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# Private Party Participation in the World Trade Organizations

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PRIVATE PARTY PARTICIPATION IN THE WORLD TRADE ORGANIZATION  
: SEEKING PROCEDURE FOR PRIVATE PARTIES TO RAISE A CLAIM BEFORE THE  
WTO DISPUTE RESOLUTION SYSTEM

by

TAEHYUNG IM

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

This paper discusses private party participation in the WTO dispute resolution system. Notwithstanding the rule-oriented reform of the WTO, there are many improvements that can be made to the WTO dispute resolution system. The lack of standing for private parties to raise a claim before the WTO dispute resolution system means there are many potential international trade dispute claims that are never resolved. Private counsel representation and submission of amicus brief by private parties acknowledge that WTO are realizing the efficacy of private interests in international trade matters. These changes, however, are not sufficient for private parties to protect their interests unless the ability to initiate dispute before the WTO is granted to them without the aid of a member state. Standing should be strictly limited to those parties that have suffered actual harm to reduce the number of frivolous suits.

INDEX WORDS: The World Trade Organization, The General Agreement on Tariffs and Trade, The WTO Dispute Resolution System, Private Party Standing, WTO Appellate Body Decisions

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## I. INTRODUCTION

The World Trade Organization (WTO), which officially came into existence on January 1, 1995, was the culmination of trade negotiations that had lasted nearly a decade.<sup>1</sup> With the WTO's creation, new trade agreements were made which reduced tariffs and other trade barriers to lower levels than ever before.<sup>2</sup> As the first international organization with the responsibility of overseeing the world trading system<sup>3</sup> and more than 140 member states,<sup>4</sup> the WTO system applies to over \$6 trillion, or about 90 percent, of international trade in goods and service per year.<sup>5</sup>

One of the most significant changes made by the WTO was the creation of a new procedure for resolving trade disputes. Because of the peculiar history<sup>6</sup> of the General Agreement on Tariffs and Trade<sup>7</sup> (GATT), the GATT dispute resolution system was primarily developed in an ad hoc, disorganized fashion. As a result, the system was extremely susceptible to political

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<sup>1</sup> Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994) [hereinafter WTO Charter].

<sup>2</sup> See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 296 (1996) [hereinafter Nichols, *Extension of Standing*].

<sup>3</sup> See JOHN H. JACKSON, THE URUGUAY ROUND AND THE LAUNCH OF THE WTO: SIGNIFICANCE & CHALLENGES, IN THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 5, 10- 11 (Terence P. Stewart ed., 1996) [hereinafter JACKSON, URUGUAY ROUND].

<sup>4</sup> See World Trade Organization, Understanding the WTO: Current WTO members (As of February 25, 2004, 146 states, including most of the industrialized world, were members of the WTO.), available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm).

<sup>5</sup> JEFFREY L. DUNOFF, ET AL, INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH, 779 (2002).

<sup>6</sup> See *infra* text accompanying notes 23-48.

<sup>7</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A- 11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

gamesmanship and diplomatic power struggles among states. The outcomes of trade disputes were affected by the unpredictability of international relations, instead of a fair and impartial interpretation of the underlying treaties.<sup>8</sup>

The Understanding on Rules and Procedures Governing the Settlement of Disputes,<sup>9</sup> an annex to the WTO Charter, made a major improvement over the GATT dispute resolution system. It greatly diminished the ability of large states to use their power to derail the dispute resolution process and advanced the WTO's stated goal of "providing security and predictability to the multilateral trading system."<sup>10</sup> Under the WTO system, the outcome of trade disputes is less dependent on the power of the states involved and more dependent on a fair and logical application of the trade agreements.

The WTO dispute resolution system is so important that the former Director General has called it "the central pillar of the multilateral trading system and the WTO's most individual contributions to the stability of the global economy."<sup>11</sup> It differs not only from dispute handling within the GATT, but in fact from most previous dispute settlement mechanisms at an international level in that it has moved from the traditional power based dispute resolution toward the new rule based dispute resolution.<sup>12</sup> Since its operation, the WTO dispute resolution

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<sup>8</sup> Glen T. Schleyer, *Power to The People: Allowing Private Parties to Raise Claims before The WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2276 (April, 1997).

<sup>9</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1226 (1994) [hereinafter Understanding].

<sup>10</sup> *Id.* art. 3(2).

<sup>11</sup> Former Director General Renato Ruggiero, WTO News: 1995-99 Speeches, Address to the Korean Business Association, (Apr. 17, 1997) (transcript available at [http://www.wto.org/english/news\\_e/spr\\_e/seoul\\_e.htm](http://www.wto.org/english/news_e/spr_e/seoul_e.htm)).

<sup>12</sup> Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM.BUS.L.J. 511, 512 (Spring 2003).

system has been very busy; more than 80 cases were filed in the first two years and more than 300 cases had been filed up to now.<sup>13</sup>

Notwithstanding its success, however, the WTO dispute resolution system has been criticized for its inability to reflect the needs and concerns of the citizens of WTO member states because it does not allow private parties to seek resolution of international trade disputes. Also, political motivations and diplomatic gamesmanship can still exist in the WTO dispute resolution system<sup>14</sup> because the WTO provision allows only states to challenge illegal trade practices.<sup>15</sup> Under the WTO dispute resolution system, the initial filing of a dispute and its continuation are affected by political motivations and international relations, instead of the merits of a claim. No matter how serious a trade violation is, the illicit trade policy will continue if no government is willing to take the political risk associated with initiating a dispute.

Under the WTO dispute resolution system, private parties must rely on their governments to assert and defend their trading rights. This approach disregards the fact that companies and individuals are the primary and real actors in international trade and are directly affected by the decisions of the WTO Dispute Settlement Body.<sup>16</sup> The lack of rights and standing for private actors makes the system less responsive to the citizen of member states and less democratic in

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<sup>13</sup> Dispute Chronologically, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

<sup>14</sup> For example, the United States successfully pressured the European Union to drop the case where the validity of the Helms-Burton Act was alleged, *See* David E. Sanger, *Europe Postpones Challenge to U.S. on Havana Trade*, N.Y. Times, Feb. 13, 1997, at A1.

<sup>15</sup> *See* Understanding, *supra* note 9, art. 3.

<sup>16</sup> *See* SUSAN STRANGE, STATES, FIRMS, AND DIPLOMACY, INT'L AFFAIRS, London, Vol. 68, no.1, (1992).

the end. Therefore, the legitimacy of the WTO dispute resolution system, which does not allow access to such key players in international trade, has been questioned.<sup>17</sup>

If private parties could initiate disputes over the legitimacy of a state's actions, then a ruling on the merits would be virtually assured. Private parties would not be susceptible to political pressures in the same way as states. Also private parties' claims would not hurt international relations because the claims could not be considered as a diplomatic attack or maneuver.<sup>18</sup>

Despite the importance of states in international law, the notion that only states enjoy rights and duties directly under international law does not really correspond with the way non-state actors and states interact because.<sup>19</sup> Private parties are the primary and real actors in world trade today, and it is their investments and efforts that are harmed by illicit trade policies. Global compliance with trade agreements is essential if the people of the world are to fully reap the economic benefits of free trade. The only adequate way to ensure global compliance and advance the WTO's goal of providing more stability and predictability to international trade is to give private parties, not just states, the right to participate in the WTO dispute resolution system.

Since its creation, the WTO has moved slowly in the direction to private party participation in its dispute resolution system. The WTO Appellate Body has asserted the right of member states to include private, non-governmental employees in their trade delegations before the WTO,<sup>20</sup> and has acknowledged the right of private individuals or organizations to submit amicus

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<sup>17</sup> See G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359 (1996) [hereinafter Shell, *Trade Stakeholders Model*].

<sup>18</sup> Schleyer, *supra* note 8, at 2277.

<sup>19</sup> See DUNOFF, *supra* note 5, at 191.

<sup>20</sup> See WTO Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sep. 9, 1997) [hereinafter EU-Bananas].

briefs in support of their positions in international trade disputes.<sup>21</sup> These decisions suggest that dispute resolution in the WTO may be changing from a solely governmental focus to a broader one.

Part II of this paper discusses the background of both the GATT and the WTO. This part examines the formation, history, and philosophy of both the GATT and the WTO, with an emphasis on their respective dispute resolution systems. Part III summarizes the competing political philosophies regarding the development of world trade dispute resolution over the past fifty years. After reviewing the arguments surrounding the extension of private participation in the WTO dispute resolution system, this part discusses the benefits that greater private participation would confer upon the WTO dispute resolution system. Part IV examines how private parties can participate in the current WTO dispute resolution system. This part reviews whether the WTO Appellate Body decisions are adequate enough to protect private parties' interests and to achieve WTO objectives. Part V examines other possible ways for enhancing private participation in the WTO. After discussing other international tribunals that allow private parties to bring suit against a state, this part tries to find the method which is appropriate to the WTO dispute resolution system. Finally, Part VI, the conclusion of this paper, examines whether future concessions permitting further private party access to the WTO can be expected to the extent that private parties can bring trade disputes before the WTO dispute resolution system.

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<sup>21</sup> See WTO Appellate Body, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, at 15-22 (holding that amicus briefs may now be sent directly to the WTO without attachment to members' submissions). WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtles*].

## **II. BACKGROUND**

The current world trade system has its roots in the years immediately following World War II, when Western states agreed that international trade frameworks were necessary to support individual national economies and the global economy as a whole, and reduce the possibility of another massive armed conflict.<sup>22</sup> An analysis of the history and development of the two major entities governing world trade, the GATT and the WTO, will help to understand the problems surrounding the GATT and the WTO dispute resolution systems.

### **A. The General Agreement on Tariffs and Trade**

The GATT was originally negotiated in 1947 by twenty-three countries<sup>23</sup> as a provisional trade agreement to lower tariffs in conjunction with the establishment of three global economic institutions: the International Trade Organization (ITO), the International Monetary Fund (IMF), and the International Bank for Reconstruction and Development (World Bank).<sup>24</sup> This subpart of the thesis deals with the development and major characteristics of the GATT, as well as the attributes, advantages, and drawbacks of the GATT dispute resolution system.

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<sup>22</sup> Roberts, *supra note* 12, at 513.

<sup>23</sup> JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 5 (1990).

<sup>24</sup> JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 31-37 (1989) [hereinafter JACKSON, *WORLD TRADING SYSTEM*].

## 1. Development of the GATT

The international trade system that emerged after World War II was a part of a new and broader conception of the international economic order expressed by the Bretton Woods Agreements. In June of 1944, representatives of the Allied states met in Bretton Woods, New Hampshire.<sup>25</sup> Near the end of World War II, these states recognized the need to address the financial and economic problems that had contributed to the Great Depression and World War II.<sup>26</sup> Because the Bretton Woods participants were from the finance ministries of their respective governments, they had established the charters of two major international financial entities at the end of the Conference - the IMF and the World Bank.<sup>27</sup>

The Bretton Woods participants also recognized the need for a third international organization which would supervise the area of world trade.<sup>28</sup> The protectionist measures that had arisen during the two decades between the World Wars had hampered international trade, and most states felt that this obstruction of free trade was a major factor contributing to the Depression and the War.<sup>29</sup> Shortly after the Bretton Woods Conference, the United States and

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<sup>25</sup> Representatives of 44 states participated in the Bretton Woods Conference. Richard Myrus, *Note, From Bretton Woods to Brussels: A Legal Analysis of the Exchange-Rate Arrangements of the International Monetary Fund and the European Community*, 62 *FORDHAM L. REV.* 2095, 2096-97 (1994).

<sup>26</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24.

<sup>27</sup> *Id.* at 31-32.

<sup>28</sup> WTO Charter, *supra* note 1, at 5; Philip M. Nichols, *GATT Doctrine*, 36 *VA. J. INT'L L.* 379, 388 (1996) [hereinafter Nichols, *GATT Doctrine*].

<sup>29</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 31; Muquel Montana i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 *COLUM. J. TRANSNAT'L L.* 103, 106-07 (1993).

the United Kingdom proposed the creation of the ITO.<sup>30</sup> The newly-formed United Nations was charged with the task of creating a charter for the ITO.<sup>31</sup>

The states participating in this unprecedented multinational effort, however, were eager to enjoy the benefits of free trade and did not want to wait for the creation of the ITO.<sup>32</sup> As an interim measure, they decided to draft and enter into a multilateral trade agreement that would regulate international trade until the ITO could take over.<sup>33</sup> This provisional arrangement was the GATT, and in 1947 the participating states signed a Protocol of Provisional Application, which put the GATT into force.<sup>34</sup>

In the meantime, the ITO was running into problems. The proposed charter for the ITO was extremely ambitious and set numerous limits on the actions that participating states could take in international trade.<sup>35</sup> As a result, in 1950, the United States Congress, refused to ratify the ITO charter because of “perceived threats to national sovereignty and the danger of too much ITO intervention in markets.”<sup>36</sup> Without U.S. participation, the ITO never came into existence,<sup>37</sup> leaving the GATT as the legal structure within which world trade policies would be

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<sup>30</sup> Nichols, *GATT Doctrine*, *supra* note 28, at 389.

<sup>31</sup> WTO Charter, *supra* note 1, at 5; Nichols, *GATT Doctrine*, *supra* note 28, at 389.

<sup>32</sup> Nichols, *GATT Doctrine*, *supra* note 28, at 389.

<sup>33</sup> WTO Charter, *supra* note 1, at 5-6; Nichols, *GATT Doctrine*, *supra* note 28, at 389.

<sup>34</sup> GATT, *supra* note 7. The states signing the GATT were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States. *Id.*

<sup>35</sup> JACKSON, URUGUAY ROUND, *supra* note 3, at 6.

<sup>36</sup> Michael R. Czinkita, *Executive Insights: The World Trade Organization - Perspectives and Prospects*, 3 J. INT’L MARKETING 85 (1995).

<sup>37</sup> “Because the support of the United States was critical, other countries that were ready to adopt the ITO charter waited to see its fate in the United State. President Truman submitted the ITO charter to Congress, but the Republicans won control of Congress in the 1948 election. In 1950, the Truman administration announced that it would no longer seek congressional approval for the ITO,” MITSUO MATSUSHITA, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 2 (2003).

developed.<sup>38</sup> The demise of the ITO meant, among other things, abandoning the ITO's consensus-based dispute resolution system, which included resort to the International Court of Justice for "advisory opinions"<sup>39</sup> and a binding arbitration option outside the ITO for disputing ITO members.<sup>40</sup>

As a result, the GATT, which was intended to be merely temporary, became by default the primary entity governing international trade<sup>41</sup> with a number of procedural weaknesses.<sup>42</sup> The mismatch between the GATT's initial conception and its ultimate function manifested itself in a number of ways, including the artificial "leasing" of its staff from the non-existent ITO<sup>43</sup> and the lack of any guiding constitution or charter.<sup>44</sup>

The "birth defect" of the GATT raised the concern that it would not survive the contentious nature of international trade.<sup>45</sup> The GATT, however, proved tremendously beneficial to world trade over the next fifty years.<sup>46</sup> Most importantly, the GATT functioned as the basis of

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<sup>38</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra note 24*, at 15. The GATT took legal effect through the "Protocol of Provisional Application," under which GATT is applied as a treaty obligation under international law. *Id.* at 13-14. The Protocol permitted the executive branches of the signing states to implement the GATT without seeking legislative approval by giving "grandfather rights" to trade legislation existing in 1947 that was inconsistent with the GATT. *Id.* at 14. These grandfather rights exist to the present day. *Id.*

<sup>39</sup> ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM & WORLD TRADE DIPLOMACY* 28-30 (2d ed. 1990).

<sup>40</sup> *Id.* at 31 n.18. The ITO Charter provided that such arbitration decisions "shall not be binding for any purpose on the Organization." (quoting ITO CHARTER art. 93(2)).

<sup>41</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra note 24*, at 37; WTO Charter, *supra note 1*, at 6; Nichols, *GATT Doctrine*, *supra note 28*, at 390.

<sup>42</sup> Nichols, *GATT Doctrine*, *supra note 28*, at 390.

<sup>43</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra note 24*, at 37.

<sup>44</sup> *Id.* at 38.

<sup>45</sup> G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 *DUKE L.J.* 829, 833 (1995) [hereinafter Shell, *Trade Legalism*].

<sup>46</sup> WTO Charter, *supra note 1*, at 6.

ongoing trade negotiations, called “trade rounds,” which resulted in diminished tariffs.<sup>47</sup> In time, the GATT eventually became a de facto international organization.<sup>48</sup>

## 2. Obligations Imposed by the GATT

The GATT’s drafters intended it to be instrumental in combating the high tariffs and other protectionist measures that had contributed to the Great Depression and World War II.<sup>49</sup> To this end, Article II of the GATT prohibits the participating states, called “Contracting Parties,” from imposing any import restrictions other than tariffs and also limits the tariffs that can be imposed.<sup>50</sup> Between the adoption of the GATT and its replacement by the WTO, the Contracting Parties repeatedly lowered the tariff limits referred to in Article II.<sup>51</sup> Eventually, the tariffs reached such low levels as to present no real impediment to free trade.<sup>52</sup>

In addition to the tariff reductions, the GATT also places limits on the internal laws and regulations of the Contracting Parties. Specifically, each state’s treatment of imports from another Contracting Party must satisfy two principles of non-discriminatory treatment set forth

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<sup>47</sup> JACKSON, WORLD TRADING SYSTEM, *supra* note 24, at 52-3; Phillip R. Trimble, *International Trade and the “Rule of Law,”* 83 MICH. L. REV. 1016, 1020 (1985).

<sup>48</sup> JACKSON, WORLD TRADING SYSTEM, *supra* note 24, at 38.

<sup>49</sup> *Id.* at 31. In the Preamble to the GATT, the Contracting Parties manifested their desire to “enter[ ] into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” GATT, *supra* note 7, Preamble.

<sup>50</sup> GATT, *supra* note 7, art. II; JACKSON, WORLD TRADING SYSTEM, *supra* note 24, at 115, 118-19.

<sup>51</sup> JACKSON, WORLD TRADING SYSTEM, *supra* note 24, at 52-3.

<sup>52</sup> See JACKSON, WORLD TRADING SYSTEM, *supra* note 24, at 53; see also Nichols, *GATT Doctrine*, *supra* note 28, at 387 (noting that the Contracting Parties anticipated that tariff limits “were to be negotiated down so that eventually trade among states would be virtually unfettered”).

by the GATT. These are referred to as “most-favored-nation treatment”<sup>53</sup> and “national treatment.”<sup>54</sup>

Article I of the GATT sets forth the most-favored-nation obligation.<sup>55</sup> Under this article, one Contracting Party cannot be given preferential treatment over another country. Instead, the imports from, and exports to, each Contracting Party must be afforded equitable treatment with respect to customs procedures and all other import- or export-related regulations. In effect, each state must “grant to every other contracting party the most favorable treatment that it grants to any country.”<sup>56</sup>

The second type of non-discrimination is national treatment, set forth in Article III of the GATT.<sup>57</sup> Under this doctrine, the domestic laws of a Contracting Party must treat goods imported from another Contracting Party no less favorably than comparable domestically-produced goods once the goods have entered the domestic market.<sup>58</sup>

### **3. GATT Dispute Resolution**

The provisional nature of the GATT shaped its dispute resolution processes, which began as a diplomatic system of dispute settlement and gradually evolved into a rule-oriented but formally nonbinding arbitration scheme. From its inception, the development of dispute resolution mechanisms under the GATT was influenced by the tension between those states desiring a more

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<sup>53</sup> GATT, *supra* note 7, art. I.

<sup>54</sup> *Id.* art. III.

<sup>55</sup> *Id.* art. I(1).

<sup>56</sup> JACKSON, WORLD TRADING SYSTEM, *supra* note 24, at 133; GATT, *supra* note 7, art. I(1).

<sup>57</sup> GATT, *supra* note 7, art. III(1)-(2).

<sup>58</sup> JACKSON, WORLD TRADING SYSTEM, *supra* note 24, at 189; GATT, *supra* note 7, art. III(1)-(2).

flexible, negotiation based dispute resolution and those states preferring a rule based dispute resolution with clear written standards.<sup>59</sup> The provisional nature of the initial agreement strongly advanced the position of advocates of the diplomatic approach, at least at the outset.<sup>60</sup> As negotiated in 1947, GATT contained only a few paragraphs devoted to dispute settlement. Articles XXII<sup>61</sup> and XXIII<sup>62</sup> provide only the most cursory guidance for the contracting parties.

The GATT dispute resolution system is triggered when a Contracting Party determines that a benefit accruing to it under the GATT is being “nullified or impaired” by the actions of another Contracting Party.<sup>63</sup> The GATT requires the states involved to try to resolve the dispute between themselves before bringing the dispute to the other Contracting Parties. The first step the complaining state must take is to “make written representations or proposals” to the state it believes to be acting in contravention of the GATT.<sup>64</sup> The other state must “give sympathetic consideration” to these representations and proposals.<sup>65</sup>

If the parties are unable to resolve the dispute themselves, Article XXIII allows the complaining party to bring the complaint before the other Contracting Parties, who will investigate and make appropriate recommendations.<sup>66</sup> In the early years of the GATT, disputes

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<sup>59</sup> JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 454 (2000).

<sup>60</sup> The GATT always suffered from birth defect, inherent weakness that handicapped its operation. *See* JOHN. H. JACKSON, *DESIGNING AND IMPLEMENTING EFFECTIVE DISPUTE SETTLEMENT PROCEDURES: WTO DISPUTE SETTLEMENT, APPRAISAL AND PROSPECTS*, IN *THE WTO AS AN INTERNATIONAL ORGANIZATION* 161, 163 (Anne O. Krueger ed., 1998).

<sup>61</sup> GATT, *supra* note 7, art. XXII.

<sup>62</sup> *Id.* art. XXIII.

<sup>63</sup> GATT, *supra* note 7, art. XXIII(1); JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 94; Nichols, *GATT Doctrine*, *supra* note 28, at 392.

<sup>64</sup> GATT, *supra* note 7, art. XXIII(1).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* art. XXIII(2).

were taken up at a meeting of all the Contracting Parties.<sup>67</sup> Because this proved too inefficient and time-consuming for most disputes, the Contracting Parties developed an alternate method, under which a working party would investigate the dispute and make a recommendation.<sup>68</sup> The working party generally consisted of representatives of the disputing countries and of a few neutral countries.<sup>69</sup>

In 1955, however, the GATT Secretariat established dispute resolution panels of three to five experts to act as independent arbitrators to facilitate dispute resolution. The GATT used this general arbitration framework for dispute resolution until the WTO came into existence in 1995.<sup>70</sup> Between 1955 and 1995, the GATT system gradually grew more legalistic and professional, but it remained formally non-binding.<sup>71</sup>

The GATT dispute resolution system worked remarkably well in its early years because compliance with the system was the norm due to “the homogeneity of the initial contracting parties and the consensus in support of the GATT rules.”<sup>72</sup> In the 1950s and 1960s, however, as more states became Contracting Parties, this policy cohesion faltered, and the “decision-making process became more cumbersome.”<sup>73</sup>

The GATT dispute resolution system had a number of features that, over time, proved problematic. The allegedly noncomplying state had a right of veto at virtually every step of the

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<sup>67</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 95; see Nichols, *GATT Doctrine*, *supra* note 28, at 393.

<sup>68</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 95; Nichols, *GATT Doctrine*, *supra* note 28, at 393-94.

<sup>69</sup> Nichols, *GATT Doctrine*, *supra* note 28, at 393-94.

<sup>70</sup> *Id.*

<sup>71</sup> For a general description of the various modifications in panel procedures that have been implemented since 1955, see JACKSON, *RESTRUCTURING GATT*, *supra* note 23, at 61-65.

<sup>72</sup> *Montana i Mora*, *supra* note 29, at 108; see Robert E. Hudec, *supra* note 39, at 190.

<sup>73</sup> *Montana i Mora*, *supra* note 29, at 108; see Hudec, *supra* note 39, at 193.

process, from the appointment of a panel, to the decision to adopt a panel report, and to a decision to authorize trade sanctions in response to noncompliance.<sup>74</sup> Moreover, there were no set time periods for the various states of the process, giving the defending state the ability to delay the proceedings.<sup>75</sup>

Most importantly, because the GATT system relied heavily on consensus<sup>76</sup> in rendering decisions, those states against which complaints were filed could readily obstruct the process and make enforcement of any panel recommendations virtually non-existent.<sup>77</sup> The consensus requirement for adopting panel decisions meant that one party could block the decision by voting against it. Therefore, the losing state could effectively veto any legal effect of the recommendation. Consequently, only one panel decision resulted in the authorization of retaliation by the Contracting Parties in the entire history of the GATT.<sup>78</sup> Even in this case, which came from a complaint by the Netherlands against the United States,<sup>79</sup> political considerations forestalled application of the authorized retaliation, and the initial trade violation continued unabated.<sup>80</sup> Another political outcome of the consensus requirement was that

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<sup>74</sup> DUNOFF, *supra* note 5, at 781.

<sup>75</sup> *Id.*

<sup>76</sup> The concept of consensus was never formally defined under the GATT. It retains characteristics similar to unanimity in that any state member present has a veto authority. Consensus is unaffected by abstentions or absence. Norio Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, 12 J. INT'L ARB. 81, 105-06 (1995).

<sup>77</sup> Roberts, *supra* note 12, at 516.

<sup>78</sup> JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 96; Shell, *Trade Stakeholders Model*, *supra* note 17, at 365.

<sup>79</sup> In 1953, the Netherlands raised a complaint about U.S. restraints on imported dairy products. The Contracting Parties authorized the Netherlands to retaliate by limiting U.S. grain imports. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 96.

<sup>80</sup> *Id.*

countries “occasionally withheld approval of a panel report in retaliation for some country’s unwillingness to allow adoption of a panel report favorable to the first country.”<sup>81</sup>

In response to the growing ineffectiveness of the dispute resolution system, states relied increasingly on unilateral threats and trade sanctions to resolve their trade-related differences.<sup>82</sup> The United States was particularly eager to resort to unilateral measures.<sup>83</sup> The use of section 301 as a unilateral trade weapon<sup>84</sup> against foreign governments and industries outside the legal framework of the GATT upset many U.S. trading partners<sup>85</sup> and became a major issue in the Uruguay Round.<sup>86</sup> As it became clear that section 301 was a target for foreign trade negotiators, Congress announced that the weak GATT dispute resolution system made section 301 a necessity and that no revisions of section 301 could be expected unless there were major changes in the dispute resolution process.<sup>87</sup> Thus, when the Contracting Parties met in the mid-1980s to overhaul the international trade system, the growing impotence of the GATT dispute resolution process was a major issue to be solved.<sup>88</sup>

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<sup>81</sup> Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT’L LAW. 389, 402 (1995).

<sup>82</sup> Nichols, *GATT Doctrine*, *supra* note 28, at 398-99.

<sup>83</sup> Shell, *Trade Legalism*, *supra* note 45, at 844-45.

<sup>84</sup> Warren Maruyama, *Section 301 and the Appearance of Unilateralism*, 11 MICH. J. INT’L L. 394, 397 (1990) (calling § 301 the “Schwarzenegger of U.S. Trade Law”).

<sup>85</sup> Wolfgang W. Leirer, *Retaliatory Action in United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84*, 20 N.C. J. INT’L L. & COM. REG. 41, 44-5 (1994) (noting that Europeans were especially upset because nearly one quarter of all section 301 cases had been aimed at Europe).

<sup>86</sup> Montana i Mora, *supra* note 29, at 130-31, 134-36.

<sup>87</sup> Alan O. Sykes, “Mandatory Retaliation” for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT’L L.J. 301, 324 (1990).

<sup>88</sup> Shell, *Trade Legalism*, *supra* note 45, at 848.

## **B. The World Trade Organization**

The next major step in the development of international trade regulation was the creation of the WTO. This subpart of the thesis sets forth the history of the WTO and, in particular, the improvements made to the process of resolving international trade disputes.

### **1. Formation of the WTO**

The Uruguay Round of trade negotiations, which commenced in 1986, was an attempt to make the international trade system more efficient. The procedures that had arisen around the GATT were proved unworkable in a number of areas, including dispute resolution, as discussed above. In addition, the GATT failed to cover several important areas of world trade, including services and intellectual property.<sup>89</sup> The Contracting Parties felt that the time had finally come to establish a new international trade organization to integrate and oversee world trade.

The Uruguay Round resulted in the formation of the WTO, which officially came into existence on January 1, 1995.<sup>90</sup> The WTO was formed to be more than just the successor to the GATT in that it was intended to supersede and encompass the GATT, as well as all the subsequent trade negotiations and procedures. The preamble to the WTO Charter states that the participating states are resolved “to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade

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<sup>89</sup> WTO Charter, *supra note 1*, at 8. Moreover, for a variety of reasons, the GATT provisions regarding agriculture went largely unheeded by the Contracting Parties. *Id.*

<sup>90</sup> WTO Charter, *supra note 1*, art. I; Nichols, *GATT Doctrine*, *supra note 28*, at 380 n.1.

Negotiations.”<sup>91</sup> Accompanying the creation of the WTO were a series of renegotiated trade agreements, including an updated version of the GATT known as GATT 1994.<sup>92</sup>

## 2. WTO Dispute Resolution

The system for resolving international trade disputes underwent major changes as a result of the Uruguay Round. The WTO Charter contains the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>93</sup> which provides the proper dispute resolution procedures in much greater detail than the GATT.<sup>94</sup> The Understanding makes six important modifications to the system for resolving trade disputes. When viewed together, these changes show that the new WTO system is much more powerful and authoritative to resolve disputes than the GATT system.<sup>95</sup>

The first major change was the creation of a single entity, the Dispute Settlement Body (DSB), to oversee all trade disputes.<sup>96</sup> As a result, all dispute settlement procedures under the GATT, the Subsidies Code, and a variety of other trade-related agreements are now brought under the DSB.<sup>97</sup> Because the GATT lacked such an overarching commission, there was an opportunity for parties to forum-shop for the particular dispute resolution mechanism that best

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<sup>91</sup> WTO Charter, *supra* note 1, Preamble.

<sup>92</sup> *Id.* at 1140.

<sup>93</sup> Understanding, *supra* note 9.

<sup>94</sup> *Id.* (listing the new WTO procedures in great detail) with GATT, *supra* note 7, art. XXIII (providing merely cursory explanation of the GATT procedures).

<sup>95</sup> Schleyer, *supra* note 8, at 2286.

<sup>96</sup> Understanding, *supra* note 9, art. 2. The DSB is composed of representatives from every state that has signed the treaty or code at issue. Shell, *Trade Legalism*, *supra* note 45, at 848 n.89.

<sup>97</sup> WTO Charter, *supra* note 1, at 1126.

suited their objectives.<sup>98</sup> The formation of the DSB ends the potential for forum-shopping and reduces the threat of inconsistent decisions.

A second modification made by the Understanding is the creation of an appellate procedure. In a clear attempt to make the dispute resolution system more consistent, fair, and effective, the Understanding gives parties the right to appeal panel decisions to the Appellate Body.<sup>99</sup> The Appellate Body is a permanent, seven-member trade court that oversees the work of all dispute resolution panels, regardless of the treaty or code that is the subject of the dispute.<sup>100</sup>

Third, the Understanding repairs a major weakness of the GATT system by making adoption of the panel and Appellate Body decisions virtually automatic. Adoption of a decision can only be forestalled if all the member states, including the winning state, agree by consensus not to adopt it.<sup>101</sup> Under the GATT, the losing party alone could single-handedly derail a panel decision by voting against it. In sharp contrast to the old GATT system, however, a WTO panel decision “shall be adopted by the Dispute Settlement Body (DSB) unless a party to the dispute formally notifies the DSB of its decision to appeal to the WTO Appellate Body or the DSB decides by consensus not to adopt the report.”<sup>102</sup> Also, once the Appellate Body has issued its opinion, the decision is binding unless the Dispute Settlement Body votes unanimously to overrule it.<sup>103</sup> Thus, under the WTO, the winning party can rescue a decision by voting for it.<sup>104</sup>

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<sup>98</sup> Shell, *Trade Legalism*, *supra* note 45, at 848; Patricia Kalla, *The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go from Here?*, 5 DICK. J. INT’L L. 82, 92 (1986) (noting that former GATT practice involved procedures under six disparate dispute mechanisms adopted by nine codes at the Tokyo Round)..

<sup>99</sup> Understanding, *supra* note 9, art. 17.

<sup>100</sup> *Id.* art. 17(1)-(2).

<sup>101</sup> *Id.* arts. 16(4), 17(14).

<sup>102</sup> *Id.* art. 16(4), reprinted in 33 I.L.M. at 1235.

<sup>103</sup> *Id.* art. 17(14), reprinted in 33 I.L.M. at 1237 (“An Appellate Body report shall be adopted by the DSB and

A fourth change made by the Understanding is the imposition of time limits on the process. Under the GATT, the dispute resolution system was open-ended and panels often deliberated in numerous sessions during a period of months.<sup>105</sup> The Understanding imposes strict time limits on the disputants,<sup>106</sup> the panel,<sup>107</sup> the Appellate Body,<sup>108</sup> and the DSB<sup>109</sup> at every stage of the proceedings, and encourages those involved to discharge their duties promptly.<sup>110</sup>

Under the GATT system, delays were often attributable to disagreements in the formation of the panel. The consensus requirement “delayed the establishment [of the panel] while the parties engaged in meaningless semantic struggles over whether anyone had a right to the establishment of a panel and the precise remit of the panel.”<sup>111</sup> The Understanding reverses the power balance by requiring consensus to delay the formation of a panel once the complaining state has requested one.<sup>112</sup> Thus, under the WTO system, another delay tactic is eliminated since panel formation is virtually automatic.

Fifth, the Understanding gives teeth to the dispute resolution system by formalizing enforcement procedures.<sup>113</sup> Under the GATT, the most that the Contracting Parties could do

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unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report . . . .”).

<sup>104</sup> Shell, *Trade Legalism*, *supra* note 45, at 850.

<sup>105</sup> Nichols, *GATT Doctrine*, *supra* note 28, at 396.

<sup>106</sup> Understanding, *supra* note 9, arts. 12(5)-(6), 15(1)-(3).

<sup>107</sup> *Id.* arts. 12(3), 12(8)-(9), 21(5).

<sup>108</sup> *Id.* art. 17(5).

<sup>109</sup> *Id.* arts. 20, 21(4).

<sup>110</sup> *Id.* art. 4(9) (encouraging parties to accelerate proceedings in cases of urgency).

<sup>111</sup> Young, *supra* note 81, at 402.

<sup>112</sup> Understanding, *supra* note 9, art. 6(1).

<sup>113</sup> *Id.* art. 22; see also Young, *supra* note 81, at 404-05 (noting that under the WTO system, “the offending party is eventually told in no uncertain terms that it is to accept all [the WTO's] rulings and decisions”).

was authorize the aggrieved state to retaliate against the violator state.<sup>114</sup> A state with sufficient political and economic power could easily ignore this retaliation and continue the prohibited practices.<sup>115</sup> By adding guiding principles on the means of enforcement, however, enforcement under the Understanding can either take the form of compensation for the harm caused by the violator state or withdrawal of trade concessions made by the affected state.<sup>116</sup>

Finally, the drafters of the Understanding addressed the problem of unilateral retaliatory action. Article 23, entitled “Strengthening of the Multilateral System,” prohibits all members from “mak[ing] a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.”<sup>117</sup> This prohibition solidifies the authoritative and exclusive position of the WTO in trade dispute resolution.<sup>118</sup>

Viewed together, these changes reflect the desire of the WTO member states to remove political influences from trade dispute resolution and encourage greater predictability and fairness in the application of trade agreements.<sup>119</sup>

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<sup>114</sup> GATT, *supra note 7*, art. XXIII(2).

<sup>115</sup> This is essentially what happened in the United States-Netherlands dispute of 1953. *See supra note 73*.

<sup>116</sup> Understanding, *supra note 9*, art. 22; Young, *supra note 81*, at 404.

<sup>117</sup> Understanding, *supra note 9*, art. 23(2)(a).

<sup>118</sup> *See Young, supra note 81*, at 400-01.

<sup>119</sup> Schleyer, *supra note 8*, at 2288.

### **III. THE ROLE OF PRIVATE PARTICIPATION IN THE WTO DISPUTE RESOLUTION SYSTEM**

The role of private parties in international dispute resolution has been the subject of debate among commentators for many years. After summarizing the philosophical debate over the nature of dispute resolution, this part shows that the WTO dispute resolution system has moved from power-oriented dispute resolution toward a rule oriented one. This part concludes that greater private participation in the WTO dispute resolution process is necessary to advance the rule-oriented reform of the WTO.

#### **A. Power vs. Rule**

Since the inception of the GATT, there has been a debate over the appropriate nature of international trade regulation and dispute resolution. Although commentators have expressed a wide spectrum of views on this issue, a general distinction can be made between those who prefer a “power-oriented” or “pragmatist” approach and those who prefer a “rule-oriented” or “legalist” approach.<sup>120</sup>

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<sup>120</sup> The concepts of power-oriented and rule-oriented diplomacy were first developed by Professor Jackson. See John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98 (1978) [hereinafter Jackson, *Crumbling Institutions*]. The terms “pragmatist” and “legalist” were first used in this context by Professor Trimble, see Trimble, *supra note 47*, at 1017, and later by numerous commentators, e.g., Montana i Mora, *supra note 29*, at 109; Shell, *Trade Legalism*, *supra note 45*, at 833.

Pragmatists believe that the goal of international trade dispute resolution should be merely to provide a forum for states to resolve disputes among themselves in whichever way they see fit.<sup>121</sup> They argue that the primary purpose of the dispute resolution system should be to end the dispute as soon as possible by encouraging negotiations, consultations, and appropriate political compromises.<sup>122</sup> Under this view, the system would encourage compromises even if they are in contravention of the rules and agreements governing the trade practices in question.<sup>123</sup>

The pragmatist view comes from the idea that trade-related diplomacy should be power-oriented rather than rule-oriented.<sup>124</sup> In power-oriented diplomacy, it is the relative power of the parties that determines the resolution of the dispute and not any predetermined set of rules.<sup>125</sup> Under this system, “[a] small country would hesitate to challenge a large one on whom its trade depends. Implicit or explicit threats . . . would be a major part of the technique employed.”<sup>126</sup>

The legalists, on the other hand, take the view that the goal of trade dispute resolution should be to preserve the integrity of the applicable rules.<sup>127</sup> The benefit of this approach is that it encourages predictability and stability in international trade practices.<sup>128</sup> They argue that

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<sup>121</sup> Young, *supra note* 81, at 390.

<sup>122</sup> OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 71 (1985); Trimble, *supra note* 47, at 1017.

<sup>123</sup> *Montana i Mora*, *supra note* 29, at 110-11.

<sup>124</sup> *Id.* at 109.

<sup>125</sup> Jackson, *Crumbling Institutions*, *supra note* 120, at 98-99.

<sup>126</sup> John H. Jackson, Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT, 13 J. WORLD TRADE L. 1, 3-4 (1979) [hereinafter Jackson, Governmental Disputes].

<sup>127</sup> See JACKSON, WORLD TRADING SYSTEM, *supra note* 24, at 93; Jackson, *Crumbling Institutions*, *supra note* 120, at 99.

<sup>128</sup> *Montana i Mora*, *supra note* 29, at 129; Trimble, *supra note* 47, at 1017-18; Young, *supra note* 81, at 390.

private parties and governments could more adequately “plan economic decisions and thereby maximize efficiency” if trade conditions are predictable.<sup>129</sup>

In a rule-oriented system, the resolution of a dispute would be based on adherence to a prescribed set of rules to which the parties have already agreed.<sup>130</sup> Any disagreements that arise concerning the application of the rules are resolved by an impartial third party or by some other unbiased, predetermined process.<sup>131</sup> In contrast to the power-oriented approach, the rule-oriented approach gives no significance to the relative power of the states in dispute.<sup>132</sup>

## **B. The Trend Toward the Rule-Oriented Approach**

The evolution of world trade dispute resolution in this century represents a shift from a power-oriented approach (i.e., pragmatism) to a rule-oriented approach (i.e., legalism).<sup>133</sup> The two major movements toward a rule-oriented approach have been the Bretton Woods Conference, including the subsequent development of the GATT, and the recent creation of the WTO.

The states participating in the Bretton Woods Conference and the drafters of the GATT were trying to create a reliable, integral set of rules that would govern world trade.<sup>134</sup> Had the ITO come into existence, it would have contained an elaborate dispute resolution system unlike any other international dispute resolution system.<sup>135</sup> Because the GATT was intended merely as a

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<sup>129</sup> Trimble, *supra* note 47, at 1017.

<sup>130</sup> Jackson, *Crumbling Institutions*, *supra* note 120, at 99.

<sup>131</sup> Jackson, *Governmental Disputes*, *supra* note 126, at 4.

<sup>132</sup> See Jackson, *Crumbling Institutions*, *supra* note 120, at 98-99.

<sup>133</sup> Professor Jackson argues more broadly that the entire “history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, toward a rule oriented approach” and that “modern western democracies ... have passed far along the scale toward a rule oriented approach.” *Id.* at 99.

<sup>134</sup> See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 93.

<sup>135</sup> *Id.*; Young, *supra* note 81, at 392-93.

preliminary agreement to regulate world trade until the ITO took over, it did not contain detailed dispute resolution provisions.<sup>136</sup> In the early years of the GATT, however, the Contracting Parties developed procedures, such as the practice of appointing an impartial panel to review the dispute and make a recommendation that reflected an acceptance of a rule-oriented approach.<sup>137</sup>

The following decades, however, were marked by a breakdown of the dispute resolution system and a retreat into power-based diplomacy.<sup>138</sup> The birth defects of the GATT began to manifest themselves as political influences crept into the dispute resolution process.<sup>139</sup> This politicization of the system undermined the integrity of the GATT rules and made the power of the parties a primary factor in the outcome of trade disputes.<sup>140</sup>

One major goal of the Uruguay Round was to improve the increasingly ineffectual dispute resolution system by inhibiting the parties' ability to use their political and economic power to circumvent the rules.<sup>141</sup> The new dispute resolution system under the WTO represents a major shift toward a legalist approach and away from the power-based diplomacy that pervaded the GATT system.<sup>142</sup>

For example, the creation of the DSB to oversee all disputes accords with the legalist idea of an impartial final arbiter. The addition of an appellate procedure shows that the member states were putting more emphasis on the adequacy and quality of rule interpretation and less on

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<sup>136</sup> Young, *supra note* 81, at 391-92.

<sup>137</sup> JACKSON, WORLD TRADING SYSTEM, *supra note* 24, at 93; Young, *supra note* 81, at 393-94.

<sup>138</sup> See JACKSON, WORLD TRADING SYSTEM, *supra note* 24, at 93; Montana i Mora, *supra note* 29, at 111, 119-20.

<sup>139</sup> JACKSON, WORLD TRADING SYSTEM, *supra note* 24, at 93; Montana i Mora, *supra note* 29, at 111, 119-20; Young, *supra note* 81, at 394.

<sup>140</sup> Montana i Mora, *supra note* 29, at 108-09.

<sup>141</sup> Shell, *Trade Legalism*, *supra note* 45, at 845.

<sup>142</sup> *Id.* at 833; Young, *supra note* 81, at 391, 399, 406.

the swift resolution of the dispute. This focus on rule integrity illustrates the member states' strong legalist view. The provision of strict time limits, the automatic adoption of panel decisions, the prohibition of unilateral action, and the heightened enforcement measures limit the ability of large states to use their power to delay, derail, or circumvent the dispute resolution system. Taken together, these changes make the WTO dispute resolution system look much more like a courtroom than like a negotiating table.

### **C. The Advantages of the Rule-Oriented Approach**

This increasing emphasis on adherence to a prescribed set of rules in international trade dispute resolution is a desirable trend that should continue in the future. Perhaps the primary benefit of such an approach is that it makes global trade practices more predictable and therefore encourages international investment and trade.<sup>143</sup> One of the goals of the WTO dispute resolution system is to “provid[e] security and predictability to the multilateral trading system.”<sup>144</sup> A power-oriented system, by definition, produces different outcomes based on the power balance of the states in dispute.<sup>145</sup> The resulting uncertainty would make private parties justifiably hesitant to invest their capital and effort into international trade.

The pragmatists' emphasis on merely resolving each dispute as quickly as possible<sup>146</sup> is too shortsighted and would actually lead to more international disputes. A reliance on the power of the respective states encourages large states to use their economic and political power to reap

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<sup>143</sup> See *Montana i Mora*, *supra* note 29, at 178.

<sup>144</sup> *Understanding*, *supra* note 9, art. 3(2).

<sup>145</sup> Young, *supra* note 81, at 390, 401.

<sup>146</sup> See Long, *supra* note 122, at 71.

benefits in contravention of the rules. Such a system would encourage, and maybe even ensure, future disputes.<sup>147</sup> A rule-oriented approach, on the other hand, encourages adherence to the rules, giving strong states no incentive to try to circumvent them.<sup>148</sup>

A further benefit of a rule-oriented approach is that it will foster more amicable international relations. A system that relies on a state's power encourages a state to exercise its power."<sup>149</sup> The international acrimony that resulted from the United States' use of unilateral actions in the decades preceding the WTO illustrates the deleterious effects that a power-oriented system can have.<sup>150</sup>

Indeed, the trend toward rule-oriented approach, both in international trade and in other contexts, may be an inevitable result of the global rise of democracy. As national power shifts from entrenched governmental decision-makers to private citizens, the power of states is increasingly divided among competing domestic constituencies.<sup>151</sup> With a state's power thus decentralized, it can less successfully be used as the primary bargaining chip in international relations. Therefore, a power-oriented approach "becomes more difficult if not impossible."<sup>152</sup>

Of course, the trend toward legalism is not without criticism. One concern is that a strong, rule-based international trade regime will limit states' ability to structure their own domestic laws.

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<sup>147</sup> David E. Sanger, *Europe Postpones Challenge to U.S. on Havana Trade*, N.Y. TIMES, Feb. 13, 1997, at A1. (noting that the United States' attempt to resolve this dispute by invoking a "national security exemption" will probably lead to future disputes over the use of such an exemption by other states).

<sup>148</sup> See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 24, at 112 ("[I]t is not the resolution of the specific dispute under consideration which is most important. Rather, it is the efficient and just future functioning of the overall system which is the primary goal of a dispute-settlement procedure.").

<sup>149</sup> Jackson, *Crumbling Institutions*, *supra* note 120, at 100.

<sup>150</sup> WTO Charter, *supra* note 1, at 25; Shell, *Trade Legalism*, *supra* note 45, at 844-45.

<sup>151</sup> See Jackson, *Crumbling Institutions*, *supra* note 120, at 100 (describing how the growth of democracy "restrict[s] the degree of power and discretion which the Executive possesses").

<sup>152</sup> *Id.* at 101.

It has been argued that the domestic laws of every state reflect the political and societal values of that state, and that imposing a superseding international law undermines these values in the name of free trade.<sup>153</sup> This argument, however, overlooks the role that each state's domestic processes played in determining whether that state would enter into the WTO. The result of the Uruguay Round was merely the Agreement Establishing the World Trade Organization.<sup>154</sup> To obtain the benefits afforded by WTO membership, and the corresponding restraints, states needed to approve the Charter through their domestic ratification processes.<sup>155</sup> The political and societal values already came into play when each state decided to join the WTO. Furthermore, the WTO Charter was drafted by governmental representatives who presumably tried to infuse their respective national values into the Charter and the trade agreements that accompanied it.

#### **D. The Benefits of Private Participation in WTO Dispute Resolution**

Like other dispute settlement systems, the purpose of the WTO dispute resolution system is to achieve WTO objectives as a whole.<sup>156</sup> The WTO dispute resolution system, therefore, cannot be estimated without considering whether it serves to maximize the objectives of the

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<sup>153</sup> Nichols, *Extension of Standing*, *supra* note 2, at 299. Professor Nichols recommends that the WTO adopt an exception under which “laws primarily codifying an underlying societal value and only incidentally hindering free trade should not be subject to World Trade Organization scrutiny.” *Id.* at 301.

<sup>154</sup> WTO Charter, *supra* note 1.

<sup>155</sup> *See id.* arts. XI, XII, XIII & XIV (referring to the need for member states to “accept” or “accede to” the agreement). The United States legislation implementing the WTO Charter is the Uruguay Round Agreements Act, 19 U.S.C. §§ 3501-3624 (1994).

<sup>156</sup> Roberts, *supra* note 12, at 526-26.

WTO. One of the WTO objectives is the promotion of trade among all states by increasing the production of goods and services and the incomes and opportunities of individuals.<sup>157</sup>

The movement toward a legal approach in international trade dispute resolution has been based on separating political influences and motives from dispute resolution. A primary benefit of such an approach is that it allows private parties to more accurately predict future trade conditions, thus allowing them to maximize the value of their resources by participating in international trade. To achieve this objective, private parties should be allowed to participate in the dispute resolution system in a manner that will enable them to protect their interests.

Of course, there are objections that the expansion of standing hurts some constituency of a member state, causes unequal treatment between private parties, and most seriously, might cause the WTO to be unable to pursue the goal of free trade because states tend to keep their control on international trade.<sup>158</sup> These objections, however, overlooks the benefits that private party participation will bring to the WTO and international trade. Allowing private parties to bring actions against state members, however, would greatly improve the ability of the WTO dispute resolution system to serve WTO objectives.

These objections, however, overlooks the benefits that private party participation will bring to the WTO and international trade. Allowing private parties to bring actions against state

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<sup>157</sup> The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, WTO Agreement, Preamble.

<sup>158</sup> Philip M. Nichols, *Participation Of Nongovernmental Parties In The World Trade Organization: Extension Of Standing In World Trade Organization Disputes To Nongovernment Parties*, 17 U. PA J. INT'L ECON. L. 295 (1996).

members, however, would greatly improve the ability of the WTO dispute resolution system to serve WTO objectives.

### 1. The “Political Capture” Theory

Private party access to the WTO can prevent the problem of political capture. The capture theory posits an organization run by individuals who try to maximize their own interests instead of interests of the organization.<sup>159</sup> In the context of a domestic organization, the members attempt to maximize a private, rather than public, utility function.<sup>160</sup> In the case of the WTO, it is run by states which might sacrifice private parties’ interest to maximize their own interests. For example, the United States might be hesitant to raise a claim against Japanese import restrictions on cars, or even to express negative view of these restrictions because the United States must consider its own interest such as diplomacy and international relations. Thus, so long as it is only states that are parties to the WTO, the only interests that can be adequately represented and reflected are those of states which may conflict with the objectives of the WTO.<sup>161</sup> On the other hand, private participation in international organizations can help break the cycle of state interest perpetuated by political capture. In her article addressing individual rights in international trade organizations, Andrea Schneider discusses the link between domestic politics and international trade:

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<sup>159</sup> Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations A Voice in the WTO?*, 12 *TRANSNAT’L LAW* 427, 431, n.17 (Fall 1999). (“Take, for example, the hazardous waste industry. High-level EPA regulators and other officials leave government positions and find high-level jobs in the same industry that they had been responsible for regulating.”).

<sup>160</sup> HORWITZ, *THE IRONY OF REGULATORY REFORM*, 36 (1989).

<sup>161</sup> Laidhold, *supra*, note 159, n.19.

The involvement of private actors in the dispute resolution mechanisms of trade organizations has the ability to reduce the linkage between trade and domestic political interests. While theoretically this link allows governments to be more responsive to their citizens, in reality, the link between trade and politics keeps governments tethered to special and well-organized interest groups. Once a state has determined that it is in its national interest to join a trade organization and once rules are adopted under that organization, the link to domestic political interests can be reduced by giving private actors standing to enforce the agreement. In that way governments will be responsible for following the rules across the board rather than selectively.<sup>162</sup>

Thus, private participation in the WTO dispute resolution system can help improve state accountability to the companies and individuals who conduct international trade. In contrast, the lack of private access to the WTO leads to political capture at the international level. Giving private parties the rights to bring cases, rather than requiring them to lobby or petition their government to take action, will eliminate the problems of political capture at the dispute resolution stages.

## **2. Democracy Deficit**

According to the theory of democracy deficit, as power is centralized in an organization or government, and as increasing numbers of laws are passed, individuals have less ability to influence the actions of the organization or government.<sup>163</sup> At the WTO, the lack of access for private parties to dispute resolution mechanisms may be more appropriately termed, “democracy absence.”<sup>164</sup> Indeed, the lack of any legitimate participation in the WTO holds corporations, NGO’s and public interest groups at a great disadvantage in contrast to the ability of states to

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<sup>162</sup> Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT’L ECON. L. 587, 594 (1998).

<sup>163</sup> *Id.* at 591.

<sup>164</sup> Laidhold, *supra note* 159, at 432.

influence trade policies. This problem is compounded at the WTO because the agreements and procedures of the WTO have a major impact on the daily operations of the business community.<sup>165</sup>

Like any organization, the WTO's continued validity and relevance is dependent on the support of those who are intended to benefit - in this case, private parties.<sup>166</sup> If private parties are denied sufficient access to the dispute resolution system, then the WTO will lose its legitimacy as the final arbiter of international trade and its decisions will be rendered powerless.<sup>167</sup>

Democracy deficit is exacerbated at the WTO in the absence of private party participation. Most of the time, and in most states, member governments of the WTO make a concerted effort to adequately represent private parties before the WTO.<sup>168</sup> In the same way, however, a member government to the WTO may choose not to represent any interests other than its own. Democracy deficit is problematic both with respect to state accountability and to the conduct of international trade among private parties. A state's capacity to act at will and subject its trade policies to political, rather than economic, environmental and other concerns lessens the

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<sup>165</sup> See *Montana i Mora*, *supra* note 29, at 162 (describing the profound impact that international treaties in general, and GATT specifically, have on individuals and businesses).

<sup>166</sup> See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 351 (1996) (arguing that "a closed dispute resolution process will undermine popular support").

<sup>167</sup> See Young, *supra* note 81, at 408 ("[P]eople are more likely to accept adverse political decisions if those decisions are made by political institutions they consider legitimate.").

<sup>168</sup> South Korea brought an action before the WTO on behalf of South Korean producers of DRAMS (Dynamic Random Access Memory chips) including Hyundai Electronics Industries and LG Semicon, *See* WTO Panel Report, *United States - Anti-Dumping Duty on DRAMs of One Megabit or Above From Korea*, WT/DS99/R.(Jan. 29, 1999); The United States brought an action before the WTO on behalf of U.S. banana growers including Chiquita Brands Int'l, Inc, *See* *EU - Bananas*, *supra* note 20.

effectiveness or applicability of the WTO.<sup>169</sup> Those problems can be solved when the WTO allows private parties to use its dispute resolution system.<sup>170</sup>

### 3. Transparency

Transparency is important in international system because “clear rules set forth how the system is going to work and create confidence on the part of users of the system.”<sup>171</sup> It encourages the parties to the dispute to use the system more often by making the rules and procedures clear, providing precedent and possible persuasive authority for other dispute resolution through published decisions, and increasing the predictability of the system.<sup>172</sup> Through transparency, the international community observes that the result was achieved in a just manner.<sup>173</sup> A low level of transparency exists if rules and procedures are not well-established in advance of a dispute. In that case, “resolution is left up to the parties, and no system is set forth.”<sup>174</sup> On the other hand, a high level of transparency is achieved when procedures and decisions of a system are published regularly to create a high level of predictability.<sup>175</sup>

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<sup>169</sup> Schleyer, *supra* note 8, at 2294. (“For example, if the United States is in delicate trade negotiations with Japan, the United States might be hesitant to raise a claim against Japanese import restrictions on, say, cars, or even to express a negative view of these restrictions. If Ford or General Motors can be the instigator or primary proponent of the claim, the problem will be addressed without the United States having to take the political heat. Certainly, the political complications ... would not be so severe or troubling if the claim was raised by a private party instead of another government.”).

<sup>170</sup> *Id.*

<sup>171</sup> Schneider, *supra* note 162, at 614.

<sup>172</sup> *Id.* at 613.

<sup>173</sup> Roberts, *supra* note 12, at 541.

<sup>174</sup> *Id.* at 615.

<sup>175</sup> *Id.* at 616.

Although the WTO has made great progress toward achieving predictability and transparency through the establishment of the DSU and regularly published decisions, there is nevertheless an inherent problem in its transparency potential.<sup>176</sup> Transparency includes not only the right to be informed, but also the right to inform and participate in the adjudicative process.<sup>177</sup> “Clearly, both the right to inform and to be informed [and thus to participate in the adjudicative process] are both important aspects of transparency.”<sup>178</sup> Therefore, true transparency in the WTO cannot be achieved without private participation in the dispute resolution system. By denying private participation in its dispute resolution system, the WTO lacks transparency because private parties in the form of individuals, corporations and NGOs can never be sure of a position that a state will endorse before the WTO.

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<sup>176</sup> *Id.*

<sup>177</sup> Laidhold, *supra note 159*, at 433.

<sup>178</sup> P. Clark & P. Morrison, *Key Procedural Issues: Transparency*, 32 INT'L LAW. 851, 857 (1998).

## **IV. THE INADEQUACY OF PRIVATE PARTICIPATION IN THE WTO DISPUTE RESOLUTION SYSTEM**

Despite its rule-oriented reform, the WTO has not opened the dispute resolution system to private parties, leaving international trade matters in sovereign states and looking at the flow of goods as occurring between these states.<sup>179</sup> Under the current WTO Dispute Resolution System, private actors are involved only to the extent that they lobby their governments to represent their interests and to protect their industries.<sup>180</sup> Private participation in the WTO dispute resolution system is now a little bit broadened by the WTO Appellate Body, which asserted the right of member states to include private, non-governmental employees in their trade delegations before the WTO,<sup>181</sup> and acknowledged the right of private individuals or organizations to submit amicus briefs in support of their positions in international trade disputes.<sup>182</sup> This part will analyze whether the degree of private party participation available at the current WTO dispute resolution system is adequate enough for private parties to protect their interests without the ability to raise a claim before WTO dispute resolution system.

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<sup>179</sup> R. Bruno, *Access of Private Parties to International Dispute Settlement: A Comparative Analysis*, 148-49 (1995) (unpublished L.L.M. thesis, Harvard University).

<sup>180</sup> For Example, the United State negotiated with Japan to open its automobile market. *See* Schneider, *supra* note 162, at 603.

<sup>181</sup> *See* EU-Bananas, *supra* note 20.

<sup>182</sup> *See* Shrimp-Turtles, *supra* note 21, at 15-22 (holding that amicus briefs may now be sent directly to the WTO without attachment to members' submissions).

## **A. Use of Domestic Influence**

Currently, private parties who want to challenge a trade practice of another state must try to use their domestic influence to get their government to raise the claim. The private party can persuade its government to raise the claim through informal means such as voting or lobbying. In addition, the United States has instituted formal procedures by which citizens can petition the government to respond to another state's trade violation.

### **1. Informal Methods**

Where a dispute resolution process is available only to states, private parties can force their government to bring their claim to the WTO dispute resolution system by lobbying or using their political power. For example, the real economic actors in the dispute in the mid-1990s between the United State and Japan over access to Japan's market for film products were film manufactures Kodak and Fuji.<sup>183</sup> Kodak successfully lobbied the U.S. government to raise the claim before the WTO and both companies worked side by side with their governments during the entire WTO dispute settlement process.<sup>184</sup>

Although member governments of the WTO try to adequately represent private parties before the WTO, there are many reasons why a state might neglect to raise a valid claim on behalf of private parties. For example, a state "might not want to repeat [a private party's] point if doing so could undermine the government in another WTO case or in domestic litigation."<sup>185</sup>

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<sup>183</sup> DUNOFF, *supra* note 5 at 216.

<sup>184</sup> *Id.*

<sup>185</sup> Charnovitz, *supra* note 166, at 353.

In addition, every state has constituents with varying interests, and the government cannot possibly represent all of their interests, no matter how well-intentioned and responsive it is.<sup>186</sup>

Furthermore, a state's responsiveness to its constituents will be balanced against its desire to maintain amicable relations with its trading partners, especially those with significant political and economic power.<sup>187</sup> For this reason a state will inevitably bring fewer claims than some of its constituents would like. This political, power-oriented influence on the dispute resolution system undermines the WTO's goals of predictability and stability in world trade.

Some commentators argue that private standing before the WTO is unnecessary because most countries that are important to international trade are responsive to the needs of their citizens.<sup>188</sup> According to the commentators, "democratic governments do function to fairly assess, evaluate, and coordinate various societal values and goals" and that "[t]his is true of trade policy as well."<sup>189</sup>

A distinction, however, must be made between the formation of trade policy and the effective implementation of policy once it is formed. With respect to the former, a government plays the essential role in balancing societal, political, and economic values. Dispute resolution, however, involves the latter, and a consideration of competing values, as opposed to an emphasis on the rules, would undermine the predictability that the WTO seeks to achieve.

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<sup>186</sup> *Id.* at 342 (noting that "many national governments fail to represent the interests of even a majority of their constituencies as periodically reflected by low approval ratings.").

<sup>187</sup> See Shell, *Trade Legalism*, *supra* note 45, at 901. Professor Shell also notes the "free rider problems" that arise in this context. He observes that the benefits of eliminating a prohibited trade practice accrue to all states, while the diplomatic fallout is confined to the state that brings the claim. Therefore, states will be hesitant to raise a claim, even where doing so would be a net benefit to world trade as a whole. *Id.* at 901-02.

<sup>188</sup> Trimble, *supra* note 47, at 1025.

<sup>189</sup> Nichols, *Extension of Standing*, *supra* note 2, at 311-12.

## 2. Formal Methods: Section 301

The United States' section 301 of the Trade Act of 1974 ("Section 301") establishes formal procedures by which private parties can petition their government to take action in response to the alleged trade infractions of another state.<sup>190</sup> This procedure could conceivably be used to expand private participation in the WTO dispute resolution system, and thus need to be examined in closer detail to evaluate its adequacy and feasibility.

Under Section 301, a citizen may petition the U.S. Trade Representative to take action against a foreign state's trade practices.<sup>191</sup> After an investigation, the Trade Representative will decide whether the trade practice in question is violating any trade agreement, and, if so, what measures should be taken.<sup>192</sup> When the United States has retaliated, it has usually been in the form of heightened tariffs or other restrictions on imports.<sup>193</sup>

Section 301 is clearly power-oriented and has produced all of the negative effects that are associated with the use of power-oriented negotiation tactics. While Section 301 actions have been highly successful in the past, they have soured relations between the United States and its trading partners and have even inspired retaliation against the United States.<sup>194</sup> The animosity toward the United States that unilateral measures can produce cautions against continued use of Section 301 to resolve trade disputes.

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<sup>190</sup> 19 U.S.C. §§ 2411-2420 (1994).

<sup>191</sup> 19 U.S.C. § 2412(a)(1).

<sup>192</sup> *Id.* §§ 2411-2420; A. Lynne Puckett & William L. Reynolds, *Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*, 90 AM. J. INT'L L. 675, 678-79 (1996).

<sup>193</sup> RICHARD O. CUNNINGHAM & CLINT N. SMITH, SECTION 301 AND DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION, IN THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, 581, 583.

<sup>194</sup> WTO Charter, *supra note 1*, at 25; Shell, *Trade Legalism*, *supra note 45*, at 844-45.

Section 301 does, in an individual case, give private parties some measure of control and input into world trade. This access, however, comes at too high a cost. The continued use of Section 301 would be a reversion to the power-oriented diplomacy of the past and would undermine the U.S.-supported efforts of the WTO to make the system fairer and more predictable.<sup>195</sup>

In addition to being unwise, continued use of Section 301 is also unlikely. The United States government's liberal use of Section 301 actions was primarily a reaction to the inefficacy of the GATT dispute resolution system.<sup>196</sup> Now that the system has been improved under the WTO, the United States is not as likely to find it necessary to resort to unilateral action under Section 301.<sup>197</sup>

Another reason why Section 301 is an inadequate method for private parties to protect their rights is that there is no guarantee that the U.S. Trade Representative will take action, even if the complaint is valid. The government retains broad discretion at every step of a Section 301 procedure.<sup>198</sup> The same political motivations that could prevent a government from raising the claims of its constituents could discourage the United States from actively pursuing a Section 301 petition.

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<sup>195</sup> See Puckett & Reynolds, *supra* note 192, at 688-89; Shell, *Trade Legalism*, *supra* note 45, at 899.

<sup>196</sup> Puckett & Reynolds, *supra* note 192, at 687; Shell, *Trade Legalism*, *supra* note 45, at 843-44.

<sup>197</sup> Puckett & Reynolds, *supra* note 192, at 689; TERENCE P. STEWART, THE URUGUAY ROUND AGREEMENTS ACT: AN OVERVIEW OF MAJOR ISSUES AND POTENTIAL TROUBLE SPOTS, IN THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, 29, 33 (Terence P. Stewart ed., 1996) [hereinafter STEWART, TROUBLE SPOTS].

<sup>198</sup> CUNNINGHAM & SMITH, *supra* note 193, at 603-04; see Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233, 246 n.61 (1996).

The strongest argument against the use of Section 301, however, is that it almost certainly would be in violation of the Understanding. Article 23(2) of the Understanding forbids states from taking unilateral action, and even from “mak[ing] a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement.”<sup>199</sup> It is hard to envision any explanation for the use of Section 301 that does not come into conflict with this prohibition.

The Understanding’s repudiation of unilateral measures is in conflict, however, with the Uruguay Round Agreements Act (the “URAA”),<sup>200</sup> the U.S. statute adopting the WTO Charter. The URAA specifically states that Congress did not intend the WTO Charter to invalidate Section 301.<sup>201</sup> It is difficult to reconcile this provision of the URAA with Article 23. Such discrepancies between domestic laws and the Understanding are covered by Article 16(4) of the WTO Charter, which requires each member to “ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”<sup>202</sup> Based on this provision, it is likely that any continued use of Section 301 will be a violation of U.S. obligations under the WTO Charter.<sup>203</sup>

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<sup>199</sup> Understanding, *supra note 9*, art. 23(2)(a); see STEWART, TROUBLE SPOTS, *supra note 197*, at 33-34.

<sup>200</sup> 19 U.S.C. §§ 3501-3624 (1994).

<sup>201</sup> *See id.* § 3512(a)(2)(B); CUNNINGHAM & SMITH, *supra note 193*, at 591.

<sup>202</sup> WTO Charter, *supra note 1*, art. XVI(4).

<sup>203</sup> *See* STEWART, TROUBLE SPOTS, *supra note 197*, at 33-34.

## **B. WTO Appellate Body Decisions regarding Private Party Participation in Dispute Resolution**

The WTO Appellate Body has handed down two decisions addressing private access to dispute resolution. In the EU–Bananas case,<sup>204</sup> where amongst other things, the Appellate Body considered Saint Lucia’s right to be represented by private rather than government counsel. The Saint Lucia’s argument was based on the principle of customary international law that a sovereign’s right to decide whom it may accredit as officials and members of its delegation cannot be limited. The Appellate Body ruling in the EU-Bananas case permitted government representation by private counsel in oral hearings before the Appellate Body.

Another case to be considered is the United States-Import Prohibition of Certain Shrimp Products in 1998, which led the WTO Appellate Body to address the procedural issue of private or non-member organization’s submission in briefs in WTO proceedings.<sup>205</sup> The Appellate Body ruled that attaching a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least prima facie valid and an integral part of that participant’s submission. The amicus briefs submitted by three groups of NGOs as an appendix to the United States submission, were admitted notwithstanding the fact the appended briefs contained legal arguments different from those submitted by the United States.

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<sup>204</sup> See EU-Bananas, *supra* note 20.

<sup>205</sup> See Shrimp-Turtles, *supra* note 21.

## 1. Private Counsel Representation

The issue of private counsel representation of WTO member governments came to a head when the Bananas Panel decided not to admit Christopher Parlin, a private lawyer representing Saint Lucia, to the panel proceedings.<sup>206</sup> In its first substantive meeting with the parties on September 10, 1996, the Panel ruled that the private counsel seeking to represent Saint Lucia was not entitled to attend the Panel's meetings in the case.<sup>207</sup>

The Panel ruling with respect to denying representation by private counsel was not specifically appealed to the Appellate Body.<sup>208</sup> Nevertheless, in July 1997, the government of Saint Lucia submitted a letter to the Appellate Body, requesting the participation of its two non-governmental legal advisers.<sup>209</sup>

On July 15, 1997, the Appellate Body granted Saint Lucia's request. The Appellate Body stated that there was nothing in the WTO agreement, the DSU, the Working Procedures, nor in customary international law or the prevailing practice of international tribunals which (1) prevents a WTO member from composing its own delegation to an Appellate Body proceeding, and (2) specifies who can represent a government in making its representations before the Appellate Body.<sup>210</sup> The Appellate Body also noted that, in the interest of member governments' representation by qualified counsel in Appellate Body proceedings, "representation by counsel of

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<sup>206</sup> WTO Panel Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA (May 22, 1997) [hereinafter EC - Bananas Panel Report].

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*; See also Understanding, *supra* note 9, Note that Saint Lucia is a third party to the case and that pursuant to Articles 16.4 and 17.4 of the DSU, only parties to a dispute, and not third parties, may appeal a Panel Report.

<sup>209</sup> See EU-Bananas, *supra* note 20, ¶ 5.

<sup>210</sup> See *id.* ¶¶ 10, 12.

a government's own choice may well be a matter of particular significance - especially for developing-country Members - to enable them to participate fully in dispute settlement proceedings.”<sup>211</sup>

The Appellate Body ruling in the EU-Bananas case expressly permits governmental representation by private counsel in oral hearings before the Appellate Body. Although the Appellate Body noted that the peculiar legal nature of its own proceedings, which permit the participation of private counsel, do not apply as fully at the panel level,<sup>212</sup> at least two panel decisions since the EU-Bananas case have reportedly allowed private counsel to participate in oral hearings.<sup>213</sup> Thus, WTO Panels and the Appellate Body have both recognized the futility, in the resolution of modern international trade disputes, of maintaining strictly government-employed delegations. Therefore, it is now possible for private parties to represent their cases before the WTO Panels and the Appellate Body if their governments agree to raise the claim and to choose them as the representatives of the governments.

Private counsel representation would improve the WTO dispute resolution system. First, private counsel representation will make the WTO dispute resolution system more legitimate and effective by responding to the needs of actual players in international trade. Because the actual parties in interest are the ones most affected by the outcome of the dispute settlement proceeding, it makes some sense to allow their counsel to take part in the process.<sup>214</sup> Second, private

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<sup>211</sup> See *id.* ¶ 12.

<sup>212</sup> Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1205 (1998).

<sup>213</sup> See WTO Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WTO doc. WT/DS54/R (July 2, 1998) ¶ 4.1.

<sup>214</sup> “[T]he WTO should lead to new areas of practice development for the private bar. U.S. lawyers should increasingly assist, lobby and shadow governments as to positions taken in WTO-based disputes ... since such

counsel representation can prevent WTO member governments from sacrificing certain issues for the sake of their long-term trade strategy. Finally, private counsel representation can solve inequity problem among WTO member governments by helping small countries utilize the WTO dispute resolution system. Therefore, contributions that private counsel representation will bring to the WTO dispute resolution system cannot be underestimated.

Permitting private counsel to represent a WTO member government, however, is not enough to adequately protect private parties' interests. Private counsel representation before the DSB is just a reaffirmation of the national sovereignty of WTO members to select their own delegates because "it is up to individual government to decide whether to include private sector counsel in their delegation to the WTO."<sup>215</sup> Thus, for private parties to have a voice before the DSB, their government must agree not only to raise a claim on behalf of the private parties, but also to include the private parties in the government's representatives to the DSB. As mentioned above, however, there are several factors that dissuade WTO member states from pursuing the interests of private parties before the WTO dispute resolution system. Private parties that are being harmed by illicit trade practices cannot protect their interests if their governments, for political reasons, refuse to raise the claims in the first place or to choose private sector counsels as the representatives.

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disputes ultimately affect 'the real parties in interest' - i.e., the lawyers' corporate clients ..." Gregory Shaffer, *The WTO: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, 91 AM. J. INT'L L. 767, 768 (Oct. 1997).

<sup>215</sup> Jessica C. Pearlman, *Participation by Private Counsel in World Trade Organization Dispute Settlement Proceeding*, 30 LAW & POL'Y INT'L BUS. 399, 414 (Winter, 1999).

## 2. Private Parties' Submission of Amicus Briefs to the WTO

In United States-Import Prohibition of Certain Shrimp and Shrimp Products in 1998, the WTO Appellate Body addressed the procedural issue of private or nonmember organizations' submission of briefs in WTO proceedings.<sup>216</sup> Despite the absence of mechanisms for private party submission of briefs to the WTO, three groups of NGOs submitted briefs to the Panel in the Shrimp-Turtle decision in the hopes that their positions would influence the Panel.<sup>217</sup> The Panel found that the acceptance of non-requested information from non-governmental sources were incompatible with the provisions of the DSU.<sup>218</sup> Article 13(1) of the DSU provides:

Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.<sup>219</sup>

The Panel in Shrimp-Turtles interpreted Article 13.2 to mean that additional information is appropriately submitted to a Panel only if the Panel expressly solicits it.<sup>220</sup>

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<sup>216</sup> In the Shrimp-Turtles decision, the WTO Appellate Body upheld an earlier WTO Panel decision that requiring the U.S. to bring its import practices with respect to shrimp into conformity with WTO obligations. The Appellate Body held that the U.S. Public Law 101-162, Section 609, which prohibited the importation of shrimp caught in nets that do not employ turtle-excluder devices, or TED's, was a violation of the introduction, or chapeau, of Article XX, *See Shrimp-Turtles, supra note 21.*

<sup>217</sup> The three NGO groups were: (1) The World Wide Fund for Nature, and the Foundation for International Environmental Law and Development, (2) the Center for International Environmental Law, the Center for Marine Conservation, the Environmental Foundation Ltd., the Mangrove Action Project, the Philippine Ecological Network, Red Nacional de Accion Ecologica, and Sobrevivencia and (3) the Earth Island Institute, the Humane Society, and the Sierra Club. *Shrimp-Turtles, supra note 21, ¶ 79.*

<sup>218</sup> *Shrimp-Turtles, supra note 21, ¶ 8.*

<sup>219</sup> *Understanding, supra note 9, art. 13(1).*

<sup>220</sup> *Shrimp-Turtles, supra note 21, ¶ 9.*

The Appellate Body rejected the Panel’s interpretation.<sup>221</sup> It held that “attaching a brief or other material to the submission of either an appellant or appellee, no matter how or where such material may have originated, renders that material at least prima facie valid and an integral part of that participant’s submission.”<sup>222</sup> The Appellate Body admitted the amicus briefs submitted by the three groups of NGOs as an appendix to the United States’ submission, although the appended briefs contained legal arguments differing from those submitted by the United States.

Under the Appellate Body holding, a Panel still retains the right to disregard or reject an amicus brief filed by a private party unless the amicus brief is adopted by the member state. The Panel does not, however, have the right to disregard the brief solely on the grounds that it was not submitted by a member. Thus, WTO Panels and Appellate Bodies retain the right, under the decision in the Shrimp-Turtles case, to accept or reject information provided by private parties. Information, in the form of amicus briefs from a private party, may still be submitted to a WTO Panel or Appellate Body as an appendix to a member’s submission. Shrimp-Turtles also held that private parties may submit amicus briefs directly to a Panel or the Appellate Body.<sup>223</sup> If a private party’s amicus brief is expressly adopted by a member to be a part of that member’s submission, however, a panel would be under an obligation to consider its

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<sup>221</sup> See *id.* ¶ 89.

<sup>222</sup> *Id.*

<sup>223</sup> The language of the Appellate Body decision has been interpreted to imply that any individual or interest group can now submit an amicus brief directly to a WTO panel, although the panel would have the discretion to disregard it. See Shrimp-Turtles, *supra* note 21; see also James Cameron, *WTO Opens Disputes to Private Voices*, NAT’L L.J., Dec. 7, 1998, at B5.

arguments.<sup>224</sup> Otherwise, private party access to the WTO, in the absence of a member's endorsement, remains discretionary with the Panel or Appellate Body receiving the information.

There are many potential advantages that unsolicited amicus brief submissions by private parties will bring to the WTO. As discussed above, a democracy deficit is perpetuated by a WTO system that strictly adheres to government-to-government dispute resolution. One of the advantages to private parties' brief submissions, therefore, is the potential to reduce the amount of the democracy deficit in the resolution of international trade disputes.<sup>225</sup> This is especially true when a member state is reluctant to make an argument on behalf of private parties because the private parties can submit directly to the WTO. Also, allowing a nongovernmental entity to make written presentations to WTO panels would lead to better informed, more enlightened panel decisions because private interests that may not be represented by the private entity's state may now be heard by the WTO.<sup>226</sup> Finally, transparency in dispute settlement is promoted by insuring that all arguments in a dispute are considered. Transparency can be improved if corporations and NGOs know that their arguments and positions have a chance to be considered during trade disputes. Increased transparency is thus promoted by a direct avenue for private parties' brief submission to the WTO.

Notwithstanding the benefits of direct brief submission by private parties, the Shrimp-Turtles decision is not enough to protect private parties' interests.<sup>227</sup> First, the decision leaves

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<sup>224</sup> See Shrimp-Turtles, *supra* note 21, ¶ 89.

<sup>225</sup> Laidhold, *supra* note 159, at 442.

<sup>226</sup> See Shell, *Trade Legalism*, *supra* note 45, at 908 (arguing that excluding private parties from WTO dispute resolution will "silenc[e] them insofar as they might contribute to wiser, more contextual decision-making").

<sup>227</sup> See Cameron, *supra* note 223, at B5.

WTO Panels and the Appellate Body with the discretion to accept or reject the arguments contained in amicus briefs unless such information is expressly adopted by the member attaching the brief. Thus, private parties' interests could still be disregarded by the WTO Panels and the Appellate Body. Second, the Shrimp-Turtles decision could lead to aggressive lobbying efforts by private organizations to influence a WTO member state in a trade dispute to expressly adopt the organization's arguments.<sup>228</sup> Moreover, private organizations may also turn their energies toward lobbying other WTO members to join in a trade dispute as a third-party participant. As a third-party participant, a member could effectively represent the legal arguments of an organization. Lobbying efforts conducted by private organizations could become burdensome and counterproductive to the point of clogging a member's ability to represent national interests before the WTO. Third, and most importantly, the private parties' rights to submit amicus briefs comes too late in the process to adequately protect the interests of private parties. Nongovernmental entities that are being harmed by illicit trade practices will still be denied relief if their governments, for political reasons, refuse to raise a claim in the first place. Therefore, the ability to file amicus briefs provides insufficient protection for private parties engaged in international trade.

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<sup>228</sup> *Id.*

## **V. PRIVATE PARTY STANDING BEFORE THE WTO DISPUTE RESOLUTION SYSTEM**

Once the idea that private participation in the WTO dispute resolution system is desirable is accepted, the appropriate level of participation should be determined. Although the WTO Appellate Body decisions have expanded private participation in the WTO dispute resolution system, the interests of private parties cannot be adequately protected without allowing private parties to raise claims to the WTO. Thus private party standing to initiate the WTO dispute resolution proceeding should be granted. This part provides a comparative analysis of the dispute resolution systems which have been set up and which operate in the context international treaties, international organizations, or both, and which grant standing to private parties. Then, this part examines which mechanism is most desirable and workable to the WTO dispute resolution system.

The following forums has been indicated by proponents of private standing before the WTO as international dispute settlement mechanisms which provide access and remedy for individuals and private entities: the North American Free Trade Agreement (“NAFTA”),<sup>229</sup> the Nordic Convention on the Protection of the Environment (the “Nordic Convention”),<sup>230</sup> the

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<sup>229</sup> See Charnovitz, *supra note* 166, at 349; Young, *supra note* 81, at 406 & n.77.

<sup>230</sup> Nordic Convention on the Protection of the Environment, Feb. 19, 1974, Den.-Fin.-Nor.-Swed., 1092 U.N.T.S. 279 [hereinafter Nordic Convention].

International Center for Settlement of Investment Disputes (the “ICSID”),<sup>231</sup> the International Labor Organization (the “ILO”),<sup>232</sup> and the European Convention on Human Rights.<sup>233</sup> In order to determine the proper threshold for standing before the WTO, it will be helpful to examine the methods used by these tribunals.

### **A. Use of Domestic Court System**

Nations have provided private parties with the ability to enforce an international agreement by expressly linking the rights of individuals to the domestic court systems of the participating states. The two primary examples of this approach are the antidumping and countervailing duties provisions of NAFTA<sup>234</sup> and the Nordic Convention on the Protection of the Environment, which allows private parties to protect their interests in their domestic courts.<sup>235</sup>

NAFTA, which came into effect on January 1, 1994, contains dispute resolution provisions to serve both states and private parties.<sup>236</sup> Chapter XIX of NAFTA creates a binding, supranational arbitration scheme accessible directly by private business parties<sup>237</sup> through which businesses may overturn final anti-dumping and countervailing duty decisions of domestic trade regulators.<sup>238</sup> NAFTA offers parties who wish to appeal anti-dumping and countervailing duty

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<sup>231</sup> Montana i Mora, *supra* note 29, at 161-62; Shell, *Trade Legalism*, *supra* note 45, at 889- 90.

<sup>232</sup> Shell, *Trade Legalism*, *supra* note 45, at 916-17.

<sup>233</sup> Montana i Mora, *supra* note 29, at 161.

<sup>234</sup> North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, arts. 1901-1911, at 682-87. (1993) [hereinafter NAFTA].

<sup>235</sup> Nordic Convention, *supra* note 230.

<sup>236</sup> See David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT’L L.J. 407, 431 (1993).

<sup>237</sup> Both private parties and states have access to this process. NAFTA, *supra* note 234, art. 1904(5), 32 I.L.M. at 683.

<sup>238</sup> NAFTA, *supra* note 234, art. 1904, 32 I.L.M. at 683-84.

decisions issued by national regulatory authorities a choice of appellate procedures. Aggrieved parties may either use the regular domestic system of judicial review of the country that issued the decision or request that a binational NAFTA arbitration panel hearS their appeal.<sup>239</sup> These arbitration panels, which are directed by the treaty to apply the domestic law of the state that issued the anti-dumping or countervailing duty decision,<sup>240</sup> provide the final decision on such allegedly unfair trade claims.<sup>241</sup> Even though private parties can raise a claim before a NAFTA panel instead of their domestic courts,<sup>242</sup> standing is still linked to the domestic laws of the importing state. Specifically, private parties are guaranteed the same right that they possess under domestic law to challenge the prohibited activities.<sup>243</sup>

Similarly, the Nordic Convention “grants individuals, groups, and non-governmental organizations access to a legal system under international law . . . treating such persons as members of a community by giving expression to their concerns, interests, and rights.”<sup>244</sup> Thus, the Nordic Convention gives “[a]ny person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State” the right to bring suit

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<sup>239</sup> *See Id.*

<sup>240</sup> If the parties elect to use an article 19 panel, the panel will apply the substantive national law and standard of judicial review of the importing state that has issued the contested ruling. *Id.* art. 1904(2), 32 I.L.M. at 683. Article 19 panels consist of five arbitrators, a majority of whom must be lawyers. *Id.* Annex 1901.2(2), 32 I.L.M. at 687.

<sup>241</sup> NAFTA provides that panel decisions may be appealed by states, *id.* art. 1904(13), 32 I.L.M. at 683, to three-member “Extraordinary Review Committees,” *id.* Annex 1904.13(1), 32 I.L.M. at 688, which may reverse a panel decision only if an arbitrator is guilty of “gross misconduct, bias, or serious conflict of interest,” if the panel “seriously departed from a fundamental rule of procedure,” or if the panel “manifestly exceeded its powers,” and only if such wrongful conduct “materially affected the panel’s decision and threatens the integrity of the binational review process,” *id.* art. 1904(13), 32 I.L.M. at 683.

<sup>242</sup> NAFTA, *supra* note 234, art. 1904(5), at 683; see Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 232 (1995). This applies only to antidumping disputes. In all other areas, only countries can initiate the dispute settlement process. NAFTA, *supra* note 234, art. 2004, at 694.

<sup>243</sup> NAFTA, *supra* note 234, art. 1904(5), at 683; see Straight, *supra* note 242, at 232.

<sup>244</sup> Philippe J. Sands, *The Environment, Community, and International Law*, 30 HARV. INT’L L.J. 393, 414 (1989).

in the offending state's courts.<sup>245</sup> Under this arrangement, there is no separate international tribunal, but merely an agreement that each state will entertain suits from nationals of other countries to the same extent that they allow suits from their own citizens.

The use of domestic courts in international arena, however, is not only detrimental to the interests of private parties,<sup>246</sup> but also unworkable and undesirable for the WTO dispute resolution system. NAFTA and the Nordic Convention include only three or four countries and only apply to a specific area of the law. In such a context, the danger of inconsistent application of the law, while not totally absent, is much less significant than it would be in the WTO, which covers over a hundred different countries<sup>247</sup> and regulates a broad spectrum of trade practices. If a similar mechanism was used for the WTO, the domestic courts of dozens of states would be simultaneously interpreting and applying WTO agreements. The resulting lack of uniformity in the application of trade laws would undermine the ability of private parties to reliably anticipate future trade practices. One major improvement of the WTO dispute resolution system over the GATT was the elimination of multiple forums for resolving disputes. A system that ties private-party standing to the domestic laws of each state would negate this benefit. Moreover, allowing each state's domestic law to define the standing requirements for the WTO would cause private access to be susceptible to politically-motivated limitations because each state could limit private party participation by limiting domestic judicial review of international trade decisions.

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<sup>245</sup> Nordic Convention, *supra* note 230, art. 3, at 296; see Christopher D. Stone, *Locale and Legitimacy in International Environmental Law*, 48 STAN. L. REV. 1279, 1283 (1996).

<sup>246</sup> There are practical obstacles to invoking the power of domestic courts to adjudicate international disputes. Courts are extremely hesitant to extend jurisdiction over the field of international relations and there are both statutory and judicial limitations on suits against foreign states, Schleyer, *supra* note 8, at 2301-02.

<sup>247</sup> See The Understanding the WTO: The Organization Members and Observers available at <[http://www.wto.org/wto/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/wto/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

## **B. Private Party Standing to the Equity Holders**

The ICSID and the ILO both provide some nongovernmental entities with standing to initiate disputes. Upon closer inspection, however, the nature of these entities serves to limit standing in a way that renders them inapposite to the WTO.

Unlike the WTO, which is an organization of states, the ICSID deals with international investment between private foreign investors and governments. As a forum of international dispute resolution, however, the ICSID acknowledges all actors operating within its system. Despite its structural difference from the WTO, the ICSID dispute resolution is worth of comparison to the WTO dispute resolution system in that it applies equally to all parties who participate in the field of international investment.<sup>248</sup>

The ICSID, established through the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States,<sup>249</sup> is a legal framework that protects and promotes the flow of foreign investment between developed and developing countries.<sup>250</sup> Unlike the WTO, the ICSID permits private parties to participate with states in settling disputes and making policy. Once parties consent to arbitration under the ICSID Convention, the ICSID permits private parties to sue states and obtain binding arbitration awards that the domestic courts of the defendant states are obligated to enforce.<sup>251</sup> The ICSID's jurisdiction

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<sup>248</sup> Laidhold, *supra* note 159, at 444.

<sup>249</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 103, 106 (1992).

<sup>250</sup> Bruno, *supra* note 179, at 79.

<sup>251</sup> Shell, *Trade Stakeholders Model*, *supra* note 17, at 372.

extends to “disputes between a Contracting State and a national of another Contracting State arising directly out of an investment-related agreement, provided both parties have consented in writing to submit such a dispute to the Centre.”<sup>252</sup> Therefore, the ICSID provides a neutral forum for arbitrating investment disputes between foreign investors and host countries.<sup>253</sup>

The ICSID, however, grants an investor a right to arbitration only if the initial investment agreement between the investor and the host country explicitly provides for ICSID arbitration.<sup>254</sup> Essentially, states are in no way compelled to use ICSID arbitration.<sup>255</sup> Furthermore, the ICSID Convention allows states to remove entire classes of disputes from ICSID jurisdiction.<sup>256</sup> Thus, the ICSID does not raise serious standing concerns in that a state must expressly grant an investor permission to sue the state. Such a system would be unworkable in the context of the WTO. Requiring states to explicitly consent to suit before the WTO for each individual case would lead to inequitable enforcement of trade agreements. Larger states could use their political and economic power to refuse to consent, while less developed states would be effectively forced to consent in order to attract more capital.<sup>257</sup> This power-based outcome would gradually weaken the predictability that the WTO has sought to achieve.

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<sup>252</sup> Rowat, *supra* note 249, at 109. “Investment” in the ICSID context has rendered “jurisdiction over a wide range of activities, including construction contracts, licensing, and concession agreements, as well as purely manufacturing activities.” *Id.*

<sup>253</sup> ICSID Convention, *supra* note 249, art. 1, at 162; Rowat, *supra* note 248, at 107.

<sup>254</sup> ICSID Convention, *supra* note 249, art. 25, at 174.

<sup>255</sup> Rowat, *supra* note 249, at 108.

<sup>256</sup> *Id.*

<sup>257</sup> This imbalance is less problematic in the ICSID context because the ICSID was established for the specific purpose of “reduc[ing] the political risks constraining increased foreign direct investment” in less developed countries. *Id.* at 105.

The ILO is the primary international organization concerned with protecting the rights of workers around the world.<sup>258</sup> Its primary function is to establish labor standards and monitor international compliance with these standards.<sup>259</sup> Under the ILO Constitution, workers' organizations can raise "representations of non-observance" against states alleged to be in violation of the required labor standards.<sup>260</sup> Individual workers cannot bring complaints, and a complaint from a workers' organization is only considered if this organization is deemed by the ILO to be authentic.<sup>261</sup>

The approach taken by the ILO dispute resolution system is inapplicable to the WTO. Extending standing to workers' organizations is not as drastic as extending it to individuals and corporations. Also, workers' organizations will be subject to the same political influences that states are and may be hesitant to file some claims in order to protect their relationship with the offending state. In order for private parties to adequately protect their interest in free trade with a minimum of political interference, the WTO needs to make standing available at the individual level, not the organizational level.

### **C. Private Party Standing to the Entity that Suffers Harm**

The harm of a state's protectionist trade practices is borne by the private parties which are doing business with that state. In order for these private parties to be confident that illicit trade

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<sup>258</sup> Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 381 (1995).

<sup>259</sup> *Id.* at 381-82.

<sup>260</sup> International Labour Office, Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference, art. 24; see Ehrenberg, *supra note* 258, at 385-86.

<sup>261</sup> See Ehrenberg, *supra note* 258, at 407. The authenticity of a workers' organization depends on "several factors, including the organization's charter and bylaws, membership, and history." *Id.*

practices will be corrected with sufficient speed and reliability, the WTO dispute resolution system needs to be available to them. In other areas of international law, private parties have standing to raise claims before international tribunals when they have suffered prospective or actual harm. An analysis of the various standing levels of these tribunals will be helpful in determining the proper standing levels for the WTO.

### **1. Standing for Prospective Harm**

The European Convention on Human Rights<sup>262</sup> allows standing for private parties who have not suffered actual harm, but for whom injury is imminent or prospective. The European Convention on Human Rights, which most European states have ratified, contains certain guarantees of basic human rights. An individual who has been a victim of a violation of these rights can file a claim with the European Commission of Human Rights.<sup>263</sup> In order to sue, the individual must have been directly affected by the violation.<sup>264</sup> For the purposes of standing, the Commission has expanded the definition of “victim” to include a potential or eventual victim.<sup>265</sup>

In the context of the WTO, allowing private parties to raise claims for prospective injuries would be too broad. Such a standard would allow everyone who could potentially do business in a state to attack that state’s trade practices. Standing for prospective injury is possible for the

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<sup>262</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

<sup>263</sup> *Id.* art. 25, at 236-38.

<sup>264</sup> See Richard Desgagné, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT’L L. 263, 284 (1995).

<sup>265</sup> *Id.* at 284-85.

European Union because the states of the European Union has given up much more of their autonomy than the states of the world would be willing to give up to the WTO.<sup>266</sup> It is clear that a similar standard for the WTO would represent a serious intrusion into the autonomy of the WTO member states. Moreover, human rights violation should be treated differently from the violation of trade agreements. Human rights violation will normally be irreversible; in contrast, economic harm, such as that resulting from restrictive trade practices, is rectifiable, so there is no danger in requiring private parties to actually suffer harm before raising a claim before the WTO.<sup>267</sup>

## **2. Standing Limited to Those Actually Harmed**

Standing for private parties, therefore, should be limited to those who have suffered actual harm due to a state's allegedly illicit trade practices. This standard is used in the dispute resolution system provided in the investment provisions of NAFTA.

Chapter XI of NAFTA provides guidelines to ensure fair treatment of foreign investors.<sup>268</sup> If a state-sanctioned monopoly or state enterprise acts in contravention of chapter XI, then foreign investors can force the offending state into arbitration.<sup>269</sup> An investor has standing to raise a claim only if the investor has actually incurred some form of loss or damage by reason of the alleged breach.<sup>270</sup> It is clear that this will not be interpreted to encompass prospective loss

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<sup>266</sup> Schleyer, *supra* note 8, at 2308.

<sup>267</sup> *Id.*

<sup>268</sup> See NAFTA, *supra* note 234, arts. 1101-1139, at 639-48.

<sup>269</sup> *Id.* art. 1116(1), at 642-43; see Charnovitz, *supra* note 166, at 349.

<sup>270</sup> NAFTA, *supra* note 234, art. 1116(1), at 642-43.

or damage because the statute of limitations for filing a complaint starts when the investor knows or should have known that the loss occurred.<sup>271</sup>

This same standard should be adopted by the WTO as the threshold for private-party claims. Allowing private parties to bring actions against state members would greatly improve the ability of the WTO dispute resolution system to fulfill WTO objectives. Standing, however, should be limited to those who have suffered economic loss as a result of behavior by state members contrary to the standards set under the WTO agreements. This standard would permit private parties to challenge trade practices that are actually inhibiting free trade, while keeping frivolous claims from the WTO dispute resolution system. Also, it ensures that the parties will be diligent in pursuing their claims.

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<sup>271</sup> *Id.* art. 1116(2), at 643.

## **VI. CONCLUSION**

An international system that includes state, corporate, organizational and individual actors and that relies solely on states to bring and enforce the laws of the treaty has a legitimacy problem. It is especially true in the context of international trade where private individuals rather than states are the primary actors.

Notwithstanding the rule-oriented reform of the WTO, there are many improvements that can be made to the WTO dispute resolution system so that dispute resolution adequately accomplishes the goals set forth for the treaty. The WTO system is imperfect because of the large gap between state and private interests. The lack of standing for private parties to bring suit before the WTO means that either there are many potential international trade dispute claims that are never resolved, or private interests already before the WTO are not heard.

Private counsel representation and submission of amicus brief by private parties acknowledge that WTO Panels and Appellate Bodies are realizing the efficacy of private interests in international trade matters. In the context of private counsel representation, the WTO acknowledges both the sovereignty of member states and the importance of stretching trade representation beyond national boundaries. In the context of private parties' brief submissions, the WTO has recognized the value of non-state arguments in trade disputes. The WTO has even permitted private parties' brief submission directly to a WTO Panel or Appellate

Body. WTO tribunals nevertheless retain the power to accept or reject any or all private parties' arguments that are not expressly adopted by a member state.

These changes, however, are not sufficient for private parties to protect their interests unless the ability to initiate dispute before the WTO is granted to private parties without the aid of a member state. As long as private parties have to rely on their governments to initiate and advance trade disputes, they will be uncertain about the future enforcement of trade agreements and will therefore be hesitant to take full advantage of the benefits of free trade.

It is true that there must be structural changes to the WTO dispute resolution system for private parties to have a voice at the WTO.<sup>272</sup> It is also true, however, that if states are actually committed to the trade treaties and to bringing the benefits of those treaties to their constituents, they must allow their own citizens to bring cases directly to the dispute resolution mechanism established under the treaty. Among many available ways of private participation in the WTO dispute resolution system, granting private parties standing before the WTO is the only way for private parties to protect their interests and for the WTO to fulfill its objectives. Standing, however, should be strictly limited to those parties that have suffered actual harm to reduce the number of frivolous suits and ensure diligence of the parties in pursuing their claims.

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<sup>272</sup> Laidhold, *supra* note 159, at 450.

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