

Broadening the Scope of Remedies in WTO Dispute Settlement *

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INTRODUCTION ----

Unlike most of the “procedural” reforms being considered in this conference, reforms seeking to broaden the remedies available in WTO dispute settlement proceedings cannot be regarded as “technical” issues. Because remedial measures directly affect the level of enforcement pressures applied to governments in violation of WTO obligations, changes in this area confront the central issue of how strong the WTO member governments want their legal system to be. Thus, in order to discuss the prospects for broadening (or strengthening) those remedies, one must begin by trying to understand the nature of the political commitment that WTO member governments have made to the WTO legal system itself.

Part I of this essay examines the underlying political commitment to the WTO legal system. It begins, as it must, with an examination of the political attitudes underlying the GATT legal system that preceded the WTO legal system, and on which the WTO system rests. It then seeks to appraise the significance of the decision to adopt the more rigorous Uruguay Round Dispute Settlement

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This essay owes a considerable debt to the comprehensive study of WTO Remedies, against the background of the customary international law of remedies, by Professor Petros Mavroidis in his chapter on Remedies in MITSUO MATSUSHITA, PETROS C. MAVROIDIS & THOMAS J. SCHOENBAUM, eds., *INTERNATIONAL ECONOMIC LAW*, (Oxford University Press, then forthcoming).

Understanding (DSU) that is the basis of the present WTO legal system. Part II then considers the remedial provisions of the WTO dispute settlement procedure themselves, comparing them with the remedies available under the previous GATT system, and considering the prospects for further strengthening the WTO remedies.

I. THE UNDERLYING POLITICAL COMMITMENT

Legal Enforcement under GATT

Histories of the GATT legal system are usually devoted to uncovering the international law that was created in a world where events of a legal character were typically confined to the shadows. In performing this task of discovery, the usual history concentrates primarily on describing the amount of effective legal activity that has occurred. It tells a story of gradual improvement in legal enforcement. The story focuses on identifiable attempts invoke legal rights, or “cases.” It asks how many cases were brought, and how well they succeeded in obtaining correction of legal violations. The usual history shows that in the 1950s GATT disposed successfully of a reasonable number of legal complaints, albeit with essentially diplomatic methods that resembled walking on eggshells. Following a legal “time out” in the 1960s to digest the EEC and a flood of new developing country members, the story resumes with a slowly growing number of legal “cases” in the 1970's coupled with an effort to codify and strengthen the adjudication procedure. The advance continues in the 1980s, with an explosion in the volume of legal complaints, an increasing juridification of the enforcement procedure, and a significant increase in the importance and political sensitivity of the matters submitted to adjudication. This development then peaks in the adoption of the Uruguay Round Dispute Settlement Understanding DSU in the early 1990s, which legislates a further strengthening and juridification of the dispute settlement procedure.¹

¹ The author's own studies of GATT legal history belong in this category of “usual histories.” See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2nd ed. (Salem, N.H.: Butterworth, 1990); Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, N.H.: Butterworth, 1993).

Told in this way, the usual history under-emphasizes other information about GATT law that would call attention to the fact that there were rather serious limitations on the political commitment governments made to GATT law. The most obvious limitation, of course, was the fact that the entire legal drama took place in a setting in which the leading governments had retained the legal authority not to obey GATT law. GATT law was never given direct effect in their domestic laws.² The fact that governments wanted the freedom to disobey was the starting point from which the GATT legal system had to build. No matter how well GATT legal system succeeded in constructing impediments to the exercise of this freedom, the legal system was always working against this fundamental reservation.

Even when the legal challenge is re-defined as an effort to induce reluctant governments to comply, the usual history's list of legal victories tends to present a potentially misleading picture of the success achieved. It often neglects to catalogue the list of important legal failures that stands alongside the successes. To give a fully balanced picture, the history of GATT law would have to recite (1) the story of the collapse of legal discipline over agriculture in the 1950s (or, rather, its failure to ever get off the ground), (2) the withdrawal of textiles and apparel from GATT legal discipline in the late 1950s, (3) the removal of legal discipline over U.S. petroleum trade at about the same time, (4) the accommodation of "residual" balance-of-payments restrictions when the balance-of-payments justification ended in the early 1960s (5) the withdrawal of the Treaty of Rome from effective legal review during the 1960s, (6) the withdrawal of export financing from GATT supervision through deference to the rules of OECD club, and (7) the rise of largely unregulated anti-dumping measures as a new form of protection.

Once these stories are set alongside the stories of successful adjudication of legal claims, it becomes apparent that the latter -- the success stories -- are stories about enforcement of smaller, more marginal legal claims. The success stories are still important, of course. They do show that

² For a detailed study of the relationship to GATT law to both EC and US domestic law, see Meinhard Hilf, Francis G. Jacobs & Ernst-Ulrich Petersmann, eds., *The European Community And GATT* (Deventer: Kluwer Publishers, 1986). For an up to date survey of the relation to WTO law and domestic laws of ten countries and the EC, see John H. Jackson & Alan O. Sykes, *Implementing the Uruguay Round* (Oxford: Clarendon Press, 1997).

governments were willing to accept legal regulation over a fairly broad range of day-to-day business.

Moreover, the area covered by more or less effective legal discipline did grow over time. As noted above, the success of GATT legal process in the early 1980s induced governments to seek adjudication of legal claims involving more and more important government measures. To be sure, the response to legal claims in these more important cases was often slow, halting and partial. The United States dragged out the *DISC* case for twelve years, and in the end claimed compliance by passing a statute that promised to give exactly the same tax subsidy as the one given by the GATT-illegal DISC.³ The United States likewise deferred compliance with the *Section 337* ruling until after its demands on intellectual property discipline were satisfied in the Uruguay Round, and even after that, it complied with only parts of the legal ruling.⁴ The EC, Canada and Japan quickly followed suit by attaching similar Uruguay Round conditions to compliance with rulings against them.⁵ But notwithstanding these delays and partial defeats, the GATT did manage to bring off positive results in most of these cases. Moreover, GATT achieved demonstrably successful adjudication of several other claims involving matters of considerable political sensitivity — for example, legal challenges to some aspects of Canada’s FIRA legislation,⁶ to the U.S. Manufacturing Clause,⁷ and to the existing regime for EC oilseeds subsidies.⁸

In sum, what one sees at the end of the GATT period is the attainment of a point along an

³ See Hudec, *Enforcing International Trade Law*, supra note 1, Chapter 5.

⁴ See Ernest P. Shriver, “Separate But Equal: Intellectual Property Importation and the Recent Amendments to Section 337,” 5 *Minnesota Journal of Global Trade* 441-465 (1996).

⁵ The three panel decisions in question were: *Japan — Restrictions on Certain Agricultural Products*, GATT, Basic Instruments and Selected Documents [hereafter BISD], 35th Supp.163-245 (1989); *Canada — Restriction on Imports of Ice Cream and Yoghurt*, GATT, BISD, 36th Supp. 68-93 (1990); *European Community — Antidumping Regulation on Imports of Parts and Components* (“Screwdriver Assembly” case) GATT, BISD, 37th Supp. 132-199 (1991). The measures involved in the first two cases disappeared into the “tariffication” process of the Uruguay Round Agreement on Agriculture. The antidumping “circumvention” measure involved in the third case to be negotiated in the Uruguay Round, but after governments failed to agree on that issue the matter was, in effect, left to national law.

⁶ *Canada — Administration of the Foreign Investment Review Act [FIRA]*, GATT, BISD, 30th Supp.140-168 (1984).

⁷ *United States — “Manufacturing Clause” in U.S. Copyright Legislation*, GATT, BISD, 31st Supp. 74-94 (1985).

⁸ *European Community — Payments and Subsidies on Oilseeds and Animal-Feed Proteins*, GATT, BISD, 37th Supp. 86-132 (1991) and 39th Supp. 91-127 (1993).

evolutionary scale. One sees that the member governments had begun to accept legal resolution of a significant number of claims, but that this acceptance did not yet extend to all subjects. One sees that considerable resistance to legal enforcement remained to be wrung out of the political attitudes of the members governments. Although the momentum of the recent past gave reason to hope for continued progress, the complete story warned that things have not advanced so far that ultimate success had become inevitable.

Adoption of the DSU

It may be objected that the corrected version of GATT legal history told above is not really complete, because it omits the adoption of the Uruguay Round Dispute Settlement Understanding. In that agreement, governments agreed to replace parts of the GATT dispute settlement procedure, under which the defendant government had a right to veto both the adoption of legal rulings (the act that made them legally binding) and the authorization of retaliation in case of noncompliance. In their place, the new WTO procedure made legal rulings legally binding automatically and made retaliation automatically available in the event of noncompliance. The fact that governments adopted the changes, it might be argued, shows that governments were, in fact, ready to make a significantly stronger commitment to enforcement of WTO legal obligations.

Alas, the story of how the Uruguay Round dispute settlement reforms came to be adopted does not support these more optimistic expectations. At the beginning of the 1986-1994 Uruguay Round negotiations, GATT governments initially decided to settle for some minor procedural improvements in the GATT disputes procedure. The decision was made in December 1988, as part of an “early harvest” of negotiating results.⁹ The “early harvest” decision on dispute settlement did agree that the steps to formation of a panel would be essentially automatic (codifying what was already all-but-established practice). But on the key issue of the veto power over legal rulings and over retaliation remedies, governments once again declined to abridge the consensus principle that

⁹ GATT, BISD, 36th Supp. 61-67 (1990).

gave the losing party the opportunity to veto such actions. The sentiment at the time was that dispute settlement would work better on the whole if defendant governments participated on a voluntary basis, and that it would not be productive to try to force governments into adjudicatory rulings they were not prepared to accept voluntarily. At this point in December 1988, one could say that it was the considered opinion of leading GATT governments that there had been no significant change in the level of resistance to legal enforcement on the part of most GATT member governments.

What, then, caused GATT governments to change their minds over the next two years? The immediate precipitating event was the considerable intensification of the infamous “Section 301” law in the United States, a law that called for the imposition of unilateral trade sanctions against other GATT members whenever the United States government determined they were in violation of their GATT obligations, or, were behaving in an otherwise unreasonable manner toward U.S. trade. The 1988 trade law passed by the U.S. Congress had created a new “Super 301,” another “Special 301” for intellectual property claims, and yet another “301” for telecommunications complaints, while at the same time adding still more kinds of “wrongful” conduct to the list of trade offenses covered by the basic Section 301 procedure. The other members of GATT viewed the new legislation as extremely threatening, and called a special session of the GATT Council to demand a change of U.S. policy.¹⁰ In reply, the United States justified its resort to unilateral actions by complaining that GATT dispute settlement procedures were too slow, and too weak, to offer adequate protection of United States trade interests. The U.S. argument laid particular stress on the veto power created by the rule of consensus decision-making.

This United States counter-attack led other governments to propose a deal. In exchange for a U.S. commitment adjudicate all WTO-based Section 301 complaints under the WTO dispute settlement system, the other GATT governments would agree to create a new and procedurally tighter dispute settlement system that would meet U.S. complaints. The United States accepted the deal.¹¹

¹⁰ See GATT Doc. C/163 (16 March 1989).

¹¹ The U.S. commitment, contained in DSU Article 23, only requires governments to adjudicate claims that rest on WTO law, since there is obviously no point in requiring governments to seek WTO approval of measures that are not being justified under WTO law. This limitation on the scope of DSU Article 23 was not exactly a loophole, however. The only way a government can defend not adjudicating unilateral trade restrictions under the DSU procedure will be to admit that there is no provision in WTO law authorizing

Within two years of the “early harvest” decision, negotiators had reached agreement on the basic elements of the new WTO disputes procedure.

Had governments suddenly discovered that they were ready to comply with a more rigorous procedure? Hardly. The change of position was a choice between two evils — between an almost certain legal meltdown if the United States were to carry out its new Section 301 instructions, and a very serious risk of legal failure, in the somewhat more distant future, if GATT adopted a dispute settlement procedure that was more demanding than governments were ready to obey. The fact that GATT governments chose the latter option does not mean that they were confident it would work. There is a general rule in diplomacy (and probably in all human affairs) that, when choosing between evils, the evil in the more distant future is to be preferred. So here. No doubt the choice made by the Uruguay Round negotiators was also influenced to some degree by “the voices of their better angels.”¹² There was little proof, however, that the better angels had any more political strength back home than they had had the year before.

As if to underline the point that basic political attitudes had not changed, the GATT/WTO governments wrote a telling footnote to the story of the Uruguay Round negotiations on dispute settlement. By the end of 1991, governments had already reached agreement to adopt the stronger

the restriction, a defense to DSU Article 23 that would amount to an admission that the trade restrictions, having no justification in WTO law, were in violation of WTO substantive provisions prohibiting such measures.

¹² In the author’s view, the gamble taken by the Uruguay Round negotiators was in fact justified by another, equally serious crisis in the GATT dispute settlement system — a crisis that would eventually have required a major strengthening of the system even if the Section 301 threat had not been present. The crisis was being generated by the following situation: The GATT dispute settlement system had succeeded in resolving cases of lesser importance, despite its procedural weaknesses, because the rulings generated by that system were considered sound, objective and authoritative by the “insider” community of trade policy officials who administered GATT affairs for their governments. The greater the GATT’s success, however, the more cases it began to receive, and the greater the importance of those cases. These more important cases generated much wider attention in national capitals, however, and under that greater scrutiny, coupled with the greater political resistance to compliance, opponents had begun to raise certain questions about the GATT’s procedural imperfections:

“Who are these judges, and how did they get this authority?”

“What influence does the Secretariat have, and where did they get their authority?”

“Why do we have to obey this ruling if we can veto its adoption?”

“Why do we have to fear retaliation if we can veto that action as well?”

The more successful the GATT procedure became, the more insistent these questions would become, and the more difficult it would be to answer them. And without satisfactory answers, GATT rulings would not have been able to retain their credibility. In short, the natural consequence of the GATT’s increasing success was that it would be forced to become stronger, and more legally correct. There was in fact no way to stand still.

Some of negotiators were undoubtedly aware of this long term problem, and this may have contributed to their willingness to take the gamble. None of this changed the underlying political commitment, however.

WTO dispute settlement procedure contained in the DSU. But the DSU did not become effective until 1 January 1995. In the interim, government obedience to the “lame duck” GATT dispute settlement system disintegrated. Provisional data assembled by the WTO Secretariat for the period 1990-1995 show that in the last 29 GATT panel rulings issued by the GATT legal system, 12 were not adopted, including 6 of the last 9 rulings. It was as though, having committed themselves to a rigorous procedure with no veto escapes, governments felt entitled to enjoy one last orgy of veto indulgence, like one last pack of cigarettes before quitting. In the author’s view, the reason why governments felt free to flout the GATT legal system was primarily the fact that a new and better WTO dispute settlement procedure was just around the corner — a fact which meant that vetoes of GATT legal rulings would no longer damage the legal system that governments needed to maintain order. When freed from that restraint, GATT’s leading governments had given free rein to their underlying attitudes toward enforcement. Those liberated attitudes did not make a very pretty picture.

If the author’s description of the political attitudes underlying the adoption of the new WTO Dispute Settlement Understanding is correct, it must be recognized that the WTO legal system serves a reluctant government clientele. It is a clientele that has made great strides toward law-respecting behavior in the last forty years, but that still has many reservations about obedience to legal rulings. An agreement adopted with this much reluctance will almost certainly encounter a bias against making its enforcement pressures stronger. To the contrary, one can expect governments to look for ways to cut back on its rigor whenever they can. The following discussion of legal remedies in the WTO legal system is written with these underlying conditions in mind.

II. BROADENING THE REMEDIES

The remedies provided by the GATT legal system were rather limited. A ruling of legal violation entitled the complaining government a rather general “recommendation” calling upon the defendant government to comply with its obligations. There was no time limit on the order to comply, and the process could drag on for years. The complaining government could at some point

request authorization to retaliate by imposing approximately equal trade barriers in return, but the request could be vetoed by the defendant. In modern GATT practice, only two requests for retaliation authority were made, both against the United States, and both were vetoed.¹³ No matter how long compliance took, there was never compensation for the harms done by the measure in violation. With the exception of one unresolved controversy over remedies in AD/CVD cases, the only remedy was forward-looking effort to secure compliance in the future.

Given the limited commitment GATT governments had made to the GATT legal system, it was hardly surprising that the remedies of the GATT legal system had been rather limited. Although these same governments then did agree to establish a more rigorous system, their dedication to that goal was still decidedly limited, and so were the “reformed” remedies they adopted. The primary remedy is still a general recommendation calling upon the defendant to comply. There is a procedure for establishing a time limit, which, so far, has ranged from eight to fifteen months. Retaliation is still the ultimate remedy for eventual non-compliance. The veto power over retaliation requests has been removed, subject to additional, time-limited procedures to resolve disputes over the defendant has in fact not complied, and over the amount and nature of the retaliation. As before, there is no compensation for past harms, no matter how long it takes to achieve compliance.

As far as the author can tell, most of the leading members of the WTO support the limited nature of present legal remedies. Even the United States -- otherwise the strongest advocate of effective dispute settlement -- finds itself on most occasions leading the opposition to more rigorous remedies.

In considering the various positions taken by WTO member countries on remedial issues, it may be helpful to remember that all WTO governments are repeat players in this game, and that they have more or less equally frequent roles as both complainants and defendants. Consequently, all

¹³ Both requests came in the *Superfund* case, *United States — Taxes on Petroleum and Certain Imported Substances*, GATT, BISD, 34th Supp. 136-166 (1988). The follow-up proceedings are discussed in Hudec, *Enforcing International Trade Law*, *supra* note 1, at pages 210-211, 535-537

WTO governments, including the United States, must view remedial issues from both perspectives. The optimum legal system is not simply the strongest legal system. It is the legal system that will be most helpful in enforcing one's trade agreement rights as complainant, while at the same time preserving the desired degree of freedom to deal with adverse legal rulings against one's own behavior.

One might venture the hypothesis that a government's own ability to comply will set a limit on how much enforcement it demands of others. That is not quite true, however. Larger and more powerful countries -- those accustomed to living by rules slanted in their favor — are likely to aim for a somewhat less balanced result. For them, the optimal remedy package will be one that works well against others but not so well against themselves. This tendency also has to be considered in explaining why WTO remedies are as they are.

The order to comply

The primary remedy for a violation of legal obligations is the “recommendation” provided for in DSU Article 19. Despite the softer connotation of the word “recommendation,” the traditional understanding of the word “recommendation” in GATT/WTO jurisprudence has been that, when approved by the plenary body acting for the full membership, it is a legally binding order.

In cases involving a violation of legal obligation, the first sentence of Article 19 calls for a recommendation “bring the [inconsistent] measure into conformity” with the legal obligation in question.¹⁴ The second sentence of Article 19 also authorizes Panels or the Appellate Body to “suggest” specific ways in which the offending member could implement the general recommendation. In those cases where there may be more than one way to achieve compliance -- for example, where a discriminatory internal tax can be cured either by substituting a level tax or by repealing the tax entirely -- , the probable meaning of the second sentence is that the panel or

¹⁴ DSU Article 26 states that recommendations in non-violation cases shall “recommend that the Member concerned make a mutually satisfactory adjustment,” it being clear that the Member is cannot be required to withdraw the measure causing the impairment. For an explanation of how the retaliation provisions of DSU Article 22.2 hollow out this proviso, see note 39 infra.

Appellate Body can “suggest” which of the options is preferable, but that suggestion would not be binding.¹⁵ Such an interpretation would be in accord with the assumption in many GATT decisions that the defendant government is free to choose among legally valid means of correction.¹⁶ It is also supported by the practical utility of allowing members to find the type of remedy that encounters the least domestic political resistance. And finally, governments could object that issuance of a binding order to implement one of several equally valid forms of compliance would amount to creating an additional obligation never agreed to.

A more difficult issue is presented by directives calling for specific remedial action on the basis of a legal ruling that such action is required in order to comply with the WTO obligation in question. The one situation in which this issue has been presented several times has been the case in which antidumping duties or countervailing duties (AD/CVDs) have been imposed in violation of GATT/WTO obligations. Panels have sometimes ruled that the defect in the existing measure cannot be remedied by further proceedings, and that compliance requires the entire proceedings to be vacated and all moneys collected to date to be refunded. Other panels have made a similar ruling in conditional terms, ordering that unless new proceedings conducted in conformity with GATT/WTO obligations arrive at revised findings that justify the full amount of past charges, the difference between past charges and the charges found to be justified must be refunded. In the legal judgment of these panels, the GATT/WTO obligations did not give the defendant member any other options in remedying the violation.

In several of these GATT decisions rendered in the 1990's, such refund orders encountered

¹⁵ Mavroidis suggests that the DSU can be interpreted to make Article 19 “suggestions” binding. He acknowledges the words of Article 19 itself are at best ambiguous. His argument for binding effect is based upon a contextual argument contrasting DSU Article 19:1 and Article 26.1(c). In the latter provision, a text authorizing panels to suggest ways of resolving the dispute is accompanied by text expressly making such suggestions non-binding. The Article 19.1 text authorizing panels to suggest remedial measures has no such limiting phrase appended to it. Mavroidis, *supra* note * at sections 3(b)(A-C). As will appear from the following discussion, the author believes the legal characterization of panel directives depends on the legal basis of the specific directive given.

Mavroidis goes further to argue that, even if such suggestions are not binding, they can be viewed as a compliance “safe harbor” -- that action conforming to the suggestion will raise an irrebuttable presumption of compliance with the legal obligation. *Ibid.* Whatever the formal legal status, this will normally be the practical result.

¹⁶ See, e.g., *United States — Taxes on Petroleum and Certain Imported Substances*, GATT, BISD, 34th Supp. 136-166 (1988), at paragraph 5.19.

considerable resistance from defendant governments. Resistance was primarily on the ground that the basic legal premise of the orders was wrong -- that there was in fact no legal obligation to make a refund at all. A second theme found in some of the objections was that such remedial details were beyond the panel's competence to adjudicate. The mixture of different objections made government positions unclear, and in almost all the cases the ultimate results left the issue unresolved, either because the defendant blocked adoption or because the case was otherwise resolved without having to resolve the question of refunds. The precedents laid down by the cases were unclear, and both points of view were still in the field at the time the WTO came into force.

The one WTO decision to rule on this issue was the panel decision in the *Guatemala Cement* case,¹⁷ a ruling that was not reviewed on appeal because the panel's entire decision was overruled and set aside by the Appellate Body on other grounds. The *Guatemala Cement* panel ruled that the initiation of the antidumping proceedings was defective because it had not been based on adequate evidence -- a defect which, the panel would later say, could not be cured by further action within the same antidumping investigation, and thus could only be cured by revoking the existing dumping order. But the panel refused to "recommend" a refund of the duties, on the ground that such a recommendation was not authorized by DSU Article 19. In the panel's view, the only binding recommendation authorized by Article 19 was the general order to "bring the measure into conformity" with the defendant's obligations. The specific steps that governments must take to implement that general order were "means of implementation," a distinct phase of the process that is initially within the discretion of the defendant, and as to which the panel could only make non-binding "suggestions." If the "means" chosen by the defendant do not achieve a legally valid solution, the panel said, that problem would have to be adjudicated under DSU Article 21.5 which provides for panel proceedings to adjudicate the adequacy of the compliance tendered by the defendant at the end of the period allowed for compliance. The *Guatemala Cement* panel then made a non-binding "suggestion." It expressed the opinion that the violation committed by initiating a proceeding without adequate evidence could not be corrected by further action in the same

¹⁷ *Guatemala — Antidumping Investigation Regarding Portland Cement from Mexico*, WTO Documents WT/DS60/R (19 June 1998) (panel report), reversed on appeal WT/DS60/AB/R (2 November 1998) (Appellate Body report).

antidumping investigation, and for this reason suggested that Guatemala revoke the existing antidumping order “because, in our view, this is the only appropriate means of implementing our recommendation.”¹⁸

These final legal conclusions concerning the adequacy of possible remedial steps were not presented as part of the “findings” or “conclusions” of the panel. They seemed to be merely predictions of the eventual legal outcome, offered as an explanation of the panel’s concluding suggestion. If the function of a remedial order is to induce the defendant government to focus on correcting the violation, it should be recognized that legal predictions of this kind would certainly give some impetus toward this end. As such, the panel’s approach in *Guatemala Cement* could be considered a plausible compromise in a situation where sharper remedial orders are subject to dispute.

If one wanted to go further toward a more definitive resolution of the remedial issue, the question that must be answered is not the legal status of “suggestions” under DSU Article 19, but rather, whether panels can adjudicate remedial issues in the first place — whether the complaining party can raise the question of what kind of relief is required, and whether panels can make definitive formal rulings on the legal issues necessary to answer those questions. In other words, can panels make legal rulings on remedial issues that would be reviewable by the Appellate Body and that would be *res judicata* in subsequent legal proceedings under DSU Article 21.5? If such remedial issues can be adjudicated definitively, it will make little practical difference whether the logical conclusion of that legal ruling is expressed as a formal (binding) recommendation, or a (non-binding) suggestion.

The argument that adjudication of such remedial issues is not possible — whether the conclusion is based on the words of DSU Article 19 or on general GATT/WTO jurisprudence — would reflect a view that the WTO dispute settlement system can only adjudicate the legality of government conduct that has actually occurred. In this case, such a view would argue, a panel cannot adjudicate whether a particular government measure would constitute compliance with a ruling until

¹⁸ *Guatemala — Antidumping Investigation Regarding Portland Cement from Mexico*, WTO Document WT/DS60/R (19 June 1998), at paragraph 8.6. Notwithstanding the earlier request for a refund order, the panel did not express any opinion, or prediction, about whether revocation of the existing antidumping order would have to include refund of the duties collected.

the government has actually presented specific actions offered as compliance. This approach would find some support in a general policy of not deciding legal issues before one can see whether they do in fact arise, and before the panel can see the full context in which the measure in question actually occurs.¹⁹ Although this is an exceedingly narrow view of justiciability, it is a view that can be expected to receive considerable support from some of the larger member countries of the WTO.

That said, it must be recognized that at least seven GATT panels have been convinced that it was appropriate for them to issue direct or contingent refund orders in their final reports.²⁰ The judgment of those seven panels will not be easy to ignore. In addition, the arguments for allowing panels adjudicate this issue are also quite strong. Assuming certain remedial measures are in fact legally required, a ruling (or an order) making clear the measures that must be taken would certainly deter governments from stalling with half-measures, and thus would bring enforcement pressure to bear most sharply and quickly.

In present WTO practice outside the area of AD/CVD law, the main battle line seems to be, not the question whether panels can issue binding rulings on remedial issues, but whether panels should say anything at all beyond the routine “bring the measure into compliance” recommendation.

Professor Mavroidis notes that the overwhelming majority of WTO panels have not availed themselves of the option to offer specific “suggestions.”²¹ He suggests that the reason for this is that panel members and their Secretariat advisors normally seek to avoid making their ruling any more intrusive than necessary, and that many defendants, and especially the larger ones, make it clear that they would not welcome any suggestions at all.

It is not difficult to understand why defendant governments prefer less precise recommendations. Such recommendations allow defendants to claim compliance for inadequate

¹⁹ As Mavroidis points out, the issue here is not “judicial economy,” for that expression is usually used to describe a situation where an issue properly before the panel can be decided, definitively, by other rulings that make the avoided ruling unnecessary. Mavroidis, *supra* note 1, at section 3(e). The issue being discussed here is whether such remedial issues should be before the panel in the first place.

²⁰ See the seven cases cited in notes 28-30 *infra*.

²¹ Mavroidis, *supra* note 1 at section 3(b)(A).

responses, and thus forcing the complainant to go to additional efforts in order to secure the correct result. Through resistance to these additional efforts, defendant governments can hope to bully the complainant into accepting a less-than-adequate response. The United States has left a trail of partial-compliance responses to such general orders.²² Needless to say, large governments have less to fear from such ambiguity when the shoe is on the other foot, for they can always use that same power imbalance to insist that smaller defendants apply the recommendation in good faith. As a general proposition, a system of ambiguous legal remedies tends to offer unequal pressures for enforcement for large and small countries.

So long as larger governments find ambiguous remedial orders advantageous, and so long as panels remain the same sort of ad hoc bodies they have always been -- largely chosen by the parties, advised by and dependent upon a Secretariat that is ultimately subject to the will of member governments -- , it can be expected that remedial orders will tend to lack specificity, whatever the actual legal powers of the panel. If, on the other had, the WTO decides to change the panel procedure by staffing panels with professional, full-time panelists, one of the consequences of that change is likely to be greater use of whatever remedial powers the panels are given.

Remedies for Past Wrongs

For most of the GATT's history, the prevailing view has been that the only remedy for violation of a legal obligation is a forward-looking order to directing the defendant to comply in the future. Except for a string of antidumping and countervailing duty (AD/CVD) cases in the late 80s and early 90s, defendant governments have not been required to compensate for harms done before the illegal measure is brought into conformity.

The most important challenge to the exclusively forward-looking view of GATT remedies

²² See the two cases cited in notes 3 and 4 supra. See also the U.S. response to the ruling in *United States — Customs User Fee*, GATT, BISD, 35th Supp. 245-292 (1989), described in Hudec, *Enforcing International Trade Law*, supra note 1 at pages 537-538. There will likely be another claim of partial compliance regarding the U.S. response to the recent *Shrimp/Turtle* ruling, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Document WT/DS58/AB/R (12 October 1998). The compliance deadline is December 6, 1999.

was a 1965 effort by GATT developing countries to add monetary compensation to the list of dispute settlement remedies. The year 1965 was the time when developing country members of GATT were using the threat of abandoning GATT for UNCTAD to ask for a better deal from GATT.²³ The developing country caucus made several proposals to improve the operation of the dispute settlement procedure. One proposal resulted in the adoption of a special accelerated procedure for complaints by developing countries, a procedure that is still in force today.²⁴ Two other proposals concerned the improvement of remedies.²⁵ One of these was a proposal for monetary damages to be paid to developing countries injured by GATT-illegal trade restrictions.

The theory of the developing country proposal for monetary compensation was that GATT-illegal trade restrictions caused serious harms to the fragile economies of developing countries, harms that would be multiplied because of their retarding effect on the development process. In these circumstances, the developing countries argued, forward-looking remedies were not enough to remedy the harm already done. Instead, they proposed, developing countries should be entitled to collect retroactive damages in the form of money awards. The money would compensate the government's economic development program, rather than private interests, a characteristic that would have removed many of the problems in calculating the harm.

The money damages proposal was advocated strenuously through a long series of committee meetings. Developed countries opposed the proposal with equal conviction. Money damages, said the developed countries, were simply outside the realm of the possible. In effect, they were saying, GATT was never meant to be taken that seriously. The proposal was not adopted.

The GATT practice of denying compensation for past wrongs reflected a view of GATT law

²³ The UNCTAD (United Nations Conference on Trade and Development) was originally a United Nations conference, held in 1964, concerned with the trade and development problems of developing countries. At the conclusion of the conference, the delegates decided to turn the conference into a permanent United Nations organization.

²⁴ See GATT, BISD, 14th Supp. 18 (1966). The procedures call for mediation and fact gathering by the Secretariat, the automatic establishment of a panel (a significant advance in those days), and a considerably accelerated time schedule.

²⁵ For a brief description of the negotiations, see Hudec, *The GATT Legal System and World Trade Diplomacy*, note 1 *supra*, pp. 242-43. The GATT document series recording the negotiations is COM.TD/F. The main proposals are COM.TD/F/W.1 (27 April 1965) and COM.TD/F/W.4 (11 October 1965).

as having a lower status than domestic law. Under the domestic law of most GATT members, taxes or other charges imposed in violation of national law were characterized as a legal nullity, and government authorities would be required to refund any monies so collected. The trade laws of such countries rarely if ever provided for such consequences when tariffs or other charges are found GATT-illegal.²⁶ The reason for the difference was simply that governments did not want GATT legal obligations to have such direct legal effect. This attitude toward GATT law was consistent with the view of GATT law as a diplomatic instrument — a set of rules whose primary function was to aid in resolving trade disputes in consensual fashion. Diplomatic settlement of trade controversies almost always begins by setting aside past conduct and concentrating on forward-looking remedies.

The one exception to the GATT's consistent practice of issuing only forward-looking remedies was a series of GATT panel decisions between 1985 and 1995, all involving AD/CVD's, in which panels ordered refunds of duties imposed in violation of GATT rules. It is not clear why these panels singled out antidumping and countervailing duties for more demanding remedies than those normally employed against other GATT-illegal charges on imports. One GATT panel referred to provisions in the 1979 Antidumping Code requiring government to refund overcharges (obligations which in terms apply to national antidumping laws, and which national laws do seem to observe at that level, ordering refunds when national authorities determine that, under national law, overcharges have been made).²⁷ Another reason might be the fact that AD/CVDs rest upon specific proceedings against specific firms, and thus their validity seems more clearly contingent upon the validity of the proceedings under review. Finally, of course, it must be recognized that the disreputable character of AD/CVD measures makes them a natural target for aggressive regulation.

At first, it seemed that GATT governments themselves agreed with the availability of a refund

²⁶ Normally, the only way to secure refunds is to try to persuade national authorities to revise their interpretation of national law, in light of the GATT/WTO ruling, so that *as a matter of national law* the refund is owing. The refunds that occur after adverse panel rulings made under NAFTA's Chapter 19 review of AD/CVD occur only because national legislation makes dispute settlement under Chapter 19 part of the domestic AD/CVD proceeding, binding on national authorities.

²⁷ *United States — Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, GATT Document ADP/82 (7 July 1992) (panel report not adopted).

remedy in such cases. The first such ruling in a 1985 case brought by Finland against New Zealand was adopted by the GATT Council, and the New Zealand did in fact issue a refund.²⁸ Afterward, six subsequent GATT panel decisions ordered refunds, but in each case the result was inconclusive. Only two of these panel reports were adopted, but only after the issues had become moot and over the express reservation of the defendant as to the panel's rulings.²⁹ The other four rulings were blocked entirely by the defendant government, with at least part of the objection to adoption being the remedy order.³⁰ The principal opponent of such refund orders was the United States, joined later by the European Community.³¹

Although governments renegotiated many provisions of the GATT Antidumping Code and the GATT Subsidies Code in the Uruguay Round, the negotiations yielded no answer to the impasse over refund orders. The United States then cast its position in cement when the U.S. Congress adopted a statutory provision, in the 1994 legislation implementing the Uruguay Round agreements, that AD/CVD or Safeguards duties already paid in "liquidated" entries would not be refunded even though the GATT-illegal duties could be revoked for all "unliquidated" entries.³²

As was noted in the previous section, the issue of AD/CVD refund orders has come up once

²⁸ *New Zealand — Imports of Electrical Transformers from Finland*, GATT, BISD, 32nd Supp.55-70 (1986).

²⁹ *United States — Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, GATT, BISD, 32nd Supp. 55-70 (1992). After the U.S. CVD had been withdrawn, the United States agreed not to block adoption of the panel ruling, but it reserved its position on the merits. *United States — Measures Affecting Imports of Softwood Lumber from Canada*, GATT, BISD, 40th Supp. 358-517 (1995). The United States announced it would be refunding deposits and bonds for other reasons, but expressly reserved its position on the validity of the panel's order that deposits and bonds be refunded. GATT Document SCM/M/67 (meeting of 27-28 October 1993)

³⁰ (1) *Canada — Countervailing Duty on Boneless Manufacturing Beef*, GATT Document SCM/85 (13 October 1987) (panel report not adopted). The case is discussed briefly in Hudec, *Enforcing International Trade Law*, supra note 1, at pages 221-222, and 533-534.

(2) *United States — Antidumping Duties on Stainless Seamless Pipes and Tubes from Sweden*, GATT Document ADP/47 (20 August 1990) (panel report not adopted). The impasse over remedies case is discussed briefly in Hudec, *Enforcing International Trade Law*, supra note 1 at pp. 572-573, 253-254. (3) *United States — Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, GATT Document ADP/82 (7 July 1992) (panel report not adopted). (4) *European Communities — Antidumping Duties on Audio Tapes in Cassettes Originating in Japan*, GATT Document ADP/136 (28 April 1995) (panel report not adopted).

³¹ Professor Mavroidis points out that the European Community appears to have shifted to the U.S. position during a 1993 complaint against Brazilian CVD's, having initially asked for a refund order in its complaint but then withdrawing its request during the panel proceeding. See *Brazil — Imposition of Provisional and Definitive Duties on Milk Powder and Certain Types of Milk from the European Economic Community*, GATT Document SCM/179 (27 December 1993) at paragraph 200. The EC opposed a request for refunds in the *Audiocassette* case, supra note 30.

³² Section 129 of the Uruguay Round Agreements Act, 108 Stat. 4813, 4836, 19 U.S.C. 3501, 3538 (1994) provides partial authority to revoke AD/CVD and Safeguards measures in order to comply with WTO panel rulings, which is an advance over prior law, but subsection (c)(1) limits the effect of such revocations to "unliquidated" entries that enter or are withdrawn from warehouse on or after the date of the order revoking the measure.

under the new WTO dispute settlement procedure, in the *Guatemala Cement* case.³³ The panel did not express a legal opinion on whether refund were required in AD/CVD cases. It ruled that the provisions of DSU Article 19 barred panels from ordering refunds in their recommendations, but added that question of refunds, as an “implementation” issue, should be dealt with in post-deadline panel proceedings under Article 21.5. The panel’s legal prediction that compliance would require revocation of the dumping order did not imply an answer to the question of whether refunds would be an appropriate remedy thereafter. In other words, the issue of whether the WTO can issue refund remedies is still open, and is now complicated with the additional question of whether WTO panels has even adjudicate that issue.

In conclusion, it bears repeating that the call for refund of GATT-illegal antidumping and countervailing duties is an exception to the perfectly consistent GATT practice of denying refunds of GATT-illegal tariffs and all other kinds of GATT-illegal charges. The domestic legal problems of making refunds in such cases remain, and there would very likely be broad opposition, probably from developing countries as well as others, against a refund remedy for things like GATT-illegal tariff charges. As for antidumping and countervailing duty cases themselves, the weight of joint U.S.-EC opposition promises to be formidable, especially with the U.S. opposition now being required by statute.

The Follow-up to Recommendations: The Two Remedies

Once a recommendation has been issued and adopted, the new dispute settlement procedure outlined in the DSU establishes what amounts to a two-part remedy designed to secure compliance. The first remedy is a series of mandatory events to focus pressure on the defendant — the establishment of a fixed deadline for compliance, and a “surveillance” mechanism requiring the defendant government to give series of reports at regular intervals stating its plans for, and progress toward, compliance. The second remedy is a provision for automatically authorizing retaliation if

³³ *Guatemala — Antidumping Investigation Regarding Portland Cement from Mexico*, WTO Documents WT/DS60/R (19 June 1998) (panel report), reversed on appeal WT/DS60/AB/R (2 November 1998) (Appellate Body report). For further discussion, see text at note 17 *infra*.

compliance is not achieved by the deadline. Although it may seem impossible to separate the threat of the second remedy from the working of the first, the first remedy actually unleashes quite distinct enforcement pressures of its own -- as is well understood by smaller and mid-size countries for whom retaliation is often not a realistic option, and for whom the deadline and surveillance procedures are in practice the only enforcement tools available.

The best way to make clear the relationship between these two post-recommendation remedies is to discuss them in reverse order -- starting with a discussion of what retaliation is and is not, and what it can and cannot do.

The Retaliation Remedy

Under the new WTO dispute settlement procedure, the complaining government has the automatic power to retaliate if the defendant government fails to comply with a ruling of violation within the time established by the deadline. The automatic retaliation power is subject to certain protections on behalf of the defendant. These include third-party review of (1) the amount of the retaliation, (2) the appropriateness of the economic sector retaliated against, and (3) the question of non-compliance itself if it is disputed. As under the level of retaliation is to be equivalent to the extent of the nullification and impairment.

The Theory and Purpose of Retaliation. A GATT-illegal trade restriction deprives the affected country of some of the economic gain it anticipated from the obligations of the GATT agreement. On that ground alone, it is economically rational to seek to remove the violation, or, at least, to obtain other, substantially equivalent trade opportunities in compensation. To the extent that retaliation, or a credible threat of retaliation, will help to achieve that goal, it may be economically rational to employ retaliation in such situations. But from an economic point of view the act of retaliation is harmful to the economy of the retaliating country, and so retaliation is justified only to the extent that, over the long run, retaliation or the threat of retaliation will yield greater economic gains, in the form of increased export opportunities, than the economic losses caused

when retaliation is actually employed. Although GATT/WTO legal theory takes a considerably more doctrinaire view of retaliation, those governments that actually employ retaliation as a remedy usually manage to use it in a restrained, economically rational manner.

The legal theory of GATT/WTO retaliation rests on the concept of reciprocity. The legal obligations of GATT, both the entire code of rules and specific network of tariff bindings, are constructed on the idea that each government's obligations are given in exchange for the obligations of the other parties to the agreement. Agreements so constructed thus involve a balance of benefits and cost — in several senses. In abstract legal terms, one can talk about any agreement as a balance of rights and obligations, the gain from the rights being paid for by the cost of the obligations. In GATT/WTO trade agreements, however, there is a more important balance of economic benefits and costs overlaying the legal balance. This balance is perceived most vividly when trade agreements are seen from a mercantilist viewpoint -- the doctrine which holds that exports are an economic gain and imports are an economic loss. From the mercantilist viewpoint, the balance of any trade agreement is the balance between the economic gains of export opportunities and the economic losses from imports. However wrong this mercantilist accounting may be as a matter of economic theory, it is widely accepted by ordinary citizens in most countries, and is thus a compelling force in national political debates over trade policy.

Under the mercantilist accounting just described, a trade restriction in violation of legal obligations obviously creates an economic imbalance, depriving the exporting country of valuable exports *and also* benefitting the importing country by reducing its imports. If the violation itself is not corrected, the aggrieved party must be entitled to some other adjustment to restore the former balance. In the first instance, the balance can be restored by "compensation" from the defendant country in the form of further trade concessions on other products. Compensation is not obligatory, however. The offending country is not required to offer it, nor is the aggrieved party required to accept whatever is offered. If compensation is not agreed to, retaliation by the aggrieved party is the final means of restoring the balance. The act of retaliation restores the balance by depriving the other party of export gains, *and also* by recapturing the "payment" made by the aggrieved party in the form

of greater imports. Notwithstanding the use of the word “compensatory,” neither compensation or retaliation involve reparation for past harms. Both these remedies are entirely forward-looking adjustments designed to restore balance to future economic relations. It is understood that both positive compensation or negative retaliation are temporary remedies, to be removed when the previous balance is restored by correcting the legal violation.

In economic terms, the balancing rationale for retaliation is a fiction. The aggrieved country does not really gain anything by raising trade barriers. That act usually inflicts a net loss upon its own citizens, even though most of its citizens are not aware of that fact.

As noted above, most governments are aware that the “balancing” rationale for retaliation makes no sense. Governments treat retaliation as a pragmatic policy tool, to be used when it produces useful results. Retaliation is usually designed to serve two related purposes. The main purpose is to assemble enough additional forces within the target government to precipitate a decision to remove the offending measure. Hopefully, the economic pain caused by the retaliation will enlist the support of the affected economic interests. In addition, the notoriety of the retaliation, threatened or actual, will give the offending measure greater visibility generally, and thereby can enlist the support of other governmental and foreign policy interests that have not previously become involved.

As in most such cases, the threat of harm is probably more influential than the actual harm itself, which can provoke anger.³⁴ Needless to say, use of retaliation for this first purpose is a rather delicate political operation, one that must be conducted sparingly and with restraint.

The second function served by retaliation is to help the retaliating government deal with the unhappiness of its own constituents who are injured by the illegal trade restriction. While these constituents obviously prefer to have compliance that restores their lost market opportunity, if that

³⁴ In assessing the political impact of retaliation, it is well to remember that the effects of retaliation are generated in several successive stages. The process begins when a list of potential targets for retaliation is published, a list which is usually considerably larger than the list eventually chosen. Then comes the government’s actual request for authority to retaliate, which usually involves a “final” list of the targets that is also larger than the list that the WTO arbitration tribunal will actually approve. At both these stages, the threatened industry has every reason to petition their government to spare them from economic harm. The actual retaliation is almost an anti-climax, and sometimes seems less important for its direct political impact than for its function in giving credibility to the earlier, broader threats.

result is not forthcoming they will usually want two other things -- the assurance that their government has employed all its weapons on their behalf, and if that does not work, the satisfaction of imposing an equivalent harm on the other side. Among the various policy tools that could be used to assuage these often quite angry demands, controlled temporary trade retaliation is actually one of the more civilized.

The measurement of equivalence. The legal theory of “balance” dictates that the amount of the retaliation must be equivalent to the size of the loss from the offending measure. DSU Article 22.4 so provides. The equivalence standard was implicit in GATT legal doctrine as well, although the accidents of GATT’s drafting origins left it with a text in GATT Article XXIII:2 that suggested a somewhat looser standard.³⁵

Although the equivalence requirement is based on a legal concept of “balance” that is irrational from an economic point of view, the equivalence requirement does happen to advance the two practical purposes of retaliation just described. More-than-equivalent retaliation would probably undermine the effort to enlist support for compliance within the target country. It would be perceived by the target country audience as taking unfair advantage of the violation, especially if, as is usually case, the audience in the target country views things from a mercantilist perspective, which tells them that extra-large retaliation involves an extra large economic *gain* for the retaliating country. To avoid such perceptions, the important thing is not the fact of equivalence itself, but rather having some credible mechanism which can certify equivalence in a politically persuasive way. Meanwhile,

³⁵ The text of GATT Article XXIII:2, based on the August 1947 draft of the ITO Charter, says that the Contracting Parties may authorize such retaliation “as they deem to be appropriate in the circumstances.” The final ITO Charter text adopted in March 1948 changed this text to read “appropriate *and compensatory, having regard to the benefit which has been nullified or impaired,*” to make clear that retaliation was not to exceed the amount needed to compensate for the harm done. ITO Charter, Article 95(3). See also, *Havana Conference, Reports of Committees and Principal Subcommittees*, U.N. Document ICITO 1/8 (September 1948) at page 155. The DSU text thus returns to the final intentions of the GATT/ITO negotiators.

The GATT panel that adjudicated the level of the Netherlands retaliation against U.S. dairy restrictions claimed that the word “appropriate” in (1947) text of Article XXIII:2 gave the panel a certain flexibility to take into account other factors that might aggravate the harm. But the panel found it “appropriate” to *reduce* the level of retaliation by 20%, suggesting that flexibility cut in both directions.. See *Netherlands — Action under Article XXIII:2*, GATT, BISD, 1st Supp. 32, 62-64 (1953), discussed in detail in Hudec, *The GATT Legal System and World Trade Diplomacy*, supra note 1, Chapter 16. A similar interpretation of “appropriate” was offered by the Secretariat’s legal advisor during discussions of the *Superfund* case. See, GATT Document C/M/220 (meeting of 8 April 1988) at page 35.

on the domestic front, an equivalence doctrine provides a useful externally-imposed restraint that help the government resist what might otherwise be demands for punitive retaliation. Moreover, a credible means of certifying equivalence can also give the government protection against the charge that it retaliated too little.

The traditional GATT approach toward adjudicating equivalency has been sensitive to the political functions of this requirement. There are usually large amounts of trade data and other statistics available when the question of equivalency arises, and the availability of this information often stimulates elaborate theories about how to measure and compare harms in a scientifically correct manner. On the few occasions where measurement has actually been adjudicated, however, GATT practice has been to avoid elaborate calculations. GATT panels have listened to all the information and to all the various theories of measurement, and but in the end have rendered an almost perfunctory decision that explains none of its underlying calculations in detail.³⁶

The recent decision of the WTO arbitration panel that determined the correct level of retaliation in the *Bananas III* case followed these precedents.³⁷ The panel began by narrowing the scope of the harm to be considered, rejecting the U.S. argument that harm should include lost exports to third-country banana producers whose banana exports had been restrained. The panel then simplified the analysis by rejecting attempts to calculate losses in terms of lost profits. Then, having defined the harm as lost exports of wholesale services from the United States to the European Community, the panel then calculated the correct level. The report contained a lengthy description of the voluminous and complex information and arguments submitted by the parties, but at the end the panel explained its conclusion in a paragraph, announcing which of several alternative methods of

³⁶ There were only two GATT panel decisions on this subject. In 1952, a panel trimmed 20% off a Netherlands request for authority to impose discriminatory QR's in response to US, quotas on dairy products that were acknowledged to be in violation of GATT obligations. *Netherlands — Action under Article XXIII:2*, GATT, BISD, 1st Supp. 32, 62-62 (1953), discussed in detail in Hudec, *The GATT Legal System and World Trade Diplomacy*, supra note 1, Chapter 16. In 1963, a GATT panel resolved conflicting claims involving the value of a tariff concession that had been withdrawn under Article XXIV:6, choosing a \$26 million trade value in place of the \$44 million claimed by the U.S. and the \$19 million claimed by the EEC. GATT Document L/2088 (23 November 1963), in 3 *International Legal Materials* 116 (1964), described in detail in Abram Chayes, Thomas Erlich and Andreas Lowenfeld, *International Legal Process* (Boston: Little, Brown & Co., 1968) at pages 249-306.

³⁷ *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WTO Document WT/DS27/ARB (9 April 1999).

measurement it had chosen and then simply announcing the “correct” number with little further explanation. As a scientific explanation, the panel’s report was disappointingly obscure. As a political solution to the issue, however, it obviously looked objective enough to persuade the relevant audiences in both countries that a neutral tribunal had made an objective judgment of equivalence.³⁸ As long as the relevant audiences were willing to accept the decision, it did all that was politically necessary.

Punitive Retaliation. Every discussion of retaliation usually gets around to the question of whether enforcement might be improved if the level of retaliation for violation were made higher than mere equivalence. In support of such proposals, it is sometimes noted that the “compensatory” level of retaliation authorized for a legal violation is no greater than the level of retaliation authorized for non-violation nullification and impairment (GATT Article XXIII:1(b)). The fact of legal violation seems to add nothing to the gravity of the wrong, at least as measured by the remedy.³⁹

Viewed as a practical question, the case for punitive sanctions is not very strong. As noted

³⁸ Trade policy officials have long employed the standard of political adequacy when setting the quality of statistical proofs offered to their constituencies. For example, for the past half century every GATT trade negotiation has been followed by proofs that the government in question “won” the negotiation by creating more exports than imports. The fact that almost every government submits statistical proof of such victories, in every trade negotiation, has moved some observers to quip that somewhere in the world there must be a country with a colossal trade deficit.

³⁹ One possible difference between the retaliation sanctions for violation and non-violation cases would be a rule that retaliation in non-violation cases must be non-discriminatory, whereas retaliation in violation cases is allowed to be discriminatory. The argument for non-discriminatory retaliation in non-violation cases is the same as it would be in the case of Article XXVIII compensatory withdrawals. That is, in both cases the retaliation can be regarded as a final settlement. Under Article XXVIII the country being retaliated against has a perfect legal right to maintain, in perpetuity, the unbound tariffs for which the retaliation is the compensatory adjustment. In non-violation cases, that would also seem to be the practical result, because GATT law explicitly provides that the defendant is neither required to withdraw the measure or to offer compensation, leaving retaliation as a response that will end the matter if the defendant exercises its right not to move. GATT/WTO rules should be interpreted to require that all permanent trade measures be made on an MFN basis, just as the triggering measure — the Article XXVIII withdrawal or the measure causing impairment — must be MFN in order to be GATT-legal. (Discriminatory withdrawals allowed under GATT Article XIX:3(a) do not contradict this analysis, because they are not permanent.)

The text of DSU Article 22.2 contradicts this analysis, however.. It seems to say that non-violation complaints, like violation complaints, should end in discriminatory retaliation. The text, which applies to both violation and nonviolation cases, authorizes the aggrieved party to “suspend the application to the Member concerned of concessions or other obligations.” The policy here would seem to be that MFN retaliation is too difficult to impose without collateral damage (that would need to be compensated), and that, unlike Article XXVIII withdrawals, the goal in a non-violation case should be either positive compensation or removal of the measure.

The decision to allow the considerable greater compulsion of discriminatory retaliation to force a positive resolution of non-violation cases is in effect a decision to undercut the frequent statement that the defendant is under no legal compulsion to change the measure or agree to compensation for it. The statement in DSU Article 26.1(d) that compensation can be a final settlement of a non-violation case, but, by implication, that retaliation cannot be, confirms this contrary analysis.

above, punitive levels of retaliation would likely be counterproductive in securing removal of the offending measure by the target government. And while punitive retaliation would please domestic interests injured by the offending measure, it would do so only at the cost of greater economic harm to one's own citizens, not to mention a greater resistance to removing the retaliation when compliance was achieved. While it might be argued that one should not allow respect for legal obligations to be undercut by such practical considerations, in the end these practical considerations cannot be ignored if governments want this legal system to produce results rather than gestures. Rather than trying to make international trade law conform to some abstract model of what "law" is, it would be more useful to recognize that international trade law is not, so far at least, a fully developed law that can demand the kind of respect implicit in the punishment model.

Collective retaliation: At a different time and in a different setting, the GATT did discuss proposals for strengthening the retaliation remedy in a slightly different way. The 1965 developing country proposals on remedies included a proposal calling for collective retaliation.⁴⁰ Developing countries argued that retaliation remedies as they then stood were useful only to large countries like the United States and the European Communities, on the ground that retaliation by a small developing country denying access to its small market is simply not an important threat to countries with very large markets. While it was true that developed country retaliation against smaller developing countries also had to be proportional to the size of the developing country's market, developing countries argued that even smaller restrictions to entry in larger developed country markets hurt them much more because of their greater need for exports, and especially when such restrictions cut off the potential for very large growth in such markets. To achieve parity of pain, the developing country negotiators asked GATT to authorize collective retaliation in cases of legal violations by large countries against developing countries. The idea was that in such cases a number of countries would be authorized to deny market access to the large-country defendant. By definition, this retaliation would also have been punitive in amount, unless one allowed a "development multiplier" to inflate the measurement of harm to developing countries.

⁴⁰ See sources cited in note 25 *supra*.

The developing country proponents argued vigorously against the unfairness of the present system of bilateral retaliation. Developed countries resisted with equal firmness, and the proposal was not adopted.

The collective retaliation proposal has been abandoned as hopeless, but the complaint remains. Except for an occasional threat of retaliation against other small countries (GATT legend has it that Indonesia once resolved a problem with Sweden by threatening to embargo Swedish trucks), the fact remains that developing countries never use retaliation remedies, either because they know retaliation will have no positive effects, or because they are dependant on developed countries in so many ways that they fear generating anger. This is as true today in the WTO as it was in the GATT. Unfortunately, the truth of the argument is also a reason why developed countries have refused to change things. Developed countries, viewing things from the perspective of their role as potential defendants, are quite comfortable with membership in a legal system where they can hurt others but some of the others cannot really hurt them. While one should not overstate the importance of retaliation to the working of WTO law for developed countries, the disproportionate impact of this remedy can be viewed as a serious flaw in the basic structure of WTO legal remedies.⁴¹

Deadlines and Other Follow-up Procedures

Judging by the text of the DSU, one of the main objections to the GATT dispute settlement was the lack of any follow-up procedure for approved legal rulings. Having set up a precise time schedule for the adjudication process that led up the adopted ruling, the negotiators then set forth a precise procedure and schedule for what happens after a ruling is adopted..

The vice of the GATT's follow-up procedure was that enforcement was left to the persistence of the complainant. To bring pressure to bear on the defendant, the complainant had to place the issue on the agenda of the GATT Council, make demands for compliance, urge other governments to support the demand, and eventually threaten retaliation. It was up to the complainant to decide how

⁴¹ Mavroidis concurs with this point. See Mavroidis, *supra* note 1, at section 3(b)(D)(iv).

often to repeat the process, when to threaten retaliation, and when to retaliate. Each initiative by the complainant could be regarded as an unfriendly act. This was a particular problem for smaller countries, but even the largest countries would feel the need to lay back whenever it seemed unwise to introduce another irritant in commercial relations with the defendant country. Threats of retaliation were almost always branded as premature, unnecessary and thus hostile.

The new WTO procedure contains automatic steps that do not require the complainant to propel the process. DSU Article 21 requires the defendant to express its intentions regarding compliance in a meeting to be held, automatically, within 30 days of the adoption of the ruling. Article 21 further provides that a “reasonable time” for compliance (a deadline) must be established, by arbitration if necessary, at the latest by the 90th day after adoption. And finally, Article 21 establishes an automatic “surveillance” mechanism by requiring the defendant government to give status reports to the Dispute Settlement Body at regular intervals.

The deadline provision follows GATT practice had recognized that governments, being clumsy institutions, are almost always unable to change an existing law or regulation immediately. DSU Article 21 states that the deadline “should not exceed 15 months” after the date of adoption, but adds that shorter or longer times may be appropriate according to the particular circumstances. Initially, it seemed that the 15-month limit would become the standard deadline, lacking any other accepted measure of how long the decision-making process should take. After the first six deadlines were fixed at 15 months, the next nine came in at between eight and thirteen months, including three arbitration awards denying longer time. Far from lacking standards, governments do seem to have succeeded in establishing on criteria that focus of the average time required for whatever decision-making procedures are required to correct the offending measure, to the exclusion of extra time for industry adjustment or dealing with political opposition.⁴²

⁴² The three arbitration rulings establishing shorter deadlines are *Indonesia — Certain Measures Affecting the Automobile Industry* WTO Documents WT/DS54/15, DS/55/15, DS59/13, and DS64/12 (7 December 1998); *Australia — Measures Affecting the Importation of Salmon*, WTO Document WT/DS18/9 (23 February 1999); *Korea — Taxes on Alcoholic Beverages*, WTO Document WT/DS75/16, DS84/14 (4 June 1999). The *Indonesian Auto* case did give extra time to the collapse of the Indonesian economy at that time. Compliance deadlines are recorded in the “Dispute Settlement Overview” heading in the WTO website, www.wto.org.

This follow-up procedure has generated one serious procedural issue so far. The issue concerns the interplay between DSU Articles 21.5 and 22.6. The dispute involves the following scenario: A ruling of violation is made and adopted, and a deadline is established, either by agreement or arbitration. If the deadline arrives and the defendant government concedes that it has not complied, the remaining steps are fairly clear. DSU Article 22.6 provides that the DSB must grant authority to retaliate within 30 days after the expiry of the reasonable time period (the deadline), subject to a further 30 days to arbitrate objections by the defendant over the level or sector of the proposed retaliation.

If the defendant claims compliance, however, and the complainant disputes that claim of compliance, problems begin to arise. Article 21.5 says the dispute must be resolved by referring the matter to a panel, preferably the original panel, which must report in 90 days. The 90-day panel proceeding causes no problems if it is completed before the deadline, because the noncompliance if any will be established by the deadline date, and the 60-day procedure set out in Article 22.6 can then operate as written. But, if the 90-day panel procedure is not completed before the deadline — for example, if the defendant does not announce its proposed corrective action until the day before the deadline —, a conflict with Article 22.6 arises. The timing provisions of Article 22.6 make no provision for delay to settle disputes over compliance. Article 22.6 requires that the DSB authorize retaliation in 30-60 days merely on the basis of the complainant's request for retaliation authority, simply assuming that the fact of non-compliance will have been established by the deadline date. In this situation, it appears that one of the two provisions must give way. . Either the timing provisions of Article 22.6 must give way and make room for completion of the 90-day panel procedure, or the Article 22.6 retaliation procedure must move forward in accordance with its own time schedule, which means retaliation must be authorized before third-party adjudication of the dispute over compliance has been completed.

The conflict between these two DSU provisions arose in the so-called *Bananas III* case in early 1999. The dispute was complicated by the extreme positions taken by both parties. The defendant, the European Community, had defined the basic elements of its proposed corrective

measures some months before the deadline, but had insisted that any challenge to the conformity of these corrective measures had to follow all the steps of the ordinary dispute settlement procedure, from 60-day consultations to a full right of appeal. In response, the complainant, the United States did not insist on Article 21.5 reviews, but instead insisted on applying the exact words of Article 22.6, claiming that those words required the DSB to authorize retaliation within 30 or 60 days of the deadline, simply on the basis of the United States' request for authority to retaliate. At the deadline, the European Community reported its corrective measures and requested a panel review of its measures under Article 21.5, as did another complainant, Ecuador. After the two 21.5 requests were referred to the original panel, the United States submitted its request for authority to retaliate under Article 22.6, to which the Community objected strenuously while also requesting a separate arbitration of the proposed level and sector of the U.S. retaliation under Article 22.6. The dispute over the U.S. retaliation request plunged the WTO's Dispute Settlement Body (DSB) into crisis for several weeks. Eventually, the combatants agreed to refer the EC's arbitration request to the original panel (which was already seized of the two earlier Article 21.5 requests), without resolving disagreement over which procedure took precedence, but with the expectation that the panel would find a practical way to decide the necessary issues.⁴³ The panel issued overlapping reports about 100 days after the deadline, finding the Community action non-complying and calculating U.S. retaliation rights at US\$194 million.⁴⁴ The United States put the retaliation into effect, applied retroactively to imports that entered after Deadline-plus-60. Given the panel's rather extraordinary mandate, the prevailing assumption has been that the panel's ad hoc manner of resolving the issues is not a precedent, and that the conflict between Articles 21.5 and 22.6 is still a completely open question awaiting a definitive resolution.

43 A statement by the Chairman of the DSB explained, "There remains the problem of how the Panel and the Arbitrators would coordinate their work [i.e., whether the 21.5 review would come first or whether the 22.6 retaliation procedure would move forward on its own 60-day timetable], but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties." Quoted in *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WTO Document WT/DS27/ARB (9 April 1999) at paragraph 4.09

44 The original rulings in the case are found in five separate panel reports giving essentially identical rulings for each of the five complainants (Ecuador, Guatemala, Honduras, Mexico and United States) and one Appellate Body report affirming with modifications the panel rulings. The panel reports are found in WTO Documents WT/DS27/R/EQU, -/GUA, -/HON, -/MEX, -/USA (dated 22 May, 1997). The Appellate Body report is found in WT/DS27/AB/R (dated 9 September 1997). The reports of the three reports issued by the post-deadline panel are WT/DS27/ARB (9 April 1999) (arbitration re level of retaliation), WT/DS27/RW/EEC (12 April 1999) (Article 21.5 request by EEC), and WT/DS27/RW/EQU (12 April 1999) (Article 21.5 request by Ecuador).

In ordinary circumstances, if one had to choose between delaying a retaliation procedure and allowing the complainant to retaliate without a third-party determination of non-compliance, the delay for third-party determination would be the least offensive deviation from the rules. Unfortunately, the bargain underlying the adoption of the DSU focused very carefully on the issue of time, the creation of a timely procedure having been one of the key demands made, and apparently obtained, by the United States. Deadlines, therefore, are an important substantive issue. Moreover, there is a case on the merits for objecting to longer deadlines, on the ground that present time limits are already quite generous, given that in most cases the defendant government will have imposed an illegal measure for at least two years before the legal ruling becomes final, and will have had that measure in effect for up to another 15 months after the ruling — with no compensation for any of the harm done during this time.

The obvious compromise would be to find a way to allow for third-party adjudication without extending the total time allowed for compliance. But that will not be easy. Simply cutting the deadlines back by 90 days would not seem to be an available if the WTO does in fact succeed in its effort to limit deadlines to the minimum time needed to take the appropriate corrective decision. A potentially more attractive alternative would be to retain the existing deadline for *implementation* of the corrective measures, but require *disclosure* of the content of the corrective measures at least 90 days before the deadline. In cases where legislation is involved the corrective measure will usually have to be defined 90 days in advance of enactment anyway. But where a short time is given for correction by executive action, the measure will not necessarily be defined that quickly. In addition, an advance notice requirement apparently runs into trouble with legislative changes as well, because some countries have argued that national legislatures will not want to give serious consideration to proposals that are simultaneously being reviewed by an international tribunal. Apparently, legislatures do not have the same problem in acting on proposals that will immediately be submitted to international review *after* their enactment.

Another possible compromise might be to find ways to cut some time from the earlier,

adjudication phase of the dispute settlement procedure to compensate for lengthening the post-ruling phase. There are some obvious targets for cutting, such as the defendant's right to block the creation of a panel for one meeting of the DSB. Unfortunately, the adjudication phase itself needs additional time at several other parts of its procedure, and time needed to assure the quality of legal rulings should arguably take precedence.

In the end, it seems inevitable that room will have to be found for the 90-day Article 21.5 procedure *before* the Article 22.6 retaliation procedure.⁴⁵ The issue will be whether governments are able to agree on other time-saving corrections to compensate for some or all of the added 90 days. For the many WTO governments who have never had much enthusiasm for the increased rigor of the DSU, increasing the time limits will pose no problem, of course. They will find it a welcome development.

Lying behind the highly visible issue of compliance deadlines are several smaller issues that have been exposed by the *Bananas III* retaliation proceedings. One problem is the text in Article 21.5 calling for referring disputes over compliance to the original "panel." The problem, of course, is that in most cases there will be a controlling Appellate Body decision that will have corrected the original panel's report to some extent. Does the reference to a 90-day procedure before the original panel mean that the panel alone should be asked to apply the Appellate Body's decision? Two other solutions are possible. One would be to add an appeal to the Appellate Body from the decision of the 90-day panel (adding another 30-60 days to the procedure) in cases where the final ruling was rendered by the Appellate Body.. A second would be to refer all Article 21.5 reviews involving Appellate Body rulings to the Appellate Body directly. There are benefits and associated detriments under all three solutions. The most important thing is to have a clear answer.

Another issue which arose in the end stages of the *Bananas III* case was the question of whether the defendant can initiate an Article 21.5 review of its own corrective measures. The

⁴⁵ Whatever the policy objection to retaliation without third-party adjudication, the *Bananas III* arbitration panel pointed out a simple practical problem -- that it could not measure the amount of nullification without knowing the extent to which the corrective measure, then in force, violated the ruling.

language of Article 21.5 would seem to permit such actions, for the text does not identify the initiating party. The traditions of GATT dispute settlement would certainly favor such a result, recalling that pro-adjudication governments led by the United States fought for two decades to establish the firm right of a party to have its rights adjudicated, with or without the consent of the opposing party. Finally, it is simply good sense to allow the defendant government to be able to resolve disputes over compliance as soon as possible in order to have time to correct whatever may be wrong before the deadline. Likewise it makes sense to allow defendants to initiate reviews whenever they wish to submit further corrections in order to remove retaliation already in force.

The one potential problem with defendant-initiated review procedures would be the possibility that they could be misused as a stalling device, by making a claim of compliance long after the deadline for compliance, and then objecting to retaliation until after the belated 90-day compliance review has been conducted.⁴⁶ A second problem would be the use of self-initiated reviews to interpose a second round of review proceedings, on a second corrective measure, before the retaliation can take effect. The answer to the stalling problem is not to forbid self-initiated actions, but to have a rule which prevents using them to stall the retaliation process. WTO procedures should permit compliance claims to be adjudicated whenever, and as often, as a new corrective measure is implemented, but the procedures must go on to say that such compliance claims come too late to stop the Article 22.6 retaliation procedure if they are made after the initial deadline for compliance. This would certainly be the answer if a corrective measure (first or second) were introduced several months after retaliation had gone into effect. In that case, it would be clear that the retaliation could stay in effect until a definitive ruling of compliance is made. The rule suggested here merely applies the same common sense answer to corrective measures introduced during the 60-day period between the deadline and the retaliation.

WTO REMEDIES IN REVIEW

The remedies provided by the WTO dispute settlement procedure are a considerable

⁴⁶ Under the United States' view of the *Bananas III* case, this was the effect of the European Community's self-initiated Article 21.5.

improvement over the remedies available under the GATT dispute settlement procedure that preceded it. Nonetheless, the WTO remedies fall a good bit short of what might ask of an effective legal system. The remedies, even those labeled “compensation,” are entirely forward-looking. There is no compensation for the economic harms done by legal violations. Orders to comply are framed in the most general terms possible, and although the DSU mentions the possibility of more specific “suggestions” that are non-binding, even this more gentle guidance is usually resisted successfully by defendants. While the vagueness of the WTO’s general orders does give defendants useful room to manoeuvre in their search to find politically acceptable means of compliance, that vagueness unfortunately also gives larger countries room to bully defendants into accepting partial compliance. The ultimate remedy is proportionate retaliation by the defendant. It has long been recognized that the retaliation remedy is not very useful to smaller countries, a fact that produces an imbalance in the enforcement options open to different members. Even for large countries, however, it should be recognized that retaliation cannot be used very often.

Given the somewhat qualified level of political commitment to the new WTO legal system described in Part I of this essay, the limitations of present WTO remedies should not come as a surprise to anyone. Nor should it be a surprise that the chances for broadening these remedies are not very good. Indeed, if the likely outcome of the current imbroglio over Articles 21.5 and 22.6 is any guide, the most likely direction of change in the near future will be toward relaxation of the rigor that exists today.

The “remedies” discussed in this essay are only one part of the overall picture of WTO legal enforcement. The ultimate “remedy” which made the GATT dispute settlement procedure as successful as it was the force of community pressure. Community pressure is something that can be generated without an elaborate structure of remedial procedures. In GATT, it was generated by the basic elements of GATT’s rather rudimentary legal structure — the advance specification of rules, the application of those rules in an objective and legally competent manner, and the occasion for regular community attention to rule violations. The new WTO procedures have very likely helped to sharpen that community pressure by creating a more rigorous structure for processing disputes in a

Hudec - Remedies

available at: <http://www.worldtradelaw.net/articles/hudecremedies.pdf>

timely fashion, with timely follow-up, and with legal rulings of a more authoritative character. A complete picture of the enforcement pressures of the WTO would have to take account of the interplay between these detailed remedies and the larger pressures they help to create. That, however, is another study for another day.