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United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia

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United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia

Joseph L. Falvey, Jr.

Abstract

This Article compares the protections and rights provided an accused before the Tribunal with those protections and rights provided an accused before U.S. courts-martial. Part I provides an overview of the statute creating the Tribunal and identifies the general principles the statute appears to advance. Part II analyzes the Tribunal's procedural and evidentiary rules, compares these rules to the analogous military rules, and discusses how well the Tribunal rules comport with the general principles advanced by the statute. This Article concludes that the Tribunal rules, although fundamentally sound, are not as protective of the individual rights of the accused as the military justice system and recommends modifications of the Tribunal rules to remedy the noted deficiencies.

ARTICLES

LOST SOVEREIGNTY? THE IMPLICATIONS OF THE URUGUAY ROUND AGREEMENTS

*William J. Aceves**

INTRODUCTION

On December 15, 1993, the Uruguay Round multilateral trade negotiations were concluded after seven years of extensive and often contentious negotiations. The Uruguay Round Agreements were subsequently signed on April 15, 1994 in Marrakesh, Morocco by 108 countries.¹ The Uruguay Round Agreements were designed to fundamentally restructure and improve the multilateral trading system that had developed under the 1947 General Agreement on Tariffs and Trade ("GATT").²

The Uruguay Round Agreements will have a significant impact on international trade.³ They extend the basic GATT framework on goods to include services, intellectual property rights, and investment matters. The Uruguay Round Agreements also increase existing GATT coverage in agriculture, textiles and clothing, and government procurement. Tariffs are reduced by approximately thirty-eight percent in diverse sectors, such as: pharmaceuticals, textiles, automobiles, steel, and food

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1. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1 art. 2 (1994) [hereinafter Final Act]. By signing the Final Act, the state representatives agreed to submit the Uruguay Round Agreements for consideration by their respective competent authorities with a view to seeking approval of the Uruguay Round Agreements in accordance with their national procedures. *Id.*

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 STAT. A3, 55 U.N.T.S. 187 [hereinafter GATT].

3. See GENERAL ACCOUNTING OFFICE, URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS (1994); EUROPEAN COMMISSION, URUGUAY ROUND: GLOBAL AGREEMENT, GLOBAL BENEFITS (1994).

products. In addition, the Uruguay Round Agreements establish a new institution, the World Trade Organization ("WTO") to facilitate their implementation and administration. The WTO provides the common institutional framework for the conduct of international trade as set forth in the Uruguay Round Agreements; establishes a forum for negotiations concerning international trade matters; and establishes a structured, expeditious, and binding dispute settlement process.

The Uruguay Round Agreements have been the subject of extensive debate in the United States.⁴ Critics argue that the WTO has been given too much power to regulate international trade and that it lacks adequate safeguards to protect American interests.⁵ Indeed, they argue that the United States does not wield sufficient power in the WTO commensurate with its international status, unlike its role in other international organizations such as the World Bank and the International Monetary Fund.⁶ Moreover, critics charge that the WTO will be run by international bureaucrats who will operate in secrecy with no accountability and no conflict of interest rules.⁷ The essence of these arguments rests on the notion of lost sovereignty — in signing the Uruguay Round Agreements, the United States has lost much of its negotiating authority on international trade matters and has subjected domestic matters to international regulation.

The response of the Clinton Administration to the issue of lost sovereignty was two-fold. In developing the implementing

4. See generally Harvey Berkman, *As GATT Gains, Will States Wane?*, NAT'L L.J., Nov. 14, 1994, at A1; *GATT Implementing Legislation, 1994: Hearings on S. 2467 Before the Committee on Commerce, Science, and Transportation*, 103rd Cong., 2nd Sess. 350 (1994) (statement of Ralph Nader, Consumer Advocate, Public Citizen); Bruce Fein, *Putting U.S. Sovereignty At Risk?*, WASH. TIMES, June 16, 1994, at A17; *World Trade Organization, Hearings Before the Committee on Foreign Relations*, 103rd Cong., 2nd Sess. (1994) (statement of Bruce Fein).

5. Opponents to the Uruguay Round Agreements included such ideologically diverse politicians as Pat Buchanan, Ralph Nader, Ross Perot, and Jesse Jackson. See Ralph Nader, *WTO Means Rule by Unaccountable Tribunals*, WALL ST. J., Aug. 17, 1994, at A12; David Sanger, *Senate Approves Pact to Ease Trade Curbs*, N.Y. TIMES, Dec. 2, 1994, at A1.

6. James Gerstenzang, *Senate Approves Sweeping Pact to Revise Global Trade Rules*, L.A. TIMES, Dec. 2, 1994, at A1.

7. *GATT Implementing Legislation, 1994: Hearings on S. 2467 Before the Committee on Commerce, Science, and Transportation*, 103rd Cong., 2nd Sess. 285 (1994) (statement of Lawrence Tribe, Professor, Harvard University Law School).

legislation, the Administration sought to clarify the relationship between the Uruguay Round Agreements and U.S. domestic law. The legislation provides that the Uruguay Round Agreements do not modify or repeal any federal or state law. In addition, the Administration agreed to support legislation that would establish a WTO Dispute Settlement Review Commission. The Commission would independently review U.S. participation in the dispute settlement process. If the Commission were to determine that the dispute settlement process was not functioning appropriately, the proposed legislation would establish procedures to facilitate the United States' withdrawal from the WTO upon Congressional approval.

This Article reviews the Uruguay Round Agreements and examines the implications of this new multilateral trading system on U.S. sovereignty.⁸ Specifically, this Article reviews the new dispute settlement process and the relevant U.S. legislation. While the substantive provisions on trade are the central purpose of the Uruguay Round Agreements, they ultimately rely upon the dispute settlement process to regulate compliance. Through the dispute settlement process, states seek to ensure compliance with the obligations established under the Uruguay Round Agreements. Indeed, the new Dispute Settlement Body ("DSB") can issue binding rulings and authorize the suspension of concessions or other obligations to ensure the implementation of its rulings.⁹ Moreover, these rulings can no longer be blocked by a single member. As such, it is principally the dispute settlement process that raises the issue of lost sovereignty.

Part I provides an overview of the Uruguay Round Agreements. It reviews the Agreement Establishing the WTO and the Understanding on Rules and Procedures Governing the Settle-

8. See Michael Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW 389 (1995) (discussing Uruguay Round Agreements). The Uruguay Round Agreements have been the subject of extensive commentary by the legal community. *Id.*; see also Thomas Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829 (1995); David Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7 (1995).

9. The Dispute Settlement Body ("DSB") is established pursuant to Article 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, art. 2, 33 I.L.M. 112, 114 (1994). The purpose of the DSB is to administer the rules and procedures of the dispute settlement process. *Id.*

ment of Disputes. Part II provides an overview of the U.S. implementing legislation. Part III reviews the proposed Dispute Settlement Review Commission. Part IV examines the implications of the Uruguay Round Agreements on U.S. sovereignty. Specifically, it analyzes the impact of the dispute settlement process on both federal and state law.

The issues raised by this analysis extend far beyond the realm of international trade and the Uruguay Round Agreements. Indeed, they encompass the basic problem of achieving international cooperation in an anarchic world. Whether expressed through the 2 x 2 matrix of the Prisoners' Dilemma or the logic of collective action, the central issue is the same — rational, egoistic actors will seek to maximize individual utility, even at the cost of the common good.¹⁰

The Uruguay Round Agreements establish an institutional framework designed to facilitate cooperative behavior in the realm of international trade.¹¹ The crux of this framework is the binding nature of the new dispute settlement process. In this manner, the Uruguay Round Agreements address the limitations of the original GATT structure. Indeed, the institutional framework of the Uruguay Round Agreements addresses the limitations of an international system where individual actors seek to maximize self-interest at the expense of the collective good. By examining the Uruguay Round Agreements, this Article can serve a prescriptive role by suggesting how other international institutions can regulate the competing struggle between domes-

10. See, e.g., Duncan Snidal, *The Game Theory of International Politics*, 38 *WORLD POL.* 25 (1985); R. Harrison Wagner, *The Theory of Games and the Problem of International Cooperation*, 77 *AM. POL. SCI. REV.* 330 (1983). The Prisoners' Dilemma is a game theory model that describes how competing interests between two egoistic actors may lead to sub-optimal behavior that inhibits cooperation. *THE NEW PALGRAVE: GAME THEORY* (John Eatwell et al. eds., 1989); MORTON R. DAVIS, *GAME THEORY: A NONTECHNICAL INTRODUCTION* 109-08 (rev. ed. 1983); R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY* 94-95 (1957). The collective action problem suggests that rational, self-interested individuals will not act to achieve a common group goal unless some form of coercion is present. See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

11. See, e.g., Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 *HARV. INT'L L.J.* 501 (1985); Robert O. Keohane, *Reciprocity in International Relations*, 40 *INT'L ORG.* 1 (1986); Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, 35 *INT'L ORG.* 561 (1981).

tic and international interests.¹²

I. THE URUGUAY ROUND AGREEMENTS

The Uruguay Round Agreements consist primarily of five separate agreements: the Agreement Establishing the WTO¹³ ("WTO Agreement"), the Multilateral Trade Agreements,¹⁴ the Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁵ ("Dispute Settlement Understanding"), the Trade Policy Review Mechanism,¹⁶ and the Plurilateral Trade Agreements.¹⁷ In addition, several ministerial decisions and declarations are appended to the Uruguay Round Agreements.¹⁸ This section will examine the WTO Agreement and the Dispute Settlement Understanding since they establish the basic frame-

12. See GUYORA BINDER, *TREATY CONFLICT AND POLITICAL CONTRADICTION: THE DIALECTIC OF DUPLICITY* 1-6, 103-34 (1988).

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

14. Agreements on Trade in Goods, Dec. 15, 1993, 33 I.L.M. 28 (1994) [hereinafter Multilateral Trade Agreements]. The Multilateral Trade Agreements are located in Annex 1A of the WTO Agreement. WTO Agreement, *supra* note 13, annex 1A, 33 I.L.M. at 28. The Multilateral Trade Agreements consist of the General Agreement on Tariffs and Trade 1994, Dec. 15, 1993, 33 I.L.M. 29 (1994), the General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 (1994), and the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994). The WTO Agreement also includes the Understanding on Rules and Procedures Governing the Settlement of Disputes. WTO Agreement, *supra* note 13, annex 2, Dec. 15, 1993, 33 I.L.M. at 112 [hereinafter Dispute Settlement Understanding]. Furthermore, the WTO Agreement encompasses the Trade Policy Review Mechanism. WTO Agreement, *supra* note 13, annex 3, *reprinted in* GATT SECRETARIAT — TRADE NEGOTIATIONS COMMITTEE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS MTN/FA II-A3 (1993). Lastly, the WTO Agreement includes the Plurilateral Trade Agreements. WTO Agreement, *supra* note 13, annex 4, *reprinted in* *Id.* at MTN/FA II-A4.

15. Dispute Settlement Understanding, *supra* note 14, 33 I.L.M. at 112.

16. *Reprinted in* GATT SECRETARIAT — TRADE NEGOTIATIONS COMMITTEE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS MTN/FA II-A3 (1993).

17. WTO Agreement, *supra* note 13, annex 4, *reprinted in* GATT SECRETARIAT — TRADE NEGOTIATIONS COMMITTEE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS MTN/FA II-A4 (1993). The Plurilateral Trade Agreements consist of the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement. *Id.*

18. See, e.g., *Decision on Measures in Favor of Least-Developed Countries, Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking*, in JOHN JACKSON ET AL., 1995 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 422, 424 (1995).

work for ensuring compliance with the Uruguay Round Agreements.

A. *The Agreement Establishing the World Trade Organization*

The preamble of the WTO Agreement sets forth its purpose: “[T]o 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 Negotiations.”¹⁹

The WTO Agreement establishes the WTO.²⁰ The WTO provides the common institutional framework for the conduct of trade relations among its Members in matters relating to the Uruguay Round Agreements and its associated legal instruments.²¹ The primary function of the WTO is to facilitate the implementation, administration, and operation of the WTO Agreement, the Multilateral Trade Agreements, and the Plurilateral Trade Agreements.²² The WTO is also responsible for administering the Dispute Settlement Understanding and the Trade Policy Review Mechanism.²³ Indeed, the Multilateral Trade Agreements, the Dispute Settlement Understanding, and the Trade Policy Review Mechanism are integral parts of the WTO Agreement, binding upon all Members.²⁴

The WTO consists of a Ministerial Conference, a General

19. WTO Agreement, *supra* note 13, pmb., 33 I.L.M. at 15.

20. *Id.* art. I, 33 I.L.M. at 15. The World Trade Organization (“WTO”) is the third incarnation of an international organization that would regulate a multilateral trading system. The original concept, the International Trade Organization was developed in the original GATT agreement. Throughout the Uruguay Round, the proposed international organization was referred to as the Multilateral Trade Organization. “Multilateral” was replaced by “World” at the conclusion of the Uruguay Round. See Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 A.J.I.L. 477, 478 (1994); CLAIRE WILCOX, *A CHARTER FOR WORLD TRADE* (1949).

21. WTO Agreement, *supra* note 13, art. II(1), 33 I.L.M. at 15-16. Article VIII provides that the WTO is granted legal personality. *Id.* art. VIII, 33 I.L.M. at 18. Members are required to accord the WTO such legal capacity as may be necessary for the exercise of its functions. *Id.*

22. *Id.* art. III(1), 33 I.L.M. at 16. “The MTO shall facilitate the implementation, administration, operation, and further the objectives of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.” *Id.*

23. *Id.* art. III(2), 33 I.L.M. at 16.

24. *Id.* art. II(2), 33 I.L.M. at 15-16. In contrast, the Plurilateral Trade Agreements are only binding upon states that have accepted them. *Id.* art. II(3), 33 I.L.M. at 16.

Council, a Secretariat, and a number of small, subsidiary entities.²⁵ The Ministerial Conference is composed of representatives from each Member State.²⁶ The Ministerial Conference is required to meet at least once every two years and is responsible for carrying out the functions of the WTO. It has the authority to take decisions on all matters under any of the Multilateral Trade Agreements. The General Council is also composed of representatives from all the Members.²⁷ In the intervals between meetings of the Ministerial Conference, its functions are conducted by the General Council. The General Council convenes as appropriate to discharge the responsibilities of the DSB²⁸ and the Trade Policy Review Body.²⁹ The Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreement and of the Multilateral Trade Agreements.³⁰ The Secretariat, headed by a Director-General, is responsible for providing administrative oversight to the WTO. The subsidiary entities oversee the functioning of the their respective agreements.³¹

The WTO continues the practice of decision-making by consensus that developed under the GATT.³² A matter is deemed to

25. *Id.* arts. IV, VI, 33 I.L.M. at 16-18.

26. *Id.* art. IV(1), 33 I.L.M. at 16.

27. *Id.* art. IV(2), 33 I.L.M. at 16.

28. *See supra* note 9 and accompanying text (discussing the DSB).

29. The Trade Policy Review Body is established pursuant to Article C(i) of the Trade Policy Review Mechanism. GATT SECRETARIAT — TRADE NEGOTIATIONS COMMITTEE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTINATIONAL TRADE NEGOTIATIONS (1993) MTN/FA II-A3 p. 1.

30. WTO Agreement, *supra* note 13, art. IX(2), 33 I.L.M. at 19. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. *Id.*

31. *Id.* art. IV(5), 33 I.L.M. at 17. Article IV(5) provides for the establishment of a Council for Trade in Goods, a Council for Trade in Services, and a Council for Trade-Related Aspects of Intellectual Property Rights ("Council for TRIPS"). *Id.* The Council for Trade in Goods oversees the functioning of the Multilateral Trade Agreements. *Id.* The Council for Trade in Services oversees the functioning of the General Agreement on Trade in Services. *Id.* The Council for TRIPS oversees the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights. *Id.* In addition, Article IV(7) provides that the Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions, and a Committee on Budget, Finance, and Administration. *Id.* art. IV(7), 33 I.L.M. at 17.

32. *Id.* art. IX(1), 33 I.L.M. at 19. The term "GATT 1947" refers to the General Agreement on Tariffs and Trade dated October 30, 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently amended or modified. *Id.* art. II(4), 33 I.L.M. at 15-16. The term "GATT 1994" refers to the General Agreement on Tariffs and Trade annexed to the WTO Agreement. *Id.*

be decided by consensus if no Member present at the meeting when the decision is taken formally objects to the proposed decision.³³ Where a decision cannot be arrived at by consensus, the matter shall be decided by voting. At meetings of the Ministerial Council and the General Council, each Member of the WTO has one vote.³⁴ Decisions are taken by a majority of the votes cast, unless otherwise provided. For example, decisions by the General Council when convened as the DSB shall be taken only in accordance with the provisions of Article 2(2) of the Dispute Settlement Understanding.³⁵

Membership in the WTO is open to states that are parties to the GATT 1947 and that accept the WTO Agreement and the Multilateral Trade Agreements.³⁶ There is no requirement, however, that WTO Members sign the Plurilateral Trade Agreements, and the agreements are not binding on states who have not accepted them.³⁷ In addition, any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations, as well as additional areas provided in the Uruguay Round Agreements, may accede to the WTO Agreement.³⁸ Such accession applies to the WTO Agreement and the Multilateral Trade Agreements.³⁹ Decisions on accession are taken by the Ministerial Conference and require a two-thirds majority vote of the WTO Members.

Each Member State is required to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the Uruguay Round Agreements.⁴⁰ In excep-

33. *Id.* art. IX, 33 I.L.M. at 19.

34. *Id.* at art. IX(1), 33 I.L.M. at 19.

35. *Id.* art. IX, 33 I.L.M. at 19.

36. *Id.* art. XI, 33 I.L.M. at 21. These states are considered original Members of the WTO. *Id.*

37. *Id.* art. II(3), 33 I.L.M. at 16. In contrast, the Tokyo Round Agreements did not require GATT Members to join all the separate agreements.

38. *Id.* art. XII, 33 I.L.M. at 21.

39. *Id.* art. XII(1), 33 I.L.M. at 21.

40. *Id.* art. XVI(4), 33 I.L.M. at 23. Article XIII provides an exception to the principle of universal application of the Uruguay Round Agreements to Member states. *Id.* art. XIII, 33 I.L.M. at 22. It provides that the WTO Agreement and the Multilateral Trade Agreements shall not apply as between any Member and any other Member if either Member, at the time either becomes a Member, does not consent to such application. *Id.* art. XIII(1), 33 I.L.M. at 22. This exception may only be invoked between original Members of the WTO Agreement who were contracting parties to GATT 1947 and who had invoked Article XXXV, which was effective as between those contracting

tional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member, provided that three-fourths of the WTO Members approve such a waiver.⁴¹ Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates.⁴² The WTO Agreement provides that least-developed countries, as recognized by the United Nations, are only required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities.⁴³

Any WTO Member may initiate a proposal to amend the WTO Agreement or the Multilateral Trade Agreements by submitting such a proposal to the Ministerial Conference.⁴⁴ Any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance must be taken by consensus. If a consensus is reached, the Ministerial Conference shall submit the proposed amendment to the Members for acceptance. If a consensus is not reached, the Ministerial Conference must decide by a two-thirds majority whether to submit the proposed amendment to the Members for acceptance. Different procedures have been established for approving amendments, depending on the nature of the original provision and the scope of the amendment. For example, amendments to the provisions of Articles IX (Decision-making) and X (Amendments) of the WTO Agreement, Articles I and II of GATT 1994, Article II(1) of the General Agreement on Trade in Services ("GATS"), and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") require unanimous approval by all the Member States.⁴⁵ Amendments to the WTO Agreement or portions of the Multilateral Trade Agreements, other than those listed in Article X(2), which are of a nature that would

parties at the time of entry into force of the WTO Agreement. *Id.* art. XIII, 33 I.L.M. at 22.

41. *Id.* art. IX(3), 33 I.L.M. at 19.

42. *Id.* art. IX(4), 33 I.L.M. at 19.

43. *Id.* art. XI(2), 33 I.L.M. at 21.

44. *Id.* art. X(1), 33 I.L.M. at 20-21.

45. *Id.* art. X(2), 33 I.L.M. at 20. The General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") are parts of the Multilateral Trade Agreements.

alter the rights and obligations of the Members, require a two-thirds approval by the Member States and take effect only for those Members who have accepted them.⁴⁶ In contrast, amendments to the WTO or portions of the Multilateral Trade Agreements, other than those listed in Article X(2), that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two-thirds of the Member States.⁴⁷

No reservation may be made to any provision of the WTO Agreement.⁴⁸ Reservations in respect to a provision of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Similarly, reservations in respect to a provision of a Plurilateral Trade Agreement are governed by the provisions of the relevant agreement.

Finally, any Member may withdraw from the WTO Agreement on six months notice at any time and for any reason.⁴⁹ Such withdrawal applies to both the WTO Agreement and the Multilateral Trade Agreements.⁵⁰

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

The Dispute Settlement Understanding is contained in Annex 2 of the WTO Agreement.⁵¹ It applies to disputes brought pursuant to the consultation and dispute settlement provisions of the WTO Agreement, the Multilateral Trade Agreements, and the Plurilateral Trade Agreements ("Covered Agreements").⁵²

46. *Id.* art. X(3), 33 I.L.M. at 20. The Ministerial Conference may, however, decide by a three-fourths majority of the Members that a state which has not accepted such an amendment is free to withdraw from the WTO, or may remain a Member with the consent of the Ministerial Conference. *Id.*

47. *Id.* art. X(4), 33 I.L.M. at 20.

48. *Id.* art. XVI(5), 33 I.L.M. at 23.

49. *Id.* art. XV, 33 I.L.M. at 23.

50. *Id.*

51. Dispute Settlement Understanding, *supra* note 14, 33 I.L.M. at 112. See generally ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993) (analyzing GATT legal system prior to WTO); GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME (Reinhard Rode ed., 1990); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1990); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989).

52. Dispute Settlement Understanding, *supra* note 14, art. 1(1), 33 I.L.M. at 114. Appendix 2 of the Understanding on Rules and Procedures Governing the Settlement

The dispute settlement provisions of the Covered Agreements may be invoked with respect to measures affecting their observance taken by regional or local governments or authorities within the territory of a Member State.⁵³ When the DSB determines that a provision of a Covered Agreement has not been observed, the Member State is required to take reasonable measures to ensure its observance.

The Dispute Settlement Understanding establishes the DSB to administer the rules, procedures, and the consultation and dispute settlement provisions of the Covered Agreements.⁵⁴ The DSB is empowered to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the Covered Agreements.⁵⁵ The DSB is required to inform the relevant WTO councils and committees of any developments in disputes related to provisions of the respective Covered Agreements.⁵⁶ The DSB meets as often as necessary to carry out its functions provided in the Dispute Settlement Understanding.⁵⁷ Further, decisions by the DSB are made by consensus.⁵⁸

The Dispute Settlement Understanding indicates that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.⁵⁹ The WTO Members recognize that the Understanding

of Disputes ("Dispute Settlement Understanding") contains a list of special rules and procedures on dispute settlement contained in the WTO Agreement, the Multilateral Trade Agreements, and the Plurilateral Trade Agreements. *Id.* art. 1(2), 33 I.L.M. at 114. To the extent that there is a difference between the rules and procedures of the Dispute Settlement Understanding and the special rules and procedures set forth in Appendix 2, the special rules in Appendix 2 shall prevail. *Id.*

53. *Id.* art. 22(9), 33 I.L.M. at 128.

54. *Id.* art. 2(1), 33 I.L.M. at 114.

55. *Id.* art. 2(1), 33 I.L.M. at 114. The DSB is required to establish a standing Appellate Body with jurisdiction to hear appeals from panel cases. *Id.* art. 17(i), 33 I.L.M. at 123-24.

56. *Id.* art. 2(2), 33 I.L.M. at 114.

57. *Id.* art. 2(3), 33 I.L.M. at 114.

58. *Id.* art. 2(4), 33 I.L.M. at 114. The DSB shall be deemed to have decided a matter by consensus if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision. *Id.* art. 2(4) n.1, 33 I.L.M. at 114.

59. *Id.* art. 3(2), 33 I.L.M. at 115. "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." *Id.*

serves to preserve the rights and obligations of Members under the Covered Agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.⁶⁰ Indeed, the prompt settlement of disputes between Member States, asserting that benefits accruing to them directly or indirectly under the covered Agreements are being impaired, is considered essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Member States.⁶¹ Consequently, the Members affirm their adherence to the principles for the management of disputes previously applied under Articles XXII and XXIII of GATT 1947 as well as the rules and procedures described in the Dispute Settlement Understanding.⁶² All solutions to matters formally raised under the consultation and dispute settlement provisions of the Covered Agreements must be consistent and must not nullify or impair any benefits accruing to any Member under those agreements.⁶³

Essentially, the aim of the dispute settlement mechanism is to secure positive solutions to disputes.⁶⁴ Indeed, it is understood that the use of the dispute settlement process should not be considered a contentious act and that, if a dispute arises, all Members will, in good faith, engage in the procedures in an effort to resolve the dispute.⁶⁵ A solution that is mutually acceptable to both parties and is consistent with the Covered Agreements will be preferred. In the absence of a mutually agreed upon solution, generally, the first objective of the dispute settlement mechanism will be to secure the withdrawal of measures that are inconsistent with the Covered Agreements.⁶⁶ The mechanism should only resort to compensation, however, when the immediate withdrawal of the inconsistent measures are impractical. As a last resort, the dispute settlement mechanism will sus-

60. *Id.*

61. *Id.* art. 3(3), 33 I.L.M. at 115.

62. *Id.* art. 3(1), 33 I.L.M. at 115. Article XXII of GATT 1947 contains procedures for consultation with respect to any matter affecting the operation of the GATT. GATT, *supra* note 2, 61 Stat. A3, 55 U.N.T.S. 187. Article XXIII of GATT 1947 contains procedures to be used in the event that any benefit accruing under the GATT is nullified or impaired. *Id.* 61 Stat. at A64-65, 55 U.N.T.S. at 267-68.

63. Dispute Settlement Understanding, *supra* note 14, art. 3(5), 33 I.L.M. at 115.

64. *Id.* art. 3(7), 33 I.L.M. at 115.

65. *Id.* art. 3(10), 33 I.L.M. at 116.

66. *Id.* art. 3(7), 33 I.L.M. at 115.

pend concessions or other obligations provided under the Covered Agreements on a discriminatory basis, subject to authorization by the DSB.

The Dispute Settlement Understanding provides an extensive range of mechanisms for the resolution of disputes. These procedures include consultations, good offices, conciliation, mediation, and arbitration.⁶⁷ The most important dispute settlement procedure, however, involves the establishment of panels. The Dispute Settlement Understanding provides an extensive, if not exhaustive, set of procedures for the establishment and operation of dispute settlement panels.⁶⁸ Unlike the prior dispute settlement process, the Dispute Settlement Understanding establishes strict time frames for the panel process, ensuring greater transparency and likelihood of success.⁶⁹

If a complaint cannot be resolved through consultations or similar procedures, a complaining party may petition the DSB for the establishment of a panel.⁷⁰ Panels are composed of three individuals who are nominated by the Secretariat.⁷¹ If either party to the dispute opposes the nominations, the Director-General of the WTO shall determine the composition of the panel, in conjunction with the Chairman of the DSB and the relevant committee or council.⁷²

The purpose of the panel is make an objective assessment of the matter before it, including an assessment of the facts of the case and the applicability of and conformity with the relevant Covered Agreements.⁷³ The panels are empowered to seek in-

67. *Id.* arts. 4-5, 25, 33 I.L.M. at 116-118, 129.

68. *Id.* arts. 6-22, 33 I.L.M. at 118-28.

69. *Id.* art. 20, 33 I.L.M. at 125. Unless otherwise agreed, the period from the date of the establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall generally not exceed nine months. *Id.* If the panel report is appealed the time period must generally not exceed twelve months. *Id.*

70. *Id.* art. 6(1), 33 I.L.M. at 118. The panel shall be established no later than the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish a panel. *Id.*

71. *Id.* art. 8(6), 33 I.L.M. at 119. The Secretariat is responsible for maintaining a list of available panel members. *Id.* art. 8(4), 33 I.L.M. at 119.

72. *Id.* art. 8(7), 33 I.L.M. at 119.

73. *Id.* art. 11, 33 I.L.M. at 120. Panels have the following terms of reference unless the parties to the dispute agree otherwise within twenty days from the establishment of the panel:

To examine, in light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the

formation from any relevant source and may consult experts when necessary.⁷⁴ Each party to the dispute may submit written submissions to the panel for consideration.⁷⁵ In addition, the parties meet with the panel on at least two occasions to present oral arguments and provide formal rebuttals to opposing arguments. Throughout this process, panel deliberations are confidential.⁷⁶ The parties to the dispute, as well as other interested parties may be present at panel meetings only when invited by the panel. Otherwise, the panel meets in closed session.

Following its consideration of the written and oral submissions of the parties, the panel issues the descriptive sections of its draft report to the parties.⁷⁷ The parties may submit written comments on the draft report to the panel.⁷⁸ The panel then issues an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions.⁷⁹ Where a panel concludes that a measure is inconsistent with a Covered Agreement, it shall recommend that the Member concerned bring the measure into conformity with that Agreement.⁸⁰ A party may submit a request for the panel to review specific aspects of the interim report prior to the circulation of the final report to all WTO Members.⁸¹ If no comments are received from any party, the interim report shall be considered the final panel report.⁸² The panel shall submit its findings in the form of a written report to the DSB.⁸³ The report of the panel shall set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it makes.⁸⁴ If the parties to the dispute settle

DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

Id. art. (7)1, 33 I.L.M. at 118.

74. *Id.* art. 13(2), 33 I.L.M. at 122.

75. *Id.* art. 12(6), 33 I.L.M. at 121.

76. *Id.* art. 14, 33 I.L.M. at 122.

77. *Id.* art. 15(1), 33 I.L.M. at 122. The descriptive section includes the factual and argument sections of the draft report. *Id.*

78. *Id.*

79. *Id.* art. 15(2), 33 I.L.M. at 122.

80. *Id.* art. 19(1), 33 I.L.M. at 124.

81. *Id.* art. 15(2), 33 I.L.M. at 122. At the request of a party, the panel shall hold an additional meeting with the parties on the issues identified in the written comments. *Id.*

82. *Id.*

83. *Id.* art. 12(7), 33 I.L.M. at 121.

84. *Id.*

the matter, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.⁸⁵

The DSB is required to adopt the panel report within sixty days of the date of circulation of the panel report to the Members unless the DSB decides by consensus not to adopt the report.⁸⁶ A party to the dispute may formally notify the DSB of its decision to appeal the panel report during the sixty-day period.⁸⁷ An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.⁸⁸ Only parties to the dispute, not third parties, may appeal a panel report.⁸⁹ As a general rule, the appellate proceedings must conclude within sixty days from the date a party to the dispute formally notifies the DSB of its decision to appeal.⁹⁰ In no case shall proceedings exceed ninety days.

The DSB is authorized to establish the Appellate Body to hear appeals from panel reports.⁹¹ The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel.⁹² If the Appellate Body concludes that a measure is inconsistent with a Covered Agreement, it shall recommend that the Member concerned bring the measure into conformity with that Agreement.⁹³ The report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the report within thirty days following its circulation to the DSB Members.⁹⁴

Within thirty days following the date of adoption of the panel or Appellate Body report, the Member State is required to inform the DSB of its intentions with respect to the implementation of the DSB's recommendations and rulings.⁹⁵ Prompt com-

85. *Id.*

86. *Id.* art. 16(4), 33 I.L.M. at 123. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members. *Id.* art. 16(1), 33 I.L.M. at 122.

87. *Id.* art. 16(4), 33 I.L.M. at 123.

88. *Id.* art. 17(6), 33 I.L.M. at 123.

89. *Id.* art. 17(4), 33 I.L.M. at 123.

90. *Id.* art. 17(5), 33 I.L.M. at 123.

91. *Id.* art. 17(1), 33 I.L.M. at 123.

92. *Id.* art. 17(13), 33 I.L.M. at 124.

93. *Id.* art. 19(1), 33 I.L.M. at 124.

94. *Id.* art. 17(14), 33 I.L.M. at 124.

95. *Id.* art. 21(3), 33 I.L.M. at 125.

pliance with recommendations and rulings of the DSB is essential to ensure DSB's effective resolution of disputes.⁹⁶ If it is impractical to comply immediately with the DSB's recommendations and rulings, the Member State is granted a reasonable time in which to do so.⁹⁷ Unless the panel or Appellate Body extends the time for providing their report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed fifteen months, unless the parties to the dispute agree otherwise.⁹⁸

The DSB is required to oversee the implementation of adopted recommendations and rulings.⁹⁹ If the recommendations and rulings are not implemented in a reasonable period of time, compensation and suspension of concessions or other obligations may be available as interim measures.¹⁰⁰ Compensation, however, is voluntary and requires negotiations between the affected parties.¹⁰¹ If no satisfactory compensation is agreed upon, any party that has invoked the dispute settlement mechanisms may request authorization from the DSB to suspend the application of concessions or other obligations under the Covered Agreements.¹⁰² The DSB is required to grant authorization to suspend concessions or other obligations within thirty days of the expiration of the reasonable period of time, unless the DSB

96. *Id.* art. 21(1), 33 I.L.M. at 125.

97. *Id.* art. 21(3), 33 I.L.M. at 125. Article 21(3) provides that the reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days following adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

Id.

98. *Id.* art. 21(4), 33 I.L.M. at 125-26.

99. *Id.* art. 21(6), 33 I.L.M. at 126.

100. *Id.* art. 22(1), 33 I.L.M. at 126.

101. *Id.*

102. *Id.* art. 22(2), 33 I.L.M. at 126.

decides by consensus to reject the request.¹⁰³ The level of suspension of concessions or other obligations authorized by the DSB must be equivalent to the level of the original nullification or impairment.¹⁰⁴ Such measures shall be temporary and may only apply until such time as the inconsistent measures are removed or a mutually satisfactory solution is reached.¹⁰⁵

The Dispute Settlement Understanding affirms the multilateral approach to dispute settlement in the Uruguay Round Agreements.¹⁰⁶ When Members seek redress for a violation of obligations, for other nullification or impairment of benefits under the Covered Agreements, or for an impediment to the attainment of any objective of the Covered Agreements, they shall have recourse to, and abide by, the rules and procedures of the Dispute Settlement Understanding.¹⁰⁷ Thus, the dispute settlement mechanism established in the Dispute Settlement Understanding represents Members' sole recourse when violations occur or when benefits are impaired or impeded.¹⁰⁸

II. THE URUGUAY ROUND AGREEMENTS ACT

On December 15, 1993, the Clinton Administration notified Congress of its intention to enter into the Uruguay Round Agreements.¹⁰⁹ In his notification letter, President Clinton stated that the Agreements fulfilled the overall U.S. negotiating objectives:¹¹⁰ first, the Agreements establish more open, equita-

103. *Id.* art. 22(6), 33 I.L.M. at 127-28.

104. *Id.* art. 22(4), 33 I.L.M. at 127.

105. *Id.* art. 22(8), 33 I.L.M. at 128.

106. *Id.* art. 23, 33 I.L.M. at 128-29.

107. *Id.* art. 23(1), 33 I.L.M. at 128.

108. *Id.* art. 23(2), 33 I.L.M. at 128.

109. 58 Fed. Reg. 67,264-67 (1993). The United States negotiated the Uruguay Round Agreements pursuant to fast-track procedures, which were authorized by Congress in 1988. 19 U.S.C. §§ 2191-903 (1988 & Supp. V 1993). Under these procedures, the Administration was required to notify Congress of its intention to enter the Uruguay Round Agreements 120 calendar days before signing the Uruguay Round Agreements. 19 U.S.C. § 2902(e)(3)(A) (1988 & Supp. V 1993). Upon the submission of the implementing legislation to Congress, the House is required to vote on the legislation within 60 days and the Senate within 90 days. *Schedule for Week of November 28, 1994*, Congressional Press Releases, Nov. 28, 1994. Motions to consider such agreements are privileged and amendments are not allowed. 19 U.S.C. § 2191(f)(1)-(2). See generally Harold H. Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L. L. 143 (1992); Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. J. INT'L. L. 471 (1990).

110. See Omnibus Trade and Competitiveness Act of 1988, Chapter 17, Negotia-

ble, and reciprocal market access that the existing GATT system; second, they reduce or eliminate barriers and other trade-distorting policies and practices; third, the Agreements create a more effective system of international trading disciplines and procedures. Furthermore, President Clinton indicated that the United States would enter into the Agreements on April 15, 1994, after which the Agreements would be submitted to Congress for approval.¹¹¹ He added, however, that the Agreements would not bind the United States and, therefore, would have no domestic legal force until Congress approved them and enacted the appropriate implementing legislation.¹¹²

The Clinton Administration prepared the implementing legislation in consultation with public and private sector entities.¹¹³ The perspectives of individual state and local governments on the Uruguay Round Agreements were submitted primarily by the Intergovernmental Policy Advisory Committee.¹¹⁴ In addition, the Advisory Committee for Trade Policy and Negotiations submitted the perspectives of both public and private sector entities.¹¹⁵ The Clinton Administration also received

tion and Implementation of Trade Agreements, 19 U.S.C. § 2901(a) (1988 & Supp. V 1993) (delineating overall trade negotiating objectives set forth by Congress). Besides the overall trade negotiating objectives, Congress identified additional principal trade negotiating objectives. *Id.* 19 U.S.C. § 2901(b) (1988 & Supp. V 1993). These objectives included: (1) to provide a more effective and expeditious dispute settlement mechanism; (2) to enhance the status of the GATT; (3) to obtain broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions; and (4) to ensure that developing countries promote economic development by assuming the fullest possible measure of responsibility for achieving and maintaining an open international trading system. *Id.*

111. 58 Fed. Reg. 67263-67267 (1993).

112. *Id.*

113. 19 U.S.C. § 2155(a) (1988 & Supp. V 1993). Section 2155(a) requires the President to seek information and advice from representative elements of the private sector and the non-Federal government sector with respect to the development, implementation, and administration of U.S. trade policy. *Id.*

114. INTERGOVERNMENTAL POLICY ADVISORY COMMITTEE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 11, 1994). The Intergovernmental Policy Advisory Committee on Trade was created pursuant to 19 U.S.C. § 2114(c)(2)(A)(ii) (1988 & Supp. V 1993). This section authorizes the President, as he deems appropriate, to establish an intergovernmental policy advisory committee on trade to serve as a principal forum in which state and local governments may consult with the federal government on trade policy matters. 19 U.S.C. § 2114(c)(2)(A) (1988 & Supp. V 1993).

115. ADVISORY COMMITTEE ON TRADE POLICY AND NEGOTIATIONS, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 15, 1994). The Advisory Committee for Trade Policy and Negotiations was established pursuant to 19 U.S.C.

comments from numerous private sector advisory committees.¹¹⁶ These advisory committees examined broad policy level issues as well as narrow technical and sectoral concerns.¹¹⁷

On September 27, 1994, President Clinton transmitted House Bill 5110 ("Uruguay Round Agreements Act" or "Uruguay Act") to Congress for formal consideration.¹¹⁸ The Bill was considered by the House Committee on Ways and Means on September 28, 1994, and was approved by a vote of thirty-five to three.¹¹⁹ After brief floor hearings, the Uruguay Round Agreements Act was approved by the House of Representatives on November 29, 1994, and the Senate on December 1, 1994.¹²⁰ Presi-

§ 2155(b)(1), which authorizes the President to create such a committee to provide overall policy advice on negotiation, development, implementation, and administration of trade agreements. 19 U.S.C. § 2155(b)(1) (1988 & Supp. 1993).

116. The policy advisory committees were established pursuant to 19 U.S.C. § 2155(c)(1) which authorizes the President to establish individual general policy advisory committees for industry, labor, agriculture, services, investment, defense, and other interests, as appropriate, to provide general policy advice on trade matters. 19 U.S.C. § 2155(c)(1). In addition, section 2155(c)(2) authorizes the President to establish such sectoral or functional advisory committees as may be appropriate. 19 U.S.C. § 2155(c)(2). Such committees shall be representative of all industry, labor, agricultural, or service interests in the sector or functional areas concerned. *Id.* Representative committees were established for the following industries: Agriculture, Defense, Industry, Investment, Labor, and Services. In addition, numerous sectoral or functional advisory committees were established pursuant to 19 U.S.C. § 2155(c)(2). 19 U.S.C. § 2155(c)(2).

117. See DEFENSE POLICY ADVISORY COMMITTEE TRADE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 10, 1994); AGRICULTURE TECHNICAL ADVISORY COMMITTEE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 10, 1994); LABOR ADVISORY COMMITTEE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 11, 1994); INDUSTRY SECTOR AND FUNCTIONAL ADVISORY COMMITTEES, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 11, 1994); SERVICES POLICY ADVISORY COMMITTEE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 12, 1994); AGRICULTURE ADVISORY COMMITTEE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 13, 1994); INDUSTRY POLICY ADVISORY COMMITTEE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 14, 1994); INVESTMENT POLICY ADVISORY COMMITTEE, REPORT ON THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Jan. 15, 1994).

118. H.R. 5110, 103rd Cong., 2d Sess. (1994). House Bill 5110 was introduced September 27, 1994 as "an Act to approve and implement the trade agreements concluded in the Uruguay Round of multilateral trade negotiations." *Id.*

119. The Committee on Energy and Commerce reported the bill without recommendation by a voice vote. The Committees on Agriculture, Education and Labor, Foreign Affairs, Government Operations, Judiciary, and Rules did not act on the bill. *Schedule for Week of November 28, 1994*, Congressional Press Releases, Nov. 28, 1994.

120. The House voted 288 to 146 in favor of approval. Helen Dewar, *Senate Approves GATT on Big Bipartisan Vote*, WASH. POST, Dec. 2, 1994, at A1. The Senate vote

dent Clinton signed the legislation on December 8, 1994.

This section examines several elements of the Uruguay Round Agreements Act. It reviews the provisions concerning implementation of the Uruguay Round Agreements. It examines the provisions that describe the implications of the Agreements on federal and state law. It also reviews the provisions that establish consultation procedures between the Federal and State Governments. Finally, this section examines the provisions in the Uruguay Round Agreements Act concerning congressional review of U.S. participation in the Uruguay Round Agreements.

A. The Implementation of the Uruguay Round Agreements

The U.S. Congress approved the Uruguay Round Agreements Act¹²¹ pursuant to § 1103 of the Omnibus Trade and Competitiveness Act of 1988¹²² and § 151 of the Trade Act of 1974.¹²³ In the implementing legislation, Congress authorized the President and other appropriate officers of the U.S. Government to issue such regulations as may be necessary to ensure that any provision of the Uruguay Act is appropriately implemented when the Uruguay Round Agreements enter into force.

Section 122(A) of the Uruguay Act provides that in the implementation of the Uruguay Round Agreements and in the functioning of the WTO, it is the objective of the United States to ensure that the Ministerial Conference and the General Council continue the practice of decision-making by consensus followed under the GATT 1947, and as required by Article IX of the WTO Agreement.¹²⁴ In furtherance of this objective, if the action would substantially affect the rights or obligations of the

was 76 to 24 in favor of approval. Prior to its vote on the Act, the Senate passed a budget waiver to overcome objections that the agreement broke budget rules because revenue lost from tariff cuts was not offset by spending reductions. The budget waiver was approved by a vote of 68 to 32. Congress was originally scheduled to vote on the Uruguay Round Agreements Act in November 1994. Pursuant to the fast-track legislation, however, Committee chairmen are granted 45 days to review the proposed legislation. 19 U.S.C. § 2901 (1988 & Supp. V 1993). Senate Commerce Committee Chairman Ernest Hollings took advantage of this procedural right to schedule a series of hearings in order to delay the vote until after the November 1994 elections. As a result, the House also postponed formal consideration of the Act until after the November elections.

121. 19 U.S.C. § 3501 (1994).

122. 19 U.S.C. § 2903 (1988 & Supp. V 1993).

123. 19 U.S.C. § 2191 (1988 & Sup. V 1993).

124. Uruguay Round Agreements Act § 122(a), 19 U.S.C. § 3532 (1994).

United States under the WTO Agreement, or under another Multilateral Trade Agreement, or potentially entails a change in federal or state law, the U.S. Trade Representative is required to consult with the appropriate congressional committee before any vote is taken by the Ministerial Conference or the General Council.¹²⁵ In addition, the Trade Representative is required to submit a report to the appropriate congressional committees describing the nature and scope of the action and the U.S. response.¹²⁶ The Trade Representative is required to consult with the appropriate congressional committees following the submission of his report.¹²⁷

In addition, § 126 of the Uruguay Act requires the Trade Representative to seek Ministerial Conference and General Council adoption of procedures that will ensure broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions.¹²⁸ These principles should be applied through the observance of open and equitable procedures in trade matters by the Ministerial Conference and the General Council, and by the dispute settlement panels and the Appellate Body.¹²⁹

B. The Implications of the Uruguay Round Agreements on Federal and State Law

Section 102(a) of the Uruguay Act reviews the implications of the Uruguay Round Agreements on federal law.¹³⁰ Section 102(a)(1) provides that no provision of the Uruguay Round Agreements shall have any effect if it is inconsistent with any law of the United States.¹³¹ Section 102(a)(2) provides that the implementing legislation shall not be construed to amend or modify any U.S. law, including any law relating to the protection of human, animal, or plant life or health; the protection of the en-

125. Uruguay Round Agreements Act § 122(b), 19 U.S.C. § 3532 (1994). The term "appropriate congressional committee" means the House Committee on Ways and Means, the Senate Committee on Finance, and any other congressional committees that have jurisdiction involving the matter. *Id.* The term "state law" includes any law of a political subdivision of a state. *Id.* § 102(b), 19 U.S.C. § 3512 (1994).

126. *Id.* § 122(c)(1), 19 U.S.C. § 3532.

127. *Id.*

128. *Id.* § 126, 19 U.S.C. § 3536-37.

129. *Id.*

130. *Id.* § 102, 19 U.S.C. § 3512.

131. *Id.* § 102(a)(1), 19 U.S.C. § 3512.

vironment; or the protection of worker safety.¹³² It adds that the implementing legislation shall not be construed to limit any authority conferred under any law of the United States, including § 301 of the Trade Act of 1974, unless specifically provided for in the implementing legislation.¹³³

If a dispute settlement panel or the Appellate Body finds that a regulation or practice of the United States is inconsistent with the Uruguay Round Agreements, § 123(G) provides that such regulation or practice may not be amended, rescinded, or otherwise modified until certain procedures are implemented.¹³⁴ First, the appropriate congressional committees must be consulted.¹³⁵ Second, the Trade Representative must seek advice regarding the modification presented by the relevant private sector advisory committees.¹³⁶ Third, the head of the relevant department or agency must provide an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification.¹³⁷ Fourth, the Trade Representative must submit a report to the appropriate congressional committees describing the proposed modification, the reasons for the modification, and a summary of the advice obtained from the private sector advisory committees.¹³⁸ Fifth, the Trade Representative and the head of the relevant federal department or agency must consult with the appropriate congressional committees on the proposed contents of the final rule or other modification.¹³⁹ Sixth, the final rule or other modification must be published in the Federal Register.¹⁴⁰ Any resulting modification may not go into effect until sixty days following the date on which consultations began, unless the President determines that an earlier date is in the national inter-

132. *Id.* § 102(a)(2), 19 U.S.C. § 3512.

133. Trade Act of 1974, 19 U.S.C. § 2101 (1988 & Supp. V 1993). Section 301 of the Trade Act of 1974 authorizes the Trade Representative to impose sanctions against unfair trade practices. *Id.* 19 U.S.C. § 2171 (1988 & Supp. V 1993).

134. Uruguay Round Agreements Act § 123(g)(1), 19 U.S.C. § 3533(g)(1). These procedures do not apply to any regulation or practice of the International Trade Commission. 19 U.S.C. § 3533(g)(4).

135. Uruguay Round Agreements Act § 123(g)(1), 19 U.S.C. § 3533(g)(1)(A).

136. § 3533(g)(1)(B).

137. *Id.* § 123(g)(1), 19 U.S.C. § 3533(g)(1)(C).

138. *Id.* § 123(g)(1), 19 U.S.C. § 3533(g)(1)(D).

139. *Id.* § 123(g)(1), 19 U.S.C. § 3533(g)(1)(E).

140. *Id.* § 123(g)(1), 19 U.S.C. § 3533(g)(1)(F).

est.¹⁴¹ During this sixty-day period, the House Committee on Ways and Means and the Senate Committee on Finance may vote to indicate their position with regards to the proposed modification.¹⁴² Such a vote, however, is not binding on the department implementing the modification.¹⁴³

Section 102(b) of the Uruguay Act reviews the implications of the Uruguay Round Agreements on state law.¹⁴⁴ Section 102(b)(2)(A) provides that no state law, or the application of such a state law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.¹⁴⁵ Section 102(b)(2)(B) describes the procedures governing such actions brought by the United States against a state or political subdivision.¹⁴⁶ A report by a dispute settlement panel or the Appellate Body regarding a state law or the law of any political subdivision shall not be considered as binding or otherwise accorded deference. Rather, the United States has the burden of proving that the law is inconsistent with the Uruguay Round Agreements. Any state whose interests may be impaired or impeded in the action shall have the unconditional right to intervene in the action as a party.¹⁴⁷ If a state law is declared invalid, it shall not be deemed to have been invalid in its application during any period before the court's judgment becomes final and all timely appeals of such judgment are exhausted.¹⁴⁸ Section 102(b)(2)(C) provides that at least thirty days before the United States brings such an action against a state or a political subdivision, the Trade Representative must provide a report to the House Committee on Ways and Means and the Senate Committee on Finance describing the proposed action and efforts by the Trade Representative

141. *Id.* § 123(g)(1), 19 U.S.C. § 3533(g)(2).

142. *Id.* § 123(g)(1), 19 U.S.C. § 3533(g)(3) (1994).

143. *Id.*

144. *Id.* § 102(b), 19 U.S.C. § 3512(b) (1994).

145. *Id.* § 102(b)(2)(A), 19 U.S.C. § 3512(a)(1) (1994).

146. *Id.* § 102(b)(2)(B), 19 U.S.C. § 3512(b).

147. *Id.* § 102(b)(2)(B)(iii), 19 U.S.C. § 3512(b). The United States is, however, entitled to amend its complaint to include a claim or cross-claim concerning the law of a state that intervenes. *Id.*

148. *Id.* § 102(b)(2)(B)(iv) 19 U.S.C. § 3512(b)(2)(B)(iv).

to resolve the matter with the state by other means.¹⁴⁹ The Trade Representative is then required to consult with the committees before the action is brought.

Finally, § 102(c)(1) of the Uruguay Act provides that no person, other than the United States, shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of the Uruguay Round Agreements.¹⁵⁰ In addition, no person, other than the United States, may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any state, or any political subdivision of a state on the ground that such action or inaction is inconsistent with the Uruguay Round Agreements. Section 102(c)(2) provides that it is the intention of Congress to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements.¹⁵¹ Read together, these provisions preclude any person, other than the United States, from bringing an action against any state or political subdivision or raising any defense to the application of state law under or in connection with any of the Uruguay Round Agreements.

C. The Establishment of Consultation Procedures

The Uruguay Round Agreements Act establishes extensive consultation procedures between the Trade Representative, Congress, and state governments. The purpose of these consultation procedures is to provide oversight of U.S. participation in the Uruguay Round Agreements and to integrate Congress and state governments into the decision-making process.

The Trade Representative is required to consult with the appropriate congressional committees throughout the entire dispute settlement process. Thus, Uruguay Act § 123(D) requires that the Trade Representative consult with the appropriate congressional committees following the establishment of a dispute settlement panel that is to consider the consistency of a federal or state law with any of the Uruguay Round Agreements.¹⁵² Sec-

149. *Id.* § 102(b)(2)(B)(iii), 19 U.S.C. § 3512(b)(2)(C) (1994).

150. *Id.* § 102(c)(1), 19 U.S.C. § 3512(c)(1) (1994).

151. *Id.* § 102(c)(2), 19 U.S.C. § 3512(c)(2) (1994).

152. *Id.* § 123(D), 19 U.S.C. § 3533(d) (1994).

tion 123(E) requires the Trade Representative to consult with the appropriate congressional committees if an appeal is filed from a panel report.¹⁵³ Section 123(F) requires the Trade Representative to promptly consult with the appropriate congressional committees following the circulation of a report of a panel or of the Appellate Body.¹⁵⁴

Similarly, § 127(A) of the Uruguay Round Agreements Act provides that whenever the United States is a party before a dispute settlement panel, the Trade Representative is required to consult with the appropriate congressional committees, the petitioner (if any), and the relevant private sector advisory committees at each stage of the proceedings.¹⁵⁵ The Trade Representative shall also consider the views of representatives of appropriate interested private sector and non-governmental organizations concerning the matter. Section 127(B)(1) requires the Trade Representative to publish a notice in the Federal Register following its request to establish a dispute settlement panel or after receiving a request from another WTO Member for the establishment of a panel.¹⁵⁶ Section 127(b)(2) requires the Trade Representative to take into account any advice received from the appropriate congressional committees, relevant private sector advisory committees, and written comments from the public in preparing U.S. submissions to the panel or Appellate Body.¹⁵⁷ Section 127(c) requires the Trade Representative to publicize all non-confidential documents presented by the United States in dispute settlement proceedings.¹⁵⁸ The Trade Representative is also required to request that other parties authorize the disclosure of their written submissions to the public. The Trade Representative shall make each report of the dispute settlement panel or the Appellate Body available to the public. Section 127(d) requires that the Trade Representative request each party in a dispute settlement proceeding to provide non-confidential summaries of its non-

153. *Id.* § 123(E), 19 U.S.C. § 3533(e) (1994).

154. *Id.* § 123(F), 19 U.S.C. § 3533 (1994).

155. *Id.* § 127(A), 19 U.S.C. § 3537 (1994).

156. *Id.* § 127(b)(1), 19 U.S.C. § 3537 (1994). The notice shall identify the initial parties to the dispute, set forth the major issues and the legal basis of the complaint, identify specific measures cited in the request for establishment of the panel, and seek written comments from the public concerning the issues raised by the dispute. *Id.*

157. *Id.* § 127(b)(2), 19 U.S.C. § 3537 (1994).

158. *Id.* § 127(c), 19 U.S.C. § 3537 (1994).

confidential written submissions.¹⁵⁹ These summaries shall then be made available to the public. Section 127(e) requires the Trade Representative to maintain a public file on each dispute settlement proceeding to which the United States is a party.¹⁶⁰

In addition, § 102(b)(1)(A) requires the President, through the Intergovernmental Policy Advisory Committees on Trade, to consult with state governments for the purpose of achieving conformity between state laws and practices and the Uruguay Round Agreements.¹⁶¹ Section 102(b)(1)(B) requires the Trade Representative to establish a federal-state consultation process for addressing issues relating to the Uruguay Round Agreements that directly relate to, or that will potentially have a direct effect on, the States.¹⁶² This consultation process requires that the States be informed on a continuing basis of matters that directly relate to, or that potentially have a direct impact on, the States. The States must be provided with an opportunity to submit information and advice concerning matters that affect them. The Trade Representative is required to take this information and advice into account when formulating U.S. positions regarding such matters.¹⁶³

Section 102(b)(1)(C) establishes cooperation procedures between states and the Federal Government when a WTO Member requests consultations with the United States concerning the consistency of a state law with the Uruguay Round Agreements.¹⁶⁴ The Trade Representative is required to notify the governor of the affected state and the chief legal officer of the jurisdiction whose law is the subject of the WTO consultation no later than seven days after the request is received. In addition, the Trade Representative must consult with representatives of the affected state regarding the matter no later than thirty days after receiving the WTO consultation request. The Trade Representative is required to ensure that the affected state is involved

159. *Id.* § 127(d), 19 U.S.C. § 3537 (1994).

160. *Id.* § 127(e), 19 U.S.C. § 3537 (1994).

161. *Id.* § 102(b)(1)(A), 19 U.S.C. § 3512 (1994).

162. *Id.* § 102(b)(1)(B), 19 U.S.C. § 3512 (1994). The Federal Advisory Committee Act does not apply to this consultation process. *Id.*

163. *Id.* § 102(b)(1)(B)(iii), 19 U.S.C. § 3512 (1994). The public file must include all U.S. submissions in the proceeding, a listing of any submissions to the Trade Representative from the public with respect to the proceedings, and the report of the dispute settlement panel or the Appellate Body. *Id.*

164. *Id.* § 102(b)(1)(C), 19 U.S.C. § 3512 (1994).

in the development of the U.S. position at each stage of the consultations and each subsequent stage of the dispute settlement proceedings. If a dispute settlement panel or the Appellate Body determines that a state law is inconsistent with the Uruguay Round Agreements, the Trade Representative is required to consult with the affected state in an effort to develop a mutually agreeable response to the adverse report. Interestingly, § 102(b)(1)(D) also requires the Trade Representative to notify and solicit the views of states when the United States makes a request for consultations under the Dispute Settlement Understanding, regarding a sub-central governmental measure of another WTO Member.¹⁶⁵

D. *Review of U.S. Participation in the WTO*

The Uruguay Round Agreements Act establishes several procedures for reviewing U.S. participation in the WTO. These provisions supplement the procedures established for reviewing U.S. participation in the dispute settlement process.

Section 123(A) requires the President to conduct an annual review of the WTO panel roster.¹⁶⁶ Under § 123(B), the Trade Representative is required to ensure that the persons appointed to the WTO panel roster are well-qualified. In addition, § 123(C) requires the Trade Representative to seek the establishment by the General Council and the DSB of rules to govern conflicts of interest by persons serving on panels and Members of the Appellate Body.

Section 124 requires the Trade Representative to submit an annual report to Congress describing the activities of the WTO.¹⁶⁷ The report must describe the major activities, work programs, budget, and personnel information of the WTO. It must describe each proceeding or report that was initiated during that fiscal year regarding federal or state law. It must also describe the status of consultations with any state whose law has been the subject of a panel or Appellate Body report that is ad-

165. *Id.* § 102(b)(1)(D), 19 U.S.C. § 3512 (1994). The Trade Representative is required to take such action at least 30 days before making the request for consultations. *Id.* In exigent circumstances, however, this requirement shall not apply, in which case the Trade Representative shall notify the appropriate representatives of each state not later than three days after making the consultation request. *Id.*

166. *Id.* § 123(a), 19 U.S.C. § 3533(a) (1994).

167. *Id.* § 124, 19 U.S.C. § 3534 (1994).

verse to the United States. Finally, the Trade Representative must describe any progress achieved in increasing the transparency of the proceedings of the Ministerial Conference and the General Council, and of dispute settlement proceedings conducted pursuant to the Dispute Settlement Understanding.

Section 125(A) provides that five years after the WTO Agreement enters into force with respect to the United States, and after every five-year period thereafter, the annual reports required under § 124 shall include an analysis of the effects of the WTO Agreement on the United States, the costs and benefits to the United States of participation in the WTO, and the value of its continued participation in the WTO.¹⁶⁸

Finally, the implementing legislation establishes procedures for Congress to seek U.S. withdrawal from the Uruguay Round Agreements. Congress may withdraw its approval of the WTO Agreement by enacting a Joint Resolution pursuant to the procedures set forth in Uruguay Act § 125(B).¹⁶⁹ Joint Resolutions may be introduced by any Member of Congress. The procedures set forth in § 152 of the Trade Act of 1974 apply to these Joint Resolutions.¹⁷⁰ Congress must adopt and transmit the Joint Resolution to the President within ninety days of Congressional receipt of the five-year review report prepared by the Trade Representative pursuant to § 125(a).¹⁷¹ If the President vetoes the Joint Resolution, both the House of Representatives and the

168. *Id.* § 125(a), 19 U.S.C. § 3535 (1994).

169. *Id.* § 125(b), 19 U.S.C. § 3535 (1994). The term "Joint Resolution" refers to a Joint Resolution of the two Houses of Congress. *Id.* For Congress to withdraw its approval of the WTO Agreement, the Joint Resolution must contain the following language: "That the Congress withdraws its approval, provided under Section 101(A) of the Uruguay Round Agreements Act, of the WTO Agreement as defined in section 2(9) of that Act." *Id.*

170. Trade Act of 1974, 19 U.S.C. § 2192(b),(d),(e),(f) (1994). *See* 19 U.S.C. § 2192 (setting forth fast-track procedures for trade legislation).

171. Uruguay Round Agreements Act § 125(A), 19 U.S.C. § 3535 (1994). Section 125 provides that it is not improper for the Senate to consider a Joint Resolution unless it has been reported by the Committee on Finance or the Committee has been discharged for failing to report by the close of the 45th day after its introduction. *Id.* Similarly, it is not in order for the House to consider a Joint Resolution unless it has been reported by the Committee on Ways and Means or the Committee has been discharged for failing to report by the close of the 45th day after its introduction. Uruguay Round Agreements Act § 125(b)(2), 19 U.S.C. § 3535(c)(2)(D) (1994). In addition, it is not in order in either the House or the Senate to consider a joint resolution, other than a Joint Resolution received from the other House, if that House has previously adopted a Joint Resolution under this section. *Id.*

Senate must vote to override the veto on or before the later of the last day of the ninety-day period, or the last day of the fifteen-day period beginning on the date that Congress receives the President's veto message.¹⁷² This provision was enacted by Congress as an exercise of its rule-making power.¹⁷³ Furthermore, Congress fully recognized the constitutional right to change these rules at any time.¹⁷⁴

III. THE DISPUTE SETTLEMENT REVIEW COMMISSION

Following transmittal of the Uruguay Round Agreements Act to Congress, the Clinton Administration began negotiations with congressional leaders to facilitate passage of the implementing legislation. These negotiations were designed to allay fears about the Uruguay Round Agreements and their possible effects on U.S. sovereignty. These concerns focused particularly on the operation of the dispute settlement mechanism and the panel process.¹⁷⁵ As the Senate minority leader, Senator Robert Dole's support for the Uruguay Round Agreements Act was critical to its passage in Congress. Consequently, the Clinton Administration worked with Senator Dole to develop additional procedures for the protection of U.S. sovereignty.

On November 25, 1994, the Office of the Trade Representative issued a press release announcing that the Administration had agreed to support legislation to establish a WTO Dispute Settlement Review Commission ("Commission").¹⁷⁶ The Com-

172. Uruguay Round Agreements Act § 125(b)(2)(ii), 19 U.S.C. § 3535(b)(2)(ii) (1994).

173. *Id.* § 125(d)(1) (1994).

174. *Id.* § 125(d)(2) (1994).

175. See Bob Dole, *GATT Not Perfect But Sees Improvement*, Congressional Press Releases, November 23, 1994. Senator Robert Dole stated:

My major concern was that the GATT agreement establishes a new dispute settlement process that could seriously harm U.S. interests. I was concerned that WTO dispute settlement panels in Geneva could rule against the U.S., and even if that ruling was clearly wrong, we could have been required to accept that bad ruling, and maybe even pay penalties to other countries.

Id.

176. Office of the United States Trade Representative, Documents Relating to the Agreement Between the Clinton Administration and Sen. Robert Dole Concerning the Uruguay Round Agreements, Issued by the White House Nov. 23, 1994, Daily Executive Reports, Nov. 25, 1994, at 225; *Documents Relating to the Clinton Administration's Agreement with Sen. Robert Dole Concerning the Uruguay Round Agreement*, 11 INT'L. TRADE REP. 1865 (1994) [hereinafter *Documents Concerning the Uruguay Round Agreement*].

mission would consist of five federal appellate court judges, appointed by the President in consultation with congressional leaders and the Chairmen and Ranking Members of the House Committee on Ways and Means and the Senate Committee on Finance. Each Commissioner would serve a four-year term subject to renewal. Provisions would be made for the appropriate staggering of the Commissioner's terms.

The Commission would be empowered to review all final WTO dispute settlement reports issued by either a panel or the Appellate Body to determine whether the final report is adverse to the United States.¹⁷⁷ In each case, the Commission would determine whether the panel or Appellate Body:

1. Demonstrably exceeded its authority or terms of reference or, where the matter concerned the Uruguay Round Antidumping Agreement, failed to apply Article 17.6 concerning standard of review;
2. Added to the obligations or diminished the rights the United States assumed under the pertinent Uruguay Round agreement;
3. Acted arbitrarily or capriciously, engaged in misconduct, or demonstrably departed from the procedures specified for panels or the appellate body in the agreements; and whether
4. The action in 1, 2, or 3 materially affects the outcome of the report.¹⁷⁸

The Federal Government and all interested parties would be entitled to address the Commission. The Commission would issue a determination within 120 days after the report is adopted. Three votes would be required for an affirmative determination.

Following the issuance of an affirmative determination by the Commission, any Member of Congress would be able to introduce a Joint Resolution requiring the President to negotiate new dispute settlement rules that would address and correct the problem identified by the Commission. The resolution would be privileged. It would be discharged from the House Committee on Ways and Means and the Senate Committee on Finance under the same procedures provided in § 125 of the implement-

177. *Documents Concerning the Uruguay Round Agreement*, *supra* note 176, at 1865. See Letter from Michael Kantor, United States Trade Representative to U.S. Senator Robert Dole (Nov. 23, 1994). *Id.*

178. *Documents Concerning the Uruguay Round Agreement*, *supra* note 176, at 1865.

ing legislation. Floor action would be expedited under the same procedures.

If the Commission issues three affirmative determinations in any five-year period, any Member of Congress would be able to introduce a Joint Resolution to disapprove U.S. participation in the WTO under the same procedures set forth in § 125 of the implementing legislation. If the resolution is enacted by Congress and signed by the President, the United States would commence withdrawal from the WTO Agreement.

According to the Clinton Administration, the goals of the Dispute Settlement Review Commission are straightforward: (1) to assure that the dispute settlement process is accountable; (2) that it is a fair process; and (3) that the dispute settlement process works as the Administration expects it to work.¹⁷⁹ While the Administration was confident that the dispute settlement process would work fairly and that the concerns expressed by many would not materialize, the Commission would provide a "fail-safe" device were the panels to exceed their authority.

IV. *THE IMPLICATIONS OF THE URUGUAY ROUND AGREEMENTS ON U.S. SOVEREIGNTY*

The Uruguay Round Agreements Act and the proposed Dispute Settlement Review Commission were designed to alleviate fears concerning the implications of the Uruguay Round Agreements on U.S. sovereignty. The purpose of this final section is to examine the success of the U.S. legislation.

A. International Agreements and the United States

As a preliminary matter, it is necessary to understand the general implications of international agreements in the United States. Both treaties and congressional-executive agreements constitute valid forms of international agreements.¹⁸⁰ Indeed,

179. Office of the United States Trade Representative, Documents Relating to the Agreement Between the Clinton Administration and Sen. Robert Dole (R-KAN) Concerning the Uruguay Round Agreement, Issued by the White House Nov. 23, 1994, Daily Executive Reports, Nov. 25, 1994, at 225.

180. U.S. CONST. art. II, § 2. Section 2 authorizes the President "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.* Congressional-Executive agreements are authorized under the inherent and plenary powers of both the President and Congress. *Id.* In *Dames & Moore v. Regan*, the U.S. Supreme Court upheld an Executive Agreement with Iran that

recent practice suggests that the particular form of an international agreement has no significant implication on its domestic application.¹⁸¹ A wide range of international obligations, including the GATT 1947,¹⁸² SALT I,¹⁸³ and the North American Free Trade Agreement¹⁸⁴ ("NAFTA") were entered under congressional-executive agreements.¹⁸⁵ Thus, the difference appears to be one of form and not substance.¹⁸⁶ The next two sub-sections

was negotiated by President Carter in order to obtain the release of America hostages in Iran. 453 U.S. 654 (1981). Writing for the Court, Justice Rehnquist validated the agreement by referring to both specific and implied congressional authorization of such action. *Dames & Moore*, 453 U.S. at 674.

Executive agreements are also used to conclude international agreements. See *United States v. Belmont*, 301 U.S. 324 (1937). In *United States v. Belmont*, the Supreme Court upheld the authority of the President to enter international agreements without the consent of Congress. *Belmont*, 301 U.S. at 330. Justice Sutherland's majority opinion indicated that "an international compact . . . is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations." *Id.* See Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995) (describing historical process which came to recognize legitimacy of congressional-executive agreements).

181. See Geoffrey Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 830-36 (1994); Jack Weiss, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L. REV. 1533 (1991); Myres McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 234 (1945).

The result is that our constitutional law today makes available two parallel and completely interchangeable procedures, wholly applicable to the same subject matters and of identical domestic and international legal consequences, for the consummation of intergovernmental agreements. In addition to the treaty-making procedure . . . there is what may be called an "agreement-making procedure," which may operate either under the combined powers of the Congress and the President or in some instances under the powers of the President alone.

Id.

182. GATT, *supra* note 2, 61 Stat. A3, 55 U.N.T.S. 187.

183. Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3462, T.I.A.S. No. 7504.

184. Canada-Mexico-United States: North American Free Trade Agreement [Done at Washington on December 8 and 17, 1992, at Ottawa on December 11 and 17, 1992, and at Mexico City on December 14 and 17, 1992], 32 I.L.M. 605 (1993).

185. See Ronald Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479, 497-502 (1990); John Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 312 (1967).

186. *But see* Testimony of Professor Laurence Tribe before the Senate Committee on Commerce, Science and Transportation, *supra* note 7. This conclusion is by no means uncontroversial. In testimony before the Senate on October 18, 1994, Harvard Law School professor Laurence Tribe argued that fast-track procedures were inappropriate and that the Uruguay Round Agreements should be submitted to the Senate as a

will review the implications of international agreements on federal and state law.

1. International Agreements and Federal Law

International agreements play an integral role in the American legal system.¹⁸⁷ In *The Paquete Habana*, the U.S. Supreme Court identified the role of international law in the United

treaty pursuant to Article II, Section 2 of the Constitution. *Id.* at 297. He argued that the content and import of the Uruguay Round Agreements required that they be submitted under the Treaty Clause of the Constitution. *Id.* Specifically, the implications of the Uruguay Round Agreements on state sovereignty "so deeply implicate the normal lawmaking process of our political system that they are impermissible if the safeguards of the Treaty Clause are not followed." *Id.* at 302.

Professor Tribe's criticism of the use of fast-track procedures for the Uruguay Round Agreements Act rather than the Treaty procedures in Article II of the Constitution is based upon the notion that the content and importance of certain international agreements requires the use of the constitutionally mandated procedures for treaties. Similarly, Professor Anne-Marie Slaughter has argued that the Treaty Clause's provision for supermajority approval is an independent guarantee that particularly important international agreements will be subject to serious deliberation and will be based upon strong national consensus. *Id.* at 286-90.

In contrast, Yale Law School professor Bruce Ackerman testified that the Congressional-Executive agreement serves the principles of constitutional democracy far better than the limited procedures provided in the Treaty Clause. *GATT Implementing Legislation, 1994: Hearings on S. 2467 Before the Committee on Commerce, Science, and Transportation, 103rd Cong., 2nd Sess. 312 (1994)* (statement of Bruce Ackerman, Professor, Yale University Law School). Professor Ackerman argued that the use of Congressional-Executive agreements has increased significantly over the past 50 years and evinces congressional cooperation in the conduct of international relations. *Id.* at 314.

Professor Tribe qualified his position in a subsequent memorandum to congressional leaders, Trade Representative Mickey Kantor and Assistant Attorney General Walter Dellinger on November 28, 1994. Gary Yerkey, *Senate Approves GATT Trade Bill*, 11 INT'L. TRADE REP. 1874 (1994). He indicated:

Although I continue to believe that the constitutional concerns that I have previously raised are deeply important, I cannot say with certainty that my prior conclusions should necessarily be adopted by others or are ones to which I will adhere in the end after giving the matter the further thought that it deserves.

Id. Professor Tribe indicated that the Administration's constitutional arguments that the Uruguay Round Agreements are not a treaty "are both powerful and plausible," and added that "it would therefore be incorrect to quote or to rely upon my earlier contrary views without adding this important qualification." See Nancy Dunne, *GATT Reforms Win Strong House Backing*, FIN. TIMES, Nov. 30, 1994, at 4.

187. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1986). The Restatement (Third) of the Foreign Relations Law of the United States provides that "[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States." *Id.*

States.¹⁸⁸ In a frequently cited passage, the Court announced that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for this determination."¹⁸⁹ As Louis Henkin has noted:

[T]here is now general agreement that international law, as incorporated into domestic law in the United States, is federal, not state law; that cases arising under international law are 'cases arising under . . . the Laws of the United States' and therefore are within the judicial power of the United States are under article III of the Constitution; that principles of international law as incorporated in the law of the United States are 'Laws of the United States' and supreme under article VI; that international law, therefore, is to be determined independently by the federal courts, and ultimately by the United States Supreme Court, with its determination binding on the state courts; and that a determination of international law by a state court is a federal question subject to review by the Supreme Court.¹⁹⁰

International agreements are considered equivalent to federal law under the Supremacy Clause of the Constitution. Article VI, clause 2 provides, in pertinent part, that "[t]his Constitution, and the Laws of the United States . . . and all Treaties made . . . shall be the supreme Law of the Land."¹⁹¹ As a result, international agreements have the same domestic authority as federal statutes. Both are considered the supreme law of the land.¹⁹²

188. *The Paquete Habana*, 175 U.S. 677 (1900).

189. *Id.* at 714.

190. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559-60 (1984).

191. U.S. CONST. art. VI(2). RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 cmt. d. (1986). Comment d provides that "[i]nternational agreements of the United States other than treaties and customary international law, while not mentioned explicitly in the Supremacy Clause, are also federal law and as such are supreme over State law." *Id.*

192. See *Chinese Exclusion Case*, 130 U.S. 581 (1889). In the *Chinese Exclusion Case*, the Supreme Court noted that "by the constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land." *Id.* at 600. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Professor Henkin has noted that while the Supremacy Clause does not

Wherever possible, international agreements and federal statutes are both given effect.¹⁹³ In cases of conflict, however, the later expression of sovereign authority prevails under *lex posterior derogat priori*, the last-in-time doctrine. Thus, a later federal statute supersedes an inconsistent international obligation. Similarly, a later international obligation supersedes an inconsistent federal statute. In *The Cherokee Tobacco*, the Supreme Court examined a conflict between an 1866 treaty and the Internal Revenue Act of 1868.¹⁹⁴ The Court noted that “[u]ndoubtedly one or the other must yield. . . . A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”¹⁹⁵ The Supreme Court has consistently upheld the doctrine that conflicts between treaties and federal legislation are resolved in favor of the most recently enacted measure.¹⁹⁶

International agreements, however, do not automatically create binding obligations or judicially enforceable rights in the U.S. legal system. Under the principles first enunciated in *Foster v. Nielson*, unless a treaty by its terms makes clear that no further Congressional action is required, or unless Congress enacts legislation implementing the treaty obligations, the treaty is viewed as an inter-state contract, unenforceable by private litigants in U.S. courts.¹⁹⁷ Thus, the status of international obligations in the United States depends upon either explicit language in the international agreement or subsequent implementing legislation by Congress.¹⁹⁸ This principle was reiterated by the Supreme

specifically provide that statutes and treaties are equal, the equality of statutes and treaties has been upheld in numerous cases. Henkin, *supra*, at 1563.

193. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Indeed, it is well-settled that “an Act of Congress ought never to be construed to violate the law of nations if other possible construction remains.” *Murray* 6 U.S. at 118. See also *United States v. Palestine Liberation Organization*, 695 F.Supp. 1456, 1464-65 (S.D.N.Y. 1988).

194. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870).

195. *Id.* at 620-21.

196. See, e.g., *Chinese Exclusion Case*, 130 U.S. at 600; *The Head Money Cases*, 112 U.S. 580, 599 (1884). See also Jonathan Turley, *Dualistic Values in the Age of International Legislation*, 44 HASTINGS L.J. 185, 226 (1993).

197. *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829).

198. See *Saipan v. U.S. Dep’t of the Interior*, 502 F.2d 90 (9th Cir. 1974). A determination of self-execution should be informed by a framework that requires an analysis of four distinct elements: (1) the intent of the parties; (2) the availability of alternative enforcement mechanisms; (3) the implications of implying self-execution versus non-self-execution; and (4) the existence of appropriate domestic procedures and institutions for the direct implementation of the treaty obligation. *Saipan*, 502 F.2d at 97. See also *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985).

Court in *The Head Money Cases* where it explained that “[a] treaty is primarily a compact between independent nations.”¹⁹⁹ The Court added that a treaty:

Depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.²⁰⁰

It is critical, therefore, to distinguish between the international and domestic obligations that flow from international agreements. An international agreement creates a binding obligation at the international level. The doctrine of *pacta sunt servanda* provides that every international agreement is binding upon the parties and must be performed by them in good faith.²⁰¹ Thus, the United States is responsible for adhering to its obligations at the international level. Indeed, it may not cite inconsistent domestic law as an excuse for disregarding its international obligation.²⁰² A country’s failure to abide by the terms of an international agreement is a violation of the agreement and may subject that state to sanctions.

In contrast, an international agreement does not automati-

199. *The Head Money Cases*, 112 U.S. 580, 598 (1884).

200. *Id.* See also *Sei Fujii v. State*, 38 Cal.2d 718 (1952) (ruling that U.N. Charter does not create enforceable rights). But see *Saipan*, 502 F.2d at 101 (holding that U.N. Trusteeship Agreement established direct, affirmative, and judicially enforceable rights).

201. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 155 U.N.T.S. 331, 339, 1980 Gr. Brit. T.S. No. 58, at 1 (amd. 7964) [hereinafter Vienna Convention] (entered into force January 27, 1990).

202. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 35-36 (4th ed. 1990); Vienna Convention, *supra* note 201, art. 27, 155 U.N.T.S. at 339, 1980 Gr. Brit. T.S. No. 58, at 17. Article 27 of the Vienna Convention on the Law of Treaties provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” *Id.* Similarly, Article 46 provides:

A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation is manifest and concerned a rule of its internal law of fundamental importance. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Vienna Convention, *supra* note 201, art. 46, 155 U.N.T.S. at 343, 1980 Gr. Brit. T.S. No. 58, at 23.

cally create a binding obligation at the domestic level. International agreements create binding obligations at the domestic level only after explicit authorization in the agreement or subsequent implementing legislation by Congress. Moreover, under the last-in-time doctrine, the United States can subsequently renounce an international obligation at the domestic level.²⁰³ As the Supreme Court noted in *The Paquete Habana*, international law is controlling only "where there is no treaty and no controlling executive or legislative act or judicial decision."²⁰⁴ While such action may create international liabilities, there is no means for redress in domestic courts.

2. International Agreements and State Law

International agreements do not automatically create binding obligations or enforceable rights at the state level. Rather, Congress is required to enact legislation implementing the international obligations at the domestic level unless the agreement makes clear that no further congressional action is required. In this respect, international agreements have the same impact on states as they do on the Federal Government.

In contrast to federal law, however, international agreements always take precedence over inconsistent state law. Under the Supremacy Clause of the Constitution, international agree-

203. See e.g., *Diggs v. Shultz*, 470 F.2d 461, 465-67 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973). For example, in *Diggs v. Shultz*, the Court of Appeals for the Second Circuit noted that it is a well settled constitutional doctrine that Congress may nullify, in whole or in part, a treaty commitment. *Diggs*, 470 F.2d at 465. Indeed, "[u]nder our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it." *Id.* at 466. See also *Moser v. United States*, 341 U.S. 41, 45 (1951); *Edey v. Robertson*, 112 U.S. 580, 597 (1884).

204. *The Paquete Habana*, 175 U.S. at 700. See also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986). It has been suggested, however, that Congress may not override all international obligations. See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1989). In *Committee of United States Citizens Living in Nicaragua v. Reagan*, the Court of Appeals for the D.C. Circuit suggested that there are certain norms of international law that Congress and the President may not violate. *Reagan*, 859 F.2d at 941.

Such basic norms of international law as the proscription against murder and slavery may well . . . restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or other individuals, that policy might well be subject to challenge in domestic court under international law.

Id. See also Ralph Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1162-65 (1990).

ments are considered the supreme law of the land and, therefore, are superior to state law.²⁰⁵ In *Missouri v. Holland*,²⁰⁶ the Supreme Court affirmed the validity of a treaty and subsequent implementing legislation against charges that they were "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment" and that they threatened to "invade the sovereign right of the State and contravene its will manifested in statutes."²⁰⁷ The Court noted that "[a]s most of the laws of the United States are carried out within the States and as many of them deal with matter which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim."²⁰⁸ "Valid treaties of course are as binding within the territorial limits of the State as they are elsewhere throughout the dominion of the United States. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."²⁰⁹ The Supreme Court reiterated this principle in *United States v. Belmont*,²¹⁰ where it noted that "plainly, the external powers of the United States are to be exercised without regard to state laws or policies. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."²¹¹ More recently, in *Japan Line, Ltd. v. County of Los Angeles*,²¹² the Supreme Court held that a California tax levied on the containers of a Japanese shipping company was an invalid state intrusion on the exclusive power of the Federal Government to regulate foreign commerce.²¹³ The Court noted that in matters of international trade, the United States "speaks

205. See, e.g., Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143, 144-48 (1993); Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1271 (1991).

206. *Missouri v. Holland*, 252 U.S. 416 (1920).

207. *Holland*, 252 U.S. at 431. See *Asakura v. Seattle*, 265 U.S. 332, 341 (1924).

208. *Holland*, 252 U.S. at 431.

209. *Id.* at 432-34. See *Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (stating that valid treaties are binding throughout territory and states of United States); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 453, 458 (1806) (holding that treaty of peace between United States and Great Britain could not be amended by individual U.S. states); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (stating that treaties made by United States are supreme law of land, and state legislatures cannot stand in their way).

210. *United States v. Belmont*, 301 U.S. 324 (1937).

211. *Belmont*, 301 U.S. at 331.

212. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

213. *Japan Line, Ltd.*, 441 U.S. at 434.

with one voice."²¹⁴

B. *The Implications of the Uruguay Round Agreements on U.S. Law*

A cursory review of the Uruguay Round Agreements reveals the profound impact of its substantive provisions on international trade matters. For example, the Agreement on Technical Barriers to Trade requires that technical regulations, including those designed to protect health, safety, and the environment, must not be more trade-restrictive than necessary to fulfill a legitimate objective.²¹⁵ Member States must use international technical regulations when such standards exist.²¹⁶ Similarly, the Agreement on the Application of Sanitary and Phytosanitary Measures requires sanitary and phytosanitary measures to be applied only to the extent necessary to protect human, animal, or plant life or health.²¹⁷ Member States must base their sanitary and phytosanitary measures on international standards, guidelines, and recommendations where such standards exist.²¹⁸ Clearly, adherence to these and similar rules will have a significant impact on Member States.

1. The Implications of the Uruguay Round Agreements on Federal Law

The Uruguay Round Agreements Act evinces the inexorable struggle between the desire to maintain authority over domestic matters and the need to comply with international obligations. The Uruguay Round Agreements Act provides that any provision in the Uruguay Round Agreements that is inconsistent with U.S. law shall have no effect. Indeed, nothing in the implementing legislation shall be construed to amend, modify, or limit any U.S. law. One must note, however, that the Uruguay Round Agree-

214. *Id.* at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

215. Agreement on Technical Barriers to Trade, art. 2(2), Annex 1A, Agreement Establishing the World Trade Organization, April 15, 1994, *reprinted in*, H.R. Doc. No. 316, 103rd Cong., 2d Sess. 1381 (1994). *See also* Testimony of Professor Laurence Tribe before the Senate Committee on Commerce, Science and Transportation, *supra* note 7.

216. Agreement on Technical Barriers to Trade, *supra* note 215, art. 2.4.

217. Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2(2), Annex 1A, Agreement Establishing the World Trade Organization, April 15, 1994, *reprinted in* H.R. Doc. No. 316, 103rd Cong., 2d Sess. 1381 (1994).

218. *Id.* art. 3(1), GATT SECRETARIAT — TRADE NEGOTIATIONS COMMITTEE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTINATIONAL TRADE NEGOTIATIONS (1993) MTN/FA II-A1A-4.

ments Act only defines the rights and obligations created by the Uruguay Round Agreements at the domestic level. It does not alter or amend U.S. obligations at the international level. The United States remains bound by the provisions of the Uruguay Round Agreements at the international level.²¹⁹ Its international obligations will remain intact unless it withdraws from the Uruguay Round Agreements or seeks a waiver of its obligations.

An example of the dichotomy between domestic actions and international obligations can be found in the implementing legislation. Section 102(a)(2)(B) of the Uruguay Round Agreements Act²²⁰ reaffirms the authority of the U.S. Trade Representative to act under § 301 of the Trade Act of 1974.²²¹ Section 301 was established by Congress to protect the United States from unfair trade practices.²²² Section 301(a) requires mandatory retaliation against a foreign government if the Trade Representative determines that the rights of the United States under any trade agreement are being denied, or a foreign government practice violates, or is inconsistent with, or otherwise denies benefits to the United States under a trade agreement, or such action is unjustifiable and burdens U.S. commerce.²²³ Section 301(b) authorizes the Trade Representative to take discretionary action if a foreign government practice is unreasonable

219. See generally Thomas William France, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481 (1994); Brand, *supra* note 185; Jackson, *supra* note 185.

220. Uruguay Round Agreements Act § 102(a)(2)(B), 19 U.S.C. § 3512 (1994).

221. See generally, Alan Skyes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y. INT'L BUS. 263 (1991) [hereinafter *Constructive Unilateral Threats*]; AGGRESSIVE UNILATERALISM (Jagdish Bhagwati and Hugh Patrick eds., 1990); Alan Sykes, *Mandatory Relation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT'L L.J. 301 (1990).

222. See Trade Act of 1988, 19 U.S.C. § 2420 (1988 & Supp. V 1993). The 1988 Trade Act introduced a new mechanism called Super 301 that requires the Trade Representative to identify trade liberalization priorities. *Id.* These consist of priority foreign country practices, including major barriers and trade distorting practices, the elimination of which are likely to have the most significant potential to increase U.S. exports. The 1988 Trade Act also introduced another mechanism called Special 301 that requires the Trade Representative to identify countries that deny adequate and effective protection of intellectual property protection. 19 U.S.C. § 2242. The Trade Representative is required to initiate investigations with respect to these practices unless it determines that the initiation of an investigation would be detrimental to U.S. economic interests. 19 U.S.C. § 2412(b)(2)(B).

223. 19 U.S.C. § 2411(a)(1).

or discriminatory and burdens or restricts U.S. commerce.²²⁴ Retaliation is subject to the specific direction of the President.²²⁵ Retaliation can include the suspension or withdrawal of benefits of trade agreements as well as duties or other import restrictions.²²⁶

The use of § 301 unilateral trade sanctions by the United States against Members of the WTO Agreement based on issues that are encompassed by the Uruguay Round Agreements would be a violation of the Uruguay Round Agreements.²²⁷ The Dispute Settlement Understanding contains the exclusive procedures for the resolution of trade disputes.²²⁸ Article 3 of the Dispute Settlement Understanding provides that the dispute settlement process established by the Uruguay Round Agreements is essential to providing security and predictability to the multilateral trading system. Article 23 requires Member States seeking redress for a violation of the Covered Agreements to abide by the rules and procedures of the Dispute Settlement Understanding. Thus, a Member State is not entitled to take unilateral action to seek redress of a violation of obligations or other nullification or impairment of benefits.²²⁹ Indeed, U.S. Trade Representative Michael Kantor has, in fact, acknowledged that the

224. 19 U.S.C. § 2411(b).

225. 19 U.S.C. § 2411(b)(2).

226. 19 U.S.C. § 2411(c).

227. See generally Nara Fusae, *A Shift Toward Protectionism Under Section 301 of the 1974 Trade Act: Problems of Unilateral Trade Retaliation Under International Law*, 19 HOFSTRA L. REV. 229 (1990). But see James R. Arnold, *The Oilseeds Dispute and the Validity of Unilateralism in a Multilateral Context*, 30 STAN. J. INT'L L. 187 (1994); Robert Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM, *supra* note 221, at 113, 137-38.

228. Andreas Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 486 (1994). Andreas Lowenfeld noted the exclusive nature of the WTO dispute resolution process. *Id.* at 486. He suggested that a losing party in the dispute settlement process may not say, "We tried the GATT process and it didn't work, so we will take retaliatory measures on our own." *Id.*

229. EUROPEAN COMMISSION, THE URUGUAY ROUND: BACKGROUND BRIEF 204 (1994). According to the European Union, the use of unilateral trade sanctions would be in violation of the WTO Agreement. *Id.*

The aim behind the WTO is that Members agree to settle their trade disputes multilaterally through the WTO instead of bilaterally or even, in the case of Section 301 of the U.S. Trade Act, unilaterally. . . . One of the central provisions of the agreement is that Members shall not themselves make determination of violations, or suspend concessions, but shall make use of the new dispute settlement procedure.

Id.

United States is required to take § 301 cases that fall under the Uruguay Round Agreements to the WTO for dispute resolution.²³⁰

One must recognized, however, that the Uruguay Round Agreements have no direct effect on the United States. U.S. laws cannot be amended or modified by the WTO. Similarly, the United States cannot be compelled to take any action in contravention of federal law without the approval of the Executive and Legislative Branches.²³¹ Thus, the United States may take any action it deems appropriate, including unilateral action under § 301, regardless of contrary provisions in the Uruguay Round Agreements.²³²

230. Kantor added, however, that the United States remains free to take unilateral action under Section 301 against states, such as China, that are not Members of the WTO or concerning issues that do not fall under the Uruguay Round Agreements. *See GATT-USTR Says Accord Reserves Section 301; Gephardt Pledges Support For GATT Deal*, 11 INT'L TRADE REP. 30 (1994).

231. GATT Director General Peter Sutherland noted that "[t]he WTO can override neither national laws nor national legislators." According to Sutherland:

The WTO can oversee retaliation in the event that there is inadequate implementation. What it cannot do is dictate to any government how that government or legislature should respond to a dispute settlement finding. That is the way it has been under GATT for 46 years, and it is the way it will be under the WTO."

Sutherland added that other countries, "not least the member states of the European Union," have not expressed concern over the sovereignty issue. *See Gary Yerkey, Head of GATT Says U.S. Plan to Withdraw From WTO is Inconsistent With Accord*, 11 INT'L TRADE REP. 1787 (Nov. 23, 1994). In testimony before the Senate Committee on Foreign Relations, Bruce Fein argued that such statements are sheer sophistry. "The WTO would create obligations that would impair U.S. sovereignty because disobedience to WTO panel rulings triggers a right to impose economic sanctions against the nation or oblige it to pay monetary compensation." *World Trade Organization, Hearings Before the Committee on Foreign Relations*, 103rd Cong., 2nd Sess. (June 14, 1994) (statement of Bruce Fein). According to Fein, sovereignty is not maintained merely because a state retains a choice between compliance with an international obligation or punishment. *Id.* "If the maintenance of United States sovereignty under international accords means no more than that the nation is permitted to violate any obligation and accept the international law consequences, then sovereignty is reduced to triviality." *Id.*

232. *See* GENERAL ACCOUNTING OFFICE, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS 16-17 (1994). According to a study by the General Accounting Office:

[U]nder the Final Act of the Uruguay Round, the United States would still be able to use its trade laws and other domestic policies, even utilizing unilateral trade actions. However, if it were to act strictly unilaterally in ways that violated WTO obligations, rules, or decisions, the United States would have to weigh the resulting costs. One cost would be the specific trade sanctions authorized by WTO if, for example, the United States were to refuse to comply with a decision made by a dispute settlement panel. Another cost would be

Thus, statements that the Uruguay Round Agreements affect U.S. sovereignty are only partially accurate. By participating in the Uruguay Round Agreements, the United States has agreed to conform its behavior to a specific international standard.²³³ The United States, however, maintains sovereign authority to determine and regulate its behavior at both the domestic and international levels. Notwithstanding, such action may violate U.S. obligations under the Uruguay Round Agreements and subject the United States to sanctions under the Dispute Settlement Understanding.

2. The Implications of the Uruguay Round Agreements on State Law

The implications of the Uruguay Round Agreements on state law are significant. Like federal law, state legislation is subject to the substantive provisions of the Agreements. As a result, state legislation is subject to challenges by WTO Members. Indeed, Article 22(9) of the Dispute Settlement Understanding provides that the dispute settlement provisions of the Covered Agreements may be applied to regional or local governments.

The Uruguay Round Agreements Act seeks to mitigate the implications of the Uruguay Round Agreements on state law. It provides that no state law, or the application of a state law, may be declared invalid on the ground that it is inconsistent with any of the Uruguay Round Agreements. Rather, the Federal Government is granted an exclusive right of action for the purpose of declaring a state law invalid under the Uruguay Round Agree-

undermining support for a system that the United States sought to strengthen because it felt that doing so would be in its best overall interests.

Id.

233. It should also be noted that the principal rationale behind Section 301 is no longer present as the Uruguay Round Agreements address many of the concerns expressed by the United States regarding the basic GATT structure. Indeed, the desire to establish a more effective and expeditious dispute settlement mechanism was a principal U.S. negotiating objective. The purpose for such a mechanism is clear: to ensure that GATT obligations are protected. Section 301 was an important instrument of U.S. trade policy precisely because GATT obligations could not be adequately protected under the prior system. In contrast, the Uruguay Round Agreements establish a binding dispute settlement mechanism. Thus, the need for unilateral action such as Section 301 is greatly diminished. See, e.g., Marjorie Minkler, *The Omnibus Trade Act of 1988, Section 301: A Permissible Enforcement Mechanism or a Violation of the United States' Obligations Under International Law?*, 11 J.L. & COM. 283 (1992); *Constructive Unilateral Threats*, *supra* note 221, at 289-291; Robert Hudec, *supra* note 227, at 113.

ments.²³⁴ As mentioned in the previous section, however, the Uruguay Round Agreements Act only defines the rights and obligations created by the Uruguay Round Agreements at the domestic level. It does not alter or amend U.S. obligations at the international level.

A recent example of the consequences that arise when state legislation violates a GATT obligation is the *Measures Affecting Alcoholic and Malt Beverages* case between the United States and Canada.²³⁵ Canada brought a GATT complaint against numerous U.S. state measures regulating alcoholic beverages. These measures included state tax measures, distribution barriers, licensing fees, transportation requirements, alcohol content regulations, and listing policies. The Canadian complaint charged that these measures created significant discrimination against the sale of Canadian alcoholic beverages in the United States. Accordingly, Canada indicated that the effect of these measures was to nullify or impair benefits accruing to Canada under the GATT. The GATT dispute settlement panel determined that many of the state measures were impermissible. Indeed, the panel ruled that even if measures were applied regardless of nationality, they were impermissible if they discriminated against like products. Thus, the panel recommended that the United States bring its inconsistent federal and state measures into conformity with its GATT obligations.

C. *The WTO Dispute Settlement Review Commission*

Senator Dole referred to the Dispute Settlement Review Commission as the "three strikes and we're out" mechanism.²³⁶ According to Senator Dole:

This process is unprecedented in the history of U.S. trade agreements. It is not a fig-leaf — it is not just another layer of complexity. It provides a clear, quick exit if our rights are

234. Testimony of Professor Laurence Tribe before the Senate Committee on Commerce, Science and Transportation, *supra* note 7. Professor Tribe suggests that this process creates an anomalous situation where the Trade Representative is required to defend a challenged state law before a dispute settlement panel and subsequently challenge the same state law in the United States. *Id.* at 295-96.

235. General Agreement on Tariffs and Trade: Panel Report—United States Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, *available in* LEXIS, Intlaw Library, BDIEL File.

236. Peter Behr, *Dole's Concerns About GATT Seem to Be Easing*, WASH. POST, Nov. 23, 1994, at A8.

being trampled in the WTO. It provides Congress with a decisive role in determining whether the interests of the U.S. are being (more) served by continued membership in the WTO. If not, we will withdraw. This process is vastly different from the six-month withdrawal provision in the WTO agreement itself. That provision does nothing more than state every country's right to withdraw. Unlike my proposal, it does not provide for careful scrutiny of individual cases, it does not provide for any congressional role, and in fact, it is unlikely that such a provision would ever be used. My new proposal provides real and effective protection against abuses of U.S. sovereignty in the World Trade Organization.²³⁷

The proposed legislation establishing the Dispute Settlement Review Commission provides three elements not found in the implementing legislation. First, it establishes an additional level of domestic review concerning U.S. participation in the Uruguay Round Agreements. As indicated, the Commission provides an independent review of all final WTO dispute settlement reports. Second, the proposed legislation provides Congress with the authority to introduce a Joint Resolution that would require the President to negotiate new dispute settlement rules that address any problems identified by the Commission. Such action could only be taken following the issuance of a decision by the Commission that the dispute settlement panel or Appellate Body acted inappropriately. Third, the proposed legislation provides an additional opportunity for Members of Congress to seek U.S. withdrawal from the Uruguay Round Agreements. It provides that any Member of Congress can introduce a Joint Resolution to disapprove of U.S. participation in the WTO if the Commission makes three affirmative determinations in any five-year period. Both resolutions would be privileged and floor action would be expedited under the same procedures found in § 125 of the implementing legislation.

The benefits of the proposed legislation are twofold. Procedurally, it establishes an additional level of review and expedited legislative procedures for Congressional action. More broadly, the proposed legislation establishes a trigger mechanism for congressional action if the dispute settlement process acts inconsistently with U.S. interests. The proposed legislation does not,

237. Bob Dole, Congressional Press Releases, *supra* note 175.

however, alter the international obligations of the United States. Thus, while it may improve Congressional oversight at the domestic level, the rights and obligations of the United States have not been changed at the international level.

CONCLUSION

States are constantly faced with a choice between relying on multilateral cooperation or resorting to unilateral action to protect their interests. This is an inevitable consequence of the anarchic nature of the international system. Like Rousseau's parable of the stag hunt, states must choose between the uncertainty of multilateral cooperation and the short term benefits of unilateral action.²³⁸

The Uruguay Round Agreements are designed to facilitate cooperative behavior in the realm of international trade. They accomplish this goal in several ways. First, the Uruguay Round Agreements replace short-term tactical calculations with long-term strategic analysis. "The distinction between cases in which similar transactions among parties are unlikely to be repeated and cases in which the expectation of future interaction can influence decisions in the present is fundamental to the emergence of cooperation among egotists."²³⁹ If a Member State violates a provision in the Agreements, it must recognize that any short-term gain may be offset by the long-term ramifications of its actions. For example, constant violations may lead to the demise of the Agreement. Second, the Agreements reduce uncertainty by providing states with reliable information and increased transparency. Thus, they provide a stable structure upon which to base state relations.²⁴⁰ Third, the Uruguay Round Agreements establish a monitoring system that reviews state behavior and identifies potential violations. The existence of a legal system that monitors the behavior of the participants and identifies

238. J.J. Rousseau, *Discourse on the Origin of Inequality*, in *BASIC POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU* 62 (Donald Cress trans. 1987). In the parable of the stag hunt, several hunters agree to cooperate to catch a stag. *Id.* When one hunter defects from the group in order to catch a rabbit, the group fails to catch the stag. *Id.*

239. Kenneth Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 *WORLD POL.* 1, 12 (1985). See also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

240. DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1990); David Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 *J. ECON. THEORY* 253 (1982).

transgressions of commonly agreed rules contributes to the efficacy of cooperative agreements.²⁴¹ Finally, the Agreements provide sanctions for violations.²⁴² The establishment of an effective dispute settlement process is perhaps the most significant accomplishment of the Uruguay Round negotiations. By creating an effective multilateral sanctioning mechanism, Uruguay Round Agreements reduce the need for unilateral action by Member States and affirms the legitimacy of a rule-based system.²⁴³

Each of these factors comprise an integral component of the Uruguay Round Agreements. Indeed, these factors establish the basic framework for developing cooperative behavior in the international system. If states seek to move beyond the realm of power politics, they must establish institutional arrangements that promote cooperation "after hegemony." This entails a fundamental recognition by national governments — that institutions provide a credible basis for the protection of state interests.²⁴⁴ As noted by Robert Keohane:

Committing oneself to an international regime implies a decision to restrict one's own pursuit of advantage on specific issues in the future. Certain alternatives that might otherwise appear desirable — imposing quotas, manipulating exchange rates, hoarding one's own oil in a crisis — become unacceptable by the standards of the regime. . . . Where there are substantial common interests to be realized through agree-

241. Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG. 533, 557 (1992); Paul Milgrom et al., *The Role of Institutions in the Revival of Trade*, 2 ECON. & POL. 1 (1990).

242. Robert Axelrod & Robert Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 WORLD POL. 226, 234-36 (1985).

243. See generally Kenneth Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992); William Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 65 (1987); OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 61-64 (1987); Phillip Trimble, *International Trade and the Rule of Law*, 83 MICH. L. REV. 1016, 1017 (1985); Robert Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 151-53 (1980).

244. See NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE (David Baldwin ed., 1993) (reviewing institutionalist literature). See also Robert Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 384 (1988); Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984). But see John Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5 (1994/95); Joseph Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 486, 498 (1988).

ment, the value of a reputation for faithfully carrying out agreements may outweigh the costs of consistently accepting the constraints of international rules. To pursue self-interest does not require maximizing freedom of action. On the contrary, intelligent and far-sighted leaders understand that attainment of their objectives may depend on their commitment to the institutions that make cooperation possible.²⁴⁵

By approving U.S. participation in the Uruguay Round Agreements, the United States has agreed to be bound by the rules and procedures of this new multilateral trading system. While the United States maintains absolute sovereignty over domestic matters, it is responsible for adhering to its obligations at the international level. To the extent that the United States wishes to participate in the Uruguay Round Agreements, it must abide by the rules and procedures of this system. Since the factors described above are essential to the success of the Uruguay Round Agreements, indeed to any international institution, it appears that the issue of lost sovereignty will remain a recurring and inevitable problem for the nation-state in the modern international system.²⁴⁶

245. ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 258-59 (1984).

246. See Kieran Cooke & Gordon Cramb, *Neighbors' Tiff Becomes First WTO Case*, *FIN. TIMES*, Feb. 23, 1995, at 4. The first WTO dispute settlement complaint was filed in February 1995 by Singapore against Malaysia and concerns imports restrictions on plastic resins. *Id.* *U.S. Urges Broad Representation on Investigative Dispute Panels*, 12 *INT'L TRADE REP.* 295 (1995); Guy De Jonquieres, *WTO Receives First Calls to Settle Disputes*, *FIN. TIMES*, Feb. 11, 1995, at 3.