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# VIRTUAL REALITY AND REALITY: THE EAST ASIAN NICs AND THE GLOBAL TRADING SYSTEM

ERNESTO M. HIZON\*

*When I tell any truth, it is not for the sake of  
convincing those who do not know it,  
but for the sake of defending those that do.*  
William Blake

*It is difficult to get a man to understand  
something when his salary depends upon  
his not understanding it.*  
Upton Sinclair

History has always had the uncanny ability to reinvent itself. The notion of history as an objective reality — a collection or thread of concrete facts and occurrences — is a dangerously naive concept that lends itself to a counterfeit perspective of reality. The history of a movement, or an idea, or a paradigm, its progression, its development into norms of behavior, are created by those who describe it, fashion its rules, define its ethics. In sum, historical interpretations and their significance

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are formulated by those who write them, constructing a virtual reality from a set of facts.

The history of the General Agreement on Tariffs and Trade (GATT) and its evolution into the World Trade Organization (WTO) is a case in point. The outcome of the Uruguay Round has been hailed as "a milestone for developing countries,"<sup>1</sup> producing the "most fundamental reform of the world trading system since the establishment of the [GATT] in 1947."<sup>2</sup> It must be borne in mind that although world trade has increased with the GATT system in place for four decades, income inequalities have remained, if not actually increased.

A World Bank publication has reported that, although world exports grew at the compound annual rate of 12.7% from 1965 to 1990, the geographic pattern of trade has hardly changed over the last quarter century. Developing countries as a group accounted for 27% of world exports in both 1965 and 1988. While the export share of several East and Southeast Asian countries rose markedly within the non-oil exporting group of developing countries, the export share of African and Western Hemisphere developing countries declined significantly. By 1990 South Korea alone was exporting more than all of Africa. Similarly, the share of industrial countries export remained unchanged at about 73%, until the late 1990s.<sup>3</sup> In practical terms, this means that while the East Asian economies progressed rapidly in the last twenty-five years, they merely acquired a greater percentage of the developing country share of the international trade pie. The industrial nations, which comprise a smaller share of the world population, maintained their larger slice of the pie, as expected.

In contrast, the World Bank estimates that the Uruguay Round is likely to generate as much as \$200 billion a year in global income, in absolute dollar terms, with somewhere between one

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1. MICHAEL BRUNO, *Foreword*, in WILL MARTIN & L. ALAN WINTERS, *THE URUGUAY ROUND: WIDENING AND DEEPENING THE WORLD TRADING SYSTEM* (1995).

2. *Id.* at 1.

3. I.M.D. LITTLE ET AL., *BOOM, CRISIS AND ADJUSTMENT: THE MACROECONOMIC EXPERIENCE OF DEVELOPING COUNTRIES* 12, 13 (1993).

quarter to one half going to developing countries, particularly to those which have relatively reduced their own protection.<sup>4</sup> The same paper by the World Bank opines that the largest gains from the Round will accrue to the East Asian WTO members, pursuant to the liberalization commitments in agriculture and manufactures, and the abolition of the Multi-Fiber Arrangement.<sup>5</sup>

In an Overview Paper prepared by the World Trade Organization, Asian developing nations, as a group, have outperformed all the other developing countries by a wide margin in terms of their share in world trade, particularly in the manufacturing sector, which doubled by ten to twenty percent since 1980. The same study also notes, in regard to developing countries, a high correlation between their export performance and the share of manufactured goods in their exports, as well as a positive correlation between exports and the share of investments in Gross Domestic Product (GDP) and of manufactures in GDP.<sup>6</sup> Proving this point, while manufactures account for more than eighty percent of total merchandise exports for the East Asian developing countries (including China), the corresponding share for other developing countries is less than half the figure.<sup>7</sup> Between 1990 to 1996 alone, seven of the ten fastest growing merchandise traders in the world were East Asian Newly Industrializing Countries (NICs),<sup>8</sup>

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4. Bruno, *supra* note 1, at 4, 5.

5. BRUNO, *supra* note 1, at 7.

6. WORLD TRADE ORGANIZATION, PARTICIPATION OF DEVELOPING COUNTRIES IN WORLD TRADE, OVERVIEW OF MAJOR TRENDS AND UNDERLYING FACTORS, WT/COMTD/W/15, at 1-2 (Note by the Secretariat, August 16, 1996).

7. BRUNO, *supra* note 1, at 7.

8. The terms "East Asian NICs" (i.e. newly industrializing economies) and "NIEs" (i.e. newly industrializing economies) have become part of the standard terminology of economists, political scientists and legal experts to describe a group of rapidly growing East Asian countries that roughly adhere to the so-called "East Asian economic development model." Neither the GATT nor the Uruguay Round agreements define what an NIC or NIE is. Suffice it to say that there is agreement that the NICs are a group of countries in East Asia which, in terms of world economic development, are in a transitional stage between the LDCs (i.e. less developed countries) of the Third World, and the AICs (i.e. advanced industrialized countries) of the West. They are also called semi-industrial countries, middle-income major exporters, and emerging or transitional economies.

The East Asian NICs are considered "new" simply because they have followed the footsteps of Japan, which is the original postwar "newly industrializing" country.

They are to be distinguished from the "old" countries such as the United States, and the countries of Western Europe, which are the "old" or traditional First World industrial countries.

The four original NICs -- Taiwan, Hong Kong, South Korea and Singapore -- have also been nicknamed the "gang of four," or the "four little tigers." Depending on the economic or developmental standards applied, other East Asian countries constitute a second-tier of NICs -- which may include Malaysia, Thailand, Indonesia and to a lesser extent, the Philippines. They are to be differentiated from the lower income developed countries who have acquired a new category, the LLDCs (i.e. the less developed countries).

There are basically two ways the NICs can be viewed from a political economy standpoint: the comparative-static view or the dynamic-global definition. Under the static view, the emergence of the NICs is an event that occurs in historical time and demarcates the phenomenon of industrialization occurring after the Second World War. See generally ANIS CHOWDHURY & IYANATUL ISLAM, *THE NEWLY INDUSTRIALIZING ECONOMIES OF EAST ASIA* (1993). The other, more dynamic view treats the emergence of the NIC as a change in the world production structure that corresponds to shifts in the international division of labor. One expert writes, "These changes occur as a result of a generalized historical movement in which industrialized countries vacate intermediate sectors in industrial production in which advanced developing countries are currently more competitive and advanced developing countries, in turn, vacate more basic industrial sectors in which the next tier of developing countries have a relative advantage." C.I. BRADFORD, JR., *The Rise of the NICS as Exporters on a Global Scale*, in *THE NEWLY INDUSTRIALIZING COUNTRIES: TRADE AND ADJUSTMENT* (L. Turner & N. McMullen eds., 1982). It is this more global definition that is implicitly used in this article. For further elaboration of this theme from the political economy point of view, see the other books by the same author: C. I. Bradford, Jr., *NICs and the Next-Tier NICS as Transitional Economies*, in *TRADE AND STRUCTURAL CHANGE IN THE PACIFIC AREA* (C. Bradford, Jr. & W. Branson eds., 1987); C. I. Bradford, Jr., *Trade and Structural Change: NICs and the Next-tier NICs as Transitional Economies*, 15:3 *WORLD DEVELOPMENT* 299.

Bela Balassa, in a pioneering World Bank study, defined a roughly quantitative view of the NIC: he classifies an NIC as one of the developing countries that had a per capita income in excess of \$1,100 in 1978 and whose share of the manufacturing sector in Gross Domestic Product (GDP) was about twenty percent or higher in 1977. BELA BALASSA, *The Newly Industrializing Countries after the Oil Crisis*, *WORLD BANK STAFF WORKING PAPERS*, No. 47/1980. This concept was later developed in B. BALASSA, *THE NEWLY INDUSTRIALIZING COUNTRIES IN THE WORLD ECONOMY* (1981).

The Organization for Economic Development (OECD) in 1979 adopted five criteria for defining an "NIE":

1. Fast growth since the 1960s;
2. High industrialization, with industrialization accounting for a large proportion of GDP;
3. Fast growth in both the absolute level of industrial employment and the share of industrial employment to total employment;
4. A high export orientation, with a rising share of world exports of manufactures;
5. Fast growth in real per capita GDP such that the country was successful in narrowing the gap with the advanced industrialized countries.

See OECD, *THE IMPACT OF THE NEWLY INDUSTRIALIZING COUNTRIES ON PRODUCTION AND TRADE IN MANUFACTURES* (1979).

including Malaysia, the Philippines, China,<sup>9</sup> Thailand, Singapore, South Korea and Indonesia.<sup>10</sup> Among the top twenty exporters in the world, seven are East Asian, including Japan, Hong Kong, China, South Korea, Singapore, Taiwan and Malaysia. Thailand and Indonesia are also included in the top thirty. It is important to note, in terms of world share of manufactures in 1996, that Hong Kong has a higher share than Belgium, and that South Korea, Singapore and Taiwan have higher aggregate shares than Spain, Mexico, Switzerland, Australia, Austria and even the Russian Federation. In the lower tier of NICs, Thailand beats Ireland, and Indonesia surpasses Norway, Denmark and Finland in terms of ranking in world merchandise trade.<sup>11</sup>

Before the East Asian downturn in July of 1997, the global economy was expanding at an accelerated rate, and the problem that many foresaw was one of too much growth. But the latest East Asian economic crisis, which many were quick to construe as a repudiation of the East Asian economic model, makes a reappraisal of the evolution of the global trade order and the present global trade order even more timely.

## I. AN OVERVIEW OF THE BASIC THESES

Since its inception, the GATT/WTO<sup>12</sup> “system” has produced a gargantuan corpus of principles that have already crystallized

A simpler definition of an NIC is a country that has manufacturing sectors of a similar relative size to those of industrialized countries. SHEILA PAGE, *TRADE FINANCE AND DEVELOPING COUNTRIES* 4 (1990).

9. China is not technically an NIC in the strict sense because of its predominantly socialist economy and much larger size, in comparison to the other NICs.

10. *World Merchandise Trade in 1996 by Region and by Leading Trader*, WTO International Trade <<http://www.wto.org/wto/intltrad/iworld.htm>>.

11. *Id.* at Appendix 1.

12. The basic legal texts for what can be collectively called the GATT/WTO system can be found in the official publication of THE WORLD TRADE ORGANIZATION, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (1994). This compendium includes, among others, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Understanding on Rules and Procedures Governing the Settlement of Disputes, and the General Agreement on

into some kind of "objective" doctrine, taking on a life of its own. Reverence for this mainstream thinking has eclipsed many of the significant subtexts hidden in its historical background, the broad repercussions of the 1994 Marrakesh accord, and the far-reaching linkages proposed for the near future between trade and non-trade related issues. Encouraged in the ongoing analysis is a somewhat dogmatic attitude toward its rules. Anything that deviates from this particular installed set of principles is labeled either economically inefficient, extremist or protectionist.

That melting pot of economically successful Asian NIC nations is a cauldron in which the liberalizing thrust of international trade (as defined by the GATT/WTO "system"), together with the phenomenal economic growth of this group of Asian countries according to their own characteristic approach to economic development, have formed a volatile mixture.

No doubt, the phenomenon called the "East Asian Miracle" has benefited from the increased access in a liberalized trading order. However, the commonly-held view that these countries achieved their economic advance in large part by violating the sacred canons of the GATT world order, and that they exploited to the hilt the preferential treatment and exceptions accorded to developing countries, is a totally disingenuous and unrealistic notion. No member state of the GATT can be said to be guiltless of skirting its restrictions when it suited their economic needs. The double standard is the only balanced standard in the interpretation of its historical context and continuing development.

Admittedly, there can be no single perspective on the development of the world trading system. The lopsided global economic and political reality, however, has steered the

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Tariffs and Trade of 1947. The aforementioned agreements are covered by this article, while the following are excluded from its scope: the plurilateral trade agreements (i.e. those on trade in civil aircraft, government procurement, dairy and bovine meat products); the Agreement on Trade Related Investment Measures; the agreement on subsidies; issues relating to trade and environment; financial services as a specific sector; maritime transport services; basic telecommunications; professional services; and the Multi-Fiber Agreement.

GATT/WTO framework in a certain direction, and has consistently favored a perspective that fails to appreciate the developing countries' experience with the system. With the rise of the East Asian NICs, and paradoxically, with their downfall, a clarification, or perhaps even a refutation of certain accepted doctrines is in order. Five arguments are set forth in this article, with many variations upon the themes elaborated from various angles throughout, as the particulars of the WTO agreements are discussed.

First, neither the GATT nor the WTO framework qualifies as a true "system" in the sense of being a consistent, coordinated and organized structure, whether formal or otherwise, that aims to regulate international trade. Due to numerous derogations and exceptions to the fundamental principles it espouses, whether within the WTO architecture or outside it, the underlying driving force is still reciprocity and overriding national or regional interests. The *quid pro quo* character of the GATT is not completely altered by the more prominent rule-based nature of the new WTO set of agreements. Recent decisions of the Appellate Body, and the ever-increasing number of panel reports, indicate that there is indeed a trend toward the "rule of law" in trade disputes. However, the WTO has yet to face the acid test of whether the developed countries, once their fundamental trade interests are threatened, would be willing to bow to the wishes of the Dispute Settlement Body (DSB).

Second, the asymmetry in the economic and political relationships between the developed and developing countries, and the Newly Industrializing Countries (NICs) which occupy the middle ground between these two poles, has caused the continuous rewriting and expansion of the international trade rules according to the dynamic factors that affect the process of globalization. This scenario is not helped any by the perpetual question never satisfactorily answered: What is a Newly Industrializing Country (NIC)? Does the onset of the East Asian crisis neutralize any claim to being an NIC? In the real world, the erstwhile dichotomy between a developed country and a developing economy has become blurred; what has evolved is a *dynamic interaction between a relatively more*



*developed country and a relatively less developed one.* The East Asian NICs have enjoyed the fruits of a globalized economy, at least before the regional crisis, but this system has marginalized other parts of the world, such as Africa and parts of the Middle East. If globalization, using the paradigm of free trade as the ideal, truly trickles down to even the poorest states, then marginalization as it occurs today should not be the case.

The endemic revision of the rules is largely based on the changing competitive relationships between the entrenched developed countries and the NIC "pretenders" to the economic throne. With the bursting of the East Asian "bubble", the future of the continued realignment of the rules to include, among others, the expanded scope of the WTO rules on services and the expiration of the grace period for developing countries in the realm of intellectual property, may largely depend on current economic needs, and paradoxically, a *quid pro quo, ad hoc* approach to the WTO system.

Third, the peculiar impact of the East Asian "miracle" can be considered as a major, if not the main impetus for the GATT's gradually shifting orientation, from the reduction of tariffs and goods, to an emphasis on services, intellectual property, investments, environment and other non-trade related issues such as labor standards, competition, social dumping and corruption. The NICs were compelled to conform to this mercantilistic drift because of the need to check the use of protectionist measures exercised formally and informally within and without the GATT framework. However, this orientation consigns the NICs, as well as the rest of the developing world, to play an eternal game of "catch-up". Without the Asian model in "catch-up" mode, the East Asian region would have remained at the periphery of the then GATT system. The NICs' emulation of Japan's success has spurred a growth industry in the arsenal of trade protection instruments, many of which remain in place, notwithstanding their fundamental incompatibility with the spirit of the Uruguay Round agreements. Thus, developing countries in East Asia and Latin America (notably Brazil and Mexico) have resorted to antidumping measures, which if examined closely, run

contrary to the spirit of the free trade philosophy of the WTO. Paradoxically, many of these measures, copied from their Western legislative models, have targeted other developing countries.

Fourth, despite the major improvements in the WTO Agreements (especially in the area of dispute settlement), the WTO body of rules remain a “patchwork quilt” of compatible and incompatible obligations and arrangements, the inconsistencies reflecting the changeable and perhaps still tentative nature of the agreement. What the Round accomplished was the extension of the GATT disciplines to agriculture, services, investment measures and intellectual property, in some areas, but only to a limited extent. Although the developments in these areas are more in the nature of framework agreements than immediate reductions in protection, the WTO *tabula* makes accessible a beachhead for further concessions in these areas from the NICs. The Uruguay Round Agreements also offer a prelude to more far-reaching proposals from the Organization for Economic Cooperation and Development (OECD) countries, such as non-trade related linkages involving labor standards, human rights, and children’s rights. Such proposals reflect the OECD countries’ continuing discomfort and defensiveness in the face of the dogged persistence of the East Asian, and to a lesser extent, Latin American NICs.

Fifth, if there was the myth of the East Asian miracle, the new myth is that of the East Asian debacle. Many critics of East Asia forget that the region experienced fifteen years of high growth — i.e. 8-10% *per annum* — largely fuelled by the confidence and investment of foreign investors. It was only in the mid-1990s, in a burst of over-expansion, that excessive borrowings occurred. Like it or not, the economic center of gravity has shifted from the Atlantic to the Pacific, notwithstanding Asian regional crisis and the birth of the Euro in 1999. East Asia’s sheer size alone guarantees its eventual recovery.

In a sense, the East Asian economies were victims of their own success. The East Asian economic crisis does not diminish the

uniqueness and efficacy of the Asian model in international commerce. The admirable values of the Chinese *guanxi* system of business by family and personal relations, the consensual leadership of the Malay *mushawarah*, the emphasis on the extended family, education and the work ethic, were debased by cronyism and corruption, the lack of checks and balances in business dealings, and the abuses of public office by government officials. In the absence of the so-called "Asian values", the region would not have had the potential for high growth. Asian values still exist and can thrive in the context of the adjustments that have to be made as the region adjusts to the stricter requirements of the global economy. Indeed, it will be these values that help the countries to recover. The region never spurned the concept of the "rule-of-law" in the economic order, which not infrequently was advanced by the naysayers of the regional economic miracle. The institution of a level playing field, and its integration in the economic, political and social structure of the Asian NICs, requires time. It took the West nearly two centuries to perfect its system that started with the nineteenth century industrial revolution. Thus, it would be unfair to judge the Asian Pacific region's performance within a much more limited time frame.

This article proceeds from a particular vantagepoint, observing the GATT/WTO system from the outside looking in, rather than viewing its development purely from within. Many ideas advanced here deviate from much of mainstream thinking. But this "heretical" approach is imperative, if only to satisfy the need to establish a different perspective.

In this study, the GATT/WTO "system" will first be distinguished from the actual global trade regime as it developed in the context of the emerging East Asian economies. Next will follow a brief narrative history of the rise of the East Asian NICs from a less than idealistic perspective. With the historical context in place, the article then delves into the concept of "fairness" and the WTO dispute settlement mechanism, placing the rules embodied in the procedure in situational context *vis-à-vis* developing countries. The changing center of gravity within the system is then illustrated by discussion of the WTO's shift in policy towards intellectual

property and services. Finally, the article concludes with an analysis of the recent East Asian economic crisis and its effect on the global trading order.

## II. THE GATT/WTO AND THE GLOBAL TRADE REGIME<sup>13</sup>

A distinction should be drawn between the GATT/WTO “system” as it purports to be, and the actual global trade regime that determines the conduct of international trade relations between nations. The original conception of the GATT was that all the contractual parties would conform to the broad, non-discriminatory principles of Most Favored Nation (MFN) status and national treatment, as stated in Articles I and III, respectively. The aim was to liberalize trade by preventing discrimination between locally produced and imported goods at national borders, as well as by seeking to prevent discrimination against goods outside national borders. At the same time, in a trade environment where tariffs were high, the GATT embarked on its noble goal of reducing tariffs by bindings agreed upon by the parties in a series of negotiating rounds. To sum up, trade rules were agreed upon *multilaterally*, theoretically amongst equal sovereigns.

The GATT was one of the postwar multilateral agreements created to avoid the perilous exercise of mercantilism and economic nationalism that lay at the roots of the conflict which led to the world wars. The GATT was conceived as merely a provisional understanding, when the Havana Charter of 1947, which sought to erect a formal institutional structure — the International Trade Organization (ITO) — to regulate the use of trade-restricting measures in international commerce, failed to be ratified. Hence the GATT, initially just a preliminary step towards a more encompassing structure to regulate the

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13. The views expressed in this section may not conform to the mainstream view. As far as the established orthodoxy is concerned, the main source is JOHN H. JACKSON, ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* (3d ed. 1995). As for the European views, a recent work is *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (Ernst-Ulrich Petersmann ed., 1996).

conduct of trade, became the core of the "value system" envisioned to liberalize trade access.

Distilled into its conceptual essence, the GATT/WTO "system" rests on two basic precepts: first, it is a rule-based system; and second, under the MFN principle, all nations are to be treated equally. As to the first postulate, various questions arise: Who writes the rules? What particular aspects of international trade do they cover? Do they favor one type or class of nations over another? Do the rules allow nations to be treated equally in the real or common sense, or are they merely treated equally under the rules, as established? As to the second premise, MFN can only achieve its objective, on the theoretical plane, if all nations are on equal footing. Otherwise, the poorer nations suffer due to equal treatment. Formally equal nations cannot in fact perform or respond equally under the same set of circumstances, since an open market system invariably enables the stronger to prevail. As a consequence, the hypothetically (or formalistically) rule-based system endures as a power-based arrangement, in which the asymmetries in the relative economic or political power of the actors determine the complexion of their trade relationship.

This critique is not meant to disparage the virtue inherent in the avowed objectives of the GATT and WTO. Without this fundamental framework, the postwar momentum in economic growth, especially for the Asian NICs, would not have occurred. However, the naturally deleterious effects of MFN on the less prosperous countries should at least be acknowledged. It must be conceded that, under such circumstances, there never has been, since the beginning of "GATT time" in 1947, nor can there ever be, a "level playing field" in the international trade environment. The "level playing field" paradigm, upon which the MFN tenet is built, refers to an optimum situation where market forces objectively determine both resource allocation and the distribution of rewards according to productivity. However, this emphasis on distribution and productivity

disregards the initial inequalities, and effectively rewards the stronger.<sup>14</sup>

This particular dimension should not be neglected or glossed over by policy-makers and commentators. It is often argued that contingent protection measures, “gray area” policies, and unilateral defensive practices against “unfair trade” have been instituted to level the playing field in the exchange of goods. Such an argument is founded upon an illusion, since there can never be a level playing field in international trade. It is actually a hypocritical assertion, because those developed nations who claim it refuse to accept that the imposition of an MFN regime on flagrantly mismatched participants imposes disadvantageous conditions on the weak. Lurking ominously throughout is the danger that the desirable “balancing of interests” in such a system would be destabilized by the imbalance of economic power resulting from the skewed coverage of the rules. In this type of free trade context, the weaker nations tend to suffer most of the time, despite procedural and institutional safeguards aimed at protecting them.

This discussion is rendered academic when one weighs the nullifying effects of the numerous derogations to the basic GATT principles. These exceptions have been formalized through various informal arrangements, formal conventions and bilateral agreements — all of which violate the letter and spirit of the principles of non-discrimination, multilateralism and transparency that the entire GATT scheme advocates. The much-maligned General System of Preferences (GSP), instituted for the benefit of developing countries, was no match for these exceptions — the special agreements in textiles (the Multi-Fiber Agreement), agriculture (variable levy in the then European Community), and manufactures (Voluntary Export Restraints in footwear, electronics, automobiles, steel, computer chips) — which were artfully targeted at commodities exported by developing countries, and later, manufactures produced by the NICs. These exclusions and deviations from

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14. OZAY MEHMET, WESTERNIZING THE THIRD WORLD 137 (1995).

the general framework punctured the already fragile legal framework sought to be created, since they pertain to specific sectors that would allow the poorer countries a fighting chance in the world market.

In the late 1980s, the emergence of unilateral trade measures primarily affecting Japan and the East Asian NICs<sup>15</sup> — exemplified by the super 301 and special 301 provisions of the Omnibus Trade Act of 1988 from the United States, and by overzealous contingency protection such as slanted anti-dumping and countervailing duty determinations from the European Community — made it distressingly clear that the global trade regime really pursued a different set of rules from those the GATT order exemplified. Not only are such measures derogations of GATT precepts, but they contravene the very structure of the liberal trading system. The following statement, written by a prominent international trade legal scholar, would be valid if and only if the GATT were synonymous with the global trade regime that actually controls international commerce. Such is not the case. Note the idealized notion of GATT as a code of legal obligations:

Finally, GATT law itself should probably be counted as a source of support for the interest of developing countries. After almost forty years, the GATT's code of legal obligations has begun to acquire the respect of a legal system built on right — on norms that command respect, not merely because they have been paid for but also because *they define correct and responsible government behaviour*. Time has also endowed GATT obligations with a quality of law in the institutional sense, so that GATT obligations now possess a certain amount of respect-for-law force independent of their substance. This larger perception of GATT law can already be seen in the handling of legal complaints brought by developing countries.

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15. See Ernesto M. Hizon, *Antidumping and the European Policy vis-à-vis the East Asian Newly Industrializing Countries*, 18 J. WORLD COMPETITION 111 (1994).

GATT law may be of only limited force, but it does seem to cover the non-paying member.<sup>16</sup>

It has also been suggested that regional trading arrangements, despite their growing prominence in all of the world's regions, likewise constitute derogations of GATT principles, and are merely tolerated because they are a fact of life. To date, neither the GATT nor WTO Secretariat has made any categorical pronouncements as to whether these regional arrangements — the most celebrated of which is the European Union — are consistent with Article XXIV of the GATT Agreement. The spreading inconsistency of the world trading system has been described as an “erosion” of GATT principles.<sup>17</sup>

Whether erosion in the system has benefited or harmed global trade is not at issue here. A closer look at the proximate causes for this erosion should be taken, an examination of why measures were favored that departed from the GATT canons. Certainly much of the “backsliding” from the ideal multilateral system could be attributed to unforeseen economic developments such as the oil shock of the seventies, the recession of the eighties, and the East Asian economic crisis of the nineties. As discussed below, it was the unanticipated, rapid ascension, first of Japan, then of the East Asian NICs, and subsequently of the second-tier NICs led by the ASEAN countries, that provoked the gradual undermining of the GATT.

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16. ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 190 (Trade Policy Research Centre 1987) (emphasis added).

17. John Whalley and Colleen Hamilton have described the global trading system as having evolved into a “system architecture” with four distinct subsystems. JOHN WHALLEY & COLLEEN HAMILTON, *THE TRADING SYSTEM AFTER THE URUGUAY ROUND* 23 (Institute for International Economics, 1996). This critique was earlier developed in JOHN WHALLEY, *The Uruguay Round and the GATT: Whither the Global System*, in C. FRED BERGSTEN & MARCUS NOLAND, *PACIFIC DYNAMISM AND THE INTERNATIONAL ECONOMIC SYSTEM* 65 (Institute for International Economics 1993). See also H.B. MALMGREN, *Threats to the Multilateral System*, in W.R. CLINE, *TRADE POLICY IN THE 1980S* (Institute for International Economics 1983); M. CAMPS & W. DIEBOLD, JR., *THE NEW MULTILATERALISM* (Council on Foreign Relations 1986); J.H. JACKSON, *RESTRUCTURING THE GATT SYSTEM*, (Pinter for the Royal Institute of International Affairs 1990).



It cannot be overemphasized that the whole philosophy of multilateralism and its institutionalization was initiated, encouraged and more than occasionally, gently forced on the others by the Western developed countries, mainly by the United States and Europe. Yet, under assault by more competitive products from the Far East, the very entities that pushed the GATT agenda were ready to act in their own self-interest by implementing trade policies contrary to GATT principles. Authors have attributed this fall to the decline of American economic and political hegemony, which dominance had contributed to the stability and steady direction of the global trading system in its first quarter of the twentieth century.<sup>18</sup> The attention of U.S. decision-makers shifted from the maintenance of a liberal international economic order to the assertion of its commercial interests *vis-à-vis* its trade partners.<sup>19</sup> With the weakening of US economic power in the global economy, the liberal economic system, despite the "progression" of the WTO, is always in jeopardy.

The erstwhile lower income (NIC) countries, which managed to progress within the constraints of the lopsided economic relationships in the postwar era, have always been the scapegoats for the deterioration of the GATT system. While it is true that many NICs were guilty of infringing the GATT rules, mostly out of the need to hurdle their economically disadvantaged positions, the contingency protection schemes, farm subsidies, Voluntary Export Restraints (VERs), and Multi-Fiber Arrangement (MFA) instituted by much of the developed world, constituted even larger scale aberrations from the GATT framework.

The anti-dumping measures in Article VI<sup>20</sup> of the GATT, carried over to the Uruguay Round agreements, were

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18. See R.O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Jagdish Bhagwati, *The Diminished Giant Syndrome*, 72 FOR. AFF. 2, 22-26 (1993).

19. GAVIN BOYD, *STRUCTURING INTERNATIONAL ECONOMIC COOPERATION* 51 (1991).

20. The primary difference between the GATT Article VI/Tokyo Round Code rules on anti-dumping and the Uruguay Round provisions on anti-dumping is the presence of additional procedural requirements to ensure, in theory, that anti-dumping is not

sophisticated trade protection measures employed by developed countries against the export manufactures of the developing countries, particularly the East Asian NICs. Hugo Paemen, the European Union's chief negotiator in the Uruguay Round, declared that dumping "is unfair by nature." He continued, "if a period of selling at a loss forms part of an export strategy aimed at wiping out the competition in the target market, GATT quite reasonably and quite properly allows countermeasures."<sup>21</sup>

However, an NIC export strategy coupled with government policies that aimed to increase their countries' share of manufactures to their overall GDP could not materialize if their economies depended entirely on their small domestic markets. Thus, expanding the share of their foreign target markets was the main impetus to their accelerated growth. If no form of domestic market protection were implemented, then the NICs would have remained primary producers and would have severely limited their options to jumpstart their economies. EU and U.S. anti-dumping determinations against products from NICs reduced the export onslaught and allowed domestic producers to fend off foreign competition, or gave them time to regroup and improve the competitiveness of their products.<sup>22</sup>

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abused. See David Palmetter, *A Commentary on the WTO Anti-Dumping Code*, 30 J. WORLD TRADE L. 4, 43-69 (1996). See also Gary N. Horlick & Eleanor C. Shea, *The World Trade Organization Antidumping Agreement*, 29 J. WORLD TRADE L. 1, 5-31 (1995).

21. HUGO PAEMEN & ALEXANDRA BENSCH, FROM THE GATT TO THE WTO -- THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND 158 (1995).

22. There is a large body of writing on anti-dumping laws, although one's opinion of them depends on which side you are on. The most recent major texts are: ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY (John H. Jackson & Edwin Vermulst eds., 1991); EDWIN VERMULST & PAUL WAER, EC ANTI-DUMPING LAW AND PRACTICE (1996). The basic, original work on dumping is JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1991). Older general works that contain sections on dumping are: JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969); KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); J.F. BESELER & A.N. WILLIAMS, ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES (1986); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993).

In the rules embodied in the GATT 1947 and the Tokyo Round Code, the reality of dumping in was obfuscated by the mass of technicalities created by the implementation of anti-dumping by national jurisdictions, notably the European Community countries and the United States. The same holds true under the even more stringent and complex anti-dumping rules contained in the Uruguay Round agreements.<sup>23</sup> Dumping, which is simplistically defined as selling goods in the foreign market at a price lower than at the price it is sold in the domestic market, does not require any determination that competition in the foreign market be "wiped out" and effectively impaired.<sup>24</sup> All it requires is a finding of the lopsided price differential between the price sold in the local market and the export market.<sup>25</sup>

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23. Palmeter, *supra* note 20, at 68.

24. There is a growing movement on the part of trade economists and international trade lawyers to eliminate anti-dumping laws altogether and replace them with antitrust and competition laws. This theme has been written about in a number of papers, among them: Jorge Miranda, *Should Antidumping Laws be Dumped?*, 28 LAW & POL'Y INT'L BUS. 255; Patrick Messerlin, *Should Anti-Dumping Rules Be Replaced by National or International Competition Rules?*, 18 WORLD COMPETITION 37 (1994); Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Antidumping and Antitrust*, 30 J. WORLD TRADE 27 (1996).

25. An extended analysis of anti-dumping is pursued here. However, Article 17 of the Anti-Dumping Agreement in the Uruguay Round agreements contains provisions on standards of review that may affect the conduct of anti-dumping cases filed with the WTO Dispute Settlement system, and ultimately, affect the products of the East Asian NICs -- against which a majority of these cases are filed. Since the WTO dispute settlement procedure is a global system, the disputes arising under the Anti-Dumping Agreement are to be resolved in accordance with the procedure outlined in the Dispute Settlement Understanding. Article 17:6(I) provides, with respect to the review of the facts regarding the dumping determination, that "[i]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

In other words, the standard of review of the dumping determinations by national authorities shall be restricted only to whether they were "proper," "unbiased" and "objective." This narrow scope limits the power of the WTO dispute settlement panel, and possibly, the Appellate Body, as the case may be, to initiate a wholly new review of the facts. In essence, it is largely dependent on, and defers to a great extent to the determinations of the national authorities, who would certainly be inclined to make a determination of dumping, if their national interest so dictates. While this may codify existing GATT Panel practice, it consolidates the position of the countries wield the anti-dumping measures. Thus, although there are procedural safeguards that might protect the disadvantaged parties, notably the parties against which anti-dumping

No WTO member state can claim any measure of innocence, since they have always fallen back on pragmatic considerations when the virtues of multilateralism and nondiscrimination were absent in concrete situations. *In pari delicto*, so to speak. Deviations from GATT postulates should be deemed deviations, regardless of what they may be called. Perversity reaches its apex when it advocates of unilateral trade measures claim that Section 301 of the U.S. Omnibus Trade and Competitiveness Act actually liberalizes trade by helping open markets not only for the United States, but for the rest of the world as well.<sup>26</sup>

*In practice*, the global trade regime is a "bi-polar" but synchronous system, in which there exists, on the one hand, a legalistic, formal structure of trade rules that flow from the evolved GATT/WTO tenets, and on the other hand, a neo-mercantilist, non-formal trade policy architecture that is defined by the asymmetric economic, historical, regional and political relationships between the member states. The seeming harmony of the international trade regime is a legal mirage perpetuated by the attractive unity of the GATT/WTO

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cases are filed, the limited standard of review diminishes their options once a contrary ruling has been issued.

For a lengthy overview of the anti-dumping "jurisprudence" of the GATT/WTO system, see Edwin Vermulst & Norio Komuro, *Anti-Dumping Disputes in the GATT/WTO, Navigating Dire Straits*, 31 J. WORLD TRADE L. 1, 5-33 (1997); Edwin Vermulst, *Adopting and Implementing Anti-Dumping Laws, Some Suggestions for Developing Countries*, 31 J. WORLD TRADE L. 2, 5-23 (1997).

26. See, e.g., GREG MASTEL, *AMERICAN TRADE LAWS AFTER THE URUGUAY ROUND* (1996). Some of the arguments in this book can be aptly characterized as "cowboy trade diplomacy" that gives *carte blanche* to the U.S. Government to decide whether a trade practice is fair or unfair, to be punished through multilateral or unilateral means. To illustrate with an excerpt:

There will still be cases that cannot be pursued through multilateral institutions, either because the target country involved is not a party to the new WTO or because the issue to be addressed is not covered by the WTO. A number of major trading countries remain outside the WTO and are likely to remain so for some time. Trade problems that are increasingly recognized as serious commercial problems, including private-sector collusion and forced technology transfer, are also beyond the scope of the WTO. In these cases, the United States will be faced with a simple choice: either act unilaterally or be prepared to tolerate the unfair practice. In those cases in which a multilateral "judge and jury" is simply unavailable, unilateral action under Section 301 remains the only solution.

*Id.* at 54.

corpus of principles, and more significantly, by the fact that it is interpreted from a single perspective. All participants in the process, whether from the developed world, or from the developing country/NIC group, weave back and forth between these two contrasting cultures, depending on short-term or long-term policy goals. In a nutshell, the GATT/WTO framework is valuable when it is useful.<sup>27</sup>

As a whole, the WTO Agreements are a continuation, rather than a reversal, of this trend toward fragmentation of the global trading regime. The term "fragmentation" is used here not to denote a reversal of the propensity toward trade liberalization, but rather, to describe the lingering piecemeal structure of the trade regime. The architecture of the WTO framework prevails as an assortment of trade arrangements mirroring once more the *quid pro quo* context of the entire negotiating process, and its final result. While in theory, the underlying philosophy of the multilateral trading order, then and now, is one of non-reciprocity, with economic welfare advantages outweighing political considerations, *reciprocity in the multilateral trade order, and not just in the multilateral negotiations, has never departed from the global trading configuration.* Weaker countries in the system, while cognizant of the benefits of liberalized trade, cannot afford to sail against the winds of the dominant philosophy because of the concurrent but contradictory parallel universe that endures with the WTO system.

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27. It can also be argued that there are also two competing, incompatible strains within the GATT structure. "Existing parallel to the illusory rule/power distinction in the appreciation of GATT law is the myth that the GATT promotes only the liberalization of trade. Peculiar to the GATT orientation is the forced marriage of liberal and mercantilistic components ..., creating internal contradictions in the entire GATT system as a whole. An economist has rightly dubbed this coupling the 'liberalization-mercantilism' syndrome. The GATT supports a legal structure composed of provisions ensuring the liberalization of trade, but at the same time, allows numerous exceptions nullifying each of these fundamental principles. These fatal protectionist 'qualifiers' neutralize the liberalizing thrust of the GATT and encourage participating states to more, rather than less protectionism." Ernesto M. Hizon, *The Safeguard Measure/VER Dilemma: The Jekyll and Hyde of Trade Protection*, 15 NW J. INT'L L. & BUS. 105, 121 (1994).

The Uruguay Round came to a successful photo finish primarily because of the fear that the failure of the Round would result in a splintering of the world into three giant trading blocs in Europe, the Americas and East Asia. In the end, the final document depended on a break in the deadlock between the United States and Europe, with compromises in contentious areas such as agriculture, textiles and the film industry.

From all indications, the conclusion of the Uruguay Round forecasts interminable negotiations that go beyond the scope of the concluded agreement. The battle lines between the developing world, the NICs, and the developed countries are once again drawn by the unyielding rush of proposals to include linkages between trade and formerly non-trade related issues such as the environment, labor standards, government corruption, anti-competitive practices, business practices (*keiretsu* in Japan, *chaebol* in Korea), child labor, and to a lesser extent, human rights. At the first WTO Ministerial conference held in Singapore in December of 1996, the cleavage between the developing countries and NICs, on the one hand, and the developed countries, on the other hand, over the subject of linkages was felt. As a compromise the Singapore Declaration issued statements that the member states would work toward a resolution of these issues, but did not go far enough to establish ground rules that would directly link trade with non-trade issues.<sup>28</sup>

The Darwinian rule of the fittest and strongest in the WTO world could once more come into play. Plainly stated, these proposals are essentially designed, in the words of the former Director of Legal Affairs of the GATT, "to permit trade restrictions designed to facilitate or promote a change in domestic policies in these areas."<sup>29</sup>

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28. 14 WTO FOCUS (December 1996).

29. Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in ROBERT E. HUDEC, *FAIR TRADE AND HARMONIZATION, PREREQUISITES FOR FREE TRADE?*, Vol. 2 LEGAL ANALYSIS 21, 36 (1996).

### III. THE MALIGNED NIC STIMULUS

It is imperative to bear in mind that the GATT rules were written in the context of the postwar economic situation, and presumed a particular economic hierarchy of nations, in which the competitive positions of each were starkly differentiated. The emergence of the NICs and the unfolding of their unique design on development wrecked havoc on the fragile balance of trade obligations that had arisen from the specific postwar economic milieu. Trade liberalization in the form of lower tariffs and vigilant non-discrimination in the exchange of goods, under the same GATT rules, would not have been sufficient to hold the NIC advance in check.

East Asia's trade surpluses with the rest of the world contrasted with the slow growth among the OECD member countries. In the nineties, the global economy slowed down considerably. Only the East Asian economies were able to maintain high growth rates, although these were also affected by the global slowdown, since much of East Asia's trade is extra-regional. In the final quarter of the twentieth century, East Asian exports rose more than thirty fold to about \$850 billion, and its share of world exports from seven to twenty-one percent. Some countries with trade deficits orchestrated increases in dumping determinations and negotiated voluntary export restraints to bypass the GATT proscription on quantitative restrictions, while others, such as the U.S., instituted special laws that authorized retaliation against countries practicing "unfair trade". These contingency measures were primarily aimed at the East Asian NICs, whose export manufacturing drives continued their momentum, and had relatively protected domestic markets.<sup>30</sup>

The world economy has changed dramatically since the genesis of the liberal world trade system. At the GATT's birth, the world was just recovering from a traumatic war, and it was hoped that with the installation of a liberalized trading order,

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30. THE WORLD BANK, EAST ASIA'S TRADE AND INVESTMENT 2-5 (1994).

the economic seeds of conflict would be minimized, if not eliminated altogether. The postwar era also spelled the end of colonialism, and thus the gradual independence of erstwhile colonies of the Western powers slowly enlarged the GATT's membership. However, the political and economic divisions of the world were striking: the developing countries were guileless bystanders in the development of GATT's rules and were uncomfortably trapped in the vicious cycle of merely providing commodities and raw materials for the industries of the West.

It is a commonly held belief that the early years of the postwar trading system provided developing countries more favorable treatment in the GATT. Perhaps from a strictly legalistic and amoral point of view, this may be so. The principles of the New International Economic Order (NIEO), a "soft-law" obligation to respect the right to economic development, became the philosophical infrastructure for the General System of Preferences (GSP) under which preferential and non-reciprocal treatment towards developing countries was recognized.<sup>31</sup>

But this myopic, or even rose-colored perspective obscures the historical and economic context altogether. Preferential treatment was willingly granted in sectors that posed no threat, or that were even beneficial to the domestic industries concerned.<sup>32</sup> Under the GATT, and the WTO, members have the right to voluntarily give tariff preferences to developing countries.<sup>33</sup> Since these preferences are accorded on an autonomous basis, they could be withdrawn at any time in whole or in part, or conditions that may be trade or non-trade related, may be attached to them. There is nothing a donee

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31. Although the GSP was incorporated into the GATT, it was granted by individual countries in the nature of a voluntary contractual obligation, with no pretense of being a definite obligation under customary international law. No legal theory was formulated to determine the specific rights and duties under GSP. See HUDEC, *supra* note 16, at 186-196.

32. HUDEC, *supra* note 16, at 189.

33. *Decision of the Contracting Parties to GATT of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, 26 BISD 203 (1990).



nation could do that could prevent the donor country from linking preferential treatment with certain domestic policies.<sup>34</sup>

For some developing countries, such as the African, Caribbean and Pacific (ACP) former colonies of the European Union nations, special treatment under the Lomé Convention's ACP Preferential Agreements was a stimulus to continue supplying primary commodities to their former colonial masters. This trapped them into the comfort of lingering dependency.<sup>35</sup> But once these preferences allowed certain imports to compete effectively with domestic firms, then the preferences were cut off by "graduating" the entitled imports or by arresting their onslaught by tightening contingency protection. In both cases, developing countries would be foolhardy to threaten retaliation available to them even under the GATT rules, as their weaker economic position and smaller markets would be no match for a potentially dangerous response from developed countries. In the end, it is still the relative strategic economic circumstances of trading countries that determine the use of the GATT legal superstructure.

#### IV. A BRIEF HISTORY FROM THE EAST ASIAN NIC PERSPECTIVE

In cold, objective terms, the world in 1947 at the inception of GATT, was divided into the "haves" and "have-nots". In the 1950s, the economic structures of the developing countries were sadly alike. Adopting policies that were direct interventions of private economic activity, the developing nations were not only poor, with low savings and employment rates, but productivity and wages were low, and credit was scarce. While the developing countries' share of world GNP fell, the OECD economies were growing at a fast clip.

In the late 1950s and in the 1960s, some developing countries, notably those in East Asia, moved from primary commodity

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34. Roessler, *supra* note 29, at 39-40.

35. See EUROPEAN TRADE POLICIES AND THE DEVELOPING WORLD (L.B.M. Mennes & J. Kol eds., 1988).

exporters to import-substitution industrialization, which created incentives for production in the domestic market by protecting local "infant industries". However, this strategy proved detrimental to overall growth by causing inefficiencies in obtaining materials, entrenching domestic monopolies and limiting the size of the market.<sup>36</sup> Foreign exchange rates were overvalued in the guise of preventing shortages of the precious foreign currency. Productivity lagged and export growth slowed. This evolution from land-intensive to labor-intensive production was followed by a move to an export-oriented industrialization policy. This shift required the formation of more capital-intensive industries and the targeting of international markets over the domestic market.<sup>37</sup>

The countries that switched to more export-oriented policies, particularly those in East Asia, found significant increases in their output, employment and productivity. Foreign exchange rates were brought down to more realistic levels, and access to intermediate goods and raw materials was facilitated. Incentives were instituted for a wide variety of goods, especially for exportable commodities and manufactures. Although the rapid economic expansion of the world economy at this time did not cause as much dislocation as it would have in a period of lower growth, the export promotion policies of some of the developing countries made them significant competitors for manufactures in the international market.<sup>38</sup>

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36. Critics of the infant-industry assumptions have argued that once government begins to intervene in favor of import-competing industries, every failing industry would seek government aid. This, however, did not occur in the case of the successful East Asian economies, which diverted to an export-based market-drive industrialization. Article XVIII of the GATT permits special infant-industry protection, but it requires a GATT review of the economic justification. Because of the cumbersome process, the provision has been hardly used. Developed countries have not often resorted to requiring the compliance with Article XVIII due the "seeming impossibility of the task." Developing countries have simply tried to evade it. See HUDEC, *supra* note 16, at 172.

37. See Tan-Jun Cheng, *Political Regime and Development Strategies: South Korea and Taiwan*, in MANUFACTURING MIRACLES: PATHS OF INDUSTRIALIZATION IN LATIN AMERICA AND EAST ASIA (Gary Gereffi & Donald Wyman eds., 1990).

38. ANNE O. KRUEGER, PERSPECTIVES ON TRADE AND DEVELOPMENT 363-367 (1990).

The rising import of manufactures affected the labor-intensive industries in developed countries, although the evidence shows that most of these difficulties would have been present anyway. Increased protection from developed country markets did not substantially reduce the growth of imports from less developed countries (LDCs),<sup>39</sup> except for textiles and apparel. An open trading system was essential for the export strategies of the LDCs. In this sense, the fortunes of the successful developing countries were intimately related to the continuing economic advancement of the developed countries and the severity of their protectionist measures.<sup>40</sup>

In the 1970s, the first-tier East Asian NICs upgraded their manufacturing to higher value-added products, conceding the labor-intensive, low-wage manufacturing sector to the second-tier East Asian NICs, led by the ASEAN countries.<sup>41</sup> The ASEAN countries more or less followed the same pattern as the first-tier countries, with the notable exception of Singapore, which did not pursue an import-substitution policy because of its small domestic market while. While ASEAN countries were initially primary commodity exporting countries coming out of colonialism, their manufactures exceeded commodities by the mid-1980s, except for oil-exporting Indonesia and Brunei.<sup>42</sup> The sharp rise of the Japanese yen and the New Taiwan dollar in the latter half of the 1980s, sparked a round of first-tier NIC investment in the lower-cost ASEAN NIC economies,<sup>43</sup>

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39. See H. Hughes & A.O. Krueger, *Effects of Protection in Developed Countries on Developing Countries' Exports of Manufactures*, in AMERICAN TRADE RELATIONS (R. Baldwin & A.O. Krueger eds., 1984).

40. KRUEGER, *supra* note 38, at 374-375.

41. See CHOWDHURY & ISLAM, *supra* note 12, at 1-56.

42. A wide range of articles and books discuss the Southeast Asian economic success story, particularly the shift from commodity exports to manufacturing. See, e.g. Linda Y.C. Lim, *Southeast Asia: Success Through International Openness*, in GLOBAL CHANGE, REGIONAL RESPONSE 238-271 (Barbara Stallings ed., 1995); EXPORT-LED INDUSTRIALIZATION AND DEVELOPMENT (Eddy Lee ed., Maruzen Asia for the International Labour Organisation 1981); EXPORT PROCESSING ZONES AND INDUSTRIAL EMPLOYMENT IN ASIA (Eddy Lee ed., Asian Employment Programme of the International Labour Organisation 1984); MOHAMMED ARIFF & HAL HILL, EXPORT-ORIENTED INDUSTRIALIZATION: THE ASEAN EXPERIENCE (1985), *cited in* Stallings, *supra*.

43. See FOREIGN DIRECT INVESTMENT IN ASEAN (Soon Lee Ying ed., Malaysian Economic Association 1990); PASUK PHONGPAICHT, THE NEW WAVE OF JAPANESE INVESTMENT IN ASEAN: DETERMINANTS AND PROSPECTS (Institute of Southeast Asian

especially in industries like consumer electronics and household appliances. Similarly affected European companies also shifted some of their manufacturing to the ASEAN countries.<sup>44</sup>

The inroads made by the East Asian NICs into the developed country markets spurred a wave of protectionism. The two fundamental principles of the GATT trading system, non-discrimination and multilateralism, were threatened with the spread of bilateralism, the demand for reciprocity and differential treatment.<sup>45</sup> From the 1970s and into the 1980s, bilateral orderly marketing arrangements (OMAs) and VERs targeted products from Japan and the East Asian NICs.<sup>46</sup>

The second half of the 1980s saw a transformation of trade policy on the part of the OECD countries. The United States led the way by shifting its emphasis from *ad hoc* bilateral agreements to more concrete measures to stem the threat from the East Asian NICs. The 1988 Omnibus Trade and Competitiveness Act defined a broad range of "unfair" trade practices, and mandated the U.S. Trade Representative to take punitive measures against the violators under Section 301 of the Act and Super 301.<sup>47</sup> One of the more recent GATT Trade Policy Reviews reported that nine of the thirteen active cases between July 1991 and June 1993 were directed against developing countries, and that eight of them concerned intellectual property rights.<sup>48</sup>

From this point on, the United States emphasized the protection of intellectual property rights, advocated the

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Studies 1990); DIRECT FOREIGN INVESTMENT IN ASIA'S DEVELOPING ECONOMIES AND STRUCTURAL CHANGE IN THE ASIA-PACIFIC REGION (Eric D. Ramstetter ed. 1991); LINA Y.C. LIM & PANG ENG FONG, FOREIGN DIRECT INVESTMENT AND INDUSTRIALISATION IN MALAYSIA, SINGAPORE, TAIWAN AND THAILAND (OECD Development Centre 1991).

44. Lim, *supra* note 42, at 251.

45. See Beth Yarbrough & Robert Yarbrough, *Cooperation in the Liberalization of International Trade: After Hegemony, What?*, 41 INT'L ORG. (1987).

46. See Vinod Aggarwal, et al., *The Dynamics of Negotiated Protectionism*, 81 AM. POL. SCI. REV. 2 (1987).

47. Section 301 of the 1974 Trade Act has been amended many times, most recently by the 1988 Omnibus Trade and Competitiveness Act, 19 U.S.C. §2411.

48. GATT, 1 TRADE POLICY REVIEW 3 (1994).

enlargement of the scope of the GATT to services, and sought the removal of non-tariff barriers to trade. In 1989, the U.S. graduated the East Asian NICs from their less-developed country status by removing their privileges under the GSP system. As Japan turned its attention to Asia in the 1990s and increased its investments there, Western observers were increasingly worried that Japan's example would encourage the rest of the region to adopt its formula of export-led growth and barriers to imports.<sup>49</sup>

Due to the emergence of the East Asian NICs, the so-called North-South dichotomy that also divided East from West, has disappeared. Economic interdependence has increased, even as the political divisions and ideologies in the world have decreased. Within the OECD club, as well as within the circle of third world countries, there is rapidly growing differentiation. For instance, the average per capita GDP of the East Asian NIC has exceeded \$8,000 (i.e. more than that of some European nations), while the nations in sub-Saharan Africa have a per capita GDP of only \$800. Indeed, the term "Third World" that was used to represent the fraternity of developing countries at the start of the GATT system has become anachronistic.<sup>50</sup> The "East Asian Miracle" has expanded the role of developing countries in the world trading system, and has both directly and indirectly shaped its future.

The near parity in economic levels has been accomplished by means of vastly dissimilar approaches to development. It is this ideological Scylla and Charybdis in tactics that leads to disputes in international trade. This strategic divergence could also be said to have greatly influenced the reactive course subsequent international trade negotiations would take.

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49. *Japan's New Identity*, BUS. WEEK, April 10, 1995, at 112. This article reported the Deutsche Bank's estimate that in 1994, Japan's direct investment in East Asia totaled \$64 billion as against the United States' \$26 billion and \$7 billion from Germany. In 1993, East Asia took 36% of Japan's exports, while the U.S. had only 17%, and Germany and France, less than 10% each.

50. Barbara Stallings, *The New International Context of Development*, in GLOBAL CHANGE, REGIONAL RESPONSE, *supra* note 42, at 349.

Asian models of development relied on institutional steps to promote exports, making full use of industrial policy to promote certain sectors of the economy. These measures included *inter alia* subsidized credit, government assistance with marketing strategies, and access to imported technology, all in the context of a protected domestic market. The Asian strategy invested heavily in the growth of human capital and physical facilities.<sup>51</sup> Aside from the Western democracies, only the East Asian NICs have overcome the barriers to development. A thought-provoking study of the East Asian high-performing economies' (HPEs) developmental model attributes their performance to the principle of "shared growth": the building of a broad, legitimating consensus between government, business community and citizenry in the shaping of economic policy toward rapid economic growth. Since each of the constituent groups are granted bargaining power in exchange for information to formulate rational economic policies, long-term economic goals could be effectively implemented.<sup>52</sup>

In its *World Development Report 1991*, the World Bank expanded on the neoclassical interpretation of East Asia's phenomenal success by underscoring effective but carefully limited government activism. In this market-friendly strategy, government's role is to ensure adequate investment in human resources, furnish incentives for the private sector, keep an open economy for international trade, and maintain a stable macroeconomic environment. Interventions should be market-friendly in order to be beneficial. In its study of the policies of developing economies, the World Bank concludes that non-market mechanisms to guide resource allocation were in fact detrimental to economic development.<sup>53</sup>

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51. See WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* (1993) [hereinafter *THE EAST ASIAN MIRACLE*]; WORLD BANK, *WORLD DEVELOPMENT REPORT* (1991). See also JOSE EDGARDO CAMPOS & HILTON L. ROOT, *THE KEY TO THE ASIAN MIRACLE, MAKING SHARED GROWTH CREDIBLE* (The Brookings Institution, 1996).

52. CAMPOS & ROOT, *supra* note 52.

53. WORLD DEVELOPMENT REPORT, *supra* note 51.

In its path-breaking 1993 report on the East Asian Miracle,<sup>54</sup> the World Bank describes the carefully managed state interventions that complemented the policy of maintaining macroeconomic fundamentals by the East Asian NICs.<sup>55</sup> These selective mechanisms, which addressed “coordination failures” in the working of markets, include mild financial repression (e.g., keeping interest rates low), directed credit, selective industrial promotion, and trade policies that push nontraditional exports. These pragmatic, flexible policy instruments were responses that promoted cooperative behavior among private firms and set performance-based standards for success. A strong institutional framework — a highly qualified and apolitical civil service — enhanced the ability to monitor performance in such a “controlled” competitive environment.<sup>56</sup> However, export subsidies and

54. THE EAST ASIAN MIRACLE, *supra* note 51.

55. Among the macroeconomic fundamentals mentioned by the World Bank are high investments in human capital, a stable and secure financial system, limited price distortions, and openness to foreign technology. THE EAST ASIAN MIRACLE, *supra* note 51.

56. THE EAST ASIAN MIRACLE, *supra* note 51, at 10-11. The World Bank Report further elucidates on the argument of cooperative behavior and competitive discipline in this way:

Competitive discipline is crucial to efficient investment. Most economies employ only market-based competition. We argue that some HPAEs (Highly Performing Asian Economies) have gone a step further by creating contests that combine competition with the benefits of cooperation among firms and between government and the private sector. Such contests range from very simple non-market allocation rules, such as access to rationed credit for exporters, to very complex coordination of private investment in the government-business deliberation councils of Japan and Korea. The key feature of each contest, however, is that the government distributes rewards -- often access to credit or foreign exchange -- on the basis of performance, which the government and competing firms monitor. To succeed, selective interventions must be disciplined by competition via either markets or contest.

It should be clarified at this point, however, that while the Bank Report advances this framework to interpret data on the East Asian NICs, it acknowledges differences in the way each of the NICs made use of this general approach for its own macroeconomic policies. For example, the first-tier NICs represented by Korea, Taiwan, and Singapore, emulating Japan in the 1950s and 1960s, first went through a phase of import-substitution before they shifted to a pro-export regime that co-existed with a moderate but highly variable protection of the domestic market. Hong Kong, being a *laissez faire* state from time immemorial, always had a strong bias in favor of exports. In the case of the second-tier NICs led by the Southeast Asian states Malaysia, Thailand and Indonesia, and lately, the Philippines, the export push in the

directed-credit programs linked to exports, which required highly directed institutional interventions, were deemed inconsistent with the GATT framework and often invited retaliation from the industrial country members.<sup>57</sup>

Anne Krueger summarized the East Asian experience when she described the phenomenon of East Asian growth “as arising out of the use of the international economy to enable the country rely on comparative advantage in allocating resources.”<sup>58</sup> It was the external economic conditions that compelled the East Asian NICs to practice state intervention and macroeconomic management to compete effectively in the world markets, and later, to liberalize their economies to respond to the changes in the global market. There was nothing inherently unique in the East Asian success story; the essential ingredients — avoidance of price and trade distortions, combined with macroeconomic stability — can be copied by other developing countries. What sets the East Asian experience apart is the “effective blending of the roles of market and state” that makes it possible to get the most out of its trade reforms and public expenditures.<sup>59</sup>

The NICs’ policy orientations, rather than a conscious effort to skirt international trade rules and exploit preferential treatment, were in the nature of necessary “mediated responses” determined by factors that were necessary to adjust to the existing economic environment. Certainly the NICs would never have been able to improve their competitiveness in the world market had they not been able to promote exports initially by shielding their local market. They would have been eternally ensconced in the primary commodity or import substitution phase of their economic development.

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1980s, was accompanied by less state interventions and relied and more broadly based market incentives and direct foreign investment.

*Id.* at 12-13.

57. *Id.* at 25.

58. ANNE O. KRUEGER, TRADE POLICIES AND DEVELOPING NATIONS 25 (The Brookings Institution 1995).

59. VINOD THOMAS & YAN WANG, THE LESSONS OF EAST ASIA, GOVERNMENT POLICY AND PRODUCTIVITY GROWTH, IS EAST ASIA AN EXCEPTION? 18 (The World Bank 1993).



The United Nations Conference on Trade and Development (UNCTAD) Report on the implications of the Uruguay Round agreements for the trade and development policies of developing countries presents the balanced view of the East Asian development model:

In addition to sound macroeconomic policies, successful countries have used a number of selective policies and measures to influence the direction and level of investment, to increase profitability of exports, to provide incentives for accumulating technological capabilities, to promote technology transfer to domestic enterprises and to reduce risks of exporting firms. In this context, these countries have deployed a variety of policy instruments, including production subsidy, export subsidy, investment-related measures such as export obligation, domestic content requirements, technology transfer clauses, risk-sharing insurance and export-financing schemes.<sup>60</sup>

The neoclassical explanation for the so-called East Asian Miracle proceeds from the premise that these countries adopted rational, market-oriented policies by liberalizing imports, adopting realistic exchange rates, and granting incentives for exports. In other words, industrial policy shaped an environment in which prices in the international market dictated its direction. Lower capital/output ratios, the elimination of inefficient "infant industries" and the challenge to increase competitiveness in the global market provided the impetus for higher growth and allowed for adjustments in the "oil shock" debt crisis-ridden years of the 1970s.<sup>61</sup>

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60. UNCTAD SECRETARIAT, A PRELIMINARY ANALYSIS OF THE RESULTS OF THE URUGUAY ROUND AND THEIR EFFECTS ON THE TRADING PROSPECTS OF DEVELOPING COUNTRIES, EXPANSION OF TRADING OPPORTUNITIES TO THE YEAR 2000 FOR ASIA-PACIFIC DEVELOPING COUNTRIES 102 n.3 (1995) [hereinafter UNCTAD REPORT].

61. The neoclassical accounts of the East Asian experience can be found in the following works: BELA BALASSA, *supra* note 12; JAGDISH BHAGWATI, FOREIGN TRADE REGIMES AND ECONOMIC DEVELOPMENT: THE ANATOMY AND CONSEQUENCES OF EXCHANGE CONTROL REGIMES (1978); Gustav Ranis, EMPLOYMENT, INCOME DISTRIBUTION AND GROWTH IN THE EAST ASIAN CONTEXT: A COMPARATIVE ANALYSIS, Paper Presented at the Conference on Experiences and Lessons of Small Open Economies, Santiago, Chile (1981).

The exegesis of neoclassical economics has its share of critics. The criticism points out the strong interventionist hand of the state in promoting a "developmental state", which could not justify the use of neoclassical analysis. In the view of the critics, the NICs developed a strategy of "acquired dynamic comparative advantage" rather than "endowed static comparative advantage". Echoing the Japanese model, the successful NICs directed capital, production and labor out of declining sectors, and into more competitive ones, in response to long-term opportunities in the international market. Blessed with a very capable administrative apparatus,<sup>62</sup> measures were efficiently carried out, on the demand side by restricting foreign competition, and on the supply side by controlling factor prices.

In contrast, the United States underscores the removal of impediments, such as overvalued exchange rates, export taxes, and bureaucratic regulation, which it believes would automatically increase exports. Import liberalization complements the reduction of export barriers because the increase in access to cheaper inputs and foreign competition by itself raises the level of competitiveness of manufactures. The decline of America's hegemony<sup>63</sup> during the 1980s meant an unwillingness to underwrite the maintenance of the liberal trading order it created. Increasing U.S. trade deficits caused by rising imports affecting domestic industries pointed to an overall decline in the competitiveness of U.S. industry, even threatening the critical high-technology sector, once thought to be a traditional strength of the United States.

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62. South Korea and Taiwan inherited from Japanese colonial rule an efficient administrative bureaucracy, a well educated populated, modern infrastructure and a good agricultural system. The decolonization process that occurred after their independence included an extensive land reform program, which provided the foundation for the sustained growth of agriculture and the capital needed to support industrialization. See Yun-han Chu, *The East Asian NICs: A State-Led Path to the Developed World*, in GLOBAL CHANGE, REGIONAL RESPONSE, *supra* note 42, at 199, 201-202.

63. The overall decline in America's economic hegemony in the 1980s spawned "declinist" literature, which associated a liberal economic order with the presence of a hegemonic state such as Great Britain in the nineteenth century and the U.S. in the postwar era. See ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981); ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987); PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987).

These problems were explained by market intervention by foreign states. The promotion of key industries, which created competitive advantage and skewed the international division of labor, was deemed to be the culprit. Another factor was said to be structural differences in national political-economic systems, which gave firms in these countries an unfair competitive advantage.<sup>64</sup> In the view of these analysts, the U.S. was a victim to strategic trade policies foisted by Japan, Europe and the NICs of East Asia and Latin America.<sup>65</sup> Of course, it was not as significant to the United States that, through its defense and research programs, subsidies were provided to the computer, semiconductor, nuclear power, aerospace and pharmaceutical industries — all of which led, naturally, to a technological edge in these areas.<sup>66</sup> But in the late 1980s, industrial sectors that were once world leaders — such as steel, semiconductors, automobiles and microelectronics — came under intense competition,<sup>67</sup> and reflected the accelerating decline of America's economic and strategic place in the world economy.<sup>68</sup>

In the classic, updated edition of the most influential and widely read analysis of the U.S. trade-policy-making system, I.M. Destler describes the mood in the 1980s:

In this atmosphere of broad trade frustration,  
many became deeply skeptical about the liberal

64. An entire book industry sprouted to point the finger at Japan and the East Asian NICs as the cause for the disequilibrium in the trading system. Among the notable "Japan-bashing" tomes is CLYDE PRESTOWITZ, JR., *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD* (1988). The main object of attack was Japan's *keiretsu* system (i.e., formal and informal links among enterprises and banks within large industrial groupings which allow for lower credit, exclusive market distribution, and discrimination against imports) and emulations thereof in the NICs (e.g. the *chaebol* in South Korea).

65. *TALKING TRADE, U.S. POLICY IN INTERNATIONAL PERSPECTIVE 7-8* (Robert S. Walters ed., 1993) [hereinafter *TALKING TRADE*]. The literature on strategic trade policy includes *AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION: GOVERNMENT POLICIES AND CORPORATE STRATEGIES* (John Zysman & Laura Tyson eds., 1983); *STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS* (Paul Krugman ed., 1986); *THE POLITICS OF INDUSTRIAL POLICY* (Claude Barfield & William Schambra eds., American Enterprise Institute 1986).

66. *TALKING TRADE*, *supra* note 65, at 11.

67. I.M. DESTLER, *AMERICAN TRADE POLITICS* 48 (1995).

68. See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987).

image of a world growing more and more open, governed increasingly by common rules of nondiscrimination in trade. What they came to see was an “unfair” world where other nations played loose with the rules and “nice guys” were likely to finish last. *They were willing to compete, but they demanded a “level playing field,” not one tilted against the United States.*<sup>69</sup>

It was no surprise that in the 1980s, many in the United States believed that the GATT was not effective. With the growing importance of international investment and services, and the decreasing competitiveness in goods, the GATT, which covered only trade in goods, was become increasingly irrelevant.<sup>70</sup> Thus, U.S. trade policy began to stress more exacting *levels* of protection (or, conversely, degrees of market access), and was not satisfied with mere reciprocal *changes* in protection.<sup>71</sup> The focus of trade strategy thus shifted to a sector- and results-oriented policy, from one that stressed the process of liberalization.<sup>72</sup> It becomes painfully clear, contrary to any assertion by any party of its benevolence in favoring any free trade order, that the liberal trading system was useful only insofar as it could satisfy national trade interests.

The same can be said of the European Union’s trade policy. The EU’s deepening integration and subsequent expansion to include twelve, and then fifteen members, has made the regional economic grouping a stronger player, and potentially the strongest participant in international trade. To a large extent, the formulation of rules for the internal market, by themselves, represent the most significant trade policy strategy in relation to the rest of the world. To date, the question of the consistency of the EU’s single market with Article XXIV of the GATT Agreement and with the general principle of non-

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69. DESTLER, *supra* note 67, at 9 (emphasis added).

70. THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 10-11 (Institute for International Economics 1994).

71. See William R. Cline, *Reciprocity: A New Approach to World Trade Policy?* 7 POLICY ANALYSES IN INT’L ECON 2, 7 (1982).

72. BAYARD & ELLIOTT, *supra* note 70, at 11.

discrimination, has never been satisfactorily resolved.<sup>73</sup> Furthermore, the EU's preferential bilateral accords with the new democracies of Central and Eastern Europe, the Mediterranean states, and African, Caribbean and Pacific (ACP) former colonies under the Lomé Convention — forming a perplexing potpourri of arrangements — raise further questions regarding their compatibility with the GATT. The evolution to the WTO has yet to settle these contradictions.

Although the formation of the EU's single market was guided by a liberal economic vision committed to the reduction of internal and external barriers, protectionism comes to the fore through its "complex and multi-layered process of trade policy formulation and implementation."<sup>74</sup> The liberal philosophy of the European integration process clashes with the mercantilist forces unleashed at the lower administrative echelons. Often, European officials at the bureaucratic levels can be influenced by industries with whom they interact. This seeming disparity in theory and practice has been defined as a paradox of liberalism confined by pragmatism.<sup>75</sup> With the European Commission striving to pull trade and policy away from the EU member states, it needs to appear to be sympathetic to domestic industrial interests.<sup>76</sup>

Like the United States, the European Community in the early 1980s entered into discriminatory bilateral and sectoral arrangements with countries outside the circle of former European colonies with which it had preferential agreements.<sup>77</sup> But in the latter part of the 1980s and well into the 1990s, the Commission preferred to use more legalistic and sophisticated trade instruments. Accordingly, it engaged in vigorous

73. See Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 22-50 (Jaime de Melo & Arvind Panagariya eds., 1993).

74. Lars Anell, *Concluding Remarks by Chairman of the GATT Council, April 15-16, 1991*, 2 *GATT TRADE POLICY REVIEW* 3 (1991).

75. Thomas R. Howell, Rosemary E. Gwynn & R. Michael Gadbow, *European Community*, in *CONFLICT AMONG NATIONS, TRADE POLICIES IN THE 1990S* 389-468 (1992) [hereinafter *CONFLICT AMONG NATIONS*].

76. *Id.* at 397.

77. Gardner Paterson, *The European Community as a Threat to the System*, in *TRADE POLICY IN THE 1980S* 230-231 (William R. Cline ed., 1983).

application of anti-dumping laws, rules of origin, and the New Commercial Policy Instrument, which was patterned after the Section 301 of the U.S. Trade Act of 1974.<sup>78</sup> But while the U.S. resorted to “aggressive unilateralism” to punish what it considered to be “unfair” trade practices, the EU responded to trade pressures via its industrial policy within the common market, notably through the Common Agricultural Policy (CAP), export monitoring of competitive foreign suppliers, government rationalization schemes, and massive regional and research subsidies. Moreover, all the EU’s major temperate-zone agricultural commodities, except oilseeds, are isolated from external competition through the Community’s variable import levies. In most sensitive sectors, tariffs have given way to anti-dumping, the most frequently used trade instrument.<sup>79</sup>

## V. THE CONCEPT OF “FAIR”: WHEN FAIR IS UNFAIR

The question inevitably arises as to what constitutes “unfair trade” among states. It is a fiction to claim that the GATT/WTO regime is not an institutional mechanism to enforce a exclusive set of economic beliefs and values. Although the trend towards “liberalization” has achieved a broad consensus, as the Uruguay Round attests, there are numerous fundamental contentious matters that have yet to be resolved.

First and foremost: What is “unfair”? Is a measure unfair if it is not consistent with the GATT, or when it does not conform to certain institutional structures and economic practices? And if the GATT rules are changed, as they have been to a certain extent in the WTO Agreements, do previously “fair” practices become “unfair”, or vice-versa? Is there a single definitive,

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78. See IVO VAN BAELE & JEAN-FRANCOIS BELLIS, ANTIDUMPING AND OTHER TRADE PROTECTION LAWS OF THE EEC (1990); RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY (Edwin Vermulst, Paul Waer, & Jacques Bourgeois eds., 1994) [hereinafter RULES OF ORIGIN IN INTERNATIONAL TRADE]. Professor Meessen retorts that Europe's arsenal of trade measures is not impressive. Karl M. Meessen, *Europe en Route to 1992: The Completion of the Internal Market and Its Impact on Non-Europeans*, 23 INT'L LAW. 359 (Summer 1989).

79. See 1 GATT TRADE POL'Y REV. 2-6 (1993).

appropriate role for the state in a country's economic development? If the managed market intervention on the part of the East Asian NICs, purportedly contrary to liberal trade principles, is unfair, then punitive unilateral measures that determine whether another state's trade practices, agricultural subsidies, or overzealous anti-dumping and countervailing duty determinations are equally, if not more, unfair. Even the threat of imposing such measures, although technically permissible as long as they are not yet in effect, does not constitute "fair" trade in view of the asymmetrical economic relationships in the trading system. It is about time that even the determination of "fairness" be fair.

Many newly industrializing countries (e.g. Taiwan, Korea and Brazil) which previously fostered an industrial policy to promote their domestic industries, have embraced many of the GATT/WTO regulatory mechanisms of their own volition. This movement away from restrictive border measures sprung from a realization that such measures, in the long term, insulate domestic industries from foreign competitive pressures and may prevent them from maintaining their international competitive edge. It is clear, however, that these countries would not have reached this stage, if the NICs had not pursued the carefully managed, rational market interventions that purportedly violated the GATT value system. The GATT's Holy Grail is a market where government interference is restrained. But can Paradise be found on GATT/WTO earth?

American attorneys who have frequently represented local parties against Japanese and other foreign firms in 301 cases, as well as others who believe that the U.S. should not give up its ability to react unilaterally, admit that because there is really no "international consensus as to what constitutes acceptable behavior in the pursuit of national interests, the GATT cannot be said currently to represent a mechanism for enforcing a comprehensive set of shared economic and industrial policy values. Absent mutual consensus on the values and rules which are being enforced, the elaboration and strengthening of GATT dispute resolution mechanisms cannot

succeed in mediating fundamental conflicts arising out of the pursuit of national commercial advantage.”<sup>80</sup>

## VI. THE WTO DISPUTE SETTLEMENT SYSTEM

The 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) contained in the Uruguay Round agreements<sup>81</sup> stands as the centerpiece of the WTO system. The DSU “judicializes”<sup>82</sup> what once was a dispute settlement procedure based on compromise. The former “contracting parties” of the GATT are now “members” of the WTO. The main organ of the WTO is the ministerial conference, which meets every two years. The body of members form the WTO Council, which is in turn divided into three councils: the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights. When the WTO Council meets *en toto* to discuss a case under the dispute settlement procedure, the Council acts as the Dispute Settlement Body (DSB). The DSU serves as the main vehicle to enforce the rights and obligations under all the “covered agreements.”<sup>83</sup> These

80. Thomas R. Howell & Alan Wm. Wolff, *Introduction, in* CONFLICT AMONG NATIONS, *supra* note 75, at 15.

81. The agreements negotiated in the Uruguay Round are attached as Annexes to the main Agreement establishing the World Trade Organization. See Agreement Establishing the World Trade Organization [hereinafter WTO AGREEMENT], Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [hereinafter URUGUAY ROUND AGREEMENTS]. Annex 1 includes the WTO AGREEMENT, together with a number of covered agreements. Annex 2 contains the Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU]. Annex 3 contains the Trade Policy Review Mechanism, and Annex 4 includes four plurilateral trade agreements (covering civil aircraft, government procurement, dairy and bovine meat products) which are not automatically covered by the dispute settlement procedure. Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. XIV in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

82. Pieter-Jan Kuyper, *The New WTO Dispute Settlement System -- the Impact on the Community*.

83. The “covered agreements” under the WTO umbrella are enumerated in Annex 1, to wit: General Agreement on Tariffs and Trade 1994; Understanding on the Interpretation of Article II:I(b) of GATT 1994; Understanding on the Interpretation of Article XVII of the GATT 1994; Understanding on Balance-of-Payments Provisions of GATT 1994; Understanding on the Interpretation of Article XXIV of the GATT 1994; Understanding in Respect of Waivers of Obligations under GATT 1994; Understanding



“covered agreements” comprise the multilateral trade agreements that bind all WTO members. With respect to the plurilateral trade agreements, which do not bind all WTO members, each them contains provisions according to which disputes arising thereunder may be settled in accordance with the DSU.<sup>84</sup>

The dispute settlement process of the WTO explicitly aspires to provide security and predictability to the multilateral trading system. It does so by preserving the rights and obligations of its members under the covered substantive agreements, and by clarifying the existing provisions of those agreements in accordance with customary rules of interpretation of public international law,<sup>85</sup> within a set of deadlines and in conformity with a prescribed procedure. The DSB, acting as a plenary organ, has the power to make decisions by “negative consensus”, whereby a matter submitted for consideration is deemed decided if no member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.<sup>86</sup> These decisions can be interposed before the adoption of a panel, after the adoption of a panel report or appellate body ruling, and concurrently with the authorization of countermeasures by suspension of concessions or obligations.

From all indications, the WTO dispute procedure has attracted the interest of more member states, whereas the previous GATT dispute settlement procedures attracted only lukewarm reception. As of January 14, 1999, 157 requests for consultation have been presented to the WTO, which number

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on the Interpretation of Article XXVIII of the GATT 1994; Marrakesh Protocol to GATT 1994; Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures (TRIMs); Agreement on Implementation of Article VI of GATT 1994, the Customs Valuation Agreement; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards; General Agreement on Trade in Services (GATS) and its Annexes; Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). See WTO AGREEMENT, *supra* note 81.

84. DSU, *supra* note 81, art. 2:1.

85. DSU, *supra* note 81, art. 3:2.

86. DSU, *supra* note 81, art. 2:4.

already exceeds half the number of cases filed during the entire life of the GATT, from 1948 to 1994. One hundred twenty of the cases presented to the WTO have materialized into distinct matters that may lead to panel reports. Eighty-eight of these matters were filed by developed country members, and twenty-nine by developing country members; four matters were filed jointly by developed and developing country members. Of these matters, 18 cases are completed, while 30 were either settled or are inactive.<sup>87</sup> In its newsletter (*WTO Focus*), the WTO Secretariat has assessed the performance of the WTO dispute settlement record in comparison to that of the earlier GATT system as follows:

about one quarter of the disputes are resolved by the parties themselves at the initial consultation stage;

members are actively using the appeals procedure, with all panel reports issued so far being brought to the Appellate Body for a final ruling;

the improved mechanism has enabled adoption by the DSB of all the Appellate Body reports and panel reports as modified by them that have so far been issued, unlike under the old GATT, when adoption took time and a number of panel reports were never adopted at all;

developing countries have become active users of the procedures.<sup>88</sup>

Under the former GATT dispute settlement scheme, the “three Cs” — conciliation, consensus and compromise — formed the core of conflict-resolution. Trade conflicts were resolved

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87. World Trade Organization, *Overview of the State-of-play of WTO Disputes*, WTO BULLETIN 1, 27-28 (Jan. 14, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

88. WTO FOCUS 21 (1997).

through negotiation rather than litigation.<sup>89</sup> Article XXII of GATT 1947 merely provided that each contracting party should accord "sympathetic consideration" to, and afford adequate opportunity for consultation regarding, the representations of another party.<sup>90</sup> Article XXIII of GATT 1947 provides the legal foundation for the 1979 Tokyo Round Understanding,<sup>91</sup> which formalized the panel proceeding created by request of the complaining party. The panel proceeding paved the way for a more adversarial type of conflict-resolution among GATT parties.<sup>92</sup> If the panel's recommendation was not followed and no satisfactory adjustment was made by the party concerned, the GATT Contracting Parties (acting as a whole) could authorize an individual contracting party to retaliate by suspending concessions or obligations, as appropriate.<sup>93</sup> Since the Contracting Parties' decision to allow countermeasures had to be unanimous, the "losing" party under a panel recommendation could block implementation of the report simply by vetoing it.<sup>94</sup> The new WTO dispute settlement rules preclude this result.

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89. See the lucid comparison of the old and new modes of dispute settlement in Edwin Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements*, 29 J. WORLD TRADE L. 2, 134 (1995).

90. GATT 1947, art. XXII:1.

91. Understanding on Notification, Consultation, Dispute Settlement, and Surveillance of 28 November 1979, BISD 26S/210 (1980) [hereinafter 1979 UNDERSTANDING].

92. *Id.*, arts. 10-21.

93. GATT 1947, art. XXIII:2.

94. Paragraph 4 of the *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)* annexed to the 1979 UNDERSTANDING, *supra* note 91, provides:

Before bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending

Under the DSU, the dispute settlement template acquires a more litigious pattern. As under GATT 1947, the WTO process begins with a request for consultation. If the matter is not resolved in this manner, the member concerned may request a panel, unless the DSB decrees otherwise. Once the parties agree on the panelists, the panel is formed, which issues a report to be considered for adoption by the DSB within 60 days. If a negative consensus emerges, appeals of issues of law covered in the panel report and legal interpretations developed by the panel may be made to the new Appellate Body of seven members. The DSB must adopt the Appellate Body report, and the parties must consent to it unconditionally, within 30 days, unless a consensus to reject it exists. The existence of an Appellate Body signifies a recourse for members who are not satisfied with the panel's ruling, giving a more "adjudicative flavor" to the panel procedure.<sup>95</sup>

It is not the purpose of this section to analyze the minutiae of the dispute settlement procedure in the WTO. However, a few elements within this paradigm have particular relevance to developing countries in general, and the circumstances of East Asian NICs in particular. Article 3:12 of the DSU makes an express reference to complaints brought by a developing country member against a developed country member. In lieu of the DSU provisions on consultations, conciliation and mediation, and panels, a developing country member has the right to invoke the Decision of 5 April 1996 on Procedures under Article XXIII of GATT 1947.<sup>96</sup> Under this Decision, developing country complainants have the option to avail of the good offices of the Director-General, acting in an *ex officio* capacity, to facilitate a solution by consulting the parties concerned, and with other contracting parties or inter-

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the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case.

95. Vermulst & Driessen, *supra* note 89, at 144.

96. Decision of April 5, 1996 on Procedures under Article XXIII, BISD 14S/18.

governmental organizations to promote a mutually acceptable solution.<sup>97</sup>

In theory, the new adjudicatory procedures and safeguards built into the DSU regime underscore the importance of the rule of law in the organization of world trade. The Uruguay Round multilateral agreements added more detail and precision to the provisions of GATT 1947 and the Tokyo Round agreements.<sup>98</sup> The DSU seeks to ensure compliance with decisions of the panel and the Appellate Body by bestowing upon panel reports and decisions resolved by the Appellate Body the quality of judicial formality and finality. In the August 1997 issue of its *WTO Focus* newsletter, the WTO Secretariat announced that it had received its 100th request for trade dispute resolution, in just a little more than two-and-a-half years of existence. The average of 40 disputes a year represents a vote of confidence by WTO members in the new dispute settlement mechanism. The GATT dealt with 300 disputes in its lifetime, or roughly six disputes a year. Developing countries have also become active users of the procedures, filing 31 of these cases (29 of which materialized into distinct matters). In some instances, developing countries have filed cases against other developing countries, a rare phenomenon during the GATT era.<sup>99</sup> Seventeen Appellate Body reports had been adopted as of January 1999.<sup>100</sup>

A European scholar has expressed the widely shared view that the enlargement of the scope of the dispute settlement provisions reduces the possibility for unilateral action by certain states, such as the U.S.'s Section 301 and the EU's new Trade Barriers Regulation (TBR) (which replaced the 1984 New Policy Instrument).<sup>101</sup> A couple of years ago, the United

97. *Id.*, arts. 1 & 3.

98. Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization* 34 COLUM. J. TRANSNAT'L L. 123, 135-136 (1995).

99. *Disputes Reach Century Mark*, 21 WTO FOCUS 1 (1997).

100. World Trade Organization Website, *Dispute Settlement*, <<http://www.wto.org>>.

101. Demaret, *supra* note 98, at 136. The new Trade Barriers Regulation (TBR), Council Regulation 3286/94 specifies internal procedures for actions against objectionable or illicit trade practices abroad, including certain areas of services and intellectual property. The actions must be authorized under international dispute

States served notice of its displeasure at its small share of the South Korean auto market by designating South Korea a "priority foreign country" (as of October 1, 1997) in the automobile sector under "Super 301" of the 1988 Trade Act, which still operates by executive order of the U.S. President. This procedure allows the U.S. to impose economic sanctions if, during the eighteen-month period following the designation, the United States is not satisfied with South Korea's efforts to remove trade barriers. South Korea, for its part, intends to take the dispute to the WTO, if the U.S. unilaterally imposes any measures pursuant to Super 301. This would be the acid test that would challenge the WTO dispute settlement mechanism and lay bare the inherent contradictions between the "rule of law" it seeks to perpetuate, and the "rule of might" wielded by economically powerful countries.<sup>102</sup>

True enough, the WTO reports that developing countries are becoming active users of the multilateral dispute-settlement mechanism, in contrast to their lukewarm reaction thereto under the GATT. Developed countries filed the vast majority of GATT dispute-settlement cases. No doubt, the near-automatic establishment of panels and adoption of their reports, and the strict timetables for every phase of the panel process contribute

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settlement provisions. The TBR, which replaces the 1984 New Commercial Policy Instrument (Council Regulation 2641/84), was patterned after the 301 provisions of the U.S. Omnibus Trade Act, but is, in contrast, a law without teeth. The European Commission sees the purpose of the regulation as to achieve greater trade liberalization within the context of international rules, rather than to protect the domestic market. European industries may complain about obstacles to trade having an effect on the EU market, but may also complain about obstacles having an effect on third-country markets resulting in adverse trade effects to EU industries. See a brief description of the TBR in *WTO*, 1 TRADE POLICY REVIEW, EUROPEAN UNION 65-67 (1995).

102. Choi Byung Il, "Who's Afraid of Super 301?" in *The Fifth Column*, FAR E. ECON. REV. 37 (1997). To a certain extent, the facts show that America has a point. Only 10,000 American cars were sold to Korea, whereas 200,000 were imported by the U.S. from Korea. Washington demands that Korea reduce its import tariff on passenger cars from 8% to the U.S. level of 2.5%. The U.S. is also asking Korea to change its method of taxing cars based on engine size. The Korean auto manufacturers object to the methods used to increase U.S. market share.

to the greater reliance on the WTO's dispute settlement procedures.<sup>103</sup>

Repercussions from a state's non-compliance with an adverse ruling remain a remote possibility, as long as one of the parties to the dispute does not possess enough economic or political might to resist the decision or to retaliate in another sector that could cause greater harm to the favored party. In the WTO framework, as in the previous GATT system, the design of the legal structure needs to be complemented by the willingness of any party, including the more economically powerful states, to conform to the results of the DSU rulings regardless of the outcome. In 1995, world merchandise trade of the four leading exporters and importers — the European Union, the United States, Japan and Canada — still covers more than half of the world's trade. (The figure is even higher if intra-EU trade is included.<sup>104</sup>) Thus, the full cooperation of these countries is of crucial importance. Without their acquiescence, the purity of the system is violated, and its effectiveness fatally impaired.

The more ominous threat comes from the use (or threatened use) of unilateral measures, when brandished about side by side with exhortations to follow the formal procedures in the WTO system. The fears over the "Super 301" clause arose because at the time when it was unveiled, the GATT dispute settlement procedure was then in place, and was perceived to be an unsatisfactory alternative to the swifter action that could be brought about by Super 301. With an effective multilateral dispute resolution mechanism now in place, the rationale for "Super 301" or any similar option disappears. Its lingering existence discloses the still festering "power-based" regime cohabiting with the WTO global trading order. Bilateral negotiations outside the WTO framework undermines the WTO's fundamental design.

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103. 9 WTO FOCUS 1-2 (1996). Among the latest panels reflecting this new trend is the one requested by the Philippines to examine its complaint against Brazil regarding Brazil's imposition of countervailing duties on desiccated coconut from the Philippines. The first WTO dispute, which was settled bilaterally, involved Singapore and Malaysia.

104. 10 WTO FOCUS 7 (1996).

## VII. THE "SINGLE UNDERTAKING" AND THE PROBLEM OF LINKAGE

Under the Uruguay Round agreements, the concept of the "single undertaking" has been introduced. In contrast to the fragmented nature of the Tokyo Round codes and the authorized exclusions to the main GATT agreement, the commitments under the WTO Agreement encompass all fifteen negotiating areas. Accordingly, members (as well as interested would-be members) were compelled to accept the composite single legal instrument: the Agreement Establishing the World Trade Organization.<sup>105</sup>

The "single undertaking" approach is a double-edged sword. On the one hand, the definitive singularity of the package of commitments appears to guarantee that the members will conform to the dispute settlement procedure. Failure to observe commitments in one sector allows retaliation in another. This concept permits "total bargaining" across issue areas, linking one issue with another, such as trade and intellectual property rights. It is argued that such form of legal consistency will be able to cut across the different institutional regimes, injecting predictability into the rules and procedures behind governmental actions.<sup>106</sup> Moreover, a single package of commitments reduces the risk of "free-riding" and forces all the member states to comply (except for the four plurilateral agreements) with the same obligations.<sup>107</sup>

However, this license to retaliate, not only threatens to disturb the equilibrium of an international regime, but can effectively sanction reversion to a "power" rather than "rule-based"

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105. WTO AGREEMENT, *supra* note 81, art. XIV.

106. Roessler, *supra* note 29, at 47.

107. In addition to the WTO AGREEMENT, there are four multilateral trade agreements, and four plurilateral trade agreements. The four multilateral agreements are the following: Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

The four plurilateral agreements are: the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement; and the International Bovine Meat Agreement.



structure *within* the WTO framework. While its aim to ensure the implementation of the dispute settlement is noble in theory, cross-retaliation can only be the weapon of the strong against the weak. A situation where a relatively weaker state loses a case and faces the threat of retaliation if it does not comply with an adverse panel or Appellate Body decision would not pose any problem, unlike a scenario where a ruling is rendered against a more economically powerful party. In the former case, retaliation — even if legally available — would be ineffectual.

It is true that the WTO's dispute settlement procedure has procedural constraints intended to prevent possible abuse of the option of cross-retaliation. The chief restriction is that the complaining party should first seek to suspend concessions or obligations with respect to the same sector concerned, before suspending concessions or obligations with respect to other sectors in the agreement.<sup>108</sup> However, *the complaining party itself determines* whether the suspension of concessions in the same sector is impracticable or ineffective, and whether the circumstances are indeed serious enough.<sup>109</sup> Placing such a determination in the hands of the complaining party affords wide latitude for abuse. The complaining party has the *discretion* to opt for retaliation in another sector, when *in its own judgment*, the suspension of obligations in the same sector, which could be availed of when the recommendations or rulings are not implemented within a reasonable amount of time,<sup>110</sup> *is not effective*.

The DSU provides for additional safeguards to counter the potential severity of cross-retaliation. Before pushing forward, the party should request authorization from the DSB for the suspension of concessions.<sup>111</sup> As a general rule, the DSB *grants authorization* to suspend the concession or obligation within thirty days of the expiry of the reasonable period of time, unless it decides, by *negative consensus*, to reject the request.

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108. DSU, *supra* note 81, art. 22:3.

109. *Id.*, art. 22:3 (b) & (c).

110. *Id.*, art. 22:1.

111. *Id.*, art. 22:2.

If the affected member objects to the level of suspension proposed, there is a final recourse in the form of arbitration, which may either be carried out by the original panel if available, or by an arbitrator appointed by the Director-General.<sup>112</sup>

However, the scope of the arbitrator's authority is fairly circumscribed. The arbitrator cannot examine the nature of the concessions or other obligations to be suspended, but can *merely determine whether the level of such suspension is equivalent to the level of nullification or impairment of rights* under the agreement. The arbitrator's evaluation is limited to the magnitude of the withdrawal of concessions, and not to the issue of cross-retaliation itself. As stated by one former GATT Senior Legal Officer, "[t]he objective is not to re-balance obligations, but [to] achieve compliance with the rules."<sup>113</sup> As the rules allow retaliation across sectors, the chances of preventing the same are minimal, provided that there has been compliance with the procedural conditions.

As a final resort, the DSU provides that if the matter referred for arbitration involves a claim regarding the rule that the complaining party first seek to suspend concessions in the same sector before opting to seek cross-retaliation, the arbitrator can determine whether or not such procedure has been followed.<sup>114</sup> This precautionary measure is equally constricted in its scope: It appears to confine itself to determining whether the proper sequence of options was complied with by the complaining party, rather than investigating an abuse of the discretion exercised by the complaining party. In the end, the complaining party retains the choice to retaliate in another sector, if it deems it impracticable or ineffective to do otherwise.

Cross-retaliation is undeniably a potent tool. It is therefore is a vital component of the DSB's enforcement mandate. Cross-

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112. *Id.*, art. 22:6.

113. Amelia Porges, *The New Dispute Settlement: From the GATT to the WTO*, 8 LEIDEN J. INT'L L. 115, 133 (1995).

114. DSU, *supra* note 81, art. 22:7.

retaliation may be permitted, for instance, in the area of textiles or agriculture (which many developing countries export) for nullification of obligations in the field of financial services or intellectual property (where developed economies hold sway). While it forges "cohesion" in the WTO system,<sup>115</sup> it can also promote abuse in the hands of a powerful state, since the same "check and balance" design for ordinary retaliation applies to this extraordinary measure. Similarly, cross-retaliation is ineffective if the weaker country that wishes to wield it, cannot use it against a stronger member.

In order to ensure that the United States would accept the Uruguay Round agreements, then-USTR Mickey Kantor promised the Republican Congress that the Democratic administration would support legislation to establish a WTO Dispute Settlement Review Commission. This Commission would consist of five federal appellate judges, appointed by the President, who would review all final WTO dispute settlement reports *adverse* to the United States, to determine *whether the panel exceeded its authority or acted outside the scope of the Agreement*. Three out of five votes would be sufficient for an affirmative determination.

Following the issuance of an affirmative determination by this Commission, any member of the U.S. Congress would be able to introduce a Joint Resolution calling on the President to negotiate new dispute settlement rules that would address and correct the problem identified by the Commission. Furthermore, if the Commission issues three affirmative determinations in any five-year period, any member of Congress could introduce a Joint Resolution to disapprove U.S. participation in the WTO. If such Resolution is enacted by Congress and signed by the President, the U.S. would commence withdrawal from the WTO Agreement.<sup>116</sup>

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115. Porges, *supra* note 113, at 124.

116. Office of the United States Trade Representative, *Documents Relating to the Agreement Between the Clinton Administration and Sen. Robert Dole Concerning the Uruguay Round Agreements*, DAILY EXEC. REP. 225 (Nov. 25, 1994); *Documents Relating to the Clinton Administration's Agreement with Sen. Robert Dole Concerning the Uruguay Round Agreement*, 11 INT'L TRADE REP. 1865 (1994).

Largely because of these reassurances, the Uruguay Round Agreements Act<sup>117</sup> was signed into law on December 8, 1994. Both the Uruguay Round Agreements Act and the proposed Dispute Settlement Review Commission were designed to alleviate fears that these agreements would encroach on U.S. sovereignty.<sup>118</sup> The Uruguay Round Agreements Act decrees that any provision in the Uruguay Round agreements that is inconsistent with U.S. legislation that defines rights and obligations *on a domestic level* shall have no effect. U.S. laws cannot be changed by WTO decisions.<sup>119</sup> The Uruguay Round agreements, like the GATT, have no direct effect in the United States.<sup>120</sup>

The Uruguay Round Agreements Act clearly does not alter U.S. obligations at the international level. Yet the possible use of unilateral Section 301 sanctions — which fall within the scope of domestic U.S. law but are based on issues covered by the Uruguay Round agreements — would obviously violate the dispute settlement provisions of the WTO,<sup>121</sup> which provide the exclusive procedure for resolving trade disputes. The exclusion of all other modes of redress guarantees the transparency, predictability and security of the WTO process.<sup>122</sup> In view of the unequivocal intent of the DSU, any argument that concedes

117. 19 U.S.C. §3501 (1994).

118. William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L. J. 427, 457 (1995).

119. *Id.* at 457, 468.

120. See Thomas William France, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481 (1994); Ronald Brand, *The Status of the General Agreement on Tariffs and Trade in the United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990); John Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 312 (1967).

121. Section 301 has a broad scope. It was established by the U.S. Congress to protect the United States from "unfair trade practices." Section 301(a) authorizes retaliation against a foreign state if the U.S. Trade Representative (USTR) determines that the rights of the U.S. under any trade agreement are denied or violated, or if an act of a foreign government is inconsistent with or denies benefits to the U.S. under such trade agreement, or if such action is unjustifiable and burdens U.S. commerce. Section 301(b) authorizes the USTR to take discretionary action if a foreign government practice is unreasonable or discriminatory and burdens or restricts U.S. Commerce. Retaliation, which is subject to the specific direction of the President, can include the suspension or withdrawal of benefits of trade agreements as well as duties or other import restrictions. Trade Act of 1988, 19 U.S.C. §2420.

122. Andreas Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 486 (1994).

the need for a "constructive" or "benevolent" unilateralism must necessarily be discarded.<sup>123</sup> Many, however, still endorse the contradictory view that unilateralism spurred the conclusion of the Uruguay Round, and continues to enhance the multilateral process in the global trade regime.<sup>124</sup>

It is clear to the U.S. *legislature* that the WTO will *not* have the final decision on the rules, and that when the rules do not lead to a favorable outcome, the United States will negotiate for a *change in the rules*. Thus, even when the rationale of the enlarged WTO procedures is to ensure that all members conform with the rules, when such rules do not satisfy American interests (as represented by the Congress), the U.S. will work for their modification. The bottom line is that the United States, under present legislation, may take any unilateral action it deems appropriate, regardless of its obligations under the provisions of the Uruguay Round agreements. As one commentator put it, the U.S. "maintains sovereign authority to determine and regulate its behavior at both the domestic and international levels."<sup>125</sup> While the DSU may sap the United States' resolve in utilizing its 301 sanctions, or put differently, raise the bar for its use, the availability of the option remains.

As long as one of the four major players in the world economy *can* wield the stick in total disregard of the dispute settlement process, the fragile balance of the adjudication process is always in jeopardy. The DSU establishes an effective sanction system on a multilateral level. As long as no unilateral action by any party is taken, no DSU/WTO rule is violated. However, the sword of Damocles that hangs over the head of the DSB

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123. See, e.g., Alan Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y. INT'L BUS. 263 (1991); Alan Sykes, *Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT'L L.J. 301 (1990); James R. Arnold, *The Oilseeds Dispute and the Validity of Unilateralism in a Multilateral Context*, 30 STAN. J. INT'L L. 187 (1994); Robert Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM (Jagdish Bhagwati & Hugh Patrick eds., 1990).

124. See Judith Hippler Bello, Claire E. Reade, Janet A. Nuzum & G. Hamilton Loeb, *International Trade Highlights in 1995*, 30 INT'L LAW. 391 (1996).

125. Aceves, *supra* note 118, at 469.

cheapens the process, and bears a constant reminder of its mortality in the face of a powerful nation. In a sense, this piece of U.S. legislative sorcery in regard to dispute settlement is a microcosm of the entire evolution of GATT behavior modification to suit the interests of the major players in international trade.

#### VIII. THE SITUATIONAL CONTEXT OF THE DSU

Although the new dispute settlement procedure in the WTO Agreement “judicializes” the entire process of conflict resolution, and pursues a fair equilibrium of rights among member states, the situational context of the new rules should be examined for a balanced perspective. The shift in 1994 from the GATT 1947 Agreement to the WTO represents a quantum leap in terms of the scope of coverage. What was once an agreement more or less restricted to trade in goods, has now expanded to one which eliminates barriers in the growing trade in services, intellectual property and investments, where the richer countries have an undeniably overwhelming intrinsic advantage over the less affluent participating countries. As the developed nations’ economies shifted from manufacturing towards their comparative advantage in services, GATT’s gravitational center steadily migrated towards greater emphasis on trade in services, wider coverage in the realm of intellectual property, and to a lesser extent, concern with trade-related investment measures.

To a large extent, the trade issues involved with services and intellectual property are intimately linked to the goods exported by the developed nations. The growth in services, mainly in the business service sector, is often necessary to obtain productivity gains in goods-producing industries. The bulk of international trade in services occurs in the form of services embodied in goods, for example, computer programming stored in a diskette as software or ISDN digital technology in telecommunications equipment. These services are built into goods that are primarily subject to the usual tariffs and trade barriers for goods. Thus, in many cases, the export of higher-technology services are no different from the

export of goods arising from such services.<sup>126</sup> Since the developed economies were victim to trade deficits with Japan and the NICs due to the disparity in their export volumes in manufactures, payment of these goods would no longer have been possible unless income from service, or embodied service exports could be generated. It was, therefore, inevitable that services and intellectual property would become an important concern in the Uruguay Round negotiations.

From this standpoint alone, changes in the *relative competitive positions* of the triangular relationship among LDC, NIC and the major economic powers, determined the peculiar balance — or to be more precise the imbalance — of rights and obligations in the Uruguay Round agreements. This not too subtle policy drift was not surprising, considering that among the developed country markets, the Quad countries — the European Union, the United States, Canada and Japan — account for more than ninety percent of developed country exports.

In contrast, the developing countries' share in world merchandise (excluding fuels) showed an increase from 14.4 to 19.2 percent between 1980 and 1992, while their percentage of the world's export of services declined from 20.8 to 18 percent between 1985 and 1992. The developing countries' increasing share of world merchandise was mainly due to a doubling of their world manufactures' trade. The most important sectors (in terms of substantial market shares in the imports of developed market economy countries) are textiles and clothing, office machines and telecommunications equipment, electric machinery, furniture and footwear.<sup>127</sup> From the point of view of total exports from developing countries, inclusive of Latin America, the growth in the share of manufactured goods was more than evident: a doubling from the 26% in 1965 to 53% in 1990. Sub-Saharan African countries and oil-exporting

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126. Herbert G. Grubel, *Issues in Free Trade in Services Between Canada and the United States*, in ECONOMIC ASPECTS OF REGIONAL TRADING ARRANGEMENTS 109-124 (David Greenway, Thomas Hyclak, Robert J. Thornton eds., 1989).

127. UNCTAD REPORT, *supra* note 60, at 71-72.

developing states continue, however, to export primary products.<sup>128</sup>

Roughly 75% of these manufactured exports from developing countries to developed market-economy countries originated in developing East Asia.<sup>129</sup> Fully 53% of developing countries' total non-fuel exports find their way into the three major developed country markets, namely the United States, Japan and the European Union. This suggests that the export of manufactures plays a more prominent role in the interests of developing countries in the aftermath of the Uruguay Round, although traditional primary agricultural products and commodities still constitute a vital component of their international trade.<sup>130</sup>

A "domino effect" played itself out as the Uruguay Round negotiations wore on. One by one, restrictions to trade in areas in which the less prosperous economies could not successfully compete, or even react satisfactorily, were gradually reduced. The new WTO agreements consummate an "institutionalization" of the lopsided balance of economic relationships between the "haves" and "have-nots", with the NICs occupying a legal *Purgatorio*, as they have often been accused as "free riders" in the erstwhile GATT system. Increased globalization of the marketplace under the WTO actually forces an economic survival of the fittest, a "winner-take-all" global marketplace, which may not necessarily be beneficial to individual economies or their populace, or in the near term, erect the social safety nets to save those marginalized by market forces. The balance of concessions in the Uruguay Round erects a sublime facade of statutory harmony. The WTO order perpetuates a standardizing, homogenizing process, in which transnational corporations, who profit from standardization and cost efficiencies, and last

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128. I.M.D. LITTLE, RICHARD N. COOPER, W. MAX CORDEN & SARATH RAJAPATIRANA, *BOOM, CRISIS AND ADJUSTMENT: THE MACROECONOMIC EXPERIENCE OF DEVELOPING COUNTRIES* 13 (1993).

129. UNCTAD REPORT, *supra* note 60, at 63-64, 115.

130. UNCTAD REPORT, *supra* note 60, at 65.



but not least, liberalized trade in goods and services, can thrive and dominate.<sup>131</sup>

If there is any doubt as to the non-altruistic tenor of the negotiating positions of the developed countries, one need not look beyond the chronology of events in the Uruguay Round. In a more or less "official" history of the GATT negotiations, a former senior official of the GATT Secretariat explains why trade in services, at some point in the negotiations, became a focal point of discussion:

A huge attraction for the developed countries was that international trade in services consisted largely of the activities at which they were best, and which drew on some of their greatest assets: banking and insurance, management know-how, shipping and air transport, advanced communications and other technology. *They argued that they could not accept open competition in their markets for products such as textiles and clothing, for which developing countries had important competitive advantages over them, unless they were allowed to exercise in world markets their competitive advantage for services.* They also insisted that trade in goods was to an increasing extent linked with the supply of services, so that rules and disciplines for services were needed to ensure the strength of the international trading system as a whole.

Developing countries generally felt themselves to be at a disadvantage in the area of services, except, possibly, as suppliers of manpower. *To a great extent, they accepted inclusion of trade in services in the Uruguay Round only because this was a price they had to pay for negotiations on other matters of importance to them, and because they preferred multilaterally agreed rules to the almost certain alternative prospect of unilateral action by major countries to force open their markets.*<sup>132</sup>

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131. Helena Norberg-Hodge, *Break Up the Monoculture*, THE NATION, July 15/22, 1996, at 20-23.

132. JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM 119-120 (World Trade Organization 1995) (emphasis added).

Similar reasons accounted for the inclusion of intellectual property protection into the GATT deliberations:

As in the case of services, developed countries saw their strength in the development of technology as a central competitive advantage on which they would need to be able to rely in the future, not least if they were being challenged by developing countries in areas of trade where they were at a competitive disadvantage. All participants in the round soon became aware that an agreement on TRIPS (“trade-related aspects of intellectual property rights”) was, whether they liked it or not, an essential element for any final package.<sup>133</sup>

This double standard is prominent in the orientation of the Uruguay Round agreements. Great strides in the realm of intellectual property and broad sweeping provisions governing trade in services dwarf the minor revisions in the provisions of contingency protection (notably the small modifications to the anti-dumping provisions).

The structural imbalance is not immediately evident; on the contrary, it is meant to remain unobtrusive, so long as there is a semblance of fairness and reasonableness in the rules of dispute settlement. But when the rules of the “club” are periodically changed to accommodate the shifting topography of the world economy, the new assortment of stipulations will tend to favor one class of countries or entities over another. Thus, while there is predictability in the enforcement of the rules within the system, the equity inherent in their application is questionable. To illustrate this point, this article discusses some of the salient features of the new intellectual property rights and services regimes below.

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133. *Id.* at 119-120 (emphasis added).

## IX. INTELLECTUAL PROPERTY RIGHTS

Two concerns spurred the United States and the European Union to attach great importance to intellectual property rights in their shopping list of concessions. First, many developing countries — the East Asian NICs conspicuously among them — afforded shorter periods of patent protection, allowing domestic imitations of Western patents to flourish in their domestic markets. Moreover, enforcement of patent protection in these countries was severely deficient and vulnerable to administrative corruption. Second, most developing countries have tolerated the widespread production and sale of pirated video and sound reproductions, unauthorized copying of computer software, and the appropriation of trademarks (or brand names) in cheap imitations that somehow reduce the enhanced value of the original products. The American and European business interests that financed and developed the innovations in these products have lost billions of dollars.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>134</sup> is the most ambitious, comprehensive multilateral agreement on intellectual property ever, incorporating intellectual property right protection as an integral part of the international trading system embodied in the WTO. For the first time, the international community has accepted an agreement covering the broad subject matter of intellectual property law. TRIPS encompasses the main categories of intellectual property rights — including copyrights, trademarks, patents, geographical indications, industrial designs, and trade secrets — and lays down extensive rules for protection and enforcement. The TRIPS Agreement also embraces the DSU for resolution of disputes between WTO members involving substantive rights and domestic enforcement. All WTO member states, as a condition for membership, are compelled to abide by TRIPS, as well as

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134. WTO AGREEMENT, *supra* note 81, Annex 1C.

the other agreements concerning trade in goods, and the General Agreement on Trade in Services (GATS).<sup>135</sup>

As in the case of pre-existing intellectual property conventions,<sup>136</sup> the TRIPS agreement is not meant to harmonize all domestic intellectual property laws. Rather, TRIPS is meant to set minimum standards of protection that must be followed by the WTO members, which are allowed to implement these standards in a manner appropriate to their own legal systems, and even to provide higher levels of protection than those required.<sup>137</sup> The obligations accord protection to “persons” of other members, which includes persons, natural or legal, who have close attachment to other members without necessarily being nationals.<sup>138</sup>

The standards set by the TRIPS Agreement largely correspond to the levels of protection set by major industrial countries. The main elements of protection are defined, the rights to be conferred and permissible exceptions are specified, and the minimum periods of protection are established. In theory at least, compliance with TRIPS is distinct from conformity with the pre-existing intellectual property conventions. In practice, however, the TRIPS Agreement requires, as an initial condition, that WTO members comply with all substantive obligations set down by the World Intellectual Property Organization (WIPO) conventions, the Paris and Berne Conventions in their most recent versions (but not the moral rights sections of the Berne Convention). All these substantive obligations are incorporated by reference into TRIPS. In addition, the TRIPS Agreement includes additional obligations

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135. WTO AGREEMENT, *supra* note 81, Annex 1A (Multilateral Agreements on Trade in Goods), and Annex 1B (General Agreement on Trade in Services).

136. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention]; Treaty on Intellectual Property in Respect of Integrated Circuits, opened for signature, May 26, 1989, 28 I.L.M. 1477 [hereinafter IPIC Treaty].

137. TRIPS, *supra* note 81, art. 1(1).

138. TRIPS, *supra* note 81, art. 1(3).

with respect to matters not covered by the previous conventions.<sup>139</sup>

The TRIPS Agreement makes transitional arrangements available to developing countries, in accordance with their level of development. Developing countries are given a grace period of five years to implement their obligations; the least developing countries are granted a transitional phase of up to eleven years.<sup>140</sup> National treatment and most-favored nation obligations, however, are mandatory from January 1, 1996.<sup>141</sup> Despite the transitional periods, Article 65(5) prohibits countries from using the transition periods to reduce levels of protection inconsistent with the TRIPS Agreement. Article 67 thereof provides that developed member states shall provide, upon request and mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least developing countries.

Furthermore, since TRIPS merely provides minimum standards, it does not give any member state an excuse for withdrawing from its international obligations under another intellectual property convention. Some believe that the TRIPS Agreement already had *de facto* effect as an international norm, even before its formal *de jure* recognition in Marrakesh in April 1994. Hence, some argue that TRIPS has a *de facto* effect even before the end of the transitional phase accorded to the developing states, when they technically accept *de jure* responsibility for their obligations.<sup>142</sup>

Arguably, recognition of intellectual property rights continues to be the ideal. But from a trade theory perspective, a single, worldwide intellectual property protection standard may be neither pragmatic nor rational. Patent protection is *a form of monopoly rent to the innovator that may create a monopoly of knowledge*, by excluding smaller competitors from the market

139. TRIPS, *supra* note 81, arts. 2(1) & 9(1). For an overview of the salient points of the TRIPS Agreement, see Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 396-397 (1996).

140. TRIPS, *supra* note 81, arts. 65, 66 & 69.

141. TRIPS, *supra* note 81, art. 65.

142. Otten & Wager, *supra* note 139, at 407-409.

who may be able to imitate and enhance the product to increase its intrinsic or social value. For developing countries without a firm industrial base, the TRIPS Agreement may insure an import monopoly for the patented products, and there would be little incentive for such countries to compete with the imported technology.<sup>143</sup>

Trebilcock and Howse rightly assert that “[t]he level of intellectual property protection each country decides to afford will thus be rationally related to whether its comparative advantage resides more in innovation or imitation and adaptation of innovations made elsewhere, and the relative weight it gives to the interests of consumers (including its own producers who are consumers of inputs), imitators, and innovators.”<sup>144</sup> The conventional view is that many countries agreed to higher intellectual property standards in order to gain, or maintain, continued access to the developed country markets that afford stricter protection to intellectual property.<sup>145</sup> Indeed, this conventional assertion may be the only realistic viewpoint.<sup>146</sup>

The high performing economies among the developing countries possess the industrial capacity to replicate the foreign technology, and could compete effectively with the

143. Samuel A. Oddi, *TRIPS -- Natural Rights and a Polite Form of Economic Imperialism*, 29 VAND. J. TRANSNAT'L L. 415, 460 (1996).

144. MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 248-250 (1995).

145. Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 1, 166-167 (1994).

146. Edmund Kitch contends that developing countries should be motivated to join the world intellectual property system based largely on the American model simply because it is in their self-interest to do so. He writes: "If patent protection is weak or non-existent, industries will develop that rely for their existence on their ability to ignore the international patent system. Once these industries have developed, they have an interest in resisting any change in the rules. Although it may be in the overall, long run interest of the country to participate in both form and substance in the international patent system, the adversely affected industries will have incentives to expend their political capital to keep that from happening." Kitch, *supra* note 145, at 178. While this argument appears to be logical, experience has shown that once the East Asian NIC industries have determined that it is in their interest to participate in the intellectual property system for their own trade advantage, then they do so. The main point advanced here is that *need and interest dictate, and will continue to dictate*, the decision to conform to the imposed intellectual property standard, and not because of any perceived intrinsic value in conforming to it.

creators of the technology.<sup>147</sup> If forced to comply with TRIPS, the NICs would suffer losses in the immediate term, since enforcement of intellectual property laws would retard copying the technology. However, a strong technological base would enable them to produce their own adapted technology. Thus, in the long run, the worldwide patent system, may be beneficial to the NICs.<sup>148</sup>

Nevertheless, it is the height of naivete to assume that the less developed WTO members, with hardly the technological capacity to innovate or even to replicate inventions, and with a limited market, can benefit from increased protection. With no industrial infrastructure or efficient administrative system, patent protection of first world technology would provide no long-term advantage to less developed countries. Unless TRIPS concretely aids the industrialization efforts of the developing countries and confers upon their consumers sufficient disposable income to purchase such inventions, the economic benefits of TRIPS will accrue mainly to the developed countries<sup>149</sup> and to those industrializing countries where intellectual property protection has gained a comparative advantage. Evidently, this is not the overriding objective of the TRIPS Agreement, which is to increase economic welfare through freer trade; if it were, imposing foreign legal standards on unwilling states in the name of harmonization would be a sophisticated form of neo-imperialism.<sup>150</sup>

A strict enforcement of the TRIPS agreement would, in an age of rapid technological innovation, reduce the number of options available to a country to respond to the influx of imported patented or copyrighted technology. Trade-offs between

147. Oddi, *supra* note 143, at 458.

148. *Id.* at 459.

149. *Id.*

150. This turn of phrase is derived from a statement of Steven P. Ladas in 1975, and was popularized in much of the intellectual property law literature by the scholar Jerome H. Reichman, *Intellectual Property in International Trade: Opportunities and risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 813 (1989). According to Reichman, "[i]mposition of foreign legal standards on unwilling states in the name of 'harmonization' remains today what Ladas deemed it in 1975, namely, a polite form of economic imperialism," *citing* STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 14-15 (1975).

innovation and imitation differ from country to country, depending on whether innovation is a major source of economic growth.<sup>151</sup> From this economic viewpoint, it is neither unreasonable nor unethical for many developing countries to have preferred a less stringent intellectual property regime. Since some of these countries often lack the assets to create their own intellectual property, obliging them to provide intellectual property protection for foreign entities is tantamount to requiring them to favor foreign over domestic interests. Furthermore, most intellectual property laws in these environments are instituted to protect domestic intellectual property holders, and not for the benefit of foreign intellectual property.<sup>152</sup>

In East Asia, as well as in other parts of the world, the nations that are least developed economically are those that favor the a low level of intellectual property, while the more economically developed ones adhere to a regime somewhat approaching the Western standards.<sup>153</sup> All indications suggest that it is the level of economic development, and not any definitive economic policy or strategy that determines the degree of devotion to intellectual property protection. It is a fact that East Asian nations such as Japan, South Korea, Taiwan, Hong Kong, and China, flourished economically because of their supposedly “unauthorized” use of copyrighted foreign technology.<sup>154</sup>

The other factor to consider in this context is that the concept of intellectual property rights is a European construct, which may not be germane to a particular socio-cultural environment. In East Asia, Chinese Confucianism continues to exert a strong

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151. TREBILCOCK & HOWSE, *supra* note 144, at 251.

152. Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 92 (1994).

153. William P. Alford, *How Theory Does -- and Does Not -- Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 15 (1994).

154. *Id.* at 16. Duane W. Layton, *Japan and the Introduction of Foreign Technology: A Blueprint for Less Developed Countries?*, 18 STAN. J. INT'L L. 171 (1982); Sang-Hyun Song & Seong-Ki Kim, *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 118 (1994); Chung-Sen Yang & Judy Y.C. Chang, *Recent Developments in Intellectual Property Law in the Republic of China*, 13 UCLA PAC. BASIN L.J. 70 (1994).



influence in the legal culture. The countries at the forefront of the East Asian economic miracle have all been profoundly influenced by Confucian values, which have either consciously or unconsciously aided in their economic development.<sup>155</sup> Confucianism's model of a good society is one based on mutual consideration of the needs of others.<sup>156</sup> Ideas or creations are not owned by their progenitors but are to be deemed part of the public domain. In most of the East Asian NICs influenced by the Confucian ethic, the interaction of individuals and society is valued as much as an individual's rights. This is reflected to varying degrees in the formulation of their intellectual property laws.

Adherence to higher standards of intellectual property protection came about within these countries, not through belated enlightenment to the virtues of such protection, but simply as a pragmatic response to a changing business environment. When it became competitively viable or politically necessary to embrace stricter levels of intellectual property protection, laws were revised or overhauled to adjust to the realities of the international marketplace. However, attitudes toward such protection did not necessarily change, nor *did they have* to change. Hence, enforcement of strict intellectual property laws remains a different issue — and problem, — altogether. Moreover, these legislative conversions occurred after a period of time during which intellectual property was not protected in the Western, non-Confucian sense, which allowed such countries to innovate from Western technologies and improve the pace of their economic development.

In most cases, the development of intellectual property law accelerates when the country's economy *requires* it, either because it is necessary to guarantee access to an important export market, or when its level of technological prowess necessitates higher protection of intellectual resources. Before this "comfort level" is reached, imposing higher levels of

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155. Umehara Takeshi, *The Civilization of the Forest*, 7 NEW PERSPECTIVES QUARTERLY 3, 29-30 (1990).

156. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 8-60 (1990).

protection may, in fact, impede economic development. At worst, it can reinforce a developing country's lower state of economic development *vis-à-vis* richer developed and developing countries. Some examples follow to illustrate this thesis.

Under the Japanese patent system, which constitutes a keystone to her industrial success, the Japanese took advantage of the exploitation-of-invention scheme, and paid little attention to the protection-of-invention guaranteed by the U.S. patent system. The Japanese patent system presumes that inventions can be made by industries and corporations, and not only by individuals. The objective of exploiting inventions is "the free dissemination of information and the guarantee of competitors' rights to "invent around" published inventions and exploit technology in the public domain."<sup>157</sup> Technology is something to be shared and distributed; the goal of development is not the fortune of any particular inventor, but constant innovation, which goal is best served by making technological information available to all.<sup>158</sup>

In South Korea, conventional attitudes toward such rights have not changed greatly, even though intellectual property laws have been strengthened due to outside pressure to conform to some standardized system. Without a perception of and conviction regarding the importance of intellectual property rights, enforcement can be difficult.<sup>159</sup> South Korea was induced to upgrade intellectual property protection when foreign investors turned to the second-tier NICs in Southeast Asia for more lucrative opportunities. At that point, South Korea needed higher technology industries to sustain its economic growth.<sup>160</sup> Patent protection encouraged the pharmaceutical industry to engage in more research and development, enacted legislation for compulsory licensing of

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157. Toshiko Takenaka, *The Role of the Japanese Patent System in Japanese Industry*, 13 UCLA PAC. BASIN L.J. 25, 29 (1994).

158. Dan Rosen & Chikako Usui, *The Social Structure of Japanese Intellectual Property Law*, 13 UCLA PAC. BASIN L.J. 32, 50-51 (1994).

159. For an exposition of South Korean intellectual property protection, see Song & Kim, *supra* note 154, at 118, 120-121 (1994).

160. *Id.* at 119, 138.

registered semiconductor chip layout-design, and spurred the growth of the publishing and software industries.<sup>161</sup>

Taiwan is not a signatory to any international convention, including the GATT, WTO and the international property conventions. But in the past years, Taiwan has taken steps to speed up the pace of protecting intellectual property rights.<sup>162</sup> Often, it has to rely on bilateral negotiations to resolve its trade disputes in the international community. Taiwan is especially sensitive to U.S. pressure, because of its large trade surplus with the U.S. and the threat of retaliatory measures under the Special 301 provisions of the Omnibus Trade Act.<sup>163</sup>

## X. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The General Agreement on Trade in Services (GATS) breaks new ground, since it represents the first extension of the global multilateral trade regime to cover the liberalization of trade and investment in services. On average, services now account for nearly three-fourths of the production and employment in industrialized countries. Although the role of services in the global economy is increasing, the service sector is protected in both developed and developing countries, usually through domestic regulatory regimes. Because services are not tangible like goods, they are not affected by tariff barriers, and thus require another trade framework for their international regulation. With the incorporation of GATS into the world trade order, the WTO advances the philosophy that the institutional control of services is necessary to remove impediments to the free flow of services and thereby accelerate global economic growth. The GATS attempts to lay

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161. *Id.* at 127-128, 134-137.

162. For the latest developments in IPR in Taiwan, see Yang & Chang, *supra* note 154.

163. For an overview of Special 301 actions against Asian countries, see Liu, *supra* note 152, at 113-116.

international ground rules for governmental actions affecting transactions in services.<sup>164</sup>

The GATS is based a framework agreement that defines the obligations of the WTO members. It also includes: schedules of specific commitments made by each WTO member in regard to specific sectors, sub-sectors, or activities, which may or may not be subject to particular qualifications; eight annexes that address sector-specific or horizontal matters; and Ministerial Decisions pertaining to the establishment of work programs for trade in professional services and terms of reference for future negotiations on maritime transport services.<sup>165</sup>

164. It is not the intent of this section to explore the scope of the GATS in detail, but merely to point out its features in relation to the basic theses of this article. For a concise discussion on the GATS see Bernard Hoekman & Pierre Sauve, *Liberalizing Trade in Services*, 243 WORLD BANK DISCUSSION PAPERS (World Bank 1994). Other authors on the GATS include: Aaditya Mattoo, *National Treatment in the GATS: Corner-Stone or Pandora's Box*, 31 J. WORLD TRADE 107 (1997); L. Altinger & A. Enders, *The Scope and Death of GATS Commitments*, 19 WORLD ECONOMY 307 (1996); A. Ahnlid, *Comparing GATT and GATS: Regime Creation under and after Hegemony*, 3 REV. INT'L POL. ECON. 650 (1994); P. Low, *Impact of the Uruguay Round on Asia: Trade in Services and Trade Related Investment Measures*, Paper Presented at the Asian Development Bank Conference on the Impact of the Uruguay Round on Asia, Manila, Philippines (1995).

165. The World Trade Organization Financial Services Agreement (FSA), completed on December 13, 1997, included market-opening commitments by 102 WTO members, which take effect in early 1999. Article 1 of GATS enumerates the following measures affecting trade in services:

- (a) cross-border: from the territory of one Member into the territory of any other Member;
- (b) consumption abroad: in the territory of one Member to the service consumer of any other Member;
- (c) commercial presence: by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) presence of natural persons: by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

In summary, Article XVI of GATS stipulates that in measures where market-access commitments are undertaken, measures which a Member shall not maintain or adopt either on a regional or national basis, unless otherwise specified in its schedule of commitments, include limitations on:

- (a) the number of service suppliers;
- (b) the total value of service transactions or assets;
- (c) the total number of service operations or the total quantity of service outputs;

The GATS Agreement covers all possible modes of supplying services. Under the Most Favored Nation (MFN) rule in Article II of the GATS Agreement, WTO members commit to treat services provided by one member state in the same way as services from any other member. However, the same article allows members to maintain measures inconsistent with MFN treatment provided that the measure is listed and meets the conditions of the Annex on Article II Exceptions, the latter to be further negotiated in subsequent liberalizing rounds. Due to concerns of service providers in developed countries that an unconditional MFN “would allow countries with restrictive policies to maintain the status quo and ‘free ride’ in the markets of more open countries,” MFN derogations were left in the agreement, especially in the areas of telecommunications,<sup>166</sup> financial services,<sup>167</sup> maritime transport, audio-visual services and air transport.<sup>168</sup> The MFN derogations set forth in the Annex on Article II Exemptions, are generally not to exceed a period of ten years, and shall be subject to negotiation in subsequent trade liberalization rounds.

While the spirit of the GATS Agreement aims to embrace practically all dimensions of the services sector, the obligations enumerated in the Agreement are triggered only if a member state schedules a particular commitment. Free trade in services exists only if the mode of supply in a specific sector is

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- (d) the total number of natural persons that may be employed in a particular sector;
  - (e) restricting and requiring specific types of legal entity or joint venture which a service supplier may supply;
  - (f) foreign equity participation in terms of maximum percentage limit.

166. No agreement on basic telecommunications could be reached when GATS and the WTO agreements were signed in Marrakesh in 1994. On February 15, 1997, sixty-nine countries taking part in the Group on Basic Telecommunications — a negotiating group within the WTO — reached an agreement covering basic telecommunication services. The agreement takes the form of a Protocol to be attached to the GATS, and is officially designated as the Fourth Protocol of the GATS. For a detailed elaboration of the telecommunications agreement. See C.E.J. Bronckers & Pierre Larouche, *Telecommunications Services and the World Trade Organization*, 31 J. WORLD TRADE L. 5 (1997).

167. See Yi Wang, *Most-Favoured-Nation Treatment under the General Agreement on Trade in Services -- and its Application in Financial Services*, 30 J. WORLD TRADE L. 91 (1996).

168. Pierre Sauve, *Assessing the General Agreement on Trade in Services, Half-Full or Half-Empty?*, 29 J. WORLD TRADE L. 125, 130-131 (1995).

untrammelled by conditions in the member's schedule. Otherwise, the commitment is conditional.

Moreover, the obligation to treat foreign service suppliers the same way as domestic foreign suppliers, which is the national treatment obligation in the GATT/WTO, is not an all pervasive rule under the GATS Agreement. While sectoral coverage is universal, the schedules may be qualified by limitations on the national treatment obligation. National treatment only applies selectively to sectors and activities, pursuant to the terms and conditions stated by each individual member country in its schedule of commitments. The GATS Agreement acknowledges that treatment of foreign and domestic suppliers may not always be identical, provided the competitive conditions facing foreign suppliers do not deteriorate. Uncertainty as to the precise meaning of the national treatment obligation, and the resulting differences in interpretation of the scope and extent of these obligations, may forestall the GATS' objective of creating a predictable trading environment for services.<sup>169</sup>

Thus, while incorporation of the GATS into the GATT/WTO architecture does shift the center of gravity from trade in goods towards services, the core of GATS is more fluid than definite, and depends largely on the relative relationships among member states, embodied in their schedules of commitment. The schedules of commitment involve a multilevel interplay of sectors, modes of supply and activities, and are qualified by a continuous negotiation for exemptions and limitations. Thus the GATS Agreement, in the long run, depends once again on the relative negotiating positions and comparative strengths of the parties *vis-à-vis* each other, as well as on their relationship to the whole corpus of GATS commitments. Further, if no schedules of commitment are made in any particular sector or sub-sector, then no liberalization of services takes place. The GATS does not require a change in the regulatory environment of the member states. If liberalization allows market access for outside suppliers, but is not matched by an antitrust policy to enhance competition, then the effect of openness in the service

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169. See the extensive discussion in Mattoo, *supra* note 164, at 198.

sector would not be felt.<sup>170</sup> Developing countries will have to decide how quickly to integrate their economies with the rest of the world. However, as the Asian crisis demonstrates, such integration will hold dangers if the doors are suddenly swung open to foreign capital, without efficient financial infrastructures to control their flow.

*The making of the rules, therefore, relies on the makers of the rules.* This is not to say that GATS is hopelessly flawed. As with any new major liberalization thrust, the process towards its ultimate objective is a gradual one. What is significant here is that the complex interplay of power interrelationships between member states intrudes on the theoretical "rule of law" balance advocated by the GATS.

## XI. THE EAST ASIAN ECONOMIC CRISIS

The East Asian NICs will pay a heavy price as a consequence of the recent East Asian economic crisis, whether or not they are to blame.<sup>171</sup> In the context of the necessary devaluations of

170. Bernard Hoekman, *Assessing the General Agreement on Trade, in SERVICES IN WORLD BANK DISCUSSION PAPERS*, No. 307, 327, 348-349 (Will Martin & L. Alan Winters eds., 1995).

171. The East Asian financial shock began with Thailand's currency devaluation against the dollar in July of 1997. Prior to decline of the baht, foreign lenders poured money into Thailand because of its surging economy. Thais borrowed abroad because of lower rates, in U.S. dollars. Flush with foreign money, Thai financial institutions lent heavily. Some customers borrowed in dollars, not anticipating that the baht would lose value against the dollar. Others squandered their loans on non-productive investments. When foreign investors became worried about the Thais' ability to repay, they began moving their money out of Thailand and converted their money from baht to dollars. At first, the Thai central bank tried to prop up the baht by buying up baht with its dollar reserves and raising its interest rates to discourage baht sales. By July, the Thai central bank began to run out of dollars until it stopped defending its currency.

The debacle in Thailand affected investors and borrowers in neighboring Southeast Asian nations who shared Thailand's problems of high foreign debt and questionable lending practices. People in Malaysia, Indonesia and the Philippines started converting their currencies into dollars until the ringgit, rupiah and peso fell in value. The panic spread to Hong Kong, causing a fall in stock prices. Hong Kong, however, was able to keep its currency value against the dollar because the Chinese central bank, with its \$88 billion in foreign reserves, was able to defend the Hong Kong dollar. Korea suffered next because, like the other countries, its development was fueled by heavy borrowing. In November 1997, the won collapsed. Later, the Japanese securities giant Yamaichi collapse, calling attention to Japan's wobbly financial

various East Asian currencies and the draconian measures required by the International Monetary Fund and the United States to restructure the economies, continued liberalization is a double-edged sword. On the one hand, these strategies will ensure that foreign investors will still be predisposed to consider increased investments in these East Asian economies. On the other hand, the East Asian countries affected will have to play another game of "catch up" once again, under global trading rules that will maintain the comparative advantage of the higher technology and more advanced economies.

Currency devaluations will naturally make manufactured goods from East Asia even cheaper to the West, and leave profits depressed in the manufacturing industries. Until such time as exchange rate adjustments clear the huge glut of manufacturing capacity born out of the export-driven strategies of the East Asian NICs, the tradeable goods will eventually have to be unloaded on the less affected, developed country markets, pushing prices downward. As an Asian country's currency falls, the competitiveness of its products is enhanced, which puts pressure on the currencies of its competitors.<sup>172</sup> Trade friction will almost certainly ensue, because the deflationary trend would provoke larger trade deficits with the United States and Europe.<sup>173</sup> The United States has already experienced this downturn in exports in its shipments of goods to the region, including Japan, China and Australia.<sup>174</sup> This, in turn, might well provoke the use of contingency protectionist —

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system, where banks are also affected by a mountain of bad debt. *Asia's Financial Shock: How it Began and What Comes Next*, WALL ST. J., November 26, 1997, at A11.

172. Martin Feldstein, *Japan's Folly Drags Asia Down*, WALL ST. J., November 25, 1997, at A22. This article encapsulates Japan's role in the East Asian crisis, which more or less reflects the basic flaws of the Japanese model of development. It notes that "[i]t was therefore Japanese monetary and banking policies that encouraged and facilitated the large current account deficits of Southeast Asia and of South Korea. The low interest rates offered by the Japanese banks and their relatively lax credit standards made it possible for Asian borrowers to incur large amounts of foreign debt, much of it denominated in dollars. The Japanese banks were eager to lend abroad because of the low interest rates and weak demand for credit at home. And they liked lending in dollars because of the higher interest rate receipts. When the yen fell relative to the dollar, however, many Asian borrowers found that they could no longer service their debts." *Id.*

173. *Global Growth at a Crossroads*, BUS. WK., November 24, 1997, at 190.

174. *Symptoms of the Asian Flu are Showing Up*, BUS. WK., April 6, 1998, at 31.



particularly anti-dumping — measures still built into the WTO system, and worse, make the threat to use unilateral trade measures more palatable to policy-makers in the advanced economies.<sup>175</sup> The Director General of the WTO specifically addressed these concerns in his remarks in April 1998 at the joint Asian Development Bank/World Trade Organization seminar:

A more real concern is what might be termed creeping protectionism — any unwarranted or excessive use of safeguards, antidumping actions or other discretionary policy tools to block out international competition. We in the WTO are watching the situation very carefully. To date there is no evidence of any protectionist measures being taken. But the trade effects of the crisis are only now beginning to be felt. Widening trade deficits could provoke protectionist sentiment; this must be resisted and we will continue to monitor developments carefully.<sup>176</sup>

What the Director General failed to mention, although immediately obvious, is that only the developed WTO member states have the political and economic wherewithal and the sophisticated legislative infrastructure to apply these “discretionary policy tools” to the goods of the affected developing country members. To reiterate, this is a lingering indication of the lopsided balance of interests inherent in the WTO system and the diminished capacity of the weaker states to influence the further revision of the rules that comprise the “rule-of-law” architecture of the GATT/WTO system.

The defeat of proposed “fast-track” legislation in the U.S. Congress demonstrates the erosion of support for free trade, at least within the legislative branch of the United States, and

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175. *The Curse of Contagion*, FIN. TIMES, Weekend November 22/November 23, 1997, at 6.

176. WTO Website, *Director General's Opening Remarks, The Joint ADB/WTO Seminar, April 29, 1998* <[http://www.wto.org/wto/new/adb\\_wto.htm](http://www.wto.org/wto/new/adb_wto.htm)>.

may presage the freer use of economic sanctions against target countries.<sup>177</sup> The U.S. Congress has already imposed trade sanctions against Burma. Other Southeast Asian countries may be potential targets, since their government policies or laws conflict with U.S. labor, environmental, human rights or religious standards.<sup>178</sup>

In an expected display of *Schadenfreude*, some economists and pundits have been quick to point out that the crisis in Asia confirms the repudiation of the unique Asian model based on Japan's phenomenal success, which "combined the dynamism of the market with the advantages of centralized government planning."<sup>179</sup> In plain language, "politicians picked industries to support; business leaders duly investment in them; and banks put up the money."<sup>180</sup> Ostensibly, the collapse of the East Asian bubble exhibits many of the features of over-expansion, such as over-investment, non-productive investments, poor lending practices, overly rapidly credit growth, unsustainable economic policies, and even conspicuous consumption.<sup>181</sup> Furthermore, the much heralded closeness or coziness of the government and industry which guaranteed astonishing economic growth, also led to exploitation by political leaders (corruption) and the relaxation of rules

177. For an overview of fast-track legislation, see I.M. DESTLER, *RENEWING FAST-TRACK LEGISLATION* (Institute for International Economics 1997).

178. Paul Craig Roberts, *A Growing Menace to Free Trade: U.S. Sanctions*, *BUS. WK.*, November 24, 1997, at 28.

179. *Asian Economies: More Myth than Miracle?*, *THE WASHINGTON POST*, November 25, 1997, at 1.

180. *Stumbling Giants*, *TIME*, November 24, 1997, at 74.

181. An editorial in the *Financial Times* succinctly encapsulates the crisis:

Fast growth encouraged over-dependence on debt. It also raised the prices of land, inducing massive debt-financed investment in poor-quality projects. Where exchange rates had been fixed, much of this borrowing was in foreign exchange. Such rickety financial structures can survive only as long as rapid growth and stable exchange rates also do. Once these underlying conditions disappear, lenders find their collateral impaired and the sale of assets by bankrupt borrowers further reduces its value. Bad debts grow, while foreign lenders flee. The weakening currency induces a rush into safe havens abroad. Once this happens, intrinsically sound borrowers can easily be pushed into bankruptcy. Investment halts and growth slows down even more, further aggravating the panic.

*A Threat to the World*, *FIN. TIMES*, November 20, 1997, at A13.

pertaining to lending and the disclosure of financial information.<sup>182</sup> It should not be forgotten, however, that much of Asian business practice was, and is still based on personal contact and trust which have their roots in the traditional values of the ethnic Chinese which dominate much of the commerce of the region.<sup>183</sup> It can be said that what Asia suffered from was too much growth, and over-ambitious economic planning, in other words, that it had exceeded the optimum level of growth.<sup>184</sup> Banks had become not merely lenders, but investors in many failed enterprises. If Asian business practices have to be modified, then they should indeed be altered. But this does not constitute a blanket repudiation of traditional ways of doing business, rather, it points out their incongruity with the more complex and demanding requirements of transparency and risk analysis in the global economy.

The prominent economist Jeffrey Sachs, Director of the Harvard Institute for International Development, claims that Asia's crisis was caused by the panicky outflow of international capital, rather than by any fundamental weakness. He has been quoted as stating, "[w]hat we have experienced is massive inflows based on high optimism about the region followed by massive outflows that one can only characterize as a panic. . . . While it is fashionable to talk about the crony capitalism in Asia and the myths of East Asian economic performance, I believe that — while those weaknesses are real — they cannot begin to account for the collapse."<sup>185</sup>

Despite the flaws that have surfaced in this Japanese-inspired model of development — now criticized as only a good "catch-up" model — it was the only viable model at the time that could enable the former primary producers of East Asia to break into the world economy and compete effectively. While the

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182. *Id.* at A13; *East Asia Swallows its Pride*, FIN. TIMES, November 24, 1997, at 27.

183. *Culture Shock*, FAR E. ECON. REV., April 16, 1998, at 54-55.

184. *What Asia May Need is Far Slower Growth*, WALL ST. J., November 3, 1997, at 1.

185. Quoted in Nayan Chanda, *Rebuilding Asia*, FAR E. ECON. REV., February 12, 1998, at 48.

emergence of another model may be necessary to lift the East Asian NICs out of the doldrums — for example one modeled on a paradigm of good governance, transparency and fiscal discipline — the decline of the East Asian juggernaut does not render its unique approach to development any less useful. What occurred was simply a degeneration of the Asian model of development due to the lack of checks and balances, which are a prerequisite to success in the global economy.

In this period of East Asian decline, many have forgotten that many economists and other scholars from both East and West wrote volumes extolling the East Asian miracle, and that politicians and statesmen from other regions sought to emulate the East Asian example by initiating similar trade policies. In the few months prior to the East Asian collapse, the IMF and World Bank praised the East Asian economies, and cited their “sound fundamentals” — budget surpluses, balance of payments, high savings, low inflation and export-oriented industries. When the Asian bubble “burst” the IMF reverted to its “I-told-you-so” attitude and prescribed its usual mix of draconian cuts in social spending, devaluation of the currency, raising of interest rates, and opening the domestic economies to foreign ownership. The bottom line of many IMF prescriptions is to protect the interests of creditors, even to the detriment of the debtor nations.<sup>186</sup>

The myth of the East Asian Miracle is as attributable to the foreign investors who saw large opportunities in Asia, as it is to the economic policies of the countries themselves. The East Asian Miracle would not have occurred, if the already developed countries and the multinational financial institutions had refused to fuel its growth. Between 1993 and 1996, money managers from the United States, Europe and Japan pumped short-term foreign credit into Thailand, Indonesia and Malaysia. By the end of 1996, according to an

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186. Joseph Stiglitz, chief economist of the World Bank, is an ardent critic of IMF austerity policies. He argues that the IMF bailout conditions in East Asia might cause a “severe recession” and were not necessary for macro-stability or long-term development. See Soren Ambrose, *The IMF Has Gotten Too Big for Its Riches*, THE WASHINGTON POST, April 26, 1998, at C2.

IMF estimate, European banks had lent \$318 billion, and their Japanese and American counterparts \$260 billion and \$46 billion respectively, to the East Asian countries. When the crisis broke in Asia, mutual fund investments in the region stood at \$38.5 billion. Foreign banks frequently lent blindly, with little or no due diligence, due to the competitive pressures and the erstwhile attractiveness of the region.<sup>187</sup> In other words, the fall of the East Asian tigers could be attributed not only to the bad governance on the part of the East Asian governments, but also to the pressures of financial globalization as well.

For example, in the three years leading up to the crisis, Thailand had savings to support 6.7% growth, but with foreign loans and investment, could grow at 8.2% on average. Malaysia's potential growth rate was 7.5% for 1993 to 1996, but was fueled to 9% with foreign lending. Indonesia's real growth averaged about 7.8%, compared to its potential growth of 7.2%. Foreign investors pumped loans into Asia despite plunging returns. But a majority of those loans were short-term. Hence, the accumulation of maturing loans was the proximate cause of the crisis.

The Asian crisis can also be viewed as a kind of a bank-run, in which international banks deserted their borrowers when international confidence in the Asian currencies declined. Developed markets were the primary export targets of these NICs, whose domestic markets were small and relatively unsophisticated, but the export-led strategy would have failed if the goods had not been priced competitively and thus were not welcomed by the importing nations.

The APEC (Asia Pacific Economic Cooperation) meeting held in Vancouver, Canada in 1997 merely reiterated APEC's avowed mission to liberalize trade among eighteen Pacific Rim nations, including the United States, Canada, Japan, Korea and China, and the troubled Southeast Asian economies such as Thailand, Malaysia, Indonesia, the Philippines. At this meeting, the

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187. *Rebuilding Asia*, FAR E. ECON. REV, February 12, 1998, at 47.

leaders renewed their commitment to opening their markets to one another, instead of reacting to the crisis by becoming more protectionist. However, one cannot gloss over the fact that the definition of "liberalization" is elastic. While some countries wanted firm timetables for cutting tariffs, a number of Asian countries declared that liberalization need only involve "economic and technical cooperation" with other members, and that decisions on the reductions be made voluntarily, and not by all countries. In the long run, what matters are the detailed work programs to be hammered out during the six months after the summit. It is certain that the events in East Asia in the near term will affect the final scheme to be formulated.<sup>188</sup> Thus, the general commitment to liberalization manifested during the forum may not be a sufficient guarantee.

The APEC nations also gave their blessing to allow the International Monetary Fund to dictate the terms needed to rehabilitate the ailing economies.<sup>189</sup> The bitter medicine the IMF intends to impose are measures to reduce wasteful subsidies, eliminate pork-barrel projects, close insolvent banks, and adopt other politically unpopular belt-tightening policies that seem anathema to the close relationships between the government and private sector in many East Asian economies.<sup>190</sup> There are critics, however, who believe that the IMF prescriptions actually "punish the victim" and that the stringent measures (e.g., fiscal austerity and high interest rates) might transform a "temporary lapse in investor confidence into a full-blown global recession" and ultimately do more harm than good.<sup>191</sup>

Paradoxically, China has been shielded from the Asian economic downturn because it is not a member of the World Trade Organization, and hence it is outside the international economic order. China could thus still protect its domestic

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188. *Elastic Approach to Free Trade*, FIN. TIMES, November 24, 1997, at 3.

189. *Summit Stresses Trade, Leaving Bailouts to IMF*, THE WASHINGTON POST, November 27, 1997, at B11.

190. *Id.* at B12.

191. *Critics Challenge IMF's Plan for Asia*, WASH. POST, November 29, 1997, at C1-C2.

manufacturers as it maintains its outward-looking export strategy. And since China's currency is not fully convertible, it is partly immune from the currency speculation that caused an outflow of investment from the Asian region.<sup>192</sup> By contrast, the Asian region, as a whole, has already been devalued as an emerging stock market region, having been overtaken not only by Latin America but also by Eastern Europe.<sup>193</sup> Unlike the Mexican currency crisis, the East Asian malaise reflects the inherent flaws of the "catch-up" system, and requires a drastic alteration of its development approach if it is to conform to the rules of global economy. It will be difficult for the economically afflicted countries in Asia to reform on their own, without an international, multilateral component that can help support the tough changes necessary to restructure the financial and developmental systems.<sup>194</sup>

More concretely, the effects of the Asian currency turmoil will be noticed in the inability of the governments to make politically sensitive commitments in areas which have been increasingly linked to trade, such as the environmental and labor standards. For instance, global talks on liberalization of the financial services market are expected to receive weaker commitments from the affected Asian states.<sup>195</sup> The WTO dispute settlement system, in light of this crisis, will become either more important or more a nuisance than ever. It will either serve as the last resort of Asian industrializing countries buffeted by the decline of the East Asian miracle economies, or will yield to a resurgence of negotiated settlements outside the WTO framework. The latter alternative may be more prevalent in an economic crisis, when the constraints of the system are too restrictive. What is certain is that the East Asian problem will cause a dislocation of the notion of balancing interests that is distinctive to the WTO design. To

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192. *China's Trade Barriers Provide Shelter in Asia's Storm*, INT'L HERALD TRIB., November 26, 1997, at 18.

193. *Asia's Emerging Markets Fall Back*, FIN. TIMES, November 28, 1997, at 19.

194. See Karl D. Jackson, *Introduction: The Roots of the Crisis*, in *ASIAN CONTAGION: THE CAUSES AND CONSEQUENCES OF A FINANCIAL CRISIS* 1, 23 (Karl D. Jackson ed., 1999).

195. *Better Offers Expected at WTO Financial Services Talks*, FIN. TIMES, November 11, 1997, at 6.

date, the resolution of disputes appears to be moving forward at an accelerated pace, considering the large number of cases filed by non-traditional claimants. But the decided cases at both panel report and Appellate Body levels demonstrate that no fundamental test case involving a clash between the East Asian panoply of trade interests, on the one hand, and the sophisticated trade protection measures of the developed countries, on the other, has yet arisen. It remains to be seen whether countries in the WTO scheme will continue to subordinate their national interests, and the narrow group interests embraced therein, to the survival of the global trading order in its present asymmetric configuration.

## XII. CONCLUSION

The primary purpose of this article is to illustrate in detail how the purportedly rule-based system of the GATT/WTO trading order is not, in reality, truly a system based on the rule of law. Rather, it is a formally rule-based system that co-exists with a trade regime that is still based on the relative economic and political power-based relationships among the member states. The entire proliferating corpus of rules and trade law “jurisprudence” has created a mainstream philosophy that advances the notion that the global trading order is, indeed, moving towards a rule of law scheme. When used in connection with the new linkages between trade and non-trade issues, rule of law is really a euphemism for further concessions by East Asian NICs to the American and European agendas in the new “millennium round” of global trade negotiations, slated for the year 2000.

Given the troubled state of many Asian economies, further liberalization under the existing trade regime might actually worsen the economic turmoil and could, as the IMF prescriptions, add fuel to the fire still raging in the region’s economies.

Having to open various sectors of their economies to foreign competition could not come at a worse time for the recovering East Asian economies. The issues currently under discussion



are sensitive areas of immediate concern to the developing nations, including agriculture, services, intellectual property rights, labor and children's rights, subsidies, anti-bribery measures, trade and competition policy, and the environment. Even a cursory consideration of these matters would lead to another clash between severely weakened East Asian negotiators and the visibly strengthened hand of the main supporters of the existing trade order.<sup>196</sup> The ongoing fire sale of the regional "crown jewels" — the regional *keiretsus*, *chaebols* or multinational industrial complexes — might even spark a backlash if foreign companies would tend to dominate the local industries.<sup>197</sup> South Korea's long history of foreign invasion and colonialism has bred a deep-seated "us-versus-them" mentality, which stands as a road block to foreigners trying to gain access to Korea's insulated economy, although this might be the only option available to save debt-ridden *chaebols* and banks on the verge of bankruptcy. The IMF's bailout program, which involves the extension of more than \$57 billion to ease a \$187 billion overseas debt, requires Korea to fling open the doors not only of its conglomerates, but also of its domestic stock and bond markets.<sup>198</sup>

The only viable alternative to the "defensive" posture of the developing nations is the more "assertive" approach suggested by a trade expert of the United Nations Conference on Trade and Development (UNCTAD), who proposes a more equitable exchange of concessions between the Pacific states and the United States and Europe. For example, the Cairns group of agricultural countries could demand better access to European Union markets and the elimination of market-distorting agricultural subsidies, in exchange for receptivity in the area of services and more vigorous implementation of intellectual property rights. East and South Asian countries could push for increased tariff liberalization in textiles, electronics and chemicals, to counteract concessions in trade/environment and pro-transparency, anti-corruption domestic policies which, after

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196. See Shada Islam, *The Heat is On*, FAR E. ECON. REV., May 21, 1998, at 61.

197. *Few Takers So Far at Asia's Great Firesale*, FAR E. ECON. REV., March 5, 1998, at 52-54.

198. *Unlocking the Citadel*, FAR E. ECON. REV., March 26, 1998, at 10-12.

all, cannot be effectively implemented by the enforcement mechanisms of an international body such as the WTO. Most important, a *modus vivendi* should be sought, once and for all, to reduce, if not eliminate the pernicious effects of anti-dumping legislation in the European Union, and to shift the focus of the debate towards negotiations on global competition rules.<sup>199</sup>

The WTO noted in the latest Annual Report by the Director-General that, despite the Asian crisis, there have been no major trade policy reversals, and there is little evidence of market closings in the world, not even in those countries directly affected by the financial crisis. Not only are the multilateral commitments under the Uruguay Round generally respected, but a large majority of countries have recently signed the new Agreements on Trade in Financial Services and on Telecommunication Services, and have committed themselves to the Declaration on Trade in Information Technology Products (ITA). At the same time, however, the WTO's Annual Report admits that "[t]rade frictions between major trading partners seem also to be on the rise. While these tensions are localized and often confined to long-standing issues, they indicate growing sensitivity about market access as global economic activity weakens, regional cycles diverge and current account imbalances increase."<sup>200</sup> It remains to be seen, however, whether the international trading system will hold out of a true willingness to adhere to the principles of liberalization, or if the participation of the less affluent countries continues to be regarded as a "necessary evil" to preclude exclusion from the system. The greatest danger to the system still lies in the economic and political might of the developing countries, which might or might not remain committed to upholding the WTO dispute settlement mechanism when a panel decision runs contrary their national or policy interests. The clash between the U.S. and the EU

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199. Islam, *supra* note 196, at 61.

200. WORLD TRADE ORGANIZATION, OVERVIEW OF DEVELOPMENTS IN THE INTERNATIONAL TRADING ENVIRONMENT, ANNUAL REPORT BY THE DIRECTOR-GENERAL, 4 WT/TPR/OV/4 (Trade Policy Review Body, November 30, 1998).

over the European practice of granting preference to its former African, Caribbean and Pacific (ACP) colonies for imports of bananas will determine whether selective compliance — or conversely “enlightened unilateralism” within the system — will be tolerated or not.<sup>201</sup>

Finally, a caveat and disclaimer. The arguments made in this article are not meant to disparage the efforts of the WTO member countries to build a working trade order founded on the fundamental principles of free and fair trade. The WTO framework and its evolutionary dispute settlement mechanism are legal devices that would have been unthinkable in the postwar era when the GATT was established. Yet history cannot be written, or rewritten solely for the benefit of those who write and enjoy the rules. This article has sought to illustrate that there is a world of a difference between the “virtual reality” formulated by this global trade architecture, and the cold reality that nonetheless dictates the trade behavior of the countries that constitute the system in its actual, working form.

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201. *Banana-trade Split*, U.S. NEWS & WORLD REPORT, January 11, 1999, at 49.