

**IMPOSSIBLE CASES:  
LESSONS FROM THE FIRST DECADE OF  
WTO DISPUTE SETTLEMENT**

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## INTRODUCTION

Dispute settlement has been integral to the operation of the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> and its successor, the World Trade Organization (WTO).<sup>2</sup> Through the use of an arbitral panel system, the GATT, and now the WTO, have interpreted the GATT and WTO Agreements and resolved a large body of disputes between trading nations.<sup>3</sup> While the general form of

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<sup>1</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>2</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1144 (1994) [hereinafter Final Act].

<sup>3</sup> For the most comprehensive review of GATT dispute settlement, see

dispute resolution in the GATT/WTO has remained the same, the process has evolved over time.<sup>4</sup> Since the 1970s the participating states have refined, amended and reworked the dispute settlement process.<sup>5</sup> One major achievement of the Uruguay Round (1986–1994) was the adoption of the Dispute Settlement Understanding (DSU).<sup>6</sup> There is general agreement that the GATT Contracting Parties<sup>7</sup> designed a more adjudicative system<sup>8</sup> when they adopted

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ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993). For a current overview of the litigation under the WTO's dispute settlement system, see WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/27 (June 9, 2006) [hereinafter *Dispute Update*].

<sup>4</sup> See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 4–11 (1999) (describing the evolution of the dispute resolution process) [hereinafter *Three Year Overview*].

<sup>5</sup> *Id.* at 7–11.

<sup>6</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

<sup>7</sup> In the text of the GATT 1947 the countries are referred to as Contracting Parties. It was not until the completion of the Uruguay Round that the WTO was set up as a membership organization. Final Act art. XI(1). The Agreements attached to the Final Act in Annexes 1 through 3 are the Multilateral Trade Agreements and bind all Member States of the WTO, as do the revisions of GATT 1947 now denominated as GATT 1994. *Id.* art. XI(2), (4). The DSU is one of the multilateral agreements binding all WTO Member States. See DSU art. 1.

<sup>8</sup> The following explanation should lead to an understanding of the DSU and why it is more adjudicative than the GATT system. The DSU system has been described as “an obligatory and exclusive, quasi-judicial system of adjudication.” Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of Appellate Body's Experience*, 26 FORDHAM INT'L L.J. 1505, 1511–12 (2003). The DSU allows a WTO Member State, which believes that another State has violated a GATT/WTO Agreement (or has nullified or impaired its expected benefits under such an agreement) to seek redress. See GATT art. XXIII(1)(a), (b). The two categories of claims before the DSU are referred to as violation and non-violation claims. The DSU expressly adopts the GATT practice developed to deal with disputes under Article XXXII of the GATT 1947, see DSU art. 3, to trigger a consultation process, see *id.* art. 4. If consultations fail to resolve the dispute, the complaining party can seek creation of a panel for the timely review of the issues. *Id.* arts. 4.7, 6. Upon completion of the panel process and the issuance of its report, a complaining party that prevails is entitled to compliance with that report and its recommendations by the responding state. *Id.* arts. 16, 21, 22. The negative consensus rule of the DSU keeps the losing party from being able to interfere with the adoption of the panel report by the Dispute Settlement Body (DSB). *Id.* art. 16.4. The DSB is comprised of all of the Member States of the WTO. The DSB has “authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the

the DSU. The “new” system<sup>9</sup> was designed to resolve disputes between parties based on the rules and what they meant rather than on power of the States conducting the dispute. Since the adoption of the DSU, scholars have examined how it operates and what role it plays in the WTO. A growing literature exists concerning the

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covered agreements,” *id.* art. 2.1, unless all WTO Member States concur. Consequently the losing state must either comply with the panel’s recommendations or inform the DSB of its intentions within a reasonable period of time. *Id.* art. 21.3.

A losing Member State that cannot comply immediately is given “a reasonable period of time in which to do so.” *Id.* That time period can either be mutually agreed upon by the parties to the dispute or determined by an arbitration. The guideline for the arbitration is “that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report.” *Id.* art. 21.3.c. “However, that time may be shorter or longer, depending upon the particular circumstances,” *id.*, or depending upon the nature of the appeal. *Id.* art. 16.4.

The DSU also created the Appellate Body (AB)—one of the great innovations of the DSU—as a standing body. The Appellate Body is comprised of seven members chosen by the WTO Member States. Each appeal is heard by a panel of three of the Appellate Body members. The entire Appellate Body, however, confers on all appeals, *see* Appellate Body Report, *Working Procedures for Appellate Review*, WT/AB/WP/5, Rule 4 (Jan. 4, 2005), and if the losing party is still found to be in error, it must comply with the AB recommendations. DSU art. 1. When a Member State loses, it is expected to bring its measure into conformity with its GATT/WTO obligations. *Id.* art. 19.1. The losing state, however, is not the judge of whether or not its actions—withdrawal of the offending measure, or its alteration or replacement with a consistent measure—are sufficient. If there is disagreement between the parties about compliance, there is a procedure for review by a panel of the new or altered measure. *Id.* art. 21.5.

In real terms the DSU provision makes it possible for countries to delay implementation. Raj Bhala & Lucienne Attard, *Austin’s Ghost and DSU Reform*, 37 INT’L LAW. 651, 661 (2003) (noting that, in practice, Member States “believe they can go three years before having to worry about compliance.”). This provision exposes the losing party to an attempt by the prevailing party to seek authorization from the DSB to suspend concessions, i.e., to retaliate. DSU art. 22.2.

There are four phases of dispute settlement: consultations, the panel process, an appellate process, and the implementation and surveillance process. The DSB keeps under surveillance the implementation of all adopted panel and Appellate Body recommendations. *Id.* art. 21.6—are all overseen by the DSB. The consultations and panel process were part of the GATT system for resolving disputes. The GATT system also authorized the suspension of concessions as a possible response by the GATT Contracting Parties. In operation, however, GATT disputes were successfully completed if the panel report was adopted and unsuccessful if the panel decision was blocked and not adopted. Some protracted disputes resulted in negotiated settlements. A clear hallmark of the GATT system was that it rested on the political will of the parties to accept panel judgments or to resist them.

<sup>9</sup> *See Three Year Overview*, *supra* note 4, at 3–15 (tracking the evolution of the GATT system into the DSU system and stressing that the DSU is not as innovative as many have suggested).



cases decided under the DSU, how Member States have responded to these cases, and what all of this means for the WTO. There are still questions, however, about whether the more adjudicative system creates different kinds of disputes or different results than the GATT system. Does the DSU create cases that are impossible to resolve?

Three new structural features of the DSU have proven instrumental in changing how Member States resolve their disputes. The DSU requires appellate review and thereby specifies the setting up and operation of an Appellate Body (AB). The DSU also subjects the political adoption of panel and Appellate Body reports to the negative consensus approach, thereby making adoption of reports "automatic" rather than truly political. Finally, the DSU adds a surveillance and implementation phase to the process to ensure that some action will be taken by the Dispute Settlement Body (DSB) in response to non-compliance.

How do the older and newer aspects of the dispute settlement system mesh? As in the GATT system, the beginning and end of all WTO cases remain highly political. In its first decade of operation a majority of all cases filed with the DSB were settled during consultations.<sup>10</sup> These cases are settled between the disputing Member States, and that settlement is reported to the DSB. Consequently, in such cases no pronouncement about GATT/WTO law is made. If the parties fail to settle, however, a dispute usually goes before a panel (or panels) of arbitrators. A large majority of all cases that reach the panel level are appealed.<sup>11</sup> The operation of panel and appeal phases has created the more adjudicative dispute settlement process. With its two levels of arbitral review, the DSU requires the parties to spend most of their time contending over the procedures for resolving the dispute and the substance of the rules. The quasi-automatic adoption of a panel—or Appellate Body—report by the DSB assures that the system will resolve all procedural disputes and determine what the rules mean.<sup>12</sup> The

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<sup>10</sup> See Carlos M. Vazquez & John H. Jackson, *Some Reflections on Compliance with WTO Dispute Settlement Decisions*, 33 *LAW & POL'Y INT'L BUS.* 555, 566 n. 54 (2002) (explaining that less than half of the cases in which consultation was requested went forward to panel consideration).

<sup>11</sup> See Kara Leitner & Simon Lester, *WTO Dispute Settlement From 1995 to 2005—A Statistical Analysis*, 9 *J. INT'L ECON. L.* 219, 226 (2006) (calculating the percentage of panel reports appealed at 70.48% as of the end of 2005).

<sup>12</sup> DSU art. 19.1. Joost Pauwelyn has described the legalization of the DSU process: "The discourse is set out in very long submissions and statements, and in

Appellate Body has self-consciously set out to issue clear, coherent, and legitimate decisions.<sup>13</sup> It must do so with compulsory jurisdiction<sup>14</sup> and limited powers for managing cases.<sup>15</sup>

The system answers all questions raised about what the law means. However, it cannot guarantee when or how the panel or Appellate Body recommendations will be followed. The panel and Appellate Body recommendations tend<sup>16</sup> to suggest that the losing party bring the offending measure(s) into conformity with obligations under the agreement at issue and usually do not provide any guidance on how this should be done. The DSU process thus returns a dispute to the political systems of the disputing parties.<sup>17</sup>

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even longer panel and Appellate Body reports, going into and explaining in detail the most intricate legal findings." Joost Pauwelyn, *The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 121, 125 (2003).

<sup>13</sup> See *Proceedings of the 99th Annual Meeting of the American Society of International Law, WTO Appellate Body Roundtable*, 99 AM. SOC'Y INT'L L. PROC. 175 (2005) (presenting views from three of the first seven AB members on how the AB set out to operate); see also *Three Year Overview*, *supra* note 4, at 30 (noting that the AB panels heavily relied on the interpretation methods of Article 31.1 of the Vienna Convention on the Law of Treaties (as authorized by the DSU art. 3.2) in order to be prudent and to give the "legal rulings the greatest possible appearance of objective legal authority"); Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 26 (2005) (noting that the AB "like more conventional judicial bodies, has opted for a rigorous, impartial, and strictly legal approach to analyzing trade complaints").

There has been concern that the Appellate Body has engaged in judicial activism. See Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 247-57 (2004) (noting the literature on the alleged judicial activism and explaining the ways in which there has been more expansive judicial lawmaking in the DSU system as opposed to the GATT system).

<sup>14</sup> The Appellate Body has compulsory jurisdiction over all claims raised by contending Member States. DSU art. 7.2; see Claus-Dieter Ehlermann, *Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO*, 1 WORLD TRADE REV. 301, 305 (2002) (noting that neither a panel nor an AB panel "is entitled to refuse to address a claim because the panelists or the Appellate Body members want to avoid a legal question that has delicate political consequences").

<sup>15</sup> See Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT'L & COMP. L.Q. 861, 862 (2004) (arguing that unlike other courts and tribunals, the AB is limited in its ability to manage cases that are inappropriate for dispute settlement proceedings).

<sup>16</sup> Parties to a dispute are entitled to ask the panel or Appellate Body to make specific recommendations about how the losing party should implement the panel/AB recommendations. DSU art. 19.1. Member States have rarely asked panels or the AB to do this.

<sup>17</sup> See Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*,

The surveillance and implementation phase gives governments the time and leeway to arrive at compliance. In other words it was designed by the Member States to produce indeterminate outcomes.<sup>18</sup> The losing state must decide how and when—with only limited guidance and oversight—it will comply. The prevailing state, in turn, must keep the losing party and the DSB engaged on the issue of whether compliance is forthcoming or adequate. The DSB oversees compliance through several methods: keeping the dispute on the DSB agenda; requiring the losing state to report on the steps it is taking towards compliance; establishing a compliance review panel (under Article 21.5) when the losing state is accused of failing to take adequate steps to comply; and authorizing the suspension of concessions (under Article 22) for states that have failed to comply. Commentators have noted that DSB oversight, apart from compliance reviews and sanctions requests, has not affected how the losing party responds.<sup>19</sup> In addition, the existence of the compliance review and sanctions phases also allows additional chances to litigate and draw out the time for full compliance. While most losing parties comply without forcing the dispute to the compliance review stage or retaliation, there are disputes that have resulted in sustained non-compliance.

During the transition from the GATT dispute settlement system towards the DSU, several scholars theorized what it would mean to shift towards a more adjudicative system. Robert Hudec, writing at a time when the GATT panel process was being strengthened, noted that efforts to force greater compliance through a tightening of the rules would create what he labeled

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38 TEX. INT'L L.J. 405, 415 (2003) (noting that the WTO dispute settlement system is political "both at its inception and at its end").

<sup>18</sup> *Id.* at 415 (arguing that the design was not a sign of lack of political will but was chosen because it allowed for maneuvering).

<sup>19</sup> Steve Charnovitz, *An Analysis of Pascal Lamy's Proposal on Collective Preferences*, 8 J. INT'L ECON. L. 449, 458–59 (2005) (noting that there really is no connection between the surveillance carried out by the DSB and the domestic parties' process for considering how and whether to come into compliance); see also Christopher Arup, *The State of Play of Dispute Settlement "Law" at the World Trade Organization*, 37 J. WORLD TRADE 897, 902 (2003) (noting that what happens to disputes still remains within the control of the Member States and the DSU uses soft methods—monitoring and reporting on implementation and discussions in WTO meetings—to encourage compliance.).

“wrong cases”<sup>20</sup>—disputes that would resist resolution. In the lead-up to the negotiations for the DSU, William Davey<sup>21</sup> and Kenneth Abbot<sup>22</sup> followed up on the “wrong cases” idea in light of the forthcoming DSU. All of these scholars believed the GATT (and the later WTO) process would spin off “wrong cases,”<sup>23</sup> which would pose very difficult problems for the organization.<sup>24</sup> Now that the DSU has been in place for over a decade<sup>25</sup> and countries have been actively pursuing cases under its terms,<sup>26</sup> it is time to revisit the idea of “wrong cases” and determine whether the phenomenon exists in the WTO. The appellation chosen by Professor Hudec, “wrong cases,”<sup>27</sup> suggests that some cases pursued and decided should never have been brought before the dispute settlement system.<sup>28</sup> In reality, “impossible cases”—cases that begin,

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<sup>20</sup> Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159-163 (1980) [hereinafter *Unfinished Business*].

<sup>21</sup> William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 73-76 (1987).

<sup>22</sup> Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111.

<sup>23</sup> *Unfinished Business*, *supra* note 20, at 159-63; Davey, *supra* note 21 at 73-76; Abbott, *supra* note 22, at 124-25, 138-42.

<sup>24</sup> *Unfinished Business*, *supra* note 20, at 166-67; Davey, *supra* note 21 at 73-76; Abbott, *supra* note 22 at 141-42.

<sup>25</sup> The DSU began operating January 1, 1995. The number of disputes brought under the DSU in the first nine years exceeded the total number of disputes brought under the GATT system operating from 1947-1994. WORLD TRADE ORGANIZATION, ANNUAL REPORT 2004 2.

<sup>26</sup> Since the DSU began operating, there have been 344 complaints brought before the DSB. The WTO reports that there have been fifty-one mutually agreed-upon solutions and twenty-nine other settled or inactive disputes. See *Dispute Update*, *supra* note 3, at ii (providing a statistical overview of WTO dispute settlement cases). It is not possible to divide this number of complaints by the reported settlements to arrive at a percentage because not all complaints that are filed turn into a WTO dispute. The DSU system allows for the formation of a single dispute with multiple claimants. See Leitner & Lester, *supra* note 11, at 219-22 (finding that in the first decade of complaints, from 1995-2005, 335 complaints were filed, but there were only 249 “matters” or actual disputes).

<sup>27</sup> The DSU does require Member States to contemplate whether bringing a dispute is well considered. See DSU art. 3.7 (announcing that “[b]efore bringing a case, a Member shall exercise its judgment as to whether an action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”). This article suggests that Member States should not bring every dispute to the DSU system; however, it does not provide criteria for determining when a dispute would be fruitful.

<sup>28</sup> According to Hudec, the Tokyo Round negotiators refining the panel process identified three different categories of wrong cases and decided “that ‘wrong’

proceed and/or end by being overly contentious, difficult, or complex—is a better term of art because “impossible cases” are a natural part of the GATT/WTO process and arguably any international dispute settlement process. Throughout this article, therefore, the term “impossible cases” will be used.

### 1. A THEORY OF IMPOSSIBLE CASES

There is no theory about why the GATT and now the WTO dispute settlement systems produce impossible cases. The factors or elements that predict which cases will prove overly difficult have never been fully catalogued and analyzed. Robert Hudec wrote about “wrong cases” as a descriptive exercise. He established three categories of cases that would tend to become legal failures.<sup>29</sup> Later scholars adopted these categories and then offered their own perspectives.<sup>30</sup> Consequently, now seems the time to offer such a theory and to isolate the factors that make an impossible case. In analyzing the phenomenon, this article will answer two critical questions: first, does the DSU create “impossible cases” or create them more often? Second, how do impossible cases affect the DSU system and the WTO?

#### 1.1. *What are “Wrong Cases” and are They “Impossible Cases?”*

In his article, *GATT Dispute Settlement, After the Tokyo Round: An Unfinished Business*,<sup>31</sup> Hudec described the worries of the GATT Contracting Parties in the late 1970s as they contemplated making the GATT panel process more legal and less diplomatic in nature.<sup>32</sup>

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complaints can lead to ‘wrong’ decisions that lower respect for GATT law.” *Unfinished Business*, *supra* note 20, at 166.

<sup>29</sup> *Unfinished Business*, *supra* note 20, at 159–63. Hudec also offered his solution for cases such as the U.S. Domestic International Sales Corporation (DISC) case, which served as his illustration of a “wrong case.” *Id.*

<sup>30</sup> See, e.g., Davey, *supra* note 21; Abbott, *supra* note 22 (analyzing various aspects of dispute settlement systems).

<sup>31</sup> *Unfinished Business*, *supra* note 20.

<sup>32</sup> The Tokyo Round debate focused on “improving the enforcement machine” for GATT disputes. There were framework negotiations on dispute settlement that resulted in the adoption of the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (Nov. 28, 1979) GATT B.I.S.D. (26th Supp.) at 210, 215 (1980). Some countries were supporters of strengthening enforcement, but anti-legalist countries were opposed to it. According to Hudec, the anti-legalists were against alterations because they believed governments would not comply and that the cases of non-compliance “would become con-

The shift towards an adjudicative system began when the Contracting Parties refined the GATT panel process.<sup>33</sup> The adoption of the DSU further codified this shift by eliminating most of the political limits to the adjudicative power of the older system.<sup>34</sup> Therefore, any analysis of "wrong cases" should apply to the WTO as well as the GATT dispute settlement system.

According to Hudec's analysis, there were three categories of "wrong cases": 1) cases involving "ordinary non-compliance;"<sup>35</sup> 2) cases involving "inoperative rules;"<sup>36</sup> and 3) cases capable of "overtaxing the GATT procedure."<sup>37</sup> Each category will be discussed in turn.

### 1.1.1. Ordinary Non-Compliance

Instances of "ordinary non-compliance" would inevitably occur, Hudec reported, because governments would respond to political pressures (coming from some industry or particular economic situation)<sup>38</sup> to flout a GATT rule. According to Hudec, they would do so even in instances where the Contracting Party knew that it would lose any GATT dispute brought to challenge the

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spicuous failures for the GATT, diminishing both its own prestige and that of its rules." *Unfinished Business*, *supra* note 20, at 159.

<sup>33</sup> See *Three Year Overview*, *supra* note 4, at 8-11 (discussing the success of the GATT dispute settlement procedure during the 1980s).

<sup>34</sup> The United States complained about two aspects of the GATT system prior to the DSU negotiations: 1) the blocking of panel reports by the losing parties of the disputes and 2) the lengthiness of GATT proceedings. *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* 2792, 2730-35 (Terence P. Stewart ed. 1993). Given the political nature of the GATT dispute settlement system, Contracting Parties could block or delay a dispute at the time the panel was established, at the time when the terms of reference for the panel were being adopted, and also when the final panel report had to be adopted by the GATT General Council.

The DSU establishes clear time frames for establishing a panel and determining the terms of reference. See DSU arts. 6, 7. Most importantly, the DSU reversed the GATT requirement that all panel reports be adopted by consensus and instead instituted the negative consensus approach. See DSU arts. 2, 3 n.1, 16.4. See generally C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 246-50 (1997) (addressing, among other issues, the effectiveness of the dispute settlement system under the DSU).

<sup>35</sup> *Unfinished Business*, *supra* note 20, at 159-60.

<sup>36</sup> *Id.* at 160-62.

<sup>37</sup> *Id.* at 163-65.

<sup>38</sup> *Id.* at 159.

measure.<sup>39</sup> Hudec's name for this category—"ordinary non-compliance"—encapsulated the political aspect of GATT dispute settlement.

Nothing has changed since the creation of the WTO. Member States pass laws and regulations, intentionally or not, which violate GATT/WTO obligations because it is in their political interests to do so. It is the intervention of the dispute settlement process that labels such conduct as violative. As noted earlier, the political process—the ultimate *resolution* of any dispute—lies within the control of the parties.<sup>40</sup> If the industry or situation facilitated by the prior conduct is regarded as crucial, the losing government may decide to refuse to comply, to delay compliance, or to comply inadequately (and thus achieve much-needed delay) with the decision of the dispute settlement body.<sup>41</sup> The prevailing country would then have to decide how it could best achieve its goal of forcing the removal of the measure or its ill effects.

The political will of states, Hudec argued, was *the* determinative element in the success and effectiveness of the system.<sup>42</sup> Con-

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<sup>39</sup> *Id.*

<sup>40</sup> See Pauwelyn, *supra* note 12, at 126 (noting that "the fact remains that *before* and *after* [the panel and AB process] (*i.e.*, in pre-panel consultations and when it comes to inducing compliance with reports) there is 'not enough law'").

<sup>41</sup> Such cases have been resolved through the DSU process. The best illustration of this is the *Hormones* case. The United States and Canada prevailed before a WTO panel and the Appellate Body in 1998 on the issue of whether the European Commission ("EC") could justify its ban on hormone-fed cattle. The EC always took the position that it could not resolve the case by simply removing the ban on hormone-enriched beef products. Instead the EC kept the ban in place until it had created a new directive justifying the ban after a "thorough and independent risk assessment." Press Release, European Commission, EU Requests WTO to Confirm That There Is No Justification for U.S./Canada to Continue to Apply Sanctions (Nov. 8, 2004), available at [http://ec.europa.eu/trade/issues/respectrules/dispute/pr081104\\_en.htm](http://ec.europa.eu/trade/issues/respectrules/dispute/pr081104_en.htm). The EC completed the new risk assessment in 2003 and then requested that the United States and Canada remove their sanctions. *Id.* Both countries have refused. Now the EC has initiated cases against both countries for refusing to lift the sanctions and a panel has heard the dispute. *Id.*; see *infra* Section 2.3.2.4.

<sup>42</sup> Hudec merits quoting at length:

A third lesson suggested by the GATT's experience is that *political will is really more important than rigorously binding procedures*—that *strong procedures by themselves are not likely to make a legal system very effective if they do not have sufficient political will behind them*. More specifically, it may be suggested that the new WTO procedure is not likely to be significantly more successful than its GATT predecessor unless the adoption of this reform is supported by significantly stronger political will on the part of leading WTO governments.

sequently, he was skeptical of whether strengthened GATT procedures, or the later the adoption of the DSU, would be enough to resolve ordinary non-compliance problems.<sup>43</sup> Moreover, Hudec did not believe political will to comply could be gauged by the new rules adopted by Member States. Adopting the more adjudicative DSU, therefore, did not prove that Member States had developed a stronger commitment to submitting to unfavorable dispute settlement decisions.<sup>44</sup> Rather, Hudec believed that the DSU was adopted primarily to constrain the unilateralism of the United States.<sup>45</sup>

Writing early on in the Uruguay Round negotiations, William Davey acknowledged the real possibility of this first category of "wrong cases" set out by Hudec.<sup>46</sup> However, Davey believed that the panel's declarative power to rule government measures as violative of GATT law would lead to compliance by countries.<sup>47</sup> Writing after the completion of the draft of what later became the DSU,<sup>48</sup> Kenneth Abbott also agreed with Hudec that wrong cases would be created.<sup>49</sup> Abbott opined that compliance would be

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*Three Year Overview*, *supra* note 4, at 11 (emphasis added).

<sup>43</sup> See *id.* at 14 ("[I]t must be anticipated that there will be defeats when governments cannot, or will not, comply with some legal rulings—just as they did under GATT.").

<sup>44</sup> See *id.* at 12 (arguing that the political will of major states in the WTO was "not strong enough to deter occasional outbreaks of noncompliant behavior, particularly among its leading citizens"). As Hudec stated:

The new WTO System asks for a stronger political commitment because it sets the bar higher. Yet it is difficult to identify any major changes in national political life in the major WTO countries that will make their political systems more receptive to WTO legal discipline than they were in the decade or two before the WTO came into being.

*Id.*

<sup>45</sup> *Id.* at 13–14; see Taylor, *supra* note 34, at 248–49 ("Eventually, the views of most negotiators shifted toward the view of the United States regarding the abandonment of positive consensus for the dispute settlement system, but only after the United States had made aggressive use of Section 301."); *infra* Section 2.2.2 (discussing the American use of the Section 301 statute prior to the Uruguay Round).

<sup>46</sup> Davey, *supra* note 21, at 74.

<sup>47</sup> See *id.* ("[I]t may help [a] respondent's government counteract domestic pressures if that government can honestly argue that condemnation by GATT is likely and retaliation by trading partners is possible.").

<sup>48</sup> See Abbott, *supra* note 22, at 111. Kenneth Abbott's draft was not altered significantly when the DSU was adopted.

<sup>49</sup> *Id.* at 142.



aided by the new implementation procedures such as automatic adoption of the panel/appellate reports and more available access to retaliation.<sup>50</sup> Like Hudec, however, Abbott expressed doubts about whether “the underlying problem of political cohesion in the GATT” had been underestimated.<sup>51</sup> Even with the new implementation features of the system, Abbott contended there would still be cases that would cause political problems. Abbott characterized one group of such cases as those where powerful countries would refuse to comply even after exhausting all available procedures.<sup>52</sup>

Hudec was correct not only about the political aspect of dispute settlement but also about the fact that some non-compliance would be “ordinary.” Any system could produce such legal failures, given the proper background. One way to assess this is to see whether the case has exhausted all procedures available under the system. Seven disputes have resulted in this type of legal failure in the WTO. Countries failing to implement Appellate Body recommendations have provoked retaliation. DSB suspension of concessions has not resolved all of these cases, although the pressure it creates may have assisted some.<sup>53</sup> In the most extreme case, *Hormones*,<sup>54</sup> retaliation lasted over eight years without dispute resolution. Instead, the non-compliance and sustained retaliation, along with a late claim of possible compliance, spawned yet another dispute.<sup>55</sup> In another of the seven cases, *Bananas III*, retaliation lasted

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<sup>50</sup> *Id.* at 137.

<sup>51</sup> *Id.* at 142.

<sup>52</sup> *Id.* It is now clear that several cases of the particular type identified by Abbott have already been brought into the WTO system. See *infra* Sections 2.3.2, 2.3.3, and 2.3.8.

<sup>53</sup> See *infra* Section 2.3.2.

<sup>54</sup> Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter *Hormones* AB Report]. The dispute went through the panel and Appellate Body process. The EC then allowed the deadline for compliance to pass. The United States and Canada requested the suspension of concessions in June 1999. Sanctions brought upon by both countries commenced in July 1999 and continue to remain in place as of 2007. See Dispute Update, *supra* note 3, at 228–29.

<sup>55</sup> See *infra* Section 2.3.2. The new cases are against the United States and Canada for maintaining the WTO authorized sanctions. See Request for the Establishment of a Panel by the European Communities, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/6 (Jan. 14, 2005); Request for the Establishment of a Panel by the European Communities, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/6 (Jan. 14, 2005). A panel was established to review both cases in February 2005.

for two years before there was a settlement of the dispute involving action by the entire WTO membership.<sup>56</sup> Even that settlement, however, has not resolved the underlying problem posed by the case. In the other five cases, the losing state did not comply, and consequently retaliation was authorized.<sup>57</sup> In two of those, the winning state used the authority to retaliate.<sup>58</sup>

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The panel heard arguments in September 2005. The chairman of the panel has announced that the final report will be issued to the parties in June 2007.

<sup>56</sup> *Bananas III* is a short-form name for Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) (adopted Sept. 25, 1997). The name *Bananas III* was adopted to distinguish it from two prior GATT disputes involving the EC banana regime. The *Bananas III* dispute resulted in sanctions authorized against the EC in April 1999 and May 2000; the first was requested by and granted to the United States and the second was granted to Ecuador. The United States used its sanctions authorization; Ecuador did not. The U.S. sanctions were not terminated until January 2002, after the United States and the EC negotiated a settlement. The DSU was notified of the settlement in two Understandings in April 2001. The Understandings required that the EC obtain two waivers from the WTO. The waivers were granted by the WTO General Council in December 2001, thus paving the way for the termination of sanctions. See Dispute Update, *supra* note 3, at 224–28. The Latin American countries that pursued *Bananas III* along with the United States remain dissatisfied with market access and are now pursuing consultation with the EC. See *infra* Section 2.3.1.

<sup>57</sup> The five other DSB authorizations to the winning party to suspend concessions came from the following: Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/ARB (Feb. 17, 2003) [hereinafter *Canada – Aircraft*]; Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) [hereinafter *U.S. – Byrd Amendment*]; Appellate Body Report, *United States – Antidumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) [hereinafter *U.S. – Anti-Dumping Act*]; Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations,”* WT/DS108/AB/R (Feb. 24 2000) [hereinafter *FSC*]; and Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999) [hereinafter *Brazil – Aircraft*].

In *Brazil – Aircraft*, the DSB authorized suspension of concessions in August. Brazil implemented new legislation; Canada continued to insist that Brazil was not in compliance. Dispute Update, *supra* note 3, at 222–23.

In *FSC*, the DSB authorized the EC in May 2003 to suspend concessions after the United States had attempted and failed to implement legislation to solve its WTO violations. The EC used that authorization beginning in March 2004. The United States adopted legislation to comply, but the EC sought another compliance review panel regarding transition provisions contained in the legislation. An AB panel found those provisions violative, and the United States faced reimposition of sanctions until it took action. See *infra* Section 2.3.6 for a more complete discussion of *FSC*.

In *Canada – Aircraft*, the DSB authorized Brazil to suspend concessions in March 2003. *Id.* at 194–95. In *U.S. – Byrd Amendment*, eight member states (Brazil, Chile, the EC, India, Japan, Korea, Canada, and Mexico) requested the DSB to authorize concessions in January 2004 because the United States had failed to with-

### 1.1.2. *Inoperative Rules (Non-Consensus)*

The second category of “wrong cases” was identified as disputes over GATT rules that had become “inoperative.” Several GATT rules—notably the discipline on regional economic integration arrangements (art. XXIV) and the escape clause (art. XIX)<sup>59</sup>—reached this status by the end of the 1960’s.<sup>60</sup> Hudec noted that there was “tacit acceptance” by the GATT Contracting Parties of widespread violations of these rules, but that not all states approved of this acquiescence.<sup>61</sup> The concern was that if the panel process was toughened to compel compliance, there would be an “avalanche of . . . complaints” by states troubled that others ignored the rules.<sup>62</sup>

The rules at issue in the 1970s were inoperative because most states no longer would or could apply them. Thus this category of

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draw the measure. In August 2004, the arbitration appointed to review the issue reported to the DSB. The DSB authorized the suspension of concessions in November 2004. In February 2006, the United States argued to the DSB that it had enacted legislation to repeal the measure. Most of the complainants, however, disagreed with the argument that this action brought the United States into compliance. Dispute Update, *supra* note 3, at 197.

In *U.S.-Antidumping Act*, the United States announced its intention to comply in 2000, but took another three years to repeal the legislation. Dispute Update, *supra* note 3, at 211–13.

<sup>58</sup> In the other two disputes where retaliation was authorized, the prevailing party did act on that authorization. In *FSC*, the DSB authorized the EC to suspend concessions in May 2003 after the United States had attempted unsuccessfully to solve its problem by passing new legislation, which was found GATT-violative. The EC used that authorization in March 2004 and kept the sanctions in place until the United States adopted new legislation that allegedly eliminated the violation. See *infra* Section 2.3.7. In *U.S. – Byrd Amendment*, eight member states (Brazil, Canada, Chile, the EC, India, Japan, Korea, and Mexico) requested that the DSB authorize the suspension of concessions in January 2004. The DSB gave that authorization in December 2004, and the EC and Canada began using that authorization in April 2005. Dispute Update, *supra* note 3, at 197. The United States passed legislation in February 2006 to repeal the legislation but left in place a transition period until October 2007. The EC expressed dissatisfaction with the transition period, claiming that it would affect imports for a number of years. The EC sanctions thus remain in place. Press Release, European Commission, EU Welcomes Repeal of Byrd Amendment and Regrets Transition Period (Feb. 2, 2006).

<sup>59</sup> GATT, *supra* note 1, arts. XXIV, XIX. Article XXIV sets out the GATT/WTO discipline on regional arrangements. Article XIX, the “Escape Clause,” sets out the discipline on emergency action for imports of particular products.

<sup>60</sup> *Unfinished Business*, *supra* note 20, at 160–62.

<sup>61</sup> *Id.* at 160.

<sup>62</sup> *Id.*

“impossible cases” should be characterized as one in which there is no overall consensus by states on certain norms (i.e., a non-consensus case). Any adjudicative dispute settlement system would allow such cases to be heard and decided and thus inevitably produce results that the losing state, and perhaps other states, would not regard as legitimate. The GATT/WTO has always had problems of this type because of its tradition of drafting open-ended and often ambiguous rules.<sup>63</sup> Davey believed that this second category – non-consensus about the rules – was inevitable and would sorely test but not destroy the system.<sup>64</sup> Abbott opined that the negotiation of new agreements in the Uruguay Round might lessen the problem of panels applying rules that no longer commanded support.<sup>65</sup> In other words, there was hope that the Uruguay Round negotiations would be used to clarify existing rules and craft new ones which were clearer. Even with that hope, however, Abbott argued that the new system, complete with appellate review, could still produce cases where the respondent and other

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<sup>63</sup> See Arup, *supra* note 19, at 910 (“The WTO agreements may expose the system to difficulty because they lack the precision and compulsion for the tribunals to be able to say they are ‘only applying the rules.’”); Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, in *IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL LAW* 9, 23 (Michael M. Hart & Debra P. Stegar eds., 1992) (asserting that GATT law was “full of gaps, omissions, inconsistencies and outmoded provisions.”); see also Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT’L L. 478, 489 (2000), stating that:

[t]rade policy increasingly implicates the clash, or potential clash, of liberal commercial values with regulatory or other nontrade aims. Negotiators often find it more expedient to gloss over these nettlesome issues than to take the time to resolve them explicitly in WTO codes, particularly where the resolution could provoke political resistance at home.

See generally Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 336–37 (1999) (discussing the complex determination of the application of law in WTO dispute resolution).

<sup>64</sup> Davey, *supra* note 21, at 74–76. Prior to the Uruguay Round Davey found that procedural aspects of the GATT system – the possibility of a political solution by the disputing parties through the seeking of a waiver and the required adoption of panel reports by the GATT Council – could mitigate the effects of such cases. *Id.* at 75.

<sup>65</sup> Abbott, *supra* note 22, at 125, stating:

In particular, the agreements being negotiated would revise – if not replace – a broad range of existing rules in sensitive areas, while adding newly negotiated rules in areas like services and intellectual property. The problem of panels applying rules that no longer command support in the community, then, should be greatly reduced.

countries would see the rule applied to its dispute as “obsolete or counterproductive.”<sup>66</sup>

The DSU has seen non-consensus cases. Some of these have been predicted by Hudec, involving rules that have long been<sup>67</sup> regarded as problematic. But there have also been non-consensus cases arising under the new WTO agreements, such as the GATS,

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<sup>66</sup> *Id.* at 142.

<sup>67</sup> There have been controversial decisions by the Appellate Body involving both article XXIV and article XIX. The cases are somewhat different, however, from what the Contracting Parties envisioned in 1980. During the Uruguay Round, these particular inoperative GATT rules were made operative for the WTO system. See The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1161 (1994) (adopted by the Contracting Parties with regard to Article XXIV. The Understanding settled several outstanding issues about the formation of free trade areas and customs unions. In addition, the Understanding made it clear that WTO States would have the right to pursue Article XXIV disputes in the dispute settlement system. *Id.* at 1163. In *Turkey—Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R (Oct. 21, 1999), the Appellate Body rendered the first decision about whether a Member State’s actions regarding a regional arrangement could be justified by invoking Article XXIV as a defense.

With regard to Article XIX, the Contracting Parties negotiated an additional agreement. See Safeguards Agreement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1161 (1994). There has been substantial litigation involving the Safeguards Agreement. Most of the cases have involved the use of such measures by the United States. See *U.S.—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Nov. 10, 2003) [hereinafter *U.S.—Steel*]; *U.S.—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea*, WT/DS202/AB/R (Feb. 15, 2002); *U.S.—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/AB/R (May 1, 2001) and *U.S.—Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia*, WT/DS178/AB/R (May 1, 2001) [hereinafter *U.S.—Lamb*]; *U.S.—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Dec. 22, 2000). None of the safeguards actions challenged before the WTO have been upheld. One of the major reasons for this has been the Appellate Body determination that actions taken under several different Member State statutes are flawed because of the failure of decision-makers to consider a factor required in Article XIX of GATT—the failure to make a finding that the surge of imports leading to a safeguards measure was a result of “unforeseen developments.” See *U.S.—Steel*, *supra* ¶ 278; *Argentina—Safeguard Measure on Imports of Footwear*, WT/DS121/AB/R ¶ 88–89 (Dec. 14, 1999); *Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R ¶ 90 (Dec. 14, 1999). The “unforeseen developments” requirement was one of several elements of Article XIX that many GATT Contracting Parties had ignored in the period before the negotiation of the Safeguards Agreement.

TRIPs, SPS and SCM Agreements,<sup>68</sup> that have more concrete or tightened types of problematic obligations. Given the GATT/WTO tradition of negotiating and adopting open ended obligations, such cases will likely continue to happen in the DSU system.<sup>69</sup>

### 1.1.3. "Overtaxing the Procedure" Cases

The third category of "wrong cases" includes those that would "overtax the panel procedure"<sup>70</sup>— cases that would prove for various reasons to be beyond the "decision-making capacity" of the GATT panel procedure.<sup>71</sup> Hudec conceded that this type of case could only be determined subjectively and that would require "invoking standards that are difficult to define."<sup>72</sup> Hudec's example was the Domestic International Sales Corporation ("DISC") case<sup>73</sup>

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<sup>68</sup> Several major agreements with new and different types of rights and obligations were adopted in the Uruguay Round. See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS Agreement]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 14 (1994) [hereinafter SCM Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement]. Of these four agreements, only the SCM Agreement had a precursor, the Subsidies Code, adopted as part of the Tokyo Round negotiations. See Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 404–05 (2001) (describing two of the new Uruguay Round Agreements: TRIPs as "noteworthy for the degree of its positive, regulatory focus" and SPS as going well beyond the concept of non-discrimination); see also Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79, 107 (2006) (noting that with regard to TRIPs and the SPS Agreement, the "WTO has reached beyond the norm of non-discrimination to achieve some level of proactive harmonization").

<sup>69</sup> One illustration is the *Hormones* case. The panel and Appellate Body in that case were asked to interpret the new SPS Agreement. See *infra* Section 2.3.2 for an extended discussion of the *Hormones* decision.

<sup>70</sup> Hudec, *supra* note 20, at 163.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 163. The Tokyo Round negotiators argued, however, that they had experienced or could identify such cases. *Id.* at 165–65.

<sup>73</sup> *Id.* Report of the Panel, *United States – Tax Legislation (DISC)*, L/4422 (Nov. 2, 1976), GATT B.I.S.D. (23rd Supp.) (1977).

which went on for four years in the GATT before it was settled by the involved parties.<sup>74</sup> Many countries viewed the DISC case as illustrative of the proposition that "'wrong' complaints can lead to 'wrong' decisions that lower respect for GATT law."<sup>75</sup>

If the DISC case is illustrative, then third category cases involve an attack on a major regulatory policy that would require the losing country to either alter the policy or replace it. Such an effort would require a large shift in ideology or resources by the losing country. Another characteristic of overtaking cases is that they require a great deal of expertise and data on the offending measure(s) and their consequences for the panel to resolve.<sup>76</sup> Hudec contended that in such cases an arbitral panel would be hard pressed to sort through and establish the facts while creating what the governments would find to be acceptable interpretations of the relevant GATT obligations. If presented with such cases panelists might go beyond their proper limits.<sup>77</sup>

Cases that look like third category cases have also been created by the WTO's more adjudicative dispute settlement. In fact a variation on the DISC case, the *Foreign Sales Corporations* ("FSC") case,<sup>78</sup> resurfaced in the WTO. The FSC case recreated the controversy between the original participating states in the earlier dispute.<sup>79</sup> The United States resisted true resolution,<sup>80</sup> even after sanc-

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<sup>74</sup> Hudec, *supra* note 20, at 163. The DISC case involved a challenge to the United States tax system used for foreign income earned by U.S. corporations and a corresponding counterclaim by the United States against the tax systems of three EC member countries.

<sup>75</sup> *Id.* at 166.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 164. Hudec's solution for such cases at the time was for GATT panelists to take a particular type of activist role as creative interpreters of GATT rules. *Id.*

<sup>78</sup> FSC, *supra* note 57.

<sup>79</sup> The EC pursued the United States arguing that the United States' creation and maintenance of Foreign Sales Corporations provided illegal export subsidies. See *infra* Section 2.3.6 for an extended discussion of the FSC case.

<sup>80</sup> The United States lost before a panel and the Appellate Body. In response the United States quickly adopted legislation, the Extra-Territorial Income Act ("ETI"), that it claimed satisfied its obligations to comply. The EC argued that, in fact, the legislation simply recreated the problem. Upon review the original panel also found the ETI to be non-compliant because the United States also included transition provisions that would have allowed a holdover of the old system. The United States then struggled over how to implement its obligations until October 13, 2004, when the House and Senate passed a corporate tax bill. Edmund L. Andrews, *Tax Measure, and Its Breaks, Passes Senate*, N.Y. TIMES, Oct. 12, 2004, at C1.

tions had been authorized, in part because Congress was of the opinion that any resolution was going to require a complete rethinking of how to tax all foreign earned income.<sup>81</sup> Ultimately the United States opted to remove the entire system. However, even in adopting this solution the United States was unable to (or believed it could not afford to) avoid GATT violations.<sup>82</sup> Other WTO disputes (*Hormones*, *Shrimp/Turtle*, *Film*, and *GMOs*) have posed similar factual<sup>83</sup> and legal quagmires for WTO panels and the Appellate Body.

Two points are worth noting. First, the WTO/DSU has produced cases that fit into more than one of Hudec's three categories of "wrong cases." His hypothesis that such cases would be created, and perhaps more frequently, by a more adjudicative dispute settlement system is correct. Second, the categories of cases are not self-contained. The WTO cases that look like "impossible cases" straddle several of the categories. It is this very characteristic that makes them "impossible."

### 1.2. Why Are There Impossible Cases?

Impossible cases occur whenever the limits that exist in any international dispute settlement system—the willing participation of states, the substance of the rules and obligations, and the design

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*See infra* pp. 131–42 for an extended discussion of the protracted path the United States took towards implementation in the FSC case.

<sup>81</sup> One prospect for resolving the dispute would have been to drop the entire concept of foreign sales corporations and do a major revision of the tax code.

<sup>82</sup> The United States' different and arguably much simpler solution was to eliminate Foreign Sales Corporations and instead offer corporations that manufacture in the United States a ten percent tax deduction. The EC argued successfully in an art. 21.5 compliance case and appeal that even this legislation was not fully GATT-compliant because the United States also included transition provisions that would have allowed a holdover of the old system. *See infra* Section 2.3.8.

<sup>83</sup> *See Hormones*, *supra* note 54; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (adopted by the DSB, Nov. 6, 1998) [hereinafter *Shrimp/Turtle*]; Panel Report, *E.C. – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/23 (Aug. 8, 2003) [hereinafter *GMOs*] (Request for Establishment of a Panel by United States fact patterns that create similar difficulties). Like the *Hormones* case, one of the time-consuming aspects of the *GMOs* case has been taking expert testimony regarding EC measures taken to ban genetically modified organisms from being imported, processed or used in the EC. The panel postponed issuing its decision several times, citing the deluge of scientific materials presented to it by the parties. *See infra* Sections 2.3.2.4, 2.3.5.2, and 2.8.3.3, for a discussion of each case.



and operation of the dispute settlement system itself—are put under severe stress. If more than one of these limits is pushed too far in a particular case, then it is even more likely to become “impossible.”

The first category—non-compliance cases—illustrates the importance of the willing participation of States. States choose which disputes to bring to the DSU and how to conduct those disputes. The DSU obligates Member States to use good faith in deciding whether to bring a case<sup>84</sup> and how to pursue one.<sup>85</sup> Willing participation becomes even more crucial once the losing state has to implement the decision rendered by the dispute settlement body. The WTO/DSU, and any other international dispute settlement system, cannot operate successfully if states bring poorly formed or argued cases or have insufficient political will to internalize its decisions.

The second category—non-consensus cases—highlights the importance of the content of the rules. If an international organization seeks rule adherence it must create and then interpret the rules so that they are perceived as legitimate. The operation of the dispute settlement system itself cannot fix or improve the rules. In fact, the DSU expressly disclaims any power to “add to or diminish the rights and obligations provided in the covered agreements.”<sup>86</sup> The panels/Appellate Body must determine what rules mean even when they are ambiguous, vague or contain gaps. Only the WTO membership, however, has the power to determine definitively what a rule means.<sup>87</sup> The WTO Member States have a decision-making and a rule negotiation process to resolve ongoing disagreements about the nature of WTO obligations.<sup>88</sup> One reason

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<sup>84</sup> DSU art. 3.3. Member States are counseled to exercise their judgment about whether an action under its procedures would be fruitful before bringing a case.

<sup>85</sup> DSU art. 3.10. Using the procedure is not contentious, procedures are to be used in good faith and complaints should not be linked to non-related complaints.

<sup>86</sup> DSU art. 3.2.

<sup>87</sup> The Member States have the authority to determine what a GATT/WTO rule means. According to the DSU its provisions are “without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.” DSU art. 3.9.

<sup>88</sup> The GATT/WTO has a long established system for negotiating and, if necessary, revising the rules—the system of negotiating rounds. The WTO is currently in the midst of the ninth set of such rounds and many aspects of existing GATT rules are subject to negotiation. *See* World Trade Organization, Ministerial

why some of the impossible cases have occurred, and others will occur, is that to date the Member States have been unwilling or unable to use the political power of the WTO system to interpret or alter rules that no longer compel consensus.

The third category – overtaking cases – will always come to any dispute settlement system. Even if a system's procedures are well designed and generally workable – not an assumption that can be completely applied to the DSU<sup>89</sup> – they may not always provide an acceptable answer for the problem posed in a dispute. For example, the DSU procedures have gaps, such as the sequencing problem<sup>90</sup> and the lack of a post-retaliation procedure,<sup>91</sup> that have been revealed during litigation.<sup>92</sup> Another procedural limit is the DSU's

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Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. The Doha Declaration indicated that there would be negotiations on new regulations on the supply of services, on agriculture, trade-related intellectual property rights, subsidies and countervailing measures and dispute settlement. One of the widely shared concerns is that the rule negotiation powers of the WTO are not as strong as those of the DSU. See Claus-Dieter Elhermann & Lothar Ehring, *The Authoritative Interpretation Under Article IX: 2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT'L ECON. L. 803, 812–14 (2005) (discussing the potential power of asserting authoritative interpretation); Gary Clyde Hufbauer, *Inconsistency Between Diagnosis and Treatment*, 8 J. INT'L ECON. L. 291, 295–96 (2005) (discussing the concept of consensus).

The WTO can adopt new or revised rules only when it reaches consensus on such rules. In the past, reaching consensus has taken quite a long time. The Uruguay Round negotiations went on from 1986 to 1994. The Doha Round began in 2001 and has now been suspended by the WTO's General Council due to irreconcilable differences among Member States over crucial issues – the reduction of agricultural subsidies and tariffs and industrial tariffs. Press Release, World Trade Organization General Council, General Council Supports Suspension of Trade Talks, Task Force Submits "Aid for Trade" Recommendations (July 27–28, 2006), [http://www.wto.org/english/news\\_e/news06\\_e/gc\\_27july06\\_e.htm](http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm) (last visited Mar. 28 2007).

<sup>89</sup> See Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 712 (2000) (describing the systemic flaws of the DSU).

<sup>90</sup> See Ernst-Ulrich Petersmann, *Prevention and Settlement of International Trade Disputes Between the European Union and the United States*, 8 TUL. J. INT'L & COMP. L. 233, 247 (2000) (explaining that the sequencing problem reveals a design flaw the parties did not have time to clarify when they adopted the DSU).

<sup>91</sup> Another gap is a procedure that must be followed after the DSB has authorized a suspension of concessions; after its use, there has been disagreement over later compliance. See *infra* Section 2.3.2 (discussing this issue in the *Hormones* dispute).

<sup>92</sup> Once highly contentious cases began to be litigated under the new DSU, it became clear that one such procedural gap was the "sequencing problem." One of the major changes from the GATT panel system to the DSU was the adoption of

lack of certain powers and rules regarding fact-finding.<sup>93</sup> As a result, the disputing parties can and do spend a large amount of time arguing about what actually happened in a case. With regard to its delivery of remedies, the DSB also lacks the power to specify how the losing party must implement the general recommendations a panel or the Appellate Body makes.<sup>94</sup> Consequently a WTO dispute can end in a number of ways – with very different implementation results.

## 2. THE DSU AND ITS IMPOSSIBLE CASES: WHICH ONES ARE, WHY THEY ARE, AND WHAT HAS HAPPENED

### 2.1. *The WTO's Impossible Cases*

The WTO/DSU system created impossible cases from the beginning – cases that fall into one or more of the three categories. The cases that most clearly fit are: *Hormones*,<sup>95</sup> *Bananas III*<sup>96</sup> *Helms-*

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an extensive system of surveillance of Member State implementation activities. The two major DSU provisions dealing with this are articles 21 and 22. Article 21 contemplates that a losing party could attempt but fail to comply. According to art. 21.5, if the parties to a dispute end up in a “disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” there can be review (whenever possible by the original panel) of the contested implementing measure. DSU art. 21.5. At the same time, article 22 states that if a losing party fails to comply within a reasonable period of time, the winning party is entitled to invoke the process for seeking DSB authorization for a suspension of concessions. *Id.* art. 22.2. Neither art. 21.5 nor art. 22.2 make reference to each other. Consequently, the proper order or sequence that disputing parties should follow is unclear.

The resulting gap in the DSU led to a political dispute and negotiations during the *Bananas III* case, *supra* note 56. *See infra* Section 2.3.1 for a complete discussion of the *Bananas III* dispute including the political resolution (subject to later reform during dispute settlement negotiations) of the sequencing dispute.

<sup>93</sup> For example, DSU lacks rules of evidence. While the DSU does allow the panels to request expert testimony, DSU art. 13.2, the DSU does not specify how the panels should weigh the expert information they receive.

<sup>94</sup> According to Article 19 of the DSU, when a panel or the Appellate Body concludes that a measure is inconsistent with GATT/WTO obligations, “it shall recommend” that the losing party “bring the measure into compliance with that agreement.” DSU art. 19.1. Article 19 does state that, in addition to its recommendations, the panel or Appellate Body “may suggest ways in which the Member concerned could implement the recommendations.” *Id.* Nevertheless, most panel and Appellate Body reports do not suggest methods for compliance. There have been such suggestions made, but only when the parties requested that the Appellate Body take such a step.

<sup>95</sup> *Hormones/AB Rep*, *supra* note 54.

<sup>96</sup> *Bananas III*, *supra* note 56.

Burton,<sup>97</sup> *Shrimp/Turtle*,<sup>98</sup> *Film*,<sup>99</sup> *Foreign Sales Corporations (FSC)*,<sup>100</sup> *Section 301*,<sup>101</sup> and *Genetically Modified Organisms (GMOs)*.<sup>102</sup> Given the busy caseload of the DSB, there will be disagreement about whether these cases or perhaps others qualify as "impossible cases."<sup>103</sup> However, there are strong reasons for nominating each case. Each case created complications during the litigation itself, in the following implementation period, or in both.<sup>104</sup>

What follows, therefore, is one interpretation of how to: 1) analyze the impossible cases of the DSU and 2) explain their consequences for the dispute settlement system and the WTO. The article will identify the characteristics or indicators of an impossible case. Each case will then be analyzed for how it developed into a case, how it was decided, and how it was or was not resolved. The conclusion of the article will attempt to analyze how the WTO has, to date, handled the legal failures that developed and what this means for the DSU System.

## 2.2. Why Are These Cases "Impossible Cases"?

Isolating the factors that trigger a highly contentious case and those that keep it from resolution is the best way to identify the impossible cases. All of the major factors relate directly to what

<sup>97</sup> Request for Establishment of a Panel by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/2 (Oct. 3, 1996) [hereinafter Helms-Burton Panel Request] (summarizing the legal dispute between the European Communities and the United States concerning Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes); see also Note by the Secretariat, *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/6 (Apr. 24, 1998) [hereinafter Helms-Burton].

<sup>98</sup> *Shrimp/Turtle*, *supra* note 83.

<sup>99</sup> Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998) (adopted Apr. 22, 1998) [hereinafter *Film*].

<sup>100</sup> *FSC*, *supra* note 57.

<sup>101</sup> Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) [hereinafter *Section 301*].

<sup>102</sup> Note by the Secretariat, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/24, WT/DS292/18, WT/DS293/18 (Mar. 5, 2004) [hereinafter *GMOs Panel*].

<sup>103</sup> William Davey characterizes most of the cases selected here as "controversial cases involving systemic issues or specific fact situations that were carried over from the GATT system." William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 18 (2005).

<sup>104</sup> The recently decided *GMOs* case is illustrative of the sorts of considerations made in the resolution of such cases. See generally *GMOs Panel*, *supra* note 102.

sparks increased chances for non-compliance, produces stronger disagreement over the legal norms, or creates greater stress on the DSU procedures.

### 2.2.1. Increased Chances for Non-Compliance

Since 1995, the WTO DSU system has received over 340 complaints.<sup>105</sup> A significant percentage of these complaints ends by being settled – without recourse to the panel process.<sup>106</sup> The rest have gone on to the panel and usually to the appellate stage. Almost all of these cases have been resolved when the losing party complied with the panel or Appellate Body recommendations. However, there is a short but notable list of cases,<sup>107</sup> *Hormones*, *Bananas III*, and *FSC* among them, which have turned into instances of sustained and/or complex non-implementation. Rather than comply by removing its ban after the loss in the *Hormones* case, the European Communities (EC) unilaterally took action to instigate an investigation it believed would resolve the case. The EC was willing to incur both long-term sanctions and additional litigation to reach its preferred result.<sup>108</sup> In *Bananas III*, the parties resolved the case

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<sup>105</sup> *Dispute Update*, *supra* note 3, at iii. As noted earlier, the actual number of disputes is 249. See *supra* note 26. In those cases, there have been fifty-one mutually agreed solutions and twenty-nine other settled or inactive disputes (situations in which the contested measure was terminated or the panel request was withdrawn).

<sup>106</sup> *Id.*

<sup>107</sup> The United States had two other disputes, *Anti-Dumping Act of 1916*, *supra* note 57, and *U.S. – Byrd Amendment*, *supra* note 57, in which the reasonable time for compliance ran for substantial time periods. Both cases showed signs of also producing “ordinary non-compliance.” With regard to the *Anti-Dumping Act of 1916* case, the Appellate Body ruled in May 2000 and the United States kept promising to repeal the Act. After years of such promises (from the July 2001 end of the “reasonable period of time” until September 2003), the EC requested arbitration about the suspension of sanctions. The EC received authorization in February 2004 but has not yet acted upon that authorization. The United States has now repealed the legislation.

In the *Byrd Amendment* case, the Appellate Body ruled against the United States in January 2003. The reasonable period of time was determined by arbitration and extended by negotiations with some of the complaining parties until December 27, 2004. Other complaining parties requested arbitration of the suspension of concessions and the arbitrator’s decision was issued in August 2004. See *Dispute Update*, *supra* note 3, at 197. The complaining parties have not yet suspended concessions. The United States, as of now, has shown no signs that it will repeal the legislation.

<sup>108</sup> See *infra* Section 2.3.2.3 (discussing EC implementation with regard to the *Hormones* case).

after the imposition of sanctions only after an EC attempt to stall and delay (implementing a non-compliant solution). Even then, the case was resolved and sanctions lifted only after a WTO political solution (a waiver).<sup>109</sup> The *FSC* case also involved a stall and delay game—the U.S. implemented what it knew to be a flawed fix to the violative statute and then fully litigated that case and faced sanctions before adopting a fix that still had problems with it.<sup>110</sup> Why did these cases not resolve—in accordance with the WTO's preference for withdrawal or replacement of the offending measure—within a reasonable period of time?

Upon examining these cases (and the other impossible cases), patterns emerge. There are repeat players and repeat problems. When these are present, the losing party has, or claims to have, greater difficulty in complying. Powerful states<sup>111</sup> are the only ones well positioned to resist the pressure to implement a DSB decision in favor of another Member State pushing hard for compliance. The only states to have resisted compliance in this scenario have been the European Communities and the United States. These states have resisted and sustained that resistance because they value the benefits of avoidance and can afford the costs of

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<sup>109</sup> See *infra* Section 2.3.1.3 (discussing the implementation phase of the *Bananas III* case).

<sup>110</sup> In the *Hormones* case, *supra* note 54, sanctions have been ongoing since 1999. In the *Bananas III* case, *supra* note 56, sanctions continued from 1999–2002. In the *FSC* case, *supra* note 57, sanctions went only from March 2004 until October 2004. *Dispute Update*, *supra* note 3, at 165; Paul Meller, *European Trade Chief Says Sanctions on U.S. Will End*, N.Y. TIMES, Oct. 26, 2004, at C2. The EC accepted the United States legislation that repealed the *FSC* system (but still allowed United States companies a transition period from 2005 until 2007). The EC, however, sought a compliance review regarding whether the new United States legislation with this transition period satisfies WTO obligations. *Id.*

The time frame of the request for suspension of concessions and the United States' response does not begin to illustrate how long the United States actually avoided compliance. The *FSC* legislation was found violative of the SCM Agreement in February 2000. The Appellate Body also found the United States' attempt to amend the legislation to be violative in January 2002. The EC was authorized to suspend concessions in May 2003 but postponed taking action until 2004. There was also a second compliance review process (panel and appeal) over the second attempt by the United States to comply. The last decision issued left the United States with no real option other than abandoning the flawed portions of the new statute. See *infra* Section 2.3.8 (discussing the second 21.5 review and how the United States ultimately responded).

<sup>111</sup> In *Hormones* and *Bananas III*, the resisting state was the European Communities. In *FSC*, the resisting state was the United States. These two states are the richest and most powerful in the WTO. The two are also the heaviest users of the DSU system. See Leitner & Lester, *supra* note 11, at 222.

non-compliance.<sup>112</sup> This does not mean that an impossible case could not exist without one or more of the powerful states. Some of the impossible cases,<sup>113</sup> *Shrimp/Turtle* and *Bananas III*, focused on government practices that largely restricted market access for other countries. But even in those two cases, one of the powerful states was a party to the dispute. This factor, therefore, increases the chance that a case involving other factors will develop into an impossible case.

Both of these large economies are also democracies with a great amount of input from citizens and industry regarding which WTO cases should be pursued and how they should be litigated and resolved.<sup>114</sup> The citizen/industry input to bring, and later to force a case to sanctions is increased greatly when a high volume of trade is impacted or market access is severely or completely cut off<sup>115</sup> by the government measure being challenged. Similarly, the resistance to resolving a case even when sanctions are imposed is increased when a major regulatory or policy shift<sup>116</sup> will be required

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<sup>112</sup> The United States and the EC have learned to plan around the time frames of DSU operation and when any final action must be taken. When contemplating resistance, a losing state knows that it will receive a reasonable period of time to comply or to litigate over whether its fix equals compliance as well as some unspecified additional time before the winning party will force the issue of suspending concessions. Even when the winning party requests such authority from the DSB, the resisting state can force an arbitration over the amount of concessions that should be suspended which will also lengthen the time period before compliance is expected. Applying some or all of these delaying tactics allows the resisting state time to balance the costs of compliance. See Monika Bütler & Heinz Hauser, *The WTO Dispute Settlement System: A First Assessment From an Economic Perspective*, 16 J. L. ECON. & ORG. 503, 506 (2000) ("Time is an important determinant of both parties' payoffs, because rents and costs accrue during the whole litigation process.").

<sup>113</sup> Illustrations are *Shrimp/Turtle*, *supra* note 83, (which primarily involved the loss of access to the United States market by South East Asian countries (Malaysia, Thailand, India)) and *Bananas III* (which involved the ACP countries and Latin American countries that grew the bananas).

<sup>114</sup> See Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. S205 (2002) (analyzing the factors causing disputes at the WTO to move from negotiation to the panel stage).

<sup>115</sup> See *infra* Sections 2.3.1.3, 2.3.2.3 (discussing trade in volumes and loss of market access in *Bananas III* and *Hormones*).

<sup>116</sup> See *infra* Section 2.3.6 (discussing the major policy shift required for the United States to comply in the *FSC* case); *infra* Section 2.3.1 (discussing the major policy shift in *Bananas III*); *infra* Section 2.3.2 (discussing *Hormones*). In the *Hormones* case, it is clear that the EC is resisting and may continue to resist any policy change that would open the market to hormone-fed beef. See Amelia Porges, *Set-*

to comply. Given the DSU preference for withdrawal of the violative measure, the losing party faces problems when a complex fix is required. Withdrawal of the measure, given public support, may be regarded as impossible. As a result, the party may search for a way to replace the measure or to "fix" the problem on its own time schedule.<sup>117</sup> The resisting state also heavily weighs such domestic political realities against the cost of DSU-authorized sanctions. In all of the cases that have sustained resistance in the WTO, there have been politically empowered stakeholders<sup>118</sup>—corporations,<sup>119</sup> citizenry,<sup>120</sup> or other countries<sup>121</sup>—pushing to bring<sup>122</sup> the case or resisting its resolution. As a result, the losing party is unwilling to disoblige these stakeholders, or at least unwilling to do so until it must.<sup>123</sup>

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*tling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. ON DISP. RESOL. 141, 176 (2003).

<sup>117</sup> See *infra* Sections 2.3.2, 2.3.6.3 (giving illustrations regarding the *Hormones* and *FSC* disputes).

<sup>118</sup> See Porges, *supra* note 116, at 154–55 ("Stakeholder complaints may be of any size, and many are surprisingly small. The only requirement is that they are important enough to someone who is important enough.").

<sup>119</sup> Politically empowered corporate stakeholders appear in more than half of the impossible cases analyzed in this article—*Bananas III*, *Hormones*, *Film*, *FSC*, and *GMOs*. In each instance, there was either strong corporate pressure on the complaining party to bring the case, strong pressure on the losing party to resist compliance, or both.

<sup>120</sup> Throughout the *Hormones* case, the EC has contended that its citizens would not allow it to comply. See *infra* Section 2.3.2 (offering a more complete discussion). There has been similar discussion regarding citizen disapproval of genetically modified foods in the *GMOs* case. See *infra* Section 2.3.8. There was a similarly engaged and activist citizen response to the *Shrimp/Turtle* case. The United States, however, was spared having to resist the Appellate Body recommendation because it was relatively easy to satisfy the objections raised by the Appellate Body. See *infra* Section 2.3.5.

<sup>121</sup> In the *Bananas III* case, the EC took the position that early resolution of the case was going to be too difficult for the ACP countries that benefited from the EC banana regime. See *infra* Section 2.3.1. Similarly, the United States took the lead in pressing the case on behalf of the Latin American countries and in pursuing the ultimate request for suspension of concessions because it was powerful enough for its sanctions to have effects on the EC. By contrast, Ecuador, although also authorized to sanction the EC, never felt that it was in an economic position to pursue sanctions. See *infra* Section 2.3.1.3 (discussing the influence stakeholders have to press trade ministries to bring WTO cases).

<sup>122</sup> See Tarullo, *supra* note 63, at 488.

<sup>123</sup> See Tarullo, *supra* note 63, at 488 (noting that it is in both the government's and government officials' interest to be responsive). Tarullo states that "[t]his pattern is reinforced in the United States and, to varying degrees, in other countries by the responsiveness of legislators to the concerns of specific constituents." *Id.*



Among the repeat problems leading to delayed compliance is the fact that the resisting state regards certain disputes as having great symbolic<sup>124</sup> importance in the culture of the country. The reason *why* the government has adopted the measure is of great importance. In the case of the EC, such views about the “collective preferences” of the public have been identified.<sup>125</sup> Several of these preferences—multilateralism, food safety, precaution regarding biotechnology—are directly implicated in several of the impossible cases.<sup>126</sup> At least two of the U.S. collective preferences, based on these cases, would appear to be national security and autonomy.

Yet another problem is that the losing state has been committed to its position on the disputed issue for a long time. Most of the impossible cases arrived in the DSU system with a weighted prior history.<sup>127</sup> In each instance there was either prior GATT litigation on the same or an analogous issue (*Bananas III*,<sup>128</sup> *Shrimp/Turtle*, *FSC*)<sup>129</sup> or a long-standing disagreement between the contending

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<sup>124</sup> See Porges, *supra* note 116, at 154–155. Porges divided WTO cases into two categories, stakeholder cases and policy cases. The policy cases are those which have symbolic stakes.

<sup>125</sup> According to the former EC Commissioner for Trade, Pascal Lamy, the name for such issues of symbolic importance is “collective preferences.” Pascal Lamy, European Commissioner for Trade, *The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation*, Address at the European Commission Conference: *Collective Preferences and Global Governance: What Future for the Multilateral Trading System?* 1 (Sept. 15, 2004) available at [http://ec.europa.eu/archives/commission\\_1999\\_2004/lamy/speeches\\_articles/spla242\\_en.htm](http://ec.europa.eu/archives/commission_1999_2004/lamy/speeches_articles/spla242_en.htm).

<sup>126</sup> According to Lamy, it is possible to be “definite about certain of Europe’s collective preferences: multilateralism, environmental protection, food safety, cultural diversity, public provision of education and healthcare, precautions in the field of biotechnology, and welfare rights.” *Id.* at 3. The *Hormones* and *GMOs* cases involve food safety and biotechnology. The *Section 301* case involves an attack on unilateralism—the converse of the valued multilateralism.

<sup>127</sup> Prior history appears to play a large role in why certain cases were brought to the WTO, how difficult they are to resolve once there, and how “impossible” it can be for the losing party to comply. See *infra* Sections 2.3.1 (*Bananas III*), 2.3.2 (*Hormones*), 2.3.4 (*Film*), 2.3.5 (*Shrimp/Turtle*), 2.3.6 (*FSC*), and 2.3.7 (*Section 301*) (discussing the prior history of each case and how it influenced each one at every stage).

<sup>128</sup> See *infra* Section 2.3.1.2 (discussing the *Bananas I* and *Bananas II* cases filed in the GATT dispute settlement system).

<sup>129</sup> See *infra* Section 2.3.6.3 (discussing the *DISC* case and how its resolution laid the framework for the *FSC* legislation and the ultimate EC attack on that legislation).

states that led to a new agreement being negotiated during the Uruguay Round (*Hormones*).<sup>130</sup>

A final factor leading to greatly increased chances for non-compliance is the strategic aspect of WTO dispute settlement. At the very beginning of the operation of the DSU, there was pent-up demand for dispute settlement. In the period right before and during the Uruguay Round negotiations, the GATT Contracting Parties had seen a significantly higher failure rate in GATT disputes.<sup>131</sup> The United States had intensified its use of Section 301 (the statute designed for attacking foreign trade barriers),<sup>132</sup> and pursued many of the cases without going to GATT dispute settlement because it argued that the GATT system itself was a failure.<sup>133</sup> The United States became the country of "aggressive unilateralism." This in turn led to support for the adoption of the DSU and, later still, to a belief that the United States was still a problem when unilateralism did not disappear with the adoption of the DSU. The *Helms-Burton*, *Shrimp/Turtle* and *Section 301* cases were pursued to constrain the different types of unilateralism perceived in each.<sup>134</sup>

### 2.2.2. *Non-Consensus Regarding the Rules*

Almost all of the impossible cases qualify as ones in which there was little or no consensus on the state of the law. It stands to reason that the parties to a dispute would disagree over the contours of the relevant legal obligations. In impossible cases, however, there is an additional complicating factor regarding the meaning of the rules. In *Hormones*, the panel and Appellate Body were required to interpret an agreement that was not only new,<sup>135</sup> but also contained a new type of obligation—positive obligations

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<sup>130</sup> See *infra* Section 2.3.2.3 (discussing the long-standing disagreement between the EC and the United States over the safety of meat products that came from cattle fed with hormone-enriched feed).

<sup>131</sup> See Taylor, *supra* note 34, at 226–27.

<sup>132</sup> See *infra* section 2.3.7, 2.3.5 (discussing the *Section 301* statute and how it was used both before and after the adoption of the DSU).

<sup>133</sup> See Taylor, *supra* note 34, at 222, 227–28.

<sup>134</sup> See Tarullo, *supra* note 63, at 488 n.41 (explaining that the EC, rather than the Member States, pushed the *Helms-Burton* and *FSC* cases to counter unilateralism in trade policy and a series of strong cases filed by the United States); see also *infra* Sections 2.3.3, 2.3.5, and 2.3.7 (discussing the unilateralism in each case).

<sup>135</sup> The United States' major objection to the EC ban on hormone-fed beef was that it violated Articles 2 and 5 of the Sanitary and Phytosanitary Agreement. SPS Agreement arts. 2 and 5.

that hold communities to standards.<sup>136</sup> The GMOs case poses the same problem in only a slightly different context.<sup>137</sup> In *Section 301*, the meaning of a new obligation in the DSU (the meaning of Article 23) itself and disputants' obligations under it was up for interpretation. The *Helms-Burton* dispute actually went unlitigated in part because it was over a major uninterpreted GATT exception<sup>138</sup> that none of the potential parties were eager to see interpreted.<sup>139</sup> The *FSC* case involved not just the core issue of whether the U.S. tax measure constituted an export subsidy,<sup>140</sup> but also whether the political compromise from the prior GATT litigation over similar legislation would be honored.<sup>141</sup> In *Film* the parties contended over the meaning of an underutilized and controversial form of GATT/WTO jurisdiction—the non-violation nullification and impairment claim.<sup>142</sup> In *Shrimp/Turtle* the disputing parties faced the first major WTO case involving the linkage between trade and the

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<sup>136</sup> The major GATT obligations focus on trade liberalization and non-discrimination. GATT art. XI (tariff bindings and the prohibition of quantitative restrictions); GATT art. I, art. 3 (the Most Favored Nation (MFN) obligation and the National Treatment obligation). By contrast the SPS obligations—to base standards measures in the sanitary and phytosanitary field upon scientific evidence and to establish such standards through a risk assessment process—go beyond non-discrimination. See SPS Agreement arts. 2 and 5; Robert E. Hudec, *Science and "Post-Discriminatory" WTO Law*, 26 B. C. INT'L & COMP. L. REV. 185, 188 (2003) (describing SPS rules as "calling for an international tribunal to second-guess the rationality of a regulatory judgment at a national level"). The SPS rules interpose an outside standard—scientific evidence—upon which to judge whether standards measures are acceptable. See Jeffery Atik & David A. Wirth, *Science and International Trade—Third Generation Scholarship*, 26 B. C. INT'L & COMP. L. REV. 171, 173 (2003) (noting that the Uruguay Round negotiators "seized on science to clearly divide the legitimate from the protectionist. Measures protective of public health, or worker safety, or the environment, are to be considered legitimate (and insulated from a trade-based attack) if they have a scientific basis.").

<sup>137</sup> One of the major issues in the GMOs dispute is whether a WTO Member State can violate the SPS Agreement by not taking action to approve products once it has set up an approvals process. See *infra* notes 160–61 (giving a complete discussion of the EC ban on GM food products).

<sup>138</sup> At stake was the National Security exception to GATT/WTO obligation. GATT art. XXI.

<sup>139</sup> See *supra* notes 89–90 and accompanying text (discussing why no WTO Member State really wants the WTO to interpret the National Security exception).

<sup>140</sup> SCM Agreement art. 3.1, Annex 1.

<sup>141</sup> See *supra* notes 126–31 and accompanying text (discussing this issue in the *FSC* dispute).

<sup>142</sup> See *supra* notes 96–100 and accompanying text (offering a complete discussion of the Article XXIII:1(b) non-violation nullification and impairment theory argued in the *Film* case).

environment.<sup>143</sup> It was clear the case would raise major disagreements about the contours of the relevant GATT exception, Article XX, because precursor GATT litigation had produced highly controversial (and ultimately unadopted) panel reports about how far a country's regulatory power could extend in this area without violating the GATT.

Even after the completion of the DSU panel and appellate phases in the *Hormones*, *Bananas III*, *Shrimp/Turtle*, and *FSC* cases, the parties continued to disagree about what constituted compliance. In *Bananas III*, *FSC*, and *Shrimp/Turtle*, the losing party passed legislation to implement the AB recommendations only to face objections by the winning state over the nature of that compliance.<sup>144</sup> In two of those cases, *Bananas III* and *FSC*, the disagreement by the winning party was found to be fully justified.<sup>145</sup> In both cases the losing state had quickly implemented a new law or regulation that was little more than a reworking of the original measure. Making strategic use of the compliance process itself<sup>146</sup>—appearing to comply in order to “end” the dispute and thereby avoid or delay retaliation—appears as a factor in these cases.<sup>147</sup>

In the *Hormones* case the EC has also made strategic use of the time following its WTO loss. Having endured five years of WTO-authorized sanctions while researching the scientific basis for its ban,<sup>148</sup> the EC has tried something novel in DSU history. The EC attempted to reopen the case to validate its chosen course of con-

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<sup>143</sup> See *supra* notes 106–11 and accompanying text (discussing the background of the *Shrimp/Turtle* case).

<sup>144</sup> According to Article 21 of the DSU, a winning state is allowed to request review by the original panel (if possible) of the new measure taken by the losing party if there is “disagreement as to the existence or consistency with a covered agreement of measures taken to comply.” DSU art. 21.5.

<sup>145</sup> In *Bananas III* the compliance review found that the second proposed EC banana regime violated GATT obligations. See *supra* note 54 for a more thorough discussion. In the *FSC* case the compliance arbitration determined that the replacement ETI legislation was also violative. See *supra* notes 131–32 and accompanying text.

<sup>146</sup> See *supra* notes 51–57, 131–42 and accompanying text (giving examples).

<sup>147</sup> Nevertheless in *Bananas II* and *FSC*, the winning state was still forced to seek the suspension of concessions in order to force compliance of some type.

<sup>148</sup> The major EC violation in the *Hormones* case was found to be its failure to conduct a risk assessment on its ban. *Hormones*, *supra* note 54. After its loss in the WTO the EC commissioned an independent scientific commission to carry out a risk assessment. The EC argued to the DSB in November 2003 that the new risk assessment showed that the hormones at issue were a risk to consumers. Dispute Update, *supra* note 3 at 229.

duct.<sup>149</sup> With its new measure allegedly justifying the ban already in place the EC argued that the United States and Canada should bring a case (an Article 21.5) to determine whether the “new” EC ban is justified. Once both states resisted this approach the EC filed a dispute against both countries arguing that their sanctions were no longer justifiable. In taking this course of action the EC put at issue the meaning of the DSU provisions on compliance.<sup>150</sup>

### 2.2.3. Stresses on the DSU System

Most of the WTO’s impossible cases have placed great, and with some open-ended, stress on the DSU system. The stresses have come from different aspects of the litigations. Several of these cases, *Hormones*, *Bananas III* and *Shrimp/Turtle* created procedural<sup>151</sup> as well as substantive disputes. The contending parties ended up fighting over important provisions in the DSU itself trying to obtain the best position possible in the ongoing dispute. Some of these procedural disagreements, particularly over whether amicus briefs should be allowed and the sequencing problem,<sup>152</sup> drew the entire DSB into the disputes. Ultimately the mandated dispute settlement review for the DSU turned into what is now a process of dispute settlement reform.<sup>153</sup>

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<sup>149</sup> The EC position was that by conducting the new risk assessment it has fulfilled its WTO obligations and deserves to have the long term sanctions removed. Dispute Update, *supra* note 3, at 229. The U.S. and Canada have expressed doubt about the risk assessment and whether it qualifies as compliance by the EC. In December 2003 the EC requested that the United States and Canada submit the compliance issue to multilateral decision as has been done in other cases involving a compliance review (under Article 21.5). The United States and Canada resisted the request and announced their willingness to hold bilateral discussions regarding the EC ban. *Id.*

<sup>150</sup> There is no provision in the DSU which authorizes the reopening of a dispute, particularly after the losing party has failed to comply. The Article 21.5 compliance reviews are offered for situations where a country has attempted to comply.

<sup>151</sup> With regard to procedural issues, in *Bananas III* the parties argued over the sequencing issue, and over standing to pursue WTO disputes. *See supra* notes 49, 51-53 and accompanying text (giving a discussion of both procedural fights). In the *Shrimp/Turtle* dispute there was a highly contentious dispute over whether the WTO/DSU system should accept amicus briefs. In the *Hormones* case the after-the-fact compliance attempts by the EC have put at issue what process should be pursued regarding the reopening of a WTO dispute. *See supra* notes 73-81 and accompanying text (discussing characteristics of overtaking cases).

<sup>152</sup> *See supra* note 92 and accompanying text (explaining that the “sequencing problem” is a procedural problem).

<sup>153</sup> *See Ernst-Ulrich Petersmann, The Doha Development Round Negotiations on*

The procedural fights in the DSB, however, at least grew out of parties attempting to invoke their rights. Additional stresses have been placed on the legitimacy of the DSU itself by states trying to send political signals to others. Several of the cases, *Helms-Burton*, *Shrimp/Turtle* and *Section 301*, were responses to the perceived aggressive unilateralism of the United States.<sup>154</sup> In others, states made strategic decisions regarding at least the timing of the filing of a case. Several of the impossible cases are widely regarded as having either inspired the filing or timing of a subsequent case against the other party (*Bananas III*—Section 301,<sup>155</sup> *Hormones/Bananas III*—FSC,<sup>156</sup> *FSC—GMOs*).<sup>157</sup> In some instances an

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*Improvements and Clarifications of the WTO Dispute Settlement Understanding 2001-2003: An Overview*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 1-7* (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004) [hereinafter *Doha Negotiations on DSU*] (describing that the 1994 mandated review was not completed prior to the Doha Round). The Ministerial Declaration for the Doha Round also provided a mandate for negotiations “on improvements and clarifications of the Dispute Settlement Understanding.” *Doha Declaration*, *supra* note 88, ¶ 30. The negotiations on the DSU are so important to the proper functioning of the WTO that they are on a separate track from the Doha Round negotiation mandates. *Id.* ¶ 47. Although the negotiations were to end in 2003, many of the proposals by Member States were so broad in scope and potential effect that the negotiations continue as of this date. See *Doha Negotiations on DSU*, *supra*.

<sup>154</sup> In *Helms-Burton*, *supra* note 97, the United States was pursued for taking unilateral actions against investment in Cuba that other countries viewed as acting outside the normal bounds of international law. In the *Shrimp/Turtle* case the United States was regarded as attempting to unilaterally force its solution to the problem of sea turtles killed in the harvesting of shrimp. For more discussion, see *supra* notes 106–10 and accompanying text. In the *Section 301* case, *supra* note 101, the EC argued that the U.S. maintenance of its trade statute—which allowed the USTR to make determinations of GATT inconsistency by other countries prior to completion of DSU procedures—violated U.S. obligations under Article 23 of the DSU. See *supra* notes 149–51 and accompanying text (discussing DSU provisions on compliance).

<sup>155</sup> Following the *Bananas III* dispute the EC responded to the U.S. announcement that it would seek authorization to suspend concessions with the announcement that it would file the *Section 301* case. After the sanctions were put into place the EC brought the *Section 301* case. See *supra* notes 149–51 and accompanying text for a more thorough discussion.

<sup>156</sup> Following the EC losses and problems with compliance in both *Hormones* and *Bananas III*, the EC brought the *FSC* case against the U.S. See Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 *CHI. J. INT'L L.* 417, 418 (2001) (arguing that the EC is believed to have brought the *FSC* case because it would cause, if the United States lost, the same type of difficult compliance problems the EC had encountered with *Hormones* and *Bananas III*).

<sup>157</sup> During the protracted compliance period it faced in the *FSC* case and in response to the protracted EC resistance in *Hormones*, the United States decided to even the score by filing the *GMOs* case.

impossible case created the basis for a later trade disagreement (*Bananas III*, *Hormones* and the U.S. adoption of carousel retaliation)<sup>158</sup> or another WTO case (*Hormones- Continued Suspension*,<sup>159</sup> *Bananas III-Byrd Amendment*),<sup>160</sup> (FSC-Boeing/ Airbus).<sup>161</sup>

### 2.3. *What Happened with the DSU's Impossible Cases?*

The power and political fights have relocated into the DSU system the manner in which parties litigate their disputes before the WTO panels and how they respond to panel and Appellate Body decisions. Analyzing an impossible case, therefore, must be done by examining the context of the dispute, the legal analysis of the panel and Appellate Body reports, and the consequences that arose from the dispute process. In this section of the article, the following questions will be answered (if appropriate) for each dispute: Why did the parties pursue this dispute in the DSU system? What

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<sup>158</sup> Congress passed the Trade and Development Act of 2000, Pub. L. No. 106-200, § 407, 114 Stat. 151, 193-94 in order to respond to the lack of EC progress in complying with the *Bananas III* and *Hormones* decisions by the WTO. The legislation amended Section 306 of the Section 301 statute to allow for carousel retaliation in order to spread the consequences of the WTO-authorized sanctions over as many EC countries as possible. The EC complained about the carousel retaliation and filed a request for consultations regarding the legislation. Request for Consultations by the European Communities, *United States – Section 306 of the Trade Act of 1974 and Amendments Thereto*, WT/DS200/1 (June 30, 2000). According to the EC the carousel retaliation provision provided for:

[A] mandatory and unilateral revision of the list of products subject to the suspension of GATT 1994 concessions or other Section 301(a) action 120 days after the application of the first suspension and then every 180 days thereafter, in order to affect imports from Members which have been determined by the United States not to have implemented recommendations made pursuant to a WTO dispute settlement proceeding.

*Id.*

The EC also threatened to take action to seek sanctions prior to the completion of the compliance review in the FSC dispute if the U.S. actually used carousel retaliation. Neither President Clinton nor President Bush used the authority. See Daniel Wüger, *The Never Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone-Treated Beef*, 33 LAW & POL'Y INT'L BUS. 777, 806-09 (2002) (describing the pressure on President Bush to implement carousel retaliation).

<sup>159</sup> See *supra* notes 70-80 and accompanying text.

<sup>160</sup> Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

<sup>161</sup> Request for Establishment of Panel by the United States, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/6, (Apr. 11, 2006). See *supra* text accompanying notes 135 and 142 for a discussion of the connection between the FSC and *Boeing/Airbus* disputes.

did the adjudication determine regarding the contested government measure and the relevant GATT/WTO Agreement? Why did the countries implement or fail to implement panel or Appellate Body recommendations?

### 2.3.1. *Bananas III*

#### 2.3.1.1. *Background*

The *Bananas III* dispute was the first case completed in the new DSU system between the United States and the EC.<sup>162</sup> By bringing this dispute, the United States chose a case pushed heavily by interested United States parties against what had already been determined to be a clearly GATT-inconsistent trade regime.<sup>163</sup> The EC, by contrast, believed it could justify its regime because the underlying goal was to assist developing countries through the EC's long-term preference program.<sup>164</sup> Neither Member State was actually acting directly to protect domestic producers. Instead, each acted, or so it contended, on behalf of other countries—the United States on behalf of the banana producing countries in Latin America and the EC on behalf of the African, Caribbean and Pacific (“ACP”) banana producing countries.

The WTO case was prompted by the EC adoption of a harmonized policy regarding banana imports in 1993.<sup>165</sup> Prior to the adoption of Regulation 404/93, each EC Member State had its own policy regarding banana imports.<sup>166</sup> Germany for example, operated on an open market basis and applied no restrictions. From the time Germany entered the EC, and the EC began adopting preference programs, Germany had insisted on its rights to treat bananas

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<sup>162</sup> The *Hormones* dispute was actually filed shortly before (Jan. 26, 1996) the *Bananas III* case (Feb. 5, 1996) but was not resolved by the Appellate Body until January 1998. The *Bananas III* AB report was circulated in September 1997.

<sup>163</sup> The *Bananas III* dispute was the follow up to two earlier cases (*Bananas I & II*) that had found the EC regime to be GATT-inconsistent. See F. Weiss, *Manifestly Illegal Import Restrictions and Non-Compliance with WTO Dispute Settlement Rulings* in *TRANSATLANTIC ECONOMIC DISPUTES* 121, 128–130 (Ernst-Ulrich Petersmann and Mark A. Pollack eds., 2003) (discussing the claims and results in *Bananas I, II and III*).

<sup>164</sup> *Id.* at 126.

<sup>165</sup> Council Regulation 404/93 on the Common Organization of the Market in Bananas, 1993 O.J. (L 47) 1 (EC).

<sup>166</sup> Weiss, *supra* note 163, at 123.



on its own terms.<sup>167</sup> Germany even challenged the Banana Regulation as violative of EC rulemaking power but lost the case.<sup>168</sup> By contrast, the other eleven EC Member States either applied a tariff-only regime,<sup>169</sup> a quota regime, or one with variations which applied both tariffs and quotas to limit market access for bananas. In all of their various forms, these schemes limited the access of Central and South American bananas to the EC market in favor of protecting space for bananas produced in former EC colonies: the African, Caribbean and Pacific states.<sup>170</sup>

The EC had a long history of broad-based preference programs for the ACP states that dated back to the earliest days of the European Community.<sup>171</sup> The major treaties between the EC and these countries were the two Yaoundé Conventions of Association<sup>172</sup> and the four Lomé Conventions.<sup>173</sup> Since preference programs by definition allow one GATT/WTO Member State to give benefits to some trading partners over others, they violate the core GATT rule on non-discrimination: the most favored nation rule. The typical response for a Member State wanting to ensure such programs is to get a political waiver for the GATT violation. The Fourth Lomé Convention contained not only preferences for ACP bananas but a Banana Protocol<sup>174</sup> that made it clear that ACP bananas would not be put in a less favorable position. The EC was committed to its

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<sup>167</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ III.5, WT/DS27/R/USA (May 22, 1997) [hereinafter *Bananas III Panel*]; Protocol Concerning the Tariff Quota for Imports of Bananas, Mar. 25, 1957, 298 U.N.T.S. 162.

<sup>168</sup> Case 3/94, GATT-WTO-Framework Agreement on Bananas, 1995 E.C.R. I-4577 (describing Germany's challenge of the Banana Regulation as violative of EC rulemaking power but ultimately losing the case).

<sup>169</sup> Weiss, *supra* note 163, at 123.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 122-23.

<sup>172</sup> Convention of Association Between the European Economic Community and Associated African States, with Related Agreements, July 20, 1963, 2 I.L.M. 971 (1963).

<sup>173</sup> African Caribbean and Pacific States–European Economic Community (ACP-EEC): Final Act, Minutes and Fourth ACP–EEC Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 (1990) [hereinafter Lomé IV]; ACP–EEC: Third Convention of Lomé, Dec. 8, 1984, 24 I.L.M. 571 (1985); ACP–EEC: Second Convention of Lomé, Oct. 31, 1979, 19 I.L.M. 327 (1980); ACP–EEC: Lomé Convention, Feb. 28, 1975, 14 I.L.M. 595 (1995).

<sup>174</sup> “[N]o ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present.” Lomé IV, *supra* note 173, Protocol 5 art. 1.

preferences to the ACP countries as part of its development program<sup>175</sup> for these countries, even if the preferences did offer less help than was intended.<sup>176</sup> In addition, the ACP banana preference was considered crucial to the economy of the countries that benefited from the import regime.<sup>177</sup>

The EC plan was to use Regulation 404/93 as part of its single market project to harmonize the different Member State policies.<sup>178</sup> What the EC actually produced to satisfy these goals was an import regime notable for its complexity and lack of transparency. Regulation 404/93 allocated quotas and different tariff rates for bananas coming into the EC to three categories of countries: ACP countries, non-traditional ACP countries, and third (or non-ACP) countries. The ACP countries were clearly treated better than the other countries. In order to import bananas into the EC, an importer also had to qualify under an import operator category. In other words, the EC imposed a complicated import licensing system that allocated licenses according to the activity function of the importer.<sup>179</sup> The overall operation of the import regime, therefore, benefited not only the ACP countries, but also importers who had traditionally served the EC market to the detriment of non-ACP countries and other importers seeking access. The EC was aware at the time it passed the banana import regime that there were GATT inconsistencies that would require a waiver of the rules by political action of the GATT General Council.<sup>180</sup>

The Latin American countries that suffered most of the discrimination quickly began taking whatever steps they could to

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<sup>175</sup> Weiss, *supra* note 163, at 126; see also Douglas Ierly, *Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute Over Bananas*, 33 LAW & POL'Y INT'L BUS. 615, 629 (2002) (describing the EU's justification of its involvement in the banana trade on the grounds of development aid).

<sup>176</sup> See Martin Wolf, *Going Bananas: Far From Helping Poor Producers, the EU Banana Regime is Discriminatory and Makes No Economic Sense*, FIN. TIMES, Mar. 24, 1999, at 18 (arguing that the ACP countries were actually not filling their share of the quotas designed to benefit them).

<sup>177</sup> *Bananas III Panel*, *supra* note 167, ¶ 6.3 (stating that for the ACP countries, the banana exports to the EC were crucial and a "very high proportion of their total banana exports.").

<sup>178</sup> Weiss, *supra* note 163, at 124.

<sup>179</sup> See Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839, 852, 863-64 (2000) (discussing the EC's establishment of three banana import categories and allocation of import licenses).

<sup>180</sup> Weiss, *supra* note 163, at 124-25.

dismantle the EC banana regime. Their actions created the two GATT decisions on the banana import regime (*Bananas I* and *Bananas II*). In 1993, five Latin American countries filed the first GATT case against the import regimes of several EC Member States.<sup>181</sup> The *Bananas I* panel found that the quota schemes of France, Italy, Spain, Portugal and the UK violated GATT Articles I (Most Favored Nation rule) and XI (Prohibition on Quantitative Restrictions).<sup>182</sup> The EC and the ACP countries blocked the adoption of the report. Right before the adoption of Regulation 404/93, the Latin American countries brought another GATT case challenging the new measure.<sup>183</sup> That GATT panel (*Bananas II*) found that 404/93 violated Articles I, II, and III of the GATT.<sup>184</sup> The EC, however, also blocked adoption of that decision. Although it was unwilling to accept any GATT decision about the banana regime, the EC did respond by applying for a GATT waiver for the Fourth Lomé Convention<sup>185</sup> and negotiating a Framework Agreement on Banana Imports<sup>186</sup> with four of the five Latin American complainants in *Bananas II*. The Framework Agreement set out a deal that exchanged increased market access for a standstill on further legal maneuvers within the dispute settlement system. The Latin American countries agreed to stop pushing for the adoption of the *Bananas II* report and not bring any additional dispute settlement proceedings on the import regime until the end of 2002, in exchange for an increase in their share of the quotas and a decrease in the tariffs charged.<sup>187</sup>

The United States became involved in the case when Chiquita Brands filed a Section 301 petition with the United States Trade Representative ("USTR") challenging the banana regime and the

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<sup>181</sup> The countries that brought the *Bananas I* case were: Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela. Report of the Panel, *EEC – Member States' Import Regime for Bananas*, ¶ 1, DS32/R (June 3, 1993).

<sup>182</sup> *Id.* ¶¶ 364, 374–75.

<sup>183</sup> Report of the Panel, *EEC – Import Regime for Bananas*, DS38/R (Feb. 11, 1994).

<sup>184</sup> *Id.* ¶¶ 170, 230.

<sup>185</sup> *The Fourth ACP – EEC Convention of Lomé-GATT Waiver*, L/7604 (Dec. 19, 1994); see also Weiss, *supra* note 163, at 129 ("The contracting parties of the Lomé Convention . . . applied for a waiver for the fourth ACP-EED Convention of Lomé with the aim 'to improve legal certainty for the trade of ACP countries.'").

<sup>186</sup> Framework Agreement on Banana Imports, Mar. 29, 1994, 34 I.L.M. 1 (1995).

<sup>187</sup> *Id.*

Framework Agreement as GATT-violative.<sup>188</sup> Chiquita had large-scale investments in the Latin American countries disadvantaged under the import regime.<sup>189</sup> Chiquita was also a wealthy firm with high-level political connections and was, at the time, one of the largest contributors to both U.S. political parties.<sup>190</sup> To many, the vigorous pursuit of the dispute by the USTR proved the United States worked on behalf of private parties rather than for overall government interests.<sup>191</sup> However, the United States had already committed itself to bringing cases in the new system and, in the early days, had taken an active role in it.<sup>192</sup> The USTR therefore initiated the Section 301 investigation and in 1995 made a preliminary determination that the banana import regime adversely affected U.S. interests. When negotiations failed, the United States terminated the Section 301 case and filed along with Ecuador, Guatemala, Honduras, and Mexico the WTO dispute against the EC.<sup>193</sup>

The plaintiffs launched a broad scale attack on the banana import regime, alleging violations of Articles I, II, III, X, XI, and XIII of the GATT, the Import Licensing Agreement, the Agreement on Agriculture, and the General Agreement on Trade in Services (GATS).<sup>194</sup> Consultations were unsuccessful and led the complainants to request a panel in April 1996. The primary defense of the EC was that the banana regime was part of the Lomé Convention and, as such, covered by the GATT waiver.<sup>195</sup> In May 1997, the

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<sup>188</sup> See Disclosure to Investors in Systemwide and Consolidated Bank Debt Obligations of the Farm Credit System, 59 Fed. Reg. 5341 (proposed Feb. 4, 1994) (to be codified at 12 C.F.R. pt. 630) (responding to the Section 301 petition); see also GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 23-24 (2003) (discussing U.S. support for Chiquita Brands' opposition to the EC banana licensing regime); Bhala, *supra* note 179, at 863 (explaining how the EC allocates import licenses).

<sup>189</sup> According to the panel, Chiquita and Dole Foods had played a major role in developing the EC banana market. The EC measures "had the effect of constraining U.S. companies' import, delivery, and distribution flexibility and required them to expand substantial capital just to try to restore their former business." *Bananas III Panel*, *supra* note 167, ¶ 4.23.

<sup>190</sup> SHAFFER, *supra* note 188, at 23-24.

<sup>191</sup> *Id.* at 23.

<sup>192</sup> *Id.* at 68.

<sup>193</sup> Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/D527/18 (Aug. 31, 1998).

<sup>194</sup> *Id.*

<sup>195</sup> *Bananas III Panel*, *supra* note 167, ¶¶ 7.95-.109 (regarding Article XIII) and ¶¶ 7.196-.204 (regarding Article I).

panel found that the regime violated the GATT (Articles I, III, X, and XIII), the Import Licensing Agreement, and the GATS (Articles II and XVII).<sup>196</sup> The panel did agree with the EC to one limited extent: it found that the Lomé Convention waiver covered the regime's violations of the Most Favored Nation rule (Article I)<sup>197</sup> but not its violations of Article XIII (providing for allocation of quotas).<sup>198</sup>

### 2.3.1.2 *The Bananas III Dispute*

The *Bananas III* dispute seems to be more important for the events that took place after the AB issued its report rather than for the issues decided in the case.<sup>199</sup> This is because the decision of the Appellate Body did not really resolve the case. The parties to the dispute remained at loggerheads over the issue of what constituted compliance. In later impossible cases there was a similar trend of the parties having extended disputes over not only what constitutes proper procedure during the compliance phase (i.e., what steps is a WTO Member State allowed to take when it designs its compliance with a DSU loss?) but also over whether actual compliance had occurred.

In its appeal, the EC argued that the United States lacked standing to pursue the dispute and attempted to defend certain aspects of the banana import regime. However, with regard to both areas of EC effort, the *Bananas III* AB panel largely upheld the panel decisions. On the standing issue, the AB report agreed that there is no requirement in the text of the DSU that a WTO Member State have a "legal interest" in a dispute in order to bring a claim.<sup>200</sup> In fact, according to the AB report, Member States have

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<sup>196</sup> *Id.* ¶ 9.1.

<sup>197</sup> *Id.* ¶¶ 7.196–.204.

<sup>198</sup> *Id.* ¶¶ 7.95–.109.

<sup>199</sup> See Mauricio Salas & John H. Jackson, *Procedural Overview of the WTO EC – Banana Dispute*, 3 J. INT'L ECON. L. 145, 165 (2000) ("Bananas III is considered a landmark case in WTO jurisprudence . . . mostly because of the precedents being set in the procedural case-law of the WTO."); see also John H. Jackson & Patricio Grane, *The Saga Continues: An Update on the Banana Dispute and Its Procedural Offspring*, 4 J. INT'L ECON. L. 581 (2001) (providing an overview of the ongoing controversy).

<sup>200</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R ¶ 132 (Sept. 9, 1997) [hereinafter *Bananas III* AB Report]. The AB report also noted that there was no need for a "legal interest" to be implied in the DSU or any other WTO Agreement. *Id.*

“broad discretion” in deciding whether to bring a claim.<sup>201</sup> The United States was found to be justified in bringing the claims in *Bananas III* because it was a producer of bananas with potential export interests and its own internal market could be affected by the EC regime.<sup>202</sup>

The AB report also upheld all of the major GATT violation decisions reached by the panel.<sup>203</sup> In particular, the AB report supported the finding that the way the banana import regime allocated quotas did not satisfy the GATT rule<sup>204</sup> and that, as a result, the Latin American countries had lost large market shares. Unfortunately for the EC, the AB report rejected the panel’s broad reading of the EC’s biggest defense to its Article I and Article XIII violations—the Lomé Waiver. The AB report found the Lomé Convention Waiver to be limited solely to the Most Favored Nation (Article I) violation and not to cover the violation regarding the allocation of quotas (Article XIII). The AB report stated that given the exceptional nature of waivers, the strict discipline on them and the restrictions put on the Lomé Waiver itself, a narrow reading of the Lomé Waiver with regard to Article XIII<sup>205</sup> was required.

In the other major set of holdings in the dispute, the AB report upheld the panel’s reading of the relationship between the GATT and GATS—that a government trade measure could be subject to both sets of rules and that the rules could overlap in their application.<sup>206</sup> The AB report also provided the first interpretation of the basic non-discrimination provisions in the GATS Agreement finding that the rules applied to *de facto* as well as *de jure* discrimination.<sup>207</sup>

The end result of the litigation was a complete rejection of the banana import regime. That overall legal result had not really been in doubt since the *Bananas II* dispute. What mattered was whether the more adjudicative WTO dispute settlement system would facilitate compliance by the losing state. The recommendations in

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<sup>201</sup> *Id.* ¶ 135.

<sup>202</sup> *Id.* ¶ 136.

<sup>203</sup> *Id.* ¶ 255.

<sup>204</sup> *Id.* ¶ 163.

<sup>205</sup> *Id.* ¶¶ 184–88.

<sup>206</sup> *Id.* ¶¶ 220–22.

<sup>207</sup> *Id.* ¶¶ 232–34.

the AB report, however, did not make it clear how compliance should take place.<sup>208</sup>

The United States received an offer for compensation to end the dispute, but rejected it.<sup>209</sup> The EC response was to offer to modify the banana regime.<sup>210</sup> After an arbitration over what would constitute a reasonable period of time to comply, the EC received a deadline of January 1, 1999.<sup>211</sup>

### 2.3.1.3 Implementation and Surveillance Phase

The EC proposed a revision to the banana import regime, which it proclaimed to be WTO-compatible. The revised scheme left in place a two-track scheme for allocating banana quotas—one for Latin American countries and another for ACP countries—although it did eliminate the discriminatory import licensing system.<sup>212</sup> Over U.S. objections that the new regime did not comply, the EC Council approved the new scheme in October 1998.<sup>213</sup> The United States and Ecuador took the lead in responding to the new legislation. The U.S. response was to announce, under its Section 301, a preliminary list of the EU products that would be subject to suspension of concessions if the EC failed to adopt a consistent regime by January 1999.<sup>214</sup> The United States later sought a DSB authorization for these sanctions under Article 22.2, which allows a

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<sup>208</sup> *Id.* ¶ 257. The entire recommendation of the AB report reads as follows:

The Appellate Body *recommends* that the Dispute Settlement Body request the European Communities to bring measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements.

*Id.* See also Bhala, *supra* note 179, at 958–59 (noting that a compliance deficit was created because recommendations in the AB report were not clear).

<sup>209</sup> Weiss, *supra* note 163, at 130.

<sup>210</sup> *Id.*

<sup>211</sup> Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 20, WT/DS27/15 (Jan. 7, 1998).

<sup>212</sup> See Bhala, *supra* note 179, at 953 (discussing the EC's two-tiered scheme for allocating banana quotas).

<sup>213</sup> Commission Regulation 2362/98, 1998 O.J. (L293/32) (Oct. 31, 1998).

<sup>214</sup> Implementation of WTO Recommendations Concerning the European Communities' Regime for the Importation, Sale and Distribution of Bananas, 63 Fed. Reg. 63,099 (Nov. 10, 1998); see Salas & Jackson, *supra* note 199, at 155 (discussing EC reactions to the proposed U.S. actions under Section 301).

request for authorization twenty days after the passing of the date of implementation.<sup>215</sup>

The EC argued that the United States was not entitled pursue Article 22 until after an Article 21.5 (compliance) panel had reviewed the new measure for compliance. The EC had already requested such a panel.<sup>216</sup> Ecuador requested the reestablishment of the original panel to resolve the conflict over compliance.<sup>217</sup> The extended disagreement over the proper procedure to be followed was the first skirmish in the fight over “sequencing”<sup>218</sup> – the issue of the proper timing of actions taken regarding implementation (whether or not a new measure is compliant with DSB recommendations) and requests for sanctions because of non-compliance. The DSU provisions relating to compliance review (Article 21.5) and the request for a DSB authorization to suspend concessions against a non-complying Member State (art. 22) do not refer to each other. Consequently, there is a gap in the procedural rules on the sequencing point. The United States and the EC each firmly insisted that the right to proceed could only be on its understanding of sequencing.

The EC was so troubled by what it saw as a U.S. unilateral threat of sanctions that at first it refused to participate in an Article 21.5 proceeding unless the United States suspended its threat of retaliation. The EC also filed a DSU case against the United States on the WTO consistency of Section 301 (which later developed into the *Section 301* dispute).<sup>219</sup> Ultimately, the EC agreed to an Article 21.5 proceeding, but one that would presume conformity of its new regime with WTO rules unless the other party followed the proper

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<sup>215</sup> Recourse by the United States to Article 22.2 of the DSU, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/43 (Jan. 14, 1999); see also Salas & Jackson, *supra* note 199, at 157–58 (describing the U.S. communication to the DSB and following events).

<sup>216</sup> Request for the Establishment of a Panel by the European Communities, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/40 (Dec. 15, 1998).

<sup>217</sup> Recourse to Article 21.5 of the DSU, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/41 (Dec. 18, 1998).

<sup>218</sup> See generally Salas & Jackson, *supra* note 199, at 153–60 (explaining the interaction between Articles 21.5 and 22 of the DSU).

<sup>219</sup> Request for Consultations by the European Community, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/1 (Nov. 30, 1998). See Weiss, *supra* note 163, at 132–33 (recalling the fight between countries over the “proper procedure to be followed to challenge the implementation of an adopted panel and Appellate Body report”).



DSU procedure. Ecuador countered with an application for an Article 21.5 panel to review the conformity of the revised regulation. The DSB granted both requests and sent them to the original panel.<sup>220</sup> The panel was asked to review the issue of sequencing. During this same time, the United States was pushing its retaliation claim forward with the DSB. The political fight over what constituted the proper procedure ultimately led to the brokering of a compromise by the Director General. The DSB would suspend consideration of the U.S. retaliation request in exchange for EC agreement to arbitrate over what would constitute an appropriate level of retaliation.<sup>221</sup>

When that arbitration moved too slowly for the United States, it again threatened retaliation. Ultimately, a panel issued a report on the Art. 21.5 requests of both the EC and Ecuador and the authorization arbitration request of the United States.<sup>222</sup> The 21.5 report found the EC revised scheme to be GATT-violative. The panel also responded to Ecuador's request for specific suggestions on EC implementation by suggesting a tariff-only system and/or action to obtain a WTO waiver for the EC regime.<sup>223</sup> The 21.5 panel declined to consider the issue of proper sequencing and declared that the issue belonged to the WTO itself in the context of the ongoing review of the DSU.<sup>224</sup> The panel did arrive at a figure for the U.S. request for retaliation: \$191.4 million per year.<sup>225</sup>

What happened to the United States and Ecuador following this 21.5 process illustrates the great advantage powerful countries have during the implementation phase of a DSU case. When the EC failed in its second attempt to produce revised legislation in a timely fashion, the United States implemented its sanctions authorization in April 1999. Ecuador also sought and received authorization to suspend concessions in the area of services and trade-related intellectual property rights rather than on trade in

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<sup>220</sup> See Salas & Jackson, *supra* note 199, at 160 (discussing the *Bananas III* panel's final determinations as to the Article 21.5 request filed by Ecuador).

<sup>221</sup> *Id.* at 160-61.

<sup>222</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/ECU (Apr. 12, 1999).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* See Weiss, *supra* note 163, at 133 (“[T]he panel declined to make such a finding as requested by the EC.”).

<sup>225</sup> *Id.* See *WTO Banana Arbitrators Find for US on Procedure, Substance*, INSIDE US TRADE, Apr. 9, 1999.

goods<sup>226</sup> because seeking retaliation through trade in goods would only hurt it.<sup>227</sup> Although granted the authorization by the DSB for this cross-retaliation, Ecuador never employed it. By contrast, the United States continued to use its sanctions while seeking a negotiated settlement to the dispute. The United States and EC parties reached an understanding<sup>228</sup> in 2001 that required in exchange for a U.S. suspension of retaliation an EC adoption of a new banana regulation by the end of 2001.<sup>229</sup> Ecuador was left out of the settlement negotiations and objected to the other two Member States attempting to end the dispute without its input. In response to these concerns, the EC later resolved its dispute with Ecuador as well.<sup>230</sup>

The new regime was designed as a tariff-only system that would go into place by January 1, 2006. Until then, the EU would continue to apply a tariff/quota system, but one based on the actual market shares (given the historical preferences) between the years of 1994 and 1996, the beginning point of the dispute.<sup>231</sup> The solution still involved GATT inconsistencies. Consequently, the EC sought and was granted two waivers ("the Doha Waiver") by the WTO membership during the Ministerial Conference in November 2001 that would allow the programs to be set up under the Understandings with Ecuador and the United States.

The negotiated settlement and WTO waiver have not fully resolved the underlying problems faced by Latin American coun-

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<sup>226</sup> Recourse of Ecuador to Article 22.2 of the DSU, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/52 (Nov. 9, 1999). See also, Salas & Jackson, *supra* note 199, at 161–62 (providing an explanation of the request Ecuador made to the DSB).

<sup>227</sup> See Salas & Jackson, *supra* note 199, at 156–57 (noting Ecuador's request for an Article 21.5 panel); Jackson & Grane, *supra* note 199, at 587 (discussing Ecuador's recourse to Article 22.2 and 22.7).

<sup>228</sup> *US-EU Banana Agreement*, INSIDE U.S. TRADE, Apr. 13, 2001, at 20. See Jackson & Grane, *supra* note 199, at 588–89 (discussing the agreement by which Ecuador was still bound); see also Press Release, The U.S.-EU Banana Agreement, Frequently Asked Questions, Apr. 11, 2001, available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2001/April/The\\_US-EU\\_Banana\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2001/April/The_US-EU_Banana_Agreement.html).

<sup>229</sup> Jackson & Grane, *supra* note 199, at 591.

<sup>230</sup> The Understandings were both submitted by the EC to the DSB as a mutually agreed solution to the dispute. Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58 (July 2, 2001).

<sup>231</sup> Ministerial Conference Decision, *European Communities – The ACP-EC Partnership Agreement*, WT/L/436 (Dec. 7, 2001).

tries. As part of the final shift to a tariff-only system, the Doha Waiver agreement required that the EC agree to arbitrations on whether the EC's final solution to tariff levels for banana imports maintained market access for Latin American countries.<sup>232</sup> It is now clear that the disputants still disagree over the concept of market access. The EC proposed two tariff levels (of 230 euros per ton and 187 euros per ton) that were challenged by the Latin American countries and rejected by WTO arbitrators as non-compliant with the terms of the Doha Waiver.<sup>233</sup> Nicaragua, Panama, and Honduras have now filed a request for consultations<sup>234</sup> on the EC Council Regulation that was adopted following the earlier arbitrations.<sup>235</sup> The Latin American countries contend that the latest tariff level in the Regulation (176 euros per ton) and the duty free quota for ACP bananas are too high (and inconsistent with the Doha Waiver<sup>236</sup>) to allow them the market access. The official EC position is that the latest proposal satisfies its obligation to arbitrate under the Doha Waiver and the tariff will allow full market access for the Latin American countries.<sup>237</sup> The dispute, which was filed as an Article 21.5 compliance matter, will go before a panel unless the parties renegotiate.

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<sup>232</sup> Request for Consultations by Nicaragua, *European Communities – Banana Import Regime and ACP-EC Partnership Agreement*, WT/DS27/64, WT/L/607/Add.18 (Dec. 7, 2005) [hereinafter 2005 Consultation]. See also Request for Consultations by Ecuador, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/65 Rev. 1 (Nov. 26, 2006).

<sup>233</sup> Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement–Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616 (Aug. 1, 2005).

<sup>234</sup> 2005 Consultation, *supra* note 232.

<sup>235</sup> Council of the European Union, Council Regulation on the Tariff Rates for Bananas, 14441/05, AGRI 297, WTO 199, ACP 148, AMLAT 93, OC 832 (Nov. 25, 2005).

<sup>236</sup> 2005 Consultation, *supra* note 232.

<sup>237</sup> Press Release, Council of the European Union, European Union Adopts New 'Tariff-Only' Import Regime for Bananas from 1 January 2006, (Nov. 29, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1493&format=HTML&aged=0&language=EN&guiLanguage=en>. The EU countries were in sharp disagreement about the tariff level to set for the new import regime. Seven countries, led by Germany, argued that the tariff was set too high. See *Bananas: EU imposes, WTO to rule*, LATIN AMERICAN CARIBBEAN & CENTRAL AMERICA REPORT, Dec. 2005, at 7.

### 2.3.2. *Hormones*

#### 2.3.2.1. *Background*

Underlying the *Hormones* dispute (WT/DS26) between the United States (and Canada) and the EC is a difference over how states determine allowable health risks. The dispute, which was filed as an Article 21.5 compliance matter and is now before a panel, highlights how differently each state handles the role of politics in determining the issue. Both the United States and Canada allow the use of growth hormones in cattle production. There is support for their choice in using hormones in the international standards on hormone use.<sup>238</sup> Both governments base their regulatory policy on such scientific evidence.<sup>239</sup> Over time, the EC came to disallow the use of any type of hormone for almost all purposes. In order to make its policy effective, the EC banned all use of the hormones for domestic and imported beef. Although the EC measure was non-discriminatory, the difference in regulatory standards between the countries greatly impacted North American producers. Almost all beef exports from the United States and Canada were shut out of the EC market.<sup>240</sup> In the ensuing dispute one party tried to satisfy the demands of U.S. and Canadian beef producers<sup>241</sup> while the other sought to satisfy consumers and consumer groups. At the same time, both sides sought to be responsive to the views of the other.

The EC adopted its strict policy on hormone use against a background of consumer outrage over health scares that produced

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<sup>238</sup> Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, II.17–II.25, WT/DS26/R/USA (Aug. 18, 1997) [hereinafter Panel Report]; David A. Wirth, *International Decisions: European Communities – Measures Concerning Meat and Meat Products*, 92 AM. J. INT'L L. 755 (1998).

<sup>239</sup> See Dale E. McNeil, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89, 99–100 (1998) (reviewing the U.S. study of hormones use).

<sup>240</sup> See P.C. Mavroidis, *The Trade Disputes Concerning Health Policy Between the EC and the US*, in TRANSATLANTIC ECONOMIC DISPUTES 233, 235–37 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003) (explaining the *Hormones* dispute).

<sup>241</sup> See Terence P. Stewart et al., *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449, 500–02 (2000) (noting the efforts of the cattle industry to use the WTO system to open up closed markets in the *Hormones* case, which have not been successful because the EC response to losing the case was to refrain from ever lifting the ban).

pressure for some action beginning in the 1970s.<sup>242</sup> The first hormone ban went into effect in 1981 immediately following consumer outcry over a health scare.<sup>243</sup> Under the terms of that ban, some hormones were permitted – those needed for therapeutic and zootechnical purposes and those used for growth promotion. The EC states were thus allowed growth hormones if they were acceptable under their regulatory schemes.<sup>244</sup> The EC Council was also charged with determining whether any hormones should be allowed. The Council authorized an EC Commission report on hormone effects and scientific development in order to fulfill its mandate. The report ultimately produced by the commission did not support a complete ban, leading the Commission to propose a ban on artificial hormones.<sup>245</sup> There was immediate<sup>246</sup> political opposition to this result from the EC Economic and Social Committee, the EC Council of Ministers, and the European Parliament. In response to this push for a stricter policy, the Commission cancelled further meetings of the scientific group that examined Commission reports.<sup>247</sup> The report ultimately produced did not support a complete ban in 1985 on all hormones used for growth purposes and authorized controlled use of hormones for therapeutic purposes only.<sup>248</sup> Throughout this period not all EC Member States supported the restrictive position ultimately adopted by the EC Council.<sup>249</sup> That ban was readopted in 1988<sup>250</sup> and renewed in 1996.<sup>251</sup> The adoption of the complete ban was widely perceived as the EC

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<sup>242</sup> See Donna Roberts, *Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations*, 1 J. INT'L ECON. L. 377, 386–87 (1998) (reviewing the background of the hormones dispute).

<sup>243</sup> Council Directive 81/602/EEC, 1981 O.J. (L 222) 32 (EC). See McNiel, *supra* note 239, at 100–06 (detailing a review of the beginnings of the hormone concerns in the EC and the scientific and legislative steps taken in response); Roberts, *supra* note 242, at 386.

<sup>244</sup> Panel Report, *supra* note 238, ¶ 4.3.

<sup>245</sup> Christian Jöerges, *Law, Science and the Management of Risks to Health at the National, European and International Level – Stories on Baby Dummies, Mad Cows and Hormones in Beef*, 7 COLUM. J. EUR. L. 1, 10–11 (2001).

<sup>246</sup> Panel Report, *supra* note 238, ¶¶ 28–29.

<sup>247</sup> Jöerges, *supra* note 245, at 10.

<sup>248</sup> Panel Report, *supra* note 238, ¶ 4.30.

<sup>249</sup> See Jöerges, *supra* note 245, at 6, 9 (noting that the U.K. and other states argued against the 1981 ban and the later 1985 ban).

<sup>250</sup> Council Directive 88/146/EEC, 1988 O.J. (L 070) 16, 18 (EC); see Roberts, *supra* note 242, at 385–87 (discussing the EC litigation over the earlier ban).

<sup>251</sup> Council Directive 96/22/EC, 1996 O.J. (L 125) 3 (EC).

responding to consumer preferences regarding hormones<sup>252</sup> and the belief that the public did not trust the government or "science" to decide the issue.

In its first response to the EC's regulatory policy in this area, the United States tried to obtain assistance from the GATT. GATT rules in the 1980s required consensus by all parties for actions to be taken regarding disputes. In 1987, the United States sought the establishment of a technical experts group under the Technical Barriers to Trade Agreement (TBT Agreement),<sup>253</sup> arguing that the EC Directive was not supported by any scientific evidence.<sup>254</sup> The EC rejected the request for such a group on the basis that the TBT Agreement did not cover a production and process method.<sup>255</sup> The dispute on the TBT issue did not progress. Shortly after this period, the ongoing negotiations under the Uruguay Round reached consensus on the major outline of a Sanitary and Phytosanitary Agreement (SPS Agreement) to deal expressly with the issue of government standards measures aimed at protecting human, animal, and plant life and safety.<sup>256</sup> The negotiators agreed in principle on two major issues: that government SPS measures should be consistent, as far as possible, with internationally established standards and that SPS measures should be based on scientific evidence.<sup>257</sup> The hormones dispute was widely regarded by negotiators as the type of issue that would be subject to the new agreement's approach of requiring states to use scientific determinations to justify health measures.<sup>258</sup>

Attempting to obtain some favorable EC response to its concerns sooner than was possible through a new set of rules, the United States threatened unilateral sanctions of 100% tariff in-

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<sup>252</sup> See Jöerges, *supra* note 245, at 10 (expressing that the EC has always pointed to surveys which reveal that consumers do not want to buy hormone-fed beef or beef products).

<sup>253</sup> Petersmann, *supra* note 90, at 237-38.

<sup>254</sup> Panel Report, *supra* note 238, ¶ 4.34 (emphasizing the U.S. argument for the establishment of the technical experts group under Article 14.5 of the TBT Agreement).

<sup>255</sup> *Id.* The EC instead argued for the establishment of a panel to review obligations under Article 14.25 of the Agreement.

<sup>256</sup> See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 202 (2d ed. 1999) (pointing out that the negotiations were reaching a consensus between the years 1988 and 1990).

<sup>257</sup> *Id.*

<sup>258</sup> Atik & Wirth, *supra* note 136, at 173; McNeil, *supra* note 239, at 90-91.

creases on eight EC agricultural products that would shut them out of the U.S. market.<sup>259</sup> The EC actually delayed its implementation of the 1988 ban for one year in response to the threat of retaliation. The sanctions went into place, however, when the EC made its hormone ban effective in 1989.<sup>260</sup> The EC requested a GATT panel on the issue of whether the United States was entitled to use such unilateral sanctions. The United States responded by blocking the creation of a panel. The United States retaliation continued until 1996 when the *Hormones* panel was established.<sup>261</sup>

### 2.3.2.2. *The Hormones Dispute*

The *Hormones* case was the first dispute the United States filed against the EC. In this case and its companion, *Bananas III*,<sup>262</sup> the United States chose to bring two longstanding and contentious disputes<sup>263</sup> to the new DSU system. The United States (and Canada<sup>264</sup>) argued that by banning meat and meat products produced by growth hormones, the EC violated Articles 2, 3, and 5 of the new SPS Agreement.

The SPS Agreement sets out the major obligations of Member States in the adoption or maintenance of sanitary and phytosanitary measures. A Member State must ensure that any SPS measure is only adopted when necessary to protect human, animal, or plant life, or health, and that it is based on scientific principles.<sup>265</sup> A Member State must base its SPS measure on international standards and guidelines, except where the country intends to provide a higher level of protection.<sup>266</sup> If a Member State does choose to

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<sup>259</sup> Petersmann, *supra* note 90, at 238.

<sup>260</sup> *Id.* The United States and EC negotiated a joint Task Force Agreement to allow the importation of products that could be certified as hormone-free. Panel Report, *supra* note 238, ¶ 4.36. This step did lead to the United States limiting its retaliation list.

<sup>261</sup> Petersmann, *supra* note 90, at 238.

<sup>262</sup> Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/1 (Feb. 12, 1996).

<sup>263</sup> See Shaffer, *supra* note 188, at 68.

<sup>264</sup> Request for Consultations by Canada, *European Communities – Measures Affecting Livestock and Meat (Hormones)*, WT/DS48/1 (July 8, 1996). The results of the U.S. and Canadian panels in the dispute reached the same results. The appeal combined the disputes.

<sup>265</sup> SPS Agreement arts. 2.1, 2.2.

<sup>266</sup> *Id.* arts. 3.1, 3.3.

provide that higher level of protection it must base its SPS measure on "an assessment, appropriate to the circumstances, of the risks" to human, animal, or plant life or health.<sup>267</sup>

The U.S. and Canadian complaints were that the EC ban was not based on scientific evidence, did not satisfy international standards, and was not based on a risk assessment. Consequently, the dispute centered on how the EC came to adopt and maintain its hormone ban. A DSU panel was established in 1996 and reported in 1997 that the ban was inconsistent with Articles 3 and 5 of the SPS Agreement.<sup>268</sup>

All parties appealed portions of the panel report.<sup>269</sup> The Appellate Body Report was widely anticipated for how its review of the panel determinations would decide the issue of the ban's inconsistency with the SPS Agreement. All of the disputants knew that the AB Report would provide the first definitive interpretation of the new agreement. In addition, there was great interest in whether the Appellate Body would reemphasize its textual approach to the interpretation of GATT/WTO obligations, an approach it had demonstrated in its first decision.<sup>270</sup> Issued in January 1998, the AB Report concurred with the panel determination that the ban violated the SPS Agreement. At the same time, however, the Appel-

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<sup>267</sup> *Id.* art. 5.1.

<sup>268</sup> Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997) [hereinafter *Hormones* Panel Report]. The Panel found that the EC ban violated Articles 3.1 and 3.3 as well as Articles 5.1 and 5.5. *Id.*

<sup>269</sup> *Hormones* AB Report, *supra* note 54. The EC argued that the panel erred with regard to: (1) the correct burden of proof, (2) the appropriate standards of review, (3) its interpretation of the Precautionary Principle (Article 5.7), (4) its failure to provide an objective assessment of the facts, (Article 11), (5) its temporal application of the SPS Agreement, and (6) its findings of violations of Articles 3.1, 3.3, 5.1, and 5.5. *Hormones* AB Report, *supra* note 54, ¶¶ 9–36. The United States appealed the panel's finding of an EC violation of Article 3.1, arguing that it did not need to resolve that issue. *Id.* ¶ 46. Canada appealed to preserve its arguments about a violation of Article 5.6 if the Appellate Body decided to modify or reverse the panel findings on Articles 3.1, 5.1 and 5.5. *Id.* ¶ 77.

<sup>270</sup> See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996). It is widely agreed that the Appellate Body has adopted a textualist approach to the GATT/WTO agreements. See Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT'L L.J. 469, 480 (2003) ("[T]he Appellate Body has certainly attached the greatest weight to the first [criteria for interpretation under the Vienna Convention] – 'the ordinary meaning of the terms of the treaty.'").



late Body rejected most of the panel's legal findings that supported its determination.<sup>271</sup>

The major failing of the EC ban,<sup>272</sup> according to the AB, was that it was not "based on" a risk assessment and thus in violation of Article 5.1. In reaching that conclusion, the Appellate Body decided the proper legal interpretation of the Article 5.1 obligation, and then examined whether the panel was correct that the EC measure failed to meet it. The Appellate Body began its analysis with a close reading of the words of Article 5.1.<sup>273</sup> It moved from an interpretation of what constitutes a "risk assessment"<sup>274</sup> to whether the EC measure was "based on" that risk assessment.<sup>275</sup> In its approach to these two preliminary points, the AB panel illustrated the proper approach for analyzing WTO obligations. The AB Report did endorse the panel's view that the obligation at issue—the requirement to conduct risk assessments—had to be examined in relationship to other SPS obligations. Article 5.1 was found to be a specific application of the Article 2 responsibility of a government to base its SPS measures on scientific principles.<sup>276</sup> Given that relationship, the elements that define the basic obligation in Article 2.2 did "impart meaning" to Article 5.1.<sup>277</sup> The Appellate Body, however, rejected the panel's attempt to make sense of the concept of "risk assessment" by contrasting it with the concept of "risk management" because the latter phrase appears nowhere in the text of the SPS Agreement.<sup>278</sup> Proper interpretation of an agreement's obligation, according to the AB Report, requires interpreting the words actually used "and not words which the in-

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<sup>271</sup> The Appellate Body disagreed with the panel's interpretation of Article 3 and Article 5.1, and it rejected the panel's findings of a violation of Article 5.5.

<sup>272</sup> The Appellate Body Report did find that the ban also violated Article 3.3 because of its violation of Article 5.1 (the failure to base the SPS measure on a risk assessment). *Hormones* AB Report, *supra* note 54, ¶ 209.

<sup>273</sup> Article 5.1 provides:

Members shall ensure that their sanitary and phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

SPS Agreement art. 5.1 (emphasis added).

<sup>274</sup> *Hormones* AB Report, *supra* note 54, ¶¶ 180–87.

<sup>275</sup> *Id.* ¶¶ 188–94.

<sup>276</sup> *Id.* ¶ 180.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* ¶ 181.

terpreter may feel should have been used.”<sup>279</sup> For the same reason, the Appellate Body also rejected the panel’s effort to explain how a “risk assessment” should be conducted—by following a two-step process of identifying the adverse health effects and then evaluating the potential or probability of such effects.<sup>280</sup>

According to the AB report, in order to follow the proper methodology when adopting an SPS measure, states need to develop a concept of the proper magnitude of risk and focus on “scientifically identified risks.”<sup>281</sup> The SPS Agreement explains how to assess risks in Article 5.2.<sup>282</sup> The factors listed there include some assessment methods that are not laboratory-based, and it is not a “closed list” of factors.<sup>283</sup> Governments are thereby free to consider “the actual potential for adverse effects on human health in the real world where people live and work and die” when adopting SPS measures.<sup>284</sup>

The same textual approach was used by the AB Report when it interpreted the Article 5.1 requirement that an SPS measure be “based on” a risk assessment. The Appellate Body rejected the panel’s attempt to add additional requirements—a “minimum procedural requirement” and a “substantive requirement” (that the scientific conclusions implicit in the measure correspond to those reached by the risk assessment)<sup>285</sup>—that a state must follow in order for its measure to be based on a risk assessment. Instead, the Appellate Body stressed that, when read contextually with Article 2.2, Article 5.1 requires that the risk assessment sufficiently warrant or reasonably support the SPS measure.<sup>286</sup> The substantive requirement of Article 5.1, and the test to be applied to all future measures, is that there be a “rational relationship between the [SPS] measure and the risk assessment.”<sup>287</sup>

Focusing closely on the text of the SPS Agreement allowed the Appellate Body to emphasize the wide latitude a government actually possesses in designing the SPS measure it believes necessary

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* ¶ 183.

<sup>281</sup> *Id.* ¶¶ 185–86.

<sup>282</sup> *Id.* ¶ 187.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* ¶¶ 188–89.

<sup>286</sup> *Id.* ¶ 193.

<sup>287</sup> *Id.*

to meet its goals.<sup>288</sup> When designing a risk assessment, governments can look at qualitative as well as quantitative factors,<sup>289</sup> adopt risk assessments developed by other Member States or international organizations,<sup>290</sup> and adopt the minority view on a scientific issue.<sup>291</sup> Consequently, when a DSU panel searches for the rational relationship between an SPS measure and its risk assessment, the panel must do a case-by-case analysis taking into account all considerations that bear on potential adverse health effects.<sup>292</sup>

The one area in which the Appellate Body concurred with the panel report was on the key fact issue—whether the EC had performed a risk assessment on the effects of growth hormones.<sup>293</sup> The Appellate Body agreed with the panel that the studies and evidence submitted by the EC showed the existence of the general risk of cancer but not the particular risks at stake in the hormone dispute—the carcinogenic or genotoxic potential of the hormone residues found in the cattle produced with growth hormones.<sup>294</sup>

The final recommendation of the Appellate Body Report was standard for such reports—that the EC bring its SPS measures into compliance with its SPS obligations.<sup>295</sup> The recommendation did not provide guidance on how the EC should comply. Since the basis for the adoption and maintenance of the ban was flawed—it was not based on a risk assessment—it is arguable that compliance required removal of the ban. Simple removal of the ban, however, was never contemplated by the EC.

#### 2.3.2.3. *Implementation and Surveillance Phase*

Eight years after the adoption of the AB Report, EC compliance remains unresolved. No other WTO dispute has continued over such a long period. Immediately after the Appellate Body issued its report, the EC announced its intention to comply. The EC, however, failed to reach consensus with the United States and Canada on the time frame for implementation.<sup>296</sup> Consequently, the

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<sup>288</sup> *Id.* ¶ 194.

<sup>289</sup> *Id.* ¶ 187.

<sup>290</sup> *Id.* ¶ 190.

<sup>291</sup> *Id.* ¶ 194.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* ¶¶ 195–209.

<sup>294</sup> *Id.* ¶ 200.

<sup>295</sup> *Id.* ¶ 255.

<sup>296</sup> Arbitration under Article 21.3(c) of the Understanding on Rules and Pro-

three parties ended up before an arbitrator on the issue of a "reasonable period" of time for EC compliance.<sup>297</sup> The Article 21.3 arbitration revealed the crucial divide between the disputing parties over what would constitute compliance with the Appellate Body recommendations. The EC argued that thirty-nine months was a "reasonable period" of time,<sup>298</sup> contending that it would need two years to perform a risk assessment and another fifteen months to take any necessary legislative action in response to such an assessment.<sup>299</sup> In support of this compliance plan, the EC contended that the DSU does not specify what implementation means and that each Member State has options concerning "the precise means of implementation."<sup>300</sup>

The United States countered with the argument that the conducting of any risk assessment was irrelevant to implementation and could not be used to delay the reasonable period of time needed to comply.<sup>301</sup> Canada concurred that withdrawal of the ban was the only way the EC measure could be brought into compliance.<sup>302</sup> Canada also argued that countenancing any argument for a risk assessment would only "reward" the EC by allowing it to claim the benefits of the precautionary principle (the SPS Agreement provision that allows for provisional measures even without a risk assessment).<sup>303</sup>

The arbitrator concluded that the "reasonable period" of time should be the shortest time possible within the legal system to im-

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cedures Governing the Settlement of Disputes, *EC – Measures Concerning Meat and Meat Products (Hormones)*; ¶¶ 1, 2, WT/DS26/15, WT/DS48/13 (May 29, 1998) [hereinafter *Hormones* 21.3].

<sup>297</sup> DSU art. 21.3.

<sup>298</sup> *Hormones* 21.3, *supra* note 296, ¶ 5.

<sup>299</sup> *Id.* As part of its argument, the EC outlined its plan to conduct hormone-specific and residue-specific assessments of all the hormones that had been banned. It also stated that it would abolish, amend, or maintain the ban based on the assessment. *Id.* ¶ 6.

<sup>300</sup> *Id.* ¶ 8.

<sup>301</sup> *Id.* ¶ 17.

<sup>302</sup> *Id.*

<sup>303</sup> The SPS Agreement has a version of the precautionary principle in Article 5.7. Under its terms a Member State can put into effect a measure even when there is insufficient scientific evidence. Article 5.7 is designed to allow provisional measures for governments needing to protect the public. Since the government receives leeway to proceed without a risk assessment, however, it is under an obligation to further study the issue. SPS Agreement art. 5.7.

plement the DSB recommendations.<sup>304</sup> The arbitrator could not reconcile the concept of prompt compliance with the EC request for time “to conduct studies or to consult experts to demonstrate the *consistency* of a measure already judged to be *inconsistent*.”<sup>305</sup> The arbitrator also noted that the EC had been facing SPS obligations since 1995 but had not managed to produce studies that would allow it to meet its obligations.<sup>306</sup> The report concluded that the EC was entitled to a 15 month period, long enough to withdraw the measure under EC legislative rules.<sup>307</sup> The decision thus undercut the EC position that it was completely free to devise its own method of compliance. The EC response was to ignore the basis for the arbitrator’s determination in its subsequent actions.

After this point, virtually every part of the *Hormones* controversy became marked by disagreements between the parties over how to proceed.<sup>308</sup> The EC followed through on its announced plans to begin a risk assessment.<sup>309</sup> In its last status report<sup>310</sup> on implementation in May 1999, the EC announced to the DSB that the available scientific evidence did not leave it in a position to lift its ban.<sup>311</sup> The United States and Canadian response was to seek authorization for the suspension of concessions under Article 22 of the DSU.<sup>312</sup>

This action precipitated a procedural controversy that remains unresolved today. The EC argued that a WTO Member State is not entitled to proceed under Article 22 unless it has followed compliance procedure under Article 21.5. The United States and Canada disagreed on the “sequencing” of steps that parties are required to

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<sup>304</sup> *Hormones* 21.3, *supra* note 296, ¶ 26.

<sup>305</sup> *Id.* ¶ 39.

<sup>306</sup> *Id.* ¶ 40.

<sup>307</sup> *Id.* ¶ 47.

<sup>308</sup> See generally Wüger, *supra* note 158, at 795–814 (discussing the disagreements and subsequent developments).

<sup>309</sup> *Id.* at 797.

<sup>310</sup> Under the DSU, Member States are required to report on the actions they have taken towards compliance. The issue of compliance is overseen by the DSB and is put on its agenda six months after the date of the reasonable time period has been established. The DSB is supposed to keep the issue on the agenda until “the issue is resolved.” DSU art. 21.6.

<sup>311</sup> Status Report by the European Communities, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/17/Add. 4, WT/DS48/15/Add. 4 (May 11, 1999).

<sup>312</sup> DSU art. 22.2.

take under Articles 21.5 and 22.<sup>313</sup> Since the EC had taken no action, the two countries felt free to seek the suspension of concessions. The parties also ended up before another arbitrator over the issue of the proper amount of concessions.<sup>314</sup> The resulting decision led to a DSB authorization of sanctions of \$116.8 million per year for the United States and \$11.3 for Canada.<sup>315</sup>

As sanctions continued, the EC took steps towards their own conception of compliance. The EC completed its first risk assessment studies (1999-2000)<sup>316</sup> and subsequently passed revised legislation banning growth hormones (banning one completely and five others provisionally) based on those studies (2003).<sup>317</sup> During this time frame, EC and United States officials also tried to negotiate a political settlement to the case—compensation for the United States and Canada and a continuation for the suspension of concessions EC ban—but no agreement was ever reached.<sup>318</sup> Trying to spur the EC into taking action it would find satisfactory, the United States in 2000 adopted “carousel retaliation.”<sup>319</sup> This is the practice of rotating the products that would be subject to the WTO-authorized tariff increase in order to increase pressure from all of the affected EC industries on their government to withdraw the ban. The United States justified its adoption of the carousel legislation on

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<sup>313</sup> See *supra* note 92 and accompanying text (discussing the sequencing controversy). Parties to other WTO disputes reaching the stage of sustained non-compliance have negotiated over the issue of sequencing in each case.

<sup>314</sup> Any suspension of concessions granted by the DSB is supposed to be equivalent to the level of nullification or impairment of the benefits suffered by the prevailing party. DSU art. 22.4. If the disputants cannot agree upon the appropriate level of concessions, the matter is sent to arbitration. *Id.* art. 22.6–7.

<sup>315</sup> Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 83 WT/DS26/ARB (July 12, 1999); see also Wüger, *supra* note 158, at 795–97 (discussing the issues raised during that arbitration).

<sup>316</sup> Wüger, *supra* note 158, at 798–800.

<sup>317</sup> Council Directive 2003/74, 2003 O.J. (L 262) 17–18 (EC); Communication from the European Communities, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/22, WT/DS48/20, Oct. 28, 2003 [hereinafter EC Communication] (attaching the EC’s new Directive 2003/74/EC to the DSB, and stating that “with the publication and entry into force of this Directive, the EC considers that it has now fully implemented the recommendations and rulings of the DSB in the aforementioned dispute.”).

<sup>318</sup> Wüger, *supra* note 158, at 812–14.

<sup>319</sup> Trade and Development Act of 2000, § 407 Pub. L. No. 106–200, 114 Stat. 251.

the EC non-compliance in *Hormones* and *Bananas III*.<sup>320</sup> When faced with threats from the EC to go to sanctions in the *FSC* dispute, however, the Clinton administration chose not to implement carousel retaliation.<sup>321</sup>

In October 2003, the EC announced its new legislation to the DSB and claimed that its new scientific evidence<sup>322</sup> justified its ban. The EC also took the position that by enacting Directive 2003/74/EC it had fully implemented the DSB recommendations thus requiring the United States and Canada to terminate sanctions.<sup>323</sup> Both the United States and Canada argued that it was not clear that the EC measure was consistent and refused the EC request to initiate a compliance proceeding under Article 21.5 to resolve this dispute.<sup>324</sup> Negotiations continued over this impasse until November 2004 when the EC requested consultations with the United States and Canada<sup>325</sup> on the legality of the continued suspension of concessions. When consultations failed, the EC requested the establishment of a panel in January 2005.<sup>326</sup> The panel heard arguments in the case in September 2005.

#### 2.3.2.4. *Continued Suspension of Obligations in EC-Hormones Dispute*

The EC claims in the new dispute are that by 1) leaving in place the suspension of concessions from the *Hormones* dispute; and 2) both making unilateral determinations that the new EC ban is in violation of the SPS Agreement and failing to seek recourse under

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<sup>320</sup> Wüger, *supra* note 158, at 806.

<sup>321</sup> *Id.* at 806–07. The United States and EC did end up having the DSU consultations over carousel retaliation but the dispute was never pursued further. *Id.* at 810.

<sup>322</sup> EC Communication, *supra* note 317, Annex I.

<sup>323</sup> *Minutes of Meeting Held in the Centre William Rappard on 7 November 2003*, ¶ 28, WT/DSB/M/157 (Dec. 18, 2003).

<sup>324</sup> *Id.* ¶¶ 29–31.

<sup>325</sup> Acceptance by the United States of the Request to Join Consultations, *United States – Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/5 (Dec. 14, 2004); Acceptance by Canada of the Request to Join Consultations, *Canada – Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321/5 (Dec. 14, 2004).

<sup>326</sup> Request for the Establishment of a Panel by the European Communities, *United States – Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/7 (Jan. 14, 2005).

Article 21.5<sup>327</sup> – the compliance procedure – the United States and Canada have violated Articles 21.5, 22.8 and 23.1 and 23.2(a) of the DSU as well as Articles I and II of the GATT.<sup>328</sup> The GATT claims relate directly to the imposition by United States and Canada of the sanctions against the EC following the *Hormones* dispute. Consequently, those claims will not be accepted by a panel as violations unless the EC can establish that the actions of both countries violate the DSU provisions. The following section sets forth and analyzes the positions the parties have taken in the dispute which was heard by a panel that was scheduled to issue its report in October 2006.<sup>329</sup>

The parties fail to agree about the very nature of the *Continued Suspension* dispute. The EC argues that the case is about the proper procedural obligations of Members who continue to maintain the suspension of concessions after proper notification by the losing party of its adoption of implementing measures.<sup>330</sup> The EC also claims the case is not about EC compliance in the *Hormones* dispute.<sup>331</sup> By contrast, the United States argues that the dispute raises the “simple question of whether the EC has established that it has come into compliance” in the *Hormones* dispute.<sup>332</sup> The total variance in these positions reflects the unusual posture of the dispute. The dispute is the first WTO case to center on the obligations of disputing parties on an issue that the DSU does not directly address – what happens after the suspension of concessions has been authorized.<sup>333</sup>

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<sup>327</sup> *Id.*; see also First Written Submission by the European Communities, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶ 4, WT/DS320 (July 11, 2005) [hereinafter EC Submission].

<sup>328</sup> *Id.* ¶ 8.

<sup>329</sup> The United States and the EC have made their written submissions available on the USTR and Europa websites. The Chairman of the panel has for the second time announced that due to the complexity of the scientific issues involved (and in scheduling a second open hearing with the Parties and experts), it would not complete its work within the normal six month time frame. Communication from the Chairman of the Panel, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/10 (Jan. 29, 2007).

<sup>330</sup> EC Submission, *supra* note 327, ¶¶ 7, 25.

<sup>331</sup> EC Submission, *supra* note 327, ¶¶ 7, 25.

<sup>332</sup> First Written Submission of the United States, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶ 7, WT/DS320 (Aug. 8 2005), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file331\\_7903.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file331_7903.pdf) [hereinafter U.S. Submission].

<sup>333</sup> The *Section 301* dispute did focus on whether the U.S. statute Section 301



The WTO-authorized sanctions in *Hormones* have gone on for almost eight years, far longer than any retaliation. The Uruguay Round negotiators did not seem to provide for sanctions to continue over a sustained period. According to the DSU, the suspension of concessions is meant to be “temporary” and continue only until the measure that was found to be inconsistent has been removed.<sup>334</sup> Obviously the drafters believed the use of sanctions would force the resisting party to comply. In addition, the DSU lacks any procedure for determining whether implementation has taken place after the use of DSB-authorized sanctions. The assumption was probably that the disputing parties would negotiate a solution to a dispute after sanctions were authorized and employed. In the other disputes which have seen the sustained use of sanctions, the parties either negotiated a settlement to end sanctions (*Bananas III*) or withdrew the sanctions after the losing state took action to remove the offending measure, even while invoking an Article 21.5 proceeding on whether the new measure was fully compliant (*FSC*). The textual gaps in Article 22, therefore, do leave the parties free to argue about what each party is required to do should a dispute reach this point.

The United States and Canada have continued sanctions because neither country believes that the EC has complied with the DSB recommendation that the EC bring its measure into compliance.<sup>335</sup> From the beginning, the United States and Canada have contended that the EC must remove the ban to be in compliance. The EC position is that it has removed the old ban and put a new measure (Directive 2003/74) in place based on its new risk assessments.<sup>336</sup> The EC contends that since it has removed the old ban and put in place a properly supported ban, it is in compliance with the DSB recommendations and that it is the continued sanctions that violate the DSU.<sup>337</sup> Thus, as it argued in November 2003 and

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was in compliance with DSU Article 23. See *infra* Section 2.3.7.2. In that case, however, the focus was on the U.S. statute and whether by maintaining it the United States violated its DSU Article 23 obligations. The *Continued Suspension* dispute goes right to the core of what steps disputing Member States are obligated to take during the post-suspension phase of a dispute.

<sup>334</sup> DSU art. 22.8.

<sup>335</sup> See Tobias Buck, *US 'Will Not Lift' Sanctions on EU in Beef Spat*, FIN. TIMES, Oct. 20, 2003, at 8 (discussing the continuation of the sanctions).

<sup>336</sup> EC Submission, *supra* note 327, ¶ 3.

<sup>337</sup> *Id.* ¶¶ 17, 95–99 (discussing factual aspects in ¶ 17 and legal arguments in ¶¶ 95–99).

maintains in the *Continued Suspension* dispute, the EC has complied with its WTO obligations by removing the old ban and enacting the new measure.<sup>338</sup>

The inability of the parties to agree on the central issues of the dispute also appears in how they argue to the panel. The EC focuses its submission on U.S. violations that indicate unilateralism on the part of the United States in continuing the suspension of concessions. According to the EC, the United States has violated the DSU provision prohibiting unilateralism, Article 23,<sup>339</sup> by continuing to suspend concessions. The particular violation claimed is of Article 23.2(a) which states that a Member shall not make a determination that a violation has occurred without recourse to dispute settlement under the DSU procedures.<sup>340</sup> The EC contends that by continuing sanctions authorized for the old measure and ignoring the EC claims of implementation, the United States is making a determination without recourse to the multilateral system—to the Article 21.5 review which it would properly test the issue of compliance.<sup>341</sup> The EC argues that it is entitled to a presumption of good faith regarding its claim that Directive 2003/74/EC is in compliance with obligations (from the *Hormones* case) and that the United States is not allowed to make a unilateral determination

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<sup>338</sup> *Id.* ¶ 7.

<sup>339</sup> Article 23 was added to the GATT/WTO dispute settlement procedures when the new DSU was adopted. The EC had pushed from the beginning of the dispute settlement negotiations for the adoption of Article 23, entitled, "Strengthening the Multilateral System." The measure was aimed at the United States and its use of Section 301. The EC had argued that the reform of the dispute settlement system required a ban on unilateral action of the type the United States had engaged in under Section 301. CROOME, *supra* note 256, at 126–27. During the final phase of negotiations on the DSU the negotiators adopted the negative consensus rule, and, as a counterpart to that, Article 23. *Id.* at 281–83.

<sup>340</sup> Specifically,

In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body Report adopted by the DSB or an arbitration award rendered under this Understanding . . . .

DSU art. 23(2).

<sup>341</sup> EC Submission, *supra* note 327, ¶¶ 62–68.

to the contrary.<sup>342</sup> Since according to this argument the EC has complied, the United States is required to discontinue the suspension of concessions under Article 22.8,<sup>343</sup> (which sets out the course of action for the removal of sanctions). In the alternative, the EC argues that if the panel finds no violations of Articles 23, 22.8, or 21.5 based on the EC presumed compliance, the panel should find that the EC has actually fully complied by adopting Directive 2003/74/EC.<sup>344</sup> Since the United States continues to suspend concessions despite the EC's actions, it is in violation of Article 22.8.<sup>345</sup>

The United States, by contrast, argues that the EC arguments lack textual support in Article 22.<sup>346</sup> According to the United States, it is the EC's actions that constitute a unilateral determination—namely, that the EC is in compliance. The United States argues that by simply making a claim that it has complied, the losing party to a WTO dispute cannot dictate the issue of whether DSB-authorized sanctions can continue.<sup>347</sup> According to the United States, the DSB plays a monitoring role at this point in WTO disputes and Article 22 is concerned with the multilateral review of compliance.<sup>348</sup> Article 22.8 by its terms contemplates the lifting of sanctions when 1) the offending measure is removed; 2) the losing Member State “provides a solution” to the nullification or impairment caused by the measure; or 3) the disputing parties reach a mutually satisfactory solution.<sup>349</sup>

The United States also contends that the EC actions do not establish any of the grounds for discontinuing sanctions. Moreover,

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<sup>342</sup> *Id.* ¶ 72, 80–98.

<sup>343</sup> *Id.* ¶ 98. Article 22.8 provides:

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measures found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

DSU art. 22(8).

<sup>344</sup> EC Submission, *supra* note 327, ¶¶ 135–46.

<sup>345</sup> *Id.* ¶ 147.

<sup>346</sup> U.S. Submission, *supra* note 332, ¶ 109.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> DSU art. 22(8); U.S. Submission, *supra* note 332, ¶ 104 (stating that these are the three grounds for removing a suspension of concessions and that the EC has to establish one of them in order to prevail in its Article 22.8 claim.).

accepting the EC position that it can determine compliance would undercut the stable operation of the DSU itself. If this argument were accepted, it would allow a Member State to avoid the consequences of a WTO breach.<sup>350</sup> Most importantly, the EC bears the burden of proof under Article 22.8.<sup>351</sup> The EC must establish to the satisfaction of the DSB that it has removed the measure or provided a solution. Since it has not done so, according to the United States, it has not made out a *prima facie* violation of Article 22.8.<sup>352</sup>

The United States then examines, and seeks to disprove, the claims the EC has made about Directive 2003/74—that the new ban on one hormone (estradiol 17 $\beta$ ) and the provisional ban on the five other hormones—complies with the SPS Agreement obligations. The EC claims that the provisional ban is justified under the SPS Agreement, Article 5.7 version of the precautionary principle, and that the final ban is justified by its risk assessment.<sup>353</sup> The United States' submission subjects each relevant SPS Agreement provision—Articles 5.7 and 5.1—to a textual analysis in order to prove that the EC's actions here cannot meet their requirements. With regard to the provisional ban, the EC cannot establish the Article 5.7 requirements that 1) it be imposed where scientific evidence is insufficient or 2) it is based on the "available pertinent information."<sup>354</sup> The United States points to the long study of hormones (over twenty-five years) and risk assessments, including those done recently, which establish that there is sufficient scientific information.<sup>355</sup> The United States also argues that the many studies which do exist reveal that the residues from meat products do not pose a risk to consumers, thus undercutting the EC claim that its provisional ban is based on the "available pertinent information."<sup>356</sup> According to the United States, the final ban on estradiol 17 $\beta$  in Directive 2003/74 also fails to satisfy EC SPS Agreement obligations for the same reason as the original EC ban—that

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<sup>350</sup> U.S. Submission, *supra* note 332, ¶ 112.

<sup>351</sup> *Id.* ¶ 113.

<sup>352</sup> *Id.* ¶¶ 114–15.

<sup>353</sup> *Id.* ¶ 121.

<sup>354</sup> *Id.* ¶ 123.

<sup>355</sup> *Id.* ¶¶ 124–27. The United States cites another Appellate Body Report on *Varietals*, which indicated that insufficient information meant that there was not even enough evidence to do a risk assessment under Article 5.1. The United States argues that there is enough evidence to do such a risk assessment on these five hormones.

<sup>356</sup> *Id.* ¶ 131.

is not based on a proper risk assessment.<sup>357</sup> The United States contends that Directive 2003/74 rests on opinions and studies that do not demonstrate the specific risks posed to humans from hormone residues.<sup>358</sup> Consequently, the opinions and studies do not reasonably support the ban as required by Article 5.1.<sup>359</sup>

With regard to its second alleged violation, the refusal to pursue the procedure under Article 21.5 to resolve the issue of EC compliance,<sup>360</sup> the United States argues that the DSU specifies several pathways parties can follow in post-suspension situations.<sup>361</sup> The policy arguments that the EC offers for why the United States was obligated to bring an Article 21.5 case would result in the DSU being “rewritten in the manner desired by the EC.”<sup>362</sup> The United States points out that since the WTO dispute reform negotiators have failed to reach a consensus on a post-suspension process, the panel should resist prescribing a solution.<sup>363</sup> The EC pursuit of the *Continued Suspension* dispute as a new case also illustrates that Article 21.5 does not provide the only way to proceed.<sup>364</sup>

The final defense of the United States is against the EC claims that it had made a unilateral determination of inconsistency of the new measure in violation of Article 23 of the DSU.<sup>365</sup> The United States argues that it has made no “determinations” about the EC Directive (and whether it complies with the EC’s obligations); rather, it has simply made statements about its evaluation of the EC Directive.<sup>366</sup>

### 2.3.3. Helms-Burton

The *Helms-Burton* case<sup>367</sup> differs from all of the other impossible

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<sup>357</sup> *Id.* ¶ 135.

<sup>358</sup> *Id.* ¶¶ 139, 141–60.

<sup>359</sup> *Id.* ¶ 167.

<sup>360</sup> *Id.* ¶ 168.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* ¶ 168.

<sup>363</sup> *Id.* ¶ 198.

<sup>364</sup> *Id.* ¶¶ 199–200.

<sup>365</sup> *Id.* ¶¶ 170–80.

<sup>366</sup> *Id.* ¶ 184.

<sup>367</sup> See Helms-Burton Panel Request, *supra* note 97 (summarizing the legal dispute between the European Communities and the United States concerning Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes).

cases in one major respect. The dispute between the EC and the United States was submitted to the DSU system but a panel, although appointed,<sup>368</sup> never reviewed the case. The United States took the position that the WTO has no jurisdiction over the dispute.<sup>369</sup> The United States refused to participate officially and never submitted any documents regarding the dispute to the DSB. The United States took this stance even though it was a supporter of the DSU and at that time was the most active litigant under its new procedures.<sup>370</sup> Consequently, the *Helms-Burton* case has a background and post-WTO aftermath<sup>371</sup> but no actual input from the dispute settlement system itself.

Why was the United States so determined to avoid the WTO as a forum for defending the Helms-Burton statute? In all likelihood, if the United States had accepted WTO jurisdiction, it would have had to develop a position on the meaning of its best defense: that the U.S. measure<sup>372</sup> was justified under Article XXI of the GATT because it served U.S. national security interests.

### 2.3.3.1. Background

The triggering event for the U.S. adoption of the Helms-Burton statute was the downing by the Cuban military of two small planes

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<sup>368</sup> See Helms-Burton Panel Request, *supra* note 97, at 3 (stating that under the terms of Article 7 of the DSU, if no agreement is reached between the parties after twenty days of establishment of a panel, the Director General appoints a panel); see also *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/3 (Feb. 20, 1997).

<sup>369</sup> The United States made statements on this issue only before the DSB and to newspapers. See David E. Sanger, *U.S. Won't Offer Trade Testimony on Cuba Embargo*, N.Y. TIMES, Feb. 21, 1997, at A1 (providing a statement from Stuart Eizenstat, United States Under-Secretary of Commerce).

<sup>370</sup> See John H. Jackson & Andreas F. Lowenfeld, *Helms-Burton, the U.S., and the WTO*, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Mar. 1997, available at <http://www.asil.org/insights/insight7.htm> (last visited Apr. 7, 2007) (expressing concerns that the United States would change the DSU system by boycotting the case).

<sup>371</sup> See generally Stefaan Smis & Kim Van Der Borgh, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227 (1999) (providing background material relating to the *Helms-Burton* case and post-WTO aftermath).

<sup>372</sup> Article XXI is entitled "Security Exceptions" and provides several bases for a state to invoke a defense for action it considers necessary for the protection of essential security interests. The most relevant provision is XXI(b)(iii), which reads: "[n]othing in this Agreement shall be construed (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations . . ." GATT art. XXI(b)(iii).

flying over Cuba in February 1996.<sup>373</sup> The legislation had already passed both houses of Congress in the fall of 1995 but had been stalled by the Clinton administration.<sup>374</sup> U.S. Congressional desire to take action against Cuba, beyond the traditional embargo, had been building since the early 1990s. The trade embargo against Cuba, put in place as a response to Castro's decision to expropriate all foreign property in 1959, began in 1962.<sup>375</sup> Increased congressional dissatisfaction towards Cuba and the desire to take additional steps against the regime in the 1990s was in response to Castro's efforts to replace lost Soviet aid with appeals to other countries to seek out investment in Cuba.<sup>376</sup>

The downing of the aircraft simply provided the political force for Senator Jesse Helms and Congressman Dan Burton to push for Presidential acceptance of the Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD),<sup>377</sup> which has most often been referred to as the Helms-Burton Act.<sup>378</sup> Even before President Clinton signed the legislation (in February 1996), there was an outcry from the EC and other major U.S. trading partners, notably Canada and Mexico, against the law.<sup>379</sup> In March 1996 the EC summarized

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<sup>373</sup> The United States argued that the planes were in international air space while Cuba contended otherwise. The four men killed were Cuban-Americans working with the anti-Castro group Brothers to the Rescue. See Jerry Gray, *President Agrees to Tough New Set of Curbs on Cuba*, N.Y. TIMES, Feb. 29, 1996, at A1 (describing the event).

<sup>374</sup> *Id.*

<sup>375</sup> Proclamation No. 3447: Embargo on All Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 6, 1962); Cuban Import Regulations, Miscellaneous Amendments, 27 Fed. Reg. 2765 (Mar. 24, 1962); see also Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 AM. J. INT'L L. 419, 420 (1996) (discussing the format of the embargo when issued).

<sup>376</sup> The first statute passed during this period was the Cuban Democracy Act of 1992, which attempted to stifle such investment by prohibiting foreign affiliates of U.S. companies' licenses if they engaged in transactions with Cuba. 22 U.S.C. §§ 6001-6010 (2004). The law also authorized the President to prohibit economic and military aid, military sales or debt relief to any country providing assistance to Cuba. *Id.* § 6005. See H. Paemen, *Avoidance and Settlement of 'High Policy Disputes': Lessons from the Dispute over 'The Cuban Liberty and Democratic Solidarity Act'*, in TRANSATLANTIC ECONOMIC DISPUTES 361-64 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003) (describing the growth of congressional dissatisfaction with Cuba).

<sup>377</sup> 22 U.S.C. §§ 6021- 6091 (2004) [hereinafter Helms-Burton Act].

<sup>378</sup> There were other factors at play as well: 1) a politically powerful group of citizens (the Cuban-American community) pushing for action and 2) long-term U.S. outrage over an unrepentant communist state located so closely to the United States.

<sup>379</sup> Paeman, *supra* note 376, at 363.

the objections of all of these countries in the formal protest, stating that the Act would revive long-standing disagreements over "the unilateral and extraterritorial aspects of various statutes implementing U.S. policy vis-à-vis Cuba."<sup>380</sup>

The Helms-Burton Act has four major sections—the overall purpose was to dissuade other countries from investing in Cuba and to undercut the Castro regime.<sup>381</sup> Title I codified and strengthened the long-standing embargo against Cuba.<sup>382</sup> Title II laid out the forms of assistance the United States was prepared to give to Cuba if it had a democratically elected government.<sup>383</sup> Title III provided a private right of action for U.S. citizens (both those who were citizens before the 1959 expropriations and those who subsequently became U.S. citizens) to pursue actions in federal court against companies that trafficked in property that had been expropriated without compensation.<sup>384</sup> Title IV of the Act required the U.S. State Department to deny U.S. visas to officials of companies (and their families) that trafficked in expropriated property.<sup>385</sup>

Not content simply to protest what was widely perceived as a unilateral attempt to force all countries to participate in the embargo against Cuba,<sup>386</sup> most major U.S. trading partners ultimately passed blocking legislation against the Helms-Burton Act.<sup>387</sup> The

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<sup>380</sup> Démarches by the European Union: Delegation of the European Commission, Mar. 5, 1996, 35 I.L.M. 398-99.

<sup>381</sup> See H.R. REP. NO. 104-202, pt. 1, at 35 (1995) ("The purpose of this new civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime the capital generated by such ventures and deter the exploitation of property confiscated from U.S. nationals").

<sup>382</sup> Helms-Burton Act, *supra* note 377, § 102.

<sup>383</sup> *Id.* §§ 202-04, 207.

<sup>384</sup> *Id.* § 302.

<sup>385</sup> *Id.* § 401.

<sup>386</sup> See Lowenfeld, *supra* note 375, at 429-30 (explaining how the provisions of the Helms-Burton Act operate as a secondary boycott).

<sup>387</sup> See Foreign Extraterritorial Measures Act (FEMA), R.S.C., ch. F-29 (1985), amended by 1996 S.C., ch. 28 (Can.), reprinted in 36 I.L.M. 111 (1997); Mexico: Act to Protect Trade and Investment from Foreign Norms That Contravene International Law, Oct. 23, 1996, 36 I.L.M. 133 (1997); Council Regulation 2271/96, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, 1996 O.J. (L309) 1, reprinted in 36 I.L.M. 125 (EC) (blocking the Helms-Burton statute).



EC also asked for WTO consultations<sup>388</sup> on the Act in May 1996 while it was preparing its blocking legislation.

The EC request for WTO consultations noted that the Cuban Democracy Act and the Liberated Act contained provisions which had the intent and effect of restraining the liberty of the EC “to export to Cuba or to trade in Cuban origin goods” and that it contained “measures which may lead to the refusal of visas and the exclusion of non-US nationals from US territory in a way which may contravene US commitments under GATS.”<sup>389</sup> In its request for the establishment of a panel, the EC claimed that the U.S. measures violated Articles V (Freedom of Transit), XI (Prohibition on Quantitative Restrictions) and XIII of the GATT and Articles II, III, VI, XI, XVI and XVII of GATS and its Annexes on the Movement of Natural Persons (paragraphs 3, 4).<sup>390</sup>

While the United States never filed any documents with regard to the dispute, it did present views on the dispute during two meetings of the Dispute Settlement Body (DSB). In the October 1996 meeting, the United States argued that the Helms–Burton Act had only two new features (the private rights of action and the exclusion provisions) and that most of the EC complaint concerned pre-existing U.S. trade measures.<sup>391</sup> According to the United States this proved that the dispute was “not fundamentally a trade matter” and that the legislation was enacted in pursuit of “essential US security interests.”<sup>392</sup> The final U.S. contention was that the WTO had been established to manage trade relations and not “diplomatic or security relations that might have incidental trade or investment effects.”<sup>393</sup> By the November 1996 DSB meeting, the United States formalized its final position on the dispute—that the

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<sup>388</sup> Request for Consultations by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1 (May 13, 1996) (circulating the request for the establishment of a panel to Members of the WTO).

<sup>389</sup> *Id.*

<sup>390</sup> Helms-Burton Panel Request, *supra* note 97.

<sup>391</sup> See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 October 1996*, WT/DSB/M/24 (Nov. 26, 1996) (describing the discussion about The Cuban Liberty and Democratic Solidarity Act that was passed in the United States and the European Communities, and their member states’ request for the establishment of a panel).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

WTO lacked competence and that any recourse to a panel would pose risks for the WTO's new dispute settlement system.<sup>394</sup>

The *Helms-Burton* dispute was the thirty-eighth dispute submitted to the DSU system. During the consultations period on the case in the fall of 1996, the DSU had been in operation for not quite two years and had produced only five panel reports and two Appellate Body reports. The new WTO and DSU were still regarded as experiments that needed support from the Member State governments. Consequently, neither side was eager to use the WTO as the only forum for resolving the dispute. The EC took some efforts to respond to the crisis by negotiating a "Common Position on Cuba," a document it closely negotiated with the United States<sup>395</sup> In response, President Clinton continued to waive the Title III provisions on private rights of action.<sup>396</sup>

When the DSB did appoint a panel under DSU rules in February 1997, the United States announced that it would not take part in the proceedings.<sup>397</sup> The United States claimed that the WTO lacked competence and that if it invoked the national security exception, there would be no proceedings in the case.<sup>398</sup> The EC resisted this interpretation of WTO competence and countered with the argument that a panel would have to decide the issue of competence.<sup>399</sup>

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<sup>394</sup> See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 November 1996*, WT/DSB/M/26 (Jan. 15, 1997) (summarizing the continuing discussion regarding The Cuban Liberty and Democratic Solidarity Act passed in the United States and the European Communities and their member states' request for the establishment of a panel).

<sup>395</sup> See Paemen, *supra* note 376, at 365 ("In an effort to de-politicize the conflict, the EU, in December 1996, adopted a 'common position' towards Cuba.") (citing Common Position of 2 December 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union on Cuba, O.J. 1996 (L332)).

<sup>396</sup> See Paemen, *supra* note 376, at 365 ("The 'common position' was quoted by President Clinton as the basis for announcing in January 1997 that he was suspending the right to bring suits under Title III for another six months.").

<sup>397</sup> See Sanger, *supra* note 369 ("Just hours after the World Trade Organization appointed a panel of judges to hear a European challenge to Washington's embargo of Cuba, the United States said today that it would refuse to take part in the legal proceedings.").

<sup>398</sup> *Id.*

<sup>399</sup> Sanger quoted Prof. Jackson's disagreement with the U.S. position ("I think the U.S. is way off base"), and noted that within the Clinton administration some officials argued that the position could later be used against U.S. interests. *Id.*

President Clinton, who had initially opposed the Helms-Burton Act, continued to push for a diplomatic settlement with the EC. Ultimately, this negotiation process resolved the dispute. In April 1998, the two governments concluded a Memorandum of Understanding<sup>400</sup> dealing with the Helms-Burton and the Iran/Libya Sanctions Act. The deal struck involved the “new” portions of Helms-Burton. The President would continue to suspend Title III and try to obtain authority from Congress to waive Title IV (on exclusions) in exchange for the EC suspension of the WTO panel.<sup>401</sup> The suspension of the WTO panel continued until the lapse of the panel’s authority under DSU rules in April 1998.<sup>402</sup> In May of that year, the United States and EC signed another agreement that removed the threat of any WTO action. The “Understanding with Respect to Disciplines for the Strengthening of Investment Protection” was adopted to provide a common U.S./EC position on how to deter future expropriations and protect investors.<sup>403</sup> The EC announced that it would not take action on the Helms-Burton Act “as long as the waiver of Title III Helms-Burton remain[ed] in effect” and waiver authority was granted for Title IV.<sup>404</sup> The official United States response was that it had always believed that the dispute was “a matter that should be handled through diplomatic channels rather than the W.T.O.”<sup>405</sup>

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<sup>400</sup> *European Union–United States: Memorandum of Understanding Concerning the U.S. Helms–Burton Act and the U.S. Iran and Libya Sanctions Act*, Apr. 11, 1997, 36 I.L.M. 529, 529–30 (1997).

<sup>401</sup> *Id.*

<sup>402</sup> See Note by the Secretariat, *United States – The Cuban Liberty and Democratic Solidarity Act, Lapse of the Authority for Establishment of the Panel*, WT/DS38/6 (Apr. 24, 1998) (describing the lapse of the panel).

<sup>403</sup> See Guide to the EU-US Summit (May 18, 1998), <http://www.eurunion.org/partner/summit/9805sum.htm> (follow “Understanding on Conflicting Requirements and Disciplines on Investment in Expropriated Properties” link) [hereinafter Guide] (“The EU and the U.S. agree to step up their efforts to develop agreed disciplines and principles for the strengthening of investment protection” and recognize “that the standard of protection governing expropriation and nationalisation embodied in international law and envisioned in the MAI should be respected by all States.”).

<sup>404</sup> The EU made a “Unilateral Statement” during the EU-US Summit that contains its pledges regarding the Helms-Burton Act. *Id.* (follow “EU Unilateral Paper” link).

<sup>405</sup> David E. Sanger, *Europeans Drop Lawsuit Contesting Cuba Trade Act*, N.Y. TIMES, Apr. 21, 1998, at A8 (quoting Stuart Eizenstat, the Under Secretary of State for economic and business affairs and chief negotiator for the United States regarding the EU’s challenge to the Helms-Burton Act).

### 2.3.3.2. *The Basis of a WTO Case*

Since the *Helms-Burton* case was avoided, it is only possible to speculate about how it would have been litigated or decided. The U.S. position was that the WTO lacked competence. If the United States stuck by that position, it would have refused to participate in any panel proceedings. It is difficult to know what course the DSB would have taken. Given how the Appellate Body has interpreted the other GATT exceptions, notably Article XX, it is fair to conclude that any invocation of Article XXI would have started with a panel examining the text and the context and purpose of Article XXI.<sup>406</sup> Nothing in the terms of Article XXI provides a jurisdictional defense. In addition, Article XXI places limiting conditions on when a state is entitled to argue for the exception.<sup>407</sup>

Prior GATT litigation never fully interpreted Article XXI.<sup>408</sup> Consequently, if the dispute had gone ahead of the WTO, the parties might have been forced to submit to a panel for determination of the crucial issues of WTO competence to hear "national security" disputes.<sup>409</sup> The other major interpretive decision would have been whether a WTO Member State invoking the exception has the power to define for itself (auto-define) what constitutes an "essential security interest."<sup>410</sup> Neither the United States nor the EC

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<sup>406</sup> See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) (criticizing the panel report for not following the "fundamental rule of treaty interpretation" by applying the General rule of interpretation set out in the Vienna Convention on the Law of Treaties, Art. 31, and thus failing to "take adequate account of the words actually used by Article XX in its several paragraphs.").

<sup>407</sup> Under Article XXI, a country is not barred from taking action which it considers "necessary for the protection of its essential security interests" (emphasis added). In addition, Article XXI specifies the type of situation that must be in place for the country to claim such protection—matters relating to fissionable materials, to traffic in arms, ammunition, or implements of war, or taken in time of war or other emergency. GATT art. XXI(b).

<sup>408</sup> See Hannes L. Schloemann & Stefan Ohlhoff, "Constitutionalization" and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 430–38 (1999) (discussing GATT experiences with Article XXI).

<sup>409</sup> Schloemann & Ohlhoff find no support for the idea of Article XXI providing a direct jurisdictional defense. *Id.* at 438–41.

<sup>410</sup> See General Agreement on Tariffs and Trade, *Minutes of Meeting Held in the Centre William Rappard on 17–19 July 1985*, C/M/191 (Sept. 11, 1985), cited in GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 561 (6th. ed. 1994) (summarizing the U.S. argument for such auto-definition in the lead-up to the establishment of a panel in *US—Trade Measures Affecting Nicaragua*); see also Schloemann & Ohlhoff, *supra* note 408, at 442–48 (discussing whether Art. XXI provides an indirect jurisdictional defense); Dapo Akande & Sope Williams, *Inter-*

would necessarily want the second issue answered if the answer ended up severely limiting a state's power to define its security interests. Undoubtedly this is one of the reasons why each side pressed so hard for a negotiated settlement.

### 2.3.3.3. *Aftermath of Avoiding a Dispute*

The issue of a WTO dispute does appear to have been resolved. The EC has not re-opened the dispute. In other ways, however, the 1998 Understanding failed to produce some of the results the two parties intended.<sup>411</sup> Congress refused to grant a waiver for Title IV and instead asked for stricter enforcement of its provisions.<sup>412</sup> The EC protested but did not take any other action.<sup>413</sup> Scholars examining the 1997 and 1998 Agreements have concluded that the U.S. position on the overall issues was actually strengthened. The EC adopted a resolution to the dispute that did not require the United States to abandon the positions it had taken in the Helms-Burton Act. In addition, the EU/U.S. resolution applies only to EC companies rather than all affected states.<sup>414</sup> During his terms in office, President Bush has regularly extended Title III waivers.<sup>415</sup>

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*national Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 381-85 (2003) (rejecting the arguments that conclude that the wording of Art. XXI leads to "an entirely . . . self-judging exception," as well as the argument "that national security questions are essentially political questions and inherently matters to be decided by the State . . ."); Kelly, *supra* note 68, at 104 ("The competing interpretive views diverge upon whether this exception is self-judging, whether the invoking state may unilaterally declare the exception, or whether the WTO may assess its validity.").

<sup>411</sup> See Paemen, *supra* note 376, at 367-69 (explaining why the Understanding failed); see also Smis & Van Der Borght, *supra* note 371, at 231-36 (discussing the 1998 Agreement generally, and how the Agreement "leaves many questions unanswered," such as whether this non-legally binding "soft law agreement may prove to have more legal force than intended by the participants.").

<sup>412</sup> See Paemen, *supra* note 376, at 367 ("The US Congress, rather than granting the legislative waiver, asked for a strict implementation of Title IV.").

<sup>413</sup> *Id.* (noting the EU's "strong opposition" as set forth in its "Unilateral Statement.").

<sup>414</sup> *Id.* at 368-69 ("It is difficult to assess what the real impact of the Helms-Burton legislation has been on foreign investment in Cuba," though it appears that, according to researcher Paolo Spadoni, "the Helms-Burton law has deterred, to some extent, new investors from doing business in Cuba."); see also Smis & Van Der Borght, *supra* note 371, at 235 (the 1998 Agreement "serves to end the [U.S. Acts'] negative consequences only for the European Union but leaves the circumstances for other states unaltered.").

<sup>415</sup> See Paemen, *supra* note 376, at 369 (observing that President Bush has regularly decided to extend the Title III waiver at each six-month interval).

### 2.3.4. Film

#### 2.3.4.1. Background

The *Film* dispute<sup>416</sup> marked the culmination of a protracted fight between the United States and Japan over the relative openness of the Japanese market. The U.S. view, put forward in its use of Section 301 against, and demands for, negotiations with Japan,<sup>417</sup> was that despite the lack of traditional trade barriers (tariffs or quotas) Japan's market was effectively closed to some U.S. goods. The Japanese market was itself structured, through its heavily regulated distribution system and its lack of strong antitrust policies and enforcement, to shut out competing goods.<sup>418</sup>

The very nature of these concerns about Japan makes the *Film* case very different from the other impossible cases pursued by the United States. In those disputes—*Bananas III* and *Hormones*—the United States could point to a clear GATT or WTO violation.<sup>419</sup> There are no GATT rules on competition policy.<sup>420</sup> Moreover, it is commonplace for countries with competition regimes to have very different interpretations of what competition means.<sup>421</sup> Finally, competition law governs private party conduct while GATT/WTO

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<sup>416</sup> Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998) [hereinafter *Film* Panel Report].

<sup>417</sup> See Taylor, *supra* note 34, at 238–42 (describing how the U.S. strategy of dealing with Japan in the 1980s and 1990s differed from its use of Section 301 regarding developing countries).

<sup>418</sup> See *id.* at 238 (describing the U.S. frustration with Japan).

<sup>419</sup> See discussion *supra* Sections 2.3.1.3, 2.3.2.3 (discussing the legal issues in the *Bananas III* and *Hormones* disputes).

<sup>420</sup> See Mitsuo Matsushita, *Basic Principles of the WTO and the Role of Competition Policy*, 3 WASH. U. GLOBAL STUD. L. REV. 363, 370 (explaining that in *Film*, “the U.S. action failed . . . due to the fact that it aimed at the wrong target” because the issue involved was private conduct—the distribution policy of Fuji—and the WTO does not have the power to deal directly with private conduct).

<sup>421</sup> See *Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, ¶¶ 26, 31, WT/WGTCP/4 (Nov. 30, 2000) (finding that national competition policies vary greatly as a result of differences in “history and stage of development, socio-economic circumstances, legal contexts and cultural norms”); see also Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 AM. U. INT'L L. REV. 343, 361 (2002) (noting that the Japanese distribution system is largely controlled by “[i]nterlocking vertical relationships—often referred to as Keiretsus,” which “are an important part of the economic fabric in Japan but might be considered verboten” by U.S. and European rules).

law constrains government action.<sup>422</sup> The United States, therefore, never pursued its concerns about Japan's market into the GATT dispute settlement system.

Given the strength of Japanese companies in the U.S. market and the resulting high trade deficit, however, the United States did feel compelled to take unilateral action against the closed nature of Japan's market.<sup>423</sup> The Section 301 statute was amended in 1988 to add to the list of "unreasonable" practices government toleration of "systematic anti-competitive activities" against which USTR could pursue investigations, make determinations, and if necessary, use threats of sanctions or sanctions.<sup>424</sup> In that same revision of the statute, Super 301 was also adopted. This new trade action was originally designed to be used by USTR for two years to identify both the priority countries and practices that posed the most significant trade barriers.<sup>425</sup> The plan by Congress was always to target Japan with Super 301.<sup>426</sup> Over the two years of the statute's life, the United States did bring several trade actions against Japan and settled each one under the threat of retaliatory sanctions.<sup>427</sup> During the same time period, however, the United States also tried to pursue its market opening strategy by creating negotiation initiatives. The most significant of these efforts was the Structural

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<sup>422</sup> See John Linarelli, *The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute*, 31 LAW & POL'Y INT'L BUS. 263, 266 (2000) (detailing a U.S. claim to the DSB relating to Japanese competition policy and restrictive business practices).

<sup>423</sup> See Taylor, *supra* note 34, at 238–39 (describing the U.S. action against Japan); see also THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 33 (1994) (explaining the "Japan Problem"); Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations"*, 72 S. CAL. L. REV. 1601, 1614–18 (1999) (discussing the development of the policy of "aggressive unilateralism" – "the aggressive use of economic threats to pressure foreign governments to negotiate solutions to international economic disputes" – and explaining how the United States used aggressive unilateralism in its Section 301 dispute over semiconductors, the pressure from which contributed to the establishment of the Structural Impediments Initiative (SII)).

<sup>424</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1301–04, 102 Stat. 1107, 1164–82 (1988); see *infra* Section 2.3.7 for a more complete description of the Section 301 statute.

<sup>425</sup> See *id.* § 1303.

<sup>426</sup> Taylor, *supra* note 34, at 239 (positing that President Reagan agreed to enact Super 301 and target Japan "in order to avoid even more protectionist legislation that had passed in the House").

<sup>427</sup> The three trade actions against Japan alleged "exclusionary government procurement in supercomputers and satellites and the alleged erection of technical barriers to trade in forest products." *Id.* at 239.

Impediments Initiative (SII) aimed at focusing on issues such as distribution policies and competition policy.<sup>428</sup> The SII negotiations produced some results regarding competition policy—Japan agreed to increase enforcement under its competition law.<sup>429</sup> The SII talks, however, never completely resolved U.S. concerns. Consequently, President Clinton agreed to the reenactment of Super 301 in 1994.<sup>430</sup>

The Uruguay Round negotiations were completed in 1994 without adding any new discipline regarding competition policy. The United States, however, kept Section 301, taking the position that “unreasonable” cases were not covered by its new obligations under the WTO’s DSU. The common view about the competition issue was that there was no real way to apply U.S. antitrust law on an extraterritorial basis to deal with the Japan problems.<sup>431</sup> The United States, therefore, brought cases under the provision of Section 301 that allowed for action against “unreasonable” practices.<sup>432</sup> The two cases were *Auto Parts*<sup>433</sup> and *Photographic Film and Paper*.<sup>434</sup>

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<sup>428</sup> See U.S., *Japan Launch Structural Impediments Initiative*, 89 DEPT. ST. BULL. 78 (1989) (detailing the Bush-Uno meeting and agreement on the SII).

<sup>429</sup> See Mitsuo Matsushita, *The Antimonopoly Law of Japan*, in GLOBAL COMPETITION POLICY 151, 155–56 (Edward M. Graham & J. David Richardson eds., 1997) (describing the Structural Impediments Initiative (SII)); see also Spencer Weber Waller, *Can U.S. Antitrust Laws Open International Markets?*, 20 NW. J. INT’L L. & BUS. 207, 211 (2000) (discussing U.S. antitrust laws in foreign competition).

<sup>430</sup> See *Clinton Renews Super 301 Measure; Provision Seeks Market Opening*, 11 Int’l Trade Rep. (BNA) 367 (Mar. 9, 1994); see also Taylor, *supra* note 34, at 239–40 (noting that while the SII talks resolved U.S. concern over some issues, like distribution, U.S. concern over other issues, like antitrust, prompted President Clinton to reenact Super 301 in 1994).

<sup>431</sup> See David A. Gantz, *Lessons From the United States–Japan Semiconductor Dispute*, 16 ARIZ. J. INT’L & COMP. L. 91, 122 (1999) (“[I]t [is] unlikely that the U.S. . . . would seek to expand its foreign antitrust activities to cover such situations.”); Epstein, *supra* note 421, at 352 (discussing the skepticism surrounding the ability of U.S. antitrust laws to penetrate market access barriers).

<sup>432</sup> See Taylor, *supra* note 34, at 277–88 (discussing how the United States uses the “unreasonable” practices provision in Section 301 to pursue structural barriers).

<sup>433</sup> See *Initiation of Section 302 Investigation and Request for Public Comment: Barriers to Access to the Auto Parts Replacement Market in Japan*, 59 Fed. Reg. 52,034 (Oct. 13, 1994) (initiation); *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: Barriers to Access to the Auto Parts Replacement Market in Japan*, 60 Fed. Reg. 26,745 (May 18, 1995) (determination) [hereinafter *Section 301 Auto Parts*].

<sup>434</sup> See *Initiation of Investigation Pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper*, 60



In the Section 301/*Auto Parts* the United States argued that the Japanese government tolerated the Keiretsus (the interlocking distribution networks that operated throughout the economy) and allowed a market setup that shut out the U.S. auto parts from the market.<sup>435</sup> The dispute ended in a negotiated settlement arrived at only after the United States threatened Japan with a one-hundred percent tariff increase on luxury automobiles.<sup>436</sup> Japan filed for consultations in the new WTO, contending that this use of Section 301 retaliation violated U.S. commitments under the GATT as well as under Article 23 of the DSU.<sup>437</sup> The two countries reached a settlement under which the United States withdrew its threat and Japan dropped the WTO dispute.<sup>438</sup>

In the *Section 301 Photographic Film* dispute, the USTR determined that the Japanese government “established and tolerated a market structure that impede[d] U.S. exports of consumer photographic materials to Japan . . . .”<sup>439</sup> The Japanese government refused to negotiate with the United States because the United States had again both used Section 301 and threatened sanctions.<sup>440</sup> Japan

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Fed. Reg. 35,447 (July 7, 1995) (initiation) [hereinafter *Section 301 Initiation*]; Section 304 Determinations: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 61 Fed. Reg. 30,929 (June 18, 1996) (determination) [hereinafter *Section 301 Photographic Film*].

<sup>435</sup> *Section 301 Auto Parts*, *supra* note 433.

<sup>436</sup> See *U.S. Threatens Duties on Luxury Cars Worth \$5.9 Billion in Japan 301 Dispute*, 12 Int'l Trade Rep. (BNA) 848 (May 17, 1995).

<sup>437</sup> Request for Consultations by Japan, *United States – Imposition of Import Duties on Automobiles from Japan Under Sections 301 and 304 of the Trade Act of 1974*, WT/DS6/1 (May 22, 1995). Japan contended that the threatened U.S. retaliation—listing products that would be covered by the tariff increase—would violate U.S. obligations under GATT Article I (MFN) and Article II (Tariff Binding). Japan also claimed that the announcement and implementation of the Section 301 determination were “inconsistent with the obligations of the Government of the United States under Article 23 of the DSU[,] which seeks [to] ‘strengthen[] the multilateral system’ by specifically prohibiting recourse to unilateral actions.” *Id.*

<sup>438</sup> The United States had wanted Japan to guarantee it a share of the Japanese auto parts market. Japan refused to do so but did offer pledges of liberalization that the two countries would review bi-annually. For a thorough review of the *Auto Parts* dispute and the DSU issues it raises, see Eleanor Roberts Lewis & David J. Weiler, *Will the Rubber Grip the Road? An Analysis of the U.S.-Japan Automotive Agreement*, 27 L. & POL'Y INT'L BUS. 631 (1996), and Jagdish Bhagwati, *The U.S.-Japan Car Dispute: A Monumental Mistake*, 72 INT'L AFF. 261 (1996).

<sup>439</sup> *Section 301 Photographic Film*, *supra* note 434.

<sup>440</sup> *Japanese Refusal to Negotiate on Film, Chips Causes Concern*, 13 Int'l Trade Rep. (BNA) 165 (Jan. 31, 1996); Andrew Pollack, *Japan's Tack on Trade: No More 1-on-1*, N.Y. TIMES, July 30, 1996, at D1.

also took the position that the subject matter of the dispute was inappropriate for Section 301 and that any complaint should have been filed with the Japan Fair Trade Commission (JFTC) because the dispute concerned Japan's failure to enforce its antimonopoly law.<sup>441</sup>

Faced with this intransigence the United States brought the *Film* dispute to the WTO.<sup>442</sup> The claims in the *Film* dispute were that a series of Japanese laws and regulations affecting the distribution and internal sale of photographic film and paper violated GATT Articles III and X, and that they also nullified and impaired GATT benefits under Article XXIII(1)(a) and (b).<sup>443</sup> The non-violation nullification and impairment claims (those under Article XXIII(1)(b)) were the first such claims the United States had brought before the DSU system. The United States had to base most of its case on these claims given the absence of GATT rules on competition policy.

One of the major forces driving the Section 301 and WTO cases on film was the U.S. decision to support its major film producer, Kodak. Kodak had long accused its major Japanese competitor, Fuji, of benefiting from the closed Japanese market. Kodak, therefore, sought out a Section 301 case by petitioning the USTR.<sup>444</sup> Both Kodak and Fuji launched extensive public relations campaigns in an attempt to influence U.S. government views about the case and whether it should pursue it before the WTO rather than unilaterally under Section 301.<sup>445</sup> Just as in *Bananas III*, the United States

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<sup>441</sup> Linarelli, *supra* note 422, at 272; see also Epstein, *supra* note 421, at 353 (analyzing the *Film* panel's findings).

<sup>442</sup> Request for Consultations by the United States, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/1 (Jun. 21, 1996) [hereinafter *Film* Consultation]. The United States also brought another request for consultations with Japan on its limitations of distribution services due to the operation of the country's Large Scale Retail Store Law. Request for Consultations by the United States, *Japan – Measures Affecting Distribution Services*, WT/DS45/1 (Jun. 20, 1996). This case involved more than just restrictions on the distribution of photographic film and paper. It was never pursued by the United States after the *Film* case was resolved. *Id.*

<sup>443</sup> *Film* Consultation, *supra* note 442.

<sup>444</sup> *Section 301* Initiation, *supra* note 434. It is normal for industries going to the USTR to present it with a brief containing not only legal arguments but a detailed factual basis for the case. See Shaffer, *supra* note 188, at 34 (evincing the normality of briefs containing a detailed factual basis for the case).

<sup>445</sup> See JAMES P. DURLING, ANATOMY OF A TRADE DISPUTE: A DOCUMENTARY HISTORY OF THE KODAK-FUJIFILM DISPUTE 63–148 (2000) (providing an extensive set of materials created by both Kodak and Fuji in the public relations campaign).

stood behind the major U.S. industry pushing for the case. In the *Film* dispute, however, the USTR made a major miscalculation.<sup>446</sup> After an aggressive litigation, the United States lost on every claim.

#### 2.3.4.2. *The Film Dispute*

The *Film* dispute rivals *Bananas III* in the complexity of the legal measures placed under attack.<sup>447</sup> The United States introduced thousands of documents in an attempt to fully set out and prove its claims. The evidence included twenty thousand pages of original Japanese-source documents.<sup>448</sup> The United States alleged that the Japanese government used eighteen measures<sup>449</sup> (eight distribution “countermeasures,”<sup>450</sup> two measures regarding large scale stores,<sup>451</sup> and eight promotion “countermeasures”<sup>452</sup>), some going back to 1967, to violate individually and collectively the GATT and to nullify or impair benefits the United States expected from three different rounds of GATT tariff negotiations.<sup>453</sup> The U.S. claims were (1)

<sup>446</sup> Shaffer, *supra* note 188, at 34 (noting that a costly loss in *Film* left the USTR in a weakened negotiating position with regard to Congress when it was considering whether to renew fast track negotiating authority).

<sup>447</sup> See *supra* Section 2.3.1 for a more thorough discussion of *Bananas III*.

<sup>448</sup> Alan Wm. Wolff, *Reflections on WTO Dispute Settlement*, 32 INT’L LAW. 951, 956 (1998).

<sup>449</sup> Over the course of the litigation the United States refined its list of the government measures it was contesting. *Film* Panel Report, *supra* note 416. The panel ultimately examined eighteen of them in its report. The panel report sets out a description of each measure as described by the United States. *Id.* ¶¶ 2.11–.52.

<sup>450</sup> The distribution “countermeasures” were adopted to counter the liberalization Japan had agreed to in new commitments made to the OECD. The eight distribution measures were: 1) The 1967 Cabinet Decision; 2) The JFTC Notification 17; 3) Distribution Committee Sixth Interim Report; 4) Distribution Committee Seventh Interim Report; 5) 1969 Survey on Transaction Terms; 6) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film; 7) 1971 Basic Plan; and 8) 1975 manual. *Id.* ¶ 10.23.

<sup>451</sup> The two measures were the Large Stores Law (with its regulations and administrative measures) and a 1979 Amendment by the Japanese Diet to the law. *Id.*

<sup>452</sup> The Premiums Law/promotion countermeasures were: 1) 1971 JFTC Notification 34; 2) 1977 JFTC Notification 5; 3) 1981 JFTC guidance on dispatched employees; 4) 1982 Self-Regulating Rules; 5) 1982 Establishment of Fair Trade Promotion Council; 6) 1983 JFTC guidance on advertising rules; 7) 1984 Self-Regulating Standards; and 8) JFTC Approval of 1987 Retailers Code. *Id.*

<sup>453</sup> The United States argued that the distribution measures violated Article III of the GATT (National Treatment). The unpublished enforcement actions by the JFTC and its unpublished guidance regarding the applicants for stores under the Large Scale Stores law violated Article X(1) (transparency requirement). All of

that the distribution measures encouraged and facilitated "the creation of market structures for [photographic] film and paper in which imports are excluded from traditional distribution channels," (2) that the restrictions on allowing large scale stores limited the "growth of an alternative distribution channel for imported film," and (3) that the promotion measures disadvantaged imports "by restricting sales promotions" and together nullified and impaired U.S. benefits under Article XXIII(1)(b).<sup>454</sup> The United States also argued that the distribution measures were inconsistent with Japan's obligations under the GATT rule on National Treatment (Article III(4)) and that Japan had failed in its obligations to make its laws and regulations transparent (Article X(1)).<sup>455</sup> Japan denied all of the allegations.<sup>456</sup>

The parties, in their submissions to the panel, focused on the non-violation claims; consequently, the panel took up these claims first and devoted most of the report to these claims.<sup>457</sup> The decision to focus on these claims became the most important aspect of the case. To prevail, the United States would have to argue that, regardless of whether Japan had violated GATT rules, Japan had denied the United States benefits the United States expected from participation in the GATT/WTO.

The Article XXIII(1)(b) basis for claims has existed since the beginnings of GATT. Even when the DSU was adopted, the Member States left this form of jurisdiction in place. By allowing such claims, the WTO countenances substantial leeway for interpretation by panels of when a complaining country is entitled to relief.<sup>458</sup> As a result, the earlier GATT panels had been fairly strict in their interpretations of when relief should be provided. In the eight non-violation cases argued prior to *Film*, the panels found only

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the eighteen measures combined to nullify and impair benefits under Article XXIII(1)(b). *Id.* ¶ 10.24.

<sup>454</sup> *Id.* ¶¶ 10.22, 10.24.

<sup>455</sup> *Id.* ¶ 10.24.

<sup>456</sup> *Id.* ¶ 10.25.

<sup>457</sup> According to the panel, the parties began with the non-violation claims in their oral and written submissions and "devoted the lion's share of their arguments to this portion of the case . . ." Although the panel normally would have dealt with the GATT violation claims first, it chose to follow what the parties had done. *Id.* ¶ 10.26-27.

<sup>458</sup> See Trachtman, *supra* note 63, at 370 (explaining that the non-violation theory "authorizes substantial construction of norms by dispute resolution").

twice that the complaining party had proven its case.<sup>459</sup> The *Film* panel began with the finding that the United States bore a special burden of proof on the non-violation claims.<sup>460</sup> The panel then turned its attention to the non-violation remedy.<sup>461</sup> The panel drew the purpose of Article XXIII(1)(b) from the last non-violation case decided in the GATT dispute system, *EC-Oilseeds*.<sup>462</sup> The Film panel agreed with the earlier GATT determination that XXIII(1)(b) was designed to safeguard the tariff concessions negotiated by countries.<sup>463</sup> As explained in *Oilseeds*, the non-violation remedy acts as a restraint on government actions that would undermine one country's tariff liberalization commitments and cost the other country the competitive relationship it expects to gain from such commitments.<sup>464</sup> The Film panel's review of the previous GATT non-violation cases led it to the conclusion that the non-violation remedy had to be "approached with caution and treated as an exceptional concept."<sup>465</sup> Although the facts of the *Film* dispute did not correspond to the earlier non-violation cases,<sup>466</sup> the panel found that facts alleged in the U.S. complaint could qualify as non-violation measures. The panel refused to forbid any government actions ("financial or non-financial, direct or indirect")<sup>467</sup> and noted

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<sup>459</sup> See Taylor, *supra* note 34, at 279–83 (detailing the history and different elements of non-violation cases); Trachtman, *supra* note 63, at 371 (noting that there have been only nine cases—including *Film*—brought using the non-violation concept).

<sup>460</sup> As the complaining party the United States would naturally bear the burden of proof. Given the fact that the non-violation remedy is an exceptional one, however, the panel pointed out that the complaining party had to provide a "detailed justification" to support its allegations. *Film* Panel Report, *supra* note 416, ¶ 10.30. The requirement for this special burden of proof comes from Article 26.1 of the DSU and had come into that understanding from prior GATT practice. *Id.* ¶ 10.30–31.

<sup>461</sup> *Id.* ¶ 10.35–.36.

<sup>462</sup> *Id.* ¶ 10.36; Report of the Panel, *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627 (Jan. 25, 1990), GATT B.I.S.D. (37th Supp.) at 86 (1991).

<sup>463</sup> *Film* Panel Report, *supra* note 416, ¶ 10.35.

<sup>464</sup> See *Id.* (drawing from the panel's quotation from *Oilseeds*).

<sup>465</sup> *Id.* ¶ 10.36. The reason for the caution in granting the remedy is that countries negotiate for the rules they agree to follow and therefore "only exceptionally would expect to be challenged for actions not in contravention of those rules." *Id.*

<sup>466</sup> All of the earlier GATT non-violation claims had involved a country offering or modifying a subsidy on a product following the grant of a tariff concession on that same product.

<sup>467</sup> *Film* Panel Report, *supra* note 416, ¶ 10.38.

that "a Member's industrial policy, pursuing the goal of increasing efficiency in a sector, could in some circumstances upset the competitive relationship in the market place between domestic and imported products . . . ." <sup>468</sup> The reasoning suggests the broadest possible reading for what can constitute a non-violation measure by a government. <sup>469</sup>

As it worked its way through the requirements to establish a non-violation claim—a government "measure" affecting a GATT/WTO "benefit accruing" to another country that is "nullified or impaired" as a result of the application of the measure—the panel adopted broad readings of two of them. Each of these interpretations is the one argued for by the United States. In conducting this analysis, the panel closely examined the text of Article XXIII(1)(b) and the earlier GATT non-violation cases.

The panel determined that the phrase "measure" encompassed more than legally binding laws and regulations and could cover administrative guidance. <sup>470</sup> The panel rejected Japan's argument that the measures under examination had to constitute legally binding obligations and adopted a broad definition. <sup>471</sup> The panel believed such a reading was necessary to achieve the goals of the non-violation remedy <sup>472</sup> and covered even private party action if there was "sufficient government involvement." <sup>473</sup> The broad reading of "measure" ensured that most of Japanese measures isolated by the U.S. were, in fact, examined by the panel. The panel report also gave a broad reading to the "benefit" requirement under Article XXIII(1)(b). <sup>474</sup> The U.S. case was aided here as well

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<sup>468</sup> *Id.*

<sup>469</sup> See Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 66 (2002) (explaining how the *Film* panel accepted the notion that "regulatory subsidies" such as tax enforcement of antitrust law could be the basis of a non-violation claim); see also Gantz, *supra* note 431, at 118 (suggesting that one of the legal "wins" by the United States was that government actions other than subsidies could nullify and impair benefits).

<sup>470</sup> The panel took notice of the Japanese government practice of providing such administrative guidance to firms and expecting compliance with such guidance "in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy." *Film Panel Report*, *supra* note 416, ¶ 10.44.

<sup>471</sup> *Id.*, ¶ 10.49

<sup>472</sup> *Id.* ¶ 10.50

<sup>473</sup> *Id.* ¶¶ 10.52–.56.

<sup>474</sup> *Id.* ¶ 10.61–.70. The benefits at issue in all of the non-violation cases in-

since it claimed “legitimate expectations”<sup>475</sup> arising from liberalization commitments made by Japan in three successive GATT negotiating rounds: the Kennedy (1967), Tokyo (1979) and Uruguay (1994) Rounds.<sup>476</sup> The panel adopted the U.S. argument that earlier concessions were incorporated into WTO obligations and that reasonable expectations could exist with regard to concessions from successive tariff rounds.<sup>477</sup> The United States was required to prove, however, that it could not have reasonably anticipated Japanese measures at the time the tariff concessions were granted in each round.<sup>478</sup> Given this requirement, even with a broad reading of “benefit,” the United States would have a tough, and what proved to be impossible, proof problem.<sup>479</sup>

With regard to the final XXIII(1)(b) requirement—causality, or proving the nullification and impairment of benefits occurred because of the government measures—the United States was also assigned a heavy burden.<sup>480</sup> According to the panel, for the United States to prevail it had to show a “clear correlation between the measures and the adverse effect on the relevant competitive relationships.”<sup>481</sup> The government measures at issue had to “upset the competitive relationship between domestic and imported” products.<sup>482</sup> The panel isolated this requirement of Article XXIII(1)(b) as the most “factually complex” area of examination and noted that

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cluding the *Film* dispute have been expectations of improved market access opportunities coming from tariff concessions.

<sup>475</sup> Prior GATT cases had determined that these “expectations” had to be legitimate—they had to take into account all of the measures of the country making the concessions “that could have been reasonably anticipated at the time of the concession.” *Id.* ¶ 10.61–70.

<sup>476</sup> *Id.* ¶ 10.63.

<sup>477</sup> *Id.* ¶¶ 10.64, 10.70.

<sup>478</sup> *Id.* ¶ 10.65.

<sup>479</sup> See Trachtman, *supra* note 63, at 371 n. 176, 373 (contending that “[b]y imposing the burdens of proof as to the legitimacy of expectations and anticipation of the subject measures, the panel substantially constrains the scope of NVNI [non-violation nullification and impairment].”).

<sup>480</sup> *Film* Panel Report, *supra* note 416, ¶ 10.82.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.* It has been argued that this type of causality would be difficult to establish for competition type claims as they involve measures that do not target a specific action. See Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?* 14 DUKE J. COMP. & INT’L L. 1, 29 (2004) (“Competition-related government measures tend to be long-term measures of general application not intended to target a specific action, similar to those at issue in the Kodak-Fuji Film dispute.”).

several earlier non-violation cases had failed because they could not prove this causal connection.<sup>483</sup>

The panel then devoted the bulk of its report to a measure-by-measure analysis of whether the United States could prove the three required elements for each claim. The parties focused most of their arguments on the facts underlying the claims.<sup>484</sup> In its examination of each measure, the panel found that the United States failed to establish all of the required elements ("measure," "benefit" or causality) for any of them. Because the United States failed to meet the evidentiary burden for the non-violation claims, it could not prove that the Japanese government's actions (as opposed to other factors) upset the competitive relationship between imported and domestic film and paper in the Japanese market.<sup>485</sup> The panel also found that the Japanese measures did not provide less favorable treatment for imported products under Article III(4) or violate Article X.<sup>486</sup>

The panel thus handed the United States a complete repudiation of its claims about the Japanese government actions regarding its domestic film market. The United States chose for the first time after a loss not to appeal. There are theories about why the United States responded as it did. Some contend that given the nature of the panel report – the United States' failure to prove its case – there was very little for an Appellate Body to review.<sup>487</sup> Others view the

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<sup>483</sup> *Film Panel Report*, *supra* note 416, ¶ 10.83. The panel found that when establishing causality, the complainant could: 1) show the measure made a de minimis contribution to nullification or impairment; 2) rely on de facto as well as de jure forms of discrimination; and 3) proceed without showing intent to cause harm. *Id.* ¶¶ 10.84–87. The United States was also allowed to argue that measures should be looked at collectively as well as individually. *Id.* ¶ 10.88.

<sup>484</sup> James P. Durling & Simon N. Lester, *Original Meanings and the Film Dispute: The Drafting History, Textual Evolution and Application of the Non-violation Nullification or Impairment Remedy*, 32 GEO. WASH. J. INT'L L. & ECON. 211, 260, 268–69 (1999) (relating how Durling and Lester, both of whom represented Fuji in the *Film* dispute, contended that the parties to the case focused on facts rather than issues of legal interpretation).

<sup>485</sup> With regard to the distribution countermeasures the panel found that the United States could not prove causality "principally because single-brand distribution appears to have occurred before and independently of those 'measures,' but also because the United States has not demonstrated that these 'measures' are directed at promoting vertical integration or single-brand distribution." *Film Panel Report*, *supra* note 416, ¶ 10.204. The panel found a similar failure to establish causality with respect to the Large Scale Stores Law and the promotion measures. *Id.* ¶¶ 10.233, 10.349.

<sup>486</sup> *Id.* ¶¶ 10.382, 10.404.

<sup>487</sup> Durling, *supra* note 445, at 648; Gantz, *supra* note 431, at 118.



manner of interpretation as one which limited the use of the theory for cases in which the target country had a non-transparent economy with close government-industry connections.<sup>488</sup> The United States officially took the position that the panel had ruled against it on factual points but not on the legal issues.<sup>489</sup> The United States followed up on the *Film* dispute by setting up an inter-agency monitoring of the Japanese film market. The basis for the U.S. monitoring was its belief that Japan had made commitments about having an open film market due to Japanese representations to the WTO panel.<sup>490</sup>

The aftermath of the case left in place yet another interpretation of the non-violation nullification and impairment theory, a failed case for it on the facts, and a higher threshold for future cases.<sup>491</sup>

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<sup>488</sup> See Alan W. Wolff, *America's Ability to Achieve its Commercial Objectives and Operation of the WTO*, 31 LAW & POL'Y INT'L BUS. 1013, 1025 (2000) (contending that the WTO was completely ineffective in such a case and that this could have been foreseen at the end of the Uruguay Round); Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 59–60 (2000) [hereinafter Stephan, *Sheriff or Prisoner?*] (noting that the *Film* panel refused to impute a potential for anticompetitive effects coming from collaborative government-industry activity and that “[g]overnments that obstruct and obfuscate but avoid confrontation act within the scope of prerogatives reserved in the GATT bargaining process”); see also Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 200 (2005) (“Conversely, when regulation takes the form of case-by-case application of general standards that are shaped by complex policy goals and that carry significant potential for international wealth redistribution, those affected by the regulation and those who impose it cannot easily commit to a mutually beneficial agreement.”).

<sup>489</sup> Mark Selinger, *WTO Panel Sides with Japan in Kodak-Fuji Film Case*, Int'l Trade Daily (BNA) (Dec. 9, 1997) (discussing how according to Ambassador Barshefsky, the United States Trade Representative (“USTR”), the panel “ignored what is happening in Japan’s restricted domestic marketplace by focusing on narrow, technical issues instead of the ‘real issues’ in the case”).

<sup>490</sup> See Mark Selinger, *USTR Statement on Japan Film* (Feb. 3, 1998) reprinted in INSIDE U.S. TRADE, at 9–12 (Feb. 6, 1998); Mark Selinger, *EU Joins U.S. In Pledging To Test Japan's Film Market Claim*, Int'l Trade Daily (BNA) at D2 (Feb. 10, 1998) (“Japan stated that it had a policy of ensuring non-discriminatory access to the Japanese distribution system and improving market access in the photographic film sector and other sectors . . . .”); see also Gary Yerkey, *U.S. Says Japan Still Not Doing Enough to Open Film Sector Despite Pledges to WTO*, 15 Int'l Trade Rep. (BNA) 1446 (Aug. 26, 1998) (“The United States . . . called on Japan to take additional ‘aggressive’ action to open its domestic market to sales of foreign photographic film and paper, accusing Tokyo of not following through on its representations to the World Trade Organization over the past few years.”).

<sup>491</sup> See Steinberg, *supra* note 13, at 252 n.35 (“The panel interpreted the non-violation nullification or impairment standard in GATT Article XXIII(1)(b), clarifying ambiguities in a way that left a narrow basis for claims based on that standard.”); Stephan, *Sheriff or Prisoner?*, *supra* note 488, at 60 (“By requiring specific

The United States was forced to return to its earlier posture for dealing with its problems with the structure of Japan's economy — long-term negotiations.<sup>492</sup>

### 2.3.5. *Shrimp/Turtle*

#### 2.3.5.1. *Background*

Like other impossible cases, the *Shrimp/Turtle* dispute was bound to provoke extended and controversial litigation in the DSU system. The dispute involved a challenge to a U.S. trade measure aimed at protecting the environment, in this case endangered sea turtles. The U.S. approach in designing this environmental protection — setting the appropriate standard for protection and attempting to coerce other states to adopt that standard by limiting U.S. market access — had been under attack for years<sup>493</sup> as an illustration of aggressive unilateralism.<sup>494</sup> The history of the *Shrimp/Turtle* dispute actually involved a unilateral measure similar in design and effect<sup>495</sup> that had been challenged in the GATT in the 1990s.<sup>496</sup> Both

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evidence of anticompetitive collusion between government and industry . . . it signaled a tolerance of protectionist policies that depend on relationships rather than positive laws."); Trachtman, *supra* note 63, at 373 ("By imposing the burdens of proof as to the legitimacy of expectations and anticipation of the subject measures, the panel substantially constrains the scope of NVNI [non-violation nullification and impairment]."); Hansen, *supra* note 423, at 1604 ("[T]he panel created significant barriers to any future claims involving antitrust concerns.").

<sup>492</sup> Gantz, *supra* note 431, at 121.

<sup>493</sup> Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENV'T L. 491, 491-92 (2002).

<sup>494</sup> Sanford Gaines, *The WTO's Reading of GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 749 (2001) ("Thailand, Malaysia, and their Asian neighbors seem to have been motivated to bring the dispute by broader policy concerns about U.S. environmental unilateralism (which could apply to other products important to them, such as timber) and by a keen desire . . . to establish clear GATT restraints on trade restrictions for environmental purposes.").

<sup>495</sup> See Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 7.11-12, WT/DS58/R (May 15, 1998) [hereinafter *Shrimp Panel Report*] (describing India, Pakistan, Malaysia and Thailand's claims regarding the violation of GATT 1994 Article XI(1)).

<sup>496</sup> See Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna/Dolphin I*]; Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994), 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin II*] (describing the U.S. embargo of imported fish harvested in purse-sein nets).

panel decisions in the *Tuna/Dolphin* dispute had gone against the United States but the decisions had not been adopted by the GATT. Consequently, the question of whether a country could adopt such measures and justify them under the GATT had never been definitively determined.

At issue in the GATT cases was U.S. legislation, the Marine Mammal Protection Act ("MMPA"), aimed at protecting dolphins by prohibiting tuna imports unless they were caught by dolphin-friendly methods.<sup>497</sup> The *Tuna/Dolphin I* case was brought by Mexico when its tuna imports into the United States were banned.<sup>498</sup> The GATT panel found the MMPA violative of the GATT Article III (National Treatment) rule and not excused by either relevant general exceptions (Article XX(b) and (g)) to the GATT rules.<sup>499</sup> The panel's controversial and heavily critiqued holding regarding Article XX<sup>500</sup> was that neither exception allowed governmental measures to protect the environment beyond the territorial juris-

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<sup>497</sup> The Marine Mammal Protection Act ("MMPA") required the government to limit the incidental killing of dolphins by commercial fishing. In order to achieve this goal, the MMPA placed restrictions on the methods U.S. fishermen could use to catch tuna and required the Secretary of Commerce to certify that the appropriate method was used. The MMPA also empowered the Secretary of Commerce to prohibit the importation of tuna products from countries whose dolphin kill ratio exceeded that of the U.S. fishermen by a certain measure. Maine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972); see also *Earth Island v. Mosbacher*, 929 F.2d 1449 (1991) (ordering enforcement of the MMPA against Mexican tuna imports).

<sup>498</sup> At issue in the dispute was tuna imported from Mexico which had been caught using purse-seine nets which did not allow for the escape of dolphins. DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 29 (Inst. Int'l Econ. 1994); see also Gaines, *supra* note 494, at 752.

<sup>499</sup> Article XX(b) allows GATT Contracting Parties to adopt measures "necessary to protect human, animal or plant life or health." Article XX(g) allows a Contracting Party to adopt measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." GATT art. XX(b), (g).

<sup>500</sup> See Howse, *supra* note 493; see also Howard F. Chang, *Towards a Greener GATT: Environmental Trade Measures and the Shrimp/Turtle case*, 74 S. CAL. L REV. 31, 32 (2000) (characterizing the GATT litigation as hostile towards environmental trade measures and the *Shrimp/Turtle* Appellate Body decision as bringing "GATT case law much closer to a reasonable balance between environmental and trade interests"); Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2141-49, 2170-98 (1995) (pointing out how the panel "strained to reach its conclusions regarding Article XX" and applied "dubious reasoning with respect to Article XX(g)"); Howard F. Chang, *Carrots, Sticks and International Externalities*, 17 INT'L REV. L. & ECON. 309 (1997) (suggesting that the regime suggested by the GATT would create perverse incentives).

diction of the enacting state.<sup>501</sup> When Mexico did not push for the adoption of the panel report,<sup>502</sup> the EC almost immediately brought a second GATT case challenging the MMPA for its secondary boycott provision, which banned tuna imports from any country engaging in tuna trade with an embargoed country. The *Tuna/Dolphin II* panel report rejected the jurisdictional limitation on the Article XX exception decided by the *Tuna/Dolphin I* panel.<sup>503</sup> Instead the panel found the United States did not qualify for an exception to GATT obligations since any government measure that would be effective only if other countries were forced to change their policies could never satisfy Article XX.<sup>504</sup> Since neither *Tuna/Dolphin* panel report was adopted, they did not come to represent GATT law on such measures. Nevertheless, the litigation and the contested interpretations of Article XX<sup>505</sup> provoked a backlash from environmental groups<sup>506</sup> concerned that the logic of the decisions would severely limit the power of a government to pursue environmental policies.

Another environment/species protective piece of legislation from the same time period was the U.S. measure aimed at limiting the number of endangered sea turtles killed in the course of commercial fishing. The measure, Section 609,<sup>507</sup> was an amendment to the Endangered Species Act that required that U.S. and foreign fishing vessels be equipped with Turtle Excluder Devices ("TEDs")

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<sup>501</sup> *Tuna/Dolphin I*, *supra* note 496, ¶¶ 5.25–.26, 5.31–.32.

<sup>502</sup> ESTY, *supra* note 498, at 31, 269.

<sup>503</sup> *Tuna/Dolphin II*, *supra* note 496, ¶ 5.15 ("[T]he text of Article XX(g) does not spell out any limitation on the location of exhaustible natural resources to be conserved."); *Tuna/Dolphin II*, *supra* note 496, ¶ 5.20 (contending that there is "no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to . . . resources located within the territory of the contracting party invoking this provision").

<sup>504</sup> *Tuna/Dolphin II*, *supra* note 496, ¶¶ 5.23–.27; *See* Gaines, *supra* note 494, at 757 ("[T]he panel concluded that the U.S. tuna embargo did not qualify under XX(g) because it did not protect the dolphin resource directly but operated by putting trade pressure on other governments to change their policies with respect to dolphin protection.").

<sup>505</sup> *See* Howse, *supra* note 493 (displaying a critique of each case).

<sup>506</sup> *See id.* at 494; ESTY, *supra* note 498, at 31 (arguing that current international trade rules must be significantly reformed to address environmental concerns while still promoting economic growth).

<sup>507</sup> Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1990, Pub. L. No. 101–162, § 609, 103 Stat. 988, 1037–39 (codified at Endangered Species Act of 1973 (ESA), 16 U.S.C.A. § 1537 (1994)) [hereinafter Section 609].

by 1989 that would allow the turtles to escape shrimp fishing nets. Section 609 authorized the State Department to follow two major courses of action in order to achieve U.S. goals. First, the State Department was empowered to commence negotiations to obtain bilateral and multilateral agreements aimed at protecting sea turtles.<sup>508</sup> Second, in the trade-related portion of Section 609, State Department was required to certify that any shrimp importing countries either had a regulatory program comparable to that of the United States (use of TEDs) or that the fishing environment did not pose a risk to sea turtles.<sup>509</sup> If the State Department did not certify the country, then shrimp imports were to be banned. The State Department developed implementing guidelines and regulations for Section 609<sup>510</sup> that concentrated on enforcing the sea turtle measures throughout the Caribbean.<sup>511</sup> Dissatisfied with this limited application of the statute, major environmental non-governmental organizations<sup>512</sup> pushed for further action by bringing litigation against the State Department. The Court of International Trade determined that the terms of the statute required the State Department to apply its certification program worldwide.<sup>513</sup>

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<sup>508</sup> *Id.* § 609(a)(1)(a).

<sup>509</sup> *See id.* § 609(b)(a)(2) (creating regulatory program requirements for importation).

<sup>510</sup> *See Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed. Reg. 9015, 9016 (Feb. 18, 1993) (implementing guidelines for following Section 609).

<sup>511</sup> *See Gaines, supra* note 494, at 765 (discussing the reasons that the State Department selected a limited geographic scope for the certification program).

<sup>512</sup> The litigation in which the environmental group ultimately prevailed was before the Court of International Trade. *See Earth Island Institute v. Christopher*, 913 F. Supp. 559, 580 (Ct. Int'l Trade 1995) (providing the full text of the opinion in which the court ruled for the environmental group). The groups filing as plaintiffs (in addition to Earth Island Institute) included the ASPCA, the Humane Society, the Sierra Club, and the Georgia Fisherman's Association. The case actually had been brought the first time in a federal district court in California but had been dismissed for lack of subject matter jurisdiction. *See Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993) (dismissing the case in California prior to its filing in the Court of International Trade).

<sup>513</sup> *See Earth Island*, 913 F. Supp. at 575 ("No language of section 609 restricts its geographical purview, nor can the court accept the premise that the statute is simply silent on the matter."); *see also Earth Island Inst. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996) (denying the State Department's request for an extension on the timeframe for complying the court's order).

Just after the U.S. litigation concluded and the State Department regulations<sup>514</sup> were revised to extend to all foreign nations,<sup>515</sup> India, Malaysia, Pakistan and Thailand sought consultations<sup>516</sup> on Section 609 and the revised guidelines and later the establishment of a panel.<sup>517</sup> The panel found that the import ban on shrimp violated GATT Article XI (the prohibition on Quantitative Restrictions)<sup>518</sup> and was not justified under the Article XX exceptions.<sup>519</sup> The basis for the panel ruling was that the U.S. measure was not justified under the terms of the chapeau (or introductory section) of Article XX as that provision did not allow unilateral trade measures taken to protect the environment.<sup>520</sup>

### 2.3.5.2. *The Shrimp/Turtle Dispute*

The shape of the *Shrimp/Turtle* dispute was determined by its

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<sup>514</sup> See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342 (Apr. 19, 1996) (providing the state department regulations for specific fishing operations).

<sup>515</sup> *Shrimp* Panel Report, *supra* note 495, ¶ 2.11.

<sup>516</sup> Request for Consultations by India, Malaysia, Pakistan and Thailand, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/1 (Oct. 14, 1996).

<sup>517</sup> See, e.g., Request for the Establishment of a Panel by Malaysia and Thailand, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/6 (Jan. 10, 1997) (requesting input on Section 609); Request for the Establishment of a Panel by Pakistan, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/7 (Feb. 7, 1997) (requesting input on Section 609); Request for Establishment of a Panel by India, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/8 (Mar. 4, 1997) (requesting input on Section 609).

<sup>518</sup> See *Shrimp* Panel Report, *supra* note 495, ¶¶ 7.11–.17 (discussing the belief that the ban violated GATT Article XI).

<sup>519</sup> See *id.* ¶¶ 7.31–.62 (discussing the belief that the ban violated GATT Article XX). The Panel found that Section 609 did not satisfy the chapeau to Article XX and thus failed to reach the issue of whether the measure was justified under Article XX(g) or XX(b). *Id.* ¶ 7.63.

<sup>520</sup> The Appellate Body stated:

In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.

*Shrimp* Panel Report, *supra* note 495, ¶ 7.45

focus on the U.S. defense – whether the United States was justified in an obvious GATT violation by a GATT exception. The U.S. motive in appealing the panel decision was to protect its statute but also to obtain a more coherent and liberal interpretation of the Article XX exception. Such an interpretation would allow a government power to pass environmental protection measures of the type under attack here and still be excused.

The Appellate Body completely rejected the basis for the panel's decision regarding Section 609.<sup>521</sup> The Appellate Body report's main critique was that the panel failed to focus on the text or the ordinary meaning of Article XX.<sup>522</sup> The Appellate Body ultimately concluded that the panel had interpreted Article XX in a way that would render it inutile for any government trying to justify an exception.<sup>523</sup> Given the panel's failure to confront Article XX properly, the Appellate Body panel had to set out the proper sequence of steps<sup>524</sup> to be followed by any panel examining whether a government measure was entitled to an exception. According to the AB, a panel should always see whether there is provisional justification for a measure under one of the paragraphs (a-j), which set out the rationales for the GATT exception, and only then determine whether the measure has been properly applied (in a fashion which does not violate the chapeau) according to Article XX.<sup>525</sup>

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<sup>521</sup> See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp AB Report*]. This report states that:

The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau.

*Id.*

<sup>522</sup> See *id.* ¶ 115 (discussing the failures of the panel); Chang, *Toward a Greener GATT*, *supra* note 500, at 37.

<sup>523</sup> *Shrimp AB Report* ¶ 121.

<sup>524</sup> The Appellate Body Report relied on its first decision in the *Gasoline* case, which also involved an environmental measure and which set out the proper sequence. The *Shrimp* panel had reversed this sequence by looking at the chapeau first. The Appellate Body Report made it clear that this was unacceptable. See *id.* ¶¶ 118–19.

<sup>525</sup> According to the Appellate Body Report, “The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inad-

After discarding the basis for the panel's opinion, the Appellate Body panel then set out "to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX."<sup>526</sup> In earlier WTO disputes, the Appellate Body had begun the practice of finishing the undone analytical work of panels.<sup>527</sup> The justification for this assertion of interpretive power came from the lack of any remand authority in the DSU. If they find the panel below to have applied the wrong test, an AB panel must complete the case using the correct legal analysis in order to issue a recommendation.<sup>528</sup>

The *Shrimp/Turtle* AB report focuses throughout on interpreting the operative phrases of both the Article XX exceptions and the chapeau. In doing so, however, the AB panel freely reached the issue of how the world community had come to see the WTO signatories' commitment to environmental protection. The analysis in the case began with a review of whether the United States could use XX(g) as a justification for its measure. Countries are allowed under XX(g) to adopt measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . . ."<sup>529</sup> The AB report found that the protection of sea turtles satisfied the requirement that the measure involve the conservation of "exhaustible natural resources."<sup>530</sup> In the course of doing so, the panel recognized that living natural resources, although renewable, can be exhausted.<sup>531</sup> The Appellate Body panel here refused to be limited to interpretations of Article XX's language which came from the GATT's drafting history and that would have limited the scope of the exception.<sup>532</sup> Instead, the AB panel determined that the ongoing commitment of the WTO to environmental protection required an "evolutionary" understanding of the concept of natural resources.<sup>533</sup> One scholar has summarized this as a

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vertence or random choice, but rather the fundamental structure and logic of Article XX." *Id.* ¶ 119.

<sup>526</sup> *Id.* ¶ 123. The Appellate Body Report did find that the *Shrimp* panel had developed enough facts for it to be able to complete the analysis. *Id.* ¶ 124.

<sup>527</sup> *Id.* ¶ 123.

<sup>528</sup> *Id.* ¶¶ 123–24.

<sup>529</sup> GATT art. XX(g).

<sup>530</sup> *Shrimp* AB Report, *supra* note 521, ¶¶ 132–34.

<sup>531</sup> *Id.* ¶ 131.

<sup>532</sup> *Id.* ¶ 130.

<sup>533</sup> *Shrimp* AB Report, *supra* note 521, ¶ 130.



“measured, analytical approach to teleological interpretation” and a “more dynamic interpretation [designed] to fit modern circumstances.”<sup>534</sup>

The United States was found to have a sufficient nexus with the migratory sea turtles to be entitled to invoke XX(g).<sup>535</sup> The AB report also found that the other XX(g) requirements—that the measure be one “relating to” conservation and done in conjunction with domestic measures—were satisfied.<sup>536</sup> Section 609 was also found to be tailored in its purpose and thus not “disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.”<sup>537</sup>

Although the United States could justify the purpose and design of its measure, the AB report determined that Section 609 was not applied as required under the terms of the chapeau.<sup>538</sup> The AB report prefaced its consideration of the U.S. measure with a discussion of what the chapeau is and what it is meant to do. In this part of its analysis the AB report also credits panelists with a great deal of interpretive power. Effectively, the chapeau requires interpreters “to mark out a line of equilibrium” between a Member State’s right to invoke an exception and another Member’s substantive rights under the GATT/WTO.<sup>539</sup> Where that line of equilibrium lies will vary in each case, depending on the kind and shape of the measure and the facts of the case.<sup>540</sup>

Section 609 was found to violate the two requirements of the chapeau: that the measure not be applied in a manner that created “unjustifiable”<sup>541</sup> or “arbitrary” discrimination.<sup>542</sup> The administration of Section 609 constituted “unjustifiable” discrimination because it required all other Member States to adopt the U.S. regula-

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<sup>534</sup> Trachtman, *supra* note 63, at 364. *But see* Raustalia, *supra* note 68, at 406 (noting that it is hard to square the politically limited function of the AB panels— not having the authority to add to or diminish the rights of parties— “with ideas like an evolutionary doctrine of GATT interpretation.”) Raustalia also notes that this interpretation amounted to a new rule of international trade law. *Id.* at 412.

<sup>535</sup> *Shrimp* AB Report, *supra* note 521, ¶¶ 143–45.

<sup>536</sup> *Id.* ¶ 141.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.* ¶¶ 161–76.

<sup>539</sup> *Id.* ¶ 159.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* ¶¶ 161–76.

<sup>542</sup> *Id.* ¶¶ 177–86.

tory program regardless of the conditions in various states.<sup>543</sup> The United States also failed, with one exception (the Inter-American Convention), at its self-assigned mission to negotiate turtle conservation with other countries. The failure was serious since the protection of the highly migratory turtles is the very type of issue which demands multilateral efforts.<sup>544</sup> The end result was that the United States negotiated with some, but not other, WTO Members, including all of the complainant states in *Shrimp/Turtle* that were affected by Section 609 and thus discriminated unjustifiably.<sup>545</sup> The unilateral manner in which Section 609 had been applied – with the processes established and administered by the U.S. alone – only underscored its unjustifiability.<sup>546</sup> Section 609 was found to constitute “arbitrary” discrimination because of its lack of transparent or predictable certification process. Section 609 lacked appeal and review procedures and was applied in a manner that denied basic fairness and due process.<sup>547</sup>

The main conclusion of the *Shrimp/Turtle* dispute was that while the measure itself (the import ban) was provisionally justified under Article XX(g), the United States had not applied its ban (through its certification program) in keeping with the chapeau requirements. This result meant that the United States would not be required to abandon or even amend Section 609, and thus eliminate the ban, but instead could revise its implementing regulations to reflect the concerns raised by the AB report.<sup>548</sup>

### 2.3.5.3. Implementation and Surveillance Phase

In November 1998 the DSB adopted the AB report on the *Shrimp/Turtle* dispute. The parties agreed to an implementation

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<sup>543</sup> *Id.* ¶ 172.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> *Id.* ¶181.

<sup>547</sup> Chang contends that this resulted in the Appellate Body determining that a case-by-case analysis was the only proper way to look at the chapeau requirements. Having chosen this approach, the report is then “explicit regarding precisely which particular features of the trade measures in question amount to ‘arbitrary or unjustifiable discrimination.’” Chang, *Toward a Greener GATT*, *supra* note 500, at 39–40.

<sup>548</sup> *Id.* at 45–46.

period of thirteen months.<sup>549</sup> During this period the United States revised the implementing regulations for Section 609 with the goal of satisfying the criticisms found in the AB report.<sup>550</sup> By the time the United States issued its final status report in November 1999 on how Section 609 would be brought into compliance, it stated that the newly revised guidelines were already in use with regard to requests from countries about certification.<sup>551</sup>

Not all parties to the dispute were satisfied with the U.S. response. Malaysia pursued its concerns about the new U.S. approach to implementation of Section 609 to an Article 21.5 compliance proceeding in October 2000.<sup>552</sup> Panel and AB reports<sup>553</sup> were issued on the question of whether the revised guidelines for Section 609 met U.S. compliance requirements. In both decisions, the revised guidelines were found to satisfy the chapeau requirements—that the regulations were being applied without arbitrary or unjustifiable discrimination.<sup>554</sup> The gist of Malaysia's argument against Section 609 and the revised guidelines was that both were simply unallowable. By continuing to apply the unilateral ban after the end of the reasonable period of time to comply, the United States was acting inconsistently with its GATT obligations and DSB recommendations.<sup>555</sup> Malaysia particularly objected to the 21.5 panel's reliance on the AB report arguments on *Shrimp/Turtle* in its analysis of the revised guidelines.<sup>556</sup> The 21.5 AB report declared that the panel had been right to use rulings from the *Shrimp/Turtle*

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<sup>549</sup> See Status Report by the United States, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/15 (July 15, 1999) (agreeing to an implementation period).

<sup>550</sup> *Id.*

<sup>551</sup> Status Report by the United States, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/15/Add. 4 (Jan. 17, 2000).

<sup>552</sup> Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶1.4, WT/DS58/RW (June 15, 2001) [hereinafter 21.5 Panel].

<sup>553</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter 21.5 AB Report]. In its review of the U.S. actions, the AB stated that the measure at issue in the compliance dispute consisted of Section 609, the revised guidelines and the application of the revised guidelines. *Id.* ¶ 79.

<sup>554</sup> 21.5 Panel, *supra* note 552, ¶¶ 5.42–.114, 6.1–.2; 21.5 AB Report, *supra* note 553, ¶¶ 111–54.

<sup>555</sup> 21.5 Panel, *supra* note 552, ¶ 1.4.

<sup>556</sup> 21.5 AB Report, *supra* note 553. Malaysia argued, in effect, that the 21.5 Panel had failed to fulfill its obligations in conducting the compliance review. The AB Report completed vindicated the panel on this issue. *Id.* ¶ 153(a).

AB report and to rely on them in its review of U.S. compliance.<sup>557</sup> According to the 21.5 AB report, Malaysia had six disagreements with the panel's report—three going to U.S. obligations regarding the negotiation of international agreements and three regarding whether the revised guidelines were sufficiently flexible to satisfy the chapeau requirements.<sup>558</sup> The main argument Malaysia made about the international agreements was that the United States should have concluded an agreement rather than just negotiating about the protection of the endangered sea turtles with countries.<sup>559</sup> The 21.5 AB report found that there was no obligation to conclude an agreement<sup>560</sup> but only one to make good faith efforts to reach comparable<sup>561</sup> international agreements with different regions regarding the protection of the sea turtles.

With regard to the flexibility of the revised guidelines, Malaysia attempted to re-invoke its argument that Section 609 would inevitably constitute arbitrary and unjustifiable discrimination as long as it conditioned market access on unilateral standards.<sup>562</sup> The 21.5 AB report made it clear that the earlier *Shrimp/Turtle* AB holding that unilateral aspects of a given measure were common features of a measure that would fall within Article XX was not dicta but “a principle that was central to” the ruling in *Shrimp/Turtle*.<sup>563</sup> The 21.5 Appellate Body Report found a crucial difference between the previous U.S. guidelines (requiring countries to adopt essentially the same program as the United States) and revised ones that

<sup>557</sup> *Id.* ¶ 109.

<sup>558</sup> *See id.* ¶¶ 113–14 (listing Malaysia's six arguments against the Panel's finding).

<sup>559</sup> *Id.* ¶ 115.

<sup>560</sup> *See id.* ¶ 124, which states that:

[I]t is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding “arbitrary or unjustifiable discrimination” under the chapeau of Article XX. We see, in this case, no such requirement.

<sup>561</sup> *See id.* ¶ 122 (“[T]he United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.”).

<sup>562</sup> *Id.* ¶ 136.

<sup>563</sup> *Id.* ¶ 138. According to Gaines: “The Appellate Body has thus put itself clearly on record for the first time, that a measure is not disqualified under Article XX merely because it is imposed unilaterally by the importing country.” Gaines, *supra* note 494, at 793.

conditioned market access on countries adopting a program comparable in effectiveness<sup>564</sup> to the U.S. program. The latter is allowable because it provides Member States subject to the measure “sufficient latitude” with respect to the program they will adopt and to allow them to adopt one “suitable to the specific conditions” prevailing in each country.<sup>565</sup> The measure a country adopts in order to satisfy Article XX chapeau requirements must have sufficient flexibility to take into account the “specific conditions prevailing in *any* exporting” Member State.<sup>566</sup>

The final conclusion of the 21.5 Appellate Body Report was that the panel had been correct in finding that Section 609, the revised guidelines, and the U.S. application of both were justified as long as the conditions and findings of the WTO reports, particularly the need for ongoing good faith negotiations for an international agreement, continued to be satisfied.<sup>567</sup>

### 2.3.6. *Foreign Sales Corporations (FSC)*

#### 2.3.6.1. *Background*

Three interrelated aspects of the *FSC* case, WT/DS108, underscore why it was bound to become an impossible case.<sup>568</sup> First, the dispute has an elaborate pre-history that uncovered the vastly different views held by the EC and the United States over whether the method of foreign earned income could constitute an export subsidiary. The *FSC* legislation was passed by Congress in 1984<sup>569</sup> to resolve a by then long-standing dispute between the two over predecessor legislation, the Domestic International Sales Corporation (“*DISC*”).<sup>570</sup> The United States and the EC engaged in a GATT dispute over the *DISC* legislation that lasted from 1976 until a ne-

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<sup>564</sup> See 21.5 AB Report, *supra* note 553, ¶ 144 (“[T]here is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*”).

<sup>565</sup> *Id.*

<sup>566</sup> *Id.* ¶ 149.

<sup>567</sup> See *Id.* ¶ 153(b) (upholding the panel’s finding).

<sup>568</sup> See Robert E. Hudec, *Industrial Subsidies: Tax Treatment of ‘Foreign Sales Corporations,’* in TRANSATLANTIC ECONOMIC DISPUTES, *supra* note 163, at 175, 203.

<sup>569</sup> The *FSC* system was part of the Tax Reform Act of 1984, Pub. L. No. 98-369, § 98 Stat. 494 (1984).

<sup>570</sup> Revenue Act of 1971, Pub. L. No. 92-178, §501, 85 Stat. 497, 535 (1971).

gotiated settlement in 1981.<sup>571</sup> The *DISC* case was the original “wrong case” used by Hudec to illustrate his thesis about the phenomenon.<sup>572</sup>

Second, the *FSC* case was brought by the EC as a strategic response to the aggressive approach the United States had taken in its DSU litigation. During the first two years of the DSU System, the United States challenged the EC on two highly politicized issues—the regulatory health standard in *Hormones* and a major aspect of its preferential trading regime in *Bananas III*.<sup>573</sup> When the EC began the *FSC* case, the United States had prevailed or was about to prevail in the other two disputes. The EC knew that if it lost the *FSC* case, compliance would be difficult if not impossible for the United States.<sup>574</sup> Major U.S. companies (e.g., Boeing, GE, Mars, Nike and Proctor & Gamble) were major beneficiaries of the *FSC* program.<sup>575</sup> The EC was also convinced that if the DSB authorized retaliation in the other two disputes, the United States would use it.<sup>576</sup> Consequently, the EC resuscitated the underlying dispute from the earlier GATT litigation—that the U.S. treatment

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<sup>571</sup> See Hudec, *Industrial Subsidies*, *supra* note 568, at 176–80 (examining the origins of, and the legal situation resulting from, the *DISC* case).

<sup>572</sup> See Hudec, *GATT Dispute Settlement After the Tokyo Round*, *supra* note 20, at 164–66 (citing the *DISC* case as a type of “wrong case” that involves “issues arguably beyond the decision-making capacity of the panel procedure”). See also Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443, 1487 (1988) (discussing the impact that the *DISC* case had on the improvement of the GATT legal practice).

<sup>573</sup> According to Hudec, the EC actions came in response to its perception that it had been improperly attacked. “The EC had considered the U.S. complaints in both cases to be unjustified—*Bananas* as inappropriate interference in a dispute between the EC and the Latin American countries producing bananas, *Hormones* as a litigious attack on a non-protectionist health measure based on very strong public health concerns.” Hudec, *Industrial Subsidies*, *supra* note 568, at 181.

<sup>574</sup> See Wolff, *Problems with WTO Dispute Settlement*, *supra* note 156, at 418 (explaining how the EU brought the *FSC* case “because dispute settlement had given the United States . . . a right of retaliation against European products, which the United States exercised.”).

<sup>575</sup> See Geoff Winestock, *EU Aims for Huge Sanctions on the U.S.—Claim of \$4.04 Billion Made to WTO is in Response to Tax Break in Dispute*, WALL ST. J., Nov. 20, 2000, at A2 (noting how the companies strenuously resisted losing the *FSC* program, and how the United States was attempting to appease them even when it adopted its final regulatory fix but it was thwarted in this effort).

<sup>576</sup> See Hudec, *Industrial Subsidies*, *supra* note 568, at 181 (explaining that one of the purposes of the *FSC* complaint was to deal with a concern over “what seemed to be a public commitment by U.S. authorities to employ trade retaliation whenever WTO legal rulings were not obeyed in a timely manner.”).

of foreign earned income constituted a prohibited export subsidy<sup>577</sup> – as a perfect case for the United States as a defending party.

Third, there is the belief that taxation issues go to the heart of sovereignty of a nation.<sup>578</sup> Subjecting a major aspect of a country's taxation system to DSU review thus allows the WTO to intrude deeply into how a country chooses to structure these laws and in issuing opinions to have a large impact on its law-making.<sup>579</sup> The playing out of the *DISC* litigation (years of impasse until a negotiated settlement) and the *FSC* dispute (three rounds of litigation over the legislation that kept the form of the U.S. tax measure until its removal) lend some support to this idea.

The *DISC* legislation was enacted in 1971 in an attempt to bring to U.S. companies the same type of tax advantages earned by European firms with export earnings.<sup>580</sup> European countries have a value added tax ("VAT") system that only taxes income earned within the territory of the country. EC companies were thus able to avoid income tax on part of their export earnings.<sup>581</sup> The *DISC* system was designed to allow U.S. companies the same advantage even though the United States had a worldwide tax policy. Export sales would be run through the *DISC*, which was, as the name indicates, a domestic subsidiary of the export corporation, and a certain percentage of the income would be considered exempt from income tax.<sup>582</sup> The EC brought the *DISC* case at least in part to

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<sup>577</sup> See *HUDEC*, *supra* note 3, at 59–100.

<sup>578</sup> See Paul R. McDaniel, *Trade Agreements and Income Taxation: Interactions, Conflicts and Resolutions*, 57 *TAX L. REV.* 275, 297 (2004) ("[F]ew problems touch more sensitive sovereignty issues than taxation."); see also Stephan, *Sheriff or Prisoner?*, *supra* note 488, at 61–65 (discussing the consequences of WTO review given the nature of the U.S. taxation system).

<sup>579</sup> The Appellate Body tried to limit the impact of its decision in the *FSC* case by explaining, after offering its recommendation, what it was *not* saying: "[T]his is not a ruling that a Member must choose one kind of tax system over another so as to be consistent with that Member's WTO obligations. In particular, this is not a ruling on the relative merits of 'worldwide' and 'territorial' systems of taxation." Appellate Body Report, *U.S. – Tax Treatment of "Foreign Sales Corporations"*, ¶ 179, WT/DS108/AB/R (Feb. 24, 2000) [hereinafter *FSC* AB Report].

<sup>580</sup> See *Hudec*, *Industrial Subsidies*, *supra* note 568, at 176 ("DISC was meant to offset . . . tax advantages [of European exporters] by allowing U.S. exporters to escape taxation on a similar portion of their export income.").

<sup>581</sup> See James Joseph Shallue, *An Analysis of Foreign Sales Corporations and the European Communities' Four Billion-Dollar Retaliation*, 31 *DENV. J. INT'L L. & POL'Y* 179, 192–95 (2002) (explaining the difference between Europe's territorial system of taxation and the United States' worldwide system).

<sup>582</sup> See *Hudec*, *Industrial Subsidies*, *supra* note 568, at 176 (explaining how the *DISC* system operated to allow companies indefinitely to defer paying taxes on

chasten the United States for what it considered the overly aggressive litigation strategy the United States had been pursuing in the GATT at that time.<sup>583</sup> The U.S. response was to argue that if the DISC legislation was violative of the GATT Article XVI(4) prohibition on export subsidies, the tax legislation systems of three other EC countries were also violative. The United States brought what amounted to a GATT countercomplaint on each of these three tax systems. The GATT panel decisions reviewing the EC statutes actually adopted the U.S. view on this issue while others found the DISC to be GATT-violative as well.<sup>584</sup> The United States argued that the DISC should be allowed to remain as a matching subsidy against the ones provided by the EC countries. When the EC refused to accept that solution, the parties remained at an impasse until a negotiated settlement was completed in 1981. The GATT Council ultimately adopted the four panel reports and an understanding reached by the parties ("Understanding").<sup>585</sup>

The United States finally enacted the FSC legislation to satisfy its GATT obligations in 1984. Corporations were required to create a foreign sales corporation and to conduct a certain amount of their export sales activity abroad. The purpose of the legislation was to conform to the GATT decision but not change much about its substance.<sup>586</sup> The FSC system, however, was built around one lesson

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the foreign earned income and thus export more profitably); see also Hunter R. Clark, Amy Bogan & Hayley Hanson, *The WTO Ruling on Foreign Sales Corporations: Costliest Battle Yet in an Escalating Trade War Between the United States and the European Union?*, 10 MINN. J. GLOBAL TRADE 291, 297-98 (2001) (detailing the taxation scheme underlying the DISC system).

<sup>583</sup> See Hudec, *Industrial Subsidies*, supra note 568, at 177 ("[M]any observers suspected that the primary purpose of the EC's legal complaint was not the removal of DISC but rather to dissuade the U.S. from overly aggressive use of the dispute settlement process.").

<sup>584</sup> See Report of the Panel, *Income Tax Practices Maintained by France*, L/4423 (Nov. 12, 1976), GATT B.I.S.D. (23d Supp.) at 114 (1977) (concluding that French income tax practices were contrary to GATT); see also Report of the Panel, *Income Tax Practices Maintained by the Netherlands*, L/4425 (Nov. 12, 1976), GATT B.I.S.D. (23d Supp.) at 137 (1977) (concluding that the Netherlands' income tax practices were contrary to GATT).

<sup>585</sup> See Hudec, *Industrial Subsidies*, supra note 568, at 178-79 (discussing how the 1981 Understanding provided that the GATT reports with regard to the case and the other three panel reports were being adopted).

<sup>586</sup> See *id.* at 203-05 (emphasizing that even if the change to the FSC did not alter the export subsidy it was a clear effort to alter a U.S. law to make it a compliant against GATT); see also Harold S. Peckron, *Uniform Rules of Engagement: The New Tax Regime for Foreign Sales*, 25 HASTINGS INT'L & COMP. L. REV. 1, 8-13 (2001) ("As any good architect, the Treasury designed a plan using the actual GATT



from the DISC case: that the relevant economic activities that qualified a company for tax exemptions had to take place outside the United States.<sup>587</sup> Arguments were still made that the FSC statute did not satisfy the 1981 Understanding.<sup>588</sup> Nevertheless, from 1984 to 1997 there was no legal challenge. The EC filing of the WTO case, therefore, came as a surprise to the United States and the WTO because it was widely believed that the EC had come to accept U.S. legislation.<sup>589</sup> Had the EC not perceived the U.S. litigation in *Hormones* and *Bananas III* to be overly aggressive,<sup>590</sup> that might have been the case. Once it was clear, however, that the United States intended to follow through with its announced policy<sup>591</sup> of “aggressive rule enforcement,”<sup>592</sup> the EC saw the advantage in pressing a case in which it might teach the United States a lesson about the strategic use of WTO dispute settlement.<sup>593</sup>

### 2.3.6.2. *The FSC Dispute*

The panel found that the FSC exemption was an export-contingent subsidy and as such violated Article 3.1(a)<sup>594</sup> of the Subsidies and Countervailing Measures Agreement (“SCM Agree-

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Council’s unanimous understanding of the five parties, which led it to suggest to Congress the . . . [FSC].”).

<sup>587</sup> See McDaniell, *supra* note 578, at 279 (analyzing the exemptive aspects of the FSC system).

<sup>588</sup> See Hudec, *Industrial Subsidies*, *supra* note 568, at 180 (“In the view of most observers, the FSC exemption did not meet the requirements of the 1981 Understanding.”).

<sup>589</sup> See *id.* (noting that this wide belief was based on the fact that “the EC had not complained about FSC’s GATT legal problems since 1985”).

<sup>590</sup> See Asif H. Qureshi & Roman Grynberg, *United States Tax Subsidies Under Domestic International Sales Corporation, Foreign Sales Corporation and Extraterritorial Income Exclusion Act Legislation within the Framework of the World Trade Organization*, 36 J. WORLD TRADE 979, 990-91 (2002) (noting that the resurrection of the issue in the late 1990s could be “attributed to” the rulings against the EC in *Hormones* and *Bananas III*).

<sup>591</sup> See H.R. Doc. No. 103-316, at 1033 (1994) (“The Administration intends to use Section 301 to pursue vigorously foreign unfair trade barriers that violate U.S. rights or deny benefits to the United States under the Uruguay Round agreements . . . [and] to use Section 301 to pursue foreign unfair trade barriers that are not covered by those agreements.”).

<sup>592</sup> Hudec, *Industrial Subsidies*, *supra* note 568, at 182.

<sup>593</sup> See *id.* at 181 (“[T]he EC had much to gain from a legal victory, even an unenforceable one.”).

<sup>594</sup> Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations,”* ¶ 7.130, WT/DS108/R (Oct. 8, 1999) [hereinafter *FSC Panel*].

ment").<sup>595</sup> The SCM Agreement prohibits almost all export subsidies.<sup>596</sup> Such subsidies are prohibited because they distort the terms of trade and have no other purpose.<sup>597</sup> According to the SCM Agreement, if the contested measure is found to be a prohibited subsidy, the panel must recommend that the subsidizing Member State withdraw the subsidy without delay and specify a time frame for the withdrawal.<sup>598</sup> The FSC panel recommended that the United States receive a one year period in order to withdraw the subsidy program.<sup>599</sup>

The United States immediately appealed the FSC panel decision. The Appellate Body panel upheld the major findings of the panel report as well as its method of interpretation. According to the AB report, the proper way of interpreting the question was to determine first whether the U.S. measure was a "subsidy" within the meaning of Article 1 of the SCM Agreement, and then whether it was a prohibited "export subsidy" within the meaning of Article 3.<sup>600</sup>

A financial contribution by a government is a "subsidy" when a government foregoes revenue it would otherwise be due.<sup>601</sup> Since the U.S. government would have collected more tax revenues if the foreign sales corporations did not exist, revenue was foregone.<sup>602</sup> The Appellate Body agreed with the panel report that what is "otherwise due" must be measured against the rules of taxation of the Member State.<sup>603</sup> The Appellate Body also adopted the panel's "but for" test—that but for the measure there would be

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<sup>595</sup> For the other contemporaneously-enacted WTO agreements, see *supra* note 68.

<sup>596</sup> SCM Agreement art. 3.2.

<sup>597</sup> See *id.* art. 3.1(a) ("Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I.").

<sup>598</sup> *Id.* art. 4.7.

<sup>599</sup> FSC Panel, *supra* note 594, ¶¶ 8.4–.8.

<sup>600</sup> FSC AB Report, *supra* note 579, ¶ 90.

<sup>601</sup> *Id.* ¶ 90; see also SCM Agreement art. 1.1(a)(1)(ii) ("[F]or the purposes of this Agreement, a subsidy shall be deemed to exist if . . . government revenue that is otherwise due is foregone or not collected.").

<sup>602</sup> See McDaniel, *supra* note 578, at 281 (summarizing the EC arguments about the FSC scheme to the panel).

<sup>603</sup> FSC AB Report, *supra* note 579, ¶ 90.

additional revenues for the government—for judging whether there was an export subsidy in the case.<sup>604</sup>

The U.S. defense to the subsidy argument was not based on the text itself; rather, the United States argued that the general definition of what was “otherwise due” was qualified by footnote 59 to the SCM Agreement, which provided the controlling legal rule.<sup>605</sup> The AB report interpreted the U.S. argument as one for an exception to the general interpretation of “subsidy” and rejected this notion, finding that, at most, footnote 59 spoke to the issue of export subsidies.<sup>606</sup> This meant that the U.S. measure did qualify as a subsidy, particularly since the United States admitted that foreign sales corporations represented a departure from the normal rules of taxation and that without this device the tax liability of exporting companies would be higher.<sup>607</sup>

The AB report then went on to disagree with the other U.S. arguments pertaining to footnote 59. The United States contended that footnote 59 was confirmed by the 1981 Understanding that resolved the *DISC* case, which supported the idea that the U.S. statute was not an export subsidy under Article 3.<sup>608</sup> The AB reviewed footnote 59 sentence-by-sentence and found that none of the statements aided the United States.<sup>609</sup> The ultimate conclusion of the AB panel was that the United States had mischaracterized the issue in the case. The proper issue is whether the United States was permitted, under Article 3.1(a), to “carve out” an export contingent exemption from the category of foreign-source income that is taxed under its other tax rules.<sup>610</sup>

The final U.S. argument on appeal was a significant one and linked directly to the *DISC* case. The United States argued that the 1981 Understanding constituted a GATT decision and thus was part of GATT 1994 and binding on all Member States.<sup>611</sup> In determining the status of the 1981 Understanding and its textual ambi-

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<sup>604</sup> *Id.* ¶ 91. The Appellate Body panel was satisfied with a “but for” test here—but for the FSC how would taxes have been paid—because “it is not difficult to establish in what way the foreign-source income of an FSC would be taxed ‘but for’ the contested measure.” *Id.*

<sup>605</sup> *Id.* ¶ 92.

<sup>606</sup> *Id.* ¶¶ 93–94.

<sup>607</sup> *Id.* ¶ 95.

<sup>608</sup> *Id.* ¶ 96.

<sup>609</sup> *Id.* ¶¶ 97–103.

<sup>610</sup> *Id.* ¶ 99.

<sup>611</sup> *Id.* ¶ 104.

guity,<sup>612</sup> the AB report examined not only the text itself but also the circumstances of its adoption (whether it was a settlement document for the tax cases or spoke to general issues) and the statement of the Chairman of the GATT Council attached to the Understanding itself.<sup>613</sup> The AB report focused on the Chairman's statement that the adoption of the dispute settlement report with the Understanding did "not affect the rights and obligations of Contracting Parties under the General Agreement."<sup>614</sup> According to the AB panel, if the Contracting Parties had intended an authoritative interpretation of export subsidies, "they would have said so in reasonably recognizable terms."<sup>615</sup> The Chairman's statement, therefore, was consistent with the view that the tax cases were to be resolved privately between the parties.<sup>616</sup> The AB report also found no guidance from the SCM Agreement or its predecessor, the Subsidies Code, on the issue presented by the case.<sup>617</sup> Moreover, even if it had agreed with the United States about the 1981 Understanding, it still would not resolve the issue of the case as presented by the AB panel.<sup>618</sup> Consequently, the AB report affirmed the panel ruling that the FSC tax exemptions amounted to subsidies contingent upon export performance.<sup>619</sup> The AB recommendation was that the FSC measure be brought into conformity with U.S. obligations under the SCM and Agriculture Agreements.<sup>620</sup>

The consequence of the AB report for the United States was that it had to eliminate or revise the FSC program so that there would not be a tax deferral that would be revenue otherwise foregone.<sup>621</sup> The "but for" test developed by the panel and adopted by

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<sup>612</sup> The Appellate Body noted that the opening phrase of the Understanding stated: "The Council adopts *these reports* [on the DISC cases] *on the understanding that with respect to these cases, and in general . . .*" *Id.* ¶ 105.

<sup>613</sup> *Id.* ¶¶ 110–12. The Appellate Body report expressly noted that the panel was correct in examining the circumstances of the adoption of the 1981 Understanding. *Id.* ¶ 111.

<sup>614</sup> *Id.* ¶ 112.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.*

<sup>617</sup> *Id.* ¶¶ 115–18.

<sup>618</sup> *Id.* ¶ 120.

<sup>619</sup> *Id.* ¶ 121.

<sup>620</sup> *Id.* ¶ 178.

<sup>621</sup> See Peckron, *supra* note 586, at 27 ("From a pure tax standpoint, it was clear in the Appellate Report that whatever the United States devised to respond to the export subsidy charge, it had to address both reports' concerns that the FSC tax regime resulted in a reduction of revenues 'otherwise due.'").

the AB panel, however, does not provide any useful guidance to Member States about what constitutes a tax subsidy.<sup>622</sup> So the United States was in the position of either trying to craft a solution without real guidance about how to do so, or abandoning a highly popular and widely used tax system.

### 2.3.6.3. Implementation and Surveillance Phase

The United States responded to the AB report in April 2000, by announcing its intention to comply.<sup>623</sup> The United States then passed new legislation within nine months,<sup>624</sup> the FSC Repeal and Extraterritorial Income Exclusion Act ("ETI Act").<sup>625</sup> The United States then argued that it crafted a provision that met the problems noted by the panel and AB panel in the FSC case.<sup>626</sup> The EC, however, immediately challenged the new legislation before an Article 21.5 compliance panel. The United States litigated and appealed the panel judgment that this scheme also constituted a prohibited export subsidy, just like the FSC system in 2002.<sup>627</sup> Most scholars examining the ETI Act did not see how it solved the problems found in the FSC legislation.<sup>628</sup> By submitting new legislation that

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<sup>622</sup> See Hudec, *supra* note 568, at 185–88 (explaining why the "but for" test is problematic and why the WTO still lacks an interpretation of "otherwise due" in SCM Article 1); McDaniel, *supra* note 578, at 290–94 ("This test had no normative power at all.").

<sup>623</sup> Robert Goulder, *U.S. Will Comply with WTO Ruling on FSC Regime, but Details Remain Unclear*, *WORLDWIDE TAX DAILY*, Apr. 11, 2000.

<sup>624</sup> See Hudec, *supra* note 568, at 192 (pointing out that the new legislation was enacted in "remarkable time"—nine months from the AB decision to the President's signature).

<sup>625</sup> FSC repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519, 114 Stat. 2423 (2000).

<sup>626</sup> See Hudec, *supra* note 568, at 192 (noting the U.S. argument that (1) since ETI income was excluded from gross income it was not a tax subsidy, (2) since the ETI system was available to any U.S. producer it was no longer contingent on exports, and (3) the ETI was designed to avoid the double taxation of foreign source income).

<sup>627</sup> The panel found that the new act also resulted in the surrender of revenue otherwise due and that the act made exporting a precondition to qualifying for the subsidy. Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, ¶¶ 8.43, 8.61, WT/DS108/RW (Aug. 20, 2001) (exercising recourse to Article 21.5 of the DSU); Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/RW (Jan. 14, 2002) (using DSU Article 21.5). The Appellate Body panel upheld the panel regarding the "subsidy" issue, *id.* ¶ 106, and the export-contingent subsidy in violation of Article 3, *id.* ¶¶ 118–20.

<sup>628</sup> See Hudec, *supra* note 568, at 192–201 (discussing the FSC legislation); Qureshi & Grynberg, *supra* note 590 (discussing solutions).

it claimed did comply, however, the United States was able to delay EC efforts to retaliate. Once the litigation was over, the EC resought authorization to retaliate against the United States.<sup>629</sup> After an arbitration on the appropriate amount for such a suspension,<sup>630</sup> the DSB authorized the EC to suspend concessions valued at just over \$4 billion per year against the United States. The retaliation authorization was then and remains the largest amount authorized in a WTO dispute. The size of the authorization revealed just how much U.S. corporations benefited from the FSC program and the limits of a dispute settlement system backed up by retaliation.<sup>631</sup> The sheer size of the authorization posed real problems for the EC. It was too heavy a weapon to wield against the United States without significant potential for backlash.

Consequently, the EC postponed proceeding with retaliation until 2004, and even then it chose to suspend only a small portion of the \$4 billion authorization. The EC had to think creatively about how to use a suspension authorization in a way that might actually prompt a quick response from the United States. The EC designed its retaliation measure, therefore, to act as a leverage device against Congress.<sup>632</sup> It was Congress that remained resistant to passing new legislation that would finally resolve the FSC dispute.<sup>633</sup> The EC tariffs were to begin in March 2004 and to cover

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<sup>629</sup> This request for an authorization to suspend sanctions was actually the second effort. The first EC request for authority to retaliate came after the United States passed the ETI Act. See *Minutes of the Meeting Held in the Centre William Rappard on 7 May 2003*, WT/DSB/M/149 (July 8, 2003) (discussing the EC dialogue of the events in the FSC litigation).

<sup>630</sup> See Decision of the Arbitrator, U.S. – Tax Treatment for “Foreign Sales Corporations,” WT/DS108/ARB (Aug. 30, 2002) (explaining the Recourse to Arbitration by the United States under Article 22.6 of the DSU).

<sup>631</sup> See Warren Vieth, *EU Imposes 1st Tariff Penalties on U.S. Goods*, L.A. TIMES, Mar. 2, 2004, at C1 (noting that, as of 2004, U.S. companies saved about \$5 billion a year under the FSC program).

<sup>632</sup> See Jonathan Weisman, *EU to Begin Sanctions on Some U.S. Goods; Action Comes Four Years After Ruling by WTO*, WASH. POST, Feb. 27, 2004, at E1 (citing EC Trade Minister Pascal Lamy as noting that the ratchet effect of the sanctions measure was designed to “focus the mind on the necessity to repeal”).

<sup>633</sup> See *id.* (noting that there were competing bills in the House and Senate); see also William Chou, Comment, *The \$4 Billion Question: An Analysis of Congressional Responses to the FSC/ETI Dispute Under WTO Export Subsidy Standards*, 25 NW. J. INT'L L. & BUS. 415 (2005) (analyzing the competing bills before Congress). There was an intense political fight because various large corporations argued that the two proposed bills would harm them. It was clear that the previous corporate beneficiaries of the FSC would no longer receive most of the benefits from the new tax provision. See generally Edmund L. Andrews, *A Civil War Within a*

only five percent of the list of products (many considered to be politically sensitive to President Bush in his campaign for reelection) the EC had previously identified in 2003. The leverage effect was achieved by arranging for the sanctions to continue to climb one percentage point for each month Congress failed to act.<sup>634</sup>

Within eight months, Congress passed the American Jobs Creation Act of 2004 ("JOBS Act").<sup>635</sup> The JOBS Act partially eliminated the ETI Act (subject to transition provisions) and put in its place a ten percent tax reduction for companies that manufacture in the United States.<sup>636</sup> The legislation thus eliminated the U.S. program that had created the extended GATT and WTO litigation. The passage of the bill, however, illustrates exactly what happens when Congress tries to take away important subsidies to powerful industries during an election year. In addition to the new tax rate, the 930-page bill contained other tax benefits worth \$170 billion for corporations.<sup>637</sup> More importantly for the purposes of the WTO litigation, however, the JOBS Act contained transition provisions which allowed the prohibited exports to stay in place until the affected U.S. industries had the opportunity to adjust to their removal. Once the JOBS Act was enacted in October 2004,<sup>638</sup> the EC announced that it would withdraw its sanctions by January 2005 without seeking DSB oversight.<sup>639</sup> While the EC was willing to withdraw its sanctions, however, it did seek a compliance panel (under Article 21.5 of the DSU) on Section 101 provisions for transi-

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*Trade Dispute*, N.Y. TIMES, Sept. 20, 2002, at C1 (discussing both the political battle over the various bills and the complaints of corporations that would stand to lose tax benefits).

<sup>634</sup> See Weisman, *supra* note 632 (noting the leverage effect of the rising sanction).

<sup>635</sup> American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) [hereinafter Jobs Act].

<sup>636</sup> *Id.* §§ 101-02.

<sup>637</sup> See Jonathan Weisman, *Special-Interest Add-Ons Weigh Down Tax-Cut Bill*, WASH. POST, Apr. 19, 2004, at A1 (describing these other tax benefits as constituting "one of the most complex, special-interest-riddled corporate tax bills in years . . .").

<sup>638</sup> Press Release, European Communities, Foreign Sales Corporations (FSC): U.S. to Repeal Illegal Export Subsidies as from 2007 (Oct. 11, 2004), available at [http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc\\_119403.pdf](http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_119403.pdf) (last visited Mar. 2, 2007).

<sup>639</sup> Press Release, European Communities, Foreign Sales Corporations (FSC): EU Welcomes US Repeal of Illegal Export Subsidies (Oct. 25, 2004), available at [http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc\\_119759.pdf](http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_119759.pdf) (last visited Mar. 2, 2007).

tion periods. The first transition period under the JOBS Act, which provided for companies to receive a portion of exemptions from income tax breaks,<sup>640</sup> effectively continued the ETI program until 2006.<sup>641</sup> The second transition period, for companies with long production schedules, allowed companies to continue to claim ETI exemptions on any order for sales signed before September 2003 and was not time limited.<sup>642</sup>

Following unsuccessful consultations, the EC requested a panel in January 2005,<sup>643</sup> arguing that the two transition periods in the JOBS Act allowed "U.S. exporters to continue benefiting from the tax exemptions already found to be WTO incompatible (a) in the years 2005 and 2006 with respect to all transitions, and (b) for an indefinite period with respect to certain contracts."<sup>644</sup> The EC claimed that this aspect of the JOBS Act violated Article 4.7 of the SCM Agreement (which requires a party to withdraw prohibited subsidies), Articles 19.1 and 21.1 of the DSU (which require a Member to implement DSB recommendations) and that it continued to violate Articles 3.1 and 3.2 of the SCM Agreement (the provisions against export subsidies).<sup>645</sup>

The second 21.5 compliance proceeding of the *FSC* dispute required the panel and Appellate Body to examine the very nature of the functions required by WTO adjudicators. The extended litigation deriving from the *FSC* dispute resembles what happened following the *Hormones* dispute. The United States and the EC extended litigation in both disputes into later proceedings in which it asked DSU panels to define the outside parameters of DSU procedures themselves. In the *Continued Suspension* dispute, the fight was over the requirements of Article 23.<sup>646</sup> In the *FSC 21.5 II* dis-

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<sup>640</sup> JOBS Act § 101(d), (f); see Paul Meller, *European Trade Chief Says Sanctions on U.S. Will End*, N.Y. TIMES, Oct. 26, 2004, at C2 (noting that the EC trade commissioner "balked" at the transitioning provisions).

<sup>641</sup> See Meller, *supra* note 640 ("The legislation allows the United States to give \$4 billion, or 80 percent of the amount distributed under the [FSC] program, to American companies [in 2005]. In 2006 this will fall to \$3 billion, or 60 percent.").

<sup>642</sup> See *id.* (discussing the transitioning stipulations in the U.S. legislation).

<sup>643</sup> Request for the Establishment of a Panel by the European Communities, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/29 (Jan. 14, 2005).

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

<sup>646</sup> See *supra* Section 2.3.2.4 for a discussion of the *Continued Suspension* case and how it serves to extend the *Hormones* litigation.



pute, the fight was over how panels are supposed to determine what compliance means under Article 21.5.

Before the *FSC 21.5 II* panel, the United States defended its inclusion of the transition provisions in the JOBS Act in two ways. First, it argued that the Article 21.5 compliance report on the ETI Act had not contained a new recommendation under Article 4.7 of the SCM Agreement (to withdraw the Act<sup>647</sup>) and thus the United States has not failed to comply. The panel rejected this defense, first pointing out that nothing in the text of Article 21.5—the mandate of the earlier compliance panel—contains a requirement that the panel make such a recommendation.<sup>648</sup> According to the panel, its interpretation was bolstered by the purpose of Article 21, to provide for the “[s]urveillance of recommendations and rulings.”<sup>649</sup> Article 21.5 compliance reviews come after the DSB has made the recommendations and rulings in a case.<sup>650</sup> Adopting the U.S. position would require a panel to “tell a Member to remove a situation of WTO-inconsistency that it has already been told to remove”<sup>651</sup> and give the non-implementing Member an additional time period to bring itself into conformity.<sup>652</sup> Handling the Article 21.5 process in such a way would actually risk undermining the DSB “by revisiting an issue already addressed and definitively resolved by the DSB.”<sup>653</sup> The panel thus rejected the U.S. argument as one that would undermine the effective operation of the DSU. Such an interpretation would encourage a cycle of non-implementing Members continuing “to adopt non-compliant measures in order to win more time to comply with adopted DSB recommendations and rulings.”<sup>654</sup>

Consequently, the panel found that the recommendations and rulings that the United States is obligated to satisfy are those from the original proceeding regarding the FSC statute that the WTO inconsistency caused by not fully withdrawing the prohibited subsi-

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<sup>647</sup> Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations,”* ¶ 7.11, 7.37–.39, WT/DS108/RW2 (Sept. 30, 2005) [hereinafter Art. 21.5 II Panel].

<sup>648</sup> *Id.* ¶¶ 7.40–.41.

<sup>649</sup> *Id.* ¶ 7.42.

<sup>650</sup> *Id.* ¶ 7.43.

<sup>651</sup> *Id.*

<sup>652</sup> *Id.* ¶ 7.44.

<sup>653</sup> *Id.* ¶ 7.45.

<sup>654</sup> *Id.* ¶ 7.46.

dies.<sup>655</sup> Seen in this light, the U.S. obligation to withdraw the ETI subsidies came from the original DSB recommendation regarding Article 4.7 of the SCM Agreement and the 2002 21.5 reports.<sup>656</sup> There was no need for a 21.5 panel to make a new recommendation.<sup>657</sup>

The United States did not argue about the nature of the JOBS Act transition provisions and whether they extended the subsidies. Accordingly, the panel found that the transition provisions in the JOBS Act allowed the underlying violations, primarily the violations regarding export subsidies, found in the earlier Article 21.5 proceedings to persist.<sup>658</sup> The panel found indefinite grandfathering of the FSC subsidies for certain transactions would also occur due to the JOBS Act.<sup>659</sup> The panel argued that continuing subsidies in both of the transition provisions was not consistent with the U.S. obligation to withdraw the prohibited subsidies.<sup>660</sup> No defense was available for the government's failure, regardless of the contractual arrangements private parties (those companies benefiting from and relying upon the subsidies) might have made.<sup>661</sup> By enacting these transition measures, the United States failed to fulfill its WTO obligations.<sup>662</sup>

In its appeal of the 21.5 II panel report,<sup>663</sup> the United States made two main arguments. The first argument reiterated that there had never been a recommendation of the DSB under Article 4.7 of the SCM Agreement (requiring withdrawal of the subsidy) with respect to the FSC 21.5 proceedings about the ETI Act.<sup>664</sup> As a result, the panel had "erroneously transformed the original DSB recommendation under Article 4.7 . . . into a general obligation to withdraw any future prohibited subsidies."<sup>665</sup> The 21.5 II Appellate Body panel characterized this basis for appeal as raising the

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<sup>655</sup> *Id.* ¶ 7.49.

<sup>656</sup> *Id.* ¶ 7.53.

<sup>657</sup> *Id.* ¶ 7.55.

<sup>658</sup> *Id.* ¶ 7.60.

<sup>659</sup> *Id.* ¶ 7.61.

<sup>660</sup> *Id.* ¶ 7.62.

<sup>661</sup> *Id.* ¶ 7.63.

<sup>662</sup> *Id.* ¶ 7.64.

<sup>663</sup> Appellate Body Report, Second Recourse to Article 21.5 by the European Communities, *United States—Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/RW2 (Feb. 13, 2006) [hereinafter Art. 21.5 II AB Report].

<sup>664</sup> *Id.* ¶¶ 20–21.

<sup>665</sup> *Id.* ¶ 76.

question of whether a recommendation made in original DSU proceedings remains in effect until the Member State has fully complied with recommendations and rulings in the original and subsequent compliance proceedings.<sup>666</sup> After reviewing the language of Article 4.7, the panel concluded that recommendations under its terms (that a subsidy be withdrawn “without delay” and that it be done within a specified time) remain in effect until the Member State has fully withdrawn the prohibited subsidy.<sup>667</sup> According to this logic, U.S. compliance—replacement of a prohibited export subsidy with a statute containing a transition period allowing the subsidy to continue for a certain time period—is not complete.<sup>668</sup> The obligation to comply with the remedy for the violation and withdraw the subsidy remains “even if several proceedings under Article 21.5 become necessary.”<sup>669</sup> The 21.5 II Appellate Body panel adopted the panel’s finding that allowing the U.S. argument to prevail would have the effect of extending the time for a Member State to comply and “lead to a potentially ‘never ending cycle’ of dispute settlement proceedings and inordinate delays in the implementation of recommendations and rulings of the DSB.”<sup>670</sup>

In reviewing the U.S. history of responses to the DSB rulings in this dispute, the 21.5 II Appellate Body panel concluded that the United States (1) failed to implement all of the DSB recommendations and rulings, (2) did not meet its obligation to withdraw fully the prohibited subsidies, and (3) continues to be under an obligation to do so.<sup>671</sup> This conclusion clearly left the United States with no option other than eliminating the transition provisions in the JOBS Act.

The other main argument in the U.S. appeal was that the panel had misinterpreted the function of an Article 21.5 panel.<sup>672</sup> Wholly apart from the issue of actual compliance, the U.S. appeal here represents an attempt to get a final ruling on how Article 21.5 panels are supposed to operate. Given the difficult compliance history of the United States in impossible cases, seeking such an answer makes sense for future U.S. litigation. The United States contended

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<sup>666</sup> *Id.* ¶ 80.

<sup>667</sup> *Id.* ¶¶ 81–83.

<sup>668</sup> *Id.* ¶ 83.

<sup>669</sup> *Id.* ¶ 84.

<sup>670</sup> *Id.* ¶ 86 (citation omitted).

<sup>671</sup> *Id.* ¶ 87.

<sup>672</sup> *Id.* ¶ 90.

that an Article 21.5 panel is not required (as suggested by the 21.5 II panel) to "fix the problem" of non-compliance. Such an interpretation would allow a panel to ignore the text of Articles 4.7 and 21.5.<sup>673</sup> The Appellate Body panel first examined the functions of an Article 21.5 panel. An Article 21.5 panel is supposed to determine whether a Member State's measures taken to comply actually implement the DSB's recommendations and rulings.<sup>674</sup> In order to do so, a 21.5 panel may examine whether a compliance measure exists or, if one does, whether it is consistent with GATT/WTO agreements, or both in situations where there has been only partial compliance.<sup>675</sup> Conducting such a review requires a 21.5 panel to examine all DSB recommendations and all measures covered by them.<sup>676</sup>

With regard to this case, the 21.5 II Appellate Body panel examined the panel's reasoning regarding its mandate and concluded that while the panel "could have used language more precise than 'fixing the problem,'" the panel had not only adequately described its task but also acted within its authority.<sup>677</sup> What the 21.5 II panel did was "examine[] whether the United States had removed fully the subsidies found in the original and first Article 21.5 proceedings to be prohibited as required by the recommendations and rulings adopted by the DSB."<sup>678</sup> The 21.5 II Appellate Body panel thus found that by enacting the JOBS Act transition provisions the United States had maintained prohibited export subsidies and consequently had not fully implemented the DSB recommendations.<sup>679</sup>

The United States had no option but to abandon the transition provisions of the JOBS Act, since failure to do so would subject it to the quick reinstatement of the DSB-authorized suspension of concessions by the EC.<sup>680</sup> The EC made a point of noting that Boeing,

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<sup>673</sup> *Id.*

<sup>674</sup> *Id.* ¶ 93.

<sup>675</sup> *Id.*

<sup>676</sup> *Id.*

<sup>677</sup> *Id.* ¶ 95.

<sup>678</sup> *Id.*

<sup>679</sup> *Id.* ¶ 96.

<sup>680</sup> See Press Release, European Union, WTO Condemns US Tax Subsidies: EU Calls on US to End Illegal Tax Breaks for Boeing, Others (Feb. 13, 2006) ("On 31 January 2005 the EU Council adopted a regulation suspending sanctions . . . . That 2005 Council Regulation provides for the reintroduction of customs duties at a 14% level 60 days following a final WTO ruling that the Jobs Act is WTO incompatible.") (citation omitted).

the main target of another trade dispute between the United States and EC, was the major beneficiary of the now invalidated transition provisions of the JOBS Act.<sup>681</sup> The EC had also made allegations regarding the FSC subsidies in its arguments in the *Airbus/Boeing* dispute.<sup>682</sup> On May 17, 2006 President Bush signed into law the Tax Increase Prevention and Reconciliation Act of 2005,<sup>683</sup> which contains a provision repealing the transition periods. The passage of the legislation on the eve of the EC plans to reintroduce sanctions led the EC to drop that plan.<sup>684</sup>

### 2.3.7. Section 301

#### 2.3.7.1. Background

The *Section 301* dispute, WT/DS/152, was the culmination of a long struggle over the embodiment of United States unilateralism.<sup>685</sup> The EC had been in the forefront of the attack on the powerful U.S. trade statute before and during the Uruguay Round ne-

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<sup>681</sup> See Edward Alden et al., *EU Threatens Sanctions over U.S. Tax Breaks WTO RULING*, FIN. TIMES, Feb. 14, 2006, at 6 (quoting EU trade commissioner Peter Mandelson as saying “[t]he US now has three months to act to avoid the reimposition of retaliatory measures . . . The EU will not accept a system of tax benefits which give US exporters, including Boeing, an unfair advantage.”); see also Paul Meller, *World Trade Group Rules Tax Benefits by U.S. Illegal*, N.Y. TIMES, Feb. 14, 2006, at C6 (“European trade officials argue that Boeing is the single biggest beneficiary under the American Jobs Creation Act. If nothing is done to repeal the law, Boeing will benefit from \$615 million over the next 10 years, according to the European Commission.”).

<sup>682</sup> See *EU Seeks Negotiated Solution on FSC but Warns of Retaliation*, 24 INSIDE U.S. TRADE (Feb. 24, 2006) (“In its case against the U.S., the EU has charged Boeing receives illegal subsidies through the FSC provisions.”); Raphael Minder & Frances Williams, *EU’s FSC Warning*, FIN. TIMES, March 15, 2006, at 11 (“The FSC issue has also become entangled in the separate EU-US over aircraft subsidies because Boeing is among the main beneficiaries of the FSC scheme.”).

<sup>683</sup> Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 513, 120 Stat. 345 (2006).

<sup>684</sup> Rory Watson, *Repeal Heals US-EU Rift*, LONDON TIMES, May 13, 2006, at 54 (“[T]he European Commission confirmed that it would now shelve the sanctions which it was preparing to introduce against US exports . . .”).

<sup>685</sup> See Joseph Kahn, *U.S. Wins Round in Trade War with Europe*, N.Y. TIMES, Dec. 23, 1999, at C2 (“During trade battles with Japan in the 1980s and early 1990s, for example, the United States used the law to retaliate against what it called Japan’s predatory trade practices, prompting Japan to complain that Washington was taking international trade rules into its own hands.”).

gotiations.<sup>686</sup> The EC position, supported by most other GATT Contracting Parties, was that there had to be a ban in the new WTO dispute settlement system on unilateral trade actions taken to address trade grievances.<sup>687</sup> Section 301 of the Trade Act of 1974<sup>688</sup> was designed to allow the President to investigate and, if necessary, take retaliatory action against U.S. trading partners who engaged in "unjustifiable" (actions that are illegal under international law or international agreements) or "unreasonable" (actions which nullified or impaired benefits under a trade agreement or which discriminated against or burdened U.S. commerce)<sup>689</sup> practices. The legislative history of the statute made it clear that the United States wanted to rely on its power rather than on the GATT<sup>690</sup> to get countries to comply with GATT objections. Given the size of the United States' market, U.S. threats to use sanctions to limit access were credible. Moreover, the United States had used Section 301 to investigate trade barriers and has employed sanctions many times when responses to its threats were regarded as inadequate.<sup>691</sup>

Section 301 was modified by Congress in 1979, 1984, 1988,<sup>692</sup> 1994<sup>693</sup> and 2000.<sup>694</sup> The revised version of the statute<sup>695</sup> was challenged in the *Section 301* dispute. The 1988 revisions passed during the Uruguay Round negotiations for a new dispute system, however, were crucial because Congress created two new forms of Sec-

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<sup>686</sup> Croome, *supra* note 256, at 126-27, 225; *see also* THE GATT URUGUAY, *supra* note 34, at 2762.

<sup>687</sup> Croome, *supra* note 256, at 126-27.

<sup>688</sup> Trade Act of 1974, Pub. L. No. 93-618, §§ 301-302, 88 Stat. 1978, 2041-43 (1975).

<sup>689</sup> *See id.* § 301(a)(1) (providing procedures for initiating a Section 301 investigation); S. REP. NO. 93-1298, at 3-4 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7186, 7301 (explaining the terms "unjustifiable" and "unreasonable").

<sup>690</sup> *See id.* at 7304 ("[T]he President ought to be able to act or threaten to act under section 301, whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade.").

<sup>691</sup> *See generally* Taylor, *supra* note 34, at 222-42.

<sup>692</sup> Trade Agreement Act of 1979, Pub. L. No. 96-39, §§ 301-304, 93 Stat. 144-317 (1979); Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304, 98 Stat. 2948, 3002 (1989); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1301-1304, 102 Stat. 1107, 1107-1574 (1988).

<sup>693</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314, 108 Stat. 4809 (1994).

<sup>694</sup> Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (2000).

<sup>695</sup> 19 U.S.C. §§ 2411-2420 (2000).

tion 301<sup>696</sup> and clearly delineated the types of actions the United States would take: (1) “mandatory” cases where the United States would take action against a country found to have violated Section 301, and (2) “discretionary” cases (those against unreasonable practices where retaliation was discretionary).<sup>697</sup> With regard to the mandatory category of cases, the United States was to take action against violations of an international agreement unless there was a settlement or a GATT dispute settlement panel ruled against the United States.<sup>698</sup> The 1988 revisions actually strengthened the unilateral power of the United States. In the time period following these revisions and leading up to the completion of the Uruguay Round, the United States increased the number of Section 301 investigations, the number of threats, and the number of times it brought sanctions against target countries.<sup>699</sup> The U.S. basis for the heavy use of the statute were to push for increased compliance with GATT rules and to get other countries to agree that new areas, particularly intellectual property rights and trade in services, should be part of the agenda of the Uruguay Round negotiations.<sup>700</sup> This use of unilateralism proved successful with regard to both of these goals. There were negotiations and ultimately agreements coming from the Uruguay Round on intellectual property rights (TRIPs) and trade in services (GATS). Section 301 was also employed to impose sanctions after the losers in several GATT cases against the United States blocked the panel reports.<sup>701</sup> These sanctions were justified by the United States in those instances as self-help made necessary because of the flaws in the GATT dispute

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<sup>696</sup> See 102 Stat. 1107, *supra* note 692, at 1164–81. The new provisions were entitled “Special 301” and “Super 301.” Under Special 301, the USTR was required to initiate investigations of countries that offered inadequate intellectual property rights protection. Under Super 301, the USTR was required to identify trading partners with the most significant barriers to U.S. goods. See Taylor, *supra* note 34, at 228–42 (discussing the U.S. use of Special 301 and Super 301).

<sup>697</sup> 102 Stat. 1107, *supra* note 692, at 1164–79.

<sup>698</sup> *Id.*

<sup>699</sup> See Taylor, *supra* note 34, at 221–25 (discussing the frequency with which the United States brought Section 301 cases, and the attendant changes in U.S. trade goals).

<sup>700</sup> See *id.* at 224 (noting that the shift in the use of the statute reflected the United States’ increasing concern over “areas of U.S. trade advantage left completely outside the GATT”).

<sup>701</sup> See *id.* at 222–28 (describing U.S. retaliatory action taken to deal with “problems reaching its goals because of the limitations of the GATT dispute settlement system”).

settlement system.<sup>702</sup> Other GATT Contracting Parties began to adopt the U.S. position that there needed to be major reform to the GATT dispute settlement system.<sup>703</sup> In large part, however, they were motivated not only by the desire to obtain a rules-based adjudicative system, but also to obtain one that provided multilateral responses to trade violations. In other words, most of the negotiating countries wanted to rein in the United States.<sup>704</sup> Those countries also agreed that negotiations on trade-related intellectual property rights and trade in services were preferable to experiencing the threat or reality of the U.S. unilateral trade statute.<sup>705</sup>

The 1994 revisions were made to bring Section 301 into compliance with U.S. Uruguay Round obligations. According to those revisions, all Section 301 cases initiated and pursued by the United States Trade Representative (USTR) regarding an international (GATT/WTO) violation had to be taken through the entire WTO/DSU process.<sup>706</sup> The discretionary category of cases, those involving unreasonable practices, was left alone. The United States did not believe it was required to alter its unilateral power regarding such matters because there was no correction to GATT/WTO disputes.<sup>707</sup>

The Uruguay Round negotiations produced the DSU, which was designed to correct the flaws of the GATT dispute system. The United States prevailed on its push for a system designed to "establish right and wrong: to deliver a legal judgment with which

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<sup>702</sup> See *id.* at 222 ("One of the reasons the United States considered itself justified in using unilateral economic power to coerce 'appropriate' trade behavior from other countries was because the multilateral system was not addressing its concerns."). See also Croome, *supra* note 256, at 125 ("Justified or not, the much-criticized 'Section 301' powers given by law to the President of the United States to take trade action against unfair behaviour by other countries were partly inspired by the American desire to provide enforcement powers missing from the GATT system.").

<sup>703</sup> See *id.* at 125-29 (discussing the various proposals put forth by participants in dispute settlement negotiations for procedural improvements or fundamental change).

<sup>704</sup> See *id.* at 127 ("Reform of the GATT dispute settlement procedures . . . must include an explicit ban on any country taking unilateral action to redress what it judged to be the trade wrongs of others.").

<sup>705</sup> See Taylor, *supra* note 34, at 234-35 ("[T]he developing countries ultimately accepted a U.S.-style TRIPs Agreement as a method for limiting Section 301 threats and sanctions.").

<sup>706</sup> Uruguay Round Agreements Act, *supra* note 693, § 314(c).

<sup>707</sup> See Statement of Administrative Action, *supra* note 591, at 1018, 1034-35.



the losing party ought obviously to comply.”<sup>708</sup> The DSU, however, was not completed without inclusion of a provision, Article 23, entitled “Strengthening the Multilateral System.” Article 23 clearly mandates that all determinations made and actions taken in response to trade violations are to be taken through the DSU system.<sup>709</sup> The provision was pushed by the EC and many other countries in order to restrain the use of Section 301.<sup>710</sup> During the negotiations, the United States was able, however, to fight off another EC proposal that all countries be required to bring their domestic legislation into compliance with Article 23.<sup>711</sup> The United States was thus allowed to retain Section 301, but with the understanding that its provisions would have to be applied in keeping with Article 23.<sup>712</sup>

### 2.3.7.2. *The Section 301 Dispute*

The EC requested consultations on Section 301 in November 1998.<sup>713</sup> The legislation was a strategic response to actions taken by the United States in its first case against the EC. The EC filed its action one month after the United States used Section 301 with regard to the *Bananas III* dispute.<sup>714</sup> The United States had invoked Section 301’s retaliation powers while seeking authorization from the DSB to suspend concessions due to the EC’s failure to implement.<sup>715</sup> The EC argued that Section 306 was inconsistent with Ar-

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<sup>708</sup> Croome, *supra* note 256, at 125.

<sup>709</sup> DSU art. 23.

<sup>710</sup> See Croome, *supra* note 256, at 126–27 (describing the proposed reform as a “highly controversial demand . . . aimed squarely at the United States and its Section 301 powers”).

<sup>711</sup> See *id.* at 127 (discussing how the initial set of improvements to be put forth at the Uruguay Round were limited to mostly procedural issues).

<sup>712</sup> See Statement of Administrative Action, *supra* note 591, at 1018–19, 1034–35.

<sup>713</sup> Request for Consultations by the European Communities, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/1 (Nov. 30, 1998) [hereinafter Consultation Notice].

<sup>714</sup> See Guy de Jonquie’res, *U.S. May Face Trade War With EU Over Beef and Bananas*, FIN. TIMES, Oct. 15, 1998, at 16 (quoting an EU official at the time declaring that “[i]t is not for the US to lay down the law. There are formal WTO procedures for dealing with this kind of issue.”).

<sup>715</sup> See Implementation of WTO Recommendations Concerning the European Communities’ Regime for the Importation, Sale and Distribution of Bananas, 63 Fed. Reg. 56,687–89 (Oct. 22, 1998) (concluding that “certain acts, policies and practices of the EC violate, or otherwise deny benefits to which the United States is entitled under, GATT 1994 and the GATS.”). See also Seung Wha Chang, *Taming*

ticles 3, 21, 22 and 23 of the DSU, Article XVI(4) of the WTO Agreement and Articles I, II, III, VIII and XI of the GATT.<sup>716</sup> When consultations failed, the EC requested a panel.<sup>717</sup> Sixteen other countries, among them major trading partners like Japan and Canada, joined as third parties to the dispute, clearly indicating intense interest by WTO Member States about the United States' use of Section 301.<sup>718</sup>

The panel issued a report in December 1999 that was not appealed. This result seemed surprising given the litigation history of the parties and the strong positions asserted before the panel. The EC argued that the United States, in adopting, maintaining and applying Section 301, had undercut the deal of the Uruguay Round. In exchange for the DSB adoption of panel and AB reports, and the authorization of the suspension of concessions, the United States was supposed to abandon its "long standing policy of unilateral action."<sup>719</sup> The United States countered that the EC had "brought a political case that is in search of a legal argument."<sup>720</sup>

The panel was well aware of the daunting task it faced. It began with a "Panel's Mandate" stating that "[t]he political sensitivity of this case is self-evident."<sup>721</sup> The panel also went on to note that the United States itself volunteered that Section 301 is "an unpopular piece of legislation" and that all of the third parties that had provided opinions held "highly critical views of this legislation."<sup>722</sup>

It is important to note at the outset that the EC's framing of the case and the U.S. defense of it led to a certain type of legal analysis by the panel. The EC did not attack the United States' use of Sec-

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*Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974*, 31 LAW & POL'Y INT'L BUS. 1151 (2000) (discussing extensively U.S. use of Section 301 and the Section 301 panel decision).

<sup>716</sup> Consultation Notice, *supra* note 713.

<sup>717</sup> Request for Establishment of a Panel by the European Communities, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/11 (Feb. 2, 1999).

<sup>718</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, ¶ 1.6, WT/DS152/R (Dec. 22, 1999) [hereinafter Section 301 Panel Report].

<sup>719</sup> *Id.* ¶ 7.2.

<sup>720</sup> *Id.* ¶ 7.9.

<sup>721</sup> *Id.* ¶ 7.11.

<sup>722</sup> *Id.*; *id.* n.630.

tion 301 in a particular trade action.<sup>723</sup> Rather, the EC argued that portions of the statute on its face violated Article 23. The United States, in turn, argued that the Section 301 provisions were discretionary in the sense that they allowed the United States to act consistently with its WTO obligations in each case.<sup>724</sup>

The three portions of the statute under attack were Section 304, Section 305 and Section 306. Each of the provisions has strict time frames for the USTR to take certain steps regarding GATT/WTO-violative actions of other governments. The provisions also rest on the idea that the United States will pursue each of these cases through the DSU system. Section 304 requires the USTR to make a determination about whether U.S. rights are being denied on or before the earlier of (1) thirty days after the conclusion of dispute settlement, or (2) eighteen months after the initiation of a Section 301 investigation.<sup>725</sup> If the USTR finds that U.S. rights are being denied, it must determine what action it will take under the statute, including the suspension of concessions or the imposition of import duties or other restrictions.<sup>726</sup> If the DSB issues a ruling favorable to the United States and the losing country implements its recommendations within a reasonable time, the USTR can determine that U.S. rights are denied but that "satisfactory" measures are being taken that justify going no further with Section 301.<sup>727</sup> Section 306 requires the USTR to monitor the implementation of measures taken by the losing government to comply. If on the basis of that review, the USTR "considers" that the other government is not complying, it is required to make a determination (as provided for in Section 304) for what further action to take. Section 305 requires the USTR to implement the action it considers necessary no later than "30 days after the date on which such determination is made."<sup>728</sup> Section 305 allows a delay of this timing require-

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<sup>723</sup> The EC did have a view that the United States' use of Section 301 in *Bananas III* was illegal but the issue was an open one at the time. The panel noted in its introductory section on its mandate that, "We are not asked to make an overall assessment of the compatibility of Sections 301-310 with the WTO agreements . . . . We are, in particular, not called upon to examine the WTO compatibility of US actions taken in individual cases in which Sections 301-310 have been applied." *Id.* ¶ 7.13.

<sup>724</sup> *Id.* ¶ 7.9.

<sup>725</sup> *Id.* ¶ 2.15.

<sup>726</sup> *Id.*

<sup>727</sup> *Id.* ¶ 2.16.

<sup>728</sup> *Id.* ¶ 2.19.

ment if the USTR determines "that substantial progress is being made, or that a delay is necessary or desirable to obtain U.S. rights or satisfactory solution with respect to the acts, policies or practices that are the subject of the action."<sup>729</sup>

Before undertaking a review of the EC arguments about each of these provisions, the panel stated that Section 301 is a piece of "complex economic and regulatory legislation" and that it had to be aware of the "multi-layered character of the national law under consideration which includes statutory language as well as other institutional and administrative elements."<sup>730</sup> This declaration proved to be the most important one of the case. It meant that the panel was going to examine not just the text of Section 301, but also statements that the United States had made about its intentions regarding the statute. Nevertheless, the panel did begin by examining the actual language of the Section 304 time frames and contrasting them with what happens in the DSU process. Section 304 with its eighteen month time frame was found to be mandatory, leaving no discretion for the Executive Branch to do anything but take action since DSU proceedings take longer than this time frame.<sup>731</sup> Section 304, therefore, gives the USTR the right to "make a unilateral determination of inconsistency even prior to the exhaustion of DSU proceedings."<sup>732</sup>

The United States defended the statute as a discretionary one under the established GATT doctrine that only mandatory laws can be violative.<sup>733</sup> The EC counter was that certain discretionary measures could violate GATT obligations.<sup>734</sup> The panel refused to use this distinction about the nature of government statutes<sup>735</sup> as the basis for determining the case. Instead, the panel decided the case by taking a textual approach stating that whether Section 304 violated Article 23 depended on the "precise obligations contained in Article 23."<sup>736</sup> Article 23 has two types of obligations that a

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<sup>729</sup> *Id.* ¶ 2.20.

<sup>730</sup> *Id.* ¶¶ 7.25–.26.

<sup>731</sup> *Id.* ¶¶ 7.31–.32.

<sup>732</sup> *Id.* ¶ 7.33.

<sup>733</sup> *Id.* ¶ 7.51.

<sup>734</sup> *Id.* ¶ 7.52.

<sup>735</sup> See Yoshiko Naiki, *The Mandatory/Discretionary Distinction in WTO Law: The US—Section 301 Case and its Aftermath*, 7 J. INT'L ECON. L. 23, 53 (2004) (concluding that the panel was not trying to reinterpret the GATT doctrine, but instead was carving out an exception for this case).

<sup>736</sup> Section 301 Panel Report, *supra* note 718, ¶ 7.53.

Member State must assume: those with regard to case specific actions and those about pursuing DSU proceedings to the exclusion of unilateral actions. In addition, the panel examined Section 304 in light of the object and purpose of Article 23.<sup>737</sup> In performing both functions, the panel found that the provision violates the text of Article 23, which prohibits unilateral action. The fact that Section 304 provides discretion to the USTR not to act condemns, rather than saves, the provision.<sup>738</sup> The panel also noted that a government's obligation to act in good faith also limits a Member's power to adopt national laws that threaten prohibited conduct.<sup>739</sup> Finally, the panel concluded that the legislation itself, wholly apart from its use in a particular case, could produce a "chilling effect" and thus damage other Member States and the market itself.<sup>740</sup> Given the role of Article 23 in the DSU—as a central element of providing confidence in the DSU System—Section 304 on its face precludes compliance with Article 23.<sup>741</sup>

The examination of the statute, however, did not end there. The panel also looked at the non-statutory elements—the institutional and administrative elements—of the statute.<sup>742</sup> After an examination of how the United States actually implemented Section 304, the panel found that the United States had lawfully removed the prima facie violation of Section 304.<sup>743</sup> At issue was the United States' promise in the Statement of Administrative Action ("SAA") that accompanied the United States' implementing legislation for the Uruguay Round. The SAA promise was that the United States would render determinations under Section 304 in conformity with U.S. obligations under the WTO.<sup>744</sup> The Panel found this curtailment of discretion to be lawful and effective because it represented the view of the President and the Congress that adopted it, and it contained a commitment for future U.S. administrations.<sup>745</sup> In addition, credence was accorded to the representations made by the United States before the panel itself in which it "explicitly, repeat-

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<sup>737</sup> *Id.* ¶¶ 7.59–.61.

<sup>738</sup> *Id.*

<sup>739</sup> *Id.* ¶ 7.68.

<sup>740</sup> *Id.* ¶¶ 7.67–.68.

<sup>741</sup> *Id.* ¶¶ 7.93–.96.

<sup>742</sup> *Id.* ¶ 7.98.

<sup>743</sup> *Id.* ¶ 7.104.

<sup>744</sup> *Id.* ¶ 7.109.

<sup>745</sup> *Id.* ¶ 7.111.

edly and unconditionally confirmed" its commitment to base a Section 304 determination only on a DSB-adopted finding.<sup>746</sup> Although it was making this determination based on unilateral statements, the panel was willing to do so with the understanding that they represented the "unambiguous and official position of the . . . [United States] that the discretion of the USTR has been limited so as to prevent a determination of inconsistency [with Article 23]." <sup>747</sup> The SAA promise was found to constitute an undertaking at an international level concerning how the United States had implemented Article 23.<sup>748</sup> Consequently, the USTR was precluded from making a determination of WTO inconsistency contrary to Article 23.<sup>749</sup> If the United States were to repudiate or remove the promise, the United States would be in violation of its Article 23 obligations.<sup>750</sup>

The panel then went on to examine the EC argument that Section 306 violated Article 23. The argument here was that Section 306 directs the USTR to make a determination of whether another Member State has failed to adequately implement a DSB ruling in a shorter time frame (thirty days after the expiration of the reasonable period to comply) than the DSU procedures under Article 21.5.<sup>751</sup> The United States argued that the statute actually relates to the time frame regarding the right to suspend concessions under Article 22.<sup>752</sup> The panel faced a problem because the United States and EC already had conflicting views on the timing of actions regarding the issues of adequate compliance (under Article 21.5) and when a Member State can seek sanctions (under Article 22). Rather than resolve this issue, the panel looked at Section 306 based on each party's interpretation. When viewed under the U.S. interpretation, Section 306 was consistent with Article 23.<sup>753</sup> However, when viewed under the EC view, there was a *prima facie* violation of Article 23 that was removed by the U.S. undertakings in the

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<sup>746</sup> *Id.* ¶¶ 7.115–.116.

<sup>747</sup> *Id.* ¶ 7.125.

<sup>748</sup> *Id.*

<sup>749</sup> *Id.* ¶ 7.126.

<sup>750</sup> *Id.*

<sup>751</sup> *Id.* ¶ 7.144.

<sup>752</sup> See *supra* Section 2.3.2.3 (discussing the "sequencing" controversy between the EC and the United States).

<sup>753</sup> Section 301 Panel Report, *supra* note 718, ¶¶ 7.159–.163.

SAA.<sup>754</sup> The panel refused to judge the U.S. action in *Bananas III* as a violation since it was based on a U.S. interpretation of how to interpret the interrelationship or sequencing between Articles 21.5 and 22.<sup>755</sup> Ultimately, this meant that Section 306 was found to be consistent with Article 23 and subject to the same limitations noted by the panel with regard to Section 304.<sup>756</sup>

The final EC attack on the statute involved the Section 305 requirement that the USTR determine within thirty days after expiration of the reasonable period what further action to take and then implement that action within sixty days.<sup>757</sup> Examining this argument also required the panel to look at it from the competing views of each party regarding how Articles 21.5 and 22 operated. When this was done, the statute was again found consistent with Article 23 under the U.S. view and inconsistent under the EC interpretation. As with the other provisions of Section 301, however, the panel found this inconsistency curtailed by the U.S. undertakings in the SAA and before the panel.<sup>758</sup> After looking at all of the elements of Section 305, the panel concluded that the USTR was “precluded from exercising his or her discretion under Section 305 in a way that results in implementation of action before DSB authorization [to suspend concessions] has been obtained.”<sup>759</sup>

The *Section 301* dispute, therefore, ended with a panel decision that allowed the United States to keep its statute. The dispute also ended with a decision foreclosing any future use of Section 301 in a way that would contradict the U.S. commitments in the SAA and in the DSU proceedings relied upon by the panel. The panel repeatedly noted that any future alteration in the U.S. view and use of its statute would expose the country to a violation argument.

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<sup>754</sup> *Id.* ¶¶ 7.164–.167.

<sup>755</sup> *Id.* ¶ 7.168.

<sup>756</sup> *Id.* ¶ 7.169.

<sup>757</sup> *Id.* ¶ 7.171.

<sup>758</sup> *Id.* ¶ 7.179.

<sup>759</sup> *Id.* ¶ 7.184.

### 2.3.8. GMOs

#### 2.3.8.1. Background

The GMOs dispute arose out of a disagreement, primarily waged between the EC and the United States,<sup>760</sup> over how to regulate products produced by, or consisting of, genetically modified organisms. The dispute reenacts the same pattern of regulatory divergence that occurred in *Hormones*,<sup>761</sup> with the United States having no trouble with food products that deeply concern the EC.<sup>762</sup> The United States has generally approved of the use of biotechnology to produce food goods and crops. Consequently, the United States does not require special procedures for the approval or marketing of genetically modified ("GM") products.<sup>763</sup> By contrast, since 1990, the EC has adopted, struggled with, and reconsidered several legislative approaches to the regulation of such products.<sup>764</sup> In addition, the EC, acting through the Commission and

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<sup>760</sup> See Request for Consultations by the United States, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/1 (May 20, 2003) [hereinafter U.S. Request]. The other complainants to the dispute are Canada and Argentina, both of whom filed separate complaints. See Request for Consultations by Canada, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS292/1 (May 20, 2003) [hereinafter Canadian Request]; Request for Consultations by Argentina, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS293/1 (May 21, 2003) [hereinafter Argentinean Request]. In addition, fifteen other countries have been participating in all three cases as third parties: Brazil, Chile, China, Chinese, Taipei, Colombia, El Salvador, Honduras, Mexico, New Zealand, Norway, Paraguay, Peru, Thailand, and Uruguay.

<sup>761</sup> See *supra* Section 2.3.2.1 (discussing this regulatory divergence in the *Hormones* dispute).

<sup>762</sup> See Petersmann, *supra* note 90, at 254 ("[T]he EC's labeling requirements are motivated by environmental and consumer concerns about GMOs . . ."); Serina Vandegrift & Christine Gould, *Issues Surrounding the International Regulation of Adventitious Presence and Biotechnology*, 44 JURIMETRICS J. 81, 89 (2003) (discussing the differing views of the United States and the EU).

<sup>763</sup> See Mark A. Pollack, *The Political Economy of Transatlantic Trade Disputes*, in TRANSATLANTIC ECONOMIC DISPUTES, *supra* note 163, at 65, 77 (pointing out that in the early 1990s the FDA decided "that genetically modified foods were not substantially different from conventional foods, and therefore required no special procedures for approval or marketing").

<sup>764</sup> See Sara Poli, *The Overhaul of the European Legislation on GMOs, Genetically Modified Food and Feed: Mission Accomplished. What Now?*, 11 MAASTRICHT J. EUR. & COMP. L. 13 (2004) (examining the reform of European Legislation on GMOs); Joanne Scott, *European Regulation of GMOs and the WTO*, 9 COLUM. J. EUR. L. 213 (2003) (discussing the background to the GMOs dispute and the EC review and



Council, does not have sole control over the regulatory issue.<sup>765</sup> The EC Member States have powers that they have used to limit severely the introduction of GM products into the EC.<sup>766</sup> The end result was an EC regulatory process that negatively affected the trade interests of the United States and other major GM producer countries such as Canada and Argentina<sup>767</sup> by not allowing them access to the EC market. As a result, all three countries filed for consultations<sup>768</sup> and ultimately invoked their right to a panel in *GMOs*.<sup>769</sup>

Despite the regulatory divergence similarity with *Hormones*, this case differs from the earlier case in several ways that might suggest the beginning of an even more prolonged dispute. Given the novel nature of the technology, the *GMOs* case lacks the long history that preceded the *Hormones* dispute.<sup>770</sup> The first use and then greater adoption of biotechnology to produce food crops did not begin until the mid-1990s.<sup>771</sup> Once the United States had approved of GM soybeans, however, it not only focused on domestic

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revision of its legislative approach in light of the controversy over introducing GM products into the EC).

<sup>765</sup> See Pollack, *supra* note 763, at 75 (stating that food safety regulatory power being held by the EC nations as well as the EU's political bodies produced a "patchwork regulatory process" that was deficient).

<sup>766</sup> See Poli, *supra* note 764, at 15–18 (discussing how pressure from the Member States can cause the Council of the European Union to act against use of *GMOs*).

<sup>767</sup> The United States, Canada and Argentina are among the major producers of GM products. See John Charles Kunich, *Mother Frankenstein, Doctor Nature, and the Environmental Law of Genetic Engineering*, 74 S. CAL. L. REV. 807, 812–13 (2001) (citing statistics of Canadian GM production); Henrique Freire de Oliveira Souza, *Genetically Modified Plants: A Need for International Regulation*, 6 ANN. SURV. INT'L & COMP. L. 129, 141 (2000) (citing statistics of Argentina's GM production).

<sup>768</sup> See U.S. Request, *supra* note 760; Canadian Request, *supra* note 760; Argentinean Request, *supra* note 760. The three requests for consultations are based on the same claims of SPS violations. They vary based on the products each country argued was being negatively affected by the EC's lack of action on GM product approvals and EC Member State bans.

<sup>769</sup> See U.S. Request, *supra* note 760 (complaining that since 1998, "the EC has applied a moratorium on the approval of biotech products," and in addition, that EC Member States were maintaining "national marketing and import bans on biotech products even though those products have already been approved by the EC for import and marketing in the EC"). The Canadian and Argentinean requests complain about the same practices.

<sup>770</sup> See *supra* Section 2.3.2.1 (discussing the history of *Hormones*).

<sup>771</sup> See Kunich, *supra* note 767, at 812 (discussing the emergence of transgenic crops); Poli, *supra* note 764, at 15–17 (discussing the emergence of the commercial GM industry and the resultant increase in production).

production but also sought the right to export into the EC. The United States procured regulatory approval through an EC Commission decision in 1996.<sup>772</sup> The EC decision to allow market access provoked opposition by European retailers and wholesalers.<sup>773</sup> Growing public opposition in the EC Member States at around the same time clearly indicated that several states were quite worried about the use of biotechnology.<sup>774</sup> When another GM product (maize) was approved at the EC level even after various national authorities raised concerns about potential health and environmental problems, it was clear that obvious dissatisfaction existed with the EC regulatory scheme.<sup>775</sup> The EC process at the time required review of any GM product by scientific advisory commissions. Despite this requirement and use of this process, several Member States—Austria, Italy and Luxembourg—enacted safeguard measures (bans) under Article 16 of the existing regulatory measure, Directive 90/220.<sup>776</sup> The EC scientific advisory committees later reviewed these bans and found them unjustified since there was no new scientific evidence.<sup>777</sup> Nevertheless, the Member States left their bans in place. Moreover, many states<sup>778</sup> announced at a 1999 meeting of the Council of Environmental Ministers that they would block any new authorizations of GM products until Directive 90/220/EEC was revised to deal with the issues of labeling and traceability.<sup>779</sup> This led to a suspension of the EC authorization

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<sup>772</sup> David Winickoff et al., *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 YALE J. INT'L L. 81, 87–88 (2005).

<sup>773</sup> See *id.* (noting that European retailers and wholesalers (EuroCommerce and EuroCoop) immediately protested the EC approval of the first GM product (GM soybeans) and any GM product; these retailers and wholesalers also called for labeling and segregation rules for GM products).

<sup>774</sup> See George Gaskell et al., *Worlds Apart? Public Opinion in Europe and the USA*, in BIOTECHNOLOGY: THE MAKING OF A GLOBAL CONTROVERSY 351 (Martin W. Bauer & George Gaskell eds., 2002) (noting widespread EC citizen disapproval of GM products).

<sup>775</sup> See Poli, *supra* note 764, at 15–17, 17 n.19 (noting that, during the time of the BSE Crisis, there was actually widespread concern over whether the EC had the proper approach to food safety).

<sup>776</sup> Council Directive 90/220/EEC, art. 16, 1990 O.J. (L 116) (EC).

<sup>777</sup> Poli, *supra* note 764, at 16 n.11.

<sup>778</sup> See Winickoff et al., *supra* note 772, at 88 (identifying France, Denmark, Greece, Italy, and Luxembourg as countries that took the hard line against new authorizations). Austria, Belgium, Finland, Germany, the Netherlands, Spain, and Sweden also said that they would adopt precautionary approach on the issue. *Id.*

<sup>779</sup> Press Release, Council of Environmental Ministers, Declarations Regarding the Proposal to Amend Directive 90/220/EEC on Genetically Modified Or-

procedure and ultimately to a moratorium on GM product approvals.<sup>780</sup> The de facto moratorium and the Member State safeguards formed the basis for the U.S., Canadian, and Argentine complaints about violations of the SPS Agreement.<sup>781</sup>

Unlike the Hormones dispute, the dispute over EC (and Member State) actions regarding GM product approvals developed after the United States and EC adopted the SPS Agreement and its discipline regarding food safety regulation. The SPS Agreement requires that government actions and measures regulating food products be based on scientific evidence and risk assessments, respectively. Once the United States, Canada and Argentina were convinced that the EC had, by means of a de facto moratorium, stopped the approval process for GM products,<sup>782</sup> negotiations to end the ban became inevitable. Where necessary, the negotiations would be followed by a WTO case<sup>783</sup> to determine whether the EC actions were appropriate.

The context for the GMOs dispute – pursuit of the EC and various Member States for not following their own regulatory procedures – suggests that this could merely be the first of several WTO cases on biotechnology products and their regulation. The questions about how a country should regulate GM products in such

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ganisms, U.N. DOC. C/99/203 (June 24–25, 1999), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/99/203&language=en>.

<sup>780</sup> See Poli, *supra* note 764, at 15 (explaining that the suspension was the result of the “rising of a consensus amongst the Member states . . .” and followed a controversial approval of GM maize); Winickoff et al., *supra* note 772, at 88 (indicating concern amongst a number of EU member states about the potential harmful effects of GM crops as an impetus for a de facto moratorium on new approvals of GMOs and a new GMO authorization process).

<sup>781</sup> See U.S. Request, *supra* note 760, at 1 (alleging that the approvals moratorium and national marketing and import bans have restricted imports of agricultural and food products from the United States).

<sup>782</sup> See Justin Gillis & Paul Blustein, *WTO Ruling Backs Biotech Crops*, WASH. POST, Feb. 8, 2006, at D1 (noting that EC consumer and retailer opposition to GM products led to an absence of GM products in the EC market); U.S. Request, *supra* note 760, at 1 (“Since October 1998, the EC has applied a moratorium on the approval of biotech products. The EC has suspended consideration of applications for, or granting of, approval of biotech products under the EC approval system.”); see also Elizabeth Becker, *U.S. Contests Europe’s Ban on Some Food*, N.Y. TIMES, May 14, 2003, at C1 (reporting that the EU had an informal moratorium on new varieties of GM food from 1998 to 2002, before implementing a new regulatory system).

<sup>783</sup> See Pollack, *supra* note 763, at 77 (explaining that the United States and EC had begun consultations over biotechnology issues, creating the EU-U.S. Biotechnology Forum and the Biotech Working Group under the Transatlantic Economic Partnership).

ways as to gain their benefits while limiting human health or environmental problems are just now being discussed. Consequently, the responses of the EC citizenry and its government have thus far been reactive. Countries with a different interpretation of the relative risks and benefits are bound to respond to the trade effects caused by the EC's limiting access to its market. The United States, Canada, and Argentina currently produce and export a high proportion of GM products,<sup>784</sup> almost all of which are still shut out of the EC market.<sup>785</sup> From these countries' perspective a satisfactory resolution of the case would require a smoothly functioning approvals process that would allow each product to be assessed based on scientific information. Moreover, any steps taken by the EC regarding the regulation of GM products has a major impact on other countries. Those still considering their own GM-regulation policies, as well as their ability to trade worldwide, have been and may continue to be impacted by the EC.<sup>786</sup> The GMOs dispute deals only with the de facto moratorium, which has since been lifted,<sup>787</sup> and the Member State safeguards that went into place in 1998. Since 1998, the EC has revised its regulatory framework to include a new review agency—the European Food Safety Authority.<sup>788</sup> The EC has also articulated its commitment to the use of the precautionary principle in regulating future approvals under its new Directive 2001/18/EC and its implementing regulation.<sup>789</sup> EC action on GM products in the future could therefore spark disputes

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<sup>784</sup> See Marc L. Busch & Robert Howse, *A (Genetically Modified) Food Fight: Canada's WTO Challenge to Europe's Ban on GM Products*, 186 C.D. HOWE INSTITUTE COMMENTARY 3 (2003), available at [http://www.cdhowe.org/pdf/commentary\\_186.pdf](http://www.cdhowe.org/pdf/commentary_186.pdf).

<sup>785</sup> See Paul Geitner & Andrew Pollack, *A Line in the Sand Over WTO's Modified-Food Ruling*, INT'L HERALD TRIB., Feb. 9, 2006, at A1 (noting that applications filed in the 1990s have still not been approved and that recent approvals since the ban was lifted have been solely for imports).

<sup>786</sup> See *id.* (noting the U.S. belief that the WTO ruling would discourage others from adopting similar barriers and from adopting biotechnology).

<sup>787</sup> See *id.* (reporting that the current EC position is that the moratorium has been lifted and that they have recently begun approving GM products).

<sup>788</sup> See Council Regulation 178/2002, 2002 O.J. (L 31) 5 (EC) ("The establishment of a European Food Safety Authority . . . should reinforce the present system of scientific and technical support which is no longer able to respond to increasing demands on it.").

<sup>789</sup> Council Directive 2001/18/EC, 2001 O.J. (L 106/1) 1. For subsequent EU regulations on GM food and feed, and on traceability and labeling of GM products, see Council Regulation 1829/2003, 2003 O.J. (L 268) 1 (EC) [hereinafter Regulation 1829] and Council Regulation 1830/2003, 2003 O.J. (L 268) 24 (EC).

about whether the new legislation or its application complies with SPS requirements. Such a later dispute might actually produce yet another impossible case—one challenging the new EC regulatory framework. It is possible this second generation case would provide a clearer picture of the limits actually placed on a WTO Member State's ability to provide the highest possible standard of protection under the terms of the SPS Agreement.

### 2.3.8.2. *The GMOs Dispute*

The three complainants in the dispute all set forth some variation on the same claims:<sup>790</sup> (1) that there was suspension of the EC approval system, (2) that there existed numerous product-specific moratoria,<sup>791</sup> and (3) that measures enacted by some EC Member States prohibited the importation and marketing of certain biotechnology products. The major legal arguments against the general and product-specific moratoria alleged by the United States were that the moratoria were SPS measures that (1) violated the procedural requirements of the SPS Agreement, which requires that any procedure be “undertaken and completed without undue delay”<sup>792</sup> and notified,<sup>793</sup> (2) constituted a SPS measure put in place without a risk assessment and thus in violation of Article 5.1,<sup>794</sup>

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<sup>790</sup> See U.S. Request, *supra* note 760, at 1–2 (alleging the suspension of the EC approval system, the EC's failure to consider applications for approval, and national marketing and import bans maintained by member States as measures inconsistent with the SPS Agreement and GATT); see also Canadian Request, *supra* note 760 (alleging that (1) due to measures taken by EC Member States, since 1998, “the EC has maintained a de facto moratorium on the approval of GM products,” (2) this keeps GM products from accessing or proceeding through the EC's approval process and (3) some Member States, including Austria, France, Greece, and Italy “have prohibited” the importation and marketing of GM products despite those products having been approved by the EC for importation and marketing.); Argentine Request, *supra* note 760 (alleging that there had been (1) de facto measures leading to the suspension/non-consideration of various applicators, (2) undue delay in finalizing consideration of various applications, and (3) specific prohibitions introduced by the Member States of the EC).

<sup>791</sup> See U.S. Request, *supra* note 760, Annexes IA & IB (listing oilseed rape, Monsanto beet, and cotton amongst the GM products subject to specific moratoria); Argentine Request, *supra* note 760, Annex I (listing various GM versions of maize and cotton for which applications have been pending or rejected).

<sup>792</sup> SPS Agreement, *supra* note 68, art. 8, Annex C(1)(a).

<sup>793</sup> *Id.* art. 7 & art. 8, Annex C(1)(b).

<sup>794</sup> *Id.* art. 5.1. The argument goes on to state that a measure put in place without a risk assessment therefore fails to satisfy the Article 2 SPS obligation that an SPS measure must have a basis in science. *Id.* art. 2.2. See U.S. First Submission, ¶¶ 109–11.

and (3) discriminated in establishing EC levels of SPS protection in violation of Article 5.5.<sup>795</sup> In regards to the EC Member State safeguards measures identified, the major legal claim charged that the SPS measures were not based on a risk assessment and thereby violated Article 5.1.<sup>796</sup>

The EC's first defense was that it had never adopted a general moratorium,<sup>797</sup> that the complaints were really about delay and omissions<sup>798</sup> and that if there was any pattern of activity regarding individual applications it was not covered by the SPS Agreement.<sup>799</sup> The EC also argued that the SPS was not designed to cover the issues raised by genetically modified organisms.<sup>800</sup> With regard to the product specific moratoria, the EC said that many of the claims were moot (because approval applications had been withdrawn or abandoned),<sup>801</sup> and that the only relevant SPS discipline related to these specific approvals was Article 8.<sup>802</sup> Finally, the Member State safeguard measures were identified as falling

<sup>795</sup> SPS Agreement, *supra* note 68, art. 5.5. "[A]void arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade." *Id.* art. 5.5. The United States also argued that this violation of Article 5.5 constituted a violation of Article 2.3. See U.S. Request, *supra* note 760, ¶ 129.

<sup>796</sup> See U.S. Request, *supra* note 760, at ¶¶ 167-73. Canada's arguments encompassed not only the U.S. violations, but also violations of the TBT Agreement. See Communication from Canada to European Commission, First Written Submission of Canada, *Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-93 (Apr. 21, 2004) ¶¶ 473-507 (alleging that none of the five EC Member State national measures meet the legitimacy threshold requirement of "credible evidence of a risk to the fulfillment of that objective") [hereinafter First Submission of Canada].

<sup>797</sup> See First Written Submission by the European Communities, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 371-73, WT/DS291-93 (May 17, 2004), [hereinafter EC First Submission] ("As set forth in the factual part, the European Communities has not adopted any 'moratorium' on the approval of GMOs and nor has it suspended the application of its GMO legislation.").

<sup>798</sup> See *id.* ¶¶ 373-76 ("The Complainants' assertions about a 'moratorium', or a 'suspension of procedures' or any 'failure to consider applications' are all in reality complaints about delay . . . . Such obligations are 'procedural' in character, and they concern the timely functioning of a defined process.").

<sup>799</sup> *Id.* ¶¶ 541-43, 566-67 (reasoning that any patterns of stalling individual applications are not challengeable under the WTO Agreement on the grounds that such measures are neither formally nor informally specified in a document).

<sup>800</sup> *Id.* ¶¶ 384-411.

<sup>801</sup> *Id.* ¶ 462.

<sup>802</sup> *Id.* ¶ 469.

within the SPS Article 5.7 provision on the precautionary principle, and thus were not required to satisfy SPS Article 5.1.<sup>803</sup>

The three complaints by the United States, Canada, and Argentina were considered by one panel.<sup>804</sup> The panel issued an interim report in February 2006 that was meant to be released only to the parties to the dispute.<sup>805</sup> Given the great interest in the case, the interim report was leaked and put on several websites. A review of the panel report section on the interim report reveals exactly why it should be confidential. All of the parties asked the panel to make changes in almost every part of the report and the panel did make significant changes.<sup>806</sup>

The GMOs panel report is over 1000 pages long and covers every argument raised by the three complainants, the EC, and third parties.<sup>807</sup> The length of the report and the lengthy period taken to issue it (over three years from the establishment of the panel) can be attributed to three factors. First, the complainants and the EC disagreed over the crucial factual issues of whether any moratoria existed and whether the moratoria were “measures” within the meaning of the SPS Agreement. Second, there were twenty-seven product moratoria and nine safeguard measures under attack and each one had to be analyzed for all legal claims. Third, the parties had major disagreements over the scientific issues (particularly going to the issue of the use of the precautionary principle under Article 5.7 of the SPS Agreement) raised by the dispute.

As a factual matter the GMOs panel found that from October 1998 to August 2003, the Member States and the EC had the ability and opportunity to prevent or delay the approval of GM product applications.<sup>808</sup> The key event triggering the existence of a general

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<sup>803</sup> *Id.* ¶¶ 572–610.

<sup>804</sup> Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-293/R (Sept. 29, 2006) at ¶¶ 7.14–.19 [hereinafter GMOs Panel Report].

<sup>805</sup> According to the DSU, the interim reports go to the parties so that they can ask the panel to “review precise aspects of the interim report prior to circulation of the final report to the Members.” DSU art. 15.2.

<sup>806</sup> GMOs Panel Report, *supra* note 804, ¶¶ 6.9–.194.

<sup>807</sup> The first six sections of the report cover all of the arguments made in written and oral form by the parties and third parties, and a discussion of the interim report. Starting with Section 7, the report then goes on to deal with all of the factual and legal claims raised by the parties.

<sup>808</sup> GMOs Panel Report, *supra* note 804, ¶ 7.1271(a).

moratorium was the position taken by five Member States in June 1999 that they would block further applications until the EC passed new legislation.<sup>809</sup> The panel thus sided with the complainants finding that there was a de facto general moratorium that operated from June 1999 to August 2003.<sup>810</sup> However, while the panel found that the general moratorium was a challengeable measure (one that could be the subject of a WTO dispute settlement proceeding) it also determined that it was not (like the EC approval legislation itself) an SPS measure.<sup>811</sup> The basis for these determinations was that the moratorium operated as a “procedural decision to delay final substantive approval decisions.”<sup>812</sup> Since the moratorium was a decision “concerning the application, or operation, of the EC approval procedures,”<sup>813</sup> it did not satisfy all of the elements for a measure under Article 5 or Article 2.<sup>814</sup>

With regard to the major legal claim about procedural defaults under the SPS Agreement, the panel reached a different conclusion. The Panel found that the major obligation in Article 8 is that a WTO Member State observe the provision of Annex C which requires that “procedures are undertaken and completed without undue delay.”<sup>815</sup> Since the EC approval regulations had such procedures, it was obligated to complete them without undue delay. According to the panel, any evaluation of whether this requirement was met had to be done on a case-by-case basis.<sup>816</sup> A WTO Member is obligated, therefore, to act as promptly as possible in following its procedures while taking into account its need to ensure the fulfillment of its SPS requirement.<sup>817</sup> The panel found that the EC lacked any justification for the delays in this case<sup>818</sup> and looked at its approval process for one product (as opposed to all twenty-seven named in the complaints) in order to determine whether there was a breach of Article 8 (and its Annex).<sup>819</sup> The

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<sup>809</sup> *Id.* ¶ 7.1271(b).

<sup>810</sup> *Id.* ¶ 7.1271(f).

<sup>811</sup> *Id.* ¶¶ 7.1288–.95.

<sup>812</sup> *Id.* ¶ 7.1379.

<sup>813</sup> *Id.* ¶ 7.1386.

<sup>814</sup> *Id.* ¶¶ 7.1395–.1421 (Article 5), ¶¶ 7.1440–.1448 (Article 2).

<sup>815</sup> *Id.* ¶ 7.1468.

<sup>816</sup> *Id.* ¶ 7.1497.

<sup>817</sup> *Id.* ¶ 7.1498.

<sup>818</sup> *Id.* ¶ 7.1532.

<sup>819</sup> *Id.* ¶¶ 7.1541–.1546.



panel found that the two year failure to complete the approval process for oilseed rape could be attributed to the moratorium and led to “undue delay” within the meaning of Article 8.<sup>820</sup>

The other SPS claim raised by Argentina was that the EC had failed in its obligation under Article 10.1 to take into account the special needs of developing country Members.<sup>821</sup> Considering all of Argentina’s arguments the panel concluded that Argentina failed to meet the burden of proof on this issue and thus rejected this claim.<sup>822</sup>

With regard to the product-specific moratoria, the panel examined the applications for final EC approval for twenty-seven products, the panel found undue delay in completion of the approval procedure respect of twenty-four of the twenty-seven products, and thus a violation of Article 8 and Annex C(1)(a).<sup>823</sup> The final set of claims to the nine safeguard measures imposed by Argentina, Belgium, France, Germany, Italy, and Luxembourg.<sup>824</sup> The complainants had argued that the safeguards were SPS measures and were inconsistent with the obligations in Article 5.1 (that the measures be based on a risk assessment) and Article 2.2 (based on scientific principles). The panel agreed, finding them to be “SPS measures”<sup>825</sup> that were not based on a risk assessment as required under Article 5.1.<sup>826</sup>

The panel also rejected the EC argument that the Safeguard measures could be justified under Article 5.7. The panel did accept the EC argument that Article 5.7 was a conditional right rather than an exception from the general obligation under Article 2.<sup>827</sup> Similarly, the panel found that Article 5.7 “operates as a qualified exemption” from the Article 5.1 obligation to base SPS measures on a risk assessment.<sup>828</sup> The panel, however, found that these safeguards could not be justified as provisional measures under Article 5.7. In the case of each of the GM products concerned, the EC’s relevant scientific committee had already evaluated the potential

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<sup>820</sup> *Id.* ¶ 7.1569.

<sup>821</sup> *Id.* ¶ 7.1605

<sup>822</sup> *Id.* ¶¶ 7.1625–.1627

<sup>823</sup> *Id.* ¶ 8.7.

<sup>824</sup> *Id.* ¶ 8.8.

<sup>825</sup> *Id.* ¶¶ 7.2923–.2924.

<sup>826</sup> *Id.* ¶¶ 7.3056–.3213.

<sup>827</sup> *Id.* ¶ 7.2973–.2977.

<sup>828</sup> *Id.* ¶ 7.2997.

risks before granting EC approval. Later, each scientific committee had also reviewed the evidence submitted by each Member State to justify its safeguard and found no reason to alter its earlier approval.<sup>829</sup> The EC-level review demonstrated that there was sufficient scientific evidence available to permit a risk assessment. Consequently, the Member States could not invoke Article 5.7, which allows a country to take action only "in cases where relevant scientific evidence is sufficient."<sup>830</sup> By maintaining the safeguards in violation of Articles 5.1 and 5.7 the Member States also acted inconsistently with their Article 2 obligations.<sup>831</sup>

The GMOs panel made three separate recommendations given its findings. First, with regard to the general de facto moratorium, the panel recommended in the case of the United States and Canada<sup>832</sup> that the EC bring it into conformity with its obligations under the SPS Agreement "if and to the extent that, that measure has not already closed to exist."<sup>833</sup> This marks a change from the interim report in which the panel found that the general moratorium had ceased and therefore made no recommendation. The United States and Canada had objected to that earlier finding, arguing that since most of the applications pending in August 2003 were still in the EC approvals process, there was a "very real possibility that a general moratorium could subsequently be reintroduced."<sup>834</sup> The panel accepted these concerns and noted that given the informal de facto nature of the moratorium it could be "reimposed just as soon as it can be ended."<sup>835</sup> The panel ultimately decided to avoid the problem of making recommendations about measures that no longer exist by making the qualified recommendation noted above.<sup>836</sup>

The recommendation provides guidance for future conduct of the EC in this area. Under its new procedure for GM approvals, the EC will be unable to engage in a similar suspension or shut down of all product approvals in order to satisfy its health/safety

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<sup>829</sup> *Id.* ¶ 8.9.

<sup>830</sup> SPS Agreement art. 5(7).

<sup>831</sup> GMOs Panel Report, *supra* note 804, ¶¶ 7.3996–.3998.

<sup>832</sup> Argentina did not raise this issue and the panel did not offer a recommendation on the general de facto moratorium in their case.

<sup>833</sup> GMOs Panel Report, *supra* note 804, ¶¶ 8.19, 8.36.

<sup>834</sup> *Id.* ¶ 7.1310.

<sup>835</sup> *Id.* ¶ 7.1311.

<sup>836</sup> *Id.* ¶ 7.1317.

concerns.<sup>837</sup> With regard to the product-specific moratoria, the EC was recommended that it bring its measures into conformity as well.<sup>838</sup> As a practical matter, this means that the EC is now under an obligation to process each application in a timely fashion (avoiding “undue delays”) in order to avoid further WTO scrutiny. The final panel recommendation for all three cases was that the EC deal with the Member State safeguard measures by bringing them into conformity.<sup>839</sup> What this means is that the EC Member States will have to withdraw each safeguard. No ban supported by a risk assessment will be allowed to stand. In order to leave the safeguard in place, the Member State would have to provide an assessment showing the risk to be higher than that existing under the current EC reports.

### 2.3.8.3. Implementation and Surveillance Phase

The EC decided not to appeal the panel report. The EC considers the general moratorium to be over and has pointed out that the EC approvals process is currently reviewing and approving some applications for GM products.<sup>840</sup> Meanwhile it will receive a reasonable period of time to comply with the other panel recommendations. From the perspective of the complainants the issue of compliance will remain open and they will be watching to see whether the safeguard measures are lifted and whether the GM products already in the pipeline and any new applications receive timely review. Given the history of United States-EC trade disputes, there will be at the very least a request for a compliance review under Article 21.5 should these steps not be taken. Beyond this likelihood, there is also every reason to believe that the GMOs case is the first, but not the last, WTO dispute on this issue. The EC’s new approvals process and its regulations on traceability and labeling of biotech products will come under close scrutiny, if not attack.

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<sup>837</sup> Scott, *supra* note 764, at 218 (contending that the EC experience with the de facto moratorium led the EC to revise its legislation in such a way as to clarify “the obligations of the various actors in the authorization process, in particular whether or not these actors have an obligation to act”).

<sup>838</sup> See GMOs Panel Report, *supra* note 804, ¶ 8.20.

<sup>839</sup> *Id.* ¶¶ 8.32, 8.48, 8.64.

<sup>840</sup> *Final GMO Panel Limits Application of MEAs in the Future WTO Disputes*, INSIDE U.S. TRADE (Oct. 13, 2006) (stating that, according to an EC spokesman, ten GM applications have been approved since the GMOs panel was established in 2003 and thirty more are currently being examined).

### 3. CONCLUSION: WHAT DOES IT MEAN?

After examining these cases, two conclusions emerge. First, impossible cases tend to arise for the same reasons. Second, impossible cases are resolved, or fail to be resolved, for very dissimilar reasons having to do not only with the choices made by the disputing parties, but also with the contribution of the WTO panels and AB panels.

Impossible cases arise because they involve powerful states with politically sensitive problems, symbolic issues, or a perceived sovereign concern. The impossible cases also tend to involve large trade volumes (or lost market access), past history, and one, if not several, politically empowered domestic groups. Given the nature of the cases, the regulatory powers under attack, and the internal politics at work, it is unsurprising that the defending party will begin by fighting for, rather than relinquishing, its measure. Inevitably, the cases also tend to be strategically useful for scoring against another major power.

What leads the impossible cases to be resolved or to resist resolution appears to be a combination of how the panel/AB panel decides (or might decide) the case, and the internal difficulties posed by compliance. Half of the impossible cases were actually resolved without protracted litigation. In other words, although they had the makings of a legal failure, the parties and the panel/AB Panel managed to avoid that result. The *Helms-Burton* dispute was kept out of the system and settled as a political rather than a trade matter. As a result, a chance to interpret Article XXI was foregone, but the DSU system avoided an early attack on its legitimacy. In the *Film* case, the complainant lost on factual rather than legal grounds and wisely resisted the impulse to appeal. The losing party in *Shrimp/Turtle* (in a decision noted for the leeway it provided to governments) was found justified in using its power. Consequently the United States only faced having to alter how it applied the environmental measure. The *Section 301* Panel crafted a political interpretation and solution (finding the sin but constraining the chance to sin further) that allowed both parties to claim victory without appeals.

By contrast, three of the other impossible cases, *Bananas III*, *Hormones*, and *FSC*, illustrate what happens when the parties fight over not only the underlying trade issues but what the dispute settlement system itself can deliver. In each case the continued fight was prompted by decisions of the AB Panel that left the winning

party determined to reap the expected benefit—the withdrawal of the offending measure. The decisions, however, also left the losing party believing itself compelled to exhaust the DSU process to avoid the adverse result. In *Bananas III*, the major parties settled the dispute only after failed attempts at implementation and the use of sanctions. Even this negotiated and politically brokered solution left other complainants dissatisfied with, and therefore looking to change, the results. The *Hormones* dispute resulted in the AB Panel giving a realistic reading to a new agreement but posing an inevitable compliance problem for the losing party. The EC had already provided a distrustful public with the maximum protection available and was loath to back down from its position. The dispute culminated in a complete breakdown between the parties over what constitutes compliance both before and after the use of sanctions. It is fair to say that the *Hormones* dispute has never been resolved. Instead, the parties entered into a “second generation” dispute—a DSU dispute created by an earlier DSU litigation. While the *Continued Suspension* dispute could resolve the important procedural issue at stake, it may still pose yet another compliance problem for the EC (if the EC loses) or the basis for a third dispute filed by the United States (if the United States loses). Finally, the *FSC* dispute illustrates how a country anxious to keep its law will use every litigation option offered by the DSU to avoid withdrawing the law for as long as possible. The *FSC* dispute ended only when the United States repealed the last GATT violation posed by its second attempt to comply with the original AB decision.

The different litigation histories and outcomes prove that the WTO’s DSU system is different from the GATT’s system. The more adjudicative system continues to produce impossible cases but offers ways to resolve them that range from acceptance to political settlement to extended and even new litigation. While the United States and EC may be the major disputants, there is another active and influential player—the panels and AB panels. Having negotiated and accepted a dispute settlement system in which the decisions are final adjudications on the law, the parties feel constrained to fight within that system. The United States/EC trade wars have turned into litigation battles.

What does all of this mean for the creators of impossible cases and for the WTO’s DSU system? For the disputing parties several lessons present themselves. Studying the impossible cases as a phenomenon has a predictive value. If one can see how impossible cases arise, the United States and EC can negotiate solutions or de-

fer immediate or strategic action and consider which disputes will be fruitful. Similarly, the ability to predict which disputes will entail political difficulty or overly costly compliance should inspire the complainant to plan for and expect prolonged litigation. In a dispute system that relies on bilateral enforcement, the winning party must either continue to press for complete compliance or accept a settlement. If an active defense still leads to defeat, the losing party should be planning a compliance strategy that allows for testing of all legal issues without abusing every procedural gap.

As for what these cases mean for the WTO and the DSU system, again several lessons surface. Given the scope of GATT/WTO law and the regulatory power at stake, there will always be impossible cases. There is a problem of less compliance by the major states and the reality of differential compliance: the major powers are in a position to refuse to comply while the smaller/less powerful cannot. No doubt the problems created by the truly impossible cases erode the legitimacy of the system. However, it is not clear that there is an easy fix, such as the often-argued-for reform of the DSU remedies. All of the impossible cases, even the unlitigated *Helms-Burton* dispute, were useful in revealing the limits of the DSU system. In each dispute the major parties used their extensive resources and expertise to pursue disputes that resulted in valuable legal interpretations of the relevant GATT/WTO agreement and/or uncovered major defects and design flaws in the DSU procedures. Whether these issues and design flaws would have been revealed as early, or canvassed as thoroughly, in the absence of the major parties is unclear. The answer for the evil of sustained non-compliance may lie in reforming that portion of the DSU that is the weakest—the implementation and surveillance phase. The impossible cases have revealed that some alterations to the DSU, such as changing the recommendation power of panels, solving the sequencing problem, and defining how to proceed after sanctions, are necessary. Another prescription would be to increase the multilateral oversight and comment by the DSB on cases where the losing party has announced its intention to comply. The major powers will continue, in some truly impossible cases, to litigate and resist. The WTO would benefit the most from anticipating this reality and limiting the options of the powerful while simultaneously

encouraging or shaming them into being good complainants and defendants.<sup>841</sup>

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<sup>841</sup> *Three Year Overview*, *supra* note 4, at 14–15. It seems only fitting to offer the final word to Professor Hudec, who argued that the best ways to counter outbreaks of noncompliant behavior are to (1) keep the disputed matter in the DSB agenda, (2) be patient and keep the matter there, even if for a long time, and (3) fashion “accommodations that produce a result” that would be “consistent with long-term respect for GATT/WTO law.” *Id.* at 15.