, 99 (1996) (explaining that parliamentary systems are based on ministerial accountability).

¹⁹ Note that many of the present signatories have western democratic systems of government, so their administrative law principles will often reflect similar principles. With prospective WTO members such as China, the similarities may be reduced. See generally WADE & FORSYTH, *supra* note 10, at 996-98 (comparing United States and Parliamentary systems).

²⁰ See J. Michael Finger, *The Meaning of "Unfair" in United States Trade Policy*, 1 MINN. J. GLOBAL TRADE 35, 44 (1992) (noting that legal remedies in antidumping and countervailing duty cases depend primarily "on administrators' understanding of laws' objectives"); see also Craig R. Giesze, *Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, as Well as Practical Business Risks and Realities for United States Exporters to Mexico in the ERA of the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 885, 929 (1994) (noting Mexican promulgation of administrative regulations which governed unfair international trade practices).

²¹ See Shell, *supra* note 9, at 833-34 (explaining that under legalist theory of international trade dispute resolution creation of rule-based trade tribunals can move world trade toward a governance system based on "the rule of law").

²² See *infra* part IV (examining principles in detail). These principles are due process/natural justice, timeliness and exhaustion, standing, transparency, judicial review, and remedies. See generally Victoria Curzon, *New Institutional Developments in GATT*, 1 MINN. J. GLOBAL TRADE 87, 89 (1992) (providing interview of new dispute settlement procedure, including improved transparency).

²³ This approach mirrors an approach in a paper prepared by Kim Rubenstein for the International Trade Regulation Committee of the Administrative law section of the American Bar Association. Kim Rubenstein, *Administrative Law Principles and the GATT* (December 1992) (unpublished manuscript, on file with author). The report looked at administrative law principles in some GATT member jurisdictions. *Id.* Those surveyed were: Australia, Canada, European Community, Germany, Hong Kong, Japan, Korea, Mexico, New Zealand, Norway, Singapore, and Sweden. *Id.*

II. GATT - RULE OR POLITICALLY ORIENTATED?

Historically, an unsettled aspect of the GATT has been its dispute-resolution role.²⁴ The GATT panel adjudicatory process originated amid suggestions that it should be based on a political/conciliatory model, rather than a legalistic/adjudicatory model of panel review.²⁵ The political/conciliatory view of the GATT lacked singular focus.²⁶ One draftsman of the GATT, at the preparatory meetings, stated that the Agreement "should deal with these subjects in precise detail so that the obligations of member governments would be clear and unambiguous."²⁷

Moreover, the drafters originally intended to place the GATT in the setting of the International Trade Organization (ITO). Consequently, the charter required a dispute-settlement procedure fo-

²⁴ The following article provides several perspectives on GATT within the context of dispute resolution in international trade. See Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT'L L. 101, 141 (1992) (concluding GATT legal "system has provided one of most successful and effective international trade dispute resolution systems in history of international relations"); see also Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade - Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1063 (1994) (characterizing GATT as lacking "well-developed mechanism for resolving disputes between the Contracting Parties"); John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 19 (1992) (stating that GATT dispute settlement processes have had some recent success but still pose important problems that need to be addressed); Mora, *supra* note 7, at 106 (asserting that new dispute-settlement procedures implemented after Uruguay Round will add certainty, predictability, and fairness to international trading system).

²⁵ See OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 5 (1987) (describing GATT as "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"); see also Mora, *supra* note 7, at 75 (noting that prior to Uruguay Round, GATT panels were conciliatory bodies rather than courts); Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578, 592 (1991) (stating that "GATT dispute settlement mechanism incorporates variants of conciliation throughout process").

²⁶ The United States is generally perceived to have supported the legalistic position, while Japan and the European Community have been considered supporters of the political/conciliatory view. Most developing countries and non-European countries have tended to support the legalistic position because they regard such an approach as a more effective protector of small country rights. See JOHN H. JACKSON ET. AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 332-59 (3rd ed. 1995) (discussing dispute resolution sanctions in GATT); see also Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 389 (1995) (explaining that some countries, particularly members of European Union, historically preferred more diplomatic approach to GATT dispute resolution, while other countries, such as United States, preferred adjudicatory approach).

²⁷ JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 93 (1989) (quoting United States representative Harry Hawkins, speaking at London meeting of Preparatory Committee of United Nations Conference on Trade and Employment).

cused on the effective use of arbitration.²⁸ Furthermore, the shift in the GATT dispute resolution procedures, from a committee or "working party" procedure to a "panel procedure," confirmed that the practice had evolved into a legalistic/adjudicatory model from an exclusively political/conciliatory model.²⁹

III. RULE OF LAW PRINCIPLES IN INTERNATIONAL TRADE DISPUTES—POST URUGUAY³⁰

The Understanding on Rules and Procedures Governing the Set-

²⁸ The fact that the International Trade Organization was not adopted may support the political/conciliatory theory in that the failure to adopt that framework is an implicit rejection of the legalistic/adjudicatory model. See generally KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATIONS* 3-8 (1970) (criticizing legalistic approach in GATT and ITO). But see JACKSON, *supra* note 27, at 32-34. Jackson argues, however, that the failure to adopt the ITO is not reflective of that sentiment, but was related to other factors. *Id.*

²⁹ See Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. L. 38 (1990) (providing discussion of the gradual trend of the GATT dispute settlement processes toward legalism); see also Miguel Montaña i Mora, *International Law and International Relations Cheek to Cheek: An International Law/International Relations Perspective on the U.S./EC Agricultural Export Subsidies Dispute*, 19 N.C. J. INT'L & COMM. REG. 1, 19 (1993) (noting since creation of panels in 1952 GATT has shifted to more legalistic approach); Young, *supra* note 26, at 393 (describing 1952 transformation of conciliatory working parties into more adjudicatory panels).

³⁰ Initially the GATT was not legalistic at all as it only had a few paragraphs devoted to dispute resolution and those paragraphs did not mention adjudication by panels. See generally JACKSON, *supra* note 27, at 94. Procedures for dispute resolution were weak. *Id.* The central and formal procedures were found in Articles XXII and XXIII. *Id.* Article XXII, entitled "Consultation," encouraged the member states involved in the dispute (Contracting Parties) to consult with one another about any matter affecting the operation of the Agreement. *Id.* If this did not solve the problem, Article XXIII provided for the lodging of written complaints with the offending party. *Id.* Originally, these complaints were first referred to "working parties" consisting of representatives from member state delegations, including those of the disputing countries. *Id.* at 95. However this primitive conflict resolution practice was short-lived. *Id.* The introduction of the panel proceeding was the first sign of a move towards an adjudicative model of conflict resolution. *Id.* Upon the introduction of panels, procedures became more judicial in appearance. *Id.* Disputants were no longer part of the decision-making body, but more like normal litigants. *Id.* The panel took on the visage of an arbiter and panels began to separate the evidentiary stage, where the parties had a right to be heard, from the decision making stage, where the panel deliberated in private. *Id.*

Articles XXII and XXIII did not set out any procedures for the panel process, these developed over time through common practice. *Id.* The Panel hearing was conducted in a manner that is typical of adversarial judicial tribunals. *Id.* The disputants, having agreed upon the terms of reference, were generally able to determine the crux of the dispute. *Id.* If a settlement was effected, the Panel prepared a report limited to a brief outline of the dispute. *Id.* If settlement did not occur, the Panel generally prepared and submitted to the parties the descriptive part of its report in an attempt to give the disputants another opportunity to seek an amicable settlement. *Id.* In due course, the report was presented to the Contracting Parties who then decided whether to adopt it. *Id.* Contracting Parties were under no compulsion to adopt the panels determination. *Id.* Most were adopted, however, while some were only noted or otherwise not explicitly approved. *Id.* In strict legal terms, it was only the decision of the Contracting Parties that was relevant under Art. XXIII. *Id.* The decision to adopt needed to be made unanimously by the Contracting Parties. *Id.*

tlement of Disputes ("DSU"),³¹ titled Annex 2, outlines the new dispute settlement rules of the GATT/WTO system. The Uruguay Round system of dispute settlement is tied to the WTO, and was inaugurated on January 1, 1995.³² The *Annexes to the Agreement Establishing the WTO*³³ contain the Agreements negotiated during the Uruguay Round. The DSU covers the negotiations and the Agreements (Covered Agreements)³⁴ that are part of its Annex 1; the DSU itself is titled Annex 2.³⁵

The DSU strengthens the rule-orientated, legalistic character of the dispute settlement mechanism in a number of ways. The DSU creates the Dispute Settlement Body (DSB),³⁶ an oversight body, to administer dispute procedures. Additionally, the DSU sets strict timetables for each stage of the proceedings, introduces automatic adoption of panel reports and, most significantly, establishes an appellate system.³⁷ In contrast, the DSU affords the conciliatory approach less weight.³⁸

³¹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112, 114 (1993) [hereinafter DSU] (noting GATT rules and procedures were codified by DSU reached in Tokyo Round); see also Young, *supra* note 26, at 391-96 (providing historical perspective on dispute resolution in GATT).

³² See DSU, *supra* note 31, 33 I.L.M. at 1125 (noting acceptance of the WTO agreement).

³³ See DSU, *supra* note 31, 33 I.L.M. at 1154 (indicating that rules and procedures are located in Annex to Agreement).

³⁴ See DSU app. 1, *supra* note 31, 33 I.L.M. at 1244 (defining "Agreements Covered by the Understanding" as term used in DSU to describe Agreements under its ambit).

³⁵ See DSU part II art. II, ¶ 3, *supra* note 31, 33 I.L.M. at 1144. The Agreements contained in Annex 4 to the Treaty establishing the WTO (the Plurilateral Trade Agreements) are not automatically covered by the DSU. *Id.* The parties to each of these Agreements must adopt a decision to that effect, which decision may include special rules or derogations from the DSU. *Id.* The Agreements concerned are the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement. *Id.* Part II, ann. 4(a)-(d).

³⁶ See DSU, part II, art. IV, ¶ 3, *supra* note 31, 33 I.L.M. at 1145. Pursuant to Article III of the WTO Agreement, the WTO administers the DSU. *Id.* at 1145. If the WTO Council meets in relation to dispute settlement its name changes to Dispute Settlement Body (DSB). *Id.* The DSB will inherit most of the functions that were exercised up until this point by the Contracting Parties. *Id.* The Contracting Parties will be renamed Members of the WTO. *Id.* at 1144

³⁷ See Akakwan, *supra* note 8, at 285 (describing general success of Uruguay Round which included establishment of dispute settlement body); see also Thomas J. Dillon, *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 375-76 (1995) (describing function and effect of DSU within new dispute resolution mechanism of WTO); Shell, *supra* note 9, at 849 (providing overview of dispute resolution system, including role of DSB).

³⁸ See DSU, *supra* note 31, 33 ILM at 1242. Only Articles 4 and 5 order consultation and mediation, and a footnote to Article 4:11 lists the consultation provisions in various WTO Agreements. *Id.*; see also Timothy A. Harr, *WTO Dispute Settlement Provisions*, 722 PLI/COMM 579, 639 (1995). The use of Articles 4 and 5 "is by mutual consent of the parties and either party may terminate at any time." *Id.*; Curtis Reitz, *Enforcement of the General*

The DSU still encourages arbitration as an alternative means of dispute settlement.³⁹ While there appears to be a significant shift towards judicialization of procedure, the conciliatory approach remains the initial step in settling disputes under the DSU.⁴⁰

Although the conciliatory approach may continue throughout the course of panel proceedings,⁴¹ the DSU provides for both conciliation and adjudication as dispute settlement methods under the WTO.⁴² However, the DSU stresses a rule-orientated function over a political/conciliatory function.⁴³

The comprehensive procedural rules in the DSU evidence the shift from the conciliatory approach towards a rule of law.⁴⁴ The procedural rules, in addition to answering all substantial procedural questions, also seek to balance any disparity of power between countries.⁴⁵ The DSU's advanced system of procedural rules

Agreement on Tariffs and Trade, 17 U. PA. J. INT'L ECON. L. 155, 195 (1996). The "idea of conciliation has remained part of . . . the ideal of dispute resolution under GATT." *Id.*

³⁹ See DSU, art. 25, *supra* note 31, 33 I.L.M. at 1242. See generally Ernst-Ulrich Petersmann, *Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 323 (discussing role of arbitration in GATT).

⁴⁰ See Dillon, *supra* note 37, at 381-82 (examining in detail provisions of Articles 4 and 5). The procedures for consultations in Article 4 remain a first step in the dispute settlement process. *Id.* The procedures for good offices, conciliation, and mediation in Article 5 are voluntary options if the parties agree. *Id.*

⁴¹ See DSU, part II, art. 5, para. 5, *supra* note 31, 33 I.L.M. at 1125-30 (noting Article 5 allows conciliation proceedings to continue parallel with the panel proceedings); see also Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53, 56-92 (1987) (providing former GATT official's view of panel procedure).

⁴² See Dillon, *supra* note 37, at 375-90 (describing dispute settlement under auspices of WTO); see also Reif, *supra* note 25, at 633 (discussing benefits of conciliatory system versus adjudication of disputes); Eric A. Schwartz, *The Resolution of International Commercial Disputes Under the Auspices of the ICC International Court of Arbitration*, 18 HASTINGS INT'L & COMP. L. REV. 719, 735 (1995) (describing ICC system for resolution of disputes by conciliation as well as adjudication).

⁴³ See *infra* notes 54-73 and accompanying text (describing procedural rules mandated by DSU).

⁴⁴ See Dillon, *supra* note 37, at 392. The author summarizes several significant procedural rules affecting obligations between GATT contracting parties, including creation of "unified" dispute resolution system and establishment of Appellate Body to review legal issues decided by panels. *Id.*

⁴⁵ See James R. Holbein & Gary Carpenter, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531, 537 (1993) (analyzing DSU's standardized procedures for dispute resolution as "improvements"); see also Myles Getlan, Comment, *TRIPS and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 204 (1995) (outlining development of DSU's new procedures for dispute resolution). See generally Richard O. Cunningham, *Dispute Settlement in the WTO: Did We Get What the United States, or Did We Give Up the Only Remedy That Really Worked?*, at 547, 576 (PLI Commercial Law and Practice Course Handbook Series No. 722, 1995) (discussing procedural effect of rules in Gatt, WTO and Uruguay Round Agreement Act). The DSU improves the old system of dispute settlement. *Id.* Its provisions guarantee: a right to a panel; the adoption of panel reports absent consensus to reject the report; appellate review of legal aspects of reports; and time limits

includes provisions governing procedures for filing a complaint,⁴⁶ timeframes for the dispute-settlement process,⁴⁷ urgent applications,⁴⁸ provisions for the joinder of third parties,⁴⁹ frameworks structuring the panel process,⁵⁰ time limitations for reaching a decision,⁵¹ parties' rights to appeal,⁵² and the enforcement of judgments.⁵³ These new procedural rules reflect "rule of law" general principles, some of which are explained below.

A. *Time-frames: Certainty in Process*

Prior to the Uruguay Round, it was obvious to most observers that the established dispute-settlement procedures were ineffective.⁵⁴ For example, members could delay or block the process because every aspect of the process, including the selection of panelists and the adoption of final reports, was decided by consensus.⁵⁵ During the Tokyo Round, drafters addressed some of the earlier problems, outlining procedures in the 1979 Understanding on Dispute Settlement.⁵⁶ Drafters adopted additional procedures in the 1982 Ministerial meeting. Additionally, during the mid-term re-

governing when members must bring their laws into conformity, with concomitant authorization to retaliate if a member has not implemented a panel's ruling within the prescribed time. *Id.*

⁴⁶ See DSU art 9, *supra* note 31, 33 I.L.M. at 116-21. Article 9 sets forth the procedures for multiple complaints. *Id.*

⁴⁷ *Id.* at 121.

⁴⁸ *Id.* at 121.

⁴⁹ *Id.* at 120.

⁵⁰ DSU, *supra* note 31, 33 I.L.M. at 117-18.

⁵¹ *Id.* at 125.

⁵² *Id.* at 123-24.

⁵³ *Id.* at 125-26 (providing procedure for "Surveillance of Implementation of Recommendations and Rulings"). See generally *id.* at 373-81 (providing detailed explanation of DSU's dispute resolution system).

⁵⁴ See, e.g., Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1203 (1994) (explaining that prior to completion of Uruguay Round there existed increasing concerns regarding several aspects of GATT dispute settlement system); see also, Nicole Telecki, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round*, 14 B.U. INT'L L.J. 187, 193 (1996) (explaining that before Uruguay Round, GATT only covered trade in goods and provided no protection for intellectual property). See generally John J. Barcelo III, *Product Standards to Protect the Local Environment—The GATT Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT'L L.J. 755, 756 (1994) (discussing new GATT rules and possible environmental threat).

⁵⁵ See Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1063 (1994) (noting flaws of GATT with respect to adoption of reports within context of trade-environment conflicts).

⁵⁶ See *Uruguayan Recourse to Article XXII*, B.I.S.D. 11S/95, ¶ 15 (1962) (later codified in Tokyo Round, 1979 Understanding on Dispute Settlement, B.I.S.D. 26S/216, Annex, para. 5) (creating nullification or impairment).

view of the Uruguay Round, more changes were introduced on a trial basis.⁵⁷ Most of the consultation phase of this regime, which was valid until the end of the Uruguay Round, has been incorporated in the 1994 DSU. The DSU, however, introduced a number of changes to the Montreal interim agreement.⁵⁸

Notable features of the 1994 DSU are the introduction of several deadlines for establishing panels⁵⁹ deliberating cases,⁶⁰ and the adoption⁶¹ and implementation⁶² of reports.

The right to a panel proceeding at the expiration of a specified consultation period is an important initiative.⁶³ Currently, delays, blocking, and other tactical methods to forestall the establishment of adjudicative panels are unlikely.⁶⁴ Under the new rules, if no mutually satisfactory result is reached following initial conciliatory efforts, either party may request a panel proceeding.⁶⁵ The conciliation process is, thus, the beginning of the adjudicatory process.⁶⁶

⁵⁷ See 1989 Dispute Settlement Procedures Improvements, B.I.S.D. 36S/61 (1990). The Montreal Interim Agreement was adopted Dec. 1988 [hereinafter 1989 Improvements].

⁵⁸ See generally Spencer W. Waller, *The Uruguay Round and the Future of World Trade*, 18 BROOK. J. INT'L L. 1, 3 (1992) (discussing 1988 midterm meeting in Montreal as producing only few tangible results).

⁵⁹ See DSU arts. 5, 8, *supra* note 31, 33 I.L.M. at 117-19 (outlining proceeding involving good offices conciliation and mediation taken by parties to dispute).

⁶⁰ *Id.* art. 12, at 120-21 (outlining panel working procedures for determining timetable for panel discussions).

⁶¹ See *id.* at 122-23 (outlining procedure for adoption of panel reports).

⁶² See *id.* at 125-26 (outlining procedure for surveillance of implementation of recommendation and ruling).

⁶³ DSU art. 4.7, *supra* note 31, 33 I.L.M. at 117 (outlining remedy available to complaining party).

⁶⁴ See, e.g., *Japan-Customs Duties, Taxes and Labelling Practices on Imported Wine and Alcoholic Beverages*, B.I.S.D. 345/83, 115, para. 5.6 (adopted on Nov. 10, 1987). In 1985, the European Community requested a consultation with Japan in line with GATT article XXII:1. *Id.* The European Community asked Japan to eliminate import restrictions on alcohol and alcoholic beverages. After two rounds of consultations the European Community considered them a failure and requested that a panel be set up in line with GATT Article XXIII:2. *Id.* But Japan opposed the establishment of the panel on the ground that the Article XXII:1 consultations had not been exhausted. *Id.*; see also Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. L. 38, 77 (1990) (noting GATT's move toward legalism prevents blocking of dispute panel decisions); SCHWARZE, *supra* note 15, at 962 (discussing panel process delaying tactics employed by European Community in its disputes with the United States in 1972).

⁶⁵ See DSU art. 4.7, *supra* note 31, 33 I.L.M. at 117 (discussing procedure for requesting panel proceeding).

⁶⁶ See *id.* at 115-17 (recommending that all GATT members engage in good faith conciliation to resolve disputes).

Since the DSU sets a strict time limit for the completion of conciliation and litigation,⁶⁷ the DSU establishes a close link between conciliation and adjudication. Strict time frames propel the dispute settlement procedures towards a more legalistic approach, creating a streamlined and strengthened system.⁶⁸ Calibrated progression of disputes through different time-limited stages minimizes the effective use of delay tactics utilized in past GATT dispute settlements. As a result, the new process is more certain and efficient.

The move toward rule of law principles is not absolute. The respect shown by parties for these deadlines likely will depend on brute politics, the identity of the parties, and the power of the countries as parties.⁶⁹ There also exist non-political factors such as the complexity of the dispute. Thus, whether the deadlines will operate effectively within the WTO dispute-settlement framework remains unclear.⁷⁰

⁶⁷ See GATT/WTO, *supra* note 1, at ¶ 4. Under GATT Article XXIII:2, parties were only required to finalize conciliation within a reasonable time and the 1979 Understanding merely required the parties to conclude consultation expeditiously. *Id.* These vague provisions provided the contracting parties with an opportunity to delay or even to block the establishment of a panel. *Id.* But see DSU, art. 4:7, *supra* note 31, 33 I.L.M. at 117 (laying down set timetable for consultation and conciliation and providing that, when specific time expires, parties concerned have right to resort to panel); Jack J. Chen, *Going Bananas: How the WTO Can Heal the Goal Banana Trade Dispute*, 63 *FORDHAM L. REV.* 1283, 1331 (1995) (stating that strict time limits of WTO dispute procedure eliminate ability of members to prolong and postpone dispute resolution process).

⁶⁸ See DSU arts. 20, 21, *supra* note 31, 33 I.L.M. at 125-26. Articles 20 and 21 dictate specific timeframes for DSB decisions. *Id.* In addition, prompt compliance with rulings or recommendations of the DSB is considered essential to ensure the effective resolution of disputes between parties. *Id.*

⁶⁹ See generally Cunningham, *supra* note 45, at 562 (proposing that not all or even most U.S. efforts to eliminate GATT-violative foreign practices will be resolved by adjudicated WTO decision).

⁷⁰ *Editorial Note*: Since the substantive writing of this article, the WTO DSB has delivered its first Panel decision and Appellate Body decision. See World Trade Organization, Doc. No. WT/DS 2/R, *reprinted in* World Trade Organization: Report of the Panel in United States - Standards for Reformulated and Conventional Gasoline and Like Products of National Origin, Jan. 29, 1996, 35 I.L.M. 274, 274-300 (containing Panel Report of United States gasoline dispute); see also World Trade Organization Doc. No. WT/DS2/AB/R, *reprinted in* World Trade Organization Appellate Body: Report of the Appellate Body in United States - Standards for Reformulated and Conventional Gasoline, May 20, 1996, 35 I.L.M. 603, 603-34 (containing Appellate Body Report of United States gasoline dispute). See generally Jennifer Schultz, *The Demise of "Green" Protectionism: The WTO Decision on the US Gasoline Rule*, *DENV. J. INT'L L. & POL'Y* (forthcoming 1996) (providing full discussion of United States Gasoline dispute). In this instance the deadlines laid down by the DSU were effectively complied with by the parties. *Id.*

In certain situations, the DSB may act upon the lapse of a deadline and bar the complaining party's non-agreement.⁷¹ In such cases, the DSB may authorize retaliatory measures or refuse to follow the DSU's decision.⁷² The DSB's ability to ignore the DSU brings into question the credibility of the system involved and illustrates the intermeshing of political and legal factors.⁷³

B. Adoption of Panel Reports

The most serious breakdown in early GATT dispute resolution was the failure to adopt certain contentious reports. Due to the consensus method of decision making, the losing party could block the adoption of a panel report at the Council level. The new rules were designed to overcome this problem. The DSU significantly changes the old procedure, adopting an approach emphasizing the rule of law.⁷⁴ For instance, Article 16.4 requires automatic adoption of reports unless there is a consensus among the parties *against* adoption.⁷⁵ This important change makes clear the consequences of a Panel decision. Regarding the adoption of Appellate reports, Article 17.4 recapitulates Article 16.4.⁷⁶

Abandonment of the consensus approach illustrates a marked "legalization" and "judicialization" of the dispute settlement pro-

⁷¹ See DSU art. 20, 21, *supra* note 31, 33 I.L.M. at 125-26. Article 20 entitled "Time-Frame for DSB Decisions" and Article 21 entitled "Surveillance of Implementation of Recommendations and Rulings" provides for specific time frames for arbitration between parties with additional time being within the discretion of the DSB. *Id.* The emphasis on prompt resolution is reflected in the creation of a fourteen month timetable for DSU proceedings. *Id.*

⁷² See *id.* at 126-28. Article 22, entitled "Compensation and Suspension of Concessions" provides that compensation and suspension of concessions or other obligations are temporary measures available in event that recommendation and Rulings are not implemented within reasonable period of time. *Id.*

⁷³ See JACKSON, *supra* note 2, at 34-38 (discussing legal and political factors in DSB's power to ignore DSU); see also WADE & FORSYTH, *supra* note 10, at 970-75 (explaining rationality of law underlying basic notions of justice that underpin legal system).

⁷⁴ See DSU art. 16.4, *supra* note 31, 33 I.L.M. at 123. Article 16.4 provides that the report shall be adopted by the 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. *Id.*; see also Reif, *supra* note 25, at 593. Although the author argues that GATT conveys a non-legalistic attitude, she indicates that the reports of the panel virtually always are founded on GATT treaty law and do not consider non-judicial elements. *Id.*

⁷⁵ See DSU art. 16.4, *supra* note 31, 33 I.L.M. at 122-23 (noting adoption of panel report by members within 60 days of issuance DSB decides by consensus not to adopt report).

⁷⁶ See DSU art. 17.14, *supra* note 31, 33 I.L.M. at 123. According to Article 17.4, "an Appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate report." *Id.*

cess.⁷⁷ Automatic adoption of panel reports may enhance their influence, as panels need no longer formulate reports with fear that the losing party will block adoption.⁷⁸ As welcome as this improvement may be, questions of efficacy still shadow the new provisions. Will the United States and the European Community, for example, accept panel reports condemning their domestic policies?⁷⁹ While members can no longer block the adoption of panel reports, they can decide not to implement decisions into their domestic arenas. Such a situation has the potential to occur in the United States due to legislation implementing the Uruguay Round Agreements.⁸⁰

⁷⁷ See Chen, *supra* note 67, at 1330. The author concludes that the rule implementing adoption of an Appellate Body report unless decided by consensus not to be adopted, creates a dramatic shift toward legalism. *Id.*

⁷⁸ See *id.* at 1330 (noting approval of automatic adoption of DSB panel reports).

⁷⁹ See *id.* at 1332-33. The United States, Japan, and other members of the European Community must adapt to the strict guidelines of the WTO so that the world does not revert back to the ineffective earlier GATT system. *Id.* The European Community and the United States have previously blocked the adoption of panel reports which they found unpalatable; see also *Banana* case DS 38/R of 11 February 1994 (not adopted by European Community); *Airbus* case SCM142 of 4 March 1992 (also not adopted by European Community); infamous *Tuna/Dolphin* case DS21/R of 3 September 1991 (not adopted by United States).

⁸⁰ See Dole Bill, S. 1438, 104th Cong., 1st Sess. (1995). It would appear that the introduction of the Dole Bill counters the perceived trend by the United States towards promotion and acceptance of an international rule of law. See also Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, opened for signature Dec. 15, 1993, 33 I.L.M. 1125, 1142 (1994). In an Agreement between the U.S. Administration and Senator Robert Dole provisions were made which may force the United States to leave the WTO if too many adverse decisions are adopted against it. The Agreement set up a WTO Dispute Settlement Review Commission which will review all final WTO dispute settlement reports adverse to the United States, to determine whether the panel exceeded its authority or acted outside the scope of the Agreement. In this Agreement the following text was adopted:

The Administration will support legislation next year to establish a WTO Dispute Settlement Review Commission. . . . It will review all final WTO dispute settlement reports, adverse to the United States, to determine whether the panel exceeded its authority or acted outside the scope of the Agreement. Following issuance of any affirmative determination by the Commission, any member of each House would be able to introduce a joint resolution calling on the President to negotiate new dispute settlement rules that would address and correct the problem identified by the Commission. If there are three affirmative determinations in any five year period, any member of each House may introduce a joint resolution to disapprove United States participation in the WTO - and if the resolution is enacted by Congress and signed by the President, the United States would commence withdrawal from the WTO Agreement. Our goals here are straightforward: (1) to assure that the dispute settlement process is accountable; (2) that it is a fair process; and (3) that it works as we expect it to work. From the Administration's standpoint, we are confident that the dispute settlement process will work fairly and that the concerns expressed by many will not materialize. However, if panels do exceed their authority, this proposal gives us a fail-safe device.

Id.

There exists a definite move to a legalistic, rule of law orientation in the GATT/WTO. While not denying that conciliation and political forces still play a vital role, the placing of those forces and administrative law principles within a clearly legal framework has changed the nature of the contest.

IV. ADMINISTRATIVE LAW PRINCIPLES IN INTERNATIONAL TRADE DISPUTE RESOLUTION

A. *Due Process/Natural Justice*⁸¹

Principles of due process and natural justice are found in many countries' administrative law systems;⁸² those principles being procedural in nature.⁸³ The need for a fair decision making process is of fundamental importance for rule of law inspired systems. The exact form of the process varies between countries, but one can identify some common, general principles.

Natural justice in Commonwealth common law countries⁸⁴ consists of two principles. First, under the hearing rule, based on the maxim *audi alteram partem*,⁸⁵ the decision-maker must give people affected by the decision an opportunity to be heard. Second, the bias rule, based on the maxim *nemo debet esse iudex in propria sua causa*,⁸⁶ requires the decision maker to be disinterested or unbiased in the matter to be decided.⁸⁷ The concept of due process in United States administrative law covers similar princi-

⁸¹ The term "due process" is used in the United States, whereas, in Commonwealth common law countries the same principles are discussed as natural justice. In Australia, the term procedural fairness is also used.

⁸² See Rubenstein, *supra* note 23 (unpublished manuscript, on file with author) (discussing administrative law principles in GATT member countries).

⁸³ See generally PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 48-49 (1989) (providing general discussion of due process). Note that in the United States, due process principles are also relevant in the constitutional context in deciding whether legislation is constitutional. This is referred to as "substantive due process."

⁸⁴ England, Australia, New Zealand, and Canada are examples.

⁸⁵ See BLACK'S LAW DICTIONARY 158 (6th ed. 1990) (defining as "[h]ear the other side; hear both sides. No man should be condemned unheard.").

⁸⁶ See BLACK'S LAW DICTIONARY 1037 (6th ed. 1990) (defining maxim as one derived from civil law: "No man ought to be a judge in his own cause").

⁸⁷ See generally WADE & FORSYTH, *supra* note 10, at 465-72 (comparing United States and Parliamentary systems); ALLARS *supra* note 10, at 236-74 (providing extensive discussion of these principles).

ples.⁸⁸ The due process concept also is consistent with many European administrative law systems.⁸⁹

1. Hearing

Whether a person is entitled to representation at a hearing differs among countries and may depend on the context of each case. As a rule, however, the right to respond to allegations, is the standard link to most administrative law principles.

GATT/WTO panels have numerous features that reflect fair hearing principles. To ensure a fair hearing, the GATT/WTO panels require that the decision maker be disinterested in the outcome. In addition, the semblance of authority is important. Consequently, the DSU requires that panels be staffed with well-qualified individuals.⁹⁰

The administrative law principle of a fair hearing is evidenced in various panel practices. Paragraph 18 of the DSU forbids *ex parte* communications with the panel or with the Appellate Body in pending matters.⁹¹ Written submissions to the panel or to the Appellate Body must be made available to all parties involved in the dispute.⁹² Appendix 3 also provides for a fair hearing.⁹³ Each disputant makes written and oral arguments to which the opponent may respond.⁹⁴ Confidentiality issues are dealt with in this

⁸⁸ See generally STRAUSS, *supra* note 83, at 32-48 (noting complicated history to development of elements due).

⁸⁹ See generally SCHWARZE, *supra* note 15, at 1173-430 (describing principles of administrative procedure within European Community).

⁹⁰ See DSU para. 8.1, *supra* note 31, 33 I.L.M. at 118. According to paragraph 8.1: Well qualified governmental and or non governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Id.

⁹¹ *Id.* para 18, at 124. Paragraph 18, entitled "Communications with the Panel or Appellate Body," forbids *ex parte* communications with the panel or appellate body concerning matters under consideration by the panel or appellate body.

⁹² DSU, *supra* note 31, 33 I.L.M. at 124.

⁹³ See *id.* at 132-33 (setting forth working procedures to be followed by dispute settlement panel).

⁹⁴ *Id.* at 133. Paragraph 10 states:

[I]n the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 and 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

Id.

context.⁹⁵ Panel members, usually trade diplomats, must not discuss issues with the disputants' representatives outside panel meetings. Pursuant to the working procedures set out in the DSU, panel members must keep all information confidential.⁹⁶

2. Independence of Panel Members

The DSU provides that the selection process of panel members should ensure the independence of those members.⁹⁷ Panel members, however, historically have been government officials from other countries. This fact may cause tension indirectly. In an attempt to remove bias, the DSU requires panelists to decide cases in their individual capacities.⁹⁸ Consequently, the DSU attempts to ensure that panelists chosen come from countries unrelated to the countries directly involved in the dispute. The level of success in ensuring impartiality is questionable because several countries and delegates have a variety of vested interests.⁹⁹ Thus, while the current provisions may lessen the possibility of nationalistic bias, the DSU has not adequately protected against all potential conflicts of interest.¹⁰⁰

The issue of bias also arises because panelists are not the final arbiters of a dispute. Instead, the panelists issue a report which members may adopt or reject.¹⁰¹ The members' ability to vote on the final outcome also raises questions of bias. Due to changes in

⁹⁵ *Id.* at 132-33. Confidentiality issues arise within two different contexts. *Id.* One is the right of individuals to get information from government about decisions affecting their interests. *Id.* The other concerns a disputing party's right to obtain information from the other side in order to identify the strengths and weaknesses of their opponent's case. *Id.* There are quite different policy issues associated with the two. *Id.* at 132.

⁹⁶ See DSU *supra* note 31, 33 I.L.M. at 132. "Panels shall follow the Working Procedures appended hereto unless the panel decides otherwise after consulting the parties to the dispute." *Id.* at 120. It is unclear what tests would be used in making such decisions.

⁹⁷ See DSU, para. 8.2, *supra* note 31, 33 I.L.M. at 118.

⁹⁸ *Id.* para. 8.9, at 119. Paragraph 8.9 states that panelists shall serve in their individual capacities and not as government representatives and that "[M]embers shall therefore not give them instructions nor seek to influence them as individuals in relation to matters before a panel." *Id.*

⁹⁹ For example, a GATT/WTO panel looking at the legality of an export subsidy on primary produce may decide in a particular way if the panel consists of delegates from countries which follow such practices.

¹⁰⁰ See David M. Schwarz, *WTO Dispute Resolution Panels: Failing to Protect Against Conflicts of Interest*, 10 AM. J. INT'L. L. & POL'Y 955, 969 (1995) (noting that DSU is vulnerable to conflicts of interest).

¹⁰¹ See DSU, *supra* note 31, 33 I.L.M. at 122-23 (discussing adoption of panel reports).

the procedure for adoption of panel reports, however, the problem of potential bias may now be lessened.¹⁰²

Members of the new Appellate Body are not chosen from the body of government officials. Rather they are chosen from a select group of multinational and international legal experts, unaffiliated with any government or other interested organization.¹⁰³ Thus, the possibility of national influences affecting the outcome of their decisions is minimized. Moreover, Paragraph 17.2 strengthens the independence of the decision makers. That paragraph states that panelists serve a four-year term on the Appellate Body, and that each person may be reappointed once.¹⁰⁴ The limitation of two terms reduces the concern that decision makers will be influenced by the lure of perpetual reappointment.

These "administrative law" provisions relating to the independence of the panel and appellate members are more elaborate than those contained in the 1989 Improvements.¹⁰⁵ Under the earlier provision, panels were only required to be composed of well-qualified governmental and/or non-governmental individuals.¹⁰⁶ The present authorization of eminent authors and specialists in international trade law or policy as panel members is further evidence of the drift towards introducing a more legalistic approach to GATT/WTO dispute settlement.

These examples reflect a move towards both clarity and certainty in procedure, thus strengthening rule of law principles. The demand for objective, impartial decision makers, and the opportunity for parties to respond fully to matters raised against them, are fundamental administrative law principles.

¹⁰² See *id.*, Part IIIB (relating to adoption of panel reports); see also SCHWARZE *supra* note 15, at 983-90 (discussing how to decrease likelihood of bias).

¹⁰³ See Frances Williams, *World Trade News: WTO Names Appeal Judges*, FIN. TIMES, Nov. 30, 1995, at 8. On November 29, 1995 the WTO Dispute Settlement Body announced the following appointments to the Appellate Body: Mr. James Bacchus of the United States; Mr. Christopher Beeby of New Zealand; Professor Claus-Dieter Ehlermann of Germany; Dr. Said El-Naggar of Egypt; Justice Florentino of the Phillipines; Mr. Julio Lacarte Muro of Uruguay; and Professor Mitsuo Matsushita of Japan. *Id.*

¹⁰⁴ DSU, *supra* note 31, 33 I.L.M. at 123.

¹⁰⁵ See *id.* at 118. "Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience." *Id.*

¹⁰⁶ *Id.* para. 18, at 118.

B. Standing

To gain access to any reviewing body, one necessarily must meet the requirement of standing.¹⁰⁷ The decision maker must determine a party's entitlement to present a case. Standing requirements apply in both administrative and private law settings.¹⁰⁸ In administrative law, however, the question is more complicated because the dispute often concerns government decisions and practice, with potentially sweeping effects.¹⁰⁹ In traditional common law cases, standing was linked to the remedies available. Now parties must show a mere "sufficient interest" in the matter.¹¹⁰ The Australian Courts, for example, may consider whether the decision adversely affected the "person aggrieved."¹¹¹ In Germany, the requirement of standing varies according to the remedy.¹¹² In the United States, standing requires that the applicant must have suffered an injury in fact, the injury must have been caused by the government action, and the court must have the ability to remedy that injury.¹¹³

¹⁰⁷ See Craig R. Gottleib, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1064 (1994) (addressing whether American wildlife biologist who has lived in Sri Lanka has standing to bring suit against American agencies funding potentially destructive construction projects in Sri Lanka). Standing is a "preliminary jurisdictional requirement' necessary to establish that a litigant is entitled to judicial action." *Id.* at 1064; see also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (proposing new structure to determine standing).

¹⁰⁸ See WADE & FORSYTH, *supra* note 10, at 669 (discussing availability of judicial review); see also *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Assoc.*, 426 U.S. 482, 491-92 (1976) (holding party must have personal or financial stake in decision to bring cause of action). In administrative law, one may apply for judicial review to the court. At common law, the Court will decide if a party has standing based on a number of factors. *Id.*; *Jacobs Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 715 F. Supp. 1000, 1004 (Kan. 1989) (holding that to maintain claim of procedural due process under Fourteenth Amendment, party must allege deprivation of property or liberty interest).

¹⁰⁹ See Don LeDue, *Michigan Administrative Law: Abridged Edition a Michigan Administrative Law Primer*, 12 T.M. COOLEY L. REV. 21, 130-31 (1995) (summarizing administrative law in Michigan). "Administrative law standing principles are the same as those in any other standing case; the difference in administrative cases is the impact of an underlying statute and the nearly universal involvement of a governing agency in the controversy." *Id.* at 130-31.

¹¹⁰ See generally P.P. CRAIG, *ADMINISTRATIVE LAW* 358-64 (2d ed. 1989) (discussing common law approach to standing).

¹¹¹ See *Administrative Decision (Judicial Review) Act § 3(4)* (1977) (Austr.) (involving persons whose interests are adversely affected by decision).

¹¹² See MAHENDRA P. SINGH, *GERMAN ADMINISTRATIVE LAW* 120-22 (1985) (discussing role of standing in German judicial system).

¹¹³ See STRAUSS, *supra* note 83, at 225 (discussing test for standing in administrative law); see also *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (discussing Article III three-pronged test for standing in private law); Gottleib, *supra* note 107, at 1070 (discussing Supreme Court's recently developed three-pronged Article III test).

The DSU addresses questions of standing.¹¹⁴ The interests of disputing parties and of Members of a covered agreement at issue must be taken into account fully during a panel process.¹¹⁵ A third-party Member with a substantial interest in the disputed matter must announce its interest to the DSB.¹¹⁶ The panel then grants the third-party Member the opportunity to be heard.¹¹⁷ Third-party Members have a right to decide unilaterally if they have a substantial interest in the argument.¹¹⁸ Thus, the panel procedure protects both the interests of the parties directly involved in a dispute and the interests of other parties.¹¹⁹

While this procedure initially appears to be broader than the standing rules in an administrative law context, it actually is narrower. The procedure encompasses less than joint rights in domestic litigation. While parties can seek to become litigants based on their substantial interests in the argument, they do not become parties to the litigation in the traditional common-law sense.¹²⁰

Unfortunately, some standing problems remain. As Waincymer points out, the DSU "provisions work best when there is a direct bilateral problem, however, many modern trading difficulties arise when one country impairs another country's export markets."¹²¹ Waincymer raises the example of Australia's complaints about American and European export subsidies on agricultural

¹¹⁴ DSU para. 10, *supra* note 31, reprinted in 33 I.L.M. at 120. Article 10, entitled "Third Parties" discusses the right of parties to a dispute, GATT members, and third parties to be heard.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* para. 10.2, at 120. Paragraph 10.2 provides:

Any member . . . having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make any written submissions in the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

Id.

¹¹⁸ See DSU, para. 10.1, *supra* note 31, 33 I.L.M. at 120. Paragraph 10.1 states that interests of members of the dispute and members of a covered agreement are to be taken into account during the dispute process. *Id.* Annex III states that the panel may hear arguments from parties to the dispute and any invited third party. *Id.* at 133.

¹¹⁹ *Id.* art. 10.1, at 120. According to Art. 10.1: "The interests of the parties to the dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process." *Id.*

¹²⁰ See Fed. R. Civ. P. 20 (Foundation Press 1995) (promulgating rule for permissive joinder of parties); see also Martin E. Silfen, *Introduction to New York Civil Practice: 1994*, at 45, 47 (PLI Litig. and Admin. and Practice Course Handbook Series No. 513, 1994) (discussing necessity of indispensability for joinder of parties).

¹²¹ MICHAEL PRYLES ET. AL. INTERNATIONAL TRADE LAW 822 (Law Book Co., Info. Serv. 1996).

products and the adverse effects of those subsidies on Australia's export performance.¹²² Naturally, importing countries happily receive cheaper, subsidized agricultural products. In this situation it is "difficult for a country like Australia not directly involved in the transaction to take an action under the GATT/WTO system."¹²³ New provisions in Paragraph 10.2 acknowledge that the DSB must recognize third party interests.¹²⁴ It is unlikely, though, that the DSB will help an impaired country unless an importing country initiates a panel proceeding.

C. Transparency

In a national context, transparency in administrative law depends upon freedom of information and open government.¹²⁵ The more transparent the process, the more accountable it is to its members, who in turn, place more confidence in the system.¹²⁶ This cascading principle also applies to dispute panels. The more open the panel's deliberations, the more accountable are its members. This openness inspires confidence in the panel's rulings.¹²⁷ Confidentiality issues, of course, arise within this context. Thus, many freedom of information statutes exempt from disclosure confidential business information.¹²⁸

Traditionally, panels have been criticized for their secrecy.¹²⁹ Environmentalists, for example, pressed the Uruguay Round for

¹²² See *id.* (discussing effect of American and European subsidies on Australian exports).

¹²³ *Id.* at 9.

¹²⁴ See DSU, *supra* note 31, 33 I.L.M. at 119. Paragraph 10.2 provides: "[a third party] shall have an opportunity to be heard by the panel and to make written submissions to the panel." *Id.*

¹²⁵ See 5 U.S.C. § 552 (1988) (governing administrative procedure of disclosure of public information); see also Jerry L. Mashaw, *Imagining the Past; Remembering the Future*, 1991 DUKE L.J. 711, 727 n.69 (1991) (discussing "administrative openness" and various Freedom of Information Acts).

¹²⁶ See STRAUSS, *supra* note 83, at 195. Strauss described open government as "perhaps a peculiarly American political idea, that publicity can serve as an effective constraint on government action—that 'sunlight is the best disinfectant.'" *Id.* at 195. We suggest openness is fundamental to any democratic system of government.

¹²⁷ See generally David Nimmer, *GATT's Entertainment: Before and NAFTA*, 15 LOY. L.A. ENT. L.J. 133, 159 (1995). "The goal of the United States in general throughout the Uruguay Round of GATT renegotiations has been to achieve transparency in national law schemes." *Id.*

¹²⁸ See Freedom of Information Act of 1966, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended at 5 U.S.C. § 552(b)(1)-(9)) (1988) (listing and explaining various exemptions from statute); see also Freedom of Information Act, § 43 (1982) (Austr.) (exempting certain information from access under statute).

¹²⁹ See John H. Jackson, *Testimony on the Uruguay Round Legislation, prepared for the U.S. Senate Finance Committee Hearing*, at 6 (Mar. 23, 1994) (on file with authors) [hereinafter Jackson testimony].

increased transparency in the dispute settlement procedures.¹³⁰ Panel secrecy, "is a relic of GATT as an essentially diplomatic forum."¹³¹ GATT secrecy bolsters the arguments of critics who are generally opposed to multilateral dispute settlement and believe that it is arbitrary and biased.¹³²

While the DSU has taken a small step towards transparency, panels still meet in closed session.¹³³ Parties to the dispute or other interested parties can attend meetings only by invitation.¹³⁴ The DSU protects from public disclosure confidential business information presented to panels. This is consistent with administrative law principles in the Freedom of Information ("FOI") legislation.¹³⁵ The DSU provisions could be narrowed, permitting the process and presentation of material to be open, subject to the exemption of confidential state or business material.¹³⁶ Of course, national governments could disclose the arguments they make before a dispute panel.¹³⁷ Even so, there is still room for greater openness and transparency if the enhancement of administrative and rule of law principles are to be consistent with other developments in the DSU.

¹³⁰ See Steven M. Anderson, *Reforming International Institutions to Improve Global Environmental Relations, Agreement, and Treaty Enforcement*, 18 HASTINGS INT'L & COMP. L. REV. 771, 818 (1995) (discussing desire for "positive change" for international environmental law as it would ensure a system with transparency and frequent operational reviews); see also Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423, 431 (1995). "A major concern of environmentalists regarding the Uruguay Round was the need for increased transparency and improved procedures for dispute settlement involving trade and environmental conflicts." *Id.*

¹³¹ See David Palmetter & 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, 1160 (1993) (describing old GATT procedure).

¹³² See, e.g., 138 CONG. REC. S1110-01 (daily ed. Feb. 6, 1992) (statement of Sen. Bentsen) (maintaining that text of DSU was only strong enough to serve as framework for trade disputes).

¹³³ See DSU para. 14, *supra* note 31, 33 I.L.M. at 122. Paragraph 14, entitled "Confidentiality" provides "panel deliberations shall be confidential. *Id.*

¹³⁴ See *id.* para. 15, at 122. Paragraph 15, entitled "Interim Review Stage" permits meetings with the panel at the request of the parties. *Id.*

¹³⁵ See 5 U.S.C. § 552(a) (1994) (providing each agency shall make public records available).

¹³⁶ *Accord* 5 U.S.C. § 552(b) (setting forth prediscovery notification procedures for confidential commercial information); see also *Morton-Norwich Prods., Inc. v. Mathews*, 415 F. Supp. 78, 81 (1st Cir. 1976) (holding that, under Freedom of Information Act, agency may refuse to produce opinions, advice evaluations, deliberations, policy formations, proposals, conclusions, or recommendations).

¹³⁷ See DSU app. 3, *supra* note 31, 33 I.L.M. at 132 (providing nothing in DSU prohibits parties to dispute from disclosing statements of its own to public).

D. *Timeliness and Finality—but no Reference to Exhaustion*

Administrative law principles of timeliness and finality also are raised within domestic national contexts. Persons affected by government decisions may seek a variety of avenues of relief,¹³⁸ particularly when judicial review is available to affected parties.¹³⁹ In the United States, a party must exhaust available administrative remedies prior to seeking judicial review. The administrative actions must be final and the conflict must be ripe for review.¹⁴⁰ Such exhaustion of administrative remedies ensures the proper allocation of resources between agencies and courts without unnecessary interruption to the agency process.¹⁴¹ In Commonwealth common-law systems, principles of exhaustion are often provided at the decision maker's discretion.¹⁴²

The GATT/WTO procedures also raise issues of timeliness and finality.¹⁴³ The international context, however, somewhat complicates matters. Disputes between nationals and their governments¹⁴⁴ and disputes between countries involve different issues. In relation to the latter, the principle of exhaustion is inapplicable. Previously, exhaustion of administrative and judicial remedies at the national level was not a condition for recourse to the international GATT dispute settlement system. The GATT/WTO Agreement maintains that position.¹⁴⁵ This inconsistency is logi-

¹³⁸ See, e.g., DAVID FOULKES, *INTRODUCTION TO ADMINISTRATIVE LAW* 191 (1968) (discussing methods of remedies available in administrative law). For example, "a remedy may be sought in the courts, in other [cases] before tribunals, in another by means of an appeal . . . to a higher official." *Id.*

¹³⁹ See, e.g., WADE AND FORSYTH, *supra* note 10, at 669 (discussing scope of judicial review). Various remedies are "interchangeable under a unified system of procedure, the 'application for judicial review.'" *Id.*

¹⁴⁰ See, e.g., STRAUSS, *supra* note 83, at 229 (discussing requirements for standing in administrative law).

¹⁴¹ See *id.* at 229 (discussing necessity of exhausting administrative remedies).

¹⁴² See WADE & FORSYTH, *supra* note 10, at 357 (discussing parliamentary exhaustion principles).

¹⁴³ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (The GATT Antidumping Code), I.E.L. I-B-2 (1989) (discussing rules governing imposition of antidumping duties); see also Timothy M. Reif, *Coming of Age in Geneva: Guiding the GATT Dispute Settlement System on Review of Antidumping and Countervailing Duty Proceedings*, 24 *LAW & POL'Y INT'L BUS.* 1185, 1196 (1993) (discussing finality in GATT Antidumping Code).

¹⁴⁴ See GATT Antidumping Code, *supra* note 143, at I-B-2; see also Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 reprinted in 6 *I.L.M.* 368 (requiring complainants to do all they can in their own countries before going to International Committee on Human Rights).

¹⁴⁵ See DSU, *supra* note 31, 33 *I.L.M.* at 115-17 (expressing desire for prompt settlement of disputes and calling on members to exercise judgment as to whether DSU action would be fruitful).

cal considering that domestic remedies often deal with the rights of individuals, while the GATT/WTO system deals with disputes between nation states.¹⁴⁶ In practice, most domestic courts tend to ignore the issue of GATT consistency in relation to national measures.¹⁴⁷ GATT/WTO dispute settlement procedures are designed to protect the rights and obligations of governments. Legal remedies are not sought to repair or to compensate injury. It would seem, therefore, that exhaustion of administrative and judicial remedies is not necessary.¹⁴⁸

E. Merits/Judicial Review—the New Appellate System

One of the most striking features of the WTO dispute settlement system is the creation of the appellate review body.¹⁴⁹ Combined, the panel process and the provisions for appellate review create a strong adjudicative system within the GATT/WTO.¹⁵⁰ The appellate body conducts a legal review of panel decisions. Article 17 of the DSU provides that the Appellate Body is to be a standing organ, comprised of seven persons appointed by the DSB for staggered four-year terms.¹⁵¹ Three members, selected on rota-

¹⁴⁶ See Scott H. Segal and Stephen J. Orava, *Playing the Zone and Controlling the Board: The Emerging Jurisdictional Consensus and the Court of International Trade*, 44 AM. U. L. REV. 2393, 2395 (1995) (discussing major concern and controversy surrounding GATT process regarding adjudication of disputes among nations); see also Helene Cooper & John Harwood, *Major Shifts in Trade are Ensured as Gatt Wins U.S. Approval*, WALL ST. J., Dec. 2, 1994, at A12 (arguing numerous safeguards in society will be undermined if trade dispute settlement is ceded to WTO without any United States veto power protection).

¹⁴⁷ See Petersmann, *supra* note 54, at 1240 (arguing GATT contracting parties do not want to hold dispute settlement proceedings hostage to completion of national administrative and judicial proceedings).

¹⁴⁸ See generally Strauss, *supra* note 83, at 79 (addressing interplay of judicial and administrative systems). There is a practical issue as to whether any real nullification and impairment could exist under Article XXIII of the GATT, when the relevant individuals may still have a right to full redress in a domestic system. One instance in which these issues could be relevant is when a dispute is brought at the GATT/WTO level in the antidumping area concerning an interim measure where appropriate domestic remedies have not been utilized.

¹⁴⁹ See Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 483 (1994) (describing creation of new appellate body as "the most drastic innovation in GATT dispute settlement"); see also Bal Gopal Das, *Intellectual Property Dispute, GATT, WIPO: Of Playing by the Game Rules and Rules of the Game*, 35 IDEA: J.L. & TECH. 149, 169 (1994) (discussing DSU's fundamental innovation in developing appellate review).

¹⁵⁰ See generally Dillon, *supra* note 37, at 375-76 (1995) (discussing four phases of new GATT dispute settlement process, including consultation, final phase, Appellate Body Review, and optional arbitration).

¹⁵¹ See, e.g., Lowenfeld, *supra* note 149, at 483-84 (discussing Paragraph 17 and appellate review process).

tion without reference to nationality or the wishes of the parties, hear each case.¹⁵² As a general rule, the time from the date of notification of the appeal until circulation of the appellate report should not exceed sixty days.¹⁵³ The DSB adopts and unconditionally accepts the Appellate Body's report unless, within thirty days of its circulation to Members, the DSB decides by consensus not to adopt it.¹⁵⁴

The appellate mechanism is designed to ensure the correct application of WTO law.¹⁵⁵ One potential problem exists in that this mechanism likely will encourage regular appeals, and therefore may weaken panel prestige and authority.¹⁵⁶ In particular, a losing government may face political pressure to appeal a negative panel finding, even if only to delay the implementation of that finding.¹⁵⁷

This system also raises some fundamental administrative law issues concerning the scope of review to be undertaken by both the panel and the appellate body. The notion of appellate review on the law is the equivalent of judicial review within national administrative law systems. For instance, if an administrative decision

¹⁵² See DSU art. 8, *supra* note 31, 33 I.L.M. at 119 (parenthetical).

¹⁵³ See *id.* at 117. According to Paragraph 4.7, a panel may be requested if dispute cannot be settled in sixty days. *Id.*

When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days.

Id.

¹⁵⁴ See *id.* at 123. Paragraph 16.4 states that a panel report will be adopted within sixty days "unless one of the parties to the dispute formally notifies the DSB of its decisions to appeal or the DSB decides by consensus not to adopt the report." *Id.*

¹⁵⁵ See, e.g., Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, 10 J. INT'L ARB. 27 (1993) (outlining general framework of GATT dispute settlement process and changes effected by the Uruguay Rounds).

¹⁵⁶ But see Taunya McLarty, *GATT 1994 Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System*, 9 FLA. J. INT'L L. 241, 270-71 (1994) (suggesting appeals will not detract from but will increase respect for panel since reasons for appeals will vary).

¹⁵⁷ See William M. Reichert, *Resolving the Trade and Environment Conflict: The WTO and NGO Consultive Relations*, 5 MINN. J. GLOBAL TRADE 219, 225 (1996). This is due in part to the fact that governments can no longer block the adoption of panel decisions. *Id.* "Under the original GATT system, any member state could block an adverse panel ruling . . . [but] [u]nder the WTO, however, panel reports are automatically adopted and it takes a negative consensus to choose not to adopt a panel report." *Id.*; see also Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT. & COMP. L. 161, 179 (1996) (suggesting that many unwarranted appeals, systematically used to delay report, could paralyze Appellate Body); Mora, *supra* note 7, at 151 (noting excessive numbers of appeals will require Appellate Body to develop procedures for disposing of frivolous appeals).

is made, any review by the Court is limited to the "lawfulness" of the decision and does not address "merits."¹⁵⁸ In Commonwealth common-law countries there is a distinction between merits review and judicial review.¹⁵⁹ Merits-review bodies, such as internal agency review¹⁶⁰ or external agency review,¹⁶¹ examine the original decision on the merits or *de novo*. The review body becomes the decision maker of a matter already decided by the administrative agency.¹⁶²

It could be argued that, in the GATT/WTO context, the dispute panel parallels the external review body. The dispute panel reviews the decision *de novo* even though the dispute between the countries may not have been heard in a national forum. Once the panel decision is made, the only avenue that the complainant can pursue, is a review on the law.¹⁶³ If this analogy is correct, then the appeal body could only decide if the panel erred in law.

Article 17.6 of the DSU provides that the appellate body's scope of review "shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel."¹⁶⁴ This raises the perennial issue of what constitutes a question of law and what constitutes a question of fact.¹⁶⁵ It also begs the question whether appellate body members from around the world can agree on this distinction. Article 17.13 states: "[The] Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel."¹⁶⁶ As Petersmann argues, "[t]his language seems broad enough to enable the Appellate Body to specify the number of legal issues not explicitly addressed in Article 17, such as . . . lack of competence of a panel, breach of procedure before a

¹⁵⁸ See generally MICHAEL E. TIGAR, *FEDERAL APPEALS, JURISDICTION AND PRACTICE* 214, 218-19 (1993) (discussing standards of federal appellate review in civil and criminal cases).

¹⁵⁹ See, e.g., ALLARS, *supra* note 10, at 162-63 (discussing natural justice in commonwealth common law countries).

¹⁶⁰ See, e.g., William Anderson, *The 1988 Washington Administrative Procedure Act - An Introduction*, 64 WASH. L. REV. 781, 815-17 (1989) (discussing internal agency review as performed by Administrative Law Judges).

¹⁶¹ See DSU art. 17.6, *supra* note 31, 33 I.L.M. at 118 (describing generally review by dispute panel).

¹⁶² See, e.g., CHERYL SAUNDERS, *APPEAL OR REVIEW: THE EXPERIENCE OF ADMINISTRATIVE APPEAL IN AUSTRALIA* (on file with authors) (1993) (explaining merits review system in Australia).

¹⁶³ See DSU, *supra* note 31, 33 I.L.M. at 123 (stating in paragraph 17.6, "[a]n appeal shall be limited to issues of law").

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., TIGAR, *supra* note 158, at 212 (contrasting questions of law and questions of fact).

¹⁶⁶ See DSU art. 17.13, *supra* note 31, 33 I.L.M. at 123.

panel which adversely affects the panel findings, and incorrect application of WTO law”¹⁶⁷ Thus, the panel’s decision is broader in scope than the appellate body’s decision, for the panel looks into the merits or facts of the case under review.

The breadth of judicial review within national domestic systems also is not clear. In common-law systems, a long-standing jurisprudential debate exists regarding the scope of judicial review.¹⁶⁸ Notions of “proportionality” and “unreasonableness” in Commonwealth law suggest that the review can be very broad indeed.¹⁶⁹

In the United States, Section 706 of the Administrative Procedure Act sets out the general framework for judicial review of agency action.¹⁷⁰ Different standards of review exist within this section.¹⁷¹ The “hard look doctrine” reflects an aggressive method of judicial review.¹⁷² By contrast, the “Chevron doctrine”¹⁷³ essentially states that where a particular statute is not “clear on its face,” the courts, rather than substitute their own interpretation, will defer to the judgment of an agency implicitly designated by the legislature if that agency has interpreted the statute in a reasonable manner.¹⁷⁴

¹⁶⁷ Petersmann, *supra* note 54, at 1217.

¹⁶⁸ See *Flack v. Cohen*, 413 F.2d 278, 279 (4th Cir. 1969) (addressing issue of court review of case *de novo* at appellate level).

¹⁶⁹ See *Associated Provincial Picture Houses Limited v. Wednesbury Corp.*, 1 KB 223 (1948) (expressing classic test for reasonableness); see also O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 669 (7th Ed. 1987) (observing that court’s tendency to broaden scope of judicial review fosters review on grounds of “unreasonableness”).

¹⁷⁰ Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1982) (hereinafter APA). The APA created an “arbitrary, capricious, . . . abuse of discretion’ standard that courts may use to review actions of government agencies”. *Id.*; see also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 759 (1989) (discussing application of standard of review of APA). See generally Marshall J. Beger, *Review of an Introduction to Administrative in the United States by Peter L. Strauss*, 60 GEO. WASH. L. REV. 268, 272-75 (1991) (discussing procedural options for rulemaking available to agencies).

¹⁷¹ See Strauss, *supra* note 83, at 243-44 (discussing section 706(2) of APA and three different standards of review for conclusions of fact made by agency).

¹⁷² See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970) (announcing court’s duty to broadly intervene if governmental agency has failed to take “a hard look” at salient problems and has not genuinely engaged in reasoned decision-making”). See generally R. CASS AND C. DIVER, ADMINISTRATIVE LAW CASES AND MATERIALS 141-80 (1987) (discussing particular aspects of judicial review: standards applied through scope, timing of review and availability to specific parties).

¹⁷³ See *Chevron v. Natural Resources Defense Counsel*, 467 U.S. 837, 842 (1984) (holding courts must address two questions when interpreting statutes: (1) whether Congress has addressed issue in question, and (2) whether an agency’s interpretation was permissible based on construction of statute).

¹⁷⁴ See *id.* at 844 (giving deference to interpretations of administrative agencies).

F. Deference Issue - Principles of Interpretation

The responses to "deference" in the GATT context are mixed. Should panel decision makers defer to a national body, or national interpretation of the GATT, following a provincial determination?¹⁷⁵ The notion of "deference" within the GATT/WTO framework is now further explained in the context of GATT/WTO reviews of anti-dumping and countervailing duty determinations. The nature of the jurisprudence that guides the GATT/WTO dispute settlement system guides the scope of its judicial review. The panel reviews national administrative law principles which are derived from the GATT/WTO. In the past, GATT dispute settlement practice¹⁷⁶ applied a *de novo* standard of legal review of the national measures. It is an established principle of interpretation in international law, however, that a *de novo* review substituting an international interpretation for that of a national agency, may not always be appropriate.¹⁷⁷ For example, if the national agency enjoys regulatory discretion and exercises that discretion in a reasonable manner without abuse, arbitrariness or manifest error, the panel will not disturb the agency's ruling.¹⁷⁸ Whether such GATT/WTO deference to the national agency's decision is warranted depends upon the rule concerned.

Anti-dumping and countervailing proceedings reveal this inherent conflict.¹⁷⁹ The standard of review for anti-dumping is set out

¹⁷⁵ See JACKSON, *supra* note 27, at 330 (suggesting that issue of deference is one of more difficult problems faced in recent years by GATT dispute settlement system).

¹⁷⁶ See DSU art. 3.1, *supra* note 31, 33 I.L.M. at 115. Article 3.1. states that past GATT dispute settlement practice shall also serve as a guide for the new dispute settlement process. *Id.*

¹⁷⁷ See *Canada-United States Free Trade Agreement: Extraordinary Challenge Committee Memorandum Opinion and Order Regarding Binational Panel Remand Decision II—In the Matter of Fresh, Chilled or Frozen Pork From Canada*, 30 I.L.M. 1151, 1163 (1991) (finding that Extraordinary Challenge Committee, appellate body, erred in considering extra evidence in its review); see also *United States: Court of Appeals for the Ninth Circuit Decision in Helen Liu v. The Republic of China (Act of State Doctrine; Foreign Sovereign Immunities Act)*, 29 I.L.M. 192, 196 (1989) (holding that while *de novo* review by an appellate body is normally inappropriate, *de novo* review of subject matter jurisdiction is exception).

¹⁷⁸ See Reif, *supra* note 143, at 1190-91 (proposing two-prong standard of review which upholds that task of panels as described by GATT is limited to conducting review of authority's decision).

¹⁷⁹ See Charles M. Gastle & Jean G. Castel, Q.C., *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in the Light of Softwood Lumber III?*, 26 LAW & POL'Y INT'L BUS. 823, 824-25 (1995) (discussing issue regarding degree of deference reviewing panels accord administrative agencies); see also Reif, *supra* note 143, at 1186-90 (exemplifying conflict between for-

in Article 17:6 of the Anti-dumping Agreement.¹⁸⁰ The standard of review of the GATT/WTO consistency of anti-dumping measures rests on the assumption that the application of the customary rules of interpretation of public international law may lead to more than one permissible interpretation. In such cases, the choice among permissible interpretations should lie with the defendant country rather than with the DSB. However, this assumption of legitimacy of diverging national interpretations conflicts with the declared objective of the WTO dispute settlement procedures. The aim of the DSU is to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.¹⁸¹ Based on the wording of Article 17:6(ii), the degree of GATT/WTO deference to national decisions is difficult to determine.¹⁸²

GATT/WTO panels do not receive the same degree of deference from the appeal body as national agencies receive from courts. Perhaps, then, they should be freed from the constraints ordinarily applied in judicial dispute settlement.¹⁸³ A dispute-settlement process that frees GATT/WTO panels from the traditional

eign antidumping and countervailing duty determination and international obligations which United States vigilantly challenges).

¹⁸⁰ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Implementation of Article VI [hereinafter the Antidumping Agreement], GATT Doc. MTN/FA (Dec.15, 1993), 33 ILM 1, 1-12 (1994) (providing full text of Antidumping Agreement).

¹⁸¹ See DSU para. 3.2, *supra* note 31, 33 I.L.M. at 114 (noting DSU serves to preserve rights and obligations of members under covered agreements and public international law).

¹⁸² See DSU art. 17.6, *supra* note 31, 33 I.L.M. at 123. Paragraph 17.6 provides: "an appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel." *Id.*; see also JACKSON ET AL., *supra* note 26, at 330. The authors state "it remains to be seen whether this provision will limit the way in which panels approach antidumping cases." There are certainly important issues in identifying the reason why there is a special standard of review in the antidumping area, and the extent to which the WTO was permitted to encroach on domestic interpretation and administrative principles. Furthermore among the ministerial declarations adopted at the end of the Uruguay Round there was one that stated that the Antidumping standard of review will be reviewed after a period of three years with a view to considering the question of whether it is capable of general application. This raises the issue of whether the WTO is really seeking to ensure a harmonized process of administration and administrative review among its member states. The authors intend to examine these issues in greater depth in forthcoming articles. *Id.*

¹⁸³ See Palmeter & Spak, *supra* note 131, at 1156-60. Palmeter and Spak reject the position that dispute resolution panels should be restrained by principles of deference or exhaustion. *Id.* The analogy between dispute resolution under the GATT and resolution of questions of U.S. administrative law is not a strong foundation for imposing any constraints on GATT panels charged with interpreting an international agreement. *Id.* Because national agencies are not GATT experts, it is possible to argue that GATT panels ought not defer to national interpretations of the GATT Anti-dumping or Subsidies Code. *Id.*

precepts of treaty interpretation essentially allows panelists to fill the gaps in an international agreement. This is a radical departure from the accepted principles of international law. The DSU supports this view of the scope of review.¹⁸⁴ The DSU states that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreement."¹⁸⁵ This provision reflects the view of many trade policy makers that international trading rights and obligations should only be created, modified, or diminished through negotiations and not through judicial interpretation.

Are the dispute panel and appellate body responsible for interpreting law in a manner that will be determinative of the law? The DSU appears to suggest that they are not. Yet, taken as a whole, this approach nonetheless displays a move towards the rule of law, with the panels and appeal bodies responsible for promoting a singular interpretation of GATT law. This shift towards utilization of public international law also is recognized in the DSU.¹⁸⁶ It states that the dispute settlement system of the WTO is to "clarify the existing provisions" under the Covered Agreements "in accordance with customary rules of interpretation of public international law."¹⁸⁷

Underlying the problems of interpretation is the issue of the sovereignty of states.¹⁸⁸ Since international law recognizes the ultimate sovereign authority of states, conflicts arise when two or more sovereign states interpret their obligations differently.¹⁸⁹

¹⁸⁴ See Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 399-00 (1995) (contrasting Tokyo Round dispute resolution mechanism to expanded scope of GATT dispute resolution process).

¹⁸⁵ DSU art. 3.2, *supra* note 31, 33 I.L.M. at 115.

¹⁸⁶ *Id.* (noting DSU seeks to clarify exiting provisions in accordance with "customary rules of interpretation of public international law").

¹⁸⁷ *Id.*

¹⁸⁸ See Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123, 127-28 (1995) (criticizing the Tokyo Round technique which resulted in varied national participation in agreements). The issue of interference with sovereignty is even more significant after the Uruguay Round because of the "take it or leave it" style of the package. *Id.* at 134. Countries who accepted the GATT/WTO accepted the entire package. *Id.* The previous system of "GATT a la carte" no longer exists. *Id.*

¹⁸⁹ See *United Nations Conference on Environment and Development: Framework Convention on Climate Change*, 31 I.L.M. 849, 851 (1992) ("[r]ecalling . . . that States have, in accordance with . . . the principles of international law, the sovereign right to exploit their own resources"); see also *Council of Europe: Framework Convention For the Protection of National Minorities*, 34 I.L.M. 351, 357 (1995) (finding that Framework Convention, Section III, article 21, will not perform contrary "to the fundamental principles of international law and in particular of the sovereign . . . independence of States").

Traditionally, the GATT dispute process avoided this tension by retaining the sovereign authority of states to interpret their GATT obligations.¹⁹⁰ The panel examined the issues, reviewed relevant documents, and offered its interpretation in the form of its report.¹⁹¹ A consensus of the GATT Council was needed before adoption of a panel report.¹⁹² The binding nature of the Panel decision as between the parties was not supplied by the Panel but was addressed in the agreement of the Contracting Parties.¹⁹³ In the current GATT/WTO, panel reports are automatically binding on the parties unless there is a consensus not to adopt them.¹⁹⁴ This automatic adoption could represent an infringement of the disputing parties' national sovereignty. At the same time, however, automatic adoption reinforces the notion of the GATT/WTO moving toward a "rule of law," where all parties are subject to the same rules.¹⁹⁵

Given the mixed messages of the DSU about the scope of review, interpretation of the breadth of review will be left to the decision makers of the panels and the appellate bodies. This may depend, therefore, on the decision maker in any given case. It is our view that the move towards a rule of law in the new dispute framework demands minimal deference to the original decision maker.¹⁹⁶

V. REMEDIES

Remedies under the GATT/WTO are understandably weak.¹⁹⁷ Like most other international agreements, neither the GATT nor the 1979 Tokyo Round Agreement define the legal liabilities of a

¹⁹⁰ See Demaret, *supra* note 188, at 127-34 (discussing GATT approach prior to Uruguay Round).

¹⁹¹ See *id.* at 126-131 (discussing evolution of GATT from 1947-1994).

¹⁹² See Chen, *supra* note 67, at 1330 (discussing abandonment of consensus approach to adoption of panel reports).

¹⁹³ See JACKSON ET AL., *supra* note 26, at 330. One issue which has continually arisen is whether the contracting parties in adopting a report in fact ever adopt a particular interpretation or merely adopt the report vis-a-vis a particular dispute between two parties. This is because there is no doctrine of precedent in international law. GATT panels, nevertheless, try to maintain judicial consistency.

¹⁹⁴ See DSU, *supra* note 31, 113 I.L.M. at 123 (addressing adoption of panel reports).

¹⁹⁵ See WADE AND FORSYTH, *supra* note 10, at 23. While "rule of law has a number of different meanings . . . [i]ts primary meaning is that everything must be done according to the law." *Id.*

¹⁹⁶ See Reif, *supra* note 143, at 580-81. (arguing that specific GATT disputes demand more deference than others).

¹⁹⁷ See Young, *supra* note 184, at 404 (discussing new enforcement provisions which include procedures and rules which will encourage implementation of and adherence to panel recommendations).

contracting party that has violated its obligations.¹⁹⁸ The new DSU indicates that the preferred solution is one mutually acceptable to the disputing parties.¹⁹⁹ Thereafter, the first objective is usually to secure the withdrawal of the measures that are inconsistent with the agreements.²⁰⁰ This withdrawal parallels the general international law obligations to perform international treaties in good faith, to withdraw any illegal measures, and to eliminate all the consequences of the illegal act. The standard recommendation of panel reports is to request that the defaulting country conform its activities to GATT/WTO.²⁰¹

Regarding compensation, Article 22.1 codifies two principles of GATT/WTO dispute settlement practice. First, compensation should only result if immediate withdrawal is impractical.²⁰² Second, compensation must be voluntary.²⁰³ Proposals to introduce into the GATT/WTO system an obligation to grant monetary or other compensation were discussed and rejected in 1966 and,

¹⁹⁸ See DSU, *supra* note 31, 33 I.L.M. at 116 (describing determination of injury and failing to say how party not in compliance with panel reports will be dealt with, as was case in Tokyo Round Agreement). The DSU recognized that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement." *Id.* at 115; see also Young, *supra* note 184, at 404 (outlining other potential results from noncompliance with panel recommendations).

¹⁹⁹ See DSU para. 3.7, *supra* note 31, 33 I.L.M. at 115.

²⁰⁰ See *id.* para. 21.5, at 126 (instructing parties to resort to dispute settlement procedures when faced with measures inconsistent with covered agreement).

²⁰¹ See *id.* para. 22.1 (noting neither compensation nor suspension of concessions is preferable to full implementation of recommendation).

²⁰² See *Understanding on Rules and Procedures Governing the Settlement of Disputes; Annex 2*, GATT Doc. WL/761484 (1994) It is recognized that in GATT dispute settlement practice:

[T]he first objective of the Contracting Parties is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement.

Id.

²⁰³ See *ECC Restrictions on Imports of Dessert Apples from Chile, Report of the Panel adopted on 22 June 1989*, in B.I.S.D. 36 S/93, 134-35. In the Chilean apple case, the GATT panel noted that there was no provision in the General Agreement obliging contracting parties to provide compensation and rejected a request by Chile that the panel recommend that the EEC accord compensatory trade benefits to Chile. *Id.*; see also *Japan—Taxes on Alcoholic Beverages, Panel Decision Adopted 11 July 1996*, GATT Doc WL/406720 (1996) (noting limited precedent effect of panel reports as described in *Chile Apple* case).

again, during the Uruguay Round negotiations.²⁰⁴ As a last resort, the complaining party may request authorization from the DSB to authorize suspension of concessions or other obligations on a discriminatory basis vis-a-vis the other Member.²⁰⁵

The parallels with administrative law remedies are evident since the DSU restricts the courts' ability to review administrative decisions. In Commonwealth common-law countries, an appellate court cannot reverse and then decide; it can only direct the original decision maker to re-decide "according to law."²⁰⁶ The remedy often is a "declaration" which states the legal position between the parties, and then the parties must act.²⁰⁷ Once again, administrative law principles appear to be influencing the GATT/WTO DSB options. Remedies within the understanding are, in essence, similar to a Court declaration. In the GATT/WTO context, whether the parties will follow the principles set forth depends on the political factors involved. Remedies, therefore, highlight the strong intermeshing of rule of law principles and political realities.

CONCLUSION

The new DSU is promoting a rule-orientated system for the settlement of international trade disputes. This illustrates a move toward a "rule of law" in the GATT/WTO context and strengthens the development of an international rule of law.²⁰⁸ "The Agree-

²⁰⁴ See *Compensation in the Context of the GATT Dispute Settlement Rules and Procedures*, Uruguay Round note by the GATT Secretariat (MTN.GNG/NG13/W/32 of 14 July 1989) (rejecting proposal of compensation in resolution of disputes).

²⁰⁵ See DSU art. 22.2, *supra* note 31, 33 I.L.M. at 126 (authorizing DSB's suspension of concessions if member fails to bring inconsistent measure into compliance with covered agreement within reasonable time).

²⁰⁶ See Administrative Decision (Judicial Review) Act, § 16 (1977) (Austl.) (referring decision back to decision maker).

²⁰⁷ See FOULKES, *supra* note 138, at 137. A declaration "declares what the legal rights of the party to the action are and has no coercive force." *Id.*; see also WADE AND FORSYTH, *supra* note 10, at 593 (addressing effect of declarations).

²⁰⁸ See James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531, 569 (1993) (noting recognized standards of international law by international bodies such as International Centre for Settlement of Investment Disputes). The International Court of Justice (ICJ), the GATT/WTO dispute settlement system, the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), and the Multilateral Investment Guarantee Agency (MIGA) promote rule orientated legal methods for the settlement of international economic disputes. *Id.*; see also Donald Dowling Jr., *Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses*, 7 PACE INT'L L. REV. 465, 479 (1995) (discussing forum selection within Europe). In Western Europe, the European Community Court of Justice and the European Court of Human Rights also add to this strengthening of an international rule of law. *Id.*

ment Establishing the World Trade Organization (WTO) . . . is not only the longest agreement ever concluded (comprising some 26,000 pages), but is also the most important worldwide agreement since the UN Charter of 1945."²⁰⁹ The WTO Agreement essentially integrates international regulation of trans-national movements of goods, services, persons, and investments. It sets out a new legal code of conduct for over 100 countries and lays the legal foundation for international economic activity for decades to come. As such, the Agreement has a substantial bearing on national sovereignty and control.

The economic, political, and legal advantages of this progressive move toward rule orientation and legal methods in the WTO dispute settlement system are numerous.²¹⁰ As Professor Jackson notes, the importance of a rule-orientated system can be quite easily established—indeed, all successful domestic economic systems rely very heavily on a rule oriented system.²¹¹

Panel reports and dispute settlement rulings may develop consistent case law, accepted interpretations, and new rules. Depending upon the approach of the decision makers to the issue of "deference," gaps will possibly be filled in the existing treaty. These changes may transform the GATT/WTO into a more consistent and comprehensive legal system. One counter argument that could be raised against a more rule-based approach is that the new system will potentially allow the dispute settlement process to develop new interpretations or quasi-common law which may in fact in the short term reduce predictability and reduce confidence in the system by some members at least. In the long term, however, the system should become more predictable and certain. This does not separate the GATT/WTO framework from its polit-

²⁰⁹ Petersmann, *supra* note 39, at 1160.

²¹⁰ See JACKSON ET AL., *supra* note 26, at 1211-16. Professor Jackson provides a detailed analysis of the costs and benefits of legal procedures in relation to the United States. *Id.* He also outlines the arguments for and against a legalistic system as it applies to United States trade and notes the dilemma of a legalistic system. *Id.*

The dilemma is that the more one maximizes the goals of a legalistic system (predictability, transparency, and elimination of corruption and political back-room deals), the more one sacrifices other desirable goals such as flexibility and the ability of government officials to make determinations in the broad national interest as opposed to catering to specific special interests. *Id.* at 1215-25.

²¹¹ See *id.* at 1232. Professor Jackson also notes that at the domestic level a rule oriented system is easier to obtain because national sovereign governments have a certain monopoly on power, whereas at the international level there is no such monopoly, and as such it is more difficult to establish an effective and efficient rule orientated system. *Id.*

ical context. On the contrary, the dispute settlement processes still include the conciliation and negotiation planks, but these planks are now defined by clear principles and processes.

In addition, the clear movement toward administrative law principles of due process/natural justice, broader standing, more transparency, and an appeal mechanism which emphasizes some form of judicial review, all point toward a stronger system for resolving international disputes. Now, if the political/conciliatory stage²¹² of GATT/WTO dispute settlement fails, a strengthened legal system with clear processes, rules, time frames, and principles remains. A move towards a rule of law within the GATT/WTO can only become clearer as these processes are called upon in forthcoming disputes.²¹³

A rule-orientated, rather than a power-orientated, interpretation and application of the GATT/WTO enhances predictability and legal security and limits the risk of abuses of power. This change ultimately reduces the transaction costs of traders and producers and thereby promotes business certainty. A rule-orientated approach to GATT/WTO dispute settlement and enforcement is also likely to promote confidence in the overall multilateral trading system by making the GATT/WTO a more credible and effective system.

²¹² See 12 Int'l Trade Rep. (BNA) No. 27 (July 5, 1995). The United States-Japan auto trade dispute which was resolved by June 28, 1995 is an example of the political/diplomatic stage. *Id.* In this dispute Japan and the United States agreed to compromise on a range of issues. *Id.* Threatened sanctions were dropped as were the WTO dispute settlement proceedings. *Id.*; see also *Japan Will Deregulate Auto Parts, Official Says*, WALL ST. J., June 28, 1995, at A8 (noting Japanese plans to deregulate its aftermarket for auto parts regardless of outcome of auto-trade discussions with United States); Bob Davis, *U.S. Expects Goals in Pact With Japan to be Met Even Without Overt Backing*, WALL ST. J., June 30, 1995, at A3 (expressing United States optimism that Japan would "endorse" United States estimates of future purchases of United States made carparts even though Japanese government refused to back American goals for auto trade).

²¹³ See Schultz, *supra* note 70 (discussing U.S. gasoline dispute).

