National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?

Matthew Schaefer
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INTRODUCTION

The Uruguay Round of Multilateral Trade Negotiations expanded the scope of substantive obligations within the world trading system to include rules on trade-in-services and trade-related intellectual property rights. This Round also strengthened existing rules relating to trade-in-goods, including a forty percent reduction in worldwide tariffs and further constraints on non-tariff barriers. The seven and one-half year negotiations also focused on institutional and procedural improvements to the world trading system. The World Trade Organization (WTO) was created to supplant the General Agreement on Tariffs and Trade (GATT) as the institution of the world trading system. Additionally, an integrated, more “judicial” dispute settlement system was agreed upon to enhance compliance with the expanded and strengthened rules of the world trading system.

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Within the United States, it was the institutional and procedural aspects of the final Uruguay Round agreement that raised the most controversy. Indeed, congressional approval of the Uruguay Round agreements was not secured until the Administration agreed to support legislation (the so-called "Dole Bill") providing for a WTO dispute settlement review commission comprised of federal appellate judges. This commission would review final WTO dispute settlement panel reports or WTO appellate body reports adverse to the United States in disputes where the United States was a responding party. In addition, the commission would review, upon request of the United States Trade Representative, adverse reports in those cases in which the United States was the complaining party. The new WTO dispute settlement rules provide for a right of appeal from dispute settlement panel reports at the international level, but many of the sovereignty concerns related to original WTO dispute settlement panels apply to the WTO appellate body as well.4

The controversy over the new WTO dispute settlement system and the proposed United States response in the form of a national WTO dispute settlement review commission raise several important questions. At the international level, one can ask whether the new WTO dispute settlement processes will enhance compliance with WTO rules. If so, will the quid pro quo of this strengthened dispute settlement system result in the reduction of national sovereignty? If yes, then is the establishment of a national WTO dispute settlement review commission necessary to protect United States sovereignty? Additionally, will the establishment of this commission aid or hinder the goal of attaining enhanced compliance with WTO rules through a new dispute settlement system?

While answers to some of these questions are incomplete or indefinite at this time, or may change as experience under the new dispute settlement system is gathered, presenting a choice between enhanced international rule compliance and national sovereignty is misleading. The new WTO dispute settlement system does not trade our citizenship interests for our consumer interests.

Rather, it shelters both of these interests from special protectionist interests. The new WTO dispute settlement system does not threaten United States sovereignty, and the national WTO dispute settlement review commission is not per se necessary to protect United States sovereignty. Nevertheless, such a commission can help eliminate any perceived sovereignty concerns and boost United States public confidence in the system. While this function is important, perhaps the most important impact that a properly structured and constrained national WTO dispute settlement review commission could have is the furtherance of WTO rule compliance.

Part I of this Article reviews the WTO Dispute Settlement Understanding (DSU), which elaborates the new dispute settlement rules. The discussion highlights a shift toward a more adjudicative model compared to the old GATT dispute settlement system. Part II analyzes whether the new system will enhance compliance with rules of the world trading system. Part III discusses the concept of sovereignty and examines whether the new dispute settlement system poses any threat to United States sovereignty. Part IV explores the United States proposal of a national WTO dispute settlement review commission as elaborated by the most recent version of the Dole Bill. The discussion focuses on the functions served by a national WTO dispute settlement review commission. This Article concludes that a properly structured and constrained United States review commission could enhance WTO rule compliance while simultaneously eliminating perceived sovereignty concerns.

I. THE NEW WTO DISPUTE SETTLEMENT UNDERSTANDING

The new WTO Dispute Settlement Understanding (DSU) applies to disputes under all Uruguay Round agreements. While a few of the agreements contain special rules related to dispute settlement, the new integrated system will largely eliminate the problems of forum shopping that occurred within the old GATT

system after the Tokyo Round non-tariff barrier codes entered into force in 1980.\textsuperscript{6}

The DSU makes several fundamental changes to the old GATT dispute settlement system. The DSU, however, also relies on previous practices under the GATT as well as codifications of GATT practice.\textsuperscript{7} An outline of the new process under the DSU follows and highlights the fundamental changes from the previous GATT system.

A. Consultations and Establishing a Dispute Settlement Panel

Consultations between the parties to a dispute are the first step in any dispute settlement proceeding.\textsuperscript{8} When a WTO member believes that its rights or benefits under a WTO agreement have been nullified and impaired, generally by violation of a rule in a WTO agreement, it requests consultations with the alleged offending member.\textsuperscript{9}

Under the DSU, when a member receives a request for consultations, it must respond within ten days and commence "good-faith" settlement negotiations within thirty days from the date of the re-


\textsuperscript{7} See DSU, supra note 5, art. 3(1), at 115. "Members affirm ... their adherence to the principles for the management of disputes heretofore applied under Article XXII and XXIII of GATT 1947, as further elaborated and modified [by the DSU]." Id.

\textsuperscript{8} See DSU, supra note 5, art. 4, at 116 (outlining consultation procedures to be employed by members).

\textsuperscript{9} It is possible for a measure which does not violate the GATT 1994 to nullify and impair benefits. Such non-violation cases under the GATT 1947, however, were relatively rare, amounting to less than four percent of all cases. See John H. Jackson, \textit{et al.}, \textit{Legal Problems of International Economic Relations} 362-63 (1995). The authors noted that only three adopted panel reports, two unadopted panel reports, two settled cases, and one claim rejected by a panel were of the non-violation type—a total of eight cases out of well over 200 in GATT history. Id. Remedies for non-violation cases are somewhat different than for violation cases under the new DSU. Id.; see also DSU, supra note 5, art. 26(1), at 130.

Additionally, some WTO agreements do not allow non-violation cases to be brought. See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, art. 64(2), 33 I.L.M. 1125, 1197, 1221 (Annex IC) (1994). Generally, a violation of a rule constitutes a prima facie case of nullification and impairment. Id.
If the required response is not forthcoming, or consultations have not begun or have failed to settle the dispute within sixty days, the complaining party may request the establishment of a dispute settlement panel.

Upon such request, a panel is established at the next meeting of the Dispute Settlement Body (DSB), unless the DSB decides by consensus not to establish the panel. In reality, the DSB is the General Council of the WTO, comprised of government representatives of WTO Members, wearing its Dispute Settlement Body "hat." A "negative consensus," or existence of an objection by every Member, that would "block" the establishment of the panel, is a practical impossibility because the party requesting the panel is not likely to object to its establishment. For this reason, the DSU can be seen as granting the automatic right to a panel within a set amount of time. Under the former GATT system, an individual contracting party, including the party against whom the complaint was directed, had the right to "block" the establishment of a panel. The old rules required a "positive consensus," or the absence of an objection by any contracting party. Although delay in the establishment of panels did not pose a problem in most cases under the old GATT system, instances of considerable delay did occur.

B. Composition of WTO Dispute Settlement Panels

Under the terms of the DSU, panels are to be composed of three "well-qualified governmental and/or non-governmental individuals." An examination of the former GATT system reveals the recent trend toward the inclusion of non-governmental individuals, such as academicians and scholars, and away from panels com-

10 See DSU, supra note 5, art. 4(3), at 116 (stating that "all Members will engage in these procedures in good faith in an effort to resolve the disputes").
11 See Jackson, supra note 2, at 11-31 (noting procedural improvements to world trading system).
12 See DSU, supra note 5, art. 6(1), at 117 (discussing establishment of panel).
14 See John H. Jackson, The Jurisprudence of International Trade: The DISC Case in GATT, 72 Am. J. Int'l L. 747, 779-81 (1978). The DISC case between the United States and the European Community in the mid-1970s is the worst example of the delay in the establishment and selection of a panel. Id. Nearly three years had passed before the parties agreed to the composition of the panel. Id.
15 DSU, supra note 5, at 118 (describing composition of panels as well as participant's qualifications).
prised solely of government individuals. Additionally, the DSU prohibits a citizen of a Member whose government is party to a dispute from serving on the panel hearing the dispute, unless the parties to the dispute agree otherwise. Since a panelist serves in his or her individual capacity, this prohibition prevents a government representative of a party to the dispute from being placed in a position in which there is a conflict of interest. The WTO Secretariat nominates panelists, and the parties can oppose such nominations only for “compelling reasons.” If parties continue to object to the nominated panelists, the WTO Director-General selects those panelists who would be most appropriate. This procedure ensures that the automatic right to a panel is not effectively thwarted or unduly delayed. Members are not permitted to instruct panelists or seek to influence them as individuals with regard to matters under consideration.

C. Process of Dispute Settlement Panels

The panel process itself has several stages. Parties to the dispute submit written briefs and present two oral arguments before the panel. The second presentation is for rebuttal purposes. The panel then relays the descriptive section of its draft report, which contains the facts and arguments of the parties, to the disputing parties.

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16 See Rosine Plank, An Unofficial Description of How a GATT Panel Works and Does Not, 4 J. Int’l Arb. 52, 54 (1987). The GATT contracting parties agreed in November 1984 to the establishment of a roster of potential non-governmental panelists. Id.; see also Improvements to the GATT Dispute Settlement Rules & Procedures, GATT, B.I.S.D. (36th Supp.) at 61 (1989); id. (31st Supp.) at 9 (1984). The DSU does not contain a preference for government-employed panelists. Id. The 1984 Understanding on Dispute Settlement did contain such a preference although this was eliminated in the 1989 Understanding on Dispute Settlement. Id.

17 See DSU, supra note 5, art. 8(3), at 119 (enumerating composition of panels).

18 See DSU, supra note 5, art. 8(1), at 119. “The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.” Id.

19 See DSU, supra note 5, art. 8(7), at 112, 119. “If there is no agreement . . . the Director-General . . . shall determine the composition of the panel by appointing panelists who the Director-General considers most appropriate . . . .” Id.

20 See DSU, supra note 5, art. 8(9), at 119. “Governments shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.” Id.

parties for comment. After considering the comments, the panel provides the parties with an interim report of its findings and conclusions with respect to the dispute. The parties are then given an opportunity to request the panel to review "precise aspects" of the interim report. If there is no request for an interim review, then the interim report becomes the final report. If an interim review request is made, then the panel is required to address, in its final report, the parties' arguments concerning the interim report. Though names of the panel members are public, opinions of individual panelists are kept anonymous. Specific time deadlines apply to each stage of the process such that a panel will normally issue a report within six months from the time it is composed.

D. Automatic Adoption of Panel Reports

Panel reports become international legal obligations only when adopted by the DSB. Similar to the establishment of panels, the adoption of panel reports under the DSU is essentially "automatic." Specifically, panel reports are automatically adopted within sixty days from the issuance of the final report unless a party chooses to appeal the decision, or the DSB decides by consensus not to adopt the report. Again, the formation of a negative consensus is a practical impossibility because, absent extremely unusual circumstances, the "winner" of the case will not formally object to adoption of the report.

Under the former GATT system, a "losing" party could "block" adoption of a panel report because adoption required a positive consensus. As part of the trade-off for losing the right to "block"

22 DSU, supra note 5, art. 15(1), at 122 (discussing interim review stage).
23 See DSU, supra note 5, art. 15(2), at 122 (stating that "a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members.").
24 See DSU, supra note 5, art. 15(3), at 122.
25 See DSU, supra note 5, art. 14(1), 14(3), 17(10), 17(11), at 122, 124.
27 See infra notes 33-36 and accompanying text (describing appellate process).
28 See DSU, supra note 5, art. 16, at 122-23 (discussing adoption of panel reports).
adoption of panel reports, the DSU has granted parties a right of appeal to a newly-created standing appellate body.\textsuperscript{29}

E. Composition of the Standing Appellate Body

The standing appellate body is comprised of seven members who also serve in their individual capacity. The composition of the standing appellate body was finally determined in late November of 1995, after much debate over the geographic diversity of appellate body members.\textsuperscript{30} Both the European Union and the United States initially demanded that they have two members from each of their respective territories. The United States finally agreed to have only one member if Europe would agree to the same. The European Union eventually acquiesced to this geographic allotment only on an interim basis and intends to press for a new geographic allotment at the first WTO ministerial meeting in Singapore in late 1996.\textsuperscript{31} With WTO dispute settlement cases already at the panel stage, however, it was necessary to have the appellate body\textsuperscript{32} operational by early 1996.

F. Process of the Appellate Body

Where a party notifies the DSB of its decision to appeal, consideration of the adoption of a panel report is delayed until after the appeal process has been concluded. Additionally, the appeal process is governed by time deadlines, which generally require the appellate body to issue a report within sixty days. While third parties with a substantial interest in the disputed matter may


\textsuperscript{31} Id. (noting that "EU had considered panel's make-up geographically unfair").

\textsuperscript{32} Id. at 2018-22 (providing biographical notes on members of WTO Appellate Body). The seven individuals chosen to the appellate body are the following: James Bacchus (United States, former Congressman), Christopher Beeby (New Zealand, career diplomat), Claus-Dieter Ehlermann (Germany, former EU Director-General of legal service and of competition for the European Commission), Said El-Naggar (Egypt, professor and international posts with the UNCTAD and the World Bank), Florentino Feliciano (Philippines, Supreme Court Justice), Julio Lacarte Muro (Uruguay, former ambassador and GATT official), and Mitsuo Matsushita (Japan, professor). Id.
submit their views to the panels, only parties to a dispute are granted the right of appeal.  

Each appeal is heard by only three members of the standing seven-member appellate body—based on a rotation system. Opinions expressed in an appellate body report are anonymous, although the names of the three members hearing the case remain public. An appeal must be limited to the legal issues addressed and legal interpretations developed in the panel report. The appellate body has broad authority to uphold, modify, or reverse a panel's legal findings and conclusions. Moreover, appellate body reports are automatically adopted by the DSB within thirty days unless the DSB decides by consensus not to adopt the report.

G. Recommendations by Panels or the Appellate Body & Remedies for Failure to Implement a Recommendation

In those cases where a panel or the appellate body concludes that a Member's trade measure is inconsistent with a WTO agreement, it must recommend that the offending party bring its actions into conformity with the agreement. Accordingly, a panel or the appellate body can suggest ways in which an offending party could implement such a recommendation. In general, there will be several options as to how to change a law to achieve legitimate, non-protectionist policy objectives in a WTO-consistent manner.

Compensation and suspension of concessions are available in the event that an offending country does not implement the recommendations or rulings of a panel or appellate body “within a reasonable period of time”—ordinarily fifteen months. The DSU emphasizes that conformity with the relevant WTO agreement is

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33 See DSU, supra note 5, art. 17(4), at 123 (discussing rights of appellate review).  
34 See DSU, supra note 5, art. 17(6). “An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel.” Id.  
35 See DSU, supra note 5, art. 17 (13) (discussing procedures for appellate review); see also Report of the Appellate Body, “United States-Standards for Reformulated and Conventional Gasoline,” AB-1996-1, at Part V (“The foregoing legal conclusions modify the conclusions of the panel . . . ”).  
36 See DSU, supra note 5, art. 17(14), at 124 (allowing for adoption of appellate reports).  
37 The term trade measure includes any law, regulation, or practice of a nation.  
38 See DSU, supra note 5, art. 19(1), at 124 (outlining scope of panel and appellate body recommendations).  
39 See DSU, supra note 5, art. 22, at 126 (providing rules for governing compensation and supervision of concessions).
preferable to either compensation or suspension of concessions.\textsuperscript{40} For this reason, compensation or suspension of concessions are considered to be “temporary” solutions only.\textsuperscript{41} Moreover, the DSB will continue to monitor the implementation of a panel recommendation even where compensation or retaliation has occurred. In short, the spotlight will continue to shine on WTO agreement violations.

Nonetheless, if within a “reasonable period of time” a Member has not brought a trade measure into conformity with its obligations under a WTO agreement, compensation negotiations or suspension of concessions may proceed.\textsuperscript{42} Compensation involves, for example, the offending party agreeing to reduce a tariff on a good of importance to the complaining party. Any compensation, however, must be on a most-favored-nation basis, making compensation negotiations difficult since any reduction in the tariff will benefit all countries which export the good to the offending country.\textsuperscript{43} Consequently, the offending party will feel the need to identify, for compensation negotiations, a product that it exclusively or largely imports from the complaining party—typically a difficult task. If compensation negotiations fail, then the complaining party can proceed to request the DSB to authorize suspension of concessions or other obligations.\textsuperscript{44}

Suspension of concessions is often referred to as “retaliation,” or in general international law terminology as “countermeasures” or “reprisal.” It can entail the complaining party raising tariffs on a good from the offending party. In essence, the DSB automatically will approve a request for authorization to suspend concessions or other obligations if the offending party continues to maintain a measure inconsistent with a WTO agreement.\textsuperscript{45} Again, authoriza-

\textsuperscript{40} See DSU, supra note 5, art. 22(1) (noting that these are temporary measures in event that recommendations and rulings are not implemented within reasonable time).

\textsuperscript{41} See DSU, supra note 5, art. 22(8), at 128. “The suspension of concessions or other obligations shall be temporary.” Id.

\textsuperscript{42} See Young, supra note 26, at 404-05. “If an aggrieved party does not think the offending party’s compliance has been adequate or timely, it may require the offending party to enter into negotiations ‘with a view to developing mutually acceptable compensation.’” Id.

\textsuperscript{43} See Jackson, supra note 2, at 133-48; DSU, supra note 5, art. 22(1) (stating that “[c]ompensation . . . shall be consistent with the covered agreements [including the MIN obligation]”).

\textsuperscript{44} See Andreas F. Lowenfeld, Remedies Along With Rights: Institutional Reform in the New GATT, 88 Am. J. Int’l L. 477, 486-87 (1994) (discussing suspension of concessions as temporary solution if no agreement on compensation is reached within specified time).

\textsuperscript{45} See id. at 486-87.
tion of suspension of concessions will result unless the DSB decides by consensus not to authorize suspension of concessions.\textsuperscript{46}

The level of suspension of concessions or other obligations authorized by the DSB is equivalent to the extent of nullification or impairment.\textsuperscript{47} There is no punitive element to authorized retaliation. Additionally, relief is only prospective, in that it provides for lost future opportunities and not for opportunities lost prior to or during the dispute settlement process. If a Member believes that retaliation is disproportionate to the level of nullification or impairment, the matter is decided by the original panel or an arbitrator appointed by the WTO Director-General. Arbitration rulings regarding the level of retaliation are binding on both disputing parties and will be approved by the DSB, unless it decides by consensus not to authorize the retaliation.\textsuperscript{48}

The DSU also specifies the type of retaliation a Member may impose. Generally, a Member must retaliate within the same sector and under the same agreement involved in the dispute.\textsuperscript{49} If necessary for effective retaliation, the DSU does allow for “cross-retaliation,” that is, retaliation in other sectors or pursuant to another agreement.\textsuperscript{50} As with the level of retaliation, disputes over the type of retaliation can be arbitrated.\textsuperscript{51}

\textbf{H. Exclusivity of the WTO Dispute Settlement System}

Article 23 of the DSU is titled “Strengthening of the Multilateral System.”\textsuperscript{52} It requires members to abide by the DSU when seeking redress of a violation or other nullification or impairment of benefits under WTO agreements.\textsuperscript{53} Pursuant to Article 23,

\begin{itemize}
\item \textsuperscript{46} See DSU, supra note 5, art. 22(6), at 127-28 (describing circumstances where DSB will authorize suspension of concessions).
\item \textsuperscript{47} See DSU, supra note 5, art. 22(4), at 127 (discussing level of suspension of concessions).
\item \textsuperscript{48} See DSU, supra note 5, arts. 22(6) & 22(7), at 127-28 (discussing recommendation or rulings).
\item \textsuperscript{49} See DSU, supra note 5, art. 22(3), at 126 (considering what concessions or other obligations to suspend).
\item \textsuperscript{50} See DSU, supra note 5, art. 22(3)(c), at 127 (finding that where serious circumstances exist, one may seek to suspend concessions under another covered agreement).
\item \textsuperscript{51} See DSU, supra note 5, art 22(6), at 127-28 (noting function and process of arbitration).
\item \textsuperscript{52} See DSU, supra note 5, art. 23, at 128 (encouraging strengthening of multilateral system).
\item \textsuperscript{53} See DSU, supra note 5, art. 23(1), at 128 (stating that “[w]hen Members seek the redress of a violation . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding”).
\end{itemize}
members are prohibited from unilaterally determining that a violation has occurred; they must resort to dispute resolution through the DSU. This article also requires members to respect the reasonable period of time given to an offending member to bring its measure into conformity with a panel agreement. Finally, members must follow the DSU rules regarding the determination of the level of retaliation.

II. ENHANCED COMPLIANCE WITH WTO RULES: DOES THE NEW WTO DISPUTE SETTLEMENT SYSTEM FURTHER THIS GOAL?

Several changes in the dispute settlement system, notably the elimination of "blocking rights" at various stages of the process and the creation of an appeals process, indicate a shift toward a more adjudicative or rule-oriented system. This shift in the DSU's focus aims to increase compliance with WTO rules. The issue of compliance has received increasing attention within the international legal community in recent years, and the world trading system is no exception to this trend. The objective of enhancing compliance was to create a more stable and predictable trading system, and, thus, to maximize the potential welfare effects of substantive rules liberalizing trade. Compliance became an even

54 See DSU, supra note 5, art. 23(2)(a), at 128-29 (noting that parties must rely on determination made by panel or appellate body).
55 See DSU, supra note 5, art. 23(2)(c), at 129 (stating that members must follow procedures and rules of DSU to implement DSU determinations).
56 See Davey, supra note 13, at 94-98 (discussing how former system under GATT allowed losing party to block consensus).
58 See Jackson, supra note 57, at 91-94 (discussing goals of GATT dispute settlement procedures); see also Shell, supra note 57, at 849-53. The new system allows the WTO to "engage in active surveillance of compliance measures" in order to ensure violations are being remedied. Id. at 851.
60 See Note, Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development, 108 HARv. L. REV. 1715, 1732 (1995) (encouraging developing
more important issue with the adoption of the expanded and strengthened rules contained in the WTO agreements. Before considering whether the new DSU will achieve this goal, it is useful to consider the performance of the old GATT dispute settlement system.

A. Results Under the Old GATT System

Taken in context, the results under the old GATT system are a surprising success story. Limited treaty provisions establishing dispute settlement standards and procedures left the old GATT dispute settlement system to evolve largely through practice. Prior to the entry into force of the WTO agreements and the DSU, the GATT system had become the most widely used, multilateral treaty-based dispute settlement system in the entire international legal system. GATT's dispute settlement system, rarely used in the 1960s and 1970s, became widely used in the 1980s and 1990s. For example, the number of cases handled by the GATT countries to push for institutionalization of international trade agreements while seeking economic growth.


62 See Jackson, supra note 6, at 18 (noting that GATT evolved dispute settlement system is most extensive in world); see also Miguel M. Mora, A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes, 31 COLUM. J. TRANSNAT'L L. 103, 105 (1993) (noting that since end of World War II GATT dispute settlement mechanisms have become most widely used dispute settlement methods for resolving disputes among states).

63 See GATT, ANALYTICAL INDEX: A GUIDE TO GATT LAW AND PRACTICE 731-34 (6th ed. 1994). The GATT system handled 40 complaints from 1960-1980 and 114 cases from 1980-89 under GATT Article XXIII and under Tokyo Round Non-Tariff Barrier Codes. Id.; see also ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 375-83 (1993). The system handled an additional 26 cases under GATT Article XXIII alone through March 1994. Id. At least 140 cases, therefore, were handled in more than fourteen years.
system over its last fifteen years far exceeded those handled by the International Court of Justice during the same period.\textsuperscript{64}

But was the old system successful in achieving compliance? One study found that of 207 complaints filed between 1948-1990, 88 resulted in panel reports.\textsuperscript{65} Sixty-eight of the panel reports found a rule violation.\textsuperscript{66} Forty-five of these decisions were implemented to achieve full compliance with the relevant rule, while fifteen additional decisions resulted in partial compliance.\textsuperscript{67} This is certainly a better than modest record of achievement.

The picture, however, was not all rosy. Fifty-five of the 207 cases were either abandoned or withdrawn.\textsuperscript{68} In at least nine of these cases, and probably double this amount, the complaints were withdrawn because the party believed that the GATT dispute settlement was ineffective.\textsuperscript{69} This circumstance raises an additional question as to the number of valid complaints not even pursued due to a belief that the system was ineffective. Moreover, there was a drop-off in compliance or positive results in the 1980s.\textsuperscript{70} Some of the negative outcomes of the late 1980s could be attributed to negotiating strategies in the Uruguay Round. It was lack of compliance, however, that brought respect for the system into question. Lastly, the statistical data does not account for the importance of individual cases.\textsuperscript{71}

Perhaps another factor in turning toward a more rule-oriented approach was the fear that the previous success of the GATT dis-

\textsuperscript{64} See \textit{International Court of Justice, Yearbook 1993-94} 5-7 (1994). The International Court of Justice handled 25 contentious cases and six advisory cases for a total of 31 cases between 1980 and July 1994. \textit{Id.}

\textsuperscript{65} See \textit{Hudec, supra} note 61, at 273-85 (providing detailed statistics of 207 GATT complaints filed between 1948 and 1990).

\textsuperscript{66} See \textit{Hudec, supra} note 61, at 278 (concluding 77\% of rulings (68 out of 88) found complaint justified).

\textsuperscript{67} \textit{Id.} at 278-79.

\textsuperscript{68} \textit{Hudec, supra} note 61, at 282.


\textsuperscript{70} \textit{Hudec, supra} note 61, at 289-94 (noting significant decline in success rate during 1980s); see also Mora, \textit{supra} note 62, at 152-53 (attributing recent problems with GATT dispute settlement to noncompliance with recommendations or rulings of members).

\textsuperscript{71} See \textit{Jackson, supra} 57, at 101-03 (examining several important GATT trade dispute cases); John F. Hall, \textit{International Law: The Year in Review}, 84 Am. Soc'y Int'l L. Proc. 130, 131 (1990) (reporting remarks of Frederic L. Kirgis, Professor of Law, Washington and Lee University, discussing recent GATT panel decisions and stressing their importance in ensuring strict enforcement of GATT).
The notion seems to be somewhat similar to the "bicycle theory" enunciated by trade specialists with respect to substantive rules liberalizing trade: move the dispute settlement system forward toward its goal of achieving maximum compliance or watch the system fall.

B. Rule-Oriented Approach of the New WTO Dispute Settlement Understanding

The DSU represents the biggest leap in a gradual evolution within the world trading system from a power-oriented approach favoring diplomacy and politics to a rule-oriented approach favoring adjudication and legal rules. It is important to realize, however, that the transformation has, in fact, been an evolution. It was within the first full decade of GATT, during the 1950s, when practice shifted to the use of panels comprised of individuals acting in their individual capacities, in place of working groups, where member governments were represented for purposes of resolving disputes. The system prior to the Uruguay Round was not a strictly power-oriented approach, and the new WTO system is not a strictly rule-oriented approach. Diplomacy and politics have not been removed from the system; rather, the relative weight of adjudication and law vis-a-vis diplomacy and politics has increased within the system.

It is useful to look at the current WTO dispute settlement system along a continuum where one end is power-orientation and

\[72\] See Hudec, supra note 61, at 365 (noting legal development generated ambition for further improvements). See generally Petersmann, supra note 57, at XL1 (discussing need for shift in international trade law to rule-oriented system).

\[73\] See I.M. Destler, American Trade Politics: System Under Stress 15 (1986) (identifying bicycle theory phenomenon); see also Victoria C. Price, New Institutional Developments in GATT, 1 Minn. J. Global Trade 87, 103-04 (1992) (noting “bicycle theory” is inherently unstable as it either progresses or collapses). See generally R. Michael GadbaW, Managing Trade Relations in the 1980s: Issues Involved in the GATT Ministerial Meeting of 1982 36 (Seymour J. Rubin & Thomas R. Graham eds., 1984) (developing theme, later known as bicycle theory, that continued GATT negotiations were important to maintain international trade agenda).

\[74\] See Young, supra note 26, at 390-91 (finding that rule-oriented system will create body of GATT jurisprudence that will increase compliance with GATT).

the other end is rule-orientation. The DSU does move the dispute settlement system toward the rule-orientation end of the continuum, but further steps in that direction are possible. For instance, it is argued that international trade rules can serve "constitutional functions" by limiting government action based on rule of law and by protecting individual economic rights and freedoms.\textsuperscript{76} To serve fully this function, private parties need access to the international dispute settlement system and/or must be given rights of action against governments in domestic law. Such a system would render dispute resolution free from diplomacy and politics. There are certain complications with this approach, however, and proposals along this line did not succeed in the Uruguay Round negotiations.\textsuperscript{77} Moreover, it is questionable whether such an approach would ultimately serve the end of increasing world welfare. For example, governments may be less likely to enter into substantive rules liberalizing trade under the aforementioned enforcement mechanism.\textsuperscript{78}

Under the DSU, numerous stages of the panel process continue to allow diplomacy and politics to operate. The first stage in any dispute is consultations.\textsuperscript{79} Even after the panel process has begun, negotiations between the parties may continue.\textsuperscript{80} Additionally, the interim review stage has been criticized by some favoring the rule-oriented approach as perhaps allowing a party the opportunity to influence the panel in the midst of a rule determination.\textsuperscript{81}

It is fair to conclude, however, that the emphasis on diplomacy and politics has been reduced. The political "check" of "blocking" the establishment of panels or the adoption of a panel report no

\textsuperscript{76} See Petersmann, supra note 57, at 288-89 (discussing possibilities of "constitutionalizing" foreign trade law and policy).

\textsuperscript{77} See Matthew Schaefer, Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions With Respect to Sub-Federal Governments?, 17 NW. J. INT'L L. BUS. (forthcoming Feb. 1997); Todd S. Shenkin, Comment, Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty, 55 U. PRR. L. REV. 541, 585 (1994) (noting denial of private parties to dispute resolution); see also Shell, supra note 57, at 896-97 (calling for need of commercial parties to be addressed in binding dispute resolution system).


\textsuperscript{79} See DSU, supra note 5, art. 4, at 1228 (enumerating guidelines for consultations).

\textsuperscript{80} See DSU, supra note 5, art. 4(5), at 1229 (encouraging settlement negotiations during consultation process).

\textsuperscript{81} Pescatore, supra note 61, at 19.
longer exists.\textsuperscript{82} Negotiations between the parties will have a greater element of rule-orientation and a lesser element of raw power as a result of this change. A challenging party is assured that it can obtain a definitive determination on alleged rule violations. This assurance makes it more likely that the parties will base negotiations on the expected determination of a panel. Additionally, the DSU explicitly requires that solutions reached between parties be consistent with covered agreements and demands notification to the DSB of negotiated solutions, further reducing the weight given to raw power.\textsuperscript{83} Thus, the heightened intensity of rule-orientation in the system appears to enhance the probability of compliance even with respect to negotiated solutions.

Retaliation in response to a rule violation can also enhance compliance with the rules.\textsuperscript{84} Under previous GATT practice, only once had the Contracting Parties jointly authorized retaliation, and ultimately, the party authorized to retaliate chose not to do so.\textsuperscript{85} The possibility of retaliation energizes export interests to join with industrial import user and consumer interests to counteract the protectionist interests of affected import-competing industries. Retaliation can, therefore, facilitate the implementation of panel reports by national parliaments.\textsuperscript{86} According to theories of public

\textsuperscript{82} See supra notes 59-62 (outlining changes in dispute settlement system).

\textsuperscript{83} See DSU, supra note 5, art. 3(b), at 1227 (setting forth general provisions to be followed by members).

\textsuperscript{84} See Lowenfeld, supra note 44, at 477, 487 (suggesting that closer legal system comes to providing remedies for breaches, more effective and reliable it becomes); see also Shell, supra note 57, at 851-52 (noting new WTO ability to enforce sanctions); Stiles, supra note 3, at 28 (describing “highly credible threat” of retaliation as instrument of compliance). But see Dillon, supra note 21, at 400 (questioning whether retaliation would be effective, particularly where complainant is developing country and defendant is wealthy developed country).

\textsuperscript{85} Netherlands Measures of Suspension of Obligations to the United States, Nov. 8, 1952, in GATT B.I.S.D. (1st Supp.) at 31 (1952) (authorizing Netherlands to suspend concessions against United States by imposing a limit on American wheat and flour imports). Requests for retaliation were submitted in a few other cases but were not approved. The GATT dispute settlement panel has authorized retaliation only once. See Roessler, supra note 61, at 72 (noting single case of retaliation); see also Davey, supra note 13, at 57 (acknowledging that retaliation has only been authorized once); Shell, supra note 57, at 832 (noting GATT dispute settlement panel has only authorized retaliation once in its entire history); Tycho H.E. Stahl, Liberalizing International Trade in Services: The Case for Sidestepping the GATT, 19 YALE J. INT’L L. 405, 424 (1994) (recognizing that retaliation has only been authorized once).

\textsuperscript{86} See Lisa L. Bhansali, New Trends in International Dispute Settlement, 87 AM. SOC’Y INT’L L. PROCE. 2, 12 (1993) (indicating that retaliation was proposed as solution to problem of implementation of panel reports); see also Jonathan T. Fried, Two Paradigms for the Rule of International Trade Law, 20 CAN.-U.S. L.J. 39, 56 (1994) (noting that retaliation
choice,\textsuperscript{87} retaliation may be a means to achieve compliance. Politicians who may have gained votes or contributions from the passage of the initial protectionist legislation risk the loss of export-related votes and contributions if retaliation follows a panel report holding the legislation to be inconsistent with WTO obligations.

Indeed, theories of public choice do seem to be relevant in previous instances of threatened or actual unilateral retaliation. Instances exist where threatened or actual unilateral retaliation has been targeted against industries within a geographic region represented by a politician who initiated the GATT-inconsistent measure. The European Community, for example, targeted products largely produced in Texas in its threatened retaliation arising out of United States Superfund legislation. The provision at issue imposed a tax of 8.2 cents per barrel on domestic crude oil received at a U.S. refinery and a tax of 11.7 cents per barrel for petroleum products entered into the United States for consumption, use or warehousing. A GATT panel ruled (as was conceded by the United States) that the tax violated the national treatment obligation of GATT. Senator Bentsen of Texas was seen as largely responsible for the legislation.\textsuperscript{88} Another example can be seen where the United States targeted retaliation against beer brewed and

has been effective at ensuring compliance with panel reports); Mora, \textit{supra} note 62, at 179 (suggesting that retaliation will provide United States and European Community with reason to convince legislatures to amend legislation to comply with GATT); Roessler, \textit{supra} note 61, at 73 (positing that GATT dispute settlement procedures are successful because they take into account real constraints of governments). \textit{But see} William D. Hunter, \textit{WTO Dispute Settlement in Antidumping and Countervailing Duty Cases, in Commerce Department Speaks on International Trade and Investment 1994}, at 547 (PLI Corp. Law & Practice Course Handbook Series No. 863, 1990) (arguing “governments may decline to implement adverse panel reports” if GATT-inconsistent measure more important than consequences of retaliation).

\textsuperscript{87} See Alan O. Sykes, \textit{The Economics of Injury in antidumping and Countervailing Duty Cases}, 16 \textit{Int'l Rev. L. & Econ.} 5, 18-21 (1996). The author states:

Public choice theory ... posits that national and multilateral trade policies alike are the result of interest group politics. National governments are viewed as politically sophisticated actors, each pursuing self-interest agendas such as maximization of votes, campaign contributions and the like. Well-organized and well-financed interest groups will influence political outcomes successfully, while poorly organized or financed interest groups will have little influence

\textit{Id.}

bottled in Ontario when that Canadian province refused to eliminate discriminatory measures against U.S.-made beer.\(^9\)

Although the change toward essentially automatic approval of retaliation is likely to enhance compliance, it may not be as important as labeling a Member a rule violator in a panel or appellate body report. This may be particularly true in the case of the United States and other economically powerful nations. Countries, including the United States, often find it difficult to craft retaliation that harms neither domestic producers that import inputs nor those in the distribution chain, such as wholesalers and retailers.\(^90\) Moreover, in cases where the United States is the rule violator, other Members, particularly those with smaller economies, may be hesitant to retaliate. In addition, these aggrieved parties may find it difficult to craft retaliation that has significant impact on the United States.\(^91\) The new DSU did not go so far as to create the possibility of collective sanctions by Members against an offending Member, although such a measure would increase the pressure for compliance caused by potential retaliation.\(^92\) Additionally, the possibility of punitive damages or retroactive relief might also increase the pressure for compliance.\(^93\) Increased em-


\(^90\) See Judith H. Bello and Alan F. Holmer, U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits, 28 Int'l. Law. 1095, 1102 (1994) (discussing how new rules will affect United States as plaintiff or defendant in GATT disputes); see also Dillon, supra note 21, at 385-85 (discussing dispute settlement procedure and breaking down entire process into stages); David Silverstein, Patents, Science and Innovation: Historical Linkages and Implications for Global Technological Competitiveness, 17 Rutgers Computer & Tech. L.J. 261, 318 n.219 (1991) (noting President Bush's warning that protection hurts American consumers and exporters because of higher prices and trade partner retaliation (quoting President Bush as expressed in BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, U.S. FOREIGN ECONOMIC POLICIES 1990 3-4 in GIST: A REFERENCE AID ON U.S. FOREIGN POLICY SEPT. 1990)).

\(^91\) See Davey, supra note 13, at 102 (finding that retaliation measures may have disparate effect on members).


\(^93\) DSU, supra note 5, art. 22(4), at 1240. The possibility of punitive damages clearly is not allowed due to the DSU requirement that retaliation be equivalent to the level of nullification of impairment. Id.; see Kuyper, supra note 88, at 253-55. Kuyper included a discus-
phasis on sanctions, however, could also have negative consequences.\textsuperscript{94} For example, it would subject more private interests to uncertainty as more trade flows are potentially subjected to increased barriers.

Therefore, while the pressure of foreign retaliation is often wanting for a large economy such as the United States, the label of a rule violator does have real consequences, particularly for the United States.\textsuperscript{95} If the United States does not live up to its obligations and take a leadership role in terms of compliance, then the respect of other Members for the rules declines. This effect is evident when the United States develops and drafts implementing legislation for trade agreements.\textsuperscript{96} Other countries carefully watch how the United States implements the rules of trade agreements, and "backsliding" by the United States causes other countries to follow its example. The status of a rule violator can also hinder negotiation of further trade liberalization and thus can energize export, industrial import user, and consumer interests supporting further liberalization.

C. Worries Over the New System

The major worries over the new DSU can be grouped into two major categories:\textsuperscript{97} 1) that "wrong" cases will be brought;\textsuperscript{98} and 2)
that the lack of political "checks" on the process will ultimately lessen respect for the system.

1. Wrong Cases

The first type of "wrong" case that has been suggested is one in which a WTO member has "unavoidably" violated a covered agreement due to intense domestic political pressures.\(^9\) This type of "wrong" case is actually one which the DSU will handle better than the old GATT system in terms of maximizing compliance.\(^10\) Under the former GATT dispute settlement system, protectionist pressure by import-competing domestic industry could force a government to "block" the process at various stages.\(^11\) By eliminating the ability to "block" the process and creating a nearly automatic right to retaliation in the event of a rule violation, the DSU makes more tangible the effects of a rule violation on export interests, thus intensifying their efforts to change the protectionist legislation.

The second type of "wrong" case suggested is a dispute arising out of a provision that is unclear or upon which there was no true agreement as to its implications during negotiations.\(^12\) It is ar-


\(^{99}\) See, e.g., *Worldview GATT II: Panel to Settle U.S.-Venezuela Gasoline Dispute*, AM. POL. NETWORK, Oct. 5, 1994, at 19 (noting United States' continued resistance to adopt panel judgment that its embargo on imported tuna trapped in nets violates GATT); see Hudec, supra note 98, at 159 (discussing that apparently, this concern had been raised throughout evolution of dispute settlement system as it moved towards a more-rule oriented approach and has further heightened in recent years. Id.

\(^{100}\) See supra note 13, at 73-74 (noting that rule-oriented system will lead to greater compliance).

\(^{101}\) See supra notes 59-62 (discussing rule-oriented system under GATT's dispute settlement system).

\(^{102}\) See Hudec, supra note 98, at 160-63 (discussing various exceptions to GATT provisions that weakened system); see also *United States Action on Japan Trade*, 141 CONG. REC. S6,433-01, S6,433 (daily ed. May 10, 1995) [hereinafter *U.S. Action on Japan Trade*] (statement of former United States trade negotiator, Alan Wolf) (suspecting flaw in WTO decision-making since rules do not cover Japanese automotive industry barriers).
argued that venturing into these areas to make essentially legislative determinations are acts of judicial activism on the part of the panels which will undermine the system. Though true, it is probably less likely that panels will engage in judicial activism under the DSU as compared to the old GATT system. The additional layers of review within the new system, including the interim review process at the panel stage and the appeals stage itself, will likely serve as a check on instances of excessive judicial activism. Moreover, panels are prohibited from increasing or diminishing the rights and obligations of the Members in the WTO agreements. This prohibition seems to advise against judicial activism.

2. Lack of Political “Checks” will Ultimately Undermine Respect for the System

Despite complaints about “blocking” under the former GATT system, that feature of the old system did ensure that there was political support for the decisions of panels. Some argue that the lack of political “checks” in the new process may mean that panel and appellate body reports are adopted without adequate political support and, thus, the process will be undermined. The “blocking” right, however, was likely a greater threat to respect for the dispute settlement system.

This concern, however, raises the question of what role the appellate body should and will play in the process. The body is given broad powers to amend, modify, or reverse panel findings, but its review is limited to legal issues. Of course, what constitutes a legal issue is subject to some debate. It has been suggested that the appellate body exercise a certain measure of political acumen as well. Any political check exercised by the appellate body


104 See Shell, supra note 57, at 898 (discussing WTO’s lack of politically accountable system of checks and balances).

105 See Lowenfeld, supra note 44, at 483-84 (noting ambiguity in legal issues terminology).

106 See Shell, supra note 57, at 897 (suggesting that appellate body may “injure the regime”).
under the guise of a "legal" issue, however, would risk undermining respect for the system and the system's potential ability to enhance compliance in the "tough" cases.

III. UNITED STATES SOVEREIGNTY: DOES THE WTO DISPUTE SETTLEMENT SYSTEM CONSTITUTE A THREAT?

Unfortunately, rhetoric concerning sovereignty was raised to such a level in the course of the Uruguay Round debate that reality was blurred.107 The images found in large, full-page newspaper ads were daunting. One ad featured a large GATT policeman shattering the United States Capitol building with a sledge hammer108 and another showed the Declaration of Independence torn in two pieces.

The debate over sovereignty has falsely promoted the notion that our citizenship interests are being exchanged for our consumer interests.109 Indeed, published allegations stated that the WTO would result in the exchange of our freedom and sovereignty for new markets.110 An alternative and more compelling explanation is that the WTO dispute settlement system creates additional pressures against special protectionist interests that violate both our consumer and citizenship interests.

The word sovereignty has so many meanings that some international scholars would prefer simply to discontinue its use.111 It is

108 JEOPARDIZED BY GATT (advertisement), N.Y. TIMES, June 27, 1994, at A15.
110 See David M. Schwartz, WTO Dispute Resolution Panels: Failing to Protect Against Conflicts of Interest, 10 AM. U. INT'L L. & POL'Y INT'L BUS. 955, 966 n.81, 967 n.83 (referencing proponents and opponents of dispute settlement system).
difficult, however, to discard it altogether because the rhetoric in trade agreement debates is often couched in terms of sovereignty. An examination of two of its most commonly used definitions is useful in the context of the dispute settlement system.

A. Holder of Supreme Power

The first definition of “sovereignty” refers to the holder of supreme power over a specific subject matter. The United States government retains the supreme power over all elements of United States trade law and policy as well as other matters addressed by the Uruguay Round agreements. The President may, with the approval of Congress, enter into international trade agreements consistent with the U.S. Constitution. Entering into the Uruguay Round agreements and the new WTO dispute settlement system was an exercise of this constitutional authority and of United States sovereignty. The United States has given up its ability to enact legislation inconsistent with the WTO rules without violating its international obligations, however, all treaties necessarily give up “sovereignty” in this respect. The United States is also subject to WTO dispute settlement complaints by other members. However, WTO dispute settlement panel reports or appellate body reports are not self-executing and do not change United States law. Congressional action, in concert with or over the veto of the President, remains the exclusive avenue to change United States law. In this respect, WTO panel reports must be distinguished from bi-national panels under Chapter 19 of the North American Free Trade Agreement (NAFTA). Much concern has been expressed over bi-national panels supplanting judicial


review of United States agency determinations in antidumping and countervailing duty cases.115 NAFTA Chapter 19 bi-national panels apply United States law116 and their decisions are virtually self-executing.117 Criticisms of this system are not appropriately directed at the WTO dispute settlement system or the general dispute settlement process of NAFTA under Chapter 20.

Thus, where the United States is faced with a WTO dispute settlement panel report recommending a change in a law inconsistent with WTO, Congress would have to enact new legislation to implement the recommendation. Of course, it might also be possible in some circumstances for the United States Executive Branch to implement a panel report through a regulation. While it is true that the United States may face retaliation (suspension of concessions) for maintaining a WTO-inconsistent law, the WTO dispute settlement system allows the United States to have the level of retaliation itself reviewed by a panel of arbitrators. It is important to remember that in the absence of WTO agreements or other treaty obligations, the lack of customary international law relating to international trade would allow a foreign trading partner to “retaliate” if it did not like a certain U.S. law. Moreover, this “retaliation” would not be reviewed by an arbitral body. Of course, the United States has a national interest in effective international trade rules, and therefore, should not exercise its option to ignore a WTO dispute settlement panel or appellate body report and maintain WTO-inconsistent legislation absent some fundamental flaw in the dispute settlement process or determination. In general, the pressure of being labeled a rule violator and/or retaliation does not interfere with our citizenship interests. Instead, such pressure promotes our citizenship interests along with our


consumer interests by helping counteract special interest legislation with a protectionist motivation or design.

B. Independence From Other Nations

Another common definition of sovereignty focuses on a nation's independence from other governments or non-subordination to an external authority. In some ways, the growing interdependence of economies, rather than any aspect of international economic law, has lessened the independence of nations from actions of other governments. The United States economy, for example, is affected by interest rates in Europe, savings rates in Japan, and growth rates in Asia and South America.

Conventional international law or "treaty" law, recognizes the sovereignty or autonomy of nations because it is based on a nation's consent to become bound. Although the consent basis of international law is not absolute, it remains a cornerstone of international trade law which is treaty based. When the United States enters into an international trade agreement, it does so consensually as an exercise of its sovereignty. By entering the WTO, the United States has agreed, in the absence of a negative consensus, to allow the establishment of dispute settlement panels under the WTO, to allow dispute settlement panel reports or appellate body reports to become binding international obligations, and to have countermeasures authorized in cases of non-implementation of a panel report. This does not, however, mean that the United States is subordinated to the WTO because the WTO panels cannot change United States law.

WTO institutional rules outside dispute settlement also protect U.S. sovereignty. Any amendment to a WTO agreement that would apply to the United States requires the United States to consent to the amendment, with the exception of those that are truly procedural and would not affect the substantive rights or obligations of the United States. Indeed, the WTO protects United States sovereignty in this regard to a greater degree than its pred-

118 BLACK'S LAW DICTIONARY 1396 (6th ed. 1990); see W.L. Hayhurst, When Sovereignties Collide—Sovereignties and the Regulation of Business in Relation to Intellectual Property: A Canadian Perspective, 20 CAN.-U.S. L.J. 195, 195 (1994) (quoting Rt. Hon. Joe Clark stating "that is the essence of sovereignty - being able to do as we want to do").

119 Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round, art. X, at 1125, 1149 (1994) (stating that "formal acceptance process" is necessary for amendment to WTO agreements).
cessor, the GATT, the de facto institution of the world trading system for the past fifty years.\textsuperscript{120} Ironically, some interests have complained that no "democratic fix" to adjudicative errors exist within the WTO because of its difficult amendment and interpretation rules.\textsuperscript{121} The critical point is that a "democratic fix" always lies in Congress, which can refuse to implement a panel report where the process is fundamentally flawed.

With this understanding of the United States Constitution and of international law, it is hard to argue that national sovereignty is somehow compromised by the federal government's agreement to the WTO dispute settlement system. Nevertheless, several critiques founded in sovereignty rhetoric must be addressed.

Critique #1: "Faceless" bureaucrats can determine that the United States is a rule violator and can ultimately impose trade sanctions against the United States.\textsuperscript{122}

Although dispute settlement panels are generally comprised of both governmental and non-governmental individuals, one reason why they remain "faceless" is that citizens of a country that is party to a dispute cannot serve on a panel. While this rule makes sense with respect to government officials due to the potential conflict of interest, it may be an unnecessary prohibition with respect to private individuals. As one previous panel member noted, the rule effectively prohibits the most renowned United States non-governmental individuals from serving on most panels because the United States is a party in many dispute settlement cases.\textsuperscript{123} Nevertheless, recent experience with NAFTA bi-national panels, which use primarily non-governmental individuals, indicates that caution should be exercised in changing the flat prohibition. Several high profile bi-national panels have split along nationality lines; in some cases with strong allegations of panelists serving

\textsuperscript{120} See Jackson, supra note 2, at 17 (stating that "protections for national sovereignty built into the WTO Charter rules on decision making are substantially enhanced"); see also Hearing on Uruguay Round Agreement, World Trade Organization and U.S. Sovereignty, Before the Senate Comm. on Foreign Relations, 103d Cong., 2d Sess. 6, 857-58 (1994) (statement of John H. Jackson) (noting increased protections of United States' sovereignty under WTO).

\textsuperscript{121} See U.S. Action on Japan Trade, supra note 102, at S6,433 (statement of Alan Wolff) (questioning proposals for automatically binding system).

\textsuperscript{122} See, e.g., Sabotage, ROLL CALL, May 18, 1992, at 18 (indicating advertisements by various groups).

\textsuperscript{123} See Pescatore, supra note 61, at 8 (explaining role of citizenship in panel selections).
despite conflicts of interest. This led one scholar to propose an amendment to Article 19 of NAFTA under which bi-national panel opinions would not be issued when the opinions split along nationality lines.

The existence of a standing appellate body under the WTO dispute settlement system will likely remove some of the allegations of "facelessness." Since it is argued that appeals within the system may be frequent, it is likely these individuals will not remain "faceless."

An additional question can be raised as to whether the United States would prefer a self-judging system where a particular country's Minister of Foreign Trade would judge United States laws. Some would respond that a power-oriented system focusing on self-judgment and negotiations is the ideal system for the United States, due to United States power within the system.

Critique #2: As the country with the greatest power in the system, the United States should seek a power-oriented system rather than a rule-oriented system.

The issue raised by this critique is whether the shift to a more rule-oriented system is beneficial even to the most powerful country. It is generally recognized that a rule-oriented system is far better for countries with small economies than is a power-oriented approach. However, both the legislative and executive branches of the United States government agreed American interests would be best served by a more rule-oriented approach in the Uruguay Round. The Omnibus Trade and Competitiveness Act of 1988 stated that a more effective and expeditious dispute settlement sys-


125 See Chapter 19 Proposal Sparks Interest From U.S. Officials, Cable Says, 2 Inside NAFTA 7 (Nov. 1, 1995).

126 See, e.g., U.S. Action on Japan Trade, supra note 102, at S6,433 (statement of Alan Wolff) (noting advantage of power-oriented system for United States).

tem was a negotiating goal of the United States during the Uruguay Round.\textsuperscript{128}

Under the old GATT system, the United States was a plaintiff more than any other country and often was involved in disputes with other powerful members such as the European Union and Japan.\textsuperscript{129} Nonetheless, there has been considerable second-guessing as to whether this rule-oriented approach is desirable, particularly in light of the fact that the United States has been a defendant nearly as much as a plaintiff in recent years.

International trade rules ultimately are established to increase national and world welfare through more efficient use of resources. It seems unlikely that a more power-oriented approach would raise national or world welfare. The threat of trade wars, damaging to United States and world welfare, would grow, particularly since many United States disputes are with other powerful WTO members. A power-oriented system would reduce the predictability and stability required by private enterprise and some allocation of resources would likely be distorted as a result. Moreover, United States power might be exercised for special interests and protectionist purposes. Indeed, when the United States "loses" a WTO dispute settlement case, will it necessarily mean that the United States has lost? In general, the WTO agreements do not prohibit Members from pursuing legitimate objectives. The rules generally, although not always, prohibit the pursuit of protectionist objectives or of legitimate objectives through protectionist means. To the extent that a majority of WTO cases are decided

The principal negotiating objectives of the United States with respect to dispute settlement are—

(A) to provide for more effective and expeditious dispute settlement mechanisms and procedures; and

(B) to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights.

\textit{Id.}; see also Judith H. Bello & Alan F. Holmer, \textit{The Post-Uruguay Round Future of Section 301}, 25 Law \& Pol'y Int'l Bus. 1297, 1304 (1994) (discussing sovereignty of United States' through limitation of bilateral or unilateral action).

\textsuperscript{129} See Jackson, \textit{supra} 57, at 100 (stating that of 77 cases involving United States either as plaintiff or defendant between 1980-89, in 40 of those cases opposing party was either European Community or Japan); see also Huebner, \textit{supra} note 61, at 597-08 (indicating that in many other disputes other party involved was current member of expanded European Union, such as Sweden and Finland).
on this basis,\textsuperscript{130} it is quite possible that U.S. citizenship and consumer interests, as well as national welfare, will have "won" in many instances in which the U.S. government loses a WTO case.

In addition to reducing the importance of power within the international system, the new system also faces allegations that it will diminish the ability of the United States to use its power unilaterally.

\textit{Critique #3: The United States' ability to use unilateral "unfair" trade remedies has been or could be diminished by the WTO dispute settlement system.}\textsuperscript{131}

One reason for the second-guessing of the new dispute settlement system is that other countries agreed to it.\textsuperscript{132} Those opposed to the new system inferred that participating countries must have gained some advantage over the United States in order for them to agree to the system. Such an implication harkens back to the mercantilist view of trade.\textsuperscript{133} Such an inference fails to recognize that the mutual advantage of trade liberalization also can be furthered by enforcement mechanisms that ensure maximum compliance with the welfare-enhancing rules. Other countries did note the limits that the new system placed on United States unilateral remedies. Concerns within the United States focused on Section 301 which has been used successfully to open foreign markets. Antidumping and countervailing duty laws, which allow additional duties to be placed on "unfair" imports, also have received considerable attention. The key question is whether the DSU lessens the ability of the United States to enforce its rights under trade agreements effectively or to respond to "unfair" imports. If so, is the lessening of this ability in our national interest?

\textsuperscript{130} See Roessler, \textit{supra} note 61, at 73 (stating that "[i]t is therefore rare that a measure complained against in the GATT serves legitimate noneconomic policy goals").


\textsuperscript{132} See id. (noting ready acceptance of other member countries).

a. Section 301

The WTO dispute settlement process is the exclusive means for pursuing remedies for WTO agreement violations. Members cannot make unilateral determinations of rule violations. Article 23 of the DSU evinces an intent that, at least for purposes of dispute settlement, the GATT is a "self-contained" system. Thus, customary, international law principles, which might have allowed for countermeasures while a nation proceeded to arbitration, no longer apply.

Section 301 allows the United States to initiate on its own accord or on the basis of a private petition an investigation of foreign trade practices that violate a WTO or other trade agreement, or are unreasonable and burdensome to United States commerce. Generally, Section 301 investigations deal with practices inhibiting U.S. exports. As it did prior to the Uruguay Round, Section 301 continues to allow the United States Trade Representative ("USTR") to utilize the international dispute settlement system before making a determination regarding a foreign trade practice under investigation. Moreover, the section does not mandate that the USTR take unilateral action against a foreign trade practice if a dispute settlement panel finds that the practice is inconsistent with WTO agreements. Thus, Section 301 can be used consistently with the new WTO dispute settlement rules. Of course, the USTR could use Section 301 in a manner inconsistent with WTO rules, including Article 23 of the DSU. Thus, the actual powers granted to the USTR by Congress have not been diminished. If the USTR chooses to exercise the granted authority in


135 See supra note 88, at 252. Kuyper explains that it is too early to determine that the WTO has moved decisively toward self-contained system, despite its intention to do so. Id. The WTO system, however, is not self-contained in another sense. The DSU explicitly adopts customary international law rules of interpretation for panels. See DSU, supra note 5, art. 3(2), at 115.


138 See supra note 2, at 107.

139 See Bello & Holmer, supra note 128, at 1307 (noting that United States retains authority to disregard certain obligations when warranted in national interest).
such a manner, respect for the new WTO dispute settlement system will be diminished, and the United States will be labeled an international rule violator.

In some senses, however, the new dispute settlement system internationalizes Section 301 because it ensures an expeditious determination regarding the consistency of a foreign country's practice with WTO agreements. In cases where a dispute settlement panel or the appellate body determines that the practice has violated a WTO agreement, the DSB will authorize retaliation automatically. Section 301 gives the USTR authority under United States law to take such retaliatory action. The timing, type, and size of retaliation otherwise chosen might be affected by the new DSU. Again, however, the USTR will have the statutory power to ignore the international rules regarding retaliation.

In short, the WTO system allows for expeditious, effective enforcement of United States rights, which arguably could be ensured under Section 301 only by unilateral action due to defects in the old GATT dispute settlement system and the limited scope of substantive obligations under GATT. The new WTO dispute settlement system, together with aggressive monitoring, will ensure that Section 301 remains an effective tool for opening foreign markets.

b. Antidumping and Countervailing Duty Remedies

The WTO agreements—specifically, the GATT 1994, the Antidumping Agreement, and the Agreement on Subsidies and Countervailing Measures—allow a Member to place an additional duty even beyond bound tariff rates on dumped and subsidized imports if such imports are causing material injury to an industry within the Member's territory. These duties are equal to the margin of dumping or the rate of subsidization, respectively. For many years, the United States was the primary user of antidumping and countervailing duty laws. In recent years, however, many

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140 See Brand, supra note 127, at 138. "[I]t seems the United States can probably withstand a reduction in the availability of [unilateral] Section 301 sanctions when accompanied by a substantially increased likelihood that sanctions authorization will come from the GATT itself." Id.

141 See Thomas O. Bayard & Kimberly A. Elliot, Reciprocity and Retaliation in U.S. Trade Policy 3 (1994). "[O]ur principal policy recommendation is that the United States move from aggressive unilateralism to aggressive multilateralism, using the improved dispute settlement mechanism to enforce WTO rules." Id.
other countries have begun to employ these “unfair” trade remedies, particularly antidumping laws. In the past, there was a domestic constituency in favor of antidumping laws that could overcome the interests opposed to such laws. Industrial import users are not always affected tangibly, and consumer interests are often diffuse and subject to transaction costs in assembling a coalition. As a result of the increased use of antidumping laws by developing countries, however, the United States now has a new domestic constituency that is opposed to antidumping laws, or at the very least protectionist abuse of such laws, namely United States exporters.

The Uruguay Round negotiations hosted a fierce debate over a revised antidumping agreement. Additionally, provisions of the United States implementing bill that amended existing antidumping law also proved to be quite controversial. The Uruguay Round Antidumping Agreement contains more stringent rules regarding national antidumping investigation procedures and slightly more stringent substantive rules. However, any changes to the Agreement, making United States imposition of antidumping duties more difficult, can be seen as necessary to protect overall United States interests in light of the current dynamics regarding use of antidumping laws. In fact, further limitations on the use of antidumping laws may be necessary to protect overall United States interests. In any event, neither export interests nor import-competing interests were satisfied with the final results.

The controversy over the substantive and procedural rules included an interesting provision found in the Antidumping Agreement which addresses the standard of review for a dispute settlement panel in judging actions of national authorities. Article

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142 See Cynthia Beltz, Investors Make Lousy Crowbars, J. COM., May 25, 1995, at 10A (noting that over 40 nations, including developing countries, have adopted antidumping laws).

143 See Jackson, et al., supra note 9, at 685; see also Jeffrey J. Schott & Johanna W. Buurman, The Uruguay Round: An Assessment 84 (1994).

144 See Jackson, et al., supra note 9, at 685.


17.6 of the Antidumping Agreement specifies various standards of review to be utilized by the panels. Specifically, Article 17.6 of the Antidumping Agreement requires panels to abide by the following standards of review:

i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The motivation behind Article 17.6 was to ensure that panelists give a certain level of deference to the factual findings and evaluations of national authorities as well as to the legal implementation of the Antidumping Agreement by national governments. While the provision received strong support from "protectionist antidumping lobbies," it is unclear just how much deference will be accorded by virtue of clause (ii) with respect to issues of law. It seems that application of customary international law rules of interpretation will not lead to several permissible interpretations of provisions of the agreement very often, if ever.

Bland, GATT Panels Need Restraining Principles, 24 Law. & Pol'y Int'l Bus. 1167, 1172-75 (1993) (describing "interpretive disputes" in applying standard of review); Timothy M. Reif, Coming of Age in Geneva: Guiding the GATT Dispute Settlement System on Review of Antidumping and Countervailing Duty Proceedings, 24 Law. & Pol'y Int'l Bus. 1185, 1189-93 (1993) (suggesting standard of review used in administrative law proceedings should be applied by GATT panels). See generally Croley & Jackson, supra note 103, at 193-213 (arguing that justification for Chevron-like deference to national authorities carries little weight in international arena but that deference may be supportable on other grounds).


148 See Petersmann, supra note 5, at 1235 (describing support groups that lobbied for Antidumping Agreement Article 17.6).
Under customary international law, the text of a provision, taking into account the context and the purpose of the agreement, is to be the primary means of interpretation.\textsuperscript{149} Where the text leaves the meaning ambiguous, a panel can refer to preparatory work of the Uruguay Round and the circumstances surrounding its conclusion.\textsuperscript{150} Only if the meaning remains ambiguous after reference to these supplementary sources would more than one permissible interpretation exist.\textsuperscript{151} Thus, it is unclear exactly how much deference a panel will ultimately grant to national authorities, at least with respect to legal issues.\textsuperscript{152}

The likelihood that panel deference to national governments will not be as great in legal implementation vis-à-vis factual matters has a sound policy basis.\textsuperscript{153} Too much discretion granted by panels to national authorities could lead to divergent implementation of the agreement by WTO members. If a lowest common denominator phenomenon occurs toward a protectionist bias in the implementation of antidumping laws, then the effectiveness of GATT rules in liberalizing trade will be weakened. As a result, United States industrial import users and exporters, as well as consumer interests, would suffer.

IV. THE DOLE BILL AND NATIONAL REVIEW OF WTO DISPUTE SETTLEMENT REPORTS

In late November 1995, Senator Robert Dole introduced the latest version of a bill to create a WTO dispute settlement review commission in the United States Senate.\textsuperscript{154} The bill's provisions


\textsuperscript{150} See Vienna Convention, supra note 149, art. 32, at 692 (following traditional themes under international law).


\textsuperscript{152} See id. (stating only that “principal negotiating objectives” were achieved).


with respect to the review commission closely resemble those in an earlier version of the bill,\textsuperscript{155} despite suggestions in the interim to constitute the commission in a different manner or to establish an additional commission.\textsuperscript{156} While many thought the bill would be forgotten with Senator Dole's retirement from the Senate, other senators have continued to press for its passage.\textsuperscript{157} The provisions of the latest Dole bill proposing to establish a national review commission are analyzed below.

\textbf{A. The National WTO Dispute Settlement Review Commission as Proposed by the Dole Bill}

The commission to be established by the Dole Bill would be comprised of five federal circuit court judges.\textsuperscript{158} These judges would be required to examine panel or appellate body reports adopted by the DSB, decided adverse to the United States, where the United States is a defendant.\textsuperscript{159} Only upon a request of the United States Trade Representative will the review commission examine reports adverse to the United States in which the United States is a plaintiff.\textsuperscript{160}

The review commission's scope of review, however, is limited to determining whether the panel or appellate body has:

1) demonstrably exceeded its authority or its terms of reference;
2) added to the obligations, or diminished the rights, of the United States under the Uruguay Round agreement which is the subject of the report;
3) acted arbitrarily or capriciously, engaged in misconduct, or demonstrably departed from the procedures specified for panels or the appellate body in the applicable Uruguay Round agreement; and

\textsuperscript{156} S. 1438, 104th Cong., 1st Sess. §§ 7 & 16 (1995). Provisions regarding private party participation and involvement in United States dispute settlement cases were significantly changed. \textit{Id}.
\textsuperscript{158} S.1438, 104th Cong., 1st Sess § 3(b)(1) (1995).
\textsuperscript{159} \textit{Id.} § 4(a)(1).
\textsuperscript{160} \textit{Id.}
4) deviated from the applicable standard of review, including in antidumping cases, the standard of review set forth in Article 17.6 of the [Antidumping] Agreement . . . .161

The review commission is to make an affirmative determination regarding the report if it finds any of the matters listed in the statutory criteria above, and the action materially affected the outcome of the report.162 One affirmative determination can lead to a congressional resolution calling upon the President to undertake negotiations to amend or modify the matter relating to the report.163 Three affirmative determinations within a five-year period can lead to a congressional resolution withdrawing Congress' approval of the Uruguay Round agreements.164

B. In the Name of Sovereignty?

The fact that the commission automatically reviews adverse decisions involving a complaint about a United States measure, while adverse reports in which the United States is a complaining party are reviewed by the commission only upon a request of the United States Trade Representative, might seem somewhat curious. Why is impartial review of complaints involving the interests of United States companies that export seemingly less important than complaints involving U.S. laws? The difference in treatment does provide an indication that one motivation is a perceived threat to United States sovereignty.165

As discussed above, one of the sovereignty clothed critiques of the DSU system extends to the possible constraints on the use of United States unfair trade laws, particularly antidumping laws.166 Indeed, the Dole Bill declares a congressional "understanding that effective trade remedies would not be eroded" by the Uruguay Round agreements.167 Again, the Uruguay Round Antidumping Agreement and the development of the United States

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161 Id. § 4(a)(2).
162 Id. § 4(a)(3).
164 Id. § 6(a)(2), (b)(2).
165 141 CONG. REC. S.16,695 (daily ed. Nov. 3, 1995). Senator Dole himself has described the legislation as "an insurance policy for our sovereignty." Id.
implementing legislation of the agreement were hotly contested.\textsuperscript{168} The debate over aspects of the Dole Bill is in part a continuation of this struggle. The commission's scope of review includes the ability to determine whether the applicable standard of review in antidumping cases has been followed by a panel.\textsuperscript{169} Proponents of antidumping laws hope that the establishment of the commission will unduly pressure panels to give broader deference to determinations made by United States authorities in antidumping cases.\textsuperscript{170} In other words, proponents hope that the commission will force panels to give an unfairly broad reading to Article 17.6 of the Antidumping Agreement.\textsuperscript{171} If this is the function the review commission ultimately serves, then its establishment will not be in the name of sovereignty but in the name of protectionism.

On a positive side, however, the review commission may help to eliminate the perception that United States sovereignty is somehow infringed upon by the DSU.\textsuperscript{172} United States participation in the WTO system is essential to that system's ability to govern world trade effectively. Critical to United States participation is the support of the American people. Thus, the possibility that the review commission will add to the system's credibility in the eyes of the American public is an important consideration. But is this reason enough to establish the commission, when other options\textsuperscript{173} might exist to eliminate perceived sovereignty concerns? Even if this reason is compelling, what impact will the commission have on compliance with WTO rules?

\textsuperscript{168} See Uruguay Round Agreements Act, 140 CONG. REC. S15,151 (daily ed. Nov. 30, 1994) (considering proposed antidumping legislation).

\textsuperscript{169} See supra notes 158-64 and accompanying text (discussing commission role in reviewing panel decisions).


\textsuperscript{172} See supra notes 165-66 and accompanying text (discussing commission creation to allay sovereignty concerns).

\textsuperscript{173} One option would be for public officials to spend more time properly explaining the system to the public.
C. In the Name of Enhanced WTO Rule Compliance?

The establishment of the review commission may enhance WTO rule compliance in a number of ways. First, a negative determination by the commission will give added impetus to implement WTO dispute settlement panel and appellate body recommendations regarding United States laws that have been found WTO-inconsistent. If the law is motivated by protectionism or if United States unfair trade laws have been abused in a protectionist manner, the apolitical decision of the review commission may be one way to combat the protectionist forces that would otherwise clamor before Congress arguing against the panel report's implementation. Within the United States policy-making system, institutional and procedural counterweights to the protectionist influence of special interests are critical to securing congressional support for trade liberalization.\(^\text{174}\) By acting as a counterweight, the review commission can enhance compliance with WTO rules.

Second, the mere existence of the review commission may serve as a positive influence, supportive of the rule-oriented system, by helping to ensure that panels and the appellate body do not stray from their task or exceed their powers.\(^\text{175}\) This positive influence is likely to spread beyond cases in which the United States is a party. Such dissemination might occur in a variety of ways. In interpreting a provision, subsequent panels may follow a previous panel’s exercise of judicial restraint in not adding to rights or obligations of the Members.\(^\text{176}\) Development of procedural and conflict of interest rules for panelists and the appellate body may be furthered by the existence of the review commission.\(^\text{177}\) These developments may, in turn, increase the respect of Members for WTO panel and appellate body decisions, resulting in a second possible

\(^{174}\) Desler, supra note 73, at 3.


\(^{176}\) See Vienna Convention, supra note 149. As a matter of law, previous panel reports have no stare decisis effect. This is in accordance with the general rules of international law. In practice, however, many GATT panels have relied on the reasoning of prior panels (as persuasive), although there have been a few instances in which a GATT panel has expressly refused to follow a prior panels reasoning or decision.

\(^{177}\) A Code of Conduct for panelists has been under discussion within the WTO since the beginning of 1995. See, e.g., WTO Dispute Settlement Body Chair Compiles Names for Appellate Body, 12 Int’l Trade Rep. (BNA) No. 17, at 715 (Apr. 26, 1995). The Uruguay Round Agreements Implementing Act requires the United States Trade Representative to seek establishment of rules governing conflicts of interests. Id.
way in which the review commission can enhance WTO rule compliance.\textsuperscript{178}

The creation of the review commission, however, is certainly not without risk in terms of WTO rule compliance. Important questions must be considered. Will panelists or appellate body members be overly timid in ruling against the United States for fear of an affirmative determination by the review commission? What if other powerful countries create their own national review commissions? Will this signal a return to the power-oriented approach? Will review commission members be familiar enough with international law and international trade rules to conduct properly their examination and thus avoid making improper affirmative determinations?\textsuperscript{179}

One fear expressed by overseas trading partners regarding the Dole Bill is that panelists or appellate body members will be unduly influenced by the possibility of an affirmative determination by the United States review commission. Undue influence on panelists would have negative implications for the goal of maximizing WTO rule compliance. This concern seems greatly minimized, however, if the review commission remains comprised of federal circuit court justices with a limited scope of review.

Proposals to include representatives of business and labor on the review commission, or to establish a separate review commission with these representatives,\textsuperscript{180} are not present in the latest version of the bill. Adoption of such proposals would change the nature of the commission and probably its mission even if the four criteria to be examined by the commission remained the same.\textsuperscript{181}

\textsuperscript{178} See Rules-Based Dispute Settlement Called Useless Without Enforcement, 12 Intl Trade Rep. (BNA) No. 30, at 1266 (July 26, 1995) (noting that WTO credibility hinges on effective dispute settlement system).


It is possible that private sector participation on the review commission would taint determinations. These participants, in contrast to judges, are more likely to be influenced by a panel or appellate body report's economic impact on the United States business or labor interests involved. In the worst case scenario, a member or members of the review commission comprised of business or labor interests might maintain a conflict of interest.

Federal appellate judges will be free of any conflicts of interest. The appellate judges' review presumably will be neutral with respect to the economic interests of a particular case. A review commission comprised of appellate judges is consistent with the overall long-term United States national economic interest in an effective dispute settlement system that is not subject to abuse. In addition, WTO dispute settlement panels and the appellate body perform a legal function. Appellate judges are better qualified to review whether a legal function has been properly performed than business or labor leaders.

If the review commission is to act as a second filter beyond the right to appeal at the international level, it is essential that the commission remain judicial in nature. In other words, while some have advocated that the review commission conduct a completely

182 See World Trade Organization Oversight: 1995 Hearings on S. 16 Before Senate Finance Comm. on S. 16, [hereinafter Hearings] 104th Cong., 1st Sess. (1995) (statement of Curtis H. Barnette) ("Filling the [review] Commission with people other than federal judges would clearly be a mistake. Members of the academic community might be seen to have biases or points of view inconsistent with the neutral perspective required for meaningful review. Similarly, use of private trade lawyers would only give rise to questions about conflicts of interest and the qualification of these individuals to act in the role of judges."); Hearings, supra (statement of Alan Wolff) ("Former judges or other attorneys in active practice will not guarantee the level of independence necessary for the Review Commission. Without sufficient independence, the Commission's value as a check on the operation of WTO panels will be undermined."); Hearings, supra (statement of George Scalise) (". . . sitting federal judges are best suited to render impartial rulings since, by the very nature of their positions, they must act without conflicts of interest."). But see Judge Questions U.S. Bill to Create WTO Review Panel, REuTERs, LnD., May 10, 1995 (discussing federal judge's doubts about review commission judicial composition). If federal judges cannot serve for constitutional reasons, then retired federal judges would be the next best composition.

183 See generally Hearings, supra note 182.

184 See id. (testimony of Curtis Barnette) ("our federal appellate judges . . . are uniquely qualified to engage in the type of review envisioned by [the Dole Bill]"); Hearings, supra note 182 (testimony of George Scalise) (". . . federal appellate judges . . . are the most qualified candidates for the role. Since their primary judicial function is to review determinations of lower courts and federal agencies, they are best suited to evaluate a WTO panel's interpretation of the Uruguay Round agreements."). But see Marianne Lavelle, Federal Judges Cast Wary Eye on Trade Panel, NAT'L L.J., May 22, 1995, at A16 (noting skepticism of federal judges as to ability to review aspects of international trade law).
de novo review of panel and appellate body reports, it is important to limit the scope of review undertaken by the commission.

Modifications could be made to the proposed review commission to further increase the likelihood that it will not detract from the proportion of rule-orientation within the WTO dispute settlement system. For instance, the bill could make clear that commission members shall use customary international law rules of interpretation when examining agreements under the four criteria within the scope of review and may not rely on unilateral United States interpretations. The United States government might disagree with a dispute settlement panel's interpretation of an agreement, but the commission's role seems to be limited to determining whether the WTO panel has performed its task properly. According to the DSU, panels and the appellate body are to use customary international law rules of interpretation. Therefore, in determining, for instance, whether a panel or the appellate body has added to the rights or obligations of the United States under a WTO agreement, the commission should use the same rules of interpretation the panel does with respect to the agreement.

Perhaps the absence of this modification is insignificant in light of the fact that this interpretational approach appears to be inherent in the role of the commission. Concerns have been raised, however, that commission members may not be sufficiently familiar with international law to apply this approach properly. Further, a general standard of review, in addition to the scope of review, might be elaborated for the commission itself (This, of course, would mean a standard of review for the commission as to whether WTO panels or the appellate body deviated from their standard of review!)


186 See DSU, supra note 5, art. 3.2, at 115. "The Members recognize that [the dispute settlement system] serves . . . to clarify the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law." Id. Under the former GATT system, panels in some instances did not follow the rules of customary international law and instead resorted almost immediately to secondary sources of interpretation. See also Kuyper, supra note 88, at 229 (noting adherence to customary international law rules of interpretation).

187 Some of the criteria, specifically numbers one and three, in the proposed commission's scope of review do contain a standard of review such as "demonstrably." The other criteria, however, specifically numbers two and four, do not contain any standard of review.
It is a fine line to draw between whether a national review commission adds an additional element of power-orientation or is a positive force within a rule-oriented system. On which side of this line any proposal for a national review commission falls depends on numerous factors, including the proposed composition and scope of review. However, it appears on balance that a properly comprised and constrained U.S. review commission can further the goal of enhanced WTO rule compliance while at the same time eliminating any perceived sovereignty concerns.

V. CONCLUSION

The new WTO dispute settlement system is more "judicial" than the old GATT system. The new system eliminates several political "checks" existing under the old GATT system, increasing the degree of rule-orientation in the system. As a result of these changes, the WTO Dispute Settlement Understanding will enhance compliance (or the likelihood of compliance) with the expanded and strengthened substantive rules of the international trading system. One must be careful, however, not to simply conduct a statistical analysis of cases when judging the success of the new system in five, ten or twenty years. The new system will address disputes arising out of stronger substantive rules in politically sensitive areas and in a broader array of areas. The new system might also attract cases that countries would not have considered under the old system because of perceptions that the system was ineffective. However, the new system will be more adept at counteracting domestic political pressures that lead to protectionist, WTO-inconsistent measures.

Concerns exist within the United States that the new system presents a threat to U.S. sovereignty. An analysis of the new system using the two most common definitions of sovereignty indicates these concerns are misplaced. Other major "sovereignty clothed" critiques have also been overstated and ignore the U.S. national interest served by the new system.

Nonetheless, a proposal to create a national commission comprised of federal appellate judges to review WTO panel and appellate body decisions adverse to the United States arose out of perceived sovereignty concerns. While eliminating these perceptions is one function a national review commission might serve, the national review commission could serve an additional function of en-
hancing compliance with WTO rules. In general, WTO rules are designed to constrain measures with a protectionist purpose or design. The national review commission can act as a counterweight to protectionist interests and thus enhance the probability of implementing panel reports adverse to the United States.

The national review commission can also act as a positive influence supporting the shift to a more rule-oriented dispute settlement system. Its influence could enhance respect for the system and ultimately enhance compliance. Clearly, the establishment of a review commission is not without risk. On balance, however, a properly comprised and constrained national review commission can serve to enhance compliance with WTO rules and thus protect our citizenship and consumer interests from special, protectionist interests.