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# Issues of legitimacy and the resolution of intellectual property disputes in the supercourt of the World Trade Organisation

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## *Int. T.L.R. 81 Introduction

In 1994, with the conclusion of the Uruguay Round Agreement, international disputes concerning intellectual property were brought within the jurisdiction of the World Trade Organisation (WTO). Legally, this event was doubly significant in that previously intellectual property had effectively lacked an international tribunal and, secondly, the WTO dispute resolution system itself was juridicised in a manner analogous to the domestic legal system. Although previous international arrangements under the Paris and Berne Conventions referred international intellectual property disputes to the International Court of Justice (ICJ), states have in the past tended to avoid any form of third party adjudication that deprives them of their sovereign power of decision-making. In particular this has been the case in matters of intellectual property where sensitive issues of national policy are likely to be involved. It is not surprising that no dispute concerning intellectual property was ever brought before the ICJ. Likewise, the fact that during the 1980s GATT panels were requested to consider several disputes concerning intellectual property, was attributed to the pragmatic, negotiations-driven character of the GATT dispute settlement process.

In what represents a landmark development, not only have international intellectual property disputes been brought within the jurisdiction of the WTO but the former predominantly diplomatic character of the GATT dispute settlement mechanism has also been succeeded by a thoroughgoing legalism. The legalistic character of the dispute settlement system has been strengthened by the addition of a standing Appellate Body[1] or trade “supercourt”,[2] and binding “judicial” decision-making, to be enforced by monitoring, and if necessary, by trade sanctions. Panel and Appellate Body decisions will automatically come into force as a matter of international law in virtually every case.[3] Although Member States, through the Dispute Settlement Body (DSB), continue to have the last word as a formal matter, in a practical sense the last legal word in reality now lies with the panels and the Appellate Body.[4] They may yet lack the authority to prosecute or issue summons, but increasingly they bear a striking resemblance to courts.[5] As India recently found in its patent dispute with the United States,[6] the new trade court has jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk the imposition of trade sanctions.[7] Considering that the WTO now comprises over 130 members, what we have in effect is a form of judicial review of states' intellectual property legislation in order to ensure its conformity with the WTO charter. In short, the closing decade of the twentieth century has witnessed the emergence of a trade supercourt, a quasi-judicial forum that has the power to review states' intellectual property legislation.

The emergence of such phenomenon prompts questions such as: why have states consented to an increasingly judicial and binding system of law enforcement? Who will use the dispute resolution system and to what end? Given the nature of the international political economy, will the most powerful states manipulate the dispute settlement system to their own ends? In disputes concerning intellectual property, what kind of justice *Int. T.L.R. 82 can the parties expect? What approach should the new “judges of international trade”[8] take in matters of “statutory interpretation”? More broadly, how should they approach the task of adjudication? Whose or which interests are likely to be given priority? The interests of the rich nations or those of the poor nations; those of the proprietor or those of the client and consumer; those of the socially privileged or those of the socially disadvantaged? Should individuals have standing before the WTO? Should the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) have direct effect so that individuals can bring an action in their national courts? What is the prevailing philosophy of the trade court? Which values are likely to predominate? What are the present limitations of the WTO dispute resolution system in cases concerning intellectual property?

These are the questions which this article attempts to address with the aim of examining the new WTO panel and appellate procedures in the light of a case study on *India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products,* 1997. In doing so, the thesis is advanced that as far as the resolution of intellectual property disputes is concerned, the trade court in its present elemental form lacks legitimacy, in the sense that it is not yet capable of meeting the needs and interests of potential disputants, without further reform. If there is one theme to be discerned behind these questions, it is that of the legitimacy of the WTO dispute resolution mechanism and, by implication, the legitimacy of its decision-making about the kinds of laws that will apply worldwide. Here, the term “legitimacy” is used broadly, as it touches both procedural aspects of dispute resolution as well as the substantive issues of justice.

In the exposition of this argument the article is organised as follows:

Part 1 addresses the legitimacy of states' consent to a legalistic and binding system of law enforcement under the rule of law. It examines the key role played by the enforcement of intellectual property rights under section 301 in achieving consent.[9] It explains how section 301 acted as both model and antithesis for greater refinement of the WTO dispute resolution system.

Part II offers an evaluation of dispute resolution in the trade supercourt with a view to identifying the key issues in the legitimacy of its decision-making. By way of focus, it begins with a case study of the first dispute concerning intellectual property to be adjudicated under the new WTO dispute resolution system, *India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products,* 1997. It discusses the key issues of legitimacy regarding the WTO supercourt, including its approach to adjudication, provision for legal representation and transparency of procedures.

Part III explains why the trade court presently lacks legitimacy with respect to a fundamental aspect of its constitution -- in so far as the participation of private individuals is extremely limited. It advocates that, in order to meet the needs of transnational society, private parties must be given standing to litigate. It examines the various ways in which municipal and regional legal systems attempt to accord private individuals standing to litigate. As a possible alternative, it discusses the feasibility of individual direct access to the WTO dispute resolution system.

As a basis for reform, Part IV identifies two models of dispute resolution which reflect the present WTO system. It then puts forward an alternative model for dispute resolution -- the stakeholder model -- which, it is submitted, will better serve to underpin the institutional reforms necessary.

## Part I: Legitimacy, Consent and the WTO Dispute Resolution Mechanism

As part of the liberal international economic order established after the destruction of two world wars, GATT was premised on the Hobbesian notion that law is both an indispensable restraint upon the forces of destruction and the best means of attaining international social harmony.[10] An important part of the model postwar international legal order was to comprise rules governing the conduct of international trade. The origin of the legalism or rule-based nature of the current Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), can be traced to the Havana Charter. The use of law as an instrument of international economic reconstruction was evident in the Havana Charter. In the event of a breach of its rules or the nullification and impairment benefits,[11] it referred disputants to arbitration,[12] to the Executive Board of the ITO for investigation and recommendation or to the International Court of Justice.[13] For the U.S. Congress, the loss of sovereignty involved in third party adjudication outweighed any gains from the state submitting to the international rule of law. Consequently, as excised, the GATT of 1947 contained little more than rudimentary provisions empowering some body such as the U.N. Economic and Social Council to assist the contracting parties in solving the dispute.

As little as 40 years later the kinds of problems attendant on the growth of a global business civilisation required global co-ordination. The WTO Charter provides that the law of each state should contain the provisions necessary to maintain the administration of government along lines which recognise its submission to rules provided in it. In signing to the Charter, each Member State has implicitly consented to a proposition inherent in the rule of law: that if justice is to be done in the process of ***Int. T.L.R. 83*** harmonising the opposing notions of state sovereignty and international public order, that will be achieved by the continued development of the international legal system. Within the context of the Charter, the rule of law means effective control of lawmaking, particularly in respect of penalties such as trade sanctions; it means that every state should be responsible to the law; that the fundamental rights of states are safeguarded by the law; and that the rights of states

should be determined by an independent tribunal. Nevertheless, the apparent consent of Member States to the judicial review of their legislation by an international organisation must continue to raise issues of political and legal legitimacy. Democratically elected parliaments and the citizens who elected them should still be concerned for the autonomy of their decision-making, because, in the absence of a unified image of global sovereignty, a clear chain of representative political action is not discernible between the Member State and the WTO.

## The protection of intellectual property and the emergence of the trade supercourt

The evolution of the WTO dispute settlement system over the last 50 years reveals that although the GATT is commonly perceived as a system of diplomatic dispute settlement, its legalistic or rule-based character is not a recent phenomenon. Legalism is part of the institutional origin of the organisation in so far as the dispute settlement provisions of the GATT and subsequently the WTO Charter build upon those in the Havana Charter. The original GATT contained sanctions in Article XXXIII (2) in the form of suspension of concessions and upon 60 days' notice, the opportunity for the offending party to withdraw from the GATT. Subsequently, GATT's contracting parties elaborated the legal character of the rules by establishing a dispute settlement procedure in respect of Articles XXII and XXIII.[14] Dispute settlement procedures were elaborated and strengthened by amendments which saw an increasingly adjudicative approach[15] : first, by the introduction of the panels of three or five independent experts, authorised to make findings and issue recommendations to the contracting parties; second, by giving panel rulings, when adopted by the contracting parties, legal status and force; third, by codifying the procedures involved in bringing a GATT action; and fourth, by the addition of provisions governing panel formation, panel composition, procedural requirements, and the adoption of panel reports. Underscoring the increasingly legalism, in 1979, during the Tokyo Round, the supplementary rules and procedures were finally codified in the Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance.

While the pace of legal reform prior to the Uruguay Round was gradual,[16] during the 1980s the widespread use of so-called non-tariff barriers or various forms of covert discrimination served to move the dispute settlement system further towards an adjudicative model.[17] In particular, the extent of counterfeiting in newly industrialising countries of Asia and South America, made the protection of intellectual property a trade issue, that is, one with serious economic and political implications for the leading industrialised countries. By 1986 the need to extend the protection of intellectual property worldwide, and to curtail the use of unilateral action under section 301, acted as a catalyst, spurring the dispute settlement system to a more advanced stage of legal development. The lack of an effective mechanism for the resolution of international intellectual property disputes was conspicuous. The Paris and Berne Conventions referred disputants to the ICJ.[18] However, Article 28(2) of the Paris Convention and Article 33(2) of the Berne Convention subsequently rendered the provision ineffectual by allowing a Member country to declare itself not bound by the provisions in any dispute that might arise between it and another Member of the Union. As a measure of the lack of ***Int. T.L.R. 84*** international acceptance of the ICJ's jurisdiction, no dispute over intellectual property rights had ever been brought before the International Court of Justice.[19]

Furthermore, as most of the states where counterfeiting was most acute lay outside the membership of the Conventions, the United States and the E.U. resorted to self-help measures in the form of unilateral action against offending states. The Special 301 provisions of the Trade Act of 1974 as amended by the U.S. Omnibus Trade and Competitiveness Act of 1988 (the Trade Act) were designed to provide a statutory framework within which to assess the adequacy of protection of intellectual property rights and market access overseas.[20] Special 301 allows the United States Trade Representative (USTR) to investigate a wide variety of perceived “unfair” trade practices on an expedited basis.[21] Under section 301 petitions to the USTR may be made for relief based very broadly on the “unjustifiable”, “unreasonable”, or “discriminatory” acts, policies or practices of foreign governments. Further, Special 301 involves a designation of countries found to maintain allegedly unfair trade practices with the aim of eliminating those practices by means of bilateral negotiation, reinforced by trade sanctions. In the decade prior to the conclusion of the TRIPS Agreement, by the use of Special 301, the United States aggressively pursued those countries with the highest level of unauthorised copying and under threat of trade sanctions coerced the enactment of the laws necessary to protect its intellectual property.

In these circumstances, although the original GATT did not expressly provide for the protection of intellectual property rights,[22] the flexibility and widespread acceptance of the GATT system of dispute resolution appeared to provide a plausible alternative. This was despite the fact that the system was

marked by delay in expediting cases and by the failure of powerful traders, in particular the United States and E.C., to implement unfavourable panel decisions. For example, in 1988, in the case of *Akzo N.V. v. E.I. du Pont de Nemours,* [23] the European Community successfully challenged the validity of U.S. patent enforcement procedures for imported products under section 337, on the ground that they violated[24] the national treatment principle in Article III of GATT 1947. Not until 1994,[25] was section 337 amended in order to bring actions by the U.S. International Trade Commission into compliance with GATT.[26]

In an effort to renew public confidence in the system, the Ministerial Declaration of September 20, 1986, which opened the Uruguay Round, affirmed the legalism or rule-orientation of the dispute resolution system as well as its pivotal role in the trade regime, as follows:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognising the contribution that would be made by more effective and enforceable GATT rules and disciplines.[27]

## Reaction against the unilateral enforcement of intellectual property rights

Legal systems develop when societies take steps to control private retaliatory activities. Judicial litigation began in Ancient Greece and Rome with the efforts of the community to restrict the self-help activities to its citizens.[28] In the new DSU, Members agreed to stay their retaliatory hand and to conform to the controls the trade community imposes on unilateral retribution. In the process of reforming the dispute resolution system, unilateral action under section 301 served as both thesis and antithesis. In the former sense it served as model for a more legalistic system of dispute settlement, imposing strict time limits, legislative demands, and even trade sanctions, in the event that those demands were not met. Section 301 provided a prototype for an enhanced ***Int. T.L.R. 85*** legalistic model of dispute settlement under the trade regime. Indeed, a strict timetable for submissions and decision-making as well as provision for retaliatory measures have since become part of the WTO dispute resolution system.

Prima facie, unilateral action under Special 301 proved successful.[29] Its use dramatically raised the international level of awareness concerning the protection of intellectual property and resulted in a marked increase in the level of intellectual property protection.[30] It saw intellectual property legislation enacted in many newly industrialising countries. Special 301 provided an incentive, albeit negative, to negotiate a settlement. By the conclusion of the TRIPS Agreement in 1994, any deficiency in the protection of intellectual property was most likely to be in the area of enforcement or administration.

Equally, it could be argued that section 301 served as antithesis in the sense that its use provoked governments to react against the threat to the international legal system posed by unilateral action. The use of section 301 galvanised support for a rule-based multilateral system of dispute settlement, which, in the circumstances, seemed a preferable alternative to the tyranny of might inherent in unilateral action. Prior to the WTO Agreement, in differing ways and degrees, both the Great Conventions[31] and the former GATT system of dispute settlement demonstrated reluctance on the part of Member States to secure the enforcement of international law at the expense of their national sovereignty. In view of the sustained use of unilateral action, the debate concerning national sovereignty and states' consent to adjudication became less significant. The only remedy which would, prima facie, lend strength to the weaker nations was to restore the rule of law by means of a multilateral mechanism for dispute settlement.

## The legal refinement of the WTO dispute resolution system

The Agreement on TRIPS encompasses the whole procedural apparatus of the law, a procedural process whereby proceedings are instituted, regulated, adjudicated upon and orders are made in respect of which the forces of a supernational organisation may be brought to bear upon designated individual states. The new mechanism therefore begins to approximate the municipal legal system. First, in contrast with the former fragmented GATT system, the WTO dispute resolution system is integrated. This means that the rules and procedures of the DSU apply to the settlement of disputes brought pursuant to all the agreements contained in the Charter.[32] Complementary provisions reinforce Article 1 of the DSU in the covered agreements. Thus, Article 64 of the TRIPS Agreement mandates the application of “the provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding to consultations and the settlement of disputes” arising under it.[33]

In the matter of process, the defects in the former system, in particular the opportunities for delay and obstruction, were met with greater legalism. Blocking the adoption of panel reports and delays in their implementation were met with additional rules giving greater prominence to adjudication, specifying strict time limits and employing retaliatory measures against the offending state. Thus, panel reports now are to be submitted within six months, though there is a “fast track” of three months for urgent cases.[34] Any infraction of the limit is to be met by referring the ***Int. T.L.R. 86*** matter to a third party for expedition. For example, in the event that the parties do not agree on the choice of panellists within 20 days from the panel's establishment, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the TRIPS council, may appoint the panel on his or her own authority.[35] Again, to prevent Member States blocking the adoption of unfavourable recommendations, both panel and Appellate Body reports are now subject to an automatic adoption rule. Finally, the DSU attempts to secure the timely implementation of the rulings of the DSB in three major ways: first by providing the Dispute Settlement Body with a role in monitoring the implementation of panel and appellate decision; second, by providing a mechanism for determining what is a reasonable period for implementation of an adverse panel or appellate decision[36] ; and third, by making it easier to employ retaliatory action against Member countries which fail to implement DSB rulings in a timely manner.

Formerly, as decisions of the GATT Council, composed of all the contracting parties, were made by consensus, a “losing” party could block the Council from adopting a panel report. As a result, it was doubtful whether decision-making was conclusive.[37] While parties did not often permanently block adoption of reports, some reports were never adopted and others were adopted only after months of delay. The DSU fundamentally changes this procedure. It eliminates the possibility of blockage by providing in Article 16 that a panel report shall be adopted at the second meeting on which it appears on the DSB's agenda, unless there is a consensus not to adopt it.[38] A consensus will occur if no Member lodges a formal objection to the decision within 60 days. Appellate Body decisions are also binding on states unless all Members vote unanimously to overrule them.[39]

### *A strengthened system of law enforcement*

Prior to the WTO Agreement, the consensual adherence of the contracting parties to the agreed rules of the GATT was the primary means of enforcement. Article XXIII(2) permitted the GATT contracting parties to authorise the prevailing party to suspend concessions owed to the losing party if the latter failed to end its violation of GATT rules.[40] However, there was no mechanism for authorising retaliation short of obtaining the affirmative votes of all GATT signatories.[41] Indeed, in the entire history of the GATT, there was only one instance when the organisation formally authorised a complaining country to withdraw trade benefits in retaliation for a defendant's violation of GATT rules.[42]

In contrast, the WTO is the primary enforcer of its rules.[43] The DSU provides for automatic retaliatory action against a member state that fails to bring its laws into conformity with panel recommendations. Under the DSU, the power of the Dispute Settlement Body is strengthened by the fact that suspension is to be authorised automatically absent their consensus to the contrary.[44] In such a case, the prevailing party may be entitled to take reprisal measures by suspending equivalent concessions, obligations or advantages either in the same trade sector or, if necessary, in other sectors.[45]

### *Judicial settlement by a standing tribunal*

Given the position and function of the new Appellate Body, states have, in effect, accepted binding “judicial” decision-making by ***Int. T.L.R. 87*** a standing tribunal.[46] The Appellate Body, composed of seven members, appointed for four-year terms, now supervises the work of all dispute resolution panels, making decisions on all issues of law or legal interpretation arising under the Charter.[47]

Formerly, Panel recommendations acquired legal status and force only if and when the GATT Council adopted them. However, the new “judges of international trade”[48] have jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk the imposition of trade sanctions. For example, in the recent case of *India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products,* the Panel recommended the Dispute Settlement Body request India bring its legislation for the patent protection of pharmaceutical and agricultural chemical products into conformity with the TRIPS Agreement. The Appellate Body subsequently upheld the recommendation. The decision demonstrates the power of judicial review under the trade regime. After a thorough audit of India's relevant municipal law, the panel and Appellate Body held

that it had failed to put in place the administrative measures necessary to the enforcement of a mandatory law.

## Part II: Issues of Legitimacy

GATT literature does not debate the question of effective law enforcement directly as such, but in terms of the diplomatic versus the legalistic method of dispute resolution as the most appropriate.[49] The formation of the WTO dispute resolution system brings an added dimension to the debate, which must now focus on issues such as the constitution of the trade court as well as the distinguishing features of its new legalism. This much is clear from the following case, which concerned a complaint by the United States that India had failed to comply with certain patent provisions of the TRIPS Agreement.

### Case study: India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products 1997

In May 1996 the United States lodged a complaint claiming that India had failed:

(a) to establish under Article 70(8) a mechanism that adequately preserves novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional period to which it is entitled under Article 65 of the Agreement[50] ;

(b) to publish and notify adequately information about such a mechanism in accordance with its transparency obligations under Article 63 of the TRIPS Agreement; and

(c) to comply with its obligations under Article 70.9 of the TRIPS Agreement, because it has failed to establish a system for the grant of exclusive marketing rights.

As of January 1995 every country, including developing countries, had to have “a means by which applications for patents for such inventions can be filed”. These applications go into a box, known as a mailbox, and if a patent is eventually granted, the patent term “will be counted from the filing date”. Article 70(9) provides that when such a patent application has been received,

exclusive marketing rights shall be granted for a period of five years after obtaining market approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such Member.

Subject to three conditions, exclusive marketing rights (EMRs) have to be granted. First, marketing approval must be obtained in India. Second, marketing approval must be obtained in another WTO country. Third, a valid and current patent must exist in another WTO country. The patent legislation needed to be changed in December 1994 to permit exclusive marketing rights and the receipt of patent applications. The Indian Patents Act did not have such provisions. So there was an ordinance in December 1994 to incorporate such clauses.

India submitted that WTO Members were free to determine the means by which patent applications could be filed, given that Article 70.8(a) requires Members to provide “a means” for filing, ***Int. T.L.R. 88*** but does not prescribe the choice of a particular method.[51] In this, India relied on Article 1.1 of the TRIPS Agreement which provides that “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”. India had initially decided to provide for a means for the filing of applications through an ordinance by the President and, when this ordinance lapsed, through administrative action by instructing the patent offices to continue to receive applications and to store them separately for future action in accordance with Article 70.8. India argued that both the legislative and the administrative approaches were available to it under Articles 1 and 70 of the TRIPS Agreement and it was therefore free to choose an administrative method pending the change in legislation.

The panel rejected India's submission. In the first place it affirmed India's right to choose how to implement the TRIPS Agreement pursuant to Article 1.1. Thus, the mere fact that India relied on an administrative practice to receive mailbox applications without legislative changes did not in itself constitute a violation of its obligations under subparagraph (a) of Article 70.8. However, it found that the lack of adequate administrative procedures, namely a mailbox application system, had effectively deprived both existing and intending applicants of benefits which they would have enjoyed in the future had there been an appropriate mechanism in place after the expiry of the Patents

(Amendment) Ordinance 1994.

The panel concluded that:

%79 India had not complied with its obligations under Article 70.8(a) to establish “a means” that adequately preserves novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional periods provided for in Article 65 of the TRIPS Agreement.

%79 India had not complied with its obligations under Article 70.9 of the TRIPS Agreement with respect to the grant of exclusive marketing rights.

%79 Alternatively, India had not complied with paragraphs 1 and 2 of Article 63 of the TRIPS Agreement in accordance with its obligation to publish and notify such information.[52]

On appeal, the Appellate Body upheld the panel's conclusions with respect to Article 70.8(a) and Article 70.9, but reversed the panel's alternative findings in respect of Article 63.[53]

## The panel's approach to the adjudication of intellectual property disputes

A key focus for new debate must be legitimacy of the dispute resolution system. There follows an examination of the panel's approach to the adjudication of intellectual property disputes.

### *Interpreting the TRIPS Agreement*

The panel addressed the general interpretative issue, that is, the standards applicable to interpretation of the TRIPS Agreement. It began by identifying the principles of international law appropriate to its interpretation. In the first place, it noted that Article 3.2 of the DSU directs panels to clarify the provisions of the covered agreements, including the TRIPS Agreement, “in accordance with customary rules of interpretation of public international law” as embodied in the 1969 Vienna Convention on the Law of Treaties (“Vienna Convention”). Second, the panel affirmed the application of the jurisprudence established under the GATT 1947 to the interpretation of the TRIPS Agreement, given that it is an integral part of the Charter.[54]

The Panel proceeded to argue that in accordance with Article 31(1) of the Vienna Convention[55] as well as GATT jurisprudence, an interpretation in “good faith” requires the protection of Members' legitimate expectations derived from the protection of the intellectual property rights provided for in the TRIPS Agreement.[56] Based upon the context and the purpose of the Agreement, this means, argued the Panel, that exporting Members can legitimately expect that market access and investments would not be frustrated by the actions of importing Members.[57] In support of their argument the panel further noted that the protection of legitimate expectations of Members regarding the conditions of competition is a well-established GATT principle.[58] According to the *Superfund* panel the rationale of the national treatment obligation in GATT Article III, is to protect the expectations of the contracting parties as to the competitive relationship ***Int. T.L.R. 89*** between their products and those of the other contracting parties.[59]

The panel acknowledged that the disciplines formed under the GATT 1947 were primarily directed at the treatment of international trade in goods, whereas the TRIPS Agreement is mainly concerned with the treatment of the nationals of other Members. Nevertheless, it had no difficulty in finding that the notion of protecting Members' legitimate expectations could also apply by analogy, in so far as TRIPS was concerned, with the competitive relationship between the nationals of the various Member states.[60] In support of this contention the panel referred to the Preamble to the TRIPS Agreement, which recognises the need for new rules and disciplines concerning “the applicability of the basic principles of GATT 1994 ”. The panel therefore concluded that, when interpreting the text of the TRIPS Agreement, the legitimate expectations of WTO Members concerning the TRIPS Agreement must be taken into account, as well as standards of interpretation developed in past panel reports laying down the principle of the protection of conditions of competition flowing from multilateral trade agreements.

### *Framing the inquiry and selecting the terms of reference*

Applying these principles to Article 70.8(a), the panel framed its inquiry in terms of whether the current Indian system for the receipt of mailbox applications could sufficiently protect the legitimate

expectations of other WTO Members as to the competitive relationship between their nationals and those of other Members, by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications.[61] By way of answer, the panel took into account: (a) the object and purpose of Article 70.8; and (b) the negotiating history of the TRIPS Agreement.[62] The panel found that in order to achieve the object and purpose of Article 70.8 India had to have a mechanism to preserve the novelty of pharmaceutical and agricultural chemical inventions, for the purposes of determining their eligibility for patent protection.[63] Given that patent protection for pharmaceutical and agricultural chemical products was a critical issue during the Uruguay Round, the panel considered that the negotiating history of the TRIPS Agreement tended to confirm this view.[64]

The panel then returned to the broader question of whether the current Indian system for the receipt of mailbox applications could sufficiently protect the legitimate expectations of WTO Members by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications. In finding against India, it emphasised that predictability in the regulation of intellectual property was essential not only to protect current trade but also to create the conditions necessary to the planning of future trade and investment.

## Freedom of trade as a theoretical underpinning

It is the application of these interpretative principles which reveals the theoretical and philosophical basis of the panel's reasoning. What does the dominance of the notion of legitimate expectations therefore say about the way in which the panel approached the task of adjudication? The reasonable expectations theory is generally attributed to the classical economics of Adam Smith as expounded in the *Wealth of Nations.* [65] According to this school of thought the economic agent acts out of self-interested motives in the pursuit of his own utility. A free individual will act for the benefit of others by seeking to please them and so obtain their custom. Given the right institutions of justice this competition is economically efficient because it maximises the consumable wealth of all societies provided, of course, there is free trade among nations. Utilitarianism is closely connected with wealth maximisation, which was the dominant political ideology during the formative period of the GATT.[66] Therefore, the notion that the protection of legitimate expectations is central to creating security and predictability in the multilateral trading system reveals the persistence of classical economic liberalism and free trade theory as the basis of law and decision-making in the WTO.

On appeal, India argued that the concept of predictability of competitive relationships could not be unquestionably imported into the TRIPS Agreement in respect of Article 70.8(a). India further argued that the panel had incorrectly read a second obligation into Article 70.8(a), which required it to create legal certainty that the patent applications would not be rejected in future, and that the panel had sought to justify its interpretation by invoking the concept. The Appellate Body accepted the argument in so far as the panel had erroneously invoked the concept in this particular case. Their reasoning was based on two legal grounds. In the first place, by invoking the concept of the “legitimate expectations”, the panel had incorrectly fused the legally distinct bases for “violation” and “non-violation” complaints under Article XXIII of the GATT 1994 into one uniform cause of action. The doctrine of protecting the “legitimate expectations” of contracting parties was developed in the context of ***Int. T.L.R. 90*** “non-violation” complaints brought under Article XXIII:1(b) of the GATT 1947. However, the case in question concerned a violation complaint.[67] Second, the Appellate Body found that the panel had incorrectly imported the concept into its application of Article 31(1) of the Vienna Convention.

## Adjudication or economic management?

Why do adjudicators tend to adopt economically efficient rules? Generally speaking, is this an appropriate and adequate basis for decision-making? In the first place, since adjudicators are not in a position to engage in wealth distribution, they are far more likely to address goals which they can achieve, such as wealth maximisation. As adjudicators they have little power to alter the distribution of wealth that the various nations, transnational entities and groups in international society receive. Second, what Adam Smith referred to as a nation's wealth, and what economists such as Posner refer to as efficiency,[68] has always been an important social value. This was particularly so in the immediate post-war period when the creation of the Bretton Woods institutions laid the foundation for the development of modern international economic law. It is not surprising therefore that this value is influential in the decisions of WTO adjudicators. It is especially influential perhaps because the competing goals involved in decision-making are both controversial and difficult to achieve with the limited tools that adjudicators have at their disposal.

These competing goals concern controversial ideas about the distribution of income and wealth in international society -- ideas about which no meaningful consensus has yet been formed, despite the call by post-colonial nations for a new international economic order and the growth of a considerable body of development law. Such competing goals are just as real for international adjudicators as they are for judges at the municipal level. In this regard, it is not surprising that India, as a developing nation, might perceive the U.S. demand for the patent protection of its pharmaceutical and agricultural products in India as yet another manifestation of colonialism. As to the question whether efficiency is the only value the WTO judges should pursue, the answer appears to be self-evident. The legitimate expectations theory bases the obligation to honour an agreement on the reasonable expectations induced by the undertakings therein and the disappointment of those obligations by breach. However, the raising of reasonable expectations *per se* is neither sufficient nor necessary for the existence of the agreement.

## In search of a broader theoretical base for decision-making

The character and tenor of the reasoning in *India -- Patent Protection* throws into sharp relief the vocational nature of the trade court. Its interpretation of the provisions in question is dominated by the theoretical underpinning of free trade, the doctrine of comparative advantage and wealth maximisation.[69] At the same time, the limits of legalism and of the current procedural framework also become clear. One of the serious disadvantages of a strictly formalist approach is that the outcome is obtained only by a conscientious application of legal rules. Substantive conceptions of justice may thereby be excluded from legal reasoning.

Yet, as the Legal Realists and Critical Legal scholars tell us, political considerations nevertheless attach to judicial decisions and may motivate those decisions at the margin. With regard to intellectual property, we are dealing with private rights that have a social dimension. Yet there is no theoretical underpinning that either reflects the impact of patenting on a predominantly rural society or gives any consideration to questions of cultural relativity. Adjudicators are constrained by the demands of the received legal reasoning and discourse. The choice between them as to the correct “legal” outcome is clear. The weight of text and precedent, the requirements of precision, clarity, and determinacy in rule interpretation, tend to leave little space for sufficient consideration of the potentially serious social or political consequences attendant on one of the proposed readings of a textual provision.

For the time being, the combination of an economic approach to problem solving and a legalistic style of decision-making helps the trade court and Member States alike avoid problems of accountability. However, a testing time must come when the actions of the trade court are no longer legitimated by results. Professor Hudec has previously referred to the risk of so-called “wrong” cases having the effect of bringing the dispute settlement system into disrepute,[70] a “wrong” case being one that is initiated in respect of an issue on which the international community has either not yet reached a consensus or on which past consensus has broken down. Past examples of such cases include contentious agricultural trade practices, such as those of the E.C. In such cases the parties show extreme reluctance to accept the panel's decision. It is then that the paucity of the trade court's theoretical underpinning will be revealed. Nonetheless, that is not to say that there can be any regression in conceptual ***Int. T.L.R. 91*** thinking about the international legal system. The power of the WTO as a law-making body and the new-found legalism of its “supercourt” call for new ways of thinking about international dispute settlement.

## Issues of due process

The legitimacy of the dispute resolution mechanism also depends on less visible but equally important questions of due process or procedural fairness. Did India have adequate opportunity to meet the case that had been brought against it by the United States? Did India have an equal opportunity to put the necessary evidence before the panel? More specifically, what kind of legal representation did the Indian Government have in preparing and presenting its case? Did it have equal access to legal expertise? Why was the hearing not open to public scrutiny? Were the factual aspects of the case adequately established? When the United States adduced evidence, did India have the opportunity adequately to test it? These questions raise issues of legal representation, access to legal resources, time limitations, the capacity of the panel to deal with factual disputes and the transparency of dispute settlement proceedings -- each of which will now be addressed in turn.

### *Legal representation*

Basic to the notion of due process is the right to effective representation by counsel of one's choice.[71] Yet this basic right is effectively denied developing countries under the current process. The strict adherence to the rule disallowing private legal representatives in panel proceedings means that developing countries do not have available their own experienced international trade lawyers. For instance, the *Banana Panel* [72] removed the private lawyers who were advising some of the Caribbean countries, after the United States and others objected that they were not permanent government officials. This places developing countries at a decided disadvantage, since laymen from these countries will be left on their own to debate points of law with experts from the major industrialised countries.[73] The practical effect of this policy is to deprive smaller countries and developing countries legal representation in panel proceedings.[74]

### *Adequate legal resources*

Adequate legal representation also depends on having the resources to employ full-time government lawyers. While a legalistic or rule-based system may benefit small and developing nations, it also imposes a burden, requiring trained personnel and resources to gather information and advance legal arguments. While few developing countries have their own trained and experienced international trade lawyers, the United States and the E.C. maintain a large contingent of such lawyers in Geneva as well as in Washington and Brussels.[75] To confine legal representation to permanent government officials is, in effect, to reserve that advantage only for those governments that can afford them, or whose volume of litigation makes the investment worthwhile.

Measures need to be put in place to ensure that affluent developed countries having the legal resources do also not have the greater access to justice. There are no legal grounds in the WTO Charter for excluding private lawyers. The DSU is silent on the subject, as are the other WTO Agreements. This suggests that the issue is not one of WTO law, but of the national law of the Member, as is the case in the International Court of Justice.[76] In the first appellate case, *United States: Standards for Reformulated Gasoline,* [77] the Appellate Body invited the private attorneys into the sessions. It is a practice the Appellate Body would do well to continue.

### *Time limitations*

It is axiomatic that due process requires both sides of a dispute to be given adequate time to prepare their case. The parties to a dispute are now required to observe explicit time limits in order to expedite a settlement.[78] While the intention to minimise delay is commendable, query whether the time limits imposed may act to disadvantage the respondent in circumstances where it has fewer legal resources at its command? Conversely, with respect to the appellate process, query whether the time limit for an appeal acts to disadvantage the appellee, since its response is required in considerably less time than is accorded appellants to lodge their appeal. Appellees are required to respond to the substantive submission of the appellants just 15 days after receiving the appellants' submission. Although the Working Procedures require appellants to file their substantive brief 10 days after the notice of appeal, appellants are aware of the issues they may wish to appeal as soon as the interim report is released to the parties. In *Gasoline,* for example, the appellant's submission was due 47 days from issuance of the Report to the Parties.[79] By contrast, the respondent's submission was due a mere 14 days from the notice of appeal, after the filing of the submission to which they were required to respond. The potential inequity of current time ***Int. T.L.R. 92*** limits is a matter which Members, who, of course imposed the limits on themselves, would do well to re-consider.

### *The capacity of WTO panels to deal with factual disputes*

In the past, establishing the facts of the case was largely an iterative process whereby each side adduced evidence in oral and written submissions to a panel who would then question the parties. Prior to rendering its decision, the panel would circulate the factual part of its report to the disputants, with the aim of arriving at a “cluster of undisputed facts”.[80] While the classic type of GATT dispute concerning the existence of quantitative restrictions is unlikely to give rise to questions of fact, the same cannot be said with respect to disputes now coming before the WTO, given its recent expansion into areas of substantive law. For example, where a panel has to consider the question whether a Member State has enforcement procedures available, so as to permit effective action against any act of infringement of intellectual property rights, the facts are more likely to be disputed. Moreover, compliance with the provisions of the TRIPS Agreement now renders municipal law a fact that must be established before the tribunal -- an evidentiary question that inevitably involves the need to draw a fine line between authentication and interpretation. For instance, on appeal, India

argued that the panel had erred in its treatment of India's municipal law since the panel did not assess the Indian law as a fact to be established by the United States, but rather as a law to be interpreted by the panel.

Further and additional questions of procedural fairness are increasingly likely to test the panel's capacity to deal with proof in factual disputes. For example, factual disputes may give rise to issues of confidentiality, where the respondent possesses evidence essential to the complainant's ability to prove an infringement of rights. Again, where the disputants allow the panel to obtain evidence from a third party, the extent to which the parties should have the opportunity to be selective of, or test the information may become an issue.[81]

### *Transparency of dispute settlement proceedings*

While publication of panel and Appellate Body reports via the Internet has greatly contributed to public scrutiny of the dispute settlement process, closed hearings continue to reflect the diplomatic heritage of the WTO. Yet, the new dispute settlement procedures are, for all practical purposes, a lawsuit and the appeal of the results of a lawsuit. If the legitimacy of the process is to be sustained, panel procedures and appellate hearings must be opened to public scrutiny. Public proceedings do not prevent private discussions with a view to settlement of publicly conducted litigation. The main effect of closing them is to lay WTO open to the accusation that it conducts Star Chamber proceedings.[82] In the constitution of the democratic state, there is a strong connection between the notion of due process and an open proceeding.[83] The dispute settlement procedures should therefore reflect the status of WTO law as part of the body of public international law, by being open and transparent.[84]

## Part III: Greater Legitimacy through Private Participation in the Dispute Resolution Process

Thus far, this evaluation of the WTO supercourt has indicated a need for greater legitimacy through the reappraisal of the approach to adjudication and certain aspects of due process, in particular, legal representation and open hearings. With respect to these issues, there is, at least, a sense in which they are “on the table” in as much as they are present within the system, albeit in elementary form. However, reform of the trade supercourt must go further to achieve legitimacy through greater public participation. In particular, in so far as private parties are denied standing to litigate, it is not yet capable of meeting the needs and interests of potential disputants in a far more fundamental way.

The present provisions of the DSU do not provide for a means of address proportional to the scope and volume of WTO law which now touches individual rights. The Uruguay Round Agreements do not grant individuals the right to initiate or participate in the dispute settlement mechanism even if they are directly affected by the dispute at issue. Under Article 13 of the DSU, the dispute settlement procedures may include “information and technical advice from any individual or body deem[ed] appropriate”, but it is up to the panel to request information from a private person and, thus, to involve the individual. Further, although the rationale for this condition may be pragmatic, in as much as it discourages a panel from delaying procedures, except for information considered essential to the case, it obviously defers to the traditional principle in international law which sees the state as the primary actor.

### The traditional rule against individual standing in international law

Traditionally, governments bring the complaints of their citizens to international fora. Thus, in cases of expropriation the ***Int. T.L.R. 93*** government takes up the claims of its injured citizens on their behalf. The private parties' interests may then be protected under international law independently from municipal law. Private parties must, therefore, rely on their respective governments to pursue their legal interests. The notion that the individual may bring a complaint at the supranational level contradicts established principles of international law. In the classic international legal system relations between nations are to be administered by the government. If an individual asserts a breach of international law by a foreign nation, it is in the discretion of the individual's government to represent its citizens in the appropriate international forum, after considering the political and economic implications of the action. Such a principle is in accordance with a system that is founded on the sovereignty of nations. Only states and in some circumstances, international organisations, are the subjects of international law. As a result, these entities are exclusively endowed with the powers to make law and enforce their rights under international law. Although the drafters of the Charter of the International Trade Organisation (ITO) discussed the possibility of a private citizen complaint and

a right of private citizens and organisations to be heard, this option was considered a threat to the theory of national sovereignty and was therefore never put in the Charter of the ITO.

## The erosion of the rule against individual standing

Nevertheless, the broad participation of private parties in the affirmation of the WTO rules has been a gradual but marked development. While WTO law does not directly grant individuals the right to initiate or participate in the dispute settlement mechanism, several agreements contain provisions requiring the participation of foreign private parties in domestic enforcement procedures. For example, anti-dumping and countervailing duty procedures; as well as procedures to obtain safeguard relief under Article XIX of the GATT 1994, are domestic procedures in which the defendant/importer is a party. The control of dumping involves private rights. As the focus of trade liberalisation moved the regulation of tariffs to other areas of private conduct, such as intellectual property rights, services, investment and competition law, this trend has been accentuated.

## Enhanced international participation and the DSU

The results of the Uruguay Round enhance the position of the world citizen in indirect ways. Article V(2) of the Agreement Establishing the WTO requires the General Council to make appropriate arrangements for co-operation and consultations with non-governmental organisations (NGOs) concerned with matters related to those of the WTO. Although the new DSU does not permit the individual to bring a complaint, it takes private interests into account. Under Article 13.1 the panel can seek information from an individual or body which it deems appropriate. In addition, under Article 13.2 “a panel may request an advisory report in writing from an expert review group”. However, the ultimate right to determine the course of the proceedings essentially remains in the hands of governments. Thus Article 13.1 requires the panel to inform the authorities of the Member State before it addresses the private person.

## An alternative course: Enforcing intellectual property rights at the municipal level

### *Under the TRIPS Agreement*

Like the other Uruguay Round Agreements, the TRIPS Agreement renders the state the vehicle for individual complaints. It contains obligations to establish enforcement mechanisms for its rules in the domestic legal systems of Member States. The TRIPS Agreement provides particulars of the judicial and administrative procedures necessary to enforce intellectual property rights both internally and at the border. Part III of the Agreement sets out the obligations of Member governments to provide procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced by foreign right-holders and nationals alike. In particular Article 43 is designed to facilitate the production of evidence, and Articles 44, 45 and 46 require judicial authorities be given the power to order injunctions, award damages and order other remedies including the disposal or destruction of infringing goods. Moreover, according to Article 50, judicial authorities are to be given the authority to order prompt and effective provisional measures, in particular where any delay is likely to cause irreparable harm to the right-holder, or where evidence is likely to be destroyed. Under Article 51 Members are required to adopt the border measures or procedures detailed in Articles 52 to 61. These enable a right-holder, who has valid grounds for suspecting that the importation of counterfeit or pirated goods may take place, to lodge an application with customs authorities for their suspension from release onto the market. In addition, Members are required to provide criminal procedures and penalties in cases of “wilful trade mark counterfeiting or copyright piracy on a commercial scale”.[85] Remedial provisions must include fines and terms of imprisonment, which are sufficient to act as a deterrent. Civil and administrative procedures must not only permit effective action against infringement of intellectual property rights but should be fair and equitable, not unnecessarily complicated or costly and should not entail unreasonable time-limits or unwarranted delays.[86] Such procedures must also allow for judicial review of final administrative decisions.[87]

### *Under domestic trade laws*

However, there is inequity in the present situation whereby nationals of the United States and E.U. are able also to access the WTO dispute resolution mechanism, albeit indirectly, by recourse to domestic legislation. The E.U. and the United States have both enacted legal mechanisms enabling private parties to invoke the intervention of the U.S. Government or the European Commission

against perceived unfair foreign trade practices, which may result in the initiation of the dispute settlement mechanism of the WTO.[88] Nationals of the United States and E.U. can initiate ***Int. T.L.R. 94*** administrative procedures under section 301 or Regulation 3286/94[89] respectively, if another country violates its obligations under the TRIPS Agreement. However, domestic administrative proceedings in the United States and E.U. under section 301 or Regulation 3286/94 respectively, grant initiation rights only to companies based in the country where the proceedings are conducted. Thus, if an Australian importer faces a trade barrier to his or her imports in the United States, he or she cannot invoke section 301 or a similar administrative procedure in Australia, since Australian law does not provide such a right.

Nevertheless, while each instrument provides a more expedient procedure in ensuring conformity with due process for private complaints, the carriage of the process at each stage remains with the government. The government or the Commission decides whether to admit a petition, whether to open an investigation and whether to initiate international dispute settlement proceedings against the offending state. Both municipal trade laws are inequitable to the extent that they can be used by the U.S. and E.U. Governments, on behalf of private parties operating within those countries, to promote their interests in foreign trade policy.

## A case for change

Although international trade law has succeeded in freeing itself from some of the boundaries of traditional international law given developments within the new *corpus juris* of the WTO, the principle of the state as the sole actor under international law still dominates international litigation. Yet the rationale for the rule dates back to Vattel's conception of international society in the eighteenth century, a society in which the primary object of international law was to maintain peace among European nations. By contrast, in the latter twentieth century the scope and volume of international trade drives the harmonisation of commercial law and policy. A transnational society, representing the spectrum of business, environmental and social welfare organisations and interests, demands a voice in law and decision-making. Similarly, recent developments in the law of human rights also demonstrate that individuals are being increasingly recognised as participants and subjects of international law.

The prohibition on the participation of individuals in international dispute resolution can no longer be justified on the basis that states are the primary subjects of international law. When the WTO legislates for intellectual property rights, individuals are directly affected. In this regard, the impact of the TRIPS Agreement on Australian legislation was significant, its implementation requiring reforms to the Copyright, Patents and in particular to the Trade Marks Act. In the case of patents and trade marks individuals found the scope of their monopoly rights in ownership considerably increased. Moreover, those in industry and business with valuable intellectual property are the ones to best observe the contravention of their rights. In as much as individuals have become the “subjects” of international law, so they should also have a right to participate in enforcement proceedings where their interests are affected.

In view of the changed circumstances, to deny individuals the right to enforce their intellectual property rights at the international level lacks legitimacy. It permits the state to rely on the traditional principle prohibiting individual participation as a means of protecting its sovereignty and its power to ensure its citizens have no other recourse against the law than the state itself. The difficulty with this arrangement is that the interests of government do not always coincide with those of the individual. Moreover, the indirect method of taking legal action tends to exacerbate the politicisation of the issue of enforcement since individuals must persuade their government to take up the dispute with another state. It is with the aim of avoiding these political obstacles that international law in the areas of both commerce and human rights has granted certain limited procedural rights to individuals.[90]

## A private right to access WTO dispute resolution: Which way forward?

### *A private right of action to challenge government acts in domestic courts?*

A private party may be given the right to initiate a cause of action in the domestic courts challenging any municipal enactment that fails to comply with the Uruguay Round Agreements. Certainly, the ability of citizens of the E.U. to challenge the inconsistency of domestic legislation suggests that individual complainants benefit from the strengthening of judicial power.[91] This option is feasible,

since based on the reasoning of the European Court of Justice (ECJ), the specificity of wording in the Uruguay Round Agreements presents an opportunity for direct applicability and for excluding the traditional rule concerning the exhaustion of local remedies.[92]

Nonetheless, the desirability of the direct applicability of the Uruguay Round Agreements is hotly debated in those countries that traditionally adhere to the dualist system of implementing ***Int. T.L.R. 95*** international law.[93] In the United States for example, direct applicability appears unlikely in the light of public debate concerning the greater legitimacy of Congress as the means of implementing WTO law. By contrast, in Europe, the idea appears more acceptable given that the specificity, or "hard-law" nature of the Uruguay Round Agreements, meets the ECJ's criterion for direct effect.[94] Nevertheless, at present, as a matter of trade policy, the Commission, like Congress, is not prepared to consider judicial review at the municipal level. The Preamble to the Council Decision concerning the conclusion of the Marrakesh Agreements, states that the Agreements "cannot be directly invoked in Member States or Community courts by private individuals who are national or legal persons".

### *Direct access to the WTO*

The possibility of challenging WTO-illegal governmental acts in municipal courts need not exclude a right to direct access to the WTO as an alternative means for private citizens. To give private citizens the right to directly invoke WTO dispute resolution procedures would have several advantages: first, it would eliminate government discretion in initiating WTO procedures. Second, it would ostensibly depoliticise minor disputes. Third, unlike domestic judicial proceedings, the application by one body, the WTO, makes a coherent interpretation of the Uruguay Round Agreements more likely and promotes the goal of predictability and stability in the international trading system.

Nevertheless, there are difficulties in simply transposing a private action to an international forum. In such a case the rulings of the panel and Appellate Body would have the same quality as the rulings of the European Court of Human Rights. Their rulings would create an obligation under international law to comply, but under the present constitution of the WTO they would not be directly enforceable in the state's territory. To do so would require the transformation of the WTO into a supranational organisation in the nature of the European Community.

Second, it is a sovereign decision of the WTO Member to obey the obligations or risk the consequences. Under the WTO Agreement, a Member can ask the WTO for authorisation for compensation or the withdrawal of concessions. But whether a government should have the right to enforce a ruling in favour of one of its citizens by these means raises difficult questions. One could argue that the former option would provide an incentive to comply with the decision. However, this would be the equivalent of direct enforcement of panel rulings which is inappropriate considering the present status of the WTO as an international organisation. Given the difficulties in allowing private parties direct access to WTO dispute resolution, any such right would have to be specifically designed for the purpose.

### *A private right to access based on regional models*

Two regional models of transnational litigation -- those of the E.U. and North American Free Trade Agreement (NAFTA) -- provide a possible way forward in allowing private litigants to enforce substantive norms. In the former instance, Article 173 of the Treaty of Rome gives individuals the right to directly file a complaint in the European Court of Justice against every legally binding European Community Law.[95] Its application has allowed the case law of the Court to overcome the principle of state sovereignty to the benefit of private citizens.

By contrast, the approach of NAFTA is more conservative. First, the procedural rights of a private actor, as provided by section 19 of NAFTA, solely refer to anti-dumping law and investment disputes. Second, the government must initiate the dispute settlement procedure at the request of a national, depriving the individual of direct access. Third, the panel decision is binding on the involved party only with respect to the matter in dispute, and the decision of the panel is immediately enforceable in the domestic law. From a practical viewpoint, the more cautious approach of NAFTA demonstrates that private parties can participate without creating confusion in traditional international trade law.[96] Since NAFTA seems to strike a balance between sovereign state autonomy and private participation, it is more likely to serve as a model for international trade agreements than the more integrative Treaty of Rome.

## A choice of pathways?

Those individuals whose rights are directly affected by lawmaking under the trade regime are equally entitled to access the enforcement system. To increase the number of actors can only improve compliance. The debate therefore is not whether, but rather by what means, individuals should participate and what is to be the nature of that participation. An intermediate step could be to provide for a private right to participate in the panel proceeding as *amicus curiae.* This form of third-party participation has long been recognised in domestic judicial proceedings and is also practised to a limited extent in international fora. However, unlike the parties to a dispute, an *amicus* cannot control the course of action-she is neither served documents in the case nor can she offer evidence or examine witnesses. The *amicus* role therefore lacks the essential components to ensure private parties' efficient and unrestricted access to WTO dispute resolution.

***Int. T.L.R. 96*** It is submitted that individual entitlement would be best realised if direct private party access to dispute resolution complements but does not exclude the traditional form of citizen representation by the government. To do otherwise would preclude from WTO participation private parties who are unable to afford the cost of those proceedings. However, in the short term, any amendment of the DSU may be difficult to achieve. Not only are Member States likely to be reluctant to consent to procedures which require a further relinquishing of sovereignty, but the WTO amendment procedures are themselves unwieldy.

## Part IV: The Case for a New Model of Dispute Resolution

Throughout the course of this article areas have been identified where reform of the dispute resolution mechanism is necessary in order to retain the legitimacy and therefore the confidence of both states and their citizens if they are to bring their intellectual property disputes to the WTO. Outwardly, it would be a simple enough matter to remedy procedural matters such as legal representation, transparency and even the standing of private individuals, in an ad hoc and piecemeal fashion. However, in any consideration of the trade court's approach to adjudication, the broader issues of theory and philosophy cannot be avoided. If reform of the trade court is to occur, it must be undertaken with an appropriate theoretical model in mind. Conceptions of justice and democracy change with the times. This means a reevaluation of the role of non-elected institutions and their ability to serve the underlying values of the democratic process. The DSU fails to recognise that international trade law has implications outside the public sphere, affecting the lives of individuals. It makes little allowance for giving individuals a role in matters that directly affect them. In this, the present international trade regime accords with a Realist perspective on international affairs, focusing on states as the supreme players in global affairs. This obviously disadvantages individuals and NGOs who may be powerless to persuade their government to take action.

The technological revolution has fractured the nation state. It can no longer pretend to represent or fully express the interests of its constituents in the international arena. Denying full participation to non-state actors fails to recognise the reality of the new transnational society composed of powerful corporations, financial institutions, as well as influential producer associations and interest groups. In these circumstances, it is often those in an industry who impose conditions on outsiders, not the state.[97] Yet the decision whether to initiate a WTO action is at the state's discretion, and individual actors must rely on their respective governments to pursue their legal interests. States cannot possibly initiate action to protect the varied and conflicting interests of all its citizens. In cases such as *India -- Patent Protection,* private interests are involved at the municipal level, whether local business or communities -- yet neither of these interests had a voice in the decision-making process.

### Three models of trade legalism

The foregoing case study reveals a weakness inherent in the present dispute settlement system that over time it may gain a technical autonomy, operating more or less independently of the governments that established it. In order to enhance its legitimacy the trade court needs a blueprint for future jurisprudential developments and systematic reform. Richard Shell offers three models of trade legalism: the regime management model, the efficient market model and the trade stakeholder model.[98]

#### *The regime management model?*

The regime management model, as the name suggests, derives from regime theory. Regime theory sees states, the primary actors in the international legal system, motivated by self-interested goals, such as wealth enhancement, power and domestic political control.[99] This model views trade

agreements as “contracts” among sovereign states which help them resolve potentially conflicting interests over these diverse goals. Legalists, favouring the regime management model, see the WTO legal system as a means to generate legitimate normative standards around which states will bargain with one another to gain wealth through more open trade -- while retaining the control they need to achieve the domestic political objectives that call for limiting trade. Regime-oriented legalists assert that international legal rules can induce states to negotiate “in the shadow of the law” rather than purely on the basis of power relationships.[100] The WTO's authority to announce binding trade standards backed by a credible threat of economic retaliation will, the legalists argue, level and order the playing field of international trade between states.

### *The efficient market model?*

The efficient market model of legalism derives from a combination of the international relations school of liberalism and the application of neoclassical free trade theory embodied as rules of ***Int. T.L.R. 97** law.[101] Under this form of liberalism nations are not conceived of as autonomous, self-maximising actors, nor are they the ultimate subjects of international law. Rather, private actors are the essential players in international societies who, in seeking to promote their own interests, influence the national policies of states. For its part, pure free trade theory posits that business firms, consumers, and workers all benefit most when states subject themselves to the competitive rigours of the global market under the economic doctrine of comparative advantage.[102] As seen by the efficient market model, the WTO is part of an emerging “global business civilisation”[103] that transcends states and requires its own, semi-autonomous legal system to operate effectively.[104] Legalists advocating the efficient market model see binding international trade rules as instruments with which to achieve efficient international capital and consumer markets by eliminating needless government interference and intrusion in international trade.[105] Ideally, this model would give businesses direct access to both supranational and domestic dispute resolution machinery in order to enforce international trade rules and reduce the legal transaction costs of global trade.

### *The insufficiency of existing models*

At present, WTO dispute resolution procedures, jurisprudential techniques and the choices made by adjudicators, are based on a combination of the regime management model and the efficient market model. On the one hand, the regime management model -- with its emphasis on state standing, international law as a source of binding norms, and the mixed motives brought by states to the WTO, offers the most plausible explanation of the existing WTO legal system.[106] On the other hand, both the consensus voting rule for overturning WTO dispute resolution decision-making and the political dynamics that led to the adoption of the reforms of the WTO Agreement, attest to the importance of the efficient market model.[107] The dominance of these two models indicates that governments, as the primary political actors, seek, whenever possible, to monopolise the means by which disputes over economic growth and allocation are resolved.

This is not a situation that private interests having direct stakes in global trade -- multinational corporations,[108] financial institutions, exporters and others -- will long endure. Equally, as the substantive provisions of the TRIPS Agreement touch the lives of all individuals, not simply those with a proprietary interest, all of the transnational political forces with a stake in trade policy deserve “places at the table” -- including standing to litigate cases -- in the WTO dispute resolution system. A choice will have to be made between an efficient market model system in which states interact only with private commercial interests in solving the problems of global economic integration and a system in which a broader array of social interests will have a voice in the process of dispute resolution.

### *A trade stakeholder model?*

A third and new model for trade governance presages greater legitimacy. The trade stakeholders model offers an alternative vision of the interplay between trade and other social policies. This model emphasises broader participation in trade adjudication, democratic processes for resolving trade conflict, and open dialogue regarding the goals of economic trade. Like the efficient market model, the trade stakeholders model is based on the insight of the international relations school of liberalism that individuals, not states, should be the primary subjects of international law. Unlike the efficient market model, which seeks to promote trade over other domestic and transnational values, the trade stakeholders model sees trade legalism as an opportunity for a wider variety of domestic and transnational interest groups to participate with states in the activity of constructing common economic and social norms.

## Conclusion

The decision-making in *India -- Patent Protection* indicates that the resolution of such disputes is increasingly likely to test the legitimacy of the trade court as a forum that is cognisant of due process and representative of private interests concerned in the dispute. Given the normative weaknesses inherent in both the ***Int. T.L.R. 98*** regime management and the efficient market models, it is arguable that the trade stakeholders model is the preferred model for delivering greater legitimacy to the system of dispute resolution.[109] In the first place, it would grant broad participatory rights to diverse constituencies affected by trade policy, similar to the rights accorded individuals within the European Union and by the European Court of Justice.[110] Second, the trade stakeholders model would also address the need to develop distinctive and innovative political mechanisms to complement the WTO's dispute resolution procedures.

While it appears that the trade court is experiencing an initial period of unquestioning approbation, the history of ECJ scholarship indicates that this will not last. Increasingly, scholars will challenge the use of law as an instrument of global economic integration without a commensurate growth in legitimacy and political accountability to accompany the process.[111] The stronger the call for supranational institutions acting above and, if necessary, against the nation state, the more the need to deal with, and to agree on, a concept of legitimacy and a process of legitimisation for such a new power.[112]

Int. T.L.R. 1998, 4(3), 81-98

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1. Art. 17, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Final Act, pt 2, Annex 2, reprinted in 33 I.L.M. at 1226-4 (1994) at 1236-37.J.H. Jackson, arguing that the rule-oriented approach to resolving trade disputes involves negotiation "by reference to what [parties] would expect an international body would conclude about the action of the transgressor in relation to its international obligations". When parties bargain "in the shadow of the law", they must take into account not only their relative power positions and interests, but also their predictions about how tribunals will interpret rules in particular cases: *The World Trading System: Law and Policy of International Economic Relations* (1989) at 99 *et seq.*

2. Arguing against a proposal to create a trade "supercourt" within the GATT see P.R.Trimble, "International Trade and the Rule of Law" (1985) 83 Michigan Law J., 829 at 1016, 1019 and 1025.See B.F. Fitzgerald, characterising Ann-Marie Slaughter's theory of liberalism: "An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws" (1995) AYIL vol. 16 at 311-314 and at 322-324; also L.C. Reif, "Multidisciplinary Perspectives on the Improvement of International Environment Law and Institutions (1994) 15 *Mich J. Int'l L.* 723, 738.

3. Art. 16 of the DSU.See M. Trebilcock and R. Howse, The Regulation of International Trade (1995) chapter 1.

4. The Dispute Settlement Body (DSB) composed of all WTO Member countries oversees the dispute resolution process:Agreement Establishing the WTO, Art. 4(3), reprinted in 33 I.L.M. at 1145. The DSB will have the power to reverse decisions of the Appellate Body, or of dispute panels if no appeal is taken, but only by unanimous vote: Arts 16(4), 17(14) of the DSU, reprinted in 33 I.L.M. at 1235, 1237.By the end of the 1980s, a metamorphosis of the international political economy had begun: the old, close relationship between state, civil society, and economy was being replaced by a new relationship between authority and economy, and between authority and society. A global business civilisation had emerged According to Strange, this "civilisation" is composed of millions of individual economic actors held together in a "complex network or web of transnational, bilateral bargains -- bargains between corporations and other corporations, between corporations and governments, and between governments". Susan Strange, "Protectionism and World Politics", 39 Int'l Org. (1985) 233, 234.

5. D. Palmeter, "The Need for Due Process in WTO Proceedings" (1997) 31 *Journal of World Trade,* 51 at 57.M. Hilf, arguing that in an interdependent world economy "states are beginning to loose [*sic* ] their freedom to act as they want" and that "international economic integration, influenced by a multitude of uncontrollable factors, entails a loss of sovereignty": "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures, in E.U. Petersmann and M. Hilf (eds.) *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (1988) at 285, 321.

6. See *India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products* Report of the Panel, September 5, 1997, WT/DS50/R. Appellate Body Report, December 19, 1997, WT/DS50/AB/R.E.U. Petersmann, *ibid.* at 201-221; Tumlir J., stating that "international [trade] rules represent a truer expression of the national interest of all the countries concerned than the mass of national [economic] legislation": Need for an Open Multilateral Trading System" (1983) 6 *World Econ.* 393, 406.

7. While compliance with the measure in question is the primary aim, under the DSU, losing respondents may attempt to negotiate a settlement involving payment of compensation to winning complainants rather than change their trade policies. If no such mutual agreement can be reached, the winner may seek approval from the DSB to withdraw treaty benefits in the amount of the nullification and impairment it has suffered:Art. 22(2), 33 I.L.M. at 1239. The amount and form of trade sanctions is subject to a separate WTO dispute resolution procedure:Art. 22(6)(7), 33 I.L.M. at 1240-41.G.R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 Duke L.J. 829 at 858-877.

8. S. Jarvin, "The Sources and Limits of the Arbitrator's Powers", in J.D.M. Lew (ed.) *Contemporary Problems in International Arbitration,* 1987, at 50, 67. The DSU mandates that panellists serve in their individual capacities and not as representatives of any government or organisation:Arts. 8.9 and 8.11 of the DSU. *ibid.* at 877-894.

9. 19 U.S.C. 2411 (1988).They undermine the principle of government representation of private claims by their wealth and influence: further see M. Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 *Journal of World Trade,* 181 at 199-200.

10. Hobbes, *Leviathan,* Part I, chs 6, 8, 11 and 12.G.R. Shell, *ibid.* at 907-922.

11. Havana Charter, Art. 93, para. 1.J.H.H. Weiler, "The Transformation of Europe" (1991) 1000 Yale LJ. 2403 at 2478-2481; B.F. Fitzgerald, "Trade-Based" Constitutionalism: The Framework for Universalising Substantive International Law?" (1996-97) Univ. of Miami Y.I.L. 111 at 114 n. 3.

12. *ibid.* Arts. 93 and 94.J.H.H. Weiler, *ibid.* at 2466-2473.

13. *ibid.* Arts. 94 and 96.T.M. Frank, *The Power of Legitimacy Among Nations,* 1990 at 16-22; and R. Seidelmann, "The Search for a New Global Order" in *A United Nations for the Twenty-First Century,* 1997 at 54.

14. J.H. Jackson, *World Trade and the Law of GATT* (1969) at 163ff: *idem,* "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT" (1979) 13 Journal of World Trade Law Iff: E. McGovern, "Dispute Settlement in the Adjudication or Negotiation", in M. Hilf, F.G. Jacobs, E.U. Petersmann, *The European Community and GATT, Studies in Transnational Economic Law* (1986) vol. 4 at 73ff; R.E. Hudec, "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business" (1980) 13 *Cornell International Law Journal* 145ff. R. Planck, "An Unofficial Description of How a GATT Panel Works and Does Not" (1987) 4 *Journal of International Arbitration* 53ff.

15. Amendments: 1966, 1979, 1982 and 1984 of the GATT procedures. For an overall view see the Analytical Index. Notes on the Drafting, Interpretation, Application of the Articles of the General Agreement, published by the Contracting Parties to GATT (GATT/LEG/2, Geneva 1985). In addition to the principal GATT dispute settlement provisions of Articles XXII and XXIII, as amended in 1955, supplementary dispute settlement rules and procedures were agreed upon in 1958, 1966, 1979, 1982 and 1984 in the Kennedy Round (1964-1967) and Tokyo Round (1973-1979) and Uruguay Round. See "Dispute Settlement" in the 1986 Ministerial "Punta del Este Declaration"; also the negotiating plans adopted on January 28, 1987, Appendices I and II of M. Hilf, F. G. Jacobs, E.U. Petersmann, *The European Community and GATT, Studies in Transnational Economic Law* (1986) vol. 4.

16. In addition to the principal GATT dispute settlement provisions of Articles XXII and XXIII, as amended in 1955, supplementary dispute settlement rules and procedures were agreed upon in 1958, 1966, 1979, 1982 and 1984 in the Kennedy Round (1964-1967) and Tokyo Round (1973-1979) and Uruguay Round. See the parts on "Dispute Settlement" in the 1986 Ministerial "Punta del Este Declaration" as well as in the negotiating plans adopted on January 28, 1987, Appendices I and II of M. Hilf, F.G. Jacobs, E.U. Petersmann, *The European Community and GATT, Studies in Transnational Economic Law* (1986) vol. 4 (1986).

17. A series of cases concerning dumping and subsidies severely tested the informality and consensual nature of the procedures: with respect to the implementation of panel reports, the U.S. blocked the adoption of *United States -- Anti-dumping duties on imports of stainless steel plate from Sweden,* 1994, ADP/117; *United States -- Imposition of antidumping duties on grey portland cement and cement clinker from Mexico,* 1992, ADP/82; *United States -- Anti-dumping duties on imports of seamless stainless steel hollow products from Sweden,* 1990, ADP/47; and failed to implement *United States -- Imposition of anti-dumping duties on imports of fresh and chilled Atlantic salmon from Norway,* 1994, ADP/87; the E.U. failed to fully implement the recommendations of panels in *E.C. -- Anti-dumping proceeding against audio tapes and audio tapes in cassettes from Japan,* 1985, ADP/136.

18. Article 28(1) of the Paris Convention and Article 33 of the Berne Convention.

19. For example, during the 1960s in clear breach of the Berne Convention, Greek law was amended to abolish the author's broadcasting right in order to enable the broadcasting organisation which had become part of the propaganda apparatus of the government to avoid paying any royalties to authors for the broadcasting of their works whether they were Greeks or foreigners. However, the other Convention countries took no action: S.M. Stewart, *International Copyright and Neighbouring Rights* (1989) at 140. See also F. Emmert, "Intellectual Property in the Uruguay Round -- Negotiating Strategies of the Western Industrialized Countries" (1990) 11 Mich J Int'l L 1317 at 1343.

20. 1988 Trade Act 1302 102 Stat. 1176-79 (1988) codified as amended at 19 U.S.C. 2420(a)(1)(1988). On the goals of section 301 see J.C. Bliss, "The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response" (1988-89) 20 *Law and Policy in International Business* 501. The E.C. has a similar trade policy instrument that is designed to afford private petitioners the opportunity to complain of foreign unfair trade practices. However, Reg-No. 2641/84 primarily seeks to protect the Common Market against foreign unfair trade practices and securing access to export markets for Community industries appears to be a secondary concern: see Council Regulation 2641/84 EEC O.J. Eur. Comm. (No L 252) 1 (1984).

21. Investigations initiated under section 301 are conducted over a 12 to 18 month period, 19 U.S.C. 2414 (1988).

22. In fact, intellectual property is mentioned only as a general exception to the GATT in Article XX(d).

23. See *Certain Aramid Fibre* case, GATT Panel Report *Basic Instruments and Selected Documents* 36S 1988-89, at para. 2.9 at 353 *et seq.* ; In the Matter of Certain Aramid Fibre, USITC Pub. 1824 Inv. No. 337-TA-194 (March 1986); Azko N.V.v. USITC 808 F 2d 1471 (Fed. Cir. 1986) cert. denied, 482 U.S. 909 (1987) (U.S. Court of Appeals affirming the ITC's exclusion order).

24. Article XXIII of the GATT.

25. Subsequently, the GATT Council found the U.S. Government slow to bring section 337 into compliance with the panel finding. The USTR proposed alternative procedures which are discussed in L. Barons, "Amending Section 337 to Obtain GATT Consistency and Retain Border Protection", 22 *Law & Policy in International Business* (1991) 289.

26. See Rockefeller Bill (s. 148) which amended section 337 and relevant federal jurisdiction provisions of Title 28 to bring actions by the International Trade Commission into compliance with GATT. However, it preserved the ITC's ability to act against violations of U.S. intellectual property laws. The wording of Rockefeller's Bill was included in the GATT implementing legislation 1994.

27. BISD 335/19.

28. "Law and Force" ch. 2 in D. Lloyd, *The Idea of Law* (1985).

29. K.Y. Chang, "Super 301 and Taiwan:A Case Study of Protecting United States Intellectual Property in Foreign Countries" (1994) 15 *Northwestern Journal of International Law and Business* 206 at 213.

30. In the Asian Pacific area alone a considerable number of enactments were made pursuant to section 301 settlements. Between 1990 and 1991 patent laws were enacted in Indonesia and India. Between 1991 and 1993 Brazil, Singapore, Japan, Taiwan and Thailand had either enacted new trade mark laws, revised existing laws or had legislation pending. In 1991 China enacted a new copyright law and in 1993 Thailand introduced a copyright Bill. Between 1990 and 1991 Japan and the Republic of Korea enacted trade secret protection. There were also improvements in the enforcement of intellectual property rights. Between 1992 and 1993 Thailand, China and Taiwan instituted higher penalties for infringement. Negotiations have recently brought about an increasing number of convictions for violations of intellectual property rights. In December 1993 Singapore convicted several major pirates of software and they received jail terms. China's first specialised court for cases concerning intellectual property rights was set up in June 1993 in the Beijing Municipal Intermediate People's Court. The court, established as an Intellectual Property Trial Division, and effective as of August 1993, hears cases on patents, trade marks, copyright licensing agreements and unfair competition.

31. The Paris and Berne Conventions.

32. Article 1.1 provides that "[the] rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedure" under the "covered agreements" which include those for GATS and the TRIPS Agreements listed in Appendix 1 to this Understanding, hereinafter referred to as the "covered agreements". The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to this Agreement.

33. For example, on July 2, 1996, the United States requested India to hold consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) regarding the absence in India of either patent protection for pharmaceutical and agricultural chemical products or formal systems that permit the filing of patent applications for pharmaceutical and agricultural chemical products and that provide exclusive marketing rights in such products (WT/DS50/1).

34. Article 12.8 of the DSU. The period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties to the dispute within three months. The interim review stage shall be conducted within the time period set out in paragraph 12.8. See also Appendix 3 of the DSU specifies time limits for implementations of the various stages in the panel process. Those time limits suggest that the panel report should normally be issued within six to eight months of the establishment of the panel.

35. Article 8.7 of the DSU continues the practice, introduced in the 1980s (GATT Contracting Parties on November 30, 1984 (BISD 31S/9), of maintaining a roster of qualified panellists, both governmental and non-governmental.

36. Article 21 addresses the former delays experienced in the implementation of panel recommendations. The DSB has supervision over the implementation of the accepted report by the offending state and the offending state has a duty to report back on this implementation to the DSB. The DSU requires a losing respondent to indicate what actions it plans to take to implement the panel's recommendations within 30 days: Art. 21.3. When immediate implementation is not practicable the state is allowed a “reasonable period of time” for implementation. The reasonable period of time may be set by the Member concerned if approved by the DSB, by agreement of the contending parties, or, absent agreement, by arbitration. Normally the period will not exceed 15 months.

37. J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989) 94-97.

38. Panel reports may be considered by the DSB for adoption 20 days after they are issued. Within 60 days of their issuance they will be deemed to have been adopted unless the DSB decides by consensus not to adopt the report, or one of the parties notifies the DSB of its intention to appeal. In accordance with the DSU only parties to the dispute may appeal a panel report, an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, and there shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body: Art. 16, Adoption of Panel Reports.

39. The Appellate Body's report is subject to the same automatic adoption rule as regular panel reports. It is to be adopted (absent consensus to the contrary) within 30 days of its circulation to DSB members: Art. 17.14.

40. Such authorisation has only been granted once, however, and that was in 1955 to allow the Netherlands to suspend concessions made to the United States as a result of U.S. quotas on Dutch agricultural products. The Netherlands apparently never utilised the authorisation. Attempts to obtain authorisations in the 1980s failed because of the consensus rule, with the target country opposing the authorisation.

41. P. Pescatore, *Drafting and Analysing Decisions on Dispute Settlement,* in *Handbook of GATT Dispute Settlement* (1991) at 3 and 36.

42. *ibid.* at 7 note 7; see Netherlands Measures of Suspension of Obligations to the United States, Nov. 8, 1952, GATT BISD 1st Supp. 32 (1953).

43. Where the Appellate Body or panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that Agreement: s. 19.1.

44. Art. 22.6 of the DSU.

45. Such retaliation can consist of increases in bound tariffs or other actions. Moreover, there are specific procedures for determining the level or extent of suspension if no agreement can be reached. The level of retaliation is to be equivalent to the economic damage sustained by the complaining state as a consequence of the original illegal measure. When the panel or appellate report is implemented, the retaliatory action shall cease: Art. 22.1.

46. For the advantages and disadvantages of permanent tribunals and a comparison to ad hoc arbitral tribunals see H. Mosler and R. Bernhardt (ed.), *Judicial Settlement of International Disputes* (Berlin 1974); H. Steinberger, “Judicial Settlement of International Disputes”, in R. Bernhardt (ed.) *Encyclopaedia of Public International Law* (1981) Instalment 1 at 120ff.

47. Art. 17 of the DSU.

48. S. Jarvin, “The Sources and Limits of the Arbitrator's Powers”, in *Contemporary Problems in International Arbitration* (1987) J.D.M. Lew (ed.) at 50, 67.

49. J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989) 85-88; cf R.E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993) at 364-365. See also O. Long, stating that “the primary objective of [the GATT] dispute settlement procedures is not to decide who is right and who is wrong but to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible”: *Law and its Limits in the GATT Multilateral Trade System* (1985) at 71 and that “legalism does not contribute to trade liberalization”: *ibid.* at 73.

50. A period of transition of 10 years is granted to developing countries in which to bring their patent legislation into conformity with the TRIPS Agreement. Article 70(8) states that the substantive legislation does not have to be changed before December 2004. Therefore, India is required to phase in patent protection by January 1, 2005: Art. 65.

51. para. 4.2. This provision is an exception to the transitional arrangements contained in Part VI of the TRIPS Agreement.

52. para. 8.1.

53. Appellate Body Report, WT/DS50/AB/R.

54. Article XVI:I of the WTO Agreement provides: “Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947.” Although there is no doctrine of *stare decisis,* leaving panels free to deviate from interpretations applied in previously adopted panel reports, they have hardly ever done so. GATT panel reports have actually established a reliable and comprehensive “case law”.

55. Article 31(1) of the Vienna Convention provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

56. The panel cited the report of the Appellate Body in *Japan -- Alcoholic Beverages,* to the effect that adopted panel reports “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute”: Appellate Body Report on “Japan -- Taxes on Alcoholic Beverages”, adopted on November 1, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS13/AB/r, p. 14.

57. The panel based its view on Underwear panel report: Panel Report on “United States -- Restrictions on Imports of Cotton and Man-made

Fibre Underwear", adopted on February 25, 1997, WT/DS24/R, para. 7.20.

58. paras. 7.20 and 7.30.

59. The *Superfund* panel stated that "[t]he general prohibition of quantitative restrictions under Article XI and the national treatment obligation of Article III have the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties": Panel Report on "United States -- Taxes on Petroleum and Certain Imported Substances", adopted on June 17, 1987, BISD 34S/136, para. 5.2.2.

60. para. 7.21.

61. para. 7.34.

62. Article 32 of the Vienna Convention gives the negotiating history a status of "supplementary means of interpretation" only.

63. para. 7.18.

64. J.C. Thomas argues that given the informal nature of WTO negotiations, an overly zealous use of the negotiating history as an aid to interpretation may give rise to issues of due process: "The Need for Due Process in WTO Proceedings" (1997) 31 *Journal of World Trade* 45 at 49.

65. A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Vol. 1, (Liberty Fund Inc., 1981) Book I.i, at 22-23 and Book II.v at 371-375.

66. The preface to the GATT 1947 calls for: "[T]he substantial reduction of tariffs and other barriers to trade and .. the elimination of discriminating treatment in international commerce". See generally J.H. Jackson. *World Trade and the Law of GATT,* Part II, (1969); J. H. Jackson, W.J. Davey, A.O. Sykes, *Legal Problems of International Economic Relations* (3rd edn, 1995), Chapters 8-11; J.H. Jackson, *The World Trading System,* Chapters 5-11.

67. Subparagraphs 1(b) and 1(c) of Article XXIII of the GATT 1994 shall not apply to the settlement of disputes under the TRIPS Agreement for a period of five years from the date of entry into force of the WTO Agreement. Thus the only cause of action permitted under the TRIPS Agreement during the first five years after the entry into force of the WTO Agreement is a "violation" complaint under Article XXIII:1(a) of the GATT 1994.

68. R. Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication" (1980) 8 *Hofstra LR* 487-507; *id.,* "Utilitarianism, Economics and Legal Theory" (1979) 8 *J. Legal Studies,* 140.

69. *The Leutwiler Report: Trade Policies for a Better Future: Proposals for Action,* GATT Sectretariat, Geneva 1985. The principle of comparative advantage is open to many criticisms: for a public choice perspective see: P.B. Stephan, "Barbarians Inside the Gate: Public Choice Theory and International Economic Law" (1995) 10 *American Univ. Jnl. Int'l Law and Policy* 745. Also see: M. Trebilcock and R. Howse, *The Regulation of International Trade* (1995) Chapter 2 on comparative advantage 2-4 and on public choice at 14-17;J. Bhagwati, "Challenges to the Doctrine of Free Trade" (1993) 25 NYU J *Int'l & Policy* 219; D.Z. Rich, *The Economics of International Trade* (1992).

70. R.E. Hudec, The GATT *Legal System and World Trade Diplomacy* (2nd ed., 1990).

71. D. Palmeter, "The Need for Due Process in WTO Proceedings" (1997) 31 *Journal of World Trade* 1, February, 51 at 53.

72. *European Communities -- Regime for the Importation, Sale and Distribution of Bananas,* May 22, 1997, WT/DS27/R.

73. D. Palmeter, *ibid.* at 53.

74. R. Evans, "Caribbean Legal Advisors Barred in WTO Banana Row", The Reuter European Community Report, September 10, 1996; cited in D. Palmeter, "The Need for Due Process in WTO Proceedings" (1997) 31 *Journal of World Trade* 51 at 53, n. 2.

75. Palmeter, *ibid.* at 53.

76. The authority to attend meetings of international organisations is a matter of certification, and certification is granted by Member States, not by the international institution.

77. *United States: Standards for Reformulated and Conventional Gasoline,* AB-1996-1, WT/DS2/AB/R, April 29, 1996.

78. A panel report is required to be prepared within six months and an appeal can take up to three months: Articles 12.8 and 17.5 of the DSU.

79. On time limits, the Appellate Body and due process see D. Palmeter, "The Need for Due Process in WTO Proceedings" (1997) 31 *Journal of World Trade* 51 at 56.

80. Thomas, *ibid.* at 46.

81. *ibid.* at 48.

82. D. Palmeter, "The Need for Due Process in WTO Proceedings" (1997) 31 *Journal of World Trade* 51 at 54.

83. In the U.S. Constitution, the Fifth Amendment guarantees due process; the Sixth Amendment requires public trials in criminal proceedings. In Australia the High Court has attempted to construct the basic right of an accused person to a fair trial from Ch. III of the Commonwealth Constitution: *Dietrich v. R* (1992) 109 ALR 385 at 408 and 436.

84. See *United States: Standards for Reformulated and Conventional Gasoline,* AB-1996-1, WT/DS2/AB/R, April 29, 1996.

85. Article 61.

86. Article 41(2).

87. Article 41(4).

88. Historically, the United States was the first to pass the U.S. Trade Act of 1974 providing strong counter-measures against the unfair trade practices of other states. EEC Regulation 2641/84, for which the U.S. Trade Act served as a model, was drafted as the legislative counterpart for the E.U.

89. E.U. Regulation 2641/84 as Modified by Reg. 3286/94.

90. The most prominent example is the institutional framework of the European Convention on Human Rights, consisting of the European Commission and the European Court of Human Rights.

91. The right of individuals to directly file a complaint in the European Court of Justice against every legally binding European Community law, under Article 173 of the Treaty of Rome, is a fundamental principle of the E.U. Its application has allowed the case law of the Court to overcome the principle of state sovereignty to the benefit of private citizens: B. Killmann, "The Access of Individuals to International Trade

Dispute Settlement" (1996) 13 *Journal of International Arbitration* 143 at 145 and 163.

92. The direct effect does not stem from the standing of the individual but from the nature of the treaty: European Commission's opinion in protocol to Bananas case *Federal Republic of Germany v. Council,* Case C 280/93, 1994. Under the "old" GATT the European Court of Justice refused to accept the doctrine of direct effect because of the vagueness and flexibility of the rules: Joint Cases 21-24/72, *International Fruit Co. v. Produkschap voor Groenten en Fruit,* 1972 ECR 1219 at 1227.

93. I. Brownlie, *Principles of Public International Law,* (4th ed) 1990, at 32-33. On the private right of action to challenge governmental acts in domestic courts in the E.U., U.S. and Japan see M. Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 *Journal of World Trade,* 181 at 193-194.

94. Since the DSU has unequivocally eliminated its soft law characteristics, all Marrakesh Agreements now have the necessary requirements to be granted direct effect in the E.U.: B. Killmann, "The Access of Individuals to International Trade Dispute Settlement" (1996) 13 *Journal of International Arbitration* 143 at 162 and 167.

95. Killmann, n. 83 above.

96. J. Schultz, "The GATT/WTO Committee on Trade and the Environment -- Toward Environmental Reform" (1995) 89 *The American Journal of International Law* 423 at 431; B. Killmann, "The Access of Individuals to International Trade Dispute Settlement" (1996) 13 *Journal of International Arbitration* 143 at 145.

97. The earliest complaint made to the WTO, just six months after it took effect, involved a U.S. complaint over Japanese measures on the automobile industry. Obviously there were large interests at stake, particularly those of U.S. parts and accessories manufacturers and suppliers. Japanese government representatives asserted that these were privately imposed measures and not a matter for state intervention.

98. G.R. Shell, "Trade Legalism and International Relations Theory: An analysis of the World Trade Organization" (1995) 44 Duke L.J. at 829.

99. A.M. Slaughter, "International law and International Relations Theory" (1993) 87 AJIL 205 at 217-219.

100. Art. 17, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Final Act, pt 2, Annex 2, reprinted in 33 I.L.M. at 1226-4 (1994) at 1236-37.J.H. Jackson, arguing that the rule-oriented approach to resolving trade disputes involves negotiation "by reference to what [parties] would expect an international body would conclude about the action of the transgressor in relation to its international obligations". When parties bargain "in the shadow of the law", they must take into account not only their relative power positions and interests, but also their predictions about how tribunals will interpret rules in particular cases: *The World Trading System: Law and Policy of International Economic Relations* (1989) at 99 *et seq.*

101. Arguing against a proposal to create a trade "supercourt" within the GATT see P.R.Trimble, "International Trade and the Rule of Law" (1985) 83 Michigan Law J., 829 at 1016, 1019 and 1025.See B.F. Fitzgerald, characterising Ann-Marie Slaughter's theory of liberalism: "An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws" (1995) AYIL vol. 16 at 311-314 and at 322-324; also L.C. Reif, "Multidisciplinary Perspectives on the Improvement of International Environment Law and Institutions (1994) 15 *Mich J. Int'l L.* 723, 738.

102. Art. 16 of the DSU.See M. Trebilcock and R. Howse, The Regulation of International Trade (1995) chapter 1.

103. The Dispute Settlement Body (DSB) composed of all WTO Member countries oversees the dispute resolution process:Agreement Establishing the WTO, Art. 4(3), reprinted in 33 I.L.M. at 1145. The DSB will have the power to reverse decisions of the Appellate Body, or of dispute panels if no appeal is taken, but only by unanimous vote: Arts 16(4), 17(14) of the DSU, reprinted in 33 I.L.M. at 1235, 1237.By the end of the 1980s, a metamorphosis of the international political economy had begun: the old, close relationship between state, civil society, and economy was being replaced by a new relationship between authority and economy, and between authority and society. A global business civilisation had emerged According to Strange, this "civilisation" is composed of millions of individual economic actors held together in a "complex network or web of transnational, bilateral bargains -- bargains between corporations and other corporations, between corporations and governments, and between governments". Susan Strange, "Protectionism and World Politics", 39 Int'l Org. (1985) 233, 234.

104. D. Palmeter, "The Need for Due Process in WTO Proceedings" (1997) 31 *Journal of World Trade,* 51 at 57.M. Hilf, arguing that in an interdependent world economy "states are beginning to loose [*sic* ] their freedom to act as they want" and that "international economic integration, influenced by a multitude of uncontrollable factors, entails a loss of sovereignty": "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures, in E.U. Petersmann and M. Hilf (eds.) *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (1988) at 285, 321.

105. See *India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products* Report of the Panel, September 5, 1997, WT/DS50/R. Appellate Body Report, December 19, 1997, WT/DS50/AB/R.E.U. Petersmann, *ibid.* at 201-221; Tumlir J., stating that "international [trade] rules represent a truer expression of the national interest of all the countries concerned than the mass of national [economic] legislation": Need for an Open Multilateral Trading System" (1983) 6 *World Econ.* 393, 406.

106. While compliance with the measure in question is the primary aim, under the DSU, losing respondents may attempt to negotiate a settlement involving payment of compensation to winning complainants rather than change their trade policies. If no such mutual agreement can be reached, the winner may seek approval from the DSB to withdraw treaty benefits in the amount of the nullification and impairment it has suffered:Art. 22(2), 33 I.L.M. at 1239. The amount and form of trade sanctions is subject to a separate WTO dispute resolution procedure:Art. 22(6)(7), 33 I.L.M. at 1240-41.G.R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 Duke L.J. 829 at 858-877.

107. S. Jarvin, "The Sources and Limits of the Arbitrator's Powers", in J.D.M. Lew (ed.) *Contemporary Problems in International Arbitration,* 1987, at 50, 67. The DSU mandates that panellists serve in their individual capacities and not as representatives of any government or organisation:Arts. 8.9 and 8.11 of the DSU. *ibid.* at 877-894.

108. 19 U.S.C. 2411 (1988).They undermine the principle of government representation of private claims by their wealth and influence: further see M. Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 *Journal of World Trade,* 181 at 199-200.

109. Hobbes, *Leviathan,* Part I, chs 6, 8, 11 and 12.G.R. Shell, *ibid.* at 907-922.

110. Havana Charter, Art. 93, para. 1.J.H.H. Weiler, "The Transformation of Europe" (1991) 1000 Yale LJ. 2403 at 2478-2481; B.F. Fitzgerald, "Trade-Based" Constitutionalism: The Framework for Universalising Substantive International Law?" (1996-97) Univ. of Miami Y.I.L. 111 at 114 n. 3.

111. *ibid.* Arts. 93 and 94.J.H.H. Weiler, *ibid.* at 2466-2473.

112. *ibid.* Arts. 94 and 96.T.M. Frank, *The Power of Legitimacy Among Nations,* 1990 at 16-22; and R. Seidelmann, "The Search for a New Global Order" in *A United Nations for the Twenty-First Century,* 1997 at 54.