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# Sovereignty, Economic Integration, and the World Trade Organization

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# Sovereignty, Economic Integration, and the World Trade Organization

## **Abstract**

Economic integration is altering the role of the state and the concept of sovereignty in international law. Intensifying economic interdependence has rendered sovereignty almost meaningless for an isolated state. However, the transfer and pooling of sovereignty in a jointly designed and mutually acceptable legalistic international institution allows state interests to be both respected and represented at the international level. After addressing the European Union model for managing advanced economic integration, the paper examines the extent to which the legal and institutional attributes of the new World Trade Organization represents a move towards a more legalistic international trade order, entailing a transfer of sovereignty from the state to the international level.

# SOVEREIGNTY, ECONOMIC INTEGRATION, AND THE WORLD TRADE ORGANIZATION<sup>®</sup>

BY SUSAN HAINSWORTH\*

Economic integration is altering the role of the state and the concept of sovereignty in international law. Intensifying economic interdependence has rendered sovereignty almost meaningless for an isolated state. However, the transfer and pooling of sovereignty in a jointly designed and mutually acceptable legalistic international institution allows state interests to be both respected and represented at the international level. After addressing the European Union model for managing advanced economic integration, the paper examines the extent to which the legal and institutional attributes of the new World Trade Organization represents a move towards a more legalistic international trade order, entailing a transfer of sovereignty from the state to the international level.

L'intégration économique vise à modifier le rôle de l'État et la notion de la souveraineté en droit international. À cause de l'interdépendance économique de plus en plus intense, la souveraineté est devenue presque une notion inutile pour un État isolé. Toutefois, le transfert de la souveraineté à une institution internationale et legaliste, créée en termes communs par plusieurs états participants, est une façon de respecter et représenter les intérêts des états au niveau international. D'abord, cet article considère le modèle de l'Union Européenne quant à la gestion de l'intégration économique plus difficile. Par la suite, l'article examine les caractéristiques légales et institutionnelles de la World Trade Organization et comment elles représentant une tendance vers un ordre commercial plus international et legaliste, ce qui constitue le transfert de la souveraineté du niveau national au niveau international.

I. INTRODUCTION .....	584
II. SOVEREIGNTY AND ECONOMIC INTEGRATION .....	586
III. SOVEREIGNTY AND THE "RULE-ORIENTED" VS. "POWER-ORIENTED" DEBATE .....	589
IV. THE EUROPEAN UNION AS A LEGAL-INSTITUTIONAL MODEL FOR MANAGING ECONOMIC INTEGRATION .....	591
V. LEGAL AND INSTITUTIONAL HISTORY OF THE INTERNATIONAL TRADE SYSTEM .....	593

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VI. THE WORLD TRADE ORGANIZATION AGREEMENT: TOWARDS MANAGEMENT OF GLOBAL ECONOMIC INTEGRATION .....	597
A. <i>The World Trade Organization</i> .....	598
1. Functions and scope .....	598
2. Structure .....	600
3. Decision making and rule creation: interpretations, waivers, and agreements .....	602
a) <i>Interpretations</i> .....	603
b) <i>Waivers</i> .....	604
c) <i>Amendments</i> .....	605
B. <i>Trade Policy Review Mechanism</i> .....	606
C. <i>Dispute Settlement Mechanism</i> .....	611
VII. CONCLUSION .....	621

By bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting universal rules and disciplines over the temptations of unilateralism and the law of the jungle. ... Regardless of the size of our economies, from now on we shall all enjoy the same rights and be subject to the same obligations.

—King Hassan II of Morocco<sup>1</sup>

## I. INTRODUCTION

The Uruguay Round *Final Act* and the accompanying Agreement Establishing the World Trade Organization (wto),<sup>2</sup> concluded by 125 countries on 15 April 1994 at Marrakesh, embody the

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<sup>1</sup> Speaking at the closing ceremonies of the Uruguay Round of Multilateral Trade Negotiations on 15 April 1994, cited in GATT Focus No. 107, May 1994 at 4 [hereinafter Focus 107].

<sup>2</sup> *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat, 1994) [hereinafter *Results of the Uruguay Round*] is over 500 pages in length, and includes the *Final Act Embodying the Results of the Uruguay Round* (at 2) [hereinafter *Final Act*] and the Marrakesh Agreement Establishing the World Trade Organization (at 6) [hereinafter wto Agreement]. Annexed as integral parts of the wto Agreement are: the Multilateral Agreements on Trade in Goods and associated agreements; the General Agreement on Trade in Services; the Agreement on Trade-Related Aspects of Intellectual Property Rights; the Understanding on Rules and Procedures Governing the Settlement of Disputes; the Trade Policy Review Mechanism; four Plurilateral Trade Agreements; twenty-three Ministerial Decisions and Declarations; and the Understanding on Commitments in Financial Services. This is accompanied by approximately 26,000 pages of national tariff and services schedules. It is estimated that the results of the *Final Act*, including a 40 per cent global tariff reduction, an extension of trade discipline into new areas, revamped dispute settlement procedures, and new institutions, will add approximately U.S. \$510 billion to annual world income: see GATT Focus No. 112, November 1994.

results of the eight-year Uruguay Round of multilateral trade negotiations, representing the most comprehensive international trade agreement ever. The WTO Agreement and its annexes strengthen existing international trade discipline, and extend international trade law rules into new economic sectors. Perhaps most importantly, the Agreement created the WTO, which came into existence on 1 January 1995, to provide a unified common institutional framework for the conduct of trade relations among its members. Established with a view to developing "an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade [GATT], the results of past trade liberalization efforts, and all of the results of the Uruguay Round,"<sup>3</sup> the WTO "will be the legal and institutional pillar of international trade in the twenty-first century."<sup>4</sup>

This paper endeavours only to provide the foundations for a much broader analysis of the post-World War II legal-institutional evolution of the international trade system, and of the role of the WTO in fostering the rule of law in international trade, seen in the context of the changing relationship between sovereignty and economic integration. Premised on the belief that the WTO's legal and institutional attributes will affect most profoundly the effectiveness of substantive rules governing the new international trade order, this paper will concentrate on the major legal-institutional or constitutional developments rather than on substantive trade policy reforms and rules.

I begin with a brief exploration of the correlation between sovereignty and international economic integration, and of the intersection of this relationship with rule-oriented and power-oriented models of international organization. I will then address the European Union (EU) model for managing advanced economic integration. After a short historical overview of the legal-institutional evolution of the global trade system, I will examine the extent to which certain legal and institutional arrangements enshrined in the new WTO Agreement represent a move towards a more legalistic international trade order, entailing a transferral of sovereign authority in the trade sphere from the state to the international level. The three WTO legal-institutional developments which this paper will focus upon are: (i) the WTO; (ii) the Trade Policy Review Mechanism; and (iii) the Dispute Settlement Mechanism.

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<sup>3</sup> Preamble to the WTO Agreement, *ibid.* at 6. See Part V, below, for a discussion of the GATT.

<sup>4</sup> Moroccan Crown Prince Sidi Mohammed in a speech at the opening of the Marrakesh Ministerial meeting on 12 April 1994, cited in Focus 107, *supra* note 1 at 2.

## II. SOVEREIGNTY AND ECONOMIC INTEGRATION

Economic integration, and the consequent deepening of multilevel international economic interdependence, is the most powerful force propelling the transformation of the contemporary international system. Economic integration is altering the way we view the role of the state and the way we conceptualize sovereignty in international law.

Because of traditional views of sovereignty, international law rules have been seen as different from, and most definitely as weaker than, domestic law rules. Viewing the state as the only sovereign entity in the international order, J. Austin refuted the basic principle that international law could properly even be called "law."<sup>5</sup> For Austin, the ultimate and exclusive sovereignty of the state logically negated the existence of international law.

The classical view of international law, founded on the principle of the sovereign equality of selfish and self-contained states with each asserting exclusive jurisdiction over activities within its territory,<sup>6</sup> endeavours to establish a framework for peaceful cooperation among states. However, this view no longer accurately reflects reality. Its rigid conception of inviolable state territorial sovereignty fails to acknowledge the toll that economic integration has taken upon the state's ability to control activities within its territory. This view of international law does not accommodate the evolving meaning of sovereignty, nor does it

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<sup>5</sup> Austin defined laws "properly so-called" as commands, and "positive law," the appropriate matter for jurisprudence as the commands of the sovereign. For Austin, the law among nations was more accurately called "positive morality": see D.J. Harris, *Cases and Materials on International Law*, 4th ed. (London: Sweet & Maxwell, 1991) at 6. For Austin's theories on state sovereignty and international law, see also J. Austin, *Lectures on Jurisprudence*, vol. 1, 5th ed. (London: John Murray, 1885), especially at 225-26; R.A. Eastwood & G.W. Keeton, *The Austinian Theories of Law and Sovereignty* (London: Methuen, 1929); and W.J. Brown, *The Austinian Theory of Law* (London: John Murray, 1926).

<sup>6</sup> This view finds its expression in many post-war international legal instruments. See, for example, *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, 59 Stat. 1031, 145 U.K.F.S. 805, arts. 2 and 78; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (1970) 9 I.L.M. 1292; *Charter of Economic Rights and Duties of States*, UNGA Res. 3281 (1975) 14 I.L.M. 251. For an analysis of sovereignty as it relates to the United Nations system, see D. Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (The Hague: Martinus Nijhoff, 1970).

readily favour the development of an integrated and rule-oriented international legal order.<sup>7</sup>

The international system can no longer be seen in classical realist terms as a community of hard-shelled and self-sufficient sovereign states selfishly pursuing their own interests without regard to the actions and policies of others. Rather, the inexorable progress of economic integration has penetrated state borders, making the state a porous and vulnerable entity transcended by transnational activities and forces.

Burgeoning transnational economic relations and activities have strained the regulatory and normative capacity of national and international institutions. Indeed, national and international authorities often appear to be at the mercy of international currency and bond traders, as the information age has brought with it the ability to transfer massive amounts of money anywhere in the world virtually instantaneously. Private citizens within states are becoming more directly affected by economic forces beyond their countries' boundaries.<sup>8</sup> In these circumstances, sovereignty has become almost meaningless or irrelevant for an isolated state. These factors have heightened the need for a more robust international framework of rules in order to enhance the management of systemic economic interdependence. The development of international law rules in this direction will provide a degree of order and certainty. It will also reduce frictions caused by problematic unregulated policy differences among states.<sup>9</sup>

Increased international economic interaction has placed many areas that were formerly regulated at the state level squarely onto the international agenda.<sup>10</sup> This overlapping of the domestic and the international both permits and demands the creation of more effective

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<sup>7</sup> See J.P. Trachtman, "L'État, C'est Nous: Sovereignty, Economic Integration and Subsidiarity" (1992) 33 *Harv. Int'l L.J.* 459 at 461. See also L. Gross, "The Peace of Westphalia, 1648-1948" (1948) 42 *AJIL* 20 at 40, where Gross states that the Westphalian system of international law, characterized by "rugged individualism of territorial and heterogeneous states, balance of power, equality of states and toleration ... ill accommodates itself to the international rule of law reenforced by necessary institutions."

<sup>8</sup> J. Jackson, *Restructuring the GATT System* (New York: Council on Foreign Relations for the Royal Institute of International Affairs, 1990) at 53-54 [hereinafter *Restructuring GATT*].

<sup>9</sup> See, for example, R.E. Hudec, "Public International Economic Law: The Academy Must Invest" (1992) 1 *Minn. J. Global Trade* 5 at 6-7.

<sup>10</sup> See, for example, D.P. Steger, "The Impact of GATT/MTO Rule-making and Rule-Interpretation on the Sovereignty of States" in *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) 138 at 140-41. Examples are trade in services, trade-related investment measures, trade-related aspects of intellectual property, and product standardization.

international law rules and the fostering of common approaches in these areas. As Brierly noted in relation to the past relative weakness of international law:

[t]he restricted range of international law is merely the counterpart of the wide freedom of independent action which states claim in virtue of their sovereignty. ... Law will never play a really effective part in international relations until it can annex to its own sphere some of the matters which at present lie within the "domestic jurisdiction" of the several states.<sup>11</sup>

Economic integration is thus forcing international relations to "annex to its own sphere" ever more trade-related sectors. The development of the rule of law in international trade thus constitutes not merely an aspiration, but a necessity. By developing accepted, agreed-upon, and consistent normative guidelines as parameters ("outer limits") for national policy-making in trade-related areas, international law rules will promote necessary convergence of domestic policies.<sup>12</sup>

State sovereignty and the effective or binding nature of international law rules have typically been thought of as inversely proportional. This tension between state sovereignty and international legal authority is the defining dynamic of the contemporary global economy.<sup>13</sup> In the regulation of international trade it is helpful to think that, to the extent that sovereign authority is taken from the state, it can be transferred to—and pooled at—the international level. Thus sovereignty should not be considered a finite concept reserved exclusively to the state, but must rather be seen as flexible and fluid: "[s]overeignty, viewed as an allocation of power and responsibility, is never lost, but only reallocated. ... When a state's sovereignty is reduced, the important question raised is where the sovereignty goes."<sup>14</sup>

This idea of sovereignty as a quality that can be distributed and reallocated within the international system cuts across the traditional analysis of international law in terms of the monist and dualist paradigms. It seems to call for a role for the state that falls between these two models.

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<sup>11</sup> J.L. Brierly, *The Law of Nations*, 6th ed. (Oxford University Press, 1963), cited in Harris, *supra* note 5 at 4.

<sup>12</sup> Steger, *supra* note 10 at 141. Steger does not see this as a diminution of sovereignty of states in the regulation of domestic policy areas, but as the development of more consistent and harmonious international rules in an increasingly interdependent world.

<sup>13</sup> G.R. Winham, *The Evolution of International Trade Agreements* (Toronto: University of Toronto Press, 1992) at 130, describes this tension as one between nationalism and internationalism.

<sup>14</sup> J.P. Trachtman, "Reflections on the Nature of the State: Sovereignty, Power and Responsibility" (1994) 20 Can.-U.S. L.J. 399 at 400 [hereinafter "Reflections"].



The dualist theory, premised upon the existence and durability of state sovereignty, holds that national law and international law co-exist as two separate and distinct entities in a definite hierarchy. Valid and binding international law norms, while universal, are at the same time barred from transgressing the rigid border of a sovereign state and affecting individuals within that state, unless transformed into the domestic legal system through the legislative instrumentality of the state.<sup>15</sup>

Monism, on the other hand, presupposes the existence of a single system of international legal norms binding upon states and individuals within those states. In the monist view, states are legal fictions and the individual is the ultimate subject of international law. Because monism brings the individual into direct contact with international law, the state does not act as an intermediary transforming international law rules into the state legal order. Rather, international law will be automatically incorporated and available as a domestic law instrument before domestic courts.

Neither of these models, however, adequately provides for the possibility that the state is neither wholly subordinate nor wholly supreme to a distinct and co-existing international legal order, but rather is a full-fledged participant in an integrated international community, "both forming and complying with law."<sup>16</sup> The state as a porous but resilient entity has a contingent stake in designing an international system, which both respects and represents its interests in the international arena.

### III. SOVEREIGNTY AND THE "RULE-ORIENTED" VS. "POWER-ORIENTED" DEBATE

The relationship between sovereignty and economic integration intersects with the debate over rule-oriented and power-oriented views of international organizations or rule systems.

The power-oriented or pragmatic approach focuses on international institutions as fora for state interaction characterized by negotiation, conciliation, and compromise. A general framework of basic rules allowing for flexibility and lacking an effective enforcement mechanism embodies the pragmatic aspiration. It has traditionally been

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<sup>15</sup> See *Restructuring GATT*, *supra* note 8 at 30-31; and D. Lasok & K.P.E. Bridge, *Law and Institutions of the European Union*, 6th ed. (London: Butterworths, 1994) at 283.

<sup>16</sup> See "Reflections," *supra* note 14 at 403.

founded upon the entrenched systemic resistance to the erosion of national sovereignty.

On the other hand, a rule-oriented international institution is based upon a legally binding constitution setting out clear and precise rules and obligations, enforced by an effective and impartial adjudication mechanism that fosters and enforces a stable and consistent international legal order. Its primary objective is the maximization of stability and predictability.

Legalism has typically been denounced by states jealous of their sovereignty. It is interesting to note, however, that progressive international economic integration is transforming the meaning of sovereignty in the context of the "rule-oriented" versus "power-oriented."

The traditional power-oriented approach to international order downplays the significance and authority of international law rules. This view has traditionally been interpreted as allowing members of the international community to maintain their legal sovereignty and policy-making competence intact despite their international obligations. While the power-oriented model offers the illusion of retaining state sovereignty without international impingement, this illusion is untenable given the present actual extent of transnational economic interaction.

In an era of intensifying economic integration spilling over into ever more sectors of economic activity, states increasingly find parameters for their actions dictated to them by the domestic and extraterritorial economic policies and activities of other states and non-state actors. Money and investment flow freely across borders. Citizens within states are increasingly affected by economic forces—and pursue economic activities—outside or across state borders. Because of its mistaken premise that the state still enjoys exclusive jurisdiction over economic activities taking place within its territory, the power-oriented international rule system neither accommodates nor takes account of the forces of functionally driven international economic integration.

In such an economically interdependent world, a rule-oriented international institution, involving a set of effective, previously agreed-upon, precise, and enforceable norms acceptable to all the participants, can be seen as a way to ensure that individual states have at least conceptual and legal input into the architecture of the international system by which they will be governed. The transfer of sovereign authority in certain areas as necessary, and its pooling at the international level, allows the state far more authority and opportunity to exercise control over the actions of other states in the system and over the legal environment in which it and its citizens operate. The

international rule system or institution does not supplant but, rather, supplements the state and represents the interests of the state participants on the international plane.

This process can be viewed as a cost-benefit analysis between the degree of local autonomy foregone and the prosperity and measure of influence over other states' actions obtained.<sup>17</sup> By pooling their sovereignty at the international level, states gain influence and authority within the system, leaving little room for the political whims and uncertainties inherent in an anarchic power-oriented system. States are not at the mercy of the unmitigated political discretion of other states within the system, but rather may operate on the assumption that all other states will adhere to the legally valid, binding, and consistent international norms which they have all have jointly designed to serve their interests.

#### IV. THE EUROPEAN UNION AS A LEGAL-INSTITUTIONAL MODEL FOR MANAGING ECONOMIC INTEGRATION

Advocates of a rule-based international trade system point to the EU's evolution, from a post-war customs union towards an intricate rule-oriented structure, as a potential model for the development of the GATT/WTO system.<sup>18</sup> There are issues on the EU's agenda that the WTO will inevitably have to address as global economic integration progresses.<sup>19</sup>

The EU<sup>20</sup> has developed into the most integrated multinational economic system in the contemporary international order. The creation

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<sup>17</sup> See Trachtman, *supra* note 7 at 465 and 467.

<sup>18</sup> See, for example, J. Jackson, "Commentary," in A.V. Deardorff & R.M. Stern, eds., *Analytical and Negotiating Issues in the Global Trading System* (Ann Arbor: University of Michigan Press, 1994) 599 at 604; and Trachtman, *supra* note 7 at 463-67.

<sup>19</sup> The Preparatory Committee for the WTO, along with being charged with ensuring a smooth transition from the GATT to the WTO, was also given the responsibility of examining these further subjects with a view to including on the WTO agenda: the relationship between immigration policies and international trade; trade and competition policy, including rules on export financing and restrictive business practices; trade and investment; regionalism; the interaction between trade policies and policies relating to financial and monetary matters, including debt and commodity markets; international trade and company law; the establishment of a compensation mechanism for the erosion of preferences; the link between trade, development, political stability, and the alleviation of poverty; and unilateral or extraterritorial trade measures. See Focus 107, *supra* note 1. All of these items have been on the EU agenda.

<sup>20</sup> For a detailed account of the EU constitutional order and institutions, see Lasok & Bridge, *supra* note 15.

of an internal market characterized by the complete freedom of movement of goods, services, persons, and capital is built on the legal foundation provided by the agreed-upon substantive and procedural rules entrenched in the Rome Treaty<sup>21</sup> and its subsequent revisions. The European Court of Justice (ECJ), whose decisions are binding upon member states and upon natural and legal persons within those states, has constitutionalized the EU's legal order and built an authoritative body of jurisprudence concerning economic integration. The Commission, with its mandate to act as a guardian of the Treaty and to pursue further integration, has—particularly in the aftermath of the 1992 Maastricht Treaty<sup>22</sup>—gained competence in an ever-growing number and range of issue-areas. Decision making in the Council of Ministers takes place by qualified majority in many domains.

The EU's supranational legal order is characterized by the fact that the member states are not entirely sovereign, as they have delegated a portion of their law-making authority in certain fields to the EU. Some of the rules contained in the Rome Treaty (and its revisions) are directly applicable within the legal orders of the member states and directly enforceable by individuals. Community law has primacy<sup>23</sup> over national law. Directly applicable provisions of Community law are given effect immediately over inconsistent national legislation. It is not necessary for a member state court to request or await the formal setting aside of the national provision by legislative, judicial, or other constitutional means. In addition, the enactment of new national provisions is prohibited to the extent that they are incompatible with Community law.<sup>23</sup> In a given sphere of activity, either the member state or the EU has sovereign authority, although there are certain spheres of mixed competence where they share authority.

Thus, EU member states have agreed to respect the authority of the ECJ over matters and persons within their territory falling within the jurisdiction of the ECJ, and have also consented to the recognition of EU law by their municipal courts.<sup>24</sup> In *Van Gend en Loos*, the ECJ stated that the European Community's legal system "constitutes a new legal order in international law for whose benefit the states have limited their

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<sup>21</sup> *Treaty Establishing the European Economic Community* (25 March 1957) 298 U.N.T.S. 11 [hereinafter Rome Treaty].

<sup>22</sup> *Treaty on European Union*, 7 February 1992, 31 I.L.M. 247.

<sup>23</sup> See *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (No. 2)* (Case 106/77), [1978] 3 C.M.L.R. 263.

<sup>24</sup> Lasok & Bridge, *supra* note 15 at 283.

sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.”<sup>25</sup>

The limitation of the jurisdiction and sovereign rights of the member states favours a transfer of sovereign authority to the Community level. Through this reallocation of sovereignty, member states curtail their autonomy but increase their influence by directly participating in the design of the international rules which govern them. They then agree to abide by the management and enforcement of the rules.

Of course, the EU’s supranational model, based on the permanence, authority, and direct applicability of rules enforced by the permanent ECJ, does not represent the only existing model for the management of contemporary international economic interdependence. Jonathan Fried, for example, argues that the *North American Free Trade Agreement*<sup>26</sup>—with a more decentralized institutional framework for fostering adherence to, implementation, and enforcement of trade rules—also creates a free trade system that “works.”<sup>27</sup> This paper concentrates on the EU model because of the far more advanced, ambitious, and legally effective system for the management of economic interdependence which it supplies.

## V. LEGAL AND INSTITUTIONAL HISTORY OF THE INTERNATIONAL TRADE SYSTEM

While the international community acknowledged the wisdom of designing, and adhering to, an international code of commercial conduct with the emergence of the *General Agreement on Tariffs and Trade*<sup>28</sup> in 1947, there was reluctance to accept an international organization to administer, monitor, legislate, and adjudicate on the basis of this code of conduct. The 1994 *Results of the Uruguay Round*, establishing the WTO, represents the third endeavour over the last fifty years to introduce an

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<sup>25</sup> (Case 26/62) *Van Gend en Loos v. Nederlands Administratie der Belastingen*, [1963] E.C.R. 1 at 29; see also Lasok & Bridge, *supra* note 15 at 81. Another seminal case similarly dealing with the nature of the EC legal order is (Case 6/64) *Costa v. Ente Nazionale Per l'Energia Elettrica ENEL*, [1964] C.M.L.R. 425 (E.C.J.).

<sup>26</sup> 17 December 1992, U.S.-Can.-Mex., Pub. L. No. 103-182, 107 Stat. 2057, 32 I.L.M. 605 [hereinafter NAFTA].

<sup>27</sup> See J.T. Fried, “Two Paradigms for the Rule of International Trade Law” (1994) 20 Can.-U.S. L.J. 39.

<sup>28</sup> 30 October 1947, Can. T.S. 1947 No. 27, 55 U.N.T.S. 187, T.I.A.S. No. 1700, cited to *Results of the Uruguay Round*, *supra* note 2 at 486 [hereinafter GATT 1947].

institutional and organizational framework to supervise the international trading system and administer the GATT. The previous two attempts, in 1948 and in 1955, were defeated in the United States Congress. The 1948 Havana Charter<sup>29</sup> for an International Trade Organization (ITO) failed because, although it would have promoted stability by fostering the rule of law in international trade (by providing fairly precise international norms and a strong dispute settlement procedure), its victorious opponents argued that it would unacceptably usurp national sovereignty and autonomy in the commercial policy domain.<sup>30</sup> Attempts to impose a strong supranational legal framework for international trade may also have been unrealistic during this period of relatively low economic integration.

Drafted merely as an interim agreement pending the coming into force of the ITO Charter, the GATT then emerged, by default, as the primary instrument for international commercial policy regulation. This happened despite the fact that the GATT was only applied provisionally and lacked the constitutional, structural, and organizational features to perform the role thrust upon it after the ITO's demise. Originally a basic set of rules and tariff concessions, it became a hybrid institution, serving both as an international trade agreement and an institutional manifestation of the trade agreements process.<sup>31</sup> Through successive rounds of multilateral trade negotiations and the development of procedures to carry on work between sessions of the contracting parties, the GATT subsequently evolved into a *de facto* international organization.<sup>32</sup> Its informal institutional growth has been cited as an

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<sup>29</sup> *United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948: Final Act and Related Documents*, UN Doc. E/Conf.2/78 (1948).

<sup>30</sup> For a comprehensive account of the demise of the Havana Charter and the origins of the GATT, see: W.A. Brown, *The United States and the Restoration of World Trade* (Washington, D.C.: Brookings Institution, 1950); R.N. Gardner, *Sterling-Dollar Diplomacy* (Oxford: Clarendon Press, 1956); C. Wilcox, *A Charter for World Trade* (New York: Macmillan, 1949); G. Bronz, "The International Trade Organization Charter" (1949) 62 Harv. L. Rev. 1089; J. Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill Book Company, 1969) [hereinafter *World Trade*]; and R. Hudec, *The GATT Legal System and World Trade Diplomacy* (Salem: Butterworths, 1990). The 1955 attempt to form the Organization for Trade Cooperation (OTC) is dealt with in *World Trade*, *ibid.* at 50-52; Hudec, *ibid.* at 72-73; and G. Bronz, "An International Trade Organization: The Second Attempt" (1956) 69 Harv. L. Rev. 440.

<sup>31</sup> Winham, *supra* note 13 at 43.

<sup>32</sup> See, for example, K. Dam, "The GATT as an International Organization" (1969) 3 J. World Trade 374.

important precedent in international law for the formation of necessary institutional attributes without legal foundation.<sup>33</sup>

Increased economic integration in the 1970s made it necessary (and more feasible) to tackle the growing problem of non-tariff trade barriers (NTB), which had taken the place of tariffs as the most prevalent obstacles to international trade liberalization efforts. However, because of the procedural and substantive difficulties in amending the GATT, and in the absence of a consensus among all of the contracting parties, the results of the Tokyo Round (1973-79) were limited to a series of side agreements and understandings concerning NTBs.<sup>34</sup> As they were signed only by some, not all, GATT contracting parties, these side agreements had the problematic result of violating the GATT most-favoured-nation (MFN) principle and splintering the GATT system into varying levels of legal obligations. In addition, each of the NTB codes contained its own dispute settlement procedures. The growing complexity of the GATT system appeared unmanageable and unable to provide a viable rule structure for managing international trade relations.<sup>35</sup>

The GATT's evolution steered a course between strict rule-orientation and a purely pragmatic accommodation of political realities.<sup>36</sup> As a set of international legal rules, the GATT's effectiveness was limited by an inadequate institutional setting, the prevalence of negotiated dispute settlement, and the lack of mechanisms for rule creation and monitoring of rule adherence. This was coupled with weak application and enforcement of rules in the form of a relatively feeble dispute settlement system, which allowed a losing party to block an

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<sup>33</sup> *World Trade*, *supra* note 30 at 153.

<sup>34</sup> See *The Texts of the Tokyo Round Agreements* (Geneva: GATT, 1986).

<sup>35</sup> See, for example, A.F. Lowenfeld, "Remedies along with Rights: Institutional Reform in the New GATT" (1994) 88 *AJIL* 477; and V. Curzon Price, "New Institutional Developments in GATT" (1992) 1 *Minn. J. Global Trade* 87 at 105.

<sup>36</sup> See, for example, O. Long, *Law and its Limitations in the International Trade System* (Dordrecht: Martinus Nijhoff, 1985) at 8. Pragmatists saw flexibility, adaptability, and diplomatic compromise as GATT's most important characteristics. Dam, for example, praised consultative and conciliatory procedures as they avoid "poisoning the diplomatic atmosphere with charges of illegality": see K. Dam, *The GATT Law and International Economic Organization* (Chicago: University of Chicago Press, 1970) at 354; and R. Hudec, "GATT or GABB: The Future Design of the General Agreement on Tariffs and Trade" (1971) 80 *Yale L.J.* 1299 at 1305 [hereinafter "GATT or GABB"]. Legalists argued GATT should be seen more as a kind of "constitution," a legally binding international instrument setting out concrete and precise rules, and enforced by an effective and impartial adjudication mechanism: see "GATT or GABB," *ibid.* at 1307; *World Trade*, *supra* note 30 at 767; J. Jackson & W. Davey, *Legal Problems of International Economic Relations*, 2d ed. (St. Paul: West, 1986); and *Restructuring GATT*, *supra* note 8.

unfavourable panel report with relative ease, and did not ensure implementation of panel recommendations.

The GATT's gradual and organic legal and institutional development has been considered to be its basic strength, since its growth was in line with what sovereign states were willing to tolerate at the time, and thus more likely to respect.<sup>37</sup> The loosely rule-oriented pre-Uruguay Round GATT framework left state autonomy and sovereignty in the trade sphere essentially untouched. This was perhaps understandable in view of the relatively low level of international economic integration during the GATT's first thirty years of existence.

Along with increased economic interdependence and a growing body of unregulated transnational activity in the 1980s, however, emerged recognition of the need to revitalize the GATT system by strengthening existing disciplines and extending norms into new areas. An increase in number and diversity of GATT membership, and the mushrooming legal complexity caused by the multiplicity of agreements and side agreements in the fragmented GATT regime, militated in favour of a revised, more integrated, and stronger legal framework. In recognition of these factors, the Uruguay Round was launched at the Punta del Este GATT ministerial meeting in September 1986.<sup>38</sup> The Ministerial Declaration stressed the necessity of reintroducing legal uniformity into international trade obligations by specifically stipulating that the results of the Uruguay Round "shall be treated as parts of a single undertaking."<sup>39</sup>

While no specific mention was made of the formation of any type of overarching international trade organization, institutional and constitutional reforms still figured largely on the Uruguay Round agenda. A stated objective of the negotiation was to "strengthen the role of GATT, improve the multilateral trading system based on the principles and rules of GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines."<sup>40</sup> Under the rubric of "Functioning of the GATT System" (FOGS), the Punta del Este Declaration stated:

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<sup>37</sup> Curzon Price, *supra* note 35 at 88-89; and Long, *ibid.* at 61-64.

<sup>38</sup> Originally scheduled to conclude in Brussels in 1990, the Round finally ended in December 1993 and the *Final Act*, *supra* note 2, was signed on 15 April 1994.

<sup>39</sup> Ministerial Declaration on the Uruguay Round, 20 September 1986, 33rd Supp. B.I.S.D. (1987) 19 at 20.

<sup>40</sup> *Ibid.*



Negotiations shall aim to develop understandings and arrangements:

- (i) to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system;
- (ii) to improve the overall effectiveness and decision-making of the GATT as an institution, including, *inter alia*, through involvement of Ministers;
- (iii) to increase the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organizations responsible for monetary and financial matters.<sup>41</sup>

The focus of strengthening the rule-oriented nature of the international trade system in the FOGS was on trade policy surveillance, enhanced ministerial involvement, and a strengthened dispute settlement mechanism. Formal proposals for a multilateral trade organization emerged in 1990-91,<sup>42</sup> and were first formally iterated in the 1991 "Dunkel Draft" Agreement.<sup>43</sup>

## VI. THE WORLD TRADE ORGANIZATION AGREEMENT: TOWARDS MANAGEMENT OF GLOBAL ECONOMIC INTEGRATION

At the time of the signing of the WTO Agreement in Marrakesh on 15 April 1994, the participating trade ministers affirmed that "the establishment of the WTO ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples."<sup>44</sup>

The Preamble to the WTO Agreement restates the GATT objectives of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources."<sup>45</sup> The Preamble adds the concept of sustainable development and, in particular,

<sup>41</sup> *Ibid.* at 26.

<sup>42</sup> See G. Patterson & E. Patterson, "The Road from GATT to MTO" (1994) 3 *Minn. J. Global Trade* 35 at 42-43. The design for the WTO can largely be traced back to *Restructuring GATT*, *supra* note 8: Jackson's ideas on a new treaty instrument containing the organizational constitution for a multilateral trade organization with provision for an integrated dispute settlement mechanism were taken up in proposals by the European Community and Canada in 1990-91.

<sup>43</sup> *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (20 December 1991).

<sup>44</sup> Focus 107, *supra* note 1 at 7.

<sup>45</sup> *Supra* note 2 at 6.

recognizes the necessity of positive efforts to promote the interests of developing countries in the multilateral trading system. With a view to achieving greater coherence in global economic policymaking, the WTO is to cooperate with the International Monetary Fund and the International Bank for Reconstruction and Development. A half-century after it was originally envisaged, the third pillar of the Bretton Woods triumvirate is finally in place (although the WTO, unlike the 1948 ITO, is not formally a part of the United Nations system).

The WTO Agreement and its related agreements will supersede prior GATT arrangements, and GATT 1994<sup>46</sup> is legally distinct from GATT 1947.<sup>47</sup> The WTO will not “succeed” the GATT 1947 within the meaning of the *Vienna Convention on the Law of Treaties*.<sup>48</sup> To the extent that national governments implement the Uruguay Round agreements and do not simultaneously withdraw from GATT’s Protocol of Provisional Application, they are simultaneously bound by two different sets of obligations to two different sets of countries for a transitional period of one year.<sup>49</sup> This transitional period of co-existence is intended to further the stability of the multilateral trading system.<sup>50</sup>

## A. *The World Trade Organization*

### 1. Functions and scope

The functions of the WTO are to facilitate the implementation, administration, and operation, and to further the objectives of the WTO Agreement and other legal instruments and agreements resulting from

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<sup>46</sup> General Agreement on Tariffs and Trade 1994, being annex 1A to the WTO Agreement, in *Results of the Uruguay Round*, *supra* note 2 at 21 [hereinafter GATT 1994].

<sup>47</sup> *Supra* note 28.

<sup>48</sup> *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 20 March 1986, U.N. Doc. A/CONF.129/15 (1986), 25 I.L.M. 543, arts. 30 and 59.

<sup>49</sup> Note that under the GATT 1994, *supra* note 45, art. 1(a), the provisions of GATT 1947 “as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement” form part of GATT 1994 (excluding the Protocol of Provisional Application).

<sup>50</sup> The transitional period may be extended for no more than one additional year. At the end of the period, “the legal instruments through which the contracting parties apply the GATT 1947” are to be terminated. See “Transitional Co-existence of the GATT 1947 and the WTO Agreement,” cited in GATT Focus No. 113, December 1994 at 4-5 (decision taken by 8 December 1994 Implementation Conference).

the Uruguay Round.<sup>51</sup> The WTO will provide a forum for negotiations and for constant ministerial involvement to advance the effectiveness of the rule-oriented institutional framework. It will administer the Understanding on Rules and Procedures Governing the Settlement of Disputes, applicable to disputes arising under all the Multilateral Agreements, to bring uniformity and consistency to the clarification and enforcement of members' legal obligations. It will also administer the Trade Policy Review Mechanism to provide transparency for domestic policies and encourage compliance with WTO norms.

The WTO is the first permanent international trade organization in history, with its own Secretariat and administrative infrastructure. This contrasts markedly with the GATT's nature as a provisional treaty, surrounded by a network of side agreements, and supported by a series of *ad hoc* arrangements and a Secretariat borrowed from the Interim Committee for the International Trade Organization (ICITO). The WTO provides a much stronger institutional framework for the development, application, and enforcement of international legal norms in the trade sphere.

The scope of the WTO is far broader than that of the GATT 1947, and it is involved in many areas which formerly were seen as the exclusive reserve of states. Under its aegis now are arrangements for almost every sector of trade-related interaction, including multilateral frameworks for trade in agriculture, textile, clothing, services, as well as trade-related aspects of intellectual property, investment measures, and the environment. Strengthened GATT disciplines have been uniformly extended into these new areas. The WTO administers a unified and integrated set of agreements which apply equally to all members.<sup>52</sup> Thus, the laws, policies, and administrative practices of each member must conform with its obligations in the Multilateral Trade Agreements and the Plurilateral Trade Agreements. This contrasts with the untidy and extensive network of agreements and side agreements which had resulted in different layers of legal obligations under the GATT 1947. A major achievement of the WTO, therefore, is that it brings uniformity back to the law of international trade.<sup>53</sup>

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<sup>51</sup> WTO Agreement, *supra* note 2, art. III.

<sup>52</sup> *Ibid.*, annexes 1, 2, and 3; the Plurilateral Agreements, being annex 4 to the WTO Agreement, *ibid.* at 438, only apply to signatories. However, art. XIII of the WTO Agreement provides, in exceptional cases, for the non-application of Multilateral Trade Agreements between Particular Members; art. XI provides for certain exceptions for less developed countries.

<sup>53</sup> Lowenfeld, *supra* note 35 at 479.

The WTO will be closer to a truly global organization than the GATT 1947 ever was. One hundred and twenty-five countries signed the Marrakesh *Final Act*. On 1 January 1995, there were eighty-five WTO original founding members, and ratification procedures in other signatories are still under way. It is anticipated that China and Russia will eventually join. The original members of the WTO are the GATT 1947 contracting parties who have agreed to all of the Multilateral Trade Agreements and have presented schedules of market access commitments for industrial goods, agricultural goods, and services.<sup>54</sup> Less developed countries only have to “undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.”<sup>55</sup> Accession of other states to the Multilateral Trade Agreements requires a two-thirds majority vote in the Ministerial Conference. The Plurilateral Trade Agreements provide for their own accession requirements.<sup>56</sup>

Like the United Nations family of organizations and other international organizations, the WTO will have legal personality and each of the members must accord it the legal capacity and the privileges and immunities necessary for the exercise of its functions.<sup>57</sup>

## 2. Structure

As Figure 1 below indicates, the WTO is to be composed of a Ministerial Conference, a General Council (which will also convene, as appropriate, as the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB)); a Council for Trade in Goods; a Council for Trade in Services; and a Council for Trade-Related Aspects of Intellectual Property Rights. The latter three Councils have the authority to establish subsidiary bodies as required. The Ministerial Conference also has the authority to establish a Committee on Trade and Development; a Committee on Balance-of-Payments Restrictions; a Committee on Budget, Finance and Administration; and “such additional Committees

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<sup>54</sup> WTO Agreement, *supra* note 2, art. XI.

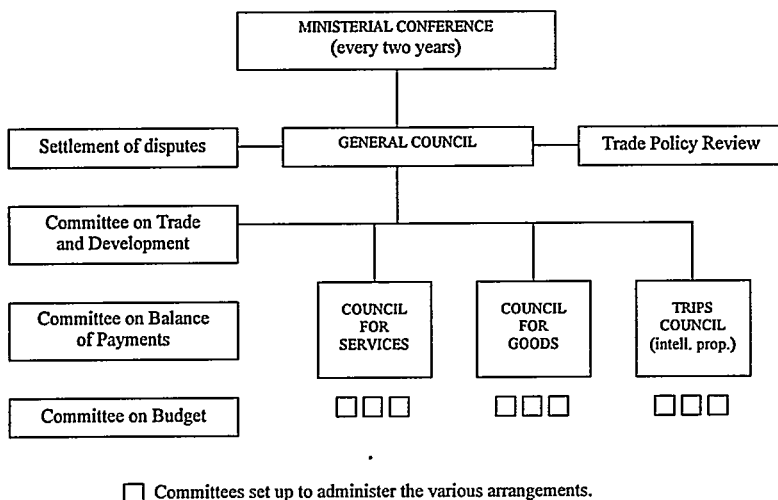
<sup>55</sup> *Ibid.*; and Decision on Measures in Favour of Least-Developed Countries, in *Results of the Uruguay Round*, *supra* note 2 at 440.

<sup>56</sup> WTO Agreement, *supra* note 2, art. XII.

<sup>57</sup> *Ibid.*, art. VIII.

with such functions as it may deem appropriate.”<sup>58</sup> The bodies established in the Plurilateral Trade Agreements are to carry out the functions assigned to them and to “operate within the institutional framework of the WTO.”<sup>59</sup> They are to report regularly to the WTO General Council.

Figure 1: Structure of the WTO



Source: GATT Focus No. 107, May 1994.

The Ministerial Conference, composed of representatives of all members, meets at least once every two years. The Ministerial Council is responsible for executing the functions of the WTO and has the authority “to take decisions on all matters under any of the Multilateral Trade Agreements.”<sup>60</sup> It can delegate authority to the General Council.

The General Council essentially replaces the former GATT Council. It is composed of representatives of all the members. It will carry on the functions of the Ministerial Conference and meet “as appropriate” in the intervals between its meetings.<sup>61</sup> It runs the day-to-day operations of the WTO. The General Council will convene as

<sup>58</sup> *Ibid.*, art. IV(7).

<sup>59</sup> *Ibid.*, art. IV(8).

<sup>60</sup> *Ibid.*, art. IV(1).

<sup>61</sup> *Ibid.*, art. IV(2).

appropriate to discharge its duties as the DSB and the TPRB. The General Council also bears the responsibility for making appropriate arrangements with non-governmental and other intergovernmental organizations whose mandates overlap with that of the WTO.

The WTO Agreement provides for the Secretariat of the WTO, headed by a Director-General. This ends the anomalous arrangement that had persisted since 1947 of the GATT "borrowing" the services of the ICITO Secretariat. The Ministerial Conference is charged with the duty of appointing the Director-General and adopting regulations setting out the powers, duties, conditions, and terms of office. The Director-General appoints the staff and sets the duties and conditions of service in accordance with Ministerial Conference regulations. The Agreement expressly stipulates that the responsibilities of the Director-General and Secretariat "shall be exclusively international in character" and that neither the Director-General nor the Secretariat are to "seek or accept instructions from any government" or any other external authority.<sup>62</sup>

### 3. Decision making and rule creation: interpretations, waivers, and amendments

The practice of decision making by consensus, as in the GATT 1947, will persist in the WTO. Consensus is deemed to exist where no member formally voices an objection. Where consensus is found not to be possible, issues will be decided by a majority of votes cast (on a one-vote-per-country basis), except as otherwise provided (for example, the Understanding on Dispute Settlement provides for special decision-making rules in that area). The Agreement contains special provisions for voting on matters connected with rule creation and adaptation, that is, relating to interpretations, waivers, and amendments of the WTO and related Agreements. A stringent three-quarters majority is required for interpretations and waivers (as opposed to the previous two-thirds GATT requirement). Depending upon the obligations involved, an amendment requires either unanimous or two-thirds majority approval in order to become effective.

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<sup>62</sup> *Ibid.*, art. VI(4).

a) *Interpretations*

Under general customary international law principles, an interpretation of an international legal instrument becomes binding upon a sovereign state only when that state gives its assent, or when the interpretation becomes a “generally accepted” principle among states, as indicated by state conduct and *opinio juris*. GATT 1947 made no explicit provision for such rule creation through definitive interpretation. However, the authority for joint action under article XXV(1), with a view to “facilitating the operation and furthering the objectives of this Agreement,”<sup>63</sup> broadly gave the contracting parties the capability of rendering legal and binding interpretations of GATT rules through decisions.<sup>64</sup>

Under the WTO Agreement, exclusive authority to adopt binding interpretations of the WTO Agreement and the Multilateral Trade Agreements is explicitly bestowed upon the Ministerial Conference and the General Council. Interpretations are to be adopted by a three-quarters majority of the members. For those Multilateral Trade Agreements in Annex 1, the authority is to be exercised on the basis of a recommendation by the particular Council overseeing the functioning of that Agreement. The Agreement explicitly stipulates that the power to adopt binding interpretations “shall not be used in a manner that would undermine the amendment provisions in Article X.”<sup>65</sup> Thus, where an interpretation would amount to an amendment affecting members’ procedural or substantive rights, the article X amendment provisions must be respected and it will not be binding upon a member without that state’s acceptance.

The authority to adopt definitive interpretations of the WTO Agreement and related Multilateral Trade Agreements represents a new power institutionalized at the international level, and shows the willingness of states to develop WTO rules and disciplines as necessary. The three-quarters voting requirement will carry the rule-creation process forward more easily than would a unanimity requirement. However, the fact that any interpretation amounting to an amendment

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<sup>63</sup> GATT 1947, *supra* note 28.

<sup>64</sup> But see *Restructuring GATT*, *supra* note 8 at 57-58, where Jackson expresses some doubt about this power. However, he concedes the possibility “that the practice of GATT in its four decades of existence has itself established an interpretation of the Article XXV powers to include the power to interpret.”

<sup>65</sup> WTO Agreement, *supra* note 2, art. IX(2).

will not bind a state unless it gives its assent shows a reticence to transfer sovereignty to the international level by reserving to the state the final decision to adopt new obligations.

b) *Waivers*

The power to grant waivers which permit derogations from an international legal instrument is also a power of rule creation, as it affects the substantive rights and obligations of members.<sup>66</sup> GATT 1947 generally provided for the granting of waivers in exceptional circumstances and with approval of a two-thirds majority of votes cast.<sup>67</sup> The WTO Agreement contains far more stringent and precise provisions on the granting of waivers, covering time limits, monitoring, and termination of waivers.

The waiver of an obligation of a member under the WTO Agreement or any of the Multilateral Trade Agreements is within the authority of the Ministerial Conference.<sup>68</sup> Waiver decisions are generally to be taken by three-quarters majority vote, with certain exceptions provided for. Waiver requests under the WTO Agreement are to be submitted to the Ministerial Conference for decision by consensus. The Ministerial Conference is to decide upon a time period, not to exceed ninety days, for consideration of the request. If no consensus is reached within this period, a decision to grant a waiver is to be taken by three-quarters majority. Waiver requests concerning the Multilateral Trade Agreements in Goods, the GATS, or the TRIPS are first to be submitted to their respective Councils for consideration during a period not greater than ninety days. After consideration, the pertinent Council is to submit a report to the Ministerial Conference.

A Ministerial Conference decision granting a waiver must be accompanied by an account of the circumstances justifying the waiver, its terms and conditions, and its termination date. Where a waiver is granted for more than a year, it must be reviewed by the Ministerial Conference within that year and annually thereafter until it terminates. The Ministerial Conference, based on its annual review, can extend, modify, or terminate the waiver.<sup>69</sup> Decisions concerning the Plurilateral

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<sup>66</sup> See Steger, *supra* note 10 at 144.

<sup>67</sup> *Supra* note 28, art. XXV(5).

<sup>68</sup> WTO Agreement, *supra* note 2, art. IX(3).

<sup>69</sup> *Ibid.*, art. IX(4).



Trade Agreements, including those on interpretations and waivers, are to be governed by the relevant agreement.<sup>70</sup>

These new waiver provisions reflect a preference for temporary, justified, closely-monitored, and controlled waivers permitting derogations from WTO legal norms that terminate as soon as compliance is feasible. The fact that control and supervision of the waiver process is centralized and unified in the Ministerial Council (which will also benefit from the expertise of the relevant Councils) will significantly aid in bringing uniformity and consistency to the process and will encourage common approaches to waiver requests.

### c) *Amendments*

Power to amend international agreements gives authority for the creation and adaptation of rules. For this reason, sovereign states have been loathe to accept an amendment power at the international level where it would encroach upon their autonomy and their control over their substantive international legal obligations. Previously, GATT 1947 Article XXX provided that unanimous consent was required to alter Article I and II, XXIX, and XXX.<sup>71</sup> Other amendments were effective, but only in respect of those that accepted them, where two-thirds of the contracting parties approved them.<sup>72</sup>

The WTO Agreement provision concerning amendments<sup>73</sup> does not altogether do away with the sovereign right of a state to reserve to itself the right to choose whether it wishes to accede to new obligations under the Agreement. Any WTO member can submit an amendment proposal relating to the WTO Agreement and the Multilateral Trade Agreements to the Ministerial Council and the General Council. While amendments to purely procedural provisions will bind all members, an amendment to the substantive rights and obligations of the members will not be binding without a member's acceptance.<sup>74</sup> This reflects a retention of some sovereign authority at the state level, and a refusal to

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<sup>70</sup> *Ibid.*, art. IX(5).

<sup>71</sup> *Supra* note 28.

<sup>72</sup> See *World Trade*, *supra* note 30 at 73.

<sup>73</sup> WTO Agreement, *supra* note 2, art. X.

<sup>74</sup> See T.M. Stikas & K.E. Helne, "The World Trade Organization and Dispute Settlement under the Uruguay Round Agreements," in G. Lew, ed., *The Commerce Department Speaks on International Trade and Investment*, vol. 1 (New York: Practising Law Institute, 1994) at 4.

allow the substantive legal design of the international rule system to be changed without specific and express consent from each state.

This brief examination of the functions, scope, structure, and powers of decision making and rule interpretation of the WTO Agreement is revealing for several reasons. First, the international community has acknowledged the utility of strengthening the legal and institutional framework for the management of their trade relations. This they have achieved through the creation of both a permanent institutionalized forum for trade discussion, and a unified system for the administration of a vast array of substantive international commercial norms.

Second, the constant involvement of the Ministerial Conference in the decision-making process will ensure more active involvement of domestic political systems in the international process of rule development, and will lead to a more prompt implementation of decisions and policies concluded at the international level.

Third, however, while the new trade institution has broad powers to administer and oversee the process of international trade, its curtailed powers of decision making and rule creation reveal that sovereign states have maintained the ultimate authority concerning the evolution of their international trading obligations. The benefits of pooling sovereign authority at the international level in the trade sphere in order for each state to gain influence over the activities of other states have clearly been recognized in the establishment of the WTO. However, states are as yet unwilling to cede to the international plane their ultimate discretion and autonomy in opting "in" or "out" of developing the architecture of the legal system which will govern them, even if opting in to perpetuate their influence will virtually always be in their interest in a world of increasingly interdependent economies.

### *B. Trade Policy Review Mechanism*

The Trade Policy Review Mechanism was adopted by the Uruguay Round midterm review agreements in April 1989.<sup>75</sup> According to this document, the purpose of the TPRM

is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral

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<sup>75</sup> Being annex 3 to the WTO Agreement, in *Results of the Uruguay Round*, *supra* note 2 at 434 [hereinafter TPRM].

trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.<sup>76</sup>

With this objective in view, the TPRM permits the “regular collective appreciation and evaluation of the full range of individual Members’ trade policies and practices and their impact on the functioning of the multilateral trading system.”<sup>77</sup> This peer review of trade policies, however, is not “intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.”<sup>78</sup> Not primarily a rule-oriented instrument, the TPRM has, however, a secondary normative objective: it aims to promote domestic trade policy transparency, in recognition of its inherent importance to the furtherance of rule development and compliance. This will help members to anticipate and defuse potential trade-related conflicts.

The TPRM is administered by the General Council meeting as the TPRB. The TPRM Agreement sets out the procedure for the periodic review of members’ trade policies, with the determining factor for the frequency of review of a member’s policies being impact on the functioning of the international trading system. The four members with the largest impact (the EU is counted as one member) are subject to review every two years. The next sixteen are to be reviewed every four years. Other members will be reviewed every six years, with an option for longer periods for least-developed members. Any member which implements policies with a significant impact on its trading partners may exceptionally be requested by the TPRM, after consultation, to accelerate its next review.

Rather than a rigorous interrogation, the review sessions are more like discussions or consultations with the member under review.<sup>79</sup> The review is founded on a report drawn up by the member(s) in question and a report drawn up by the Secretariat, based on information generally available and as provided to it by the member under review. The results of the review are published and sent to the Ministerial Conference, which is to take note of it.

The TPRM Agreement also contains a reporting requirement, stipulating that each member should report to the TPRB on a regular basis in order to achieve the greatest possible degree of transparency.

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<sup>76</sup> *Ibid.* at 434.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> See Curzon Price, *supra* note 35 at 99-101.

The TPRB is obligated to undertake an appraisal of the TPRM not more than five years after the WTO Agreement's entry into force, and to present the results of its appraisal to the Ministerial Conference. In addition, the TPRB is also to undertake an "annual overview of developments in the international trading environment which are having an impact on the multilateral trading system."<sup>80</sup>

Observers have differed in their view of the nature and utility of the TPRM. While dispute settlement reforms are generally considered a rule-oriented or legalistic development, Price, for example, argues that the TPRM in contrast "reflects a diplomatic and peer-pressure approach to the enforcement problem."<sup>81</sup> While some see considerable utility in the TPRM's pragmatic peer-pressure approach to increased transparency, Jackson has criticized precisely this aspect of the TPRM as a step backward for GATT's rule-oriented development. Jackson has noted that

[t]hese reviews could indeed be an important addition to the GATT, providing information to many GATT members about the trade policies of particular Contracting Parties, and offering an opportunity for criticism of those policies.<sup>82</sup>

But he has also written that

it must be recognized that these reviews are not likely to have a significant impact on the implementation or effectiveness of the legal obligations contained in the variety of GATT treaties and protocols, including those that will come into effect at the end of the Uruguay Round. Indeed there are some risks that this review mechanism will divert attention from the legal norms in such a way as actually to decrease the pressure on Contracting Parties to observe those norms. To some degree, the [TPRM] is a concession to the view that GATT is primarily a "negotiating" or "consulting" organization, rather than one which tries to define and implement reasonably precise norms to help the standardization of world trading activities.<sup>83</sup>

Notwithstanding Jackson's criticism, the TPRM can also arguably be considered as a secondary weapon in the rule-oriented arsenal. Consisting of a pragmatic peer review with a focus on discussion and negotiation, it has the added effect of casting light on domestic policies and practices, and providing an opportunity for their appraisal in relation to the contextual international norms. While ostensibly leaving state sovereignty untouched, the principle of submitting to peer review and criticism of policies does indeed smack of acknowledgement of an advanced degree of economic interdependence, and the consequent

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<sup>80</sup> TPRM, *supra* note 75 at 437.

<sup>81</sup> Curzon Price, *supra* note 35 at 100-01.

<sup>82</sup> *Restructuring GATT*, *supra* note 8 at 79-80.

<sup>83</sup> *Ibid.* at 80.

importance of channelling state policy-making toward the development of common, accepted approaches in the trade policy arena. Through exposure of unacceptable domestic policies, the TPRM sets parameters within which it encourages adherence to accepted international norms. Obviously, the more autonomous and intrusive investigative authority residing in the Secretariat, the more candid and credible its appraisal and the more effective the review. Another important condition for the effectiveness of the TPRM is that the norms furnishing the standard of review must be fairly precise and concrete and represent a strong consensus about what is desirable and acceptable.<sup>84</sup>

There is no binding legal avenue for enforcement of reforms to any non-compliant policies which may be exposed during the review, except perhaps through subsequent resort to the Dispute Settlement Mechanism (DSM) by a member affected by the non-compliant measure. However, a documentary archive would be created as a permanent record of the trade-related conduct of each member under review. The knowledge that a written record of the review will be published, and that a further review will arrive as scheduled will presumably encourage compliance or at least a move toward convergence with international norms.

Increased transparency will also have the effect of raising knowledge at the domestic level, so that citizens can make informed judgments concerning optimal policies and costs and benefits of alternative measures based upon this information. Thus, surveillance at the international level must be complemented and reinforced by domestic surveillance.<sup>85</sup> While the process is pragmatic, it is based on legalism: although national sovereignty is apparently maintained intact in the TPRM, there is a tacit acknowledgement that transparency and exposure of non-compliance is an initial step towards facilitating policy harmonization and convergence with international rules. The TPRM may not represent a pooling of state sovereignty in the sense of permitting each member to increase its authority by designing and participating in a binding supranational rule structure; it does, however, represent a pool for "mirroring" state sovereignty in relation to an international rule consensus. The implicit focus is on rendering national legislation and policies more compatible with international norms, thus highlighting the importance of the international legal framework.

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<sup>84</sup> R. Blackhurst, "Strengthening GATT Surveillance of Trade-Related Policies" in E.-U. Petersmann & M. Hilf, eds., *The New GATT Round of Multilateral Trade Negotiations*, 2d ed. (Deventer: Kluwer, 1991) 123 at 143.

<sup>85</sup> *Ibid.* at 126.

The TPRM will assume some of the work of, and decrease pressure on, the DSM. Prior to the Uruguay Round, resort to the DSM by lodging a complaint was virtually the only vehicle for exposure of non-compliance.<sup>86</sup> GATT-inconsistent actions by contracting parties would regularly persist unchallenged. There was reluctance to refer a complaint for dispute settlement, both because of the dubious efficiency and considerable time requirements characteristic of the former panel process, and also because potential complainants were hesitant to open their own GATT-inconsistent policies to scrutiny.<sup>87</sup> As a process for the regular exposure of non-compliance through individual investigations of trade-related policies has now been institutionalized in the TPRM, there will be less pressure on the dispute settlement system for the performance of this function.<sup>88</sup>

It is interesting to note the differences between the WTO TPRM and NAFTA's arrangements concerning the promotion of trade policy transparency. With transparency as one of its chief objectives,<sup>89</sup> NAFTA requires that each party must ensure that its laws, regulations, procedures, and administrative practices relating to the Agreement are promptly published or otherwise made available.<sup>90</sup> NAFTA parties are also to notify other parties of "any proposed or actual measure that the Party considers might materially affect the operation of [the Agreement] or otherwise substantially affect" other parties' interests under the Agreement.<sup>91</sup> Under NAFTA, control of transparency remains strictly within state authority. Notification of material measures must take place only to the maximum extent possible. While NAFTA parties are obligated to provide interested persons and parties with an opportunity to comment on relevant proposed measures,<sup>92</sup> there is no provision for constant surveillance or regular review of trade policies. Due to NAFTA's decentralized legal order, it cannot provide the TPRM's institutionalized multilateral procedure with an investigative mandate vested in the Secretariat and a rotating schedule for individual trade policy review.

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<sup>86</sup> Curzon Price, *supra* note 35 at 96.

<sup>87</sup> *Ibid.*

<sup>88</sup> M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 398.

<sup>89</sup> See NAFTA, *supra* note 26, art. 102.1.

<sup>90</sup> *Ibid.*, art. 1802.1.

<sup>91</sup> *Ibid.*, art. 1803.

<sup>92</sup> *Ibid.*, art. 1802.2.

### C. *Dispute Settlement Mechanism*

The substantive rules in any legal regime are only as effective as the capacity of that regime to provide remedies for breaches of those rules or the rights they secure.<sup>93</sup> Without the judge in the background, contracts and other binding legal arrangements are of little value.<sup>94</sup> The international legal system labours under the disadvantage of lacking an effective judge or “world court” with a comprehensive mandate to provide relief for the violation of international obligations.<sup>95</sup>

A strong, credible, and effective dispute settlement system, which maintains the balance of rights and duties of members within the system and operates to provide legal remedies for violations of agreed-upon international norms, is therefore a keystone of a rule-oriented multilateral trade regime under the WTO Agreement. The history of the GATT dispute settlement process reveals a strong tension between, and an effort to balance, the pragmatic handling of trade tensions through negotiation and compromise, and the legalistic settlement of disputes through the application of previously agreed-upon binding international rules and procedures.<sup>96</sup>

The GATT 1947 dispute settlement regime, set out in articles XXII and XXIII of that Agreement, emphasized compromise, consultation, and pragmatism.<sup>97</sup> Practices evolved on the basis of these provisions and were codified in the 1979 Tokyo Round Dispute Settlement Understanding (DSU 1979).<sup>98</sup> Although the DSU 1979 did not signify a radical transformation of the dispute settlement procedures, “it was significant in that it represented a willingness of the Contracting Parties to reaffirm their commitment to the existing dispute settlement

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<sup>93</sup> See Lowenfeld, *supra* note 35 at 488.

<sup>94</sup> See J. Tumlir, “GATT Rules and Community Law” in M. Hilf, F. Jacobs & E.-U. Petersmann, eds., *The European Community and the GATT* (Deventer: Kluwer, 1986) at 6 and 20, cited in *Restructuring GATT*, *supra* note 8 at 55.

<sup>95</sup> While the original 1948 Havana Charter for an International Trade Organization provided for recourse to the International Court of Justice on questions of law arising under the Charter, neither the GATT 1947 nor the WTO Agreement makes any provision for this. The Understanding on Rules and Procedures Governing the Settlement of Disputes, being annex 2 to the WTO Agreement, in *Results of the Uruguay Round*, *supra* note 2 at 404 [hereinafter DSU], also stipulates that its dispute settlement procedures are exclusive.

<sup>96</sup> Trebilcock & Howse, *supra* note 88 at 38; and Lowenfeld, *supra* note 35 at 479.

<sup>97</sup> *Supra* note 28.

<sup>98</sup> “Understanding Regarding the Notification, Consultation, Dispute Settlement and Surveillance,” GATT Doc. L/4907 (28 November 1979), 26th Supp. B.I.S.D. (1980) 210.

process and to make explicit what had previously been only informal practice."<sup>99</sup> However, the legal status and authority of this DSU 1979 remained ambiguous, in part because each of the nine Tokyo Round NTB Codes also provided for its own dispute settlement mechanism.

Steger has noted that although the GATT 1947's rules were originally vague, "a tapestry of interpretations or jurisprudence defining what those rules mean" has been woven through the dispute settlement process.<sup>100</sup> In this way, judicial decisions developed the GATT 1947 as a constitution far beyond the original drafters' intent. However, although some rule-oriented evolution occurred in the interim, in 1992 Hudec could still remark:

Governments have not yet been willing to surrender any meaningful degree of autonomy to international legal regimes in economic affairs. GATT's dispute settlement machinery has been celebrated as a major victory along the road to enforceable norms—and rightly so. But on the tree of legal evolution GATT's adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute resolution ceremonies practiced among primitive societies.<sup>101</sup>

The 1994 dispute settlement arrangements, essentially based upon measures adopted after the 1988 Montreal midterm review, are reformed and streamlined. They augur a less crude and far more rule-oriented dispute settlement process, with enhanced rule-compliance and rule-enforcement capacity. The DSU will also be supplemented by the WTO acting as a permanent organization and forum for the multilateral discussion on trade disputes. The WTO itself will operate informally to encourage and ensure rule compliance. This will promote dispute avoidance. While the dispute settlement reforms are significant in enhancing the rule-oriented nature of the organization, the WTO's permanent forum for discussion, as well as the institutionalized mechanism for trade policy surveillance in the TPRM, will aid in defusing tension and encouraging pre-emptive resolution of trade disputes.

The DSU 1994 states that

[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB

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<sup>99</sup> United States International Trade Commission, *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements*, Report to the Committee on Finance, United States Senate, USITC Publication 1793, December 1985 at 27.

<sup>100</sup> Steger, *supra* note 10 at 141.

<sup>101</sup> *Supra* note 9 at 6.



cannot add to or diminish the rights and obligations provided in the covered agreements.<sup>102</sup>

The DSU emphasizes that the prompt settlement of disputes “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”<sup>103</sup>

The aim of the WTO dispute resolution mechanism is to reach a positive, and preferably mutually acceptable, solution to a dispute. In the absence of a mutually acceptable solution, the primary objective is withdrawal of inconsistent measures. Compensation will be provided only where the removal of the offending measure is not immediately possible. The last resort envisaged by the DSU is the suspension of concessions or other obligations under the covered agreements, which can be applied against the offending member subject to DSB authorization and surveillance.

The DSU has created an integrated system, to be administered by the DSB, which has responsibility for all the steps under virtually all disputes arising under the WTO Agreement or any of the Multilateral Trade Agreements (the “covered agreements”). The DSB is also responsible for disputes arising under the Plurilateral Trade Agreements,<sup>104</sup> but only to the extent that the parties to a particular Plurilateral Trade Agreement agree that the DSU will apply. Where the dispute involves a Plurilateral Agreement, “only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.”<sup>105</sup>

Membership of the DSB is the same as that of the General Council, but the DSB will have its own Chairperson, staff, and rules of procedure. The DSB will exercise the authority of the General Council and the Councils and committees of the covered agreements, meeting “as often as necessary” to carry out its functions within the relevant time frames.<sup>106</sup> The DSB is to administer all dispute settlement rules and procedures, including the establishment of panels, consideration and adoption of panel and appellate reports, surveillance of implementation of rulings, and recommendations and authorization of suspension of concessions or other obligations as retaliatory measures. DSB decisions are to be made on a consensual basis.

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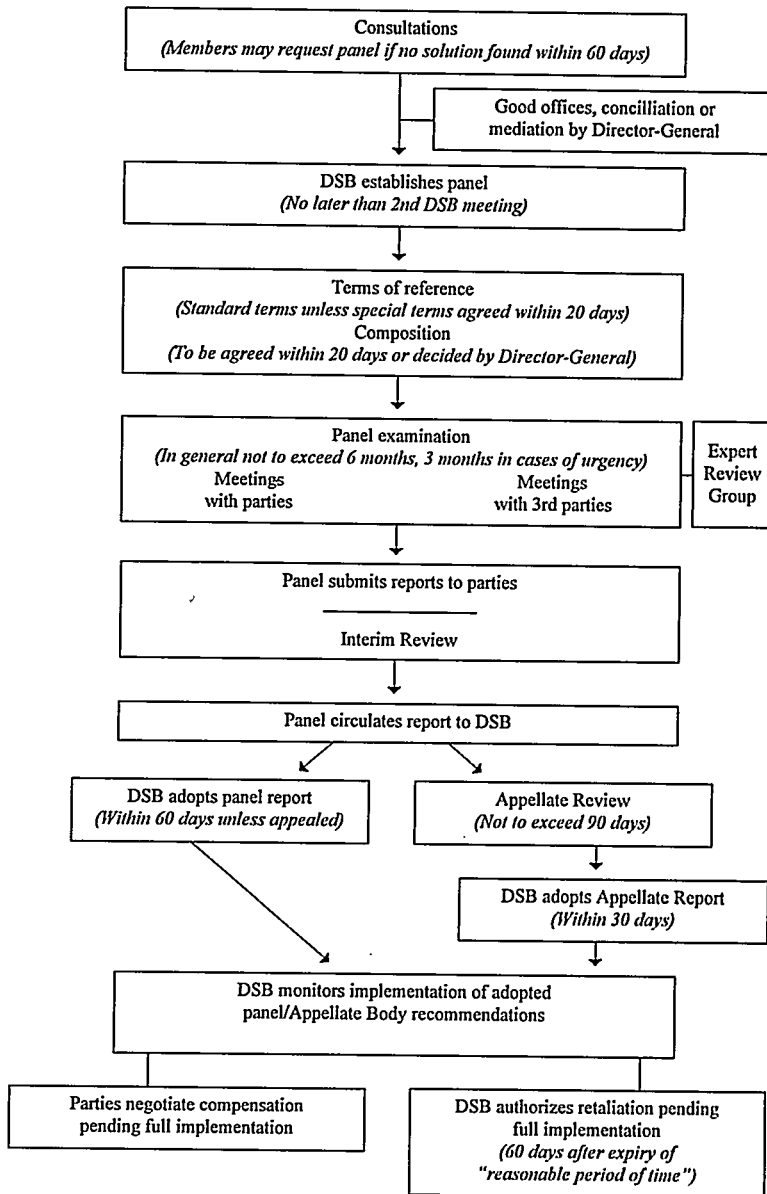
<sup>102</sup> DSU, *supra* note 95, art. 3(2).

<sup>103</sup> *Ibid.*, art. 3(3).

<sup>104</sup> *Supra* note 52 at 438.

<sup>105</sup> DSU, *supra* note 95, art. 2(1).

<sup>106</sup> *Ibid.*, art. 2(1).

**Figure 2: Dispute Settlement Understanding Procedures**

Source: GATT Focus No. 107, May 1994.

This broad authority residing in the DSB will mean greater automaticity in the establishment of panels (in the absence of a

consensus against establishment), terms of reference and composition of panels, and in adoption of panel and appellate reports. The DSU furnishes strict time limits and more precise rules for each phase in the process. A major advantage of the new DSU will be that the same panel will be able to address all issues raised under any of the covered agreements.<sup>107</sup>

The DSU stresses the importance of consultations in achieving the resolution of disputes. Each member has undertaken to “accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.”<sup>108</sup>

A member must respond to a request for consultations within ten days, and enter into consultations within thirty days of the request. If after sixty days of the request there is no settlement, the complaining party may request the establishment of a panel. If any of these deadlines are missed or consultations are denied, the complaining party may then proceed directly to request that a panel be established. The member requesting consultations must notify the DSB and the relevant Councils and Committees of the request. Third parties with a “substantial trade interest” in consultations may participate in them if the requested member agrees that their claim is well-founded.<sup>109</sup>

Good offices, conciliation, and mediation may be undertaken voluntarily if the parties to the dispute agree.<sup>110</sup> Binding arbitration is also available as an alternative avenue of dispute resolution where issues are “clearly defined” between the parties.<sup>111</sup>

Where consultations fail to resolve the dispute, the DSB will establish a panel, unless the DSB decides by consensus against its establishment. The DSU sets out specific rules and deadlines for deciding the terms of reference and composition of panels.<sup>112</sup> The *ad hoc* panels are to be composed of three well-qualified individuals drawn from a roster maintained by the Secretariat. Once established, the panel must complete its work within six months. Three months are added where a

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<sup>107</sup> Stikas & Helne, *supra* note 74 at 6.

<sup>108</sup> DSU, *supra* note 95, art. 4(2).

<sup>109</sup> *Ibid.*, art. 4(11).

<sup>110</sup> *Ibid.*, art. 5(1).

<sup>111</sup> *Ibid.*, art. 25(1).

<sup>112</sup> *Ibid.*, arts. 7 and 8, respectively.

panel report is appealed. An additional three months may also be permitted in exceptionally complex cases.<sup>113</sup>

The function of the panels is to assist the DSB in discharging its responsibilities under the DSU and covered agreements. Thus,

a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.<sup>114</sup>

The DSU outlines panel procedures in detail. Third parties having a "substantial interest" in the matter under investigation can be heard before, and make written submissions to, the panel.<sup>115</sup> The Secretariat will continue to assist panels "especially on the legal, historical and procedural aspects of the matters dealt with."<sup>116</sup>

Strict deadlines are imposed for the adoption of panel and appellate reports, lessening the possibility for a losing party to draw out or block the adoption process. Within sixty days of the issuance of a panel report where no appeal is lodged, and within thirty days of the issuance of an appellate report, the DSB is to adopt the report unconditionally unless there is a consensus against adoption.

If an adopted report holds that a challenged measure is inconsistent with a provision in a covered agreement, the DSU is supposed to recommend that the offending state bring the measure into conformity with the pertinent agreement. A report can suggest ways in which the member can implement the recommendations.

Recognizing that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members,"<sup>117</sup> the DSU provides for the surveillance of implementation of recommendations and rulings. At a DSB meeting within thirty days of the adoption of a panel or Appellate Body report, the member concerned must inform the DSB of its

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<sup>113</sup> *Ibid.*, art. 20.

<sup>114</sup> *Ibid.*, art. 11.

<sup>115</sup> *Ibid.*, art. 10(2).

<sup>116</sup> *Ibid.*, art. 27. Lowenfeld, *supra* note 35 at 485, points out that the Secretariat has played a significant, but little-known role in the GATT dispute settlement panel process, as GATT staff members from both economic and legal offices have sat with panelists, prepared drafts of findings of fact, and in some instances drafted key sections of panel reports. He notes that, "[i]n many ways, this little-known role of the secretariat has been highly useful—providing an institutional memory and a safeguard in case one or more panelists were unprepared."

<sup>117</sup> DSU, *supra* note 95, art. 21(1).

intentions concerning the implementation of recommendations and rulings. If immediate compliance is not possible, the member will have a reasonable period of time in which to comply.

In contrast with past practice, the determination of what constitutes a "reasonable period" is subject to DSB approval or agreement between the parties within forty-five days of the report's adoption. If this proves impossible, the "reasonable period" will be determined by binding arbitration to take place within ninety days of the issuance of the report. The arbitrator will be chosen by the parties or, failing agreement, by the Director-General. A guideline of fifteen months is offered as a "reasonable period."<sup>118</sup>

If parties disagree over whether a measure taken to comply with a panel report is consistent with the agreement in question, the issue is referred to a dispute settlement panel—if possible, the panel that heard the original dispute.

The DSB is charged with keeping the implementation of the report under surveillance, an issue which any DSB member can raise at any time following the report's adoption. Unless the DSB decides otherwise, the subject is to be placed on the DSB agenda six months after the establishment of the "reasonable period" of time, and is to remain on the agenda thereafter until the issue is resolved.<sup>119</sup> Extensive and precise provisions govern the last-ditch option of compensation and the temporary suspension of concessions, in the event the losing party fails to remove the offending measure in compliance with a report. Retaliation after expiry of the "reasonable period" cannot be blocked by a losing party; there must be a consensus against it in the DSB.

The concept of appellate review of panel decisions by a permanent appellate body is perhaps the most significant and innovative attribute of the DSU. While it has been criticized as potentially reducing the authority and prestige of panels,<sup>120</sup> because of the concern that the losing party will automatically appeal an unfavourable panel report, the addition of an appellate instrument was inevitable once the adoption of panel reports became virtually automatically effective.<sup>121</sup> Appeals are "limited to issues of law covered in the panel report and legal

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<sup>118</sup> *Ibid.*, art. 21(3).

<sup>119</sup> *Ibid.*, art. 21(6).

<sup>120</sup> P. Pescatore, "The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects," (1993) 10 *J. Int'l Arb.* 27, cited in Lowenfeld, *supra* note 35 at 483.

<sup>121</sup> *Ibid.*

interpretations developed by the panel."<sup>122</sup> Appellate panels are to be composed of three individuals, unaffiliated with any government, drawn from a standing pool of seven persons of "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally,"<sup>123</sup> to be appointed by the DSB and available at all times on short notice.

The Appellate Body is to submit its report to the DSB within sixty days of the filing of the appeal. As mentioned, the 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 Body report within thirty days following its circulation to the Members."<sup>124</sup>

As in international law generally, there is technically no *stare decisis* in the GATT/WTO dispute resolution process.<sup>125</sup> However, even during the Uruguay Round, GATT panel reports were increasingly being viewed as a body of case law,<sup>126</sup> with panels referring to previous reports as having a persuasive force resembling binding precedent.<sup>127</sup> Adopted reports provide guidance to the application of GATT/WTO principles; even unadopted reports have furnished an indication of general practice. The newly-entrenched virtually automatic adoption of panel reports (in the absence of an appeal or a consensus against adoption) will produce more strengthened and authoritative applications of WTO principles through panel and appellate interpretations. The Appellate Body will play a significant role in bringing consistency and uniformity to the interpretation of the international norms enshrined in the WTO's constitutional base, and will create an authoritative body of jurisprudence on questions of law concerning the covered agreements.

The extensive reforms encapsulated in the DSU have prompted many observers to argue that the adjudicatory and legalistic paradigm has clearly prevailed. Lowenfeld, for example, has stated that the DSU "seems to establish within the GATT for the first time a genuine system of enforceable rules and remedies."<sup>128</sup>

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<sup>122</sup> *Ibid.*, art. 17(6).

<sup>123</sup> *Ibid.*, art. 17(3).

<sup>124</sup> *Ibid.*, art. 17(14).

<sup>125</sup> See *Restructuring GATT*, *supra* note 8 at 67.

<sup>126</sup> Steger, *supra* note 10 at 141.

<sup>127</sup> *Restructuring GATT*, *supra* note 8 at 67.

<sup>128</sup> *Supra* note 35 at 481.

The greater automaticity in the establishment of panels and the adoption of panel and appellate reports, the strict time limits for each step, and the strengthened surveillance procedures to reinforce implementation of panel rulings all reflect a willingness by the members to design and abide by more rigorous international rules. To this extent, they have transferred some of their sovereign authority in the trade area to the international arena by agreeing to abide by this new discipline. By the same token, each state has gained influence over the actions of other members in the system because of their identical undertakings.

Despite the new developments, however, the WTO dispute settlement procedures still lack many characteristics necessary to transform them into the truly effective international court for international trade, which the present extent of global transnational economic activity calls for. The WTO system of legal remedies and rule enforcement has a very long road to travel before it remotely resembles the EU's intricate system for the management of economic interdependence through effective dispute settlement and rule enforcement.

No privatization of international trade disputes has occurred. Even arbitration remains strictly state-to-state.<sup>129</sup> NAFTA, for example, in addition to its comprehensive government-to-government dispute settlement procedures,<sup>130</sup> also provides for mixed investor-state arbitration.<sup>131</sup> This is limited to disputes arising under Chapter 11 of the Agreement dealing with investment matters. Any NAFTA private investor alleging breach of investment-related obligations by a NAFTA host country other than the investor's own may establish an arbitral panel to hear the dispute.<sup>132</sup> The arbitration may be governed by any one of three sets of arbitration rules:<sup>133</sup> (i) the International Centre for the Settlement of Investment Disputes (ICSID) Convention (provided that both the disputing party and the party of the investor are signatories); (ii) the Additional Facility Rules of ICSID (provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention); or (iii) the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. By failing to

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<sup>129</sup> DSU, *supra* note 95, art. 25.

<sup>130</sup> *Supra* note 26, c. 20.

<sup>131</sup> See Fried, *supra* note 27 at 48-49.

<sup>132</sup> NAFTA, *supra* note 26, art. 1116 deals with claims by an investor on its own behalf; art. 1117 deals with claims by an investor on behalf of an enterprise.

<sup>133</sup> See *ibid.*, art. 1120.

offer an option of privatized or mixed arbitration similar to the NAFTA Chapter 11 model, even within certain limited areas, the WTO dispute settlement arrangements fall short of providing any direct avenue for individuals to pursue claims arising under any of the WTO Agreements. WTO dispute settlement therefore remains at the public inter-state level, with governments as the only possible complainants and defendants.

In addition, none of the rules contained in the WTO Agreement are yet directly applicable or enforceable by individuals before domestic courts as an integral part of their state's domestic law.<sup>134</sup> Members have not undertaken to respect the authority of WTO panels over matters and persons within their territory falling within the jurisdiction of the WTO under the any of the WTO Agreements.

The WTO panel process does not possess the absolute, valid, and binding legal authority enjoyed by, for example, the ECJ within the EU. Ultimately, WTO members retain the right to exercise their state sovereignty by deciding not to implement the panel recommendations in their domestic trade order. However, there is a price attached to this decision to invoke sovereignty to justify non-compliance:<sup>135</sup> the risk of retaliation. Under the WTO Agreement, a state also has the right to exercise its sovereignty by choosing to withdraw completely from the WTO.<sup>136</sup>

The United States, for example, has devised its own method to deal with this question. A compromise that surfaced during the congressional WTO ratification debate during the autumn of 1994 led to the establishment of a panel of retired American judges to review all WTO panel reports that decide against the United States. If the judges find that a decision is unfair, any member of Congress can introduce a resolution calling on the White House to renegotiate dispute settlement rules. If the judges find three unfair decisions in five years, Congress can vote to withdraw from the WTO.

As economic interdependence becomes ever more profound, however, the price exacted for a state invoking its sovereignty in this way may become so high—due to the necessity of remaining in the increasingly close-knit world trading “club”—that it no longer remains a viable option. Foregone would be the benefits and prosperity associated with participation in the WTO's trade liberalization and integration

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<sup>134</sup> See E.-U. Petersmann, “Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System” in Petersmann & Hilf, eds., *supra*, note 84 at 33.

<sup>135</sup> See G. Horlick, “Sovereignty and International Trade Regulation” (1994) 20 Can.-U.S. L.J. 57 at 60.

<sup>136</sup> *Supra* note 2, art. XV.



processes, and an international framework of rules designed to protect state interests and promote stability and consistency. The isolated state would then be at the mercy of the world's transnational economic forces without the strengthened discipline and influence which the DSU, combined with the other legal and institutional attributes of the WTO, have introduced for states in the realm of international trade.

## VII. CONCLUSION

Progressive economic integration demands a stronger rule-based legal framework, which recognizes the contingent interest of states in pooling their sovereignty at the international level in the trade sphere. While there is still far to go before a truly effective rule of international trade law is entrenched, the legal-institutional advancements heralded by the formation of the WTO represent progress in this direction.

The former GATT/WTO Director-General Peter Sutherland has stated:

The WTO is in no way an assault on any country's sovereignty. If anything it enhances it by providing a more effective dispute settlement mechanism through which countries can ensure that their rights are respected and by providing a permanent forum for adapting the international trade policy agenda to the real needs of nations. Effective exercise of sovereignty is indissoluble from the rule of law in international relations and this is what the WTO enforces.<sup>137</sup>

Taken together, the permanently institutionalized trade policy forum and unified common institutional framework of the WTO; the increased transparency and rule adherence promoted by the TPRM; and the more legalistic nature of the dispute settlement system for rule compliance and rule enforcement to provide enhanced protection of states' rights and legal remedies, equip states with a common platform from which to design and participate in an international legal system which effectively represents and respects their interests. This is the future of state sovereignty in the international trade order.

The EU has accommodated the changing nature of sovereignty and its reallocation from the state to the Union level by addressing the democratic deficit (through direct election of, and more influence attributed to, the European Parliament), and by entrenching the principle of subsidiarity into its constitutional order. As global economic integration deepens and commercial issues are increasingly annexed to the international agenda, the world trading community and the WTO will

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<sup>137</sup> Cited in GATT Focus No. 110, August-September 1994 at 7.

have to confront similar issues. Questions of where sovereignty actually resides and where it should be allocated for the most efficient and effective regulation of transnational economic activity (*i.e.*, at the sub-state, regional, state, or supranational level) will become ever more salient.