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Article

*763 THE NATURE OF REMEDIES IN INTERNATIONAL TRADE LAW

Sungjoon Cho [FNa1]

Introduction

On August 30, 2002, the World Trade Organization (WTO) [FN1] authorized the European Communities (EC) to suspend its tariff concessions and other obligations toward the United States to the extent of U.S. $4 billion for the latter's failure to comply with the Appellate Body's decision that the United States had violated the WTO rules, in particular, the WTO Subsidy Code [FN2] by providing the prohibited subsidies to foreign sales corporations (FSCs) in the form of tax breaks (the FSC Article 22.6 Report). [FN3] The sheer scale of the EC's suspension in response to the U.S. violation is unprecedented, far surpassing the suspensions authorized in two previous cases that invoked the WTO enforcement mechanism, Banana III [FN4] and Hormones. [FN5] [FN6] At first glance, this dramatic finale for such a high-profile case might be welcomed as an impressive revelation of the real achievement of the WTO system equipped with teeth, unlike its predecessor the old GATT. [FN7] No member, even the powerful United States, can simply walk away from the legal consequences of its violations, now being forced to pay the price. The victim of those violations, which is the EC in this case, would be vindicated and satisfied by ***765** this bounty or remedy. In sum, justice and the rule of law in the field of international trade would now seem to be upheld. Indeed, it will not be surprising if such decisions by the Appellate Body encourage activists of all kinds to attempt to link various issues to WTO sanctions "[l]ike the bright light that attracts insects on a warm night . . . ." [FN8]

On second thought, however, this instance of sanctions, retaliation or economic vengeance appears to be a source of problems, rather than a solution. Despite the popular acceptance that sanctions are an icon of the new WTO system, sanctions are just an aspect of the law of the WTO, [FN9] not its representative or symbolic manifestation. Overemphasizing this particular aspect of the WTO law, which is partly attributable to an effort to placate the U.S. Congress into the ratification of the Uruguay Round, [FN10] tends to create a misguided, distorted image of the WTO, one close to a super body reigning and commandeering over its member countries, rather than one akin to a legal community. Critically, in terms of remedies, a domestic analogy based on corrective justice or vengeance cannot but retain serious limitations in the international dimension in which a variety of interests are entangled in a complex way. These limitations seem to be more palpable when considering to whom the above-mentioned remedies are directed. Do they serve the general interests of the victim, i.e., the EC itself in the above-mentioned FSC Article 22.6 Report? Or, more narrowly, do they serve the well-being of certain groups of people within the EC who actually lobbied the EC to champion their grievances before the WTO panel? Do these different vectors of interests always converge? This series of questions tends to raise a more fundamental query on the raison d'etre of the WTO system, namely for what purpose the WTO exists.

Against this backdrop, this paper questions the conventional belief regarding the efficacy of the WTO sanctions in light of remedies and attempts to reconceptualize the true nature of WTO remedies. Part I examines how the concept of remedies has evolved through the history of the old GATT 1947 and the new WTO system. It demonstrates that the private law (contracts) ***766** nature of remedies embedded in the early GATT practices has been transformed to public law nature in the subsequent jurisprudence as well as the new WTO system. Part II surveys the various functions and modalities of the current WTO system, such as cessation, compensation,

restitution and sanctions, and argues that a remedial hierarchy exists among them, with cessation being prioritized. Part III then discusses the limitations of WTO remedies: first, the perils and paradoxes of sanctions, i.e., eventual manifestation of developmental disparity, mercantilist regression and wrong cases; second, the welfare loss and distributive injustice. Based on these problems raised, Part IV finally attempts to reconceptualize the nature of WTO remedies, focusing on "norm-building" as a communal remedy and also exploring the possibility of a "connection" between WTO remedies and domestic remedies.

I. The Concept of Remedies Under the GATT/WTO System

1-1. Prototype

The remedial prototype under GATT 1947 Article XXIII is deeply associated with the origin and nature of GATT 1947 itself. GATT 1947, patterned after the inter-war U.S. bilateral trade agreements, was mainly a reciprocal tariff reduction mechanism. [FN11] Therefore, this pact among "contracting parties" purported to cherish and preserve the delicate balance of tariff concessions by means of legal obligations such as Articles II and III for tariff binding and national treatment, respectively. [FN12] In this regard, violations of these legal obligations were considered serious not because they were violations but because a subtle balance of tariff concessions would be destroyed. This destruction of balance, for instance through an introduction of new trade barriers, was in turn deemed to nullify or impair the benefits of certain contracting parties whose exports unexpectedly declined due to these barriers. Therefore, the original format of remedies under GATT 1947 was ***767** intended to "restore" the delicate balance of interests that contracting parties had labored to establish through a series of tariff reduction negotiations. [FN13]

Mirroring this strong reciprocal foundation of GATT 1947, Article XXIII provided the requirement of "nullification or impairment of benefits," which is close to the concept of injury in the law of contracts. [FN14] In early years, panels spent as much interpretive energy on this element as they did on the determination of consistency of the questioned measure with the GATT law. For instance, in 1958, the United Kingdom sued Italy before the GATT 1947 panel, complaining that an Italian statute (Law No. 949) providing special credit facilities only to purchasers of domestically produced tractors violated the GATT and "impaired the benefits which should accrue to the United Kingdom under the Agreement" by decreasing the imports of UK tractors. [FN15] The panel bifurcated its reasoning in parts III and IV entitled: "Alleged inconsistency of the effects of the provisions of the Italian Law with the provisions of paragraph 4 of Article III" and "Alleged nullification or impairment of benefits accruing to the United Kingdom under the General Agreement." [FN16] After implying that the Italian measures violated Article III (National Treatment) of the GATT, the panel turned to a lengthy, detailed interpretation as to "whether the operation of Law No. 949 had caused injury to United Kingdom commercial interests, and whether such an injury represented an impairment of the benefits accruing to the United Kingdom under the General Agreement." [FN17] Finally, the panel recommended that Italy should eliminate the "adverse effects" that the operation of Law No. 949 had brought to the UK. [FN18]

In addition, the contractual nature of GATT 1947 attached a great importance to the original expectations of the contracting parties regarding the value of tariffs on specific products. Accordingly, the framers of GATT 1947 were circumspect enough to provide unusual remedies for situations in which ***768** those expectations were somehow later denied even without any violation of the WTO rules, i.e., "non-violation" claims. [FN19] For example, in 1950, a GATT working party examined whether Australia had failed to comply with GATT by suddenly removing sodium nitrate from the pool of nitrogenous fertilizers that it had subsidized. [FN20] The working party concluded that such removal, although not violating GATT, did nullify or impair the benefits accruing to Chile under tariff concessions granted by Australia to Chile on sodium nitrate in 1947, because Chile could have "reason to assume" that the subsidy on sodium nitrate would remain effective. [FN21] Likewise, in Sardines, the panel found that the Nor-

wegian government could have reasonably assumed during tariff negotiations that preparations of the type of clupeoid in which they were interested would be no less favorably treated than other preparations of the same family. [FN22] The panel then ruled that the subsequent German modification of this situation "substantially reduced the value of the concessions obtained by Norway" and that Norway therefore "suffered an impairment of a benefit accruing to it under the General Agreement." [FN23]

However, the above-mentioned concept of remedies under GATT 1947 should be distinguished from a more secular use of "trade remedies" in the domestic context. To deal with the so-called "unfair" trade practices such as anti-dumping and subsidies by other trading partners, most GATT 1947 contracting parties retained domestic statutes, i.e., anti-dumping or anti-subsidies law, which could remedy unfair foreign practices through imposing anti-dumping or countervailing duties. [FN24] GATT Article VI also legalized these trade remedy laws subject to certain requirements. [FN25] Subsequently, Tokyo Round Codes and the WTO side agreements further elaborated various procedural requirements for invoking these domestic trade remedy laws. [FN26] ***769** While the remedies in the context of GATT 1947 through the concept of nullification or impairment under Article XXIII were to protect the benefits of the contracting parties in general, these trade remedies in the form of additional tariffs often served to protect the vested interests of certain industries in the territory of the contracting parties. [FN27] Yet, when these trade remedies were misused or abused, failing to meet certain requirements established in GATT Article VI and other Codes, the contracting parties could invoke Article XXIII to re-remedy these violations.

1-2. Evolution

The evolution and success of the GATT dispute settlement system changed the general contour of remedies. First of all, as the dramatic reduction of tariffs across most products diluted the GATT identity as a tariff reduction mechanism, the nature of remedies was no longer preoccupied with safeguarding the delicate balance of tariff concessions. Rather, non-tariff barriers (NTBs) became more problematic to international trade than conventional tariffs because domestic regulations tended to be complicated, reflecting the ever-growing modern regulatory demand in areas such as human health and the environment, and thus burdensome to trade. [FN28] Together with this focal change, the GATT dispute settlement mechanism itself was subject to transformation. More cases were brought before the dispute settlement panel, and naturally the GATT jurisprudence was enriched and developed. [FN29] ***770** Gradually, the GATT came to look like a more sophisticated legal system, rather than a mere intergovernmental pact. [FN30] As the former Director of the WTO Appellate Body Secretariat Debra Steger aptly described, the GATT slowly turned into "something greater than a contract that could be withdrawn from by any contracting party whenever it found the obligations too onerous." [FN31] Consequently, the global trading community began to be more interested in preserving such a legal system, which turned the nature of remedies into compliance with the system that would basically require the withdrawal of violations, but not necessarily the rebalancing of tariff concessions to undo the injuries, i.e., nullification or impairment. [FN32]

In fact, cracks in the concept of "nullification or impairment" had already begun to appear quite early. In the sixties, the Uruguayan Recourse Panel ruled that in cases where measures violate the GATT provisions, they would, prima facie, constitute a case of nullification or impairment. [FN33] In interpreting GATT Article XXIII, this ruling focused on the violation itself rather than its effect (nullification or impairment) in that it shifted the burden of proving the existence of nullification or impairment from the complainant to the defendant. In other words, the panel created a presumption of the existence of nullification or impairment in case of violations of the GATT provisions. This ruling was later codified in the Annex to 1979 Dispute Settlement Understanding. [FN34] Then, the Superfund panel made this injury requirement, i.e., nullification or impairment, literally meaningless in the violation claims ***771** by first observing that the operation of the presumption had been in practice "irrefutable" and then ruling that even very insignificant trade effect arising from the

violation could not substantiate the absence of nullification or impairment: the violation would ipso facto constitute a nullification or impairment. [FN35]

The above-mentioned jurisprudential development under GATT 1947, which highlighted the concept of violations and thus the withdrawal of them as remedies, has finally been crystallized in the new WTO system. For instance, DSU Article 21.5 provides a legal ground for a "compliance panel" which is convened to resolve disputes on "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings . . . ." [FN36] Furthermore, Article 22 upholds the remedial priority of the removal of violations by expressly stating that other modalities of remedies, such as compensation, are only temporary and never preferred over the removal of violations and conformity with the WTO rules. [FN37] Such clear-cut language eloquently indicates that the WTO system prioritizes, in terms of remedies, consistency and conformity with the WTO rules over compensation whose concept is deeply associated with such elements as injury, damages and nullification or impairment. [FN38]

II. Modalities and Functions of the WTO Remedies

2-1. Varying Modalities and Functions

Cessation

In the domain of public international law, "cessation and non-repetition" is generally considered a foremost remedy for an internationally wrongful act. [FN39] This form of remedy also exists under the WTO system, namely the ***772** withdrawal of the questioned measure to conform to the WTO rules. [FN40] The technical formula for this mode of remedy that panels or the Appellate Body render on the basis of their general terms of reference is to determine whether the questioned measure is inconsistent with the WTO law, and, if so, to recommend such measure to be brought to conformity to the WTO law. [FN41] Such determination of the violation and the recommendation of conformity, as combined, can be said to signify the withdrawal of the questioned measure. [FN42] In this regard, cessation has a dual function in the WTO system. First, by halting the questioned measure, it resolves the dispute as well as remedies the situation in which a complaining party has suffered. Second, by bringing the questioned measure to consistency with the WTO law, it eventually contributes to realizing the objective and purpose that the WTO pursues, such as trade liberalization and sustainable development. [FN43] Yet, it often becomes controversial whether a losing party has really remedied the violative situation, i.e., whether it has truly withdrawn its measure that was condemned as a violation or it has merely window-dressed the measure while still keeping the violative effect alive. To address this subsequent dispute, DSU Article 21.5 provides the so-called "compliance panel" procedure in ***773** which the original panel determines whether the original remedy it has rendered, i.e., the withdrawal of the questioned measure, has been fulfilled by the losing party. [FN44]

Another important question related to cessation concerns whether a losing party should withdraw or change its domestic statute that caused the violation. The answer to the question basically rests on the nature of the measure in question. First, a complaining party can target a certain domestic statute itself as a violation, under which situation the complaining party needs to show that the statute is so dispositive and mandatory that the violation results without executive intervention beyond mere mechanical application. Then, a panel's or the Appellate Body's ruling would directly affect the destiny of the statute since it would address the statute as such or on its face. For instance, the Non-Rubber Footwear panel held that the automatic backdating provisions of § 331 of the U.S. Trade Act of 1974 and § 104(b) of the 1979 Trade Agreements Act are mandatory legislation that cannot be modified by the executive. [FN45]

On the other hand, a complaining party can aim to challenge a certain pattern of application or implementation of a given domestic statute, not the statute itself. If the complaining party prevails under such circumstances, a panel or the Appellate Body would recommend the losing party only to modify its practice or application of the statute without the need to change or repeal the statute itself. Notably, the new WTO dispute settlement system has begun to seriously engage in these "as applied" cases which had

not been so spotlighted under the old GATT 1947 system. In particular, when interpreting the "chapeau," which is the preambular language of GATT Article XX, [FN46] the Appellate Body has established a new hermeneutics that scrutinizes whether a Member has applied its own legislation in such a way that it does not amount to an arbitrary or unjustifiable discrimination, to wit in good faith, ***774** instead of reviewing whether a Member's domestic statute itself is necessary or relating to achievement of its own regulatory objectives.

For instance, the Appellate Body in the Shrimp-Turtle case eloquently manifested this application-oriented chapeau test. After rejecting the panel's approach, which had bypassed the interpretation of Article XX(g) and dealt directly with the chapeau instead, the Appellate Body criticized the panel for its obsession with the "design of the measure itself," and its consequent failure to examine specifically how the application of § 609 constitutes "a means of arbitrary or unjustifiable discrimination" in addressing the chapeau. [FN47] It then drew attention to flaws in the actual application by the United States of its own § 609, such as the fact that the United States had never seriously attempted to negotiate a cooperative agreement with the four complainants while "multilateral procedures" such as the Inter-American Convention for the Protection and Conservation of Sea Turtles were "available and feasible." [FN48] Critically, however, despite losing its case, the United States was not recommended to repeal or amend § 609 itself, but only its application. [FN49]

In sum, this application-oriented hermeneutics has a constructive implication with respect to the WTO remedies. This new hermeneutics tends to encourage offending parties to respect the WTO rules in a nuanced and subtle way without unduly undermining their margin of discretion or further sovereignty because the hermeneutics ultimately leaves a domestic statute intact, only suspending its effect to the extent that it would be applied in a violative direction.

Compensation

Compensation is the most liberal form of remedies that aims to achieve a "mutually acceptable" [FN50] settlement based on the principle of "full and fair address." [FN51] Compensation as a form of remedy usually denotes a pecuniary ***775** concept, which is close to damages. [FN52] However, if compensation were to be calculated as a fixed amount of money, the injury itself need be pre-determined and quantified, which is not an easy task in the field of international trade law. [FN53] Even the complaining parties themselves do not put forward the amount or the extent of injury that the accused parties have inflicted on them when they initially file their complaints before the WTO panel. Rather, the complaining parties mostly request the repeal or withdrawal of disputed measures which they argue violated the WTO law. Therefore, compensation as a remedy tends to follow these initial wishes of the complaining parties. Hence, compensation is in a non-pecuniary format. [FN54]

Often, it has been disputed whether compensation in the WTO system should be offered bilaterally or multilaterally. Considering the voluntary [FN55] nature of compensation in the adversarial context of the WTO dispute settlement mechanism, one might argue that compensation should remain bilateral. DSU Article 22.2 also provides for the term "mutually acceptable compensation." [FN56] However, as Joost Pauwelyn correctly pointed out, DSU Article 22.1 also provides that compensation "shall be consistent with the covered agreements," which include GATT 1994 Article I (MFN obligation). [FN57] This provision purports to temper the bilateral ethos inherent in the settlement for compensation in order to prevent a situation where two parties concerned would create in the name of compensation new illegal trade barriers which might harm third parties, and thus, yet another dispute could ensue in the future. In this regard, when parties notify the WTO of the fact that they agreed on a mutually acceptable compensation, they usually include in such ***776** notification a clause offering the same treatment in the compensation agreement to any other member. [FN58]

Restitution (Retrospective Remedy)

Under public international law, restitution has long been recognized as a retrospective form of reparation. The Permanent Court of International Justice, in its celebrated Chorzow Factory decision,

held that:

> B) The essential principle contained in the actual notion of an illegal act-a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals-is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. [FN59] Likewise, under the WTO system one can also conceive a retrospective remedy which is close to restitution in the public international law sense, [FN60] if the amount of injury resulting from such violation can easily be quantified or monetized. For instance, in cases of anti-dumping or subsidies, those duties imposed illegally can be calculated without difficulty and reimbursed, though those duties may represent only a part of the injury that the afflicted parties have suffered as a result of breach of the law of anti-dumping or subsidies. Furthermore, the nature of anti-dumping or countervailing duties that target and victimize specific industries also tends to make such retrospective remedies (reimbursement of duties) plausible in terms of undoing the injuries inflicted on specific industries. In fact, there have been some decisions recommending retrospective remedies in the GATT/WTO jurisprudence. [FN61]

***777** Nonetheless, these retrospective remedies have been regarded as the exception rather than the norm mainly because the framers of both the GATT 1947 and the WTO prioritized in text the withdrawal of the violative measures, which is prospective in nature, over other forms of remedies. Even such exceptions, i.e., a very small number of panel decisions recommending retrospective remedies, arouse substantial controversy. [FN62] This consistently negative attitude toward the retrospective remedies seems to be continued under the WTO system. [FN63] For instance, a recent compliance panel under DSU Article 21.5 surprisingly held that under the WTO Subsidy Code, to withdraw the violation, i.e., the prohibited subsidy, may include a retrospective remedy, i.e., repayment of the prohibited subsidy. [FN64] Although this panel report was adopted without an appeal, it was harshly criticized by most member countries, which demonstrates the members' reluctance in accepting retrospective remedies. [FN65]

Sanctions

The remedy of last resort under the DSU is the "suspension of the concessions," which is basically a self-enforcing mechanism based on the authorization from the Dispute Settlement Body (DSB). [FN66] This mechanism, often referred to as sanctions or retaliation, has been regarded as an icon of the new WTO system in that such teeth provide an operable threat deterring future violations not only by the losing party but also by other members that witnessed the sanctions. In fact, this enforcement mechanism is not new: the old GATT 1947 also provided for it. [FN67] However, under the old system, the ***778** enforcement mechanism was almost inoperable mainly because the losing party could veto the adoption of the very panel report that condemned its breach. In other words, the losing party could deactivate the whole dispute settlement process and effectively save itself from even a remote possibility of sanctions. This critical flaw was eventually rectified under the new DSU in which a panel or the Appellate Body report was required to be adopted almost automatically under the principle of negative consensus, which has resultantly smoothed the way for any enforcement procedure in the subsequent stage. [FN68]

One of the most controversial issues regarding sanctions is their appropriate level or scale. [FN69] To one camp that still holds a contractual understanding on the nature of the WTO and thus views the function of remedies as a restoration of the balance of reciprocity that WTO obligations represent, the quantity of sanctions must be proportional to actual trade loss, i.e., the extent of nullification or impairment, which complaints may have suffered due to a questioned measure. [FN70] However, to another camp that regards the WTO sanctions basically as a compliance-inducing mechanism, a punitive sanction may be imposed, exceeding any proportional level. [FN71] In fact, the latter position appeared in the recent FSC Article 22.6 Report. At the final stage of the FSC saga, the United States challenged the EU's

request for authorization of a $4 billion sanction against it under DSU Article 22.6. [FN72] Surprisingly, the Arbitrators rejected the United States' argument that this amount was disproportionate to the EU's trade loss caused by its violations [FN73] and sided with the EC in terms of the amount of sanction. [FN74]

To buttress their conclusion, the Arbitrators heavily relied on the premise that not only WTO sanctions but also general countermeasures in public international law should compel violators to comply with rules, i.e., to withdraw their violative measures. [FN75] In this regard the Arbitrators viewed that the appropriateness of sanctions in this case should not be unduly limited by the volume of actual trade injury considering the "gravity of the initial wrongful act and the objective of securing the withdrawal of a prohibited ***779** export subsidy . . . ." [FN76] To further underpin their punitive perspective in this case, the Arbitrators focused on the gravity of violation by the United States: Its prohibited export subsidies are a more severe form of violation than "actionable" subsidies which can be sustained if only adverse effects caused by those subsidies are neutralized. [FN77] Moreover, the Arbitrators distanced its reasoning from the outreach of DSU Article 22.4, which explicitly requires a quantitative benchmark, i.e., the level of a sanction being "equivalent to the level of the nullification or impairment," by pointing out that such language is absent in the WTO Subsidy Code that is a lex specialis to the DSU in terms of dispute settlement procedures. [FN78]

However, this Arbitral ruling seems to go too far despite its understandable premise. Although the primary purpose of countermeasures is to induce compliance with rules by violators, a certain cap in the scale should nonetheless exist in light of equity or fairness. One cannot find a rationale of the U.S. style punitive damages either in the WTO or in public international law in general. On the contrary, the recent Draft Articles on Responsibility of States prepared by the ILC manifestly stipulate the proportionality requirement even taking into account the gravity of wrongful acts. [FN79] Without such minimum discipline, sanctions risk being abused or misused, thereby making them illegitimate and unsustainable.

Another controversial issue regarding sanctions lies in the procedural sequence towards their materialization under the DSU. To actually enforce sanctions against the losing party, an authorization by the DSB is required under the DSU. Yet the road to such authorization is not so smooth. First, the existence of non-compliance with the original decision, and second, the level of sanctions, i.e., the extent of concessions to be suspended, need be determined. Because these two issues are often controversial, the DSU provides a certain mechanism in which those disputes can be addressed. Article 21.5 provides that: "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." [FN80] Then, Article 22.6 provides that: "However, if the ***780** Member concerned objects to the level of suspension proposed, . . . the matter shall be referred to arbitration." [FN81]

However, in light of the sequence between Articles 21.5 and 22.6, the DSU regrettably leaves a certain degree of ambiguity. When a dispute on compliance unfolded in the aftermath of Banana III for the first time under the WTO system, the winning party (the United States) requested the DSB "to authorize suspension of the application to the European Communities (EC) and its member States of tariff concessions and related obligations under GATT 1994 covering trade in an amount of U.S. $520 million" after unilaterally determining that the losing party (the EC) failed to implement what the Appellate Body originally ruled in Banana III. [FN82] The EC objected to this interpretation, arguing that the original panel should have an authority to decide whether the losing party has implemented the Appellate Body decision. [FN83] The arbitration panel, contrary to the EC's position, ruled that in determining whether the level of suspension is equivalent to the level of nullification or impairment under Article 22.7, the panel, as a "logical way forward," should in advance determine whether the EC's revised regime, which it had established as an implementation of the original Banana III decision, violated the WTO rules. [FN84] Despite

this case law, the subsequent jurisprudence demonstrates that complainants rely on compliance panels under Article 21.5 to first address disputes on compliance with the original panel/Appellate Body recommendations, rather than directly turning to Article 22.6 to seek authorization of suspension of concessions. [FN85] Considering the rationale of the DSU, which aims to prevent Members' unilateral ***781** determination as to the consistency with the WTO rules of any measure, as can be seen in Article 23, the latter approach seems more desirable. [FN86]

2-2. Remedial Hierarchy

Having examined various forms and functions of remedies under the WTO dispute settlement system, a critical question arises: Does the WTO give the losing party a choice between cessation, i.e., withdrawal of the violative measure, and mere compensation without such performance?

In general, with respect to the state responsibility under public international law, Christine Gray submitted that:

> The determination of the consequences of a breach of international law is left initially to the discretion of the injured state; there are many examples of claims completely out of proportion with the injury suffered being met and also of similar breaches of international law being followed by different means and amounts of reparation. [FN87] According to her position, the winning party should choose what kind of remedies it will eventually accept. However, on this issue Judith Bello seems to place herself starkly opposite to this position. Grounded mainly on the omnipotent concept of "sovereignty," she argues that compliance with the WTO law is "elective" from the standpoint of the losing party. [FN88] Bello argues that the losing party can choose among withdrawal of violations, provision of compensation or being subject to retaliation. [FN89] She also seems to rationalize her argument by trivializing the legal value of the WTO treaty. She argues that the WTO rules, like the GATT rules, are "simply not 'binding' in the traditional sense" because "the WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas." [FN90] She viewed the WTO as a "confederation of sovereign national governments" relying upon "voluntary compliance." [FN91]

***782** However, she gravely misunderstood the nature of international law in general and blatantly ignored its essential distinction from domestic law. An analogy to domestic law cannot help but have inherent limitations simply because international law lacks a centralized political authority such as the World Government or the World Congress which might have rendered to international law something similar to federal marshals. Yet having those apparatuses is a subsidiary, not a primary element of law. [FN92] It would be to almost deny the rationale of international law itself to stick to such an ancillary aspect of law in the context of international law. Furthermore, Bello also committed a serious mistake in equating the old GATT rules with the new WTO rules boasting a myriad of innovations and transformations, which have reinforced the normative force of the WTO system. [FN93]

In a reply to Bello's thesis, Professor John Jackson elucidated why there exists a hierarchy among the different WTO remedies. [FN94] Professor Jackson showed that the DSU "clearly establishes a preference for an obligation to perform the recommendation" based on the black letter law stipulated in the DSU, such as a panel or the Appellate Body's basic duty of recommendation of bringing any violative measure into conformity with the WTO rules (DSU Article 19), the temporary nature of compensation as a remedy (DSU Articles 3.7, 22.1), and continuing surveillance until performance has occurred (DSU Article 22.8). [FN95] Although it is regrettable that such surveillance has been in reluctance and even eclipsed by bilateral settlements, this unsatisfactory record does not alter the hierarchy of remedies established under the WTO system. Markedly, this remedial hierarchy is also found in the terrain of public international law. Draft Articles on Responsibility of States by the International Law Commission (ILC) emphasized that a State in breach of international law continues to bear a duty to perform the obligation that it breached, [FN96] and that any "countermeasure,"

i.e., sanctions, should be aimed to ***783** induce compliance, i.e., the resumption of performance of the obligations in question by a violating State. [FN97]

More recently, however, Alan O. Sykes reached the same conclusion as Bello, yet from a totally different perspective. Grounded on the "law and economics" approach whose mantra is that "the law should always be efficient," [FN98] he argued that paying damages in the form of compensation or suspension of concessions is "an option for WTO Members" and that it is "both understandable and desirable" "as a matter of economic logic." [FN99] First, he offered a reading of DSU provisions which is opposite to that of Professor Jackson, turning the DSU into a "Holmesian 'perform or pay' system." [FN100] Then, he brought to the fore a bold analogy of the "choice between damages and specific performance in the law of private contracts," [FN101] and applied such analogy to the WTO setting based on the premise that the WTO is a "multiparty contract" from the standpoint of the "positive political theory." [FN102]

Despite the novelty and freshness of his approach, Sykes misunderstood the real identity of the WTO system. His analogy to a private contract, which might have made more sense under the old GATT 1947, can at most have very little application under the WTO, considering its new telos under its charter. In other words, the WTO is no more a mere contract among the contracting parties, but an independent international organization established by its members in order to envisage an integrated legal system for international trade. [FN103] Under such legal system, the concept of "efficient breach" [FN104] is non sequitur. Aptly, he attempted to justify his position by using an example of politically combustible case, i.e., Hormones, [FN105] contending that: "Thus, if we suppose arguendo that allowing Europe to maintain its hormone beef regulation is politically efficient because the benefits in Europe are great and ***784** the costs abroad smaller, only a breach of the agreement can enable this efficient adjustment to occur." [FN106]

Yet again he seemed to be too preoccupied with the economic test which cannot claim but limited significance in the WTO system. The cost of a breach of WTO rules exceeds a narrow, short-term commercial calculation. Negative effects undermining the legal system itself reach many sectors and spread over a long period of time: such breach is never efficient in the long-term. Admittedly, political hot potatoes such as Hormones and Bananas III, which may be dubbed "wrong cases," [FN107] should be kept away from the WTO dispute settlement mechanism to protect its judicial integrity. However, this could only be achieved by an ex ante prevention of disputes through intergovernmental and/or transgovernmental cooperation-cum-deliberation, not by an ex post breach of rules. Even if all these efforts fail and the WTO rules should necessarily give in, a waiver would be a better option than a flat breach. [FN108]

III. The Limitation of WTO Remedies

3-1. Perils and Paradoxes of Sanctions

Admittedly, sanctions may play a certain role in inducing compliance with the WTO rules through the deterrence of similar violations in the future, [FN109] beyond a narrower remedial role of penalties or satisfaction. In this regard, it may be understandable that a number of scholars have recently proposed to bolster the enforcement mechanism in various ways as a vehicle ***785** for strengthening the rule of WTO law. [FN110] However, aside from the impracticability of such proposals stemming from the extreme difficulty of amending the current treaty text, in particular the DSU, they still raise a more fundamental question as to whether the sanctions themselves really work. [FN111]

Sanctions often run counter to what they exactly attempt to achieve. They envisage power imbalances between the rich and the poor in the international arena in the vacuum of law. In addition, while they may contribute to inducing compliance by the losing party or to restoring justice, sanctions simultaneously hurt the inflictor's own people and economy. Furthermore, they nurture political resentment and eventually foment political debacle.

First, by privatizing sanctions and thus leaving the power of retaliation in the hands of the winning party, the WTO deprives itself of the rule of law and

instead invites the rule of the jungle in international power politics. Without an aura of law, relationships among trading nations are vulnerable to economic and political disparities. Therefore, even if a poor country manages to obtain an authorization to retaliate against a rich country, the effectiveness of such retaliation cannot help but be limited, considering the huge discrepancy between the two in their economic sizes. [FN112] Confronting this developmental dilemma, one might be tempted to attribute it to an incomplete sanction mechanism that is unworkable for the developing countries. [FN113] However, the dilemma results not necessarily because the current WTO enforcement mechanism is biased against the developing countries but because the concept of sanctions itself creates disadvantages to them. In this context, the Banana III arbitration panel, which addressed Ecuador's request ***786** for authorization of suspension of concessions under DSU Article 22.6, pointedly observed that:

> We have made extensive remarks above on the suspension of obligations under the TRIPS Agreement and in particular concerning the legal and practical difficulties arising in this context. Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality. [FN114] Furthermore, even if such sanction is effective arguendo, the small, poor country should also take into account any negative political implication in the future that the sanction may bring vis-a-vis the targeted big, rich country. Certainly, the small, poor country would not want to sacrifice much bigger potential economic benefits for such a one-time Pyrrhic victory. For instance, even in a heated row with the EU on the banana issue, Ecuador had to eventually opt for a negotiation, not a full legal battle, because it acknowledged the price it would have paid by taking the latter route. [FN115] On the contrary, the big, rich country could wield a fatal blow to the small, poor country by a mere threat of such sanction because the latter desperately relies on the market access to the former.

Second, sanctions or retaliation under the DSU take the form of "suspension" of concessions or other obligations. Accordingly, sanctions usually end up raising tariffs or non-tariff barriers to the detriment of the losing party's market access, which is nothing but a mercantilist regression. [FN116] As Steve Charnovitz posited, international institutions do not generally contradict their own raison d'etre in the name of sanctions. [FN117] Charnovitz ***787** trenchantly observed that "the World Health Organization does not authorize one party to spread viruses to another. The World Intellectual Property Organization does not fight piracy with piracy. So the WTO's use of trade restrictions to promote freer trade is bizarre." [FN118]

Although such revival of trade restrictions may appeal to specific domestic industries that compete with foreign producers affected by the sanctions, the rest of the domestic economy, in particular consumers and manufacturers, who prefer cheaper imports, would suffer. [FN119] In other words, the sanctions result in the decrease of general welfare while only contributing to the increase of special rents to a narrow group of people. [FN120] This grim picture may be understandable considering the reality of the political economy in international trade. In fact, every WTO dispute is adjudicated only when a government champions a domestic industry's grievance against a foreign competitor. Nonetheless, this welfare-reducing outcome of sanctions and an embedded protectionism fly directly in the face of free trade which the WTO pursues. [FN121]

Third, sanctions or other enforcement measures under the DSU is, most of all, designed to induce compliance mainly through threat. [FN122] Yet such ***788** threat does not simply work when the political cost of compliance is too high. As Oran Young trenchantly observed, even states who respect the au-

thoritativeness of a treaty and its specific behavioral prescriptions frequently find it advantageous to violate them in practice. [FN123] Under such circumstances, according to Joel Trachtman, states tend to have the "level of compliance that they want" [FN124] and therefore "the nirvana of perfect compliance is a chimera." [FN125] In other words, in high-profile cases, which are deep-rooted in political complexities [FN126] and thus potential headliners, it tends to be harder for the losing party to stomach the rule of law against it. [FN127] Furthermore, in a political sense the very notion of being enforced or retaliated tends to make it even harder for the losing party to reach any settlement because any concession from the losing party would appear to be a give-in.

Nonetheless, once this high-profile case, which Professor Hudec coined a "wrong case," [FN128] is filed and adjudicated before the WTO dispute settlement mechanism, like toothpaste out of a tube, there is no going-back. [FN129] The case tends to be spotlighted and its political stakes escalated. Third parties would love to witness real retaliation in this case, regarding it as a litmus test of the effectiveness of the WTO dispute settlement system. These circumstances provide a fertile ground for a political stalemate, getting rid of stages for the political theater, in which domestic politicians and their constituencies can have some breathing room and comfort. [FN130] Finally, these wrong cases, even ***789** if once adjudicated, never fade away but come back in the future with different names because adjudication is short of an ultimate solution, as was witnessed in a dramatic reincarnation of the notorious GATT DISC (1977) [FN131] dispute as the WTO FSC (2000) [FN132] case, both of which concern the same U.S. tax break measures tantamount to prohibited subsidies.

3-2. Welfare Loss and Distributive Injustice

WTO remedies tend to mirror the very nature of substantive obligations whose breach they intend to remedy. However, those remedies, in parallel with the reach of breached obligations, could still remain suboptimal even after full compliance when those obligations mandate a limited extent of behavioral change by the losing party. For instance, the principle of non-discrimination enshrined in various GATT/WTO rules, such as the National Treatment principle, is inherently a "negative" obligation. In other words, a member could bring its discriminatory tax measures into conformity with the WTO law even by making domestic taxpayers suffer more than before, as long as the scale of domestic and foreign treatment is balanced. Of course, a more ideal way of compliance would be to lower a tax rate applied to foreign producers, rather than to raise a tax rate applied to domestic producers. Yet, such choice, albeit seemingly ideal, cannot be forced because the underlying obligation, i.e., non-discrimination or national treatment, does not obligate a Member to go that far. To bind the Member to do so would require yet another substantive obligation which is a "positive one," such as "harmonization."

In fact, a GATT panel has already acknowledged this inherent limitation of remedies. In Superfund (1987) in which a U.S. domestic tax was declared discriminatory, the panel admitted the possibility that even a GATT-consistent non-discriminatory remedy could result in a negative trade impact to both domestic and international commerce if the United States raises the tax rate for domestic producers to comply with the national treatment obligation, instead of lowering the tax rate for foreigners up to the point that the tax rate ***790** is leveled with that for domestic producers. [FN133] In the same vein, Japan raised the tax rate on shochu to reduce the tax gap between shochu and whisky/brandies to meet the national treatment standard in complying with the panel report in Japanese Shochu I. [FN134] This limitation has also been envisaged under the WTO system. In the aftermath of Hormones, the EC attempted to tighten the regulation on other carcinogens (carbadox and olaquindox), which were compared with hormones in dispute, in order to create a non-discriminatory situation by way of implementing the Appellate Body decision. [FN135] Likewise, in the aftermath of Australian Salmon, the Australian government re-examined its rules on the importation of ornamental fish, which was compared with the salmon in dispute, for the same purpose as the EC had in mind in the post-Hormones process. [FN136]

This re-regulatory and trade-restricting aspect of certain WTO remedies tends to carry seriously negative implications on the domestic economy in light of

welfare loss and distributive injustice. To create yet another trade barrier in the name of the WTO, remedies certainly result in market distortion and welfare loss without serving any legitimate regulatory purpose. Moreover, considering that most tax measures falling under the WTO law are an "indirect tax" levied on products, collection of those taxes in compliance with the panel/Appellate Body decisions tends to be "regressive," hurting the poor more than the rich in the domestic economy. Under these circumstances, the WTO remedies ironically contribute to distributive injustice in the domestic dimension, which may in turn breed resentment toward the WTO system itself.

IV. Reconceptualizing the WTO Remedies

4-1. Norm-Building as a Communal Remedy

The Significance of Norm-Building Under the WTO System

The contractual framework of GATT 1947, as well as its lingering legacy in the WTO, empowered the contracting parties (Members) to retain a ***791** considerable degree of authority with which to dispose of the panel proceeding. Virtually in any stage, they could halt or undo the whole proceeding based on either political or pragmatic motivation. Often, parties concerned realized only after the panel process began that their disputes would be better addressed by negotiation and settlement, rather than by adjudication. [FN137] Although this ethos of settlement may fulfill part of the remedial functions of the dispute settlement system, [FN138] such ethos, if prevalent, could undermine the effort to establish a legal community of international trade.

Critically, however, the aforementioned private law nature came to be tempered by the new teleology of the global trading system that the WTO stands for. While the old GATT 1947 pursued a rather narrow objective of the elimination of discriminatory trade barriers, the new WTO system upholds a broader mission of developing "an integrated, more viable and durable multilateral trading system . . . ." [FN139] Such a multilateral trading system cannot be established merely through a sum of contractual relationships among Members. Rather, this system should be firmly premised on a constitutional perspective according to which Members are bound by certain indisposable obligations. Under the system, even bilateral settlements between Members are conducted in the shadow of law, not totally under political calculations. In other words, the physis of political bargains should be tamed by the nomos of legal governance. [FN140] As a result, the system can institutionalize within itself ***792** predictability and reliability. [FN141] After all, the WTO is no more a provisional executive agreement among the contracting parties as the old GATT 1947 used to be: It is an independent international organization enjoying its own legal identity. Therefore, under the WTO, a violation should be deemed not as a breach of contract but as damage to the legal system whose sole remedy is to repair the system by re-confirming its rules. In this sense, norm-sustaining or norm-building itself through the dispute settlement mechanism is a collective, communal remedy under the WTO because it serves the broader goal of governing the global trading community beyond merely resolving disputes between the particular parties concerned. [FN142]

Ironically, this norm-building as a collective, communal remedy also retains a "political" appeal. The stability and predictability that norm-building can provide serves governments and states in various ways, including reducing the amount of administrative and diplomacy costs. In this regard, Robert Hudec trenchantly observes that "[g]overnments . . . unusually have a longer-term interest in the efficacy of the legal relationships they have established with other governments, and so they are more inclined to act in ways designed to preserve those relationships. Ultimately, the compliance decisions of governments are determined more by calculated self-interest than by force." [FN143]

New WTO Jurisprudence for Norm-Building

As discussed above, a norm, [FN144] not a contract, should be the operating code for the global trading system, and norm-building itself regarded as a collective, communal remedy with which to maintain and improve the system. Considering this public nature, the WTO norm must be defined, taking into consideration diverse values and interests advocated and represented in the system. In other words, the

norm should be subtle and accommodating enough to enjoy legitimacy from a broad range of constituencies and minimize resistance from any violated member in light of compliance. After all, in the ***793** absence of effective acceptance of and compliance with such a norm, the global trading system would soon be paralyzed, being relegated to the status of a jungle in which only power politics tends to determine its destiny.

To explore and define such a norm necessitates revisiting the institutional history of the global trading system. [FN145] What the framers of the system sought to accomplish through GATT was to foster free trade through a series of tariff reductions and to police self-defeating mercantilist protection. This anti-protectionist telos eventually led to a built-in pro-trade bias in GATT itself. Non-trade social concerns, such as human health and environmental protection, have been treated as mere exceptions to the general obligations, such as National Treatment. [FN146] However, this pro-trade bias could not be sustained when domestic regulations received greater attention than before, and traditional trade policy measures, such as tariffs and quotas, have begun to vanish. Therefore, the global trading system has come to require a new telos which is capable of transcending the narrow purpose of anti-protection while at the same time connoting a much broader ideal of integration that ensures that both trade values and social values are upheld not in a competing, but in a coherent and synergetic fashion.

Critically, the new telos was also reflected in the hermeneutical attitude of the Appellate Body created as part of the new WTO dispute settlement mechanism. Under the old GATT, panels focused on the content of a given domestic regulation itself in their judicial review, which often resulted in a presumptive conclusion that such a measure was not necessary or even rationally unrelated to the attainment of social values of the regulating state. For instance, in the Thai Cigarette case, the old GATT panel categorically disregarded a domestic regulatory need to restrict the importation of tobacco as unnecessary to protect human health because this measure was not trade-restrictive. [FN147] According to the Thai Cigarette panel, the import restrictions could be considered necessary "only if there were no alternative measure ***794** consistent with the General Agreement or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives." [FN148] This second-guessing or negation of legitimate policy objectives often infuriated domestic policy makers and thus diminished their perception of GATT's legitimacy.

However, under the new WTO system the Appellate Body directed its interpretive focus to the "manner" in which a given domestic regulation is applied, and not to the regulation itself. In its jurisprudence, the Appellate Body has tried to scrutinize on a case-by-case basis whether a given domestic regulation was applied consistently and evenhandedly or whether it respected fundamental principles of law, rather than reinvestigating, on its own accord, whether the substance of the regulation itself was necessary or related to the achievement of the regulating states' social policy goals. For instance, the Appellate Body in the Gasoline case acknowledged that the U.S. Gasoline Rule itself was properly "primarily aimed at" and thus relating to the conservation of natural resources for the purpose of Article XX(g). [FN149] However, it subsequently rejected the United States' argument regarding the inevitability of discrimination against foreign refiners due to administrative difficulties on the grounds of possible regulatory cooperation with affected countries which the United States had conducted in other areas, such as tax and anti-trust. [FN150] The result of this new test was to safeguard the Members' regulatory autonomy since it provided ample regulatory leeway for domestic regulators. Therefore, under this new test, even if a measure turned out to be a violation, the outcome was not catastrophic but merely suspensive, demanding only a change of application, rather than a repeal of the statute. For instance, when the United States lost the famous Shrimp-Turtle case in ***795** 1998, it was not forced to change its domestic statute § 609, but only its application. [FN151]

This new WTO jurisprudence holds an important implication with respect to norm-building as a collective, communal remedy in the global trading system. The micro-managing nature of the manner-and application-oriented jurisprudence constructs a legal

system that addresses a wide range of ideals and parameters that coexist and interact in the global trading system, such as free markets and social regulation, as well as international economic efficiency and domestic regulatory need. By focusing on how to regulate rather than what to regulate, the WTO jurisprudence requires Members only to heed their regulatory process, such as due process and fairness, yet leaves wide open their particular choices of regulatory contents, leading them to pursue their unique domestic regulatory objectives while complying with the multilateral trade treaties. [FN152] Consequently, the manner-and application-oriented WTO jurisprudence guides and fine-tunes everyday regulatory performance by Member countries, building up in the long-run a synergistic legal web between dual goals of free markets and legitimate social regulation. This is the most important aspect of the WTO norm that should be understood as a communal, collective remedy under the WTO system.

Prerequisites for Norm-Building: Policy Agenda

Importantly, certain prerequisites should be met to materialize the aforementioned collective, communal remedy. First, the content of settlement or compensation should be fully disclosed and further monitored to ensure that a violative measure is consistent with the WTO law. [FN153] Even if the parties ***796** concerned are satisfied with their own settlement, it may only serve their bilateral purpose, still running short of the rule of law sustaining the legal system defining and structuring the WTO, unless the original violation is rectified. In this line, the aftermath of a dispute should be closely monitored in a transparent manner to prevent the integrity of the WTO system from being compromised by any political deal. [FN154] For this purpose, the WTO surveillance mechanism, i.e., the "Trade Policy Review Mechanism" (TPRM), [FN155] can be put to use more vigorously than ever in monitoring compliance by losing parties.

Second, in the absence of a guardianship, as seen in the European Commission's authority to file a suit before the European Court of Justice on behalf of the Union, WTO members themselves should be vigorous, as legal guardians for the WTO, in filing complaints which not only concern their own interests but also involve important legal issues from the standpoint of the legal community in general. Fortunately, the Appellate Body has taken a lenient stance on the issue of standing (locus standi), [FN156] paving the way for such communal litigation to preserve the legal integrity of the system. In Banana III, the Appellate Body rejected the EC's argument that a certain legal interest needs to be present to bring a case against another member under the WTO dispute settlement system, and granted standing to the United States, which barely had a direct commercial interest in bananas. [FN157] In sum, the Appellate Body held that a Member's decision as to whether to initiate a complaint is discretionary and "self-regulating." [FN158] Under this liberal jurisprudence on standing, WTO Members could and should fulfill their fiduciary duties as participants and beneficiaries of the legal system by actively engaging in the dispute settlement procedures.

Third, the jurisgenerative [FN159] or jurisprudence-developing function of the WTO dispute settlement mechanism should be fullypromoted. For this purpose, a more professional and permanent group of panelists and Appellate Body members should be available in order to enhance the general quality of panel/Appellate Body reports and secure the legal coherence and integrity of decisions. Current recruits, mostly consisting of diplomats and political ***797** appointees, run short of achieving such coherence and integrity. [FN160] In this context, William Davey, the former Director of the Legal Affairs Division of the WTO, proposed the establishment of a "Panel Body," which is more permanent and legally professional than the current ad hoc panels. [FN161] Davey submitted that: "In my view, the need for legal expertise in virtually all cases argues for a strict requirement that panelists have some legal training. To the extent that other kinds of expertise may be needed, it should be taken into account in the selection of Panel Body members so that some of them have both legal and other expertise. [FN162] In addition, the exercise of judicial economy should be cabined to deepen the WTO jurisprudence. This principle has been ambiguously and inconsistently invoked by the WTO panels and the Appellate Body, often being used to avoid the important yet controversial legal issues that com-

plaining parties raised. [FN163] Beyond serving to merely resolve a specific dispute before them, panels and the Appellate Body should be prudent and diligent enough to embrace those difficult legal issues even if defending parties have already been ruled to violate a sufficient number of provisions. This judicial activism seems healthy and even called for since it eventually contributes to enrich the WTO case law and its acquis.

Last but not least, members should refrain from bringing the aforementioned wrong cases before the panel to protect the judicial integrity of the WTO dispute settlement system. [FN164] Those high-profile disputes would be better resolved through mutual cooperation in a cooled-down and workman-like manner. [FN165] At this juncture, it is worthwhile to note that at the early days of the old GATT panel practices, the contracting parties, in particular the big ones such as the U.S. and the EC, were circumspect enough ***798** not to overtax a burgeoning dispute settlement system by bringing in high-profile cases. [FN166]

4-2. Dispute Prevention as a Negative Remedy

An important effect flowing from norm-building is "dispute prevention" because the WTO norm deters and prevents future disputes. [FN167] In this context, dispute prevention may be portrayed as a negative remedy since it forestalls a remedial situation even before such situation transpires, rather than to correct the situation afterwards. In a narrow sense, dispute prevention connotes a special prevention effect. As a specific case is adjudicated and its panel or the Appellate Body reports are issued, trade jurisprudence comes to be formulated in a certain subject-matter, such as National Treatment or Subsidies. This sector-specific trade jurisprudence emits to disputants signals which help them to resolve their disputes even without recourse to tribunals. However, this non-adjudication or settlement is in itself distinct from the diplomatic resolution of disputes that prevailed in the early GATT 1947 era. While such diplomatic solutions were likely to stem from the absence of relevant case law, settlements under the WTO system, by contrast, seem to be strongly influenced by the richness of jurisprudence. The presence of relevant case law, in other words, means that parties to many disputes will have no reason to go to tribunals thanks to the ease with which the probable outcome can be predicted on the basis of existing jurisprudence. This prognosis enables such parties to settle their disputes in the shadow of the law.

On the other hand, in a broad sense, dispute prevention represents a general prevention effect. As the bulk of case law is accumulated and its compliance becomes more regular, the general attitudes of potential disputants toward adversarial legal contests tend to become more moderate. Under these circumstances, adjudication can be invoked in a less emotional manner and motivated byless political considerations. Rather, adjudication is understood to contribute to further clarification and development of international trade law beyond the existing one. This mature phenomenon is critical to the institutional health of the global trading system since it can effectively de-fatigue the system. Not only abuse or misuse, but also overuse of the dispute settlement mechanism is pathological to the system in its entirety, in particular ***799** considering a still young institutional age of the WTO. Moreover, the unprecedented number of WTO memberships as well as the frequency and density of their daily transactions make the challenge of docket control more daunting than ever. Under these circumstances, dispute prevention certainly helps avoid a system overload via reducing the number of unnecessary disputes.

4-3. Connecting the WTO Remedies to the Domestic Remedies

Conventional Approaches

The WTO system exists not merely for the intergovernmental welfare between and among Members, but also for the interests of the system's micro-participants such as consumers, producers or farmers. In this regard, the rule of law in the WTO as a collective, communal remedy, as discussed above, can eventually serve the welfare and interests of individual economic players through securing the stability and predictability of the WTO system. One recent WTO panel eloquently highlighted this profound premise of the WTO and succinctly coined it "indirect effect." [FN168] The Section 301 panel held that:

7.76 The security and predictability in question are of "the multilateral trading system." The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators. . . . 7.78 It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect. [FN169] This "indirect effect" nonetheless may sound empty in practice to the injured individual because the WTO remedies are directed to Member countries, not their nationals who do not even have standing in the WTO dispute settlement proceeding. Then, would it be possible to incorporate a certain WTO rule or jurisprudence in the realm of a domestic judicial system, thereby enabling domestic victims to take advantage of domestic remedies? [FN170] An immediate ***800** answer to this question would be the adoption of direct effect that empowers or enfranchises individuals to directly sue Member countries or other individuals before the domestic court on the ground of violation of WTO rules. [FN171] This proactive doctrine originally devised under EU law attempts to constitutionalize the WTO law in the domestic terrain so that it can serve to internalize certain fundamental WTO provisions. [FN172] It is often understood as a legal instrument to induce compliance with the WTO law through "'deputizing' or 'coopting' the domestic legal system, or . . . making the domestic rule of law 'hostage' to compliance with the . . . [WTO] law." [FN173] However, in most dualist countries where the WTO Agreement should be nationalized through independent domestic legal instruments in order to achieve a domestic legal effect, such direct effect cannot be accommodated without a special legal ground, such as "self-executing treaties." [FN174] Moreover, considering the lack of sophisticated legal infrastructure and jurisprudence ***801** with which to operate the direct effect doctrine, unlike the EU, its adoption in the WTO context sounds rather impractical. [FN175] For this reason, even advocates of direct effect usually take a modest approach in this tricky issue. [FN176]

Another methodology linking the WTO panel/Appellate Body reports to domestic remedies may be conceived through an analogy of the "recognition and enforcement" of foreign court decisions. Grounded on various rationales such as comity, domestic courts have long recognized and enforced foreign court decisions and bestowed certain legal effects on them. [FN177] Admittedly, this analogy may invite some criticism in that the WTO itself is not a sovereign entity but an international organization created by sovereign members, and that the reports issued by panels or the Appellate Body are not technically court decisions but mere recommendations. Yet, considering the long-respected half-century of jurisprudence as well as a more legalized adjudicative system under the WTO, such a formalistic objection can be contained to certain extents. However, a critical demerit of this approach is that it requires either proper amendments of the WTO Agreement or accommodative domestic legal infrastructure, both of which seem radical and unrealistic under current circumstances. [FN178] In other words, it would still be ***802** impractical to think of a situation where a domestic court orders monetary compensation for an importer suing its own country based on the direct recognition of a corresponding WTO Appellate Body decision which struck down the country's trade restriction that harmed the importer.

A New Approach: "Indirect Recognition"

Instead, one may reasonably speculate on a more implied, nuanced way of delivering the WTO panel and the Appellate Body decisions to the domestic judicial system and providing domestic remedies to injured individuals. As long as domestic judges comprehend and sympathize with the contents of those WTO panel or Appellate Body reports which involve the same factual matrices as their own domestic cases, they can judicially incorporate, albeit indirectly, those decisions in various ways into the domestic jurisprudence. [FN179] For instance, domestic judges can simply attempt to avoid conflict between WTO panel or Appellate Body decisions and their own domestic decisions; [FN180] they can cross-

fertilize the WTO panel or the Appellate Body decisions from a comparativist standpoint; [FN181] they can cite or quote certain portions of those panel or the Appellate Body decisions if such citation or quotation is likely to strengthen their own judicial reasoning. [FN182]

***803** More critically, local judges can espouse the main holdings of the WTO panel or the Appellate Body decisions by employing basic legal principles that most domestic constitutions or constitutive treaties include, such as the Commerce Clause, [FN183] Supremacy Clause, [FN184] Equal Protection Clause, [FN185] and Due Process Clause [FN186] in U.S. law as well as the "Non-Discrimination" principle [FN187] or "Due Process" provision [FN188] in EU law. These fundamental legal obligations are capable of safeguarding domestic court decisions from narrow favoritism or protectionism because these obligations defy any discriminatory treatment for the benefit of specific industries, and to the detriment of more general economic players, including consumers, importers and distributors. [FN189] Consequently, those economic players can secure domestic remedies, including monetary compensation, in the domestic court, in sharp contrast with a situation under the WTO system that renders no such direct remedies despite the same factual and legal matrices.

As a matter of fact, the basic spirit underlying the aforementioned proposal of "indirect recognition," i.e., harmonizing as much as possible the domestic law with the international law, can also be found elsewhere in terms of both legal doctrines and academic theses. For instance, the famed Charming Betsy doctrine under U.S. constitutional jurisprudence established that even facially unambiguous text could be interpreted against such language if textual interpretation would violate the law of nations or international law. [FN190] More recently, eminent constitutional law scholars and even a U.S. Supreme Court Justice have begun to raise their voices for an argument that domestic judges should listen more to their foreign counterparts, and that ***804** domestic court decisions be more attuned to foreign, international law (court decisions) in similar subject-matter. [FN191]

In tandem with this notion of indirect recognition, the U.S. federal courts have often issued decisions consistent and compatible with the GATT or WTO law in certain domestic cases that embrace international trade law issues. [FN192] Even as early as the fifties, a Hawaiian court struck down a local statute which violated Article III of GATT. [FN193] Lobbied by the local poultry industry, the state of Hawaii introduced a statute that prohibited anyone from selling any foreign eggs without a placard carrying the words "WE SELL FOREIGN EGGS" printed and displayed in such an eye-catching way that consumers would certainly notice them. [FN194] The court first opined that the statute should follow the provisions of GATT grounded on the Supremacy ***805** Clause of the U.S. Constitution. [FN195] Then, the court itself applied and interpreted GATT, concluding that the statute violated GATT Article III for treating imported eggs less favorably than domestic ones which did not bear such a burdensome requirement, and at the same time that the statute did not qualify for GATT Article XX exception. [FN196] This is a monumental case since it demonstrated with eloquence the possibility that the court can accommodate GATT in the context of domestic law, thereby rendering domestic remedies to domestic complainants who have suffered from certain violations of international trade law.

For another empirical confirmation of indirect recognition, a U.S. district court struck down as unconstitutional a Puerto Rican sanitary regulation mandating the inspection as well as the collection of an inspection fee on all imported pigeon peas. [FN197] The regulation also stipulated that any importer who failed to pay the fee would lose her business license in Puerto Rico. [FN198] The court held this regulation to be illegal for violating the Commerce Clause of the U.S. Constitution because the Puerto Rican regulation flatly discriminated against interstate commerce when it imposed substantial costs on pigeon pea importers which were not borne by their local counterparts. [FN199] This decision provided remedies in the domestic context to victims who had suffered from violations of international trade law, such as GATT Article III (National Treatment), and the SPS Agreement, [FN200] which addresses issues

on trade and sanitary measures.

This trend of indirect recognition that eventuates in harmony or convergence between domestic and international court decisions is not limited to U.S. soil. In the aftermath of the Bananas saga, Chiquita has recently filed a lawsuit for $525 million in damages against the EC in the Court of First Instance of the European Communities. [FN201] Facing Commission Regulation No. 2362/98, which was launched to comply with the Bananas III decision but later struck down as WTO-inconsistent by a WTO arbitration panel, Chiquita claimed to have suffered from substantial loss of profits as a result of the ***806** discriminatory license distribution system that the regulation created. [FN202] In its complaint, Chiquita alleged that the omission had breached not only the WTO rules but also "the principle of nondiscrimination, the freedom to pursue trade or business as well as the principle of good faith in international law." [FN203] This case seems inspiring in that it provides for the community legal system a new, fresh stimulus in terms of local, regional remedies for violations of international trade law.

Markedly, a couple of factors seem to contribute to this trend of indirect recognition or interpretive harmony between foreign, international and domestic courts. [FN204] First, the nature of the subject-matter, i.e., international trade, tends to mobilize common interests and sympathies among foreign, international and domestic court judges. Due to their interpenetrating and universal nature, trade-related cases cover a wide range of jurisdictions: interstate, regional or international. In other words, the ever-growing economic interdependence among different trading nations or institutions also tends to nurture a "global ethos" [FN205] among domestic judges who continuously confront cases that involve international or transnational economic issues. [FN206]

Second, the nature of judges or panelists as interlocutors of legal discourse on specific issues such as international trade also tends to enable them to sympathize with each other. As professional lawyers or jurists, [FN207] those members of an "epistemic community" [FN208] are likely to establish a ***807** "transjudicial" network [FN209] in which they can exchange and share each other's legal views and interpretations. [FN210] In fact, we have already witnessed a prototype of such transjudicial communication in the context of the rich cooperative relationship between the European Court of Justice and Member States' courts. [FN211] This delicate and nuanced judicial partnership made an essential contribution to European integration through the phenomenon of judicial empowerment. [FN212] A similar judicial partnership can also be found in the U.S. context between federal and state courts. In the evolution of U.S. federalism, federal and state courts have been able to maintain a subtle cooperation. [FN213] If such a judicial partnership functions well, despite the existence of different legal cultures, judges' common codes, i.e., basic, fundamental principles of law, which are ubiquitously manifested in the domestic constitutions, tend to facilitate them to get connected and enlightened with each other. [FN214] Under these fertile circumstances, domestic ***808** and foreign, international court decisions are likely to converge on certain legal issues involving international trade, thereby realizing the indirect recognition which can produce domestic remedies for the violation of WTO rules. [FN215]

Conclusion

It is important to note that the true nature of WTO remedies reflects the raison d'etre of the WTO system itself. If we understand the WTO as a genuinely integrated multilateral legal system beyond its intergovernmental genesis, WTO remedies should be firmly hinged on growing norm-building that can ensure a stable and predictable operation of the system. Under such a legal system, WTO remedies not only address disputes but also prevent them in a practical manner. This perspective tends to conceive WTO remedies as public goods for all Members beyond a mere instrument that settles and satisfies particular parties concerned in specific cases. At the same time, however, this macro nature of WTO remedies should not unduly alienate individual players operating within the system. Namely, the WTO remedies should also respond to the complaining voices of down to earth businesses who have suffered from violations of WTO rules. Thus, it is imperative to connect WTO remedies with domestic remedies to make the former

palpable and workable to those everyday individual players in this enlarged enclave of the legal community that the WTO eventually purports to create.

Notably, this transjudicial connection between the WTO tribunal and domestic courts can be more sensitized by a nuanced use of the suggestion function that a panel or the Appellate Body may exercise when it renders its decision. Under DSU Article 19.1, a panel or the Appellate Body, in addition to rendering a decision recommending a violative measure to be brought into conformity with the WTO rules, "may suggest ways in which the Member concerned could implement the recommendations." [FN216] Out of many ways of such implementation, a judicial one is particularly relevant to the transjudicial connection discussed here in that a panel or the Appellate Body can offer ***809** certain remedial guidelines which domestic courts may refer to when adjudicating domestic cases which involve the same or related legal issues.

In conclusion, this "collective judicial deliberation" [FN217] through the transjudicial connection between the WTO tribunal and domestic courts can contribute to a more advanced and mature dimension of rule of law in the global trading system, which marks the true nature of WTO remedies. [FN218] This is one of the surest ways in which the WTO could serve its own legitimacy in this interdependent and integrative world. [FN219]

[FNa1] . Assistant Professor, Chicago-Kent College of Law, Illinois Institute of Technology. I thank Dean Anne-Marie Slaughter and Professor Joel Trachtman for their helpful comments. I also thank Professors Joseph Weiler and William Alford for their support and inspiration. I am grateful to Jihay Ellie Kwack for her editorial assistance. All errors, of course, are mine. Finally, I dedicate this article to the late Professor Robert Hudec whose remarkable teaching and advice have always inspired me. Despite his hectic schedule, he kindly read an earlier draft of this article and gave me long, invaluable comments. He will be very much missed by many international trade law scholars, including myself.

[FN1] . Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments-Results of the Uruguay Round vol. I, 33 I.L.M. 1125, 1144-53 (1994) [WTO Doc. Symbol LT/UR/A/1]. This document, as well as other WTO documents cited in subsequent footnotes, can be found online by going to http://docsonline.wto.org and clicking on "search for documents," "simple search" and entering the WTO document symbol listed in brackets.

[FN2] . Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization [hereinafter WTO Agreement]; Annex IA, Legal Instruments-Results of the Uruguay Round vol. I (1994) [hereinafter WTO Subsidy Code] [WTO Doc. Symbol LT/UR/A-1A/9].

[FN3] . See WTO Arbitrator's Decision on United States Tax Treatment for "Foreign Sales Corporations," WT/DS108/ARB (Aug. 30, 2002) [hereinafter FSC Article 22.6 Report].

[FN4] . WTO Appellate Body Report on EC Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter Bananas III].

[FN5] . WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), WT,DS26/AB/R (Jan. 16, 1998) [hereinafter Hormones].

[FN6] . WTO Arbitrator's Decision on EC Regime for the Importation, Sale, and Distribution of Bananas, WT/DS27/ARB, ¶ 8.1 (Mar. 30, 2000) (awarding $191.4 million damages to the U.S.) [hereinafter Banana III Arbitration (U.S.)]; WTO Arbitrator's Decision on EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/ARB, ¶ 83 (July 12, 1999) (awarding $116.8 million damages to the United States).

[FN7] . General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. Annex IA of the WTO Agreement includes GATT 1994, which consists of the original GATT text (GATT 1947) and other ancillary

legal documents. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, supra note 2.

[FN8] . Annex IA. Steve Charnovitz, Rethinking WTO Trade Sanctions, 95 Am. J. Int'l L. 792, 832 (2001).

[FN9] . Cf. Henry M. Hart Jr., Holmes' Positivism-An Addendum, 64 Harv. L. Rev. 929, 935 (1951) (Hart submitted that: "The remedial parts of law-rights of action and other sanctions-are subsidiary. To the primary parts they have the relation of means to ends. They come second not first." (emphasis added)).

[FN10] . Robert E. Hudec, The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective, in Development, Trade, and the WTO: A Handbook 81-84 (Bernard Hoekman et al. eds., 2002) [hereinafter Hudec, A Developing Country Perspective].

[FN11] . See Robert E. Hudec, The GATT Legal System: A Diplomat's Jurisprudence, 4 J. World Trade L. 615, 616-36 (1970) [hereinafter Hudec, A Diplomat's Jurisprudence]; see also Ernst-Ulrich Petersmann, The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948, 31 Common Mkt. L. Rev. 1157, 1171 (1994); Ernest H. Preeg, Traders and Diplomats: An Analysis of the Kennedy Round of Negotiations Under the General Agreement on Tariffs and Trade 23-24 (1970); see also Edwin Vermulst & Bart Driessen, An Overview of the WTO Dispute Settlement System and Its Relationship with the Uruguay Round Agreements, 29 J. World Trade L. 131, 136 (1995).

[FN12] . Hudec, A Diplomat's Jurisprudence, supra note 11, at 624.

[FN13] . See Clair Wilcox, A Charter for World Trade 159 (1949); see also Kenneth W. Dam, The GATT: Law and International Economic Organization 352 (1970); Charnovitz, supra note 8, at 801.

[FN14] . GATT, supra note 7, art. XXIII, ¶ 1. Admittedly, most treaties would be some kind of "contract" from a positivistic standpoint in that they are based on the "consent" of contracting governments. See Hans Kelsen, Principles of International Law 438-39 (Robert W. Tucker ed., 2d rev. ed. 1966); see also Steven R. Ratner & Anne-Marie Slaughter, Appraising the Methods of International Law: A Prospectus for Readers, 93 Am. J. Int'l L. 291, 293 (1999).

[FN15] . Italian Discrimination Against Imported Agricultural Machinery, Oct. 23, 1958, GATT B.I.S.D. (7th Supp.) at 60, ¶ 1 (1959) [WTO Doc. Symbol BISD/75/60] (emphasis added).

[FN16] . Id. at pts. III, IV (emphasis added).

[FN17] . Id. ¶ 17 (emphasis added).

[FN18] . Id. ¶ 20.

[FN19] . See GATT, supra note 7, art. XXIII, ¶ 1, § b; see also WTO Agreement, supra note 2, Understanding on Rules and Procedures Governing the Settlement of Dispute, Annex 2, art. 2, ¶ 1. See generally Sungjoon Cho, GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?, 39 Harv. Int'l L.J. 311 (1998) (discussing non-violation provisions of WTO dispute settlement system).

[FN20] . The Australian Subsidy on Ammonium Sulphate, Apr. 3, 1950, GATT B.I.S.D. (vol. 2) at 188 (1952) [WTO Doc. Symbol BISD/II/188].

[FN21] . Id. ¶¶ 12-17.

[FN22] . Treatment by Germany of Imports of Sardines, Oct. 31, 1952, GATT B.I.S.D. (1st Supp.) ¶ 16 (1953) [WTO Doc Symbol BISD/15/53].

[FN23] . Id. ¶ 17 (emphasis added).

[FN24] . See, e.g., Trade Act of 1974, Pub. L. No. 93-618, § 321 (d) (1974).

[FN25] . GATT, supra note 7, art. VI (Anti-Dumping and Countervailing Duties).

[FN26] . See John H. Jackson, The World Trading System: Law and Policy of International Economic

Relations 255-58 (2d. ed. 1997) (regarding Tokyo Round Codes). See also Ministry of Commerce (Wellington), Trade Remedies and the GATT: The Outcome of the Uruguay Round (1994) (regarding new WTO Codes); WTO Subsidy Code, supra note 2; WTO Agreement, supra note 2, Agreement on Implementation of Article VI of the GATT 1994, Annex IA [hereinafter WTO Anti-dumping Code].

[FN27] . See, e.g., WTO Subsidy Code, supra note 2, art. 16 (defining of Domestic Industry); WTO Anti-Dumping Code, supra note 26, art. 4 (defining Domestic Industry).

[FN28] . "[R]egulatory regimes have been brought into greater interaction as the removal of direct barriers to the flows of goods and money between states (tariffs/quotas and exchange controls) has shifted attention towards regulatory difference as a barrier to entry of commodities or capital." Sol Picciotto, The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks, in International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States 89, 189 (William Bratton et al. eds., 1996).

As globalization proceeds, however, it has become increasingly evident that one nation's economic policies can affect other countries. When nations were separated by high trade barriers and trade flows were limited, one country could ignore another's domestic economic policies. As barriers have come down, other countries' domestic policies have become much more important. Globaphobia: Confronting Fears About Open Trade 89, 189 (Gary Burtless et al. eds., 1998).

[FN29] . According to Professor Hudec's study, more than half of all 207 GATT complaints were filed during the last decade (1980-1989) in the old GATT 1947 history. Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System 375-83 (1993) [hereinafter Hudec, Enforcing International Trade Law] (chronicling all 207 GATT complaints).

[FN30] . See generally Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement 84-87 (1997) (discussing "[p]rogressive 'legalization' and codification of GATT dispute settlement procedures").

[FN31] . Debra P. Steger, Afterword: The "Trade and . . ." Conundrum-A Commentary, 96 Am. J. Int'l L. 135, 137 (2002) (emphasis added). In a similar context, it can be said that GATT evolved from an interest-driven "contract" to a norm-based "covenant." See Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 Int'l Org. 421, 424-25 (2000).

[FN32] . See Charnovitz, supra note 8, at 803-08; Patricio Grane, Remedies Under WTO Law, 4 J. Int'l Econ L. 755, 763 (2001). But see Judith Hippler Bello, The WTO Dispute Settlement Understanding: Less is More, 90 Am. J. Int'l L. 416, 417 (1996) (maintaining that "[t]he only sacred WTO imperative is to maintain that balance so as to maintain political support for the WTO Agreement by members"). But see John H. Jackson, The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligations, 91 Am. J. Int'l L. 60 (1997) (responding to Bello's article).

[FN33] . Uruguayan Recourse to Article XXIII, Nov. 16, 1962, GATT B.I.S.D. (11th Supp.) at 95 (1963) [WTO Doc. Symbol BISD/11S/95].

[FN34] . Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1980) [WTO Doc. Symbol L/4907] [hereinafter 1979 DSU].

[FN35] . See United States-Taxes on Petroleum and Certain Imported Substances, Jan. 17, 1987, GATT B.I.S.D. (34th Supp.) at 136, §§ 5.1.3-5.1.12 (1988) [WTO Doc. Symbol L/6175] [hereinafter Superfund].

[FN36] . Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, WTO Agreement, supra note 2 [hereinafter DSU], art. 21, ¶ 5 (emphasis added).

[FN37] . Id. at art. 22, ¶ 1.

[FN38] . See infra § 2-2.

[FN39] . Article 30

Cessation and Non-Repetition The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require. U.N. GAOR Int'l Law Comm., 53d Sess., Supp. No. 10, at 51, U.N. Doc. No. A/56/10 (2001) [hereinafter Draft Articles on Responsibility of States]. G.A. Res. 83 U.N. GAOR, 56th Sess., Agenda item 162, at Annex, pt. 2, ch. 1, art. 30, U.N. Doc. A/RES/56/83 (2001). See also Resolution of the General Assembly of the UN, A/RES/56/83, Responsibility of States for Internationally Wrongful Acts, adopted on Dec. 12, 2001.

[FN40] . DSU, supra note 36, arts. 3, ¶ 7; 19, ¶ 1; 22, ¶ 1; 22, ¶ 8. See Jackson, supra note 32, at 60-64; Chi Carmody, Remedies and Conformity Under the WTO Agreement, 5 J. Int'l Econ. L. 307, 315 (2002); Grane, supra note 32, at 759.

[FN41] . DSU, supra note 36, art. 19, ¶ 1.

[FN42] . But cf. Carmody, supra note 40, at 316 (viewing that "strategic ambiguity" embedded in the term "conform" tends to render to losing parties some flexibility by which they can introduce "measures of equivalent effect" in a WTO-consistent manner).

[FN43] . In this line, Jeffrey Dunoff observed that:

In conventional trade disputes, nation A imposes a barrier to goods from nation B. If nation B prevails in WTO dispute resolution, nation A is instructed to remove the offending trade measure. However, although nation A "lost" the particular dispute, the conventional understanding is that nation A actually "wins" because removing the trade restriction increases its aggregate welfare. To be sure, removing a trade barrier might harm an inefficient domestic producer, but from a systemic perspective it is a gain to both A and B to have more efficient producers successfully compete against less efficient domestic producers. Thus, while losing a case might present the losing government with some political difficulties, there was a rough consensus within the trade community that eliminating a trade measure because it was deemed GATT-inconsistent was a win-win action. Jeffrey Dunoff, The WTO in Transition: Of Constituents, Competence and Coherence, 33 Geo. Wash. Int'l L. Rev. 979, 1005 (2001).

[FN44] . DSU, supra note 36, art. 21, ¶ 5. Even under GATT 1947, which lacked an express provision as to a compliance panel, an original panel could be re-convened to examine whether the defendant party had complied with recommendations by the Contracting Parties (panel). See, e.g., Uruguayan Recourse to Article XXIII, Mar. 3, 1965, GATT B.I.S.D. (13th Supp.) at 35, ¶ 1 (1965) ("On 6 July 1964 the Council agreed, on a request by the Government of Uruguay, that this Panel be reconvened to pursue further the question of compliance with the Article XXIII recommendations made by the Contracting Parties on 16 November 1962 . . . .") [WTO Doc. Symbol L/2074].

[FN45] . United States-Denial of Most-Favoured Nation Trading States as to Non-Rubber Footwear from Brazil, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 128, ¶ 6.13 (1993) [WTO Doc. Symbol DS/8/R].

[FN46] . GATT, supra note 7, art. XX, pmbl. ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, ..." (emphasis added)).

[FN47] . WTO Appellate Body Report on United States Import Prohibition of Certain Shrimp Products, WT/DS58/AB/R, ¶ 115 (Oct. 12, 1998) [hereinafter Shrimp-Turtle].

[FN48] . Id. ¶¶ 166-70; Gregory Shaffer, International Decision: United States-Import Prohibition of Certain Shrimp and Shrimp Products, 93 Am. J. Int'l L. 507, 512 (1999).

[FN49] . Reacting to the Appellate Body Report in Shrimp-Turtle, the USTR emphasized that the U.S. law (Section 609) had been left intact by the Report. U.S. Trade Rep., Press Release: WTO Appellate Body Found US Sea Turtle Law Meets WTO Criteria

But Faults US Implementation, (Oct. 12, 1998), at http:// www.ustr.gov/releases/1998/10/98-92.pdf (last visited on Feb. 16, 2004).

[FN50] . DSU, supra note 36, art. 22, ¶ 2.

[FN51] . Dinah Shelton, Remedies in International Human Rights Law 70 (1999).

[FN52] . Cf. Draft Articles on Responsibility of States, supra note 39, art. 36 (Compensation).

Article 36 Compensation 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established. Id.

[FN53] . Cf. Shelton, supra note 51, at 70 (observing that "[t]he categorization and measurement of pain and suffering is one of the most difficult issues in damages").

[FN54] . Cf. Joost Pauwelyn, Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach, 94 Am. J. Int'l L. 335, 337 (2000). Palmeter and Mavroidis attributed such uncommon usage of compensation in the WTO context to its nature as a "re-balancing of trade concessions." David Palmeter & Petros C. Mavroidis, Dispute Settlement in the World Trade Organization: Practice and Procedure 167 (1999).

[FN55] . DSU, supra note 36, art. 22, ¶ 1.

[FN56] . Id., art. 22, ¶ 2 (emphasis added).

[FN57] . Id., art. 22, ¶ 1; Pauwelyn, supra note 54, at 337 n.12.

[FN58] . See, e.g., WTO Notification of Mutually Agreed Solution, Korea-Measures Concerning the Shelf-Life of Products, WT/DS5/5, G/AG/W/8, July 31, 1995 ("The treatment accorded in the annexes to imported products shall be no less favourable than the treatment accorded to like products of national origin or to like products of any other country.").

[FN59] . Case Concerning the Factory at Chorzow (Pol. v. Germany), 1928 P.C.I.J. (serv. A) No. 17 (Sept. 13), available at http:// www.worldcourts.com/pcij/eng/cases/chorzow2law.htm (last visited Feb. 25, 2004) (emphasis added).

[FN60] . Draft Articles on Responsibility of States, supra note 39, art. 35 (Restitution).

Article 35 Restitution A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, ... Id. The ILC defined "reparation" broadly including restitution and compensation. Id., art. 34.

[FN61] . Patricio Grane comprehensively surveyed retrospective remedies in GATT/WTO case law that mostly fall under the anti-dumping or subsidies law. Grane, supra note 32, at 763-69. See also Ernst-Ulrich Petersmann, International Competition Rules for the GATT/WTO World Trade and Legal System, 27 J. World Trade 35 (1993).

[FN62] . Under the GATT 1947 the losing party was allowed to veto the panel decision, those panel reports that recommended retrospective remedies were often vetoed and thus failed to be adopted. See Grane, supra note 32, at 764. See also Palmeter & Mavroidis, supra note 54, at 162-23.

[FN63] . See Grane, supra note 32, at 766-69. See also WTO Panel Report on Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221/R, ¶ 3.41 (July 15, 2002) (noting that both disputing parties, the United States and Canada, agreed on the "principle of prospective implementation" under the DSU).

[FN64] . WTO Panel Report on Australian Subsidies to Producers and Exporters of Automotive Leather, WT/DS126/RW, ¶ 6.39 (Jan. 21, 2000). The Panel held that:

Based on the ordinary meaning of the term "withdraw the subsidy," read in context, and in light of its object and purpose, and in order to give it effective meaning, we conclude that the recommendation to "withdraw the subsidy" provided for in Article 4.7 of the SCM Agreement is not limited to prospective action only but may not encompass repayment of

the prohibited subsidy. Id. (emphasis in original).

[FN65] . Grane, supra note 32, at 769.

[FN66] . DSU, supra note 36, art. 1, ¶ 1.

[FN67] . GATT, supra note 7, art. XXIII, ¶ 2.

[FN68] . DSU, supra note 36, art. 16, ¶ 4; art. 17, ¶ 14.

[FN69] . Hudec, A Developing Country Perspective, supra note 10, at 86.

[FN70] . Id.

[FN71] . Id.

[FN72] . FSC Article 22.6 Report, supra note 3, ¶ 1.4.

[FN73] . Id. ¶ 3.1.

[FN74] . Id. ¶ A 34.

[FN75] . Id. ¶¶ 5.41, 5.57, 5.59.

[FN76] . Id. ¶ 5.41.

[FN77] . Id. ¶¶ 5.32-5.43.

[FN78] . Id. ¶¶ 5.45-5.48.

[FN79] . Draft Articles on Responsibility of States, supra note 39, at art. 51 (Proportionality).

[FN80] . DSU, supra note 36, at art. 21, ¶ 5 (emphasis added).

[FN81] . Id. art. 21, ¶ 6 (emphasis added).

[FN82] . Banana III Arbitration (U.S.), supra note 6, ¶ 1.1.

[FN83] . See id. ¶ 4.6.

> [T]he European Communities has repeatedly emphasized that any determination of the amount of concessions to be suspended would have to be based exclusively on the amount of the nullification or impairment caused by its revised regime if it were found to be WTO-inconsistent-albeit in another procedure before us, i.e. in our capacity as reconvened panelists under Article 21.5. Id. (emphasis added). "[T]he European Communities argues that if we consider the WTO consistency of its banana regime in an arbitration proceeding under Article 22, we will deprive Article 21.5 of its raison d'etre." Id. ¶ 4.11 (emphasis added).

[FN84] . Id. ¶¶ 4.1-4.15.

[FN85] . See, e.g., WTO Panel Report on United States Anti-Dumping on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/RW (Nov. 7, 2000); WTO Appellate Body Report on United States Import Prohibition on Certain Shrimp Products, WT/DS58/AB/RW (Oct. 20, 2001); WTO Appellate Body Report on United States Tax Treatment of "Foreign Sales Corporations," WT/DS108/AB/RW (Jan. 14, 2002).

[FN86] . This problem of the sequence or sequencing is being reviewed by Members as one of the reform agendas for the DSU. Dispute Settlement: Members Discuss "Sequencing" and Timeframe Constraints, 6 Bridges Wkly. Trade News Dig., Mar. 19, 2002, available at http://www.ictsd.org/weekly/02-03-19/index.htm (last visited Feb. 19, 2004).

[FN87] . Christine D. Gray, Judicial Remedies in International Law 6 (1987). See also Carmody, supra note 40, at 312.

[FN88] . Bello, supra note 32, at 417.

[FN89] . Id.

[FN90] . Id. at 416-17.

[FN91] . Id. at 417.

[FN92] . See supra text accompanying note 9.

[FN93] . See generally Michael K. Young, Dispute Resolution in the Uruguay Round: Lawyers' Triumph over Diplomats, 29 Int'l Law. 389 (1995) (regarding the comparison between the old GATT 1947 and the new WTO system in terms of the rule-orientedness).

[FN94] . Jackson, supra note 32, at 60-64.

[FN95] . Id. at 63 (emphasis added). In fact, this preference for the withdrawal of the measures concerned vis-a-vis compensation seems to have already been established in the old GATT system. See 1979 DSU, supra note 34, at 210. See Carmody, supra note 40, at 315; Grane, supra note 32, at 760-61 (regarding supporting views for the priority of cessation (withdrawal) as remedies).

[FN96] . Draft Articles on Responsibility of States, supra note 39, art. 39 (Continued Duty of Performance).

[FN97] . Id. art. 49 (Object and Limits of Countermeasures).

[FN98] . Shelton, supra note 51, at 40.

[FN99] . Alan O. Sykes, The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding: Damages or Specific Performance?, in New Directions in International Economic Law: Essays in Honor of John H. Jackson 347, 347 (Marco Bronckers & Reinhard Quick eds., 2000) [hereinafter New Directions].

[FN100] . Id. at 349-52.

[FN101] . Id. at 352-54.

[FN102] . Id. at 354-57.

[FN103] . See WTO Agreement, supra note 2, art. I (Establishment of the Organization), art. II (Scope of the WTO), art. III (Functions of the WTO), art. IV (Structure of the WTO), art. VIII (Status of the WTO).

[FN104] . Sykes, supra note 99, at 356.

[FN105] . See Hormones, supra note 5.

[FN106] . Sykes, supra note 99, at 356-57 (emphasis added).

[FN107] . See Robert E. Hudec, GATT Dispute Settlement after the Tokyo Round: An Unfinished Business, 13 Cornell Int'l L.J. 145, 159 (1980). See also William J. Davey, Dispute Settlement in GATT, 11 Fordham Int'l L.J. 51, 67-78 (1987); John H. Jackson, The Jurisprudence of International Trade: The DISC Case in GATT, 72 Am. J. Int'l L. 747, 779-80 (1978) [hereinafter Jackson, The DISC Case] (raising a similar concept of "big cases," which cannot be handled properly by adjudication).

[FN108] . WTO Ministerial Conference, The ACP-EC Partnership Agreement, WT/MIN(01)/15 (Nov. 14, 2001) (authorizing a waiver to GATT Article I (MFN) for both EC and ACP countries and thus ending a long-standing banana dispute).

[FN109] . See Frederic L. Kirgis, Jr., International Organization in Their Legal Setting 554 (2d ed. 1993). This deterrent function of sanctions can also be found in other areas of international law. See, e.g., Ronald B. Mitchell, International Oil Pollution at Sea: Environmental Policy and Treaty Compliance 291-92 (1994) (describing the International Maritime Organization's (IMO's) successful regulation of international oil pollution by oil tankers through enforcing the mechanism of the International Oil Pollution Prevention (IOPP) certificate without which tankers could be barred from doing business or detained in port under the International Convention for the Prevention of Pollution from Ships).

[FN110] . See, e.g., Pauwelyn, supra note 54, at 345 (arguing for "collective enforcement"); Marc L. Busch & Eric Reinhardt, Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec 457, 478 (Daniel L. M. Kennedy & James D. Southwick eds., 2002) [hereinafter Political Economy] (proposing "stiffer penalties and speedier legal authorization for retaliation"). But cf. Charnovitz, supra note 8, at 825-27 (suggesting a softer notion of "fine"); id. at 831 (suggesting "compulsory and automatic compensation"). To strengthen the impact of sanctions, the U.S. Congress has recently passed a bill containing the so-called "carousel provision" to rotate the target products for sanctions every six months. See id. at 797 n.36; Trade and Development Act of 2000, Pub. L. No. 106-200, § 407, 114 Stat. 251, 293.

[FN111] . See International Financial Institution

Advisory Commission, Report (Mar. 2000), available at http://www.house.gov/jec/imf/meltzer.htm (last visited on Feb. 19, 2004); Charnovitz, supra note 8, at 797.

[FN112] . See Charnovitz, supra note 8, at 816-17; Pauwelyn, supra note 54, at 338.

[FN113] . See Henrik Horn & Petros C. Mavroidis, Remedies in the WTO Dispute Settlement System and Developing Country Interests (1999), at http://www1.worldbank.org/wbiep/trade/papers_2000/BPdisput.pdf (last visited on Feb. 18, 2004) (arguing that the lack of a workable sanction mechanism in the WTO tends to privatize the sanction against violators, which puts "economically and politically weak" countries in a disadvantageous position).

[FN114] . WTO-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB/ECU (Mar. 24, 2000), ¶ 177 (emphasis added). See also Hudec, A Developing Country Perspective, supra note 10, at 84 (observing that the WTO's greater emphasis on retaliation makes the "dispute settlement system even more one-sided than before," favoring larger developed countries); David Palmeter & Stanmir A. Alexandrov, "Inducing Compliance," in WTO Dispute Settlement, in Political Economy, supra note 110, at 662.

[FN115] . Banana Dispute: Ecuador and EC Hold Talks to Avoid WTO Dispute, 5 Bridges Wkly. Trade News Dig., Apr. 24, 2001, available at http://www.itsd.org/html/weekly/24-04-01/Story3.html (last visited on Feb. 18, 2004) (quoting an informed source stating that "it is difficult for Ecuador as a small developing country with severe economic problems to resist major pressure from the US and the EU over the banana issue . . . .").

[FN116] . Pauwelyn, supra note 54, at 343, 810.

[FN117] . Steve Charnovitz, Should the Teeth be Pulled?: An Analysis of WTO Sanctions, in Political Economy, supra note 110, at 622.

[FN118] . Id. See also Andreas F. Lowenfeld, Remedies Along with Rights: Institutional Reform in the New GATT, 88 Am. J. Int'l L. 477, 487 (1994) (observing that retaliation is not favored under the DSU because it is by definition against the WTO rules and also erects a new trade barrier).

[FN119] . Charnovitz argues that a WTO-approved sanction victimizes domestic consumers who may feel unrepresented under the WTO system and finds a basis for his argument in the dicta of recent case law (Section 301) emphasizing the position of individuals in the WTO system. Charnovitz, supra note 8, at 811. See also id. at 815 (quoting Adam Smith arguing in the Wealth of Nations that when retaliation fails to secure the dismantling of foreign trade barriers, "it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them"); Gary N. Horlick, Problems with the Compliance Structure of the WTO Dispute Resolution Process, in Political Economy, supra note 110, at 631, 641 (stating that "the purpose of the WTO is not to impose 100 percent duties on importers of Roquefort cheese, or other innocent bystanders"); Frieder Roessler, Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past, 19 U. Pa. J. Int'l Econ. L. 513, 528 (1998) (arguing that "a trade sanction inflicts costs both on the imposing nation and on the target nation, and the cost for the former can sometimes exceed that of the latter").

[FN120] . See Charnovitz, supra note 8, at 815 (viewing that trade sanctions tend to stimulate domestic protectionist sentiment). Carmody observed that this self-destructive effect of sanctions has contributed to the rarity of actual implementation of sanctions under the WTO system when winning parties are authorized to retaliate. Carmody, supra note 40, at 320.

[FN121] . This argument stands powerful even in the domestic sense. See Robert E. Hudec, The Role of Judicial Review in Preserving Liberal Foreign Trade Policies, in National Constitutions and International Economic Law 503, 503-08 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (discussing Tumlir's critique of protectionism as "constitutional failure").

[FN122] . See Robert E. Hudec, The GATT Legal System and World Trade Diplomacy 196-97 (2d ed. 1990) (trenchantly observing that "[t]he symbolic purpose of retaliation is largely fulfilled by the fanfare which surrounds the formal decision authorizing it" and that "[a]ctual implementation of the retaliatory measures tends to be something of an anticlimax").

[FN123] . Oran R. Young, Compliance and Public Authority: A Theory with International Applications 106-08 (1979).

[FN124] . Joel P. Trachtman, Bananas, Direct Effect and Compliance, 10 Eur. J. Int'l L. 655, 655 (1999).

[FN125] . Id. at 678.

[FN126] . In this regard, wrong cases are "polycentric" in that they "create a different complicated pattern of tensions" and notably involve "allocation of economic resources." See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 394-404 (1978).

[FN127] . Cf. Charnovitz, supra note 8, at 808-09 (observing that cases like Hormones and Bananas may be "unrepresentative of the diversity of disputes on which sanctions might be tested" on account of "deep-seated political choices by the EC on health, culture, and historical trade preferences"). Of course, under a different situation where domestic resistance against a particular panel or the Appellate Body reports can be accommodated, the losing party government may capitalize on "foreign pressure" to reform certain policy areas. Id. at 813-14.

[FN128] . See supra note 107.

[FN129] . To prevent these wrong cases from being adjudicated, the "consultation" process may be utilized and thus proper settlements result. See William J. Davey, WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding "Over-Legalization," in New Directions, supra note 99, at 295-56.

[FN130] . Robert E. Hudec, International Economic Law: The Political Theater Dimension, 17 U. Pa. J. Int'l Econ. L. 9, 10 (1996).

[FN131] . United States-Tax Legislation (DISC), Nov. 12, 1976, GATT B.I.S.D. (23d Supp.) at 98 (1977) [WTO Doc. Symbol L/4422]. See generally Jackson, The DISC Case, supra note 107; Robert E. Hudec, Reforming GATT Adjudication Procedures: The Lessons of the DISC Case, 72 Minn. L. Rev. 1443 (1988).

[FN132] . WTO Appellate Body Report on U.S. Tax Treatment for "Foreign Sales Corporations," WT/DS108/1 (Mar. 20, 2000). See generally Julie Elizabeth McGuire, World Trade Organization Finds U.S. Foreign Sales Corporation Violates EU Trade Agreements, 2 Law. J. 5 (2000).

[FN133] . Superfund, supra note 35, ¶ 5.1.9.

[FN134] . Japan-Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 83, ¶ 2.8 [WTO Doc. Symbol L/6216].

[FN135] . See David G. Victor, The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years, 32 N.Y.U. J. Int'l L. & Pol. 865, 924-34 (2000).

[FN136] . See id.

[FN137] . See, e.g., United States-Imposition of Countervailing Duty without Injury Criterion, Sep. 30, 1981, L/5192. In this case, India complained about the United States' application of its countervailing duty law to Indian products without the determination of "material injury." Although the panel was established to review this case, the United States and India reached a settlement and the latter withdrew the complaint in the middle of the panel proceeding. See Hudec, Enforcing International Trade Law, supra note 29, at 486-87.

[FN138] . In fact, the original purpose of the old GATT dispute settlement mechanism under Articles XXII and XXIII was "settlement," rather than "adjudication." See Debra P. Steger & Susan M. Hainsworth, New Directions in International Trade

Law: WTO Dispute Settlement, in Dispute Resolution in the World Trade Organisation 28, 29 (James Cameron & Karen Campbell eds. 1998). According to the classic Aristotelian remedial justice, such settlement seems important in that it serves the benefits and satisfaction of "victims," i.e., defendant countries in the case of WTO disputes. See Shelton, supra note 51, at 38-39.

[FN139] . WTO Agreement, supra note 2, pmbl.

[FN140] . See Carmody, supra note 40, at 314; II Y.B. Int'l Comm. 55 (1993) ("not only the interest of the injured State or States but also the interests of the international community in the preservation of, and reliance upon, the rule of law"). Cf. Jonathan I. Charney, Universal International Law, 87 Am. J. Int'l L. 529, 532 (1993) (arguing that "[t]he international legal system is supported not only by states' interests in promoting individual rules, but also by their interests in preserving and promoting the system as a whole"). Regarding basic information on the metaphor of nomos versus physis, see, e.g., Paul Ledere, The Sophists: The Origin of Western Philosophical Ethics, available at http://faculty.ccri.edu/paleclerc/ethics/sophists.shtml (last visited on Feb. 19, 2004).

[FN141] . Cf. Pauwelyn, supra note 54, at 341; Superfund, supra note 35, ¶ 5.2.2 (emphasizing that the GATT rules should not only protect current trade but also "create the predictability needed to plan future trade"). In this regard, remedies under the WTO system can be said to be "prospective," rather than "retrospective." See Carmody, supra note 40, at 314; Grane, supra note 32, at 760.

[FN142] . See Kenneth Abbott, GATT as a Public Institution: The Uruguay Round and Beyond, 18 Brook. J. Int'l L. 31, 32 (1992).

[FN143] . Hudec, A Developing Country Perspective, supra note 10, at 82 (emphasis added).

[FN144] . For the purpose of this paper, "WTO norm" can be defined as an integrated set of legal expressions of the WTO system that are declared and clarified through interpretations of the dispute settlement mechanism.

[FN145] . See supra part I.

[FN146] . GATT, supra note 7, arts. III, XX.

[FN147] . "In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not 'necessary' within the meaning of Article XX(b)." Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on Nov. 7, GATT B.I.S.D. (37th Supp.), at 200, ¶ 81 (1991) [hereinafter Thai Cigarette] [WTO Doc. Symbol DS10/R].

[FN148] . Id. ¶ 75 (emphasis added).

[FN149] . WTO Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/9, at 20 (May 20, 1996) [hereinafter Gasoline (1996)] [WTO Doc. Symbol WT/DS2/9].

[FN150] . The Appellate Body emphasized that:

> The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate. . . . [I]t appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. . . . But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States. Id. at 26.

[FN151] . See U.S. Trade Rep., Press Release:

WTO Appellate Body Found U.S. Sea Turtle Law Meets WTO Criteria But Faults U.S. Implementation, Oct. 12, 1998, at http://www.ustr.gov/releases/1998/10/98-92.pdf (last visited on Feb. 19, 2004).

[FN152] . Cf. Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause, 47 Vand. L. Rev. 1401, 1406 (1994). Probably, such sophisticated jurisprudence is common to any mature, well-advanced legal system. Donald Kommers and Michel Waelbroeck observed this trend in recent U.S. Dormant Commerce Clause jurisprudence. They submit that: "In the newer cases what is regulated is less important than how it is regulated. The practical operation of a regulatory scheme is more important than whether it affects intrastate or interstate commerce directly or incidentally." (emphasis original). Donald P. Kommers & Michel Waelbroeck, Legal Integration and the Free Movement of Goods: The American and European Experience, in Forces and Potential for a European Identity (Book 3), Methods, Tools and Institutions (Volume 1), Integration Through Law: European and the American Federal Experience 165, 174 (Mauro Cappelletti et al. eds., 1985).

[FN153] . See DSU, supra note 36, art. 22, ¶¶ 1, 8.

[FN154] . Cf. Pauwelyn, supra note 54, at 344-45 (discussing the DSU-illegality of offsetting compensation).

[FN155] . Trade Policy Review Mechanism, Annex 3, WTO Agreement, supra note 2 [hereinafter TPRM].

[FN156] . Bananas III, supra note 4, ¶ 132.

[FN157] . Id. ¶ 132-38.

[FN158] . Id. ¶ 135.

[FN159] . Robert M. Cover, Nomos and Narrative, in Narrative, Violence, and the Law: The Essays of Robert Cover 95, 110 (Martha Minow et al. eds., 1992).

[FN160] . Cf. Malcolm N. Shaw, A Practical Look at the International Court of Justice, in Remedies in International Law: The Institutional Dilemma 11, 48 (Malcolm D. Evans ed., 1998) (Evans observes that States expect from the International Court of Justice "an authoritative decision based on internationally accepted criteria within the bounds of reasonable professional predictability." (emphasis added)).

[FN161] . William J. Davey, A Permanent Body for WTO Dispute Settlement: Desirable or Practical?, in Political Economy, supra note 110, 496 at 518-19.

[FN162] . Id. at 518.

[FN163] . See, e.g., Hormones, supra note 5, ¶ 8.272 (refusing to examine the sensitive legal question of an alleged conflict or hierarchy between GATT and the SPS Agreement).

[FN164] . Cf. C.W. Jenks, Craftsmanship in International Law, in International Law in the Twentieth Century 75, 80 (Leo Gross ed., 1969) (maintaining that "[a] jurisprudence which . . . ignores and belittles the limitations with which the rule of law operates in practice in international affairs in the present stage of development of the law, and a jurisprudence which rationalizes, defends and even idealizes these limitations, are equally unhelpful and unserviceable").

[FN165] . For instance, the Hormones dispute could have been addressed through a non-adjudicative solution, including an appropriate "labeling" system, discussed in a constructive transatlantic regulatory dialogue. See Victor, supra note 135, at 921.

[FN166] . See Davey, Dispute Settlement in GATT, supra note 107, at 62.

[FN167] . Cf. Roger Fisher, Improving Compliance with International Law 22-23 (1981) (maintaining that one of the multiple objectives of compliance is "future-oriented," deciding "on what ought to happen next").

[FN168] . WTO Panel Report on United States-Sections 301-310 of the Trade Act of 1974, WT/DS152/R (Jan. 27, 2000), ¶ 7.78.

[FN169] . Id. ¶¶ 7.76, 7.78.

[FN170] . Cf. Elisabeth Zoller, Enforcing International Law Through U.S. Legislation 6 (1985) (observing that the remedy provided for the breach of international law is "entirely domestic in nature since the individualization of the breach makes redress possible as a matter of domestic law"); C.F. Amerasinghe, Local Remedies in International Law 1 (1990) (viewing that "rule of local remedies" is accepted as part of customary international law, codified in certain treaties such as the "International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights" as well as raised in "international litigations before the International Court of Justice and other arbitral tribunals").

[FN171] . See notably J.H.H. Weiler, The Transformation of Europe, 100 Yale L.J. 2403, 2413-14 (1991). Cf. Antonio F. Perez, The International Recognition of Judgments: The Debate Between Private and Public Law Solutions, 19 Berkeley J. Int'l L. 44, 49-50 (2001) (observing that the "direct effect" doctrine in the EU system operates in the same way as the Full Faith and Credit Clause of the U.S. Constitution under which states are obliged to recognize and enforce each other's judgments).

[FN172] . See, e.g., Ernst-Ulrich Petersmann, How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?, 20 Mich. J. Int'l L. 1, 30 (1998) (arguing that "European integration law and WTO law confirm the Kantian insight that rule of law requires compulsory judicial protection of freedom and non-discrimination at home and abroad").

[FN173] . Trachtman, supra note 124, at 657. See also Pauwelyn, supra note 54, at 346 n.67 ("Another tool to bolster enforcement of WTO rules would be to give them 'direct effect' in national courts.").

[FN174] . See generally Carlos Manuel Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695 (1995). See also Edith Brown Weiss, The Rise or the Fall of International Law?, 69 Fordham L. Rev. 345, 357 (2000). Similarly, certain treaties in the areas of civil aviation and marine transport create a "uniform regime" on domestic remedies, requiring "the imposition of municipal liability, civil or criminal, for breach of their terms or of regulations drawn up by states in accordance with the treaty." Gray, supra note 87, at 222. Obviously, the U.S. made it doubly sure that the WTO treaty is not a self-executing treaty: only the U.S. government itself can file a suit before the U.S. court based on WTO rules. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(c)(1), 108 Stat. 4809, 4818 (1994).

(c) Effect of Agreement With Respect to Private Remedies Limitations-No person other than the United States (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement. Id.

[FN175] . From the perspective of "cost-benefit analysis," Joel Trachtman and Philip Moremen warned that "[b]efore transferring rights from states back to individuals, we should investigate the benefits that might flow from each institutional structure, as well as the costs, including transaction costs." Joel P. Trachtman & Philip M. Moremen, Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?, 44 Harv. Int'l L. J. 221, 249 (2003). Cf. Ari Afilalo, Constitutionalization Through the Back Door: A European Perspective on NAFTA Investment Chapter, 34 N.Y.U. J. Int. L. & Pol. 1, 6-8 (2001) (warning that an application of NAFTA Chapter 11 (Investment) may establish a "de facto system of state liability through which private parties, as compared with the EU regime, can directly sue the Member state even for violations of general rules governing trade in goods, not investment," and arguing that grey measure falling within the boundary between trade in goods and investment should be directed to the realm of "state-to-state" litigation, compatible with the "limited level of supranational constitutionalization of NAFTA").

[FN176] . See, e.g., Ronald A. Brand, Direct Effect of International Economic Law in the United States and the European Union, 17 Nw. J. Int'l L. & Bus. 556, 608 (1996-97) (suggesting that "[w]hile the global system is not yet ready for the wholesale application of these developments, it is important that we realize the need to move in a similar direction"). Thomas Cottier & Krista Nadakavukaren Schefer, The Relationship Between World Trade Organization Law, National and Regional Law, 1 J. Int'l Econ. L. 83, 118-19 (1998) (arguing that "we might succeed with a step-by-step, provision-by-provision approach to negotiations, achieving a gradual direct effect of most, if not all, of the WTO Agreements"). Of course, in a legal regime where a sufficient legal infrastructure is established, direct effect tends to serve as a vehicle to "interconnect" different legal systems. See generally Piet Eeckhout, The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, 34 Common Mkt. L. Rev. 11, 48-55 (1997).

[FN177] . See Frank Griffith Dawson & Ivan L. Head, International Law, National Tribunals and the Rights of Aliens 276 (1971) (citing Hilton v. Guyot, 159 U.S. 113 (1895)).

[FN178] . But cf. Perez, supra note 171, at 73-82 (proposing the incorporation of recognition and enforcement of foreign judgments in the WTO system through a treaty-making process).

[FN179] . Cf. Mohammed Bedjaoui, The Reception by National Courts of Decisions of International Tribunals, in International Law Decisions in National Courts 21, 22-23 (Thomas M. Franck & Gregory H. Fox eds., 1996) [hereinafter National Courts] (broadly defining "reception" as a national court's reference to an international judicial decision in connection with a dispute before the national court, and observing a more prevalent "osmosis" of international decisions into the domestic legal order through the emergence of supranationality in certain universal and regional organizations); Sarita Ordonez & David Reily, Effect of the Jurisprudence of the International Court of Justice on National Courts, in National Courts, supra, at 345 (illustrating various ways in which domestic courts have "received" the International Court of Justice decisions and advisory opinions).

[FN180] . Meinhard Hilf, The Role of National Courts in International Trade Relations, 18 Mich. J. Int'l L. 321, 346-47 (1997) [hereinafter Hilf, The Role of National Courts] (observing in the EU context that "national courts tend to interpret the relevant implementing legislation in a manner which avoids conflicts with existing GATT law").

[FN181] . Anne-Marie Slaughter, A Typology of Transjudicial Communication," in National Courts, supra note 179, at 51-52.

[FN182] . Cf. Alec Stone Sweet, The New GATT: Dispute Resolution and the Judicialization of the Trade Regime, in Law above Nations: Supranational Courts and the Legalization of Politics 118, 138 (Mary L. Volcansek ed., 1997) (suggesting that "WTO legal norms gradually embed themselves within national legal systems, either by domestic legislative actions or judicial decisions"); Richard M. Goodman & John M. Frost, International Economic Agreements and the Constitution 2 (The Inst. for Int'l Econ., Working Paper No. 00-2, 2000), available at http://www.iie.com/publications/wp/2000/00-2.pdf (last visited on Feb. 19, 2004) (arguing that "international agreements, such as GATT and NAFTA, can serve as useful interpretive guidelines for the Court where the challenged state measure restricts the cross-border flow of goods or services").

[FN183] . U.S. Const. art. I, § 8, cl. 3.

[FN184] . Id. at art. VI.

[FN185] . Id. at amend. XIV.

[FN186] . Id. at amends. V, XIV.

[FN187] . Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340), art. 2, § 7 (1997); Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3, art. 12 (1997) [hereinafter EC Treaty].

[FN188] . EC Treaty, supra note 187, art. 230.

[FN189] . See Hudec, supra note 121, at 503-08 (regarding a standpoint viewing protectionism as a "constitutional failure").

[FN190] . See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18; Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 Vand. L. Rev. 1103, 1197 (1990).

[FN191] . See, e.g., Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1276 (1996) (arguing that the law applied by the Supreme Court in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), was a "customary body of rules" derived from jus gentium and that no court is free to establish its own hermeneutics in departure from it). From a congruent standpoint, Justice O'Connor advocates that domestics courts should "faithfully recognize the obligations imposed by international law" as seen in Murray v. The Charming Betsy, 6 U.S. (2 Cronel) 64, and The Paquete Habana, 175 U.S. 677 (1900). See Sandra Day O'Connor, Federalism of Free Nations, 28 N.Y.U. J. Int'l L. & Pol. 35, 38-42 (1995). She emphasizes the federalist ideal of healthy dialogue and mutual trust which may be formed between domestic courts and transnational tribunals, which might be depicted in terms of Kant's "federalism of free nations." Id. at 41. See also Sandra Day O'Connor, Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law, Fed. Law. Sept. 1998, at 20, 20-21 (highlighting the flexibility and dynamism of the common law tradition which enables the borrowing of new ideas from other legal systems and permits the "civilizing fiction of constitutional law"); Bruce Ackerman, The Rise of World Constitutionalism, 83 Va. L. Rev. 771, 775 (1997) (advising his readers strongly to "look upon the American experience as a special case, not as the paradigmatic case"); Roger J. Miner, The Reception of Foreign Law in the U.S. Federal Courts, 43 Am. J. Comp. L. 581, 581 (1995) (observing that the U.S. federal courts tend to "duck and run" in the face of foreign law issues despite that they are beginning to "form a significant part of the business of the federal courts"); Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L. J. 1225, 1228 (1999) (introducing a "more systematic approach to the possibility of learning from constitutional experience elsewhere"). Cf. W. Michael Reisman, Through or Despite Governments: Differentiated Responsibilities in Human Rights Program, 72 Iowa L. Rev. 391, 394-97 (1987) (introducing Georges Scelle's celebrated argument for dedoublement fonctionnel which views domestic courts as "functional international courts").

[FN192] . See Debra Herz, Effects of International Arbitral Tribunals in National Courts (II), in National Courts, supra note 179, at 219 (concluding that GATT panel decisions have been "influential" in the U.S. Courts despite the lack of "formal deference"). See also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (rejecting the 1996 Massachusetts law barring state entities from purchasing goods or services from companies doing business with Burma on the ground that the state Act was "preempted," and its application "unconstitutional, under the Supremacy Clause"); WTO Request for Consultation, United States-Measure Affecting Government Procurement, WT/DS88/1 (June 26, 1997).

[FN193] . Hawaii v. Ho, 41 Haw. 565 (1957).

[FN194] . Id. at 565.

[FN195] . Id. at 567-69.

[FN196] . Id. at 569-71.

[FN197] . Goya De Puerto Rico Inc. v. Santiago, 59 F. Supp. 2d 274, 276 (D.P.R. 1999).

[FN198] . Id. at 276.

[FN199] . Id. at 277.

[FN200] . Agreement on Application of Sanitary and Phylosanitary Measures, Annex IA, WTO Agreement, supra note 2.

[FN201] . See Chiquita Sues EC Over Banana Regime, Bridges Wkly. Trade News Dig., Jan. 30, 2001, available at http://www.ictsd.org/html/weekly/story6.30-01-01.htm (last visited on Feb. 19, 2004).

[FN202] . Action brought on 25 January 2001 by

Chiquita Brands International, Inc, Chiquita Banana Company B.V. and Chiquita Italia, S.p.A. against the Commission of the European Communities, (Case T-19/01), 2001 O.J. (C108) 23, available at http://europa.eu.int/eur-lex/en/archive/2001/c_1082001 0407en.html (last visited on Feb. 19, 2004).

[FN203] . Id. at 24.

[FN204] . See Slaughter, supra note 181, at 60-62.

[FN205] . See Martin A. Rogoff, Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court, 11 Am. U. J. Int'l L. & Pol'y 559, 646 (1996) (quoting Richard Falk, Evasions of Sovereignty, in Contending Sovereignties: Redefining Political Community 336 (R.B.J. Walker & Saul H. Mendlevitz eds., 1990)).

[FN206] . In this regard, Frank Dawson and Ivan Head stated that: "Just as attorneys are considered 'officers of the court' in a domestic setting, they also must learn to regard themselves as agents or officers of the international legal order, with obligations transcending national boundaries." Dawson & Head, supra note 177, at 312.

[FN207] . Cf. Peter Goodrich, Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis 7 (1987) (arguing that "legal practice and legal language are structured in such a way as to prevent the acquisition of such knowledge by any other than a highly trained elite of specialists in the various domains of legal study"); Bernard S. Jackson, Semiotics and Legal Theory 286 (1985) (observing that the "audience, or groupe semiotique" of judicial discourse is relatively restricted).

[FN208] . See Rogoff, supra note 205, at 674 (observing that "[n]ational judges, when they interpret international agreements, especially the typical international agreements that come before national courts for interpretation and application, may profitably be thought of as members of an epistemic community").

[FN209] . See Anne-Marie Slaughter, International Law in a World of Liberal States, 6 Eur. J. Int'l L. 503, 524-26 (1995).

[FN210] . See Jonathan I. Charney, Third Party Dispute Settlement and International Law, 36 Colum. J. Transnat'l L. 65, 73 (1997); Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273, 323-26 (1997); Anne-Marie Slaughter, Liberal International Relations Theory and International Economic Law, 10 Am. U. J. Int'l L. & Pol'y 717, 743 (1995); Slaughter, supra note 181, at 57-59 (discussing "a common judicial identity and methodology"); Anne-Marie Slaughter, Judicial Globalization, 40 Va. J. Int'l L. 1103, 1107 (2000) (discussing this phenomenon in the European Community).

[FN211] . See Slaughter, supra note 209, at 524-26; J.H.H. Weiler, A Quiet Revolution: The European Court of Justice and Its Interlocutors, 26 Comp. Pol. Stud. 510, 521-22 (1994). See also Paul R. Dubinsky, The Essential Function of Federal Courts: The European Union and the United States Compared, 42 Am. J. Comp. L. 295, 296-97 (1994) (introducing the emerging view that "the Court of Justice together with the national courts must exercise certain essential functions in an increasingly federalized Common Market").

[FN212] . See Weiler, supra note 171, at 2426.

[FN213] . See Mauro Cappelletti, Forward to the Florence Integration Project Series, in A Political, Legal and Economic Overview (Book 1), Methods, Tools and Institutions (Volume 1), Integration Through Law: European and the American Federal Experience v. & n.1 (Mauro Cappelletti et al. eds., 1985).

[FN214] . See Wolf Sauter, The Economic Constitution of the European Union, 4 Colum. J. Eur. L. 27, 41 (1998). Cf. H. Lauterpacht, Private Law Sources and Analogies of International Law viii (Archon Books 1970) (1927) (arguing that "general principles of law, recognized by civilised States and adopted by customary and conventional international law as a source of decision in international disputes, are for the most part identical with generally recognised

principles of private law" (emphasis added)); Raul Emilio Vinuesa, The New Role of Equity as a Source of International Law, in XIX Thesaurus Acroasium of the Institute of Public International Law and International Relations of Thessaloniki "Peace Messenger of the UN" 451, U.N. Doc. A/42/487, (1992); Pippa Tubman, National Jurisprudence in International Tribunals, in National Courts, supra note 179, at 451 (observing that general principles of law have played an important role in the development of international law).

[FN215] . Cf. Thomas M. Franck & Gregory H. Fox, Introduction: Transnational Judicial Synergy, in National Courts, supra note 179, at 4-5 (observing that an "inter-jurisdictional discourse," by which "monitoring and implementing functions" can be shared by international and domestic courts, creates a "functional synergy" equivalent to that found in an advanced "federal system, with national and provincial courts providing mutual reinforcement of essential norms while also protecting space for varied local experimentation and due reference to socio-cultural sensibilities").

[FN216] . DSU, supra note 36, art. 19.1 (emphasis added).

[FN217] . Slaughter, supra note 181, at 52-54.

[FN218] . Cf. id. at 65 (maintaining that "a process of collective deliberation over the protection of human rights would, in effect, create a multidimensional mechanism for creating and enforcing the human rights provisions of a hypothetical global constitution."); Ordonez & Reily, supra note 179, at 371 (arguing that "domestic judges need to realize that they play an integral role in the continuing development of international law").

[FN219] . Cf. Hilf, The Role of National Courts, supra note 180, at 346-47 (maintaining that a major effort made at both national and international levels to provide for more efficient application of GATT law would boost the efficiency of the WTO system as a whole and reinforce its legitimacy).

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