1997

Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System

Glen T. Schuyler

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol65/iss5/9
POWER TO THE PEOPLE: ALLOWING PRIVATE PARTIES TO RAISE CLAIMS BEFORE THE WTO DISPUTE RESOLUTION SYSTEM

Glen T. Schleyer*

INTRODUCTION

The World Trade Organization (the "WTO") is currently embroiled in a political controversy that threatens to tear it apart. The controversy involves a complaint that the European Union has filed with the WTO dispute resolution system alleging that recent U.S. legislation is in contravention of international law. The legislation at issue is the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, better known as the Helms-Burton Act (the "Act"). The Act allows U.S. courts to impose sanctions on companies, both U.S. and foreign, that do business in Cuba. The European Union alleges that the Act is "an illegal effort to force Europe, Canada and Mexico to join the American effort to isolate Castro."

Sound legal arguments can be made both for and against the validity of the Helms-Burton Act, but it is likely that the soundness of these arguments will have nothing to do with the ultimate outcome of the dispute. The United States is trying to use its vast political and economic power to prevent the question from ever coming before a WTO dispute resolution panel. The United States has been pressuring the European Union to drop the case completely, and the European Union recently succumbed to this pressure somewhat by requesting a delay in the formation of a panel.

This political imbroglio could lead to the premature end of the WTO. The WTO, which officially came into existence on January 1, 1995, was the culmination of trade negotiations lasting nearly a dec-

---

* This note is dedicated to my wife, Monica, and to my family.
3. Id. §§ 6081-6082. More specifically, the Act gives a cause of action to U.S. nationals whose property in Cuba was seized by the Castro regime without compensation. Under the statute, entities that do business in Cuba are trafficking in the stolen property of these U.S. nationals and can be held accountable. Id.; see Steven E. Hendrix, Tensions in Cuban Property Law, 20 Hastings Int'l & Comp. L. Rev. 1, 82-83 (1996).
5. See id. at A9 (noting that "[e]xperts disagree on whether Europe would win its case if it went before the [WTO dispute resolution] panel").
7. Id.
8. Id.
It was the first international organization charged with the responsibility of overseeing the world trading system, and within six months of its creation, 100 countries had accepted membership. Accompanying the WTO's creation was a battery of new trade agreements which reduced tariffs and other trade barriers to lower levels than ever before.

One of the most significant changes made by the WTO was the creation of a new centralized procedure for resolving trade-related disputes. Because of the peculiar history of the WTO's predecessor, the General Agreement on Tariffs and Trade (the "GATT"), the pre-WTO dispute resolution system was primarily developed in an ad hoc, disorganized fashion. As a result, the system was extremely susceptible to political gamesmanship and diplomatic power struggles among nations. The outcomes of trade disputes were subject to the vagaries and capriciousness of international relations, instead of a fair and impartial interpretation of the underlying treaties.

The Understanding on Rules and Procedures Governing the Settlement of Disputes, an annex to the WTO Charter, was a major improvement over the prior system. It greatly diminished the ability of large nations to use their power to derail the dispute resolution process. This depoliticization of dispute resolution advanced the WTO's stated goal of "providing security and predictability to the multilateral trading system." Under the new system, the outcome of trade disputes is less dependent on the power of the nations involved and more dependent on a fair and logical application of the trade agreements.

The current debate over the Helms-Burton Act, however, shows that the depoliticization process is far from over. Political motivations and diplomatic gamesmanship can still have a crippling effect on the
PRIVATE PARTIES AND THE WTO

WTO dispute resolution system. The root of this problem is found in the WTO provision that allows only nations to challenge illegal trade practices. Such a system ensures that the initial filing of a dispute and its continued vitality will be profoundly susceptible to political subversion. No matter how egregious a trade violation is, if no government is willing to take the political risk associated with initiating a dispute, the illicit trade policy will continue. Moreover, allowing only nations to challenge illegal trade practices can lead to a souring of international relations, as the Helms-Burton dispute illustrates. Just as under the GATT, countries' political motivations can still distort and declaw the powerful WTO dispute resolution system.

All these problems could be mitigated by allowing private parties to initiate disputes before the WTO. Private parties—both individuals and companies—that do business in Cuba are the entities most directly injured by the Helms-Burton Act. They are faced with the choice of either forgoing potentially profitable ventures or opening themselves up to liability under the Act. This choice is made more difficult by the United States' political maneuvering—not only do these private parties have to predict whether the Helms-Burton Act would be deemed valid, but they have to predict whether a determination of its validity will occur at all.

If private parties could initiate disputes over the legitimacy of a nation's actions, then a ruling on the merits would be virtually assured. Private parties would not be susceptible to political pressures in the same way as nations. Moreover, a claim raised by a private party against a nation, unlike a claim raised by one nation against another, would not be injurious to international relations because the claim could not be interpreted as a diplomatic attack or maneuver.

Private parties are the primary actors in world trade today, and it is their investments and efforts that are harmed by illicit trade policies. Global compliance with trade agreements is essential if the people of the world are to fully reap the economic benefits of free trade. The only adequate way to ensure global compliance and advance the WTO's goal of lending more stability and predictability to international trade is to let private parties, not just nations, initiate disputes.

Part I of this Note summarizes the formation, history, and philosophy of both the GATT and the WTO, with an emphasis on their respective dispute resolution systems. Part II analyzes the competing political philosophies that have guided the development of world trade dispute resolution over the past fifty years. Part II then argues that a rule-oriented approach to dispute resolution, as opposed to a power-oriented approach, has been and should continue to be the

18. See id. art. 3.
trend. In addition, part II discusses the benefits that greater private participation would confer upon a rule-oriented dispute resolution system. Part III reviews various mechanisms for enhancing private participation in the WTO other than actual standing, and concludes that each one is either unworkable or would inadequately protect the interests of private parties. Finally, part IV examines the different thresholds for standing that the WTO could use and concludes that standing should be available to any private party who has actually suffered some loss or damage because of an allegedly prohibited trade practice. Furthermore, part IV recommends the creation of a commission within the WTO that would evaluate, organize, and process private-party complaints.

I. THE HISTORY OF THE GATT AND THE WTO

The current world trading system has its roots in the years immediately following World War II, when Western nations sought to eliminate the protectionist and discriminatory trade practices that had helped inflame international animosity and alienation between the World Wars. An analysis of the history and development of the two major entities governing world trade—first the GATT, then the WTO—will be useful in contextualizing the problems surrounding world trade today.

A. The General Agreement on Tariffs and Trade

The GATT was the first real attempt by the major nations of the world to create a cohesive system of world trade regulation. This part discusses the development and major characteristics of the GATT, as well as the attributes, advantages, and drawbacks of the GATT dispute resolution system.

1. Development of the GATT

In June of 1944, while the Allied forces tore through Europe, representatives of the Allied nations met in Bretton Woods, New Hampshire.20 With the end of World War II in sight, these nations recognized the need to address the financial and economic problems that had contributed to the Great Depression and the War.21 Because the participants in the Bretton Woods Conference were from the finance ministries of their respective governments, they placed an emphasis on financial and banking matters, not on trade issues.22 At the
end of the Conference, the participants had established the charters of two major international financial entities—the International Monetary Fund and the International Bank for Reconstruction and Development (better known as the World Bank).

The Bretton Woods participants also recognized the need for a third international organization—one that would oversee the area of world trade. The protectionist measures that had arisen during the two decades between the World Wars had hampered international trade, and most nations felt that this obstruction of free trade was a major factor contributing to the Depression and the War. Shortly after the Bretton Woods Conference, the United States and the United Kingdom proposed the creation of an International Trade Organization (the “ITO”). The newly-formed United Nations was charged with the task of creating a charter for the ITO.

The nations participating in this unprecedented multinational effort, however, were eager to enjoy the benefits of free trade and did not want to wait until the ITO could get on its feet. As an interim measure, they decided to draft and enter into a multinational trade agreement that would regulate international trade until the ITO could take over. This provisional arrangement was the GATT, and in 1947 the participating nations signed a Protocol of Provisional Application, which put the GATT into force.

In the meantime, the ITO was running into problems. The proposed charter for the ITO was extremely ambitious and set numerous limits on the actions that participating nations could take in international trade. As a result, in 1950, the United States Congress, hesitant to cede too much power, refused to ratify the charter. As the only world power whose economy was not ravaged by World War II, the United States had tremendous influence, and its refusal to ratify
the ITO charter effectively ensured that the Organization would never come into being.\textsuperscript{33}

The untimely death of the ITO left a void in international trade regulation. The GATT, which was intended to be merely temporary, became by default the primary entity governing international trade.\textsuperscript{34} Of course, the GATT was merely an agreement, without the force of a treaty and certainly without the power and presence of an organization.\textsuperscript{35} The mismatch between the GATT's initial conception and its ultimate function manifested itself in a number of ways, including the artificial "leasing" of its staff from the non-existent ITO\textsuperscript{36} and the lack of any guiding constitution or charter.\textsuperscript{37}

The inauspicious birth of the GATT raised the concern that it would not survive the contentious nature of international trade. As it turned out, however, the GATT proved tremendously beneficial to world trade over the next fifty years.\textsuperscript{38} Perhaps its most important function was forming the basis of ongoing trade negotiations, called "trade rounds," which resulted in diminished tariffs.\textsuperscript{39} In time, the GATT developed such a penumbra of procedures and rules that it eventually became a de facto international organization.\textsuperscript{40} As Professor John H. Jackson writes, "[t]hat it could do so, despite the flawed basic documents on which it had to build, is a tribute to the pragmatism and ingenuity of many of its leaders over the years."\textsuperscript{41}

2. Obligations Imposed by the GATT

The GATT's drafters intended it to be instrumental in combating the high tariffs and other protectionist measures that had contributed to the Great Depression and World War II.\textsuperscript{42} To this end, Article II of

\begin{itemize}
    \item 33. Jackson, World Trading System, \textit{supra} note 21, at 34; Nichols, \textit{GATT Doctrine}, \textit{supra} note 9, at 390. Ironically, it was the United States that had initially proposed the creation of the ITO. This change in position was effected by numerous factors, including a post-war desire for a normalization of international relations and the shift of the U.S. Congress to Republican control in 1948. Jackson, World Trading System, \textit{supra} note 21, at 34.
    \item 34. Jackson, World Trading System, \textit{supra} note 21, at 37; Jackson, \textit{Uruguay Round}, \textit{supra} note 10, at 6; Montañu i Mora, \textit{supra} note 25, at 107; Nichols, \textit{GATT Doctrine}, \textit{supra} note 9, at 390.
    \item 35. Nichols, \textit{GATT Doctrine}, \textit{supra} note 9, at 390.
    \item 36. Jackson, World Trading System, \textit{supra} note 21, at 37; Nichols, \textit{GATT Doctrine}, \textit{supra} note 9, at 390.
    \item 37. Jackson, World Trading System, \textit{supra} note 21, at 38.
    \item 38. Jackson, \textit{Uruguay Round}, \textit{supra} note 10, at 6.
    \item 40. Jackson, World Trading System, \textit{supra} note 21, at 38.
    \item 41. \textit{Id.}
    \item 42. \textit{Id.} at 31. In the preamble to the GATT, the Contracting Parties manifested their desire to "enter[] into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the
the GATT prohibits the participating nations, called "Contracting Parties," from imposing any import restrictions other than tariffs and also limits the tariffs that can be imposed.\textsuperscript{43} Between the adoption of the GATT and its replacement by the WTO,\textsuperscript{44} the Contracting Parties repeatedly lowered the tariff limits referred to in Article II.\textsuperscript{45} Eventually, the tariffs reached such low levels as to present no real impediment to free trade.\textsuperscript{46}

In addition to the tariff reductions, the GATT also places limits on the internal laws and regulations of the Contracting Parties. Specifically, each nation's treatment of imports from another Contracting Party must satisfy two doctrinal principles of non-discriminatory treatment set forth by the GATT. These are referred to as "most-favored-nation treatment"\textsuperscript{47} and "national treatment."\textsuperscript{48}

Article I of the GATT sets forth the most-favored-nation obligation.\textsuperscript{49} Under this article, one Contracting Party cannot be given preferential treatment over another country. Instead, the imports from, and exports to, each Contracting Party must be afforded equitable treatment with respect to customs procedures and all other import- or export-related regulations. In effect, each nation must "grant to every other contracting party the most favorable treatment that it grants to any country."\textsuperscript{50}

\begin{flushright}
\textsuperscript{43} GATT, supra note 14, art. II; Jackson, World Trading System, supra note 21, at 115, 118-19; Nichols, GATT Doctrine, supra note 9, at 387.
\textsuperscript{44} See infra text accompanying notes 78-82 (discussing the replacement of GATT by the WTO).
\textsuperscript{45} Jackson, World Trading System, supra note 21, at 52-3; Trimble, supra note 39, at 1020.
\textsuperscript{46} See Jackson, World Trading System, supra note 21, at 53; see also Nichols, GATT Doctrine, supra note 9, at 387 (noting that the Contracting Parties anticipated that tariff limits "were to be negotiated down so that eventually trade among nations would be virtually unfettered").
\textsuperscript{47} GATT, supra note 14, art. I.
\textsuperscript{48} Id. art. III.
\textsuperscript{49} Id. art. I(1).
\textsuperscript{50} Jackson, World Trading System, supra note 21, at 133; accord Nichols, GATT Doctrine, supra note 9, at 386. Article I(1) reads in relevant part as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation . . ., any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, supra note 14, art. I(1). For a discussion of the economic and political advantages of most-favored-nation treatment, see Jackson, World Trading System, supra note 21, at 134-36.
\end{flushright}
The second type of non-discrimination is national treatment, set forth in Article III of the GATT. Under this doctrine, the domestic laws of a Contracting Party must treat goods imported from another Contracting Party no less favorably than comparable domestically-produced goods once the goods have entered the domestic market.

3. GATT Dispute Resolution

In expectation that Contracting Parties would occasionally disagree about the interpretation and application of GATT provisions, the GATT provides a procedure for resolution of trade disputes. Like the rest of the GATT, this procedure, set forth in Article XXIII, was intended to be merely provisional. Therefore, it does not exhaustively detail every step of the process, and much of the ultimate dispute resolution procedure was embodied in customs and practices developed by the Contracting Parties while resolving actual disputes.

The foundation of the GATT dispute resolution system is Article XXIII. The system is triggered when a Contracting Party determines that a benefit accruing to it under the GATT is being “nullified or impaired” by the actions of another Contracting Party. The GATT requires the nations involved to try to resolve the dispute between themselves before bringing the dispute to the other Contracting Parties. The first step the complaining nation must take is to “make written representations or proposals” to the nation it believes to be

---

51. GATT, supra note 14, art. III(1)-(2).
52. Jackson, World Trading System, supra note 21, at 189; Nichols, GATT Doctrine, supra note 9, at 386. Article III reads in relevant part as follows:

1. The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin. Moreover, in cases in which there is no substantial domestic production of like products of national origin, no contracting party shall apply new or increased internal taxes on the products of the territories of other contracting parties for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed; and existing internal taxes of this kind shall be subject to negotiation for their reduction or elimination.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

GATT, supra note 14, art. III(1)-(2).
53. See Jackson, World Trading System, supra note 21, at 94; Nichols, GATT Doctrine, supra note 9, at 393-94.
54. In addition, Article XXII contains provisions that encourage consultations between Contracting Parties. This article, however, does not provide for further action in the event that consultations fail. See GATT, supra note 14, art. XXII; Jackson, World Trading System, supra note 21, at 94; Nichols, GATT Doctrine, supra note 9, at 392.
55. GATT, supra note 14, art. XXIII(1); Jackson, World Trading System, supra note 21, at 94; Nichols, GATT Doctrine, supra note 9, at 392.
acting in contravention of the GATT.\textsuperscript{56} The other nation must "give sympathetic consideration" to these representations and proposals.\textsuperscript{57}

If the parties are unable to resolve the dispute themselves, Article XXIII allows the complaining party to bring the complaint before the other Contracting Parties, who will investigate and make appropriate recommendations.\textsuperscript{58} In the early years of the GATT, disputes were taken up at a meeting of all the Contracting Parties.\textsuperscript{59} Because this proved too inefficient and time-consuming for most disputes, the Contracting Parties developed an alternate method, under which a working party would investigate the dispute and make a recommendation.\textsuperscript{60} The working party generally consisted of representatives of the disputing countries and of a few neutral countries.\textsuperscript{61}

In the mid-1950s, a third option became prevalent—the use of an impartial panel, composed of three to five trade experts. The experts were to decide the matter fairly and impartially and were not to act as representatives of their respective governments.\textsuperscript{62} After considering the arguments of both parties, and of interested third parties, the panel would issue a report detailing its findings and recommendations.\textsuperscript{63}

The panel report had no legal effect unless it was adopted by consensus of the Contracting Parties. Therefore, the losing party could effectively block adoption of the report by voting against it.\textsuperscript{64} If the panel ruled in favor of the complaining nation and if the report was then adopted, the Contracting Parties were authorized to take action against the losing nation. If "circumstances [were] serious enough to justify such action," the Contracting Parties could authorize the complaining nation to retaliate against the losing nation by denying it any benefits that accrue to it under the GATT.\textsuperscript{65}

The GATT dispute resolution system worked remarkably well in its early years. Because of "the homogeneity of the initial contracting parties and the consensus in support of the GATT rules," compliance

\begin{itemize}
\item \textsuperscript{56} GATT, supra note 14, art. XXIII(1).
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id. art. XXIII(2).
\item \textsuperscript{59} Jackson, World Trading System, supra note 21, at 95; see Nichols, GATT Doctrine, supra note 9, at 393.
\item \textsuperscript{60} Jackson, World Trading System, supra note 21, at 95; Nichols, GATT Doctrine, supra note 9, at 393-94.
\item \textsuperscript{61} Nichols, GATT Doctrine, supra note 9, at 393-94.
\item \textsuperscript{62} Jackson, World Trading System, supra note 21, at 95; Nichols, GATT Doctrine, supra note 9, at 394; G. Richard Shell, Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, 44 Duke L.J. 829, 841 (1995) [hereinafter Shell, Trade Legalism].
\item \textsuperscript{63} Nichols, GATT Doctrine, supra note 9, at 396.
\item \textsuperscript{64} Id. at 396-97; Shell, Trade Legalism, supra note 62, at 842; Shell, Trade Stakeholders Model, supra note 19, at 365; Michael K. Young, Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats, 29 Int'l Law. 389, 392 (1995).
\item \textsuperscript{65} GATT, supra note 14, art. XXIII(2); Young, supra note 64, at 392.
\end{itemize}
with the system was the norm. In the 1950s and 1960s, however, as more nations became Contracting Parties, this policy cohesion faltered, and the "decision-making process became more cumbersome."\(^6\)

The dispute resolution system began to grow more susceptible to increasingly fractious political considerations. One of the first blows to the credibility of the system came in 1955, when the United States used its political influence and power to get the other Contracting Parties to waive certain U.S. obligations regarding agricultural products.\(^7\) The potential political fallout of panel decisions began to undermine their effectiveness as panels intentionally wrote ambiguously worded opinions in politically sensitive areas.\(^8\)

The structure of the system itself was overly susceptible to political influence. The consensus requirement for adopting panel decisions meant that one party could block the decision by voting against it. Therefore, the losing nation could effectively veto any legal effect of the recommendation.\(^9\) As a result of this tepid adoption procedure, only one panel decision resulted in the authorization of retaliation by the Contracting Parties in the entire history of the GATT.\(^7\) Even in this case, which resulted from a complaint by the Netherlands against the United States,\(^7\) political considerations forestalled application of the authorized retaliation, and the initial trade violation continued unabated.\(^10\) Another political upshot of the consensus requirement was that countries "occasionally withheld approval of a panel report in retaliation for some country's unwillingness to allow adoption of a panel report favorable to the first country."\(^11\)

In response to the growing ineffectiveness of the dispute resolution system, nations relied increasingly on unilateral threats and trade sanctions to resolve their trade-related differences.\(^12\) The United States was particularly eager to resort to unilateral measures, a propensity that aggravated many of its trading partners and led to greater tension in the international arena.\(^13\) When the Contracting Parties met in the mid-1980s to overhaul the international trade system, the

---

67. Montaña i Mora, supra note 25, at 108; see Hudec, supra note 66, at 193.
70. See supra text accompanying note 64.
71. Jackson, World Trading System, supra note 21, at 96; Shell, Trade Stakeholders Model, supra note 19, at 365.
73. Id.
74. Young, supra note 64, at 402.
75. Nichols, GATT Doctrine, supra note 9, at 398-99.
76. Shell, Trade Legalism, supra note 62, at 844-45.
growing impotence of the GATT dispute resolution process was a major issue that they needed to resolve.77

B. The World Trade Organization

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

1. Formation of the WTO

The Uruguay Round of trade negotiations, which commenced in 1986, was an attempt to completely revamp and streamline the international trade system. The de facto procedures that had arisen around the GATT were proving unworkable in a number of areas, including dispute resolution, as discussed above.78 In addition, the GATT failed to cover several areas of vital importance to world trade, including services and intellectual property.79 The Contracting Parties felt that the time had finally come to establish an international trade organization to integrate and oversee world trade.

The Uruguay Round resulted in the formation of the WTO, which officially came into existence on January 1, 1995.80 The WTO was formed to be more than just the successor to the GATT—it was intended to supersede and encompass the GATT, as well as all the subsequent trade negotiations and procedures. The preamble to the WTO Charter states that the participating nations are resolved “to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.”81 Accompanying the creation of the WTO were a series of renegotiated trade agreements, including an updated version of the GATT known as GATT 1994.82

2. WTO Dispute Resolution

The system for resolving international trade disputes underwent major changes as a result of the Uruguay Round. The WTO Charter contains an Understanding on Rules and Procedures Governing the

77. Id. at 845-48.
78. See supra text accompanying notes 68-74.
79. Jackson, Uruguay Round, supra note 10, at 8. Moreover, for a variety of reasons, the GATT provisions regarding agriculture went largely unheeded by the Contracting Parties. Id.
80. WTO Charter, supra note 9, art. I; Nichols, GATT Doctrine, supra note 9, at 380 n.1.
81. WTO Charter, supra note 9, pmbl.
82. Id. at 1140.
Settlement of Disputes\textsuperscript{83} (the "Understanding") which details the proper dispute resolution procedures in much greater detail than the GATT.\textsuperscript{84} The Understanding makes six important modifications to the system for resolving trade disputes. When viewed together, these changes show that the new WTO system is a much more powerful and authoritative tool for resolving disputes than the GATT system.

The first major change is the creation of a single entity, the Dispute Settlement Body (the "DSB"), to oversee all disputes.\textsuperscript{85} Because the GATT lacked such an overarching commission, there was an opportunity for parties to forum-shop for the particular dispute resolution mechanism that best suited their objectives.\textsuperscript{86} The formation of the DSB reduced the threat of inconsistent decisions that forum-shopping typically raises.

A second modification made by the Understanding is the creation of an appellate procedure. In a clear attempt to make the dispute resolution system more consistent, fair, and effective, the Understanding gives parties the right to appeal panel decisions to the Appellate Body.\textsuperscript{87} The Appellate Body is a permanent court made up of seven judges appointed by the DSB.\textsuperscript{88}

Third, the Understanding repairs a major weakness of the GATT system by making adoption of the panel and Appellate Body decisions virtually automatic. Adoption of a decision can only be forestalled if all the member nations, including the winning nation, agree by consensus not to adopt it.\textsuperscript{89} Under the GATT, the losing party could single-handedly derail a panel decision by voting against it;\textsuperscript{90} under the WTO, in contrast, the winning party can single-handedly rescue a decision by voting for it.\textsuperscript{91} This shift in presumption protects the dispute resolution process from political sabotage and gives panel decisions much more potency.

A fourth change made by the Understanding is the imposition of time limits on the process. Under the GATT, the dispute resolution system was open-ended and panels often deliberated in numerous sessions during a period of months.\textsuperscript{92} The Understanding imposes strict

\begin{itemize}
  \item[83.] Understanding, supra note 16.
  \item[84.] Compare id. (listing the new WTO procedures in great detail) with GATT, supra note 14, art. XXIII (providing merely cursory explanation of the GATT procedures).
  \item[85.] Understanding, supra note 16, art. 2. The DSB is composed of representatives from every nation that has signed the treaty or code at issue. Shell, \textit{Trade Legalism}, supra note 62, at 848 n.89.
  \item[86.] Shell, \textit{Trade Legalism}, supra note 62, at 848.
  \item[87.] Understanding, supra note 16, at 17.
  \item[88.] Id. art. 17(1)-(2).
  \item[89.] Id. arts. 16(4), 17(14).
  \item[90.] \textit{See supra} text accompanying note 64.
  \item[91.] Shell, \textit{Trade Legalism}, supra note 62, at 850.
  \item[92.] Nichols, \textit{GATT Doctrine}, supra note 9, at 396.
\end{itemize}
time limits on the disputants,93 the panel,94 the Appellate Body,95 and the DSB96 at every stage of the proceedings and encourages those involved to discharge their duties promptly.97

Under the GATT system, delays were often attributable to disagreements in the formation of the panel. The consensus requirement "delayed the establishment [of the panel] while the parties engaged in meaningless semantic struggles over whether anyone had a right to the establishment of a panel and the precise remit of the panel."98 The Understanding reverses the power balance by requiring consensus to delay the formation of a panel once the complaining nation has requested one.99 Thus, under the WTO system, panel formation is virtually automatic and yet another delay tactic is thereby eliminated.

Fifth, the Understanding gives teeth to the dispute resolution system by empowering the WTO to impose sanctions on nations that refuse to comply with adopted decisions.100 Under the GATT, the most that the Contracting Parties could do was authorize the aggrieved nation to retaliate against the violator nation.101 A nation with sufficient political and economic power could easily ignore this retaliation and continue the prohibited practices.102 The Understanding provides for ongoing surveillance of the transgressor's trade practices to ensure that they comply with the decision.103

Finally, the drafters of the Understanding addressed the vexing problem of unilateral retaliatory action. Article 23, entitled "Strengthening of the Multilateral System," prohibits all members from "mak[ing] a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding."104 This prohibition solidifies the authoritative and exclusive position of the WTO in trade dispute resolution.105

93. Understanding, supra note 16, arts. 12(5)-(6), 15(1)-(3).
94. Id. arts. 12(3), 12(8)-(9), 21(5).
95. Id. art. 17(5).
96. Id. arts. 20, 21(4).
97. See id. art. 4(9) (encouraging parties to accelerate proceedings in cases of urgency).
98. Young, supra note 64, at 402.
99. Understanding, supra note 16, art. 6(1).
100. Id. art. 22; see also Young, supra note 64, at 404-05 (noting that under the WTO system, "the offending party is eventually told in no uncertain terms that it is to accept all [the WTO's] rulings and decisions").
101. GATT, supra note 14, art. XXIII(2); see supra text accompanying note 65.
102. This is essentially what happened in the United States-Netherlands dispute of 1953. See supra notes 72-73 and accompanying text.
103. Understanding, supra note 16, art. 21; Young, supra note 64, at 404.
104. Understanding, supra note 16, art. 23(2)(a).
105. See Young, supra note 64, at 400-01.
Viewed together, these changes reflect the desire of the WTO member nations to depoliticize trade dispute resolution and encourage greater predictability and fairness in the application of trade agreements.

II. THE ROLE OF PRIVATE PARTICIPATION IN THE WTO DISPUTE RESOLUTION SYSTEM

The role that private parties should play in international dispute resolution has been the subject of debate among commentators for many years. This part summarizes the philosophical debate over the nature of dispute resolution and argues that the history of dispute resolution under the GATT and the WTO shows a trend toward greater reliance on consistent application of trade agreements and less reliance on the relative power of the disputants. This part concludes that this emphasis on rule integrity is a desirable one, and that greater private participation in the WTO dispute resolution process is necessary to advance this trend.

A. Pragmatism vs. Legalism: The Philosophical Debate over the Nature of International Trade Dispute Resolution

Since the inception of the GATT, there has been a debate over the appropriate nature of international trade regulation and dispute resolution. Although commentators have expressed a wide spectrum of views on this issue, a general distinction can be made between those who prefer a "power-oriented" or "pragmatist" approach and those who prefer a "rule-oriented" or "legalist" approach.106

Pragmatists believe that the goal of international trade dispute resolution should be merely to provide a forum for nations to resolve disputes among themselves in whichever way they see fit.107 The primary purpose of the dispute resolution system, they argue, should be to end the dispute as soon as possible by encouraging negotiations, consultations, and appropriate political compromises.108 Under this view, the system would encourage compromises even if they are in contravention of the rules and agreements governing the trade practices in question.109

106. The concepts of power-oriented and rule-oriented diplomacy were first developed by Professor Jackson. See John H. Jackson, The Crumbling Institutions of the Liberal Trade System, 12 J. World Trade L. 93, 98 (1978) [hereinafter Jackson, Crumbling Institutions]. The terms "pragmatist" and "legalist" were first used in this context by Professor Trimble, see Trimble, supra note 39, at 1017, and later by numerous commentators, e.g., Montañá i Mora, supra note 25, at 109; Shell, Trade Legalism, supra note 62, at 833.

107. Trimble, supra note 39, at 1017; Young, supra note 64, at 390.

108. Olivier Long, Law and Its Limitations in the GATT Multilateral Trade System 71 (1985); Trimble, supra note 39, at 1017; Young, supra note 64, at 390.

109. See Montañá i Mora, supra note 25, at 110-11; Trimble, supra note 39, at 1017.
A necessary corollary to the pragmatist view is the idea that trade-related diplomacy should be power-oriented rather than rule-oriented. In power-oriented diplomacy, it is the relative power of the parties that determines the resolution of the dispute and not any pre-determined set of rules. Under this system, "[a] small country would hesitate to challenge a large one on whom its trade depends. Implicit or explicit threats . . . would be a major part of the technique employed."

The legalists, on the other hand, take the view that the goal of trade dispute resolution should be to preserve the integrity of the applicable rules. The benefit seen in this approach is that it encourages predictability and stability in international trade practices. Private parties and governments, it is argued, could more adequately "plan economic decisions and thereby maximize efficiency" if trade conditions are predictable.

The legalist view dovetails with a rule-oriented approach to diplomacy. In a rule-oriented system, the resolution of a dispute would be based on adherence to a prescribed set of rules to which the parties have already agreed. Any disagreements that arise concerning the application of the rules are resolved by an impartial third party or by some other unbiased, predetermined process. In contrast to the power-oriented approach, the rule-oriented approach gives no significance to the relative power of the disputants.

B. The Historical Trend Toward Legalism

The evolution of world trade dispute resolution in this century represents a shift from power-oriented diplomacy (i.e., pragmatism) to rule-oriented diplomacy (i.e., legalism). The two major leaps forward in this movement have been the Bretton Woods Conference, in-

112. John H. Jackson, Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT, 13 J. World Trade L. 1, 3-4 (1979) [hereinafter Jackson, Governmental Disputes].
113. See Jackson, World Trading System, supra note 21, at 93; Jackson, Crumbling Institutions, supra note 106, at 99.
114. Montañà i Mora, supra note 25, at 129; Trimble, supra note 39, at 1017-18; Young, supra note 64, at 390.
115. Trimble, supra note 39, at 1017.
118. Jackson, Governmental Disputes, supra note 112, at 4.
119. See Jackson, Crumbling Institutions, supra note 106, at 98-99.
120. Professor Jackson argues more broadly that the entire "history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach" and that "modern western democracies . . . have passed far along the scale towards a rule oriented approach." Id. at 99.
cluding the subsequent development of the GATT, and the recent creation of the WTO.

The nations participating in the Bretton Woods Conference and the drafters of the GATT were trying to create a reliable, integral set of rules that would govern world trade.121 Had the ITO gotten off the ground, it would have contained an elaborate dispute resolution system unlike any that had come before.122 Because the GATT was intended merely as a preliminary agreement to regulate world trade until the ITO took over, it did not contain detailed dispute resolution provisions.123 In the early years of the GATT, however, the Contracting Parties developed procedures, such as the practice of appointing an impartial panel to review the dispute and make a recommendation, that reflected an acceptance of a rule-oriented, legalistic approach.124

The following decades, however, were marked by a breakdown of the dispute resolution system and a retreat into power-based diplomacy.125 The "birth defects" of the GATT began to manifest themselves as political influences crept into and distorted the dispute resolution process.126 This politicization of the system undermined the integrity of the GATT rules and made the power of the parties a primary factor in the outcome of trade disputes.127

One major goal of the Uruguay Round was to improve the increasingly ineffectual dispute resolution system by inhibiting the parties' ability to use their political and economic power to circumvent the rules.128 The new dispute resolution system under the WTO represents a major shift toward a legalist approach and away from the power-based pragmatism that pervaded the GATT system.129

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

121. See Jackson, World Trading System, supra note 21, at 93 (quoting Harry Hawkins, one of the GATT drafters, as stating that the GATT "should deal with these subjects in precise detail so that the obligations of member governments would be clear and unambiguous").
122. Id.; Young, supra note 64, at 392-93.
123. Young, supra note 64, at 391-92; see supra text accompanying note 53.
124. Jackson, World Trading System, supra note 21, at 93; Montañá i Mora, supra note 25, at 118-19; Young, supra note 64, at 393-94.
125. See Jackson, World Trading System, supra note 21, at 93; Montañá i Mora, supra note 25, at 111, 119-20; Young, supra note 64, at 394.
126. Jackson, World Trading System, supra note 21, at 93; Montañá i Mora, supra note 25, at 111, 119-20; Young, supra note 64, at 394; see supra text accompanying notes 68-74.
127. Montañá i Mora, supra note 25, at 108-09.
128. Shell, Trade Legalism, supra note 62, at 845.
129. Id. at 833; Young, supra note 64, at 391, 399, 406; see also Montañá i Mora, supra note 25, at 137 (describing the 1989 Uruguay Round developments as being the "first step towards a legalistic reform").
PRIVATE PARTIES AND THE WTO

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

C. The Advantages of a Legalistic Approach

This increasing emphasis on rule integrity in international trade dispute resolution is a desirable trend that should continue in the future. Perhaps the primary benefit of such an approach is that it makes global trade practices more predictable and therefore encourages international investment and trade. One of the stated goals of the WTO dispute resolution system is to "provide security and predictability to the multilateral trading system." A power-oriented system, by definition, produces different outcomes based on the power balance of the disputants at that point in history, as the current Helms-Burton debate illustrates. The resulting uncertainty would make private parties justifiably hesitant to invest their capital and effort into international trade.

The pragmatists' emphasis on merely resolving each dispute as expeditiously as possible is too shortsighted and would actually lead to more international disputes. A reliance on the power of the respective nations encourages large nations to use their economic and political might to reap benefits in contravention of the rules. Such a system would encourage, maybe even ensure, future disputes. A rule-oriented approach, on the other hand, encourages adherence to the rules, giving strong nations no incentive to try to circumvent them.

130. See Montañà i Mora, supra note 25, at 178.
131. Understanding, supra note 16, art. 3(2); see also Renato Ruggiero, Director-General of the WTO, Welcome to the WTO's Web Server (last modified Sept. 20, 1996) <http://www.wto.org/wto/rugg2_wpf.html> (on file with the Fordham Law Review) [hereinafter Ruggiero, WTO Welcome] (noting that access to markets must be "both predictable and secure").
132. Young, supra note 64, at 390, 401.
133. See Long, supra note 108, at 71.
134. See Sanger, supra note 1, at A1 (noting that the United States' attempt to resolve this dispute by invoking a "national security exemption" will probably lead to future disputes over the use of such an exemption by other nations).
135. See Jackson, World Trading System, supra note 21, at 112 ("[I]t is not the resolution of the specific dispute under consideration which is most important. Rather, it is the efficient and just future functioning of the overall system which is the primary goal of a dispute-settlement procedure.")
A further benefit of a rule-oriented approach is that it will foster more amicable international relations. A system that relies on a nation's power encourages a nation to exercise its power, or at least "flex [its] muscles which can get out of hand."\textsuperscript{136} The international acrimony that resulted from the United States' use of unilateral actions in the decades preceding the WTO\textsuperscript{137} illustrates the deleterious effects that a power-oriented system can have, as does the current rancor surrounding the United States' efforts to disrupt the WTO's consideration of the Helms-Burton Act.

Indeed, the trend toward rule-oriented diplomacy, both in international trade and in other contexts, may be an inevitable result of the global rise of democracy. As national power shifts from entrenched governmental decision-makers to private citizens, the power of nations is increasingly fragmented among competing domestic constituencies.\textsuperscript{138} With a nation's power thus decentralized, it can less successfully be used as the primary bargaining chip in international relations. Therefore, a power-oriented approach "becomes more difficult if not impossible."\textsuperscript{139}

Of course, the trend toward legalism is not without its critics. One concern is that a strong, rule-based international trade regime will limit nations' ability to structure their own domestic laws. Professor Philip M. Nichols argues that the domestic laws of every nation reflect the political and societal values of that nation, and that imposing a superseding international law undermines these values in the name of free trade.\textsuperscript{140}

This argument overlooks the role that each nation's domestic processes played in determining whether that nation would enter into the WTO. The result of the Uruguay Round was merely the Agreement Establishing the World Trade Organization.\textsuperscript{141} To obtain the benefits afforded by WTO membership, and the corresponding restraints, nations needed to approve the Charter through their domestic ratification processes.\textsuperscript{142} The political and societal values that

\begin{itemize}
  \item \textsuperscript{136} Jackson, \textit{Crumbling Institutions}, supra note 106, at 100.
  \item \textsuperscript{137} Jackson, \textit{Uruguay Round}, supra note 10, at 25; Shell, \textit{Trade Legalism}, supra note 62, at 844-45.
  \item \textsuperscript{138} See Jackson, \textit{Crumbling Institutions}, supra note 106, at 100 (describing how the growth of democracy "restrict[s] the degree of power and discretion which the Executive possesses").
  \item \textsuperscript{139} \textit{Id.} at 101.
  \item \textsuperscript{140} Nichols, \textit{Extension of Standing}, supra note 12, at 299. Professor Nichols recommends that the WTO adopt an exception under which "laws primarily codifying an underlying societal value and only incidentally hindering free trade should not be subject to World Trade Organization scrutiny." \textit{Id.} at 301.
  \item \textsuperscript{141} WTO Charter, supra note 9.
  \item \textsuperscript{142} See \textit{id.} arts. XI, XII, XIII & XIV (referring to the need for member nations to "accept" or "accede to" the agreement). The United States legislation implementing the WTO Charter is the Uruguay Round Agreements Act, 19 U.S.C. §§ 3501-3624 (1994).
\end{itemize}
Professor Nichols wants to protect already came into play when each nation decided to join the WTO. Furthermore, the WTO Charter was drafted by governmental representatives who presumably tried to infuse their respective national values into the Charter and the trade agreements that accompanied it.

Professor Nichols also sees the “rigidity of the [WTO] dispute resolution process” as presenting “a special danger,” in that “[c]ountries asked to choose between obedience to the World Trade Organization and having empirically legitimate [domestic] laws may choose to ignore the World Trade Organization.” This possibility is belied by the eagerness with which nations joined the WTO. According to the WTO Homepage on the World Wide Web, “[o]ut of a potential membership of 152 countries and territories, 76 governments became members of the WTO on its first day, with some 50 other governments at various stages of completing their domestic ratification procedures.” This enthusiastic response shows that these nations readily accepted the limitations that the WTO would put on their domestic processes in order to obtain the benefits of a stable, predictable system of free trade.

D. The Benefits of Private Participation

The movement toward legalism in international trade dispute resolution has been based on separating political influences and motives from the dispute resolution system. As discussed above, a primary benefit of such an approach is that it allows private parties to more accurately predict future trade conditions, thus allowing them to maximize the value of their resources by participating in international trade. If we want to encourage private parties to engage in international trade, we need to allow them to participate in the dispute resolution system in a manner that will enable them to sufficiently protect their interests.

The agreements and procedures of the WTO have a major impact on the daily operations of the business community. Like any organization, the WTO’s continued validity and relevance is dependent on

---

143. Nichols, Extension of Standing, supra note 12, at 300.
145. Professor Nichols himself acknowledges the tremendous financial benefit resulting from the free trade provisions of the agreements accompanying the WTO’s creation. He cites an International Monetary Fund report estimating that the WTO tariff reductions “should increase the value of the world economy by between 212 billion and 500 billion dollars.” Nichols, Extension of Standing, supra note 12, at 296.
146. See supra text accompanying notes 120-29.
147. See supra text accompanying notes 130-35.
148. See Ruggiero, WTO Welcome, supra note 131 (noting that “[t]he WTO is very young, yet its potential impact on the lives of businessmen, inventors, consumers, farmers, scientists, creative artists and workers in all endeavours, is already evident”); see also Montañà i Mora, supra note 25, at 162 (describing the profound impact that
the support of those it is intended to benefit—in this case, private parties. If private parties are denied sufficient access to the dispute resolution system, then the WTO will lose its legitimacy as the final arbiter of international trade and its decisions will be rendered impotent.

Private participation also improves the quality of the WTO's interpretation of the rules. Private parties will raise claims and make arguments that governments might deem politically unwise to propound on their own initiative. Limiting private participation, on the other hand, silences private parties "insofar as they might contribute to wiser, more contextual decision-making."

A further benefit of private participation is that it "tend[s] to de-emphasize and depoliticize many relatively minor trade or economic complaints that now exist between nations." For example, if the United States is in delicate trade negotiations with Japan, the United States might be hesitant to raise a claim against Japanese import restrictions on, say, cars, or even to express a negative view of these restrictions. If Ford or General Motors can be the instigator or primary proponent of the claim, the problem will be addressed without the United States having to take the political heat. Certainly, the political complications arising from the Helms-Burton Act would not be so severe or troubling if the claim was raised by a private party instead of another government.

Professor Nichols argues that the enhanced publicity that would accompany greater private participation would actually harm the cause of free trade because constituencies who oppose free trade will be more vocal in advancing their protectionist ideologies. He predicts that "[t]he resulting loss of its low profile might prove disastrous for international treaties in general, and GATT specifically, have on individuals and businesses)."

See Steve Charnovitz, Participation of Nongovernmental Organizations in the World Trade Organization, 17 U. Pa. J. Int'l Econ. L. 331, 331, 351 (1996) (arguing that "a closed dispute resolution process will undermine popular support"); Ruggiero, WTO Welcome, supra note 131 ("As the world's most recent, and most far-reaching, initiative in multilateral economic cooperation, the World Trade Organization has a need to be well understood by a wide public . . .").

See Young, supra note 64, at 408 ("[P]eople are more likely to accept adverse political decisions if those decisions are made by political institutions they consider legitimate.").

See Charnovitz, supra note 149, at 353; Shell, Trade Legalism, supra note 62, at 901.

Shell, Trade Legalism, supra note 62, at 908; accord Charnovitz, supra note 149, at 351.

John H. Jackson et al., Implementing the Tokyo Round: National Constitutions and International Economic Rules 209 (1984) [hereinafter Jackson, Tokyo Round]; accord Montañà i Mora, supra note 25, at 161; cf. Young, supra note 64, at 408 (discussing how the depoliticization of dispute resolution can "give an offending country some political cover to make necessary changes").

Nichols, Extension of Standing, supra note 12, at 315.
free trade.\textsuperscript{155} As support for this notion, he cites the "rancorous de-
bates" within the United States surrounding the ratification of the
WTO Charter and the North American Free Trade Agreement
("NAFTA").\textsuperscript{156}

This somewhat paternalistic view seems to be based on the supposi-
tion that the enormous benefits of free trade will not be understood
by the public at large. The business community, however, has a tre-
mendous interest in free trade and will most likely be a significant
voice in the public debate.\textsuperscript{157} Professor Nichols' reliance on the U.S.
debate surrounding the WTO and NAFTA seems to be misplaced,
considering that the protectionists lost each of those battles. In fact,
the more logical conclusion to draw from the WTO and NAFTA de-
bates is that public airings of free trade issues tend to come out in
favor of trade liberalization, not in favor of protectionism.

Professor Nichols is also concerned that "[a]llowing private parties
that were not successful when values and goals were balanced at the
national level to [participate in dispute resolution] would create an
irreconcilable dissonance for countries engaged in the delicate process
of trade negotiation."\textsuperscript{158} He fears that giving weight to the views of
private parties would "create uncertainty about a country's true
position."\textsuperscript{159}

The premise of this point seems to be misguided. If a party's values
were not advanced by its government at the time the relevant trade
agreement was being negotiated, then these values would not have
been incorporated into the trade agreements. Therefore, the party
would not have a WTO claim for violation of this agreement.

In any event, trade negotiations will not be harmed just because
constituents of the participating nations may have tried to enforce
prior agreements. As discussed above, allowing private parties to par-
ticipate more broadly actually takes some political heat off of govern-
ments and will lead to more amicable trade relations.\textsuperscript{160} In addition,
trade negotiations will be more meaningful if the parties know that
the resulting agreements will be predictably and fairly enforced.

Finally, Professor Nichols' concern that giving private parties more
of a voice would engender confusion over the true position of a nation
seems unrealistic. As Professor G. Richard Shell observes, "[t]his ar-

\textsuperscript{155} Id.
\textsuperscript{156} Id. at 315-16; North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 [hereinafter NAFTA].
\textsuperscript{157} Shell, Trade Stakeholders Model, supra note 19, at 376; see also Australia: ABB Chief Wants Complaints Procedures at WTO, Bangkok Post, Dec. 8, 1994, available in LEXIS, World Library, TXPRIM File (describing the call by David de Purry, co-chairman of ABB Asean Brown Boveri, for the WTO to allow companies to lodge complaints with the dispute resolution system).
\textsuperscript{158} Nichols, Extension of Standing, supra note 12, at 318.
\textsuperscript{159} Id.
\textsuperscript{160} See supra text accompanying notes 136-37.
argument gives trade bureaucrats too little credit."161 Surely WTO panel members will be able to tell whether the position they are hearing is coming from a government official or a private party.162 The presentation of a wider variety of opinions should not be viewed with alarm, but should be embraced as a means of improving the quality of panel decisions.163

III. THE INADEQUACY OF ANY LEVEL OF PRIVATE PARTICIPATION SHORT OF PRIVATE STANDING

Once we have accepted the idea that private participation in the dispute resolution system is a desirable goal, we need to determine the appropriate level of participation. There are many ways that private parties can be given the power to influence the dispute resolution system. The most direct method is to grant private parties standing to raise claims before the WTO, but if a lower standard would adequately allow private parties to protect their interests, then we should adopt this lower standard. An analysis will show, however, that any level of private participation in the dispute resolution system short of standing is either inadequate, unfeasible, or both.

A. Private Parties' Use of Their Domestic Influence

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

1. Informal Methods

Some commentators argue that private standing before the WTO is unnecessary because most countries that are important to international trade are representative nations which will be responsive to the needs of their citizens.164 Professor Nichols writes that "democratic governments do function to fairly assess, evaluate, and coordinate various societal values and goals" and that "[t]his is true of trade policy as well."165

161. Shell, Trade Stakeholders Model, supra note 19, at 374.
162. Id. at 374-75.
163. See Charnovitz, supra note 149, at 342 ("[O]ne need not posit a failure in democracy to support greater [private] participation in international organizations. To the contrary, [private] participation should be viewed as an exemplification of the democratic vision.").
164. Trimble, supra note 39, at 1025.
165. Nichols, Extension of Standing, supra note 12, at 311-12.
We must make a distinction, however, between the formation of trade policy and the effective implementation of policy once it is formed. With respect to the former, Professor Nichols is correct in stressing the essential role a government plays in balancing competing societal, political, and economic values. Dispute resolution, however, involves the latter, and a consideration of competing values, as opposed to an emphasis on the rules, would undermine the predictability that the WTO seeks to achieve.

There are many reasons why a nation might neglect to raise a valid claim on behalf of a constituent. For example, as one commentator notes, a nation "might not want to repeat [a private party's] point if doing so could undermine the government in another WTO case or in domestic litigation."166 In addition, every nation has constituents with varying interests, and the government cannot possibly represent all of their interests, no matter how well-intentioned and responsive it is.167 In addition, a nation's responsiveness to its constituents will be balanced against its desire to maintain amicable relations with its trading partners, especially those with significant political and economic power.168 For this reason a nation will inevitably bring fewer claims than some of its constituents would like. This political, power-oriented influence on the dispute resolution system subverts the WTO's goals of predictability and stability in world trade.

2. Formal Methods

Some nations have instituted formal procedures by which a private party can petition the government to take action in response to the alleged trade infractions of another nation. The most influential of these procedures is the United States' section 301 of the Trade Act of 1974 ("Section 301").169 Partially as a response to the perceived overuse of Section 301, the European Community enacted an analogous procedure—Council Regulation 2641/84 on the Strengthening of the Common Commercial Policy ("Regulation 2641/84").170 These procedures could conceivably be used to expand private participation

166. Charnovitz, supra note 149, at 353.
167. Cf. id. at 342 (noting that "many national governments fail to represent the interests of even a majority of their constituencies as periodically reflected by low approval ratings.")
168. See Shell, Trade Legalism, supra note 62, at 901. Professor Shell also notes the "free rider problems" that arise in this context. He observes that the benefits of eliminating a prohibited trade practice accrue to all nations, while the diplomatic fallout is confined to the nation that brings the claim. Therefore, nations will be hesitant to raise a claim, even where doing so would be a net benefit to world trade as a whole. Id. at 901-02.
in the dispute resolution system, and thus need to be examined in closer detail to evaluate their adequacy and feasibility.

a. Section 301

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

Section 301 is clearly a power-oriented device, and it has produced all of the negative effects that are associated with the use of power-oriented negotiation tactics. While Section 301 actions have been highly successful in the past, they have soured relations between the United States and its trading partners and have even inspired retaliation against the United States.

The animosity towards the United States that unilateral measures can produce cautions against continued use of Section 301 to resolve trade disputes. Section 301 does, in an individual case, give private parties some measure of control and input into world trade. This access, however, comes at too high a cost. The continued use of Section 301 would be a reversion to the power-oriented diplomacy of the past and would undermine the U.S.-supported efforts of the WTO to make the system fairer and more predictable.

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

---

175. See Puckett & Reynolds, supra note 172, at 688-89; Shell, Trade Legalism, supra note 62, at 899.
176. Puckett & Reynolds, supra note 172, at 687; Shell, Trade Legalism, supra note 62, at 843-44.
Another reason that Section 301 is an inadequate method for private parties to protect their rights is that there is no guarantee that the Trade Representative will take action, even if the complaint is valid. The government retains broad discretion at every step of a Section 301 procedure. The same political motivations that could prevent a government from raising the claims of its constituents could discourage the United States from actively pursuing a Section 301 petition.

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

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

Some commentators argue that the WTO agreements will actually enhance the usefulness of Section 301 by increasing the number of trade restrictions that it can be used to combat. The short-term effectiveness of Section 301, however, is not in dispute. It is clear that Section 301 has successfully protected U.S. interests in the past and, given the power and influence of the United States, it is likely that the

---


179. See supra text accompanying notes 164-68.

180. Understanding, supra note 16, art. 23(2)(a); see Stewart, Trouble Spots, supra note 177, at 33-34.


182. See id. § 3512(a)(2)(B); Cunningham & Smith, supra note 173, at 591.

183. WTO Charter, supra note 9, art. XVI(4).

184. See Stewart, Trouble Spots, supra note 177, at 33-34.

185. Cunningham & Smith, supra note 173, at 592.
United States would get away with continued use of Section 301 in the future. This, however, does not mean that continuing to take unilateral actions against its trading partners in circumvention of the WTO is a wise course of action for the United States. On the contrary, Section 301 threatens the continued validity and relevance of the WTO dispute resolution system which the United States has worked so hard to improve.

b. Regulation 2641/84

In 1984, the European Community adopted Regulation 2641/84 which gives private parties the right to petition the EC Commission to investigate harmful foreign trade practices. A private party has standing to raise a complaint if it is “acting on behalf of a Community industry” that has been injured by an illicit trade practice of another nation.\(^{186}\) The Commission will initiate an investigation of the offending trade practice if it deems it “necessary in the interest of the Community.”\(^{187}\) An investigation can entail consultations with the nation in question,\(^ {188}\) public hearings,\(^ {189}\) and the submission of briefs.\(^ {190}\) The Commission can recommend retaliatory action if it determines that such action is necessary and is not prohibited by international law.\(^ {191}\)

Regulation 2641/84 has been rarely used since its adoption,\(^ {192}\) and will most likely be used even more sparingly now that the WTO dispute resolution system has been improved. Europe’s adoption of Regulation 2641/84 was largely a response to the United States’ use of Section 301,\(^ {193}\) and the expected decrease in Section 301 actions will surely result in even less use of Regulation 2641/84.

In addition, Regulation 2641/84, by its own terms, does not allow the EC to undertake unilateral measures until the international dispute resolution procedures have been exhausted.\(^ {194}\) This express subordination of the Regulation to dispute resolution indicates that it will become increasingly antiquated now that the dispute resolution system has been improved.

---

187. Regulation 2641/84, supra note 170, art. 6(1), at 3.
188. Id. art. 6(1)(b), at 3.
189. See id. art. 6(1)(a), at 3.
190. See Leier, supra note 186, at 78.
191. Regulation 2641/84, supra note 170, art. 10, at 5; Leier, supra note 186, at 81. Although Regulation 2641/84 does not define “international law,” GATT 1994 would certainly qualify. Leier, supra note 186, at 83.
192. Montañá i Mora, supra note 25, at 133.
193. See Leier, supra note 186, at 69; Silverman, supra note 178, at 251-52.
194. Regulation 2641/84, supra note 170, art. 10(2), at 5; Montañá i Mora, supra note 25, at 135; Daniel G. Partan, Retaliation in United States and European Community Trade Law, 8 B.U. Int’l L.J. 333, 341 (1990).
Moreover, as with Section 301, it is likely that continued use of Regulation 2641/84 would violate Article 23 of the Understanding, which prohibits unilateral retaliation. In any event, even if Regulation 2641/84 were to be used more broadly, it would continue to be susceptible to political influences and motives and would therefore undermine the goals of security and predictability that private parties desire.

B. Use of Domestic Courts

Another potential avenue that private parties can use to protect their interest in free trade is their domestic courts. If domestic courts had the power to make effective determinations about the trade practices of foreign nations, then private parties would have a potent mechanism for ensuring global compliance with international trade agreements. Upon closer inspection, however, the use of domestic courts in the international arena entails more disadvantages than advantages and would actually be detrimental to the interests of private parties.

First, there are practical obstacles to invoking the power of domestic courts to adjudicate international disputes. Courts are extremely hesitant to extend jurisdiction over the field of international relations. United States courts, for example, pay a great deal of deference to the executive and legislative branches in this area and rarely invalidate foreign-related actions of Congress or the President. As for the European Community, "the case-law of the [European Court of Justice (the "ECJ")] is in a state of profound and seemingly hopeless confusion as far as the problem of the direct applicability of treaties is concerned." In most cases, the ECJ has held that individuals may not bring international trade-related issues before the Court. In cases where the ECJ has heard such claims, jurisdiction has been based on

195. Understanding, supra note 16, art. 23; see supra text accompanying notes 180-84.
196. See, e.g., Haig v. Agee, 453 U.S. 280, 292, 309-10 (1981) (upholding Congress's delegation of power to the President to revoke the plaintiff's passport and noting that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 114 (1948) (holding that certain Presidential determinations regarding foreign air transportation are not subject to judicial review because "executive decisions as to foreign policy . . . are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936) (upholding Congress's delegation of power to the President in the area of foreign policy).
198. See Montañà i Mora, supra note 25, at 170-71; see, e.g., Joined Cases 21 to 24/72, International Fruit Co. v. Produktschap voor Groenten en Fruit, 1972 E.C.R. 1219, 1228.
EC regulations such as Regulation 2641/84.\textsuperscript{199} As discussed above, the future use of this regulation is in question.\textsuperscript{200}

The ability of courts to adjudicate claims against foreign nations is also problematic. In the United States, there are both statutory and judicial limitations on suits against foreign nations. The Foreign Sovereign Immunities Act of 1976 (the "FSIA")\textsuperscript{201} expressly strips U.S. courts of jurisdiction over suits against foreign sovereigns, with limited exceptions.\textsuperscript{202} Even where the FSIA does not bar jurisdiction, under the judicially-created act-of-state doctrine courts will "abstain from inquiry into the validity of an act by a foreign state within its own territory."\textsuperscript{203}

In addition to these numerous practical obstacles, allowing private parties to raise international trade disputes in domestic courts would do more harm than good to the predictability of world trade. As discussed above, one major benefit of the WTO's legalistic approach is the establishment of a single mechanism for resolving trade disputes.\textsuperscript{204} Allowing each nation's courts to independently interpret and enforce international trade agreements would frustrate this benefit.\textsuperscript{205}

In other contexts, nations have provided private parties with the ability to enforce an international agreement by expressly linking the rights of individuals to the domestic court systems of the participating nations. The two primary examples of this approach are the NAFTA antidumping provision\textsuperscript{206} and the Nordic Convention on the Protection of the Environment (the "Nordic Convention").\textsuperscript{207}

When antidumping disputes arise concerning the application of one party's laws under chapter 19 of NAFTA, private parties can raise a complaint before a NAFTA panel.\textsuperscript{208} Standing is linked to the domestic laws of the importing nation. Specifically, private parties are guar-

\textsuperscript{199} See Montañà i Mora, supra note 25, at 173; see, e.g., Case 70/87, Fédération de l'industrie de l'huillerie de la CEE (Fediol) v. Commission of the European Communities, 1989 E.C.R. 1781.

\textsuperscript{200} See supra text accompanying notes 186-95.


\textsuperscript{203} Link, supra note 202, at 259.

\textsuperscript{204} See supra text accompanying notes 85-86.

\textsuperscript{205} See Long, supra note 108, at 27; Montañà i Mora, supra note 25, at 175.

\textsuperscript{206} NAFTA, supra note 156, arts. 1901-1911, at 682-87.


\textsuperscript{208} NAFTA, supra note 156, art. 1904(5), at 683; see Samuel C. Straight, \textit{GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States}, 45 Duke L.J. 216, 232 (1995). This applies only to antidumping disputes. In all other areas, only countries can initiate the dispute settlement process. NAFTA, supra note 156, art. 2004, at 694.
anteed the same right that they possess under domestic law to challenge the prohibited activities.\textsuperscript{205}

Similarly, the Nordic Convention gives "[a]ny person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State" the right to bring suit in the offending nation's courts.\textsuperscript{210} Under this arrangement, there is no separate international tribunal, but merely an agreement that each nation will entertain suits from nationals of other countries to the same extent that they allow suits from their own citizens.

An analogous system for the WTO would be unworkable and undesirable. The above arrangements include only three or four countries and only apply to a specific area of the law. In such a context, the danger of inconsistent application of the law, while not totally absent, is much less significant than it would be in the WTO, which covers over a hundred different countries\textsuperscript{211} and regulates a broad spectrum of trade practices. If a similar mechanism was used for the WTO, the domestic courts of dozens of nations would be simultaneously interpreting and applying WTO agreements. The resulting lack of uniformity in the application of trade laws would undermine the ability of private parties to reliably anticipate future trade practices. One major improvement of the WTO dispute resolution system over the GATT was the elimination of multiple forums for resolving disputes. A system that ties private-party standing to the domestic laws of each nation would negate this benefit. Moreover, allowing each nation's domestic law to define the standing requirements for the WTO would cause private access to be overly susceptible to politically-motivated limitations—each nation could limit private-party challenges to its trade practices by limiting domestic judicial review of international trade decisions.

C. Private Participation in Policy Formation

Several commentators have argued that the WTO should allow private parties and organizations to have greater influence in setting the policies and standards of international trade.\textsuperscript{212} Such a suggestion is

\textsuperscript{209} NAFTA, supra note 156, art. 1904(5), at 683; see Straight, supra note 208, at 232.


\textsuperscript{212} See Charnovitz, supra note 149, at 340-48; Shell, Trade Legalism, supra note 62, at 922 ("[U]ltimately, individuals and [nongovernmental organizations] will need to become more deeply involved in the legislative process by which the world trade community creates rules and standards—not just the adjudicative process by which these rules are applied.").
not novel in world trade—in fact, the draft charter for the ITO provided that "[t]he Organization may make suitable arrangements for consultation and co-operation with nongovernmental organizations concerned with matters within the scope of this Charter."\textsuperscript{213} An identical provision is included in the WTO Charter.\textsuperscript{214}

To some extent, private participation in the formation of international trade policy has already taken place. The countries participating in the Uruguay Round of trade negotiations made significant efforts to solicit public comments.\textsuperscript{215} And on an ongoing basis, the Policy Dialogue Group—a coalition of academic experts, members of the business community, and representatives of special interest groups—meets regularly with WTO officials to discuss current issues in international trade.\textsuperscript{216}

Enhancing the role of private parties in establishing international trade policy is an admirable goal and the trend toward greater involvement is promising. The input of private parties will surely be helpful in eliminating policy-based barriers to free trade. But as long as access to the dispute resolution system is limited to nations, private parties can never be sure that the policies that they helped develop will actually be enforced. No matter how advantageous the underlying policies are, political motivations can still prevent nations from raising valid complaints when these policies are transgressed.

D. Private Parties' Ability to Submit Amicus Briefs

Currently, private parties are not allowed to submit amicus briefs to WTO dispute resolution panels.\textsuperscript{217} This prohibition has been the subject of some criticism from commentators\textsuperscript{218} and from the United States.\textsuperscript{219} Allowing some nongovernmental entities to make written presentations to WTO panels, it is argued, would lead to better informed, more enlightened panel decisions.\textsuperscript{220}

Permitting qualified private parties to submit amicus briefs would certainly improve the WTO dispute resolution system. But the ability to participate in ongoing disputes between nations, while desirable, comes too late in the process to adequately protect the interests of

\begin{itemize}
  \item \textsuperscript{213} ITO Charter, art. 87(2), quoted in Charnovitz, supra note 149, at 338.
  \item \textsuperscript{214} WTO Charter, supra note 9, art. V(2).
  \item \textsuperscript{215} Nichols, Extension of Standing, supra note 12, at 305-06.
  \item \textsuperscript{216} Shell, Trade Legalism, supra note 62, at 923-24.
  \item \textsuperscript{217} See Charnovitz, supra note 149, at 352.
  \item \textsuperscript{218} See, e.g., id. at 355.
  \item \textsuperscript{219} Shell, Trade Legalism, supra note 62, at 913 n.368.
  \item \textsuperscript{220} See Charnovitz, supra note 149, at 351 (arguing that private participation will “increase the information available to the panel, thereby leading to better informed—and hopefully better quality—panel decisions”); Shell, Trade Legalism, supra note 62, at 908 (arguing that excluding private parties from WTO dispute resolution will “silenc[e] them insofar as they might contribute to wiser, more contextual decision-making”).
\end{itemize}
PRIVATE PARTIES AND THE WTO

private parties. Nongovernmental entities that are being harmed by illicit trade practices will still be denied relief if their governments, for political reasons, refuse to raise their claims in the first place. The ability to file amicus briefs, like every other level of private participation short of standing, provides insufficient protection for private parties engaged in international trade.

IV. MAKING PRIVATE-PARTY STANDING VIABLE

The final argument of those who oppose private standing is that even if it is desirable, it is not practicable. Professor Nichols maintains that "it is difficult to envisage a scheme that could equitably allow for direct participation by all of the citizens of the world."221 But the fact is that private standing has worked elsewhere in the international context.

The major international forums pointed to by proponents of private standing before the WTO include:222 the International Center for Settlement of Investment Disputes (the "ICSID"),223 the International Labour Organisation (the "ILO"),224 the European Convention on Human Rights,225 and the investment provisions of NAFTA.226 In order to determine the proper threshold for standing before the WTO, it will be helpful to examine the standards used by these other tribunals.

A. Systems Where Standing Is Limited by the Nature of the Entity

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

The ICSID was formed in 1965 when the World Bank's Executive Directors adopted the ICSID Convention.227 The ICSID provides a neutral forum for arbitrating investment disputes between foreign in-

221. Nichols, Extension of Standing, supra note 12, at 313.
222. Some commentators also mention NAFTA's antidumping provisions and the Nordic Convention as possible models for private access to the WTO. See Shell, Trade Legalism, supra note 62, at 887, 917. As discussed above, however, these agreements link private access to the domestic law of each nation, and the WTO is too far-reaching and diverse for such a system. See supra text accompanying notes 206-11.
223. See Jackson, Tokyo Round, supra note 153, at 207-08; Montañà i Mora, supra note 25, at 161-62; Shell, Trade Legalism, supra note 62, at 889-90.
224. See Charnovitz, supra note 149, at 348; Shell, Trade Legalism, supra note 62, at 916-17.
225. See Jackson, Tokyo Round, supra note 153, at 207-08; Montañà i Mora, supra note 25, at 161.
226. See Charnovitz, supra note 149, at 349; Young, supra note 64, at 406 & n.77.
vestors and host countries. An investor has a right to arbitration only if the initial investment agreement between the investor and the host country explicitly provides for ICSID arbitration. Essentially, nations are in no way compelled to use ICSID arbitration. Furthermore, the ICSID Convention allows nations to remove entire classes of disputes from ICSID jurisdiction.

The ICSID does not raise serious standing concerns—in order for an investor to sue a nation, the nation must expressly grant that investor permission to do so. Such a system would be unworkable in the context of the WTO. Requiring nations to explicitly consent to suit before the WTO for each individual case would lead to inequitable enforcement of trade agreements. Larger nations could use their political power and economic clout to refuse to consent, while less developed nations would be effectively forced to consent in order to attract much-needed capital. This power-based outcome would sap the system of the predictability that the WTO has sought to achieve.

The ILO is the primary international organization concerned with protecting the rights of workers around the world. Its primary function is the establishment of labor standards and the monitoring of international compliance with these standards. Under the ILO Constitution, workers’ organizations can raise “representations of non-observance” against nations alleged to be in violation of the required labor standards. Individual workers cannot bring complaints, and a complaint from a workers’ organization is only considered if this organization is deemed by the ILO to be authentic.

The approach taken by the ILO dispute resolution system is inapplicable to the WTO. Extending standing to workers’ organizations is not nearly as drastic as extending it to individuals and corporations. Workers’ organizations will be subject to the same political influences

---

228. ICSID Convention, supra note 227, art. 1, at 162; Rowat, supra note 227, at 107.
229. ICSID Convention, supra note 227, art. 1, at 162; Rowat, supra note 227, at 107.
230. Rowat, supra note 227, at 108.
231. Id.
232. This imbalance is less problematic in the ICSID context because the ICSID was established for the specific purpose of “reduc[ing] the political risks constraining increased foreign direct investment” in less developed countries. Id. at 105.
234. Id. at 381-82.
236. See Ehrenberg, supra note 233, at 407. The authenticity of a workers’ organization depends on “several factors, including the organization’s charter and bylaws, membership, and history.” Id.
that nations are and may be hesitant to file some claims in order to protect their relationship with the offending nation. In order for private parties to adequately protect their interest in free trade with a minimum of political interference, the WTO needs to make standing available at the individual level, not the organizational level.

B. Standing for Any Entity that Suffers Harm

The direct harm of a nation’s protectionist trade practices is borne by the private entities who are doing business with that nation. In order for these private parties to be confident that illicit trade practices will be corrected with sufficient speed and reliability, the WTO dispute resolution system needs to be available to them. In other areas of international law, private parties do, in fact, have standing to raise claims before international tribunals. In addition, U.S. courts regularly hear claims raised by private parties regarding the discriminatory trade practices of U.S. states. An analysis of the various standing levels of these tribunals will be helpful in determining the proper threshold for the WTO.

1. Standing for Prospective Harm

Some tribunals allow standing for private parties who have not suffered actual harm, but for whom injury is imminent or prospective. Two such tribunals are the European Convention on Human Rights and the U.S. federal courts in the context of the negative Commerce Clause of the U.S. Constitution.

The European Convention on Human Rights\(^\text{237}\) which most European nations have ratified, contains certain guarantees of basic human rights. An individual who has been a victim of a violation of these rights can file a claim with the European Commission of Human Rights.\(^\text{238}\) In order to sue, the individual must have been directly affected by the violation.\(^\text{239}\) For the purposes of standing, the Commission has expanded the definition of “victim” to include a potential or eventual victim.\(^\text{240}\)

A similar standard is applied by U.S. courts in evaluating constitutional claims under the U.S. Commerce Clause. The Commerce Clause of the U.S. Constitution gives Congress the power to regulate interstate commerce.\(^\text{241}\) Courts have inferred from this positive grant

---


\(^\text{238}\) Id. art. 25, at 236-38.

\(^\text{239}\) See Richard Desgagné, Integrating Environmental Values into the European Convention on Human Rights, 89 Am. J. Int'l L. 263, 284 (1995). Moreover, as a prerequisite to filing a claim with the Commission, the individual must have exhausted all national remedies in the offending nation. European Convention, supra note 237, art. 26, at 238; see Desgagné, supra, at 265 n.18.

\(^\text{240}\) Desgagné, supra note 239, at 284-85.

\(^\text{241}\) U.S. Const. art. I, § 8.
of power a limitation on the ability of states to discriminate against or inhibit interstate trade.\(^{242}\) This doctrine is known as the negative Commerce Clause.\(^{243}\)

Plaintiffs in negative Commerce Clause cases technically face the same standing requirement of all plaintiffs—they must have suffered an "injury in fact."\(^{244}\) The injury can be either actual or imminent, but a general expectation of being injured at some point in the future is insufficient.\(^{245}\) In applying the negative Commerce Clause, however, courts have rarely addressed this issue and have taken an expansive view of standing. The courts "either fail[] to look closely for any injury . . . or hypothesize[] some injury from the challenged discrimination."\(^{246}\) In effect, the courts have determined that the required injury is the loss of an opportunity to compete equally for market share.\(^{247}\)

In the context of the WTO, allowing private parties to raise claims for prospective injuries would be too broad a standard. Such a standard would allow everyone who could potentially do business in a nation to attack that nation's trade practices. Standing for prospective injury is adequate for the European Union and for the United States because the nations of the European Union and the U.S. states have given up much more of their autonomy than the nations of the world would be willing to give up to the WTO.

Some commentators have argued that the Supreme Court's expansive view of standing under the negative Commerce Clause undermines state democratic processes and violates federalist principles.\(^{248}\) Whatever the validity of this view with respect to the states, it is clear that a similar standard for the WTO would represent an unprecedented and unwarranted intrusion into the autonomy of the member nations. Moreover, allowing standing for prospective human rights violations is necessary because such violations will normally be irreversible; in contrast, economic harm, such as that resulting from restrictive trade practices, is rectifiable, so there is no danger in requiring private parties to actually suffer harm before raising a claim before the WTO.

2. Standing Limited to Those Actually Harmed

Private-party standing before the WTO, therefore, should be limited to those who have suffered actual harm due to a nation's allegedly illicit trade practices. A model of this standard's application in inter-

---

243. Id.
244. See id. at 264.
245. Id.
246. Id. at 264-65.
247. Id. at 265. The Supreme Court has gone even farther than this, and allowed entities that are not even in interstate commerce to sue based on the discriminatory practices of others in their community. Id. at 266-67.
national law is the dispute resolution system provided in the invest-
ment provisions of NAFTA.

Chapter 11 of NAFTA establishes guidelines to ensure the fair
treatment of foreign investors.249 If a state-sanctioned monopoly or
state enterprise acts in contravention of chapter 11, then foreign inves-
tors can force the offending nation into arbitration.250 An investor has
standing to raise a claim if the investor has actually incurred some
form of loss or damage by reason of the alleged breach.251 It is clear
that this will not be interpreted to encompass prospective loss or dam-
age because the statute of limitations for filing a complaint starts when
the investor knows or should have known that the loss occurred.252

This same standard should be adopted by the WTO as the threshold
for private-party claims. Requiring actual harm caused by an alleged
trade infraction would permit private parties to challenge trade prac-
tices that are actually inhibiting free trade, while keeping frivolous
claims from flooding the system.

C. Screening Mechanism

The WTO should set up a commission to filter out frivolous claims
and advance meritorious ones. This system could be modeled on the
European Commission on Human Rights, which serves as a screening
mechanism for the European Court of Justice.

Under the European Convention, an individual who claims to be a
victim of a human rights violation can raise a complaint before the
European Commission of Human Rights (the "Commission").253 If
the complaint is "manifestly ill-founded" or does not allege a prima
facie violation of the complainant’s rights, then the Commission dis-
misses it.254 If the complaint raises a valid claim and all the relevant
prerequisites have been satisfied, the Commission undertakes an in-
vestigation and encourages the parties to reach a "friendly settlement
of the matter on the basis of respect for Human Rights."255 If parties
cannot reach a settlement, the Commission writes a report recom-
mending the action that should be taken256 and refers the question to
the European Court of Justice, the actual adjudicator of claims.257

An analogous commission—call it, say, the Commission for Free
Trade (the "CFT")—could be set up by the WTO to serve as a filter
for private-party claims. A private party would file a claim with the

250. Id. art. 1116(1), at 642-43; see Charnovitz, supra note 149, at 349.
251. NAFTA, supra note 156, art. 1116(1), at 642-43.
252. Id. art. 1116(2), at 643.
253. European Convention, supra note 237, art. 25, at 236-38.
254. Id. art. 27, at 238.
255. Id. art. 28, at 238-40.
256. Id. art. 31, at 240.
257. Id. art. 48, at 246.
FORDHAM LAW REVIEW

CFT detailing the offending trade practice and the specific loss suffered. The CFT would determine whether the objectionable trade practice presents a prima facie violation of a trade agreement and whether the complainant has suffered actual damage as a result. If the claim is meritless, or if the complainant has suffered no actual loss or damage, the CFT would dismiss the claim.

Before proceeding, the CFT would publicize the existence of the dispute so that concerned nations and other private parties with standing would have the option of joining in. Because the impact of any given trade violation will be fairly widespread, the CFT should have the ability to consolidate duplicative claims of both private parties and governments. This could be done either at the outset by the CFT or later in the dispute by letting eligible parties intervene in existing cases. This aspect of dispute resolution is not much of a departure from the present system—the WTO currently has the capability to consolidate similar claims from different nations,\(^\text{258}\) and nations can intervene in ongoing disputes.\(^\text{259}\)

In accordance with the preference for resolving WTO disputes through initial consultations,\(^\text{260}\) the CFT would then contact the offending nation and encourage the parties to come to some agreement. Because the goal of the dispute resolution system is to foster free trade and preserve the integrity of the rules, the offending nation would not be allowed to buy off the complainant. Any acceptable settlement would have to take the form of a modification of the trade policy in question.

If the parties come to an agreement that the CFT deems to be a fair resolution of the dispute, the CFT would draft an order requiring the offending nation to make the relevant changes. As with panel recommendations,\(^\text{261}\) this order would become binding unless the member nations agree by consensus not to adopt it. If the parties fail to come to an agreement, the CFT would submit the dispute to the existent WTO dispute resolution system. From that point on, the system would function as it does now.

Contrary to claims of some commentators,\(^\text{262}\) such a system of private standing is not unworkable. Due to the CFT’s ability to consolidate claims, the number of separate disputes will be limited to the number of trade practices that can be reasonably interpreted as breaching international agreements. The benefit of private-party standing is that it will virtually guarantee that diplomatic motives and

\(^{258}\) Understanding, \textit{supra} note 16, art. 9.

\(^{259}\) \textit{Id.} art. 10.

\(^{260}\) \textit{See id.} art. 4 (stating that the first step in a trade dispute should be consultation between the parties).

\(^{261}\) \textit{Id.} art. 16(4).

\(^{262}\) \textit{See, e.g.,} Nichols, \textit{Extension of Standing, supra} note 12, at 313.
political gamesmanship will not let objectionable trade practices remain in place for long.

**Conclusion**

The creation of the WTO was a remarkable step forward in the depoliticization of the dispute resolution system and the establishment of a secure, predictable world trade system. But the job is not yet done, as the current Helms-Burton dispute makes vividly clear. As long as private parties have to rely on their governments to initiate and advance trade disputes for them, they will be uncertain about the future enforcement of trade agreements and will therefore be hesitant to take full advantage of the benefits of free trade.