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THE POLITICS OF WTO DISPUTE SETTLEMENT

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1. INTRODUCTION

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) that came into force on January 1, 1995, both expanded the scope of trade liberalization and created a new institutional architecture to govern this process — the World Trade Organization (WTO).¹ The Dispute Settlement Understanding (DSU) is perhaps the most innovative feature of the WTO.² It created a standing appeals tribunal, the Appellate Body, to act as the final arbiter in trade disputes among WTO members. The Appellate Body has already found numerous practices in member states to contravene WTO rules, and these decisions have frequently led to changes in government behavior. Some political scientists have depicted the WTO dispute settlement system as a triumph of rule-bound and impartial legalism over power politics in the international system. Judith Goldstein, Miles Kahler, Robert Keohane, and Anne-Marie Slaughter [2000: 389], for example, claim that “the WTO represents a victory for the legalists ... (DSU) panel members construct their decisions with the assistance of a legal secretariat that helps them to resolve legal issues rather than to broker a political compromise.”

In contrast, we highlight the political foundations on which the apparent power and successes of the WTO are built, as well as the fragility of these foundations. A robust legal system of international trade dispute settlement may one day emerge in the WTO, and a gradualist and politically sensitive strategy on the part of litigants and judges alike may well provide the best hope of achieving it. Nonetheless, there is no gainsaying that power and interest international politics has been alive and well in the short history of the DSU. Moreover, there are strong indications that this will remain the case into the foreseeable future.

We do not address in this article whether the WTO has helped to level the playing field between the developed and developing worlds.³ Rather, we focus on interactions among the United States (US), the European Union (EU), and the Appellate Body.⁴ By any measure, the US and the EU are the twin titans of international trade. As the highest court in the WTO legal system, the Appellate Body has the final say on all questions of law that arise in WTO disputes. The success of the DSU depends heavily on the support of the US and the EU — using it when they have complaints and, more importantly, abiding by adverse decisions in cases brought against them. Moreover, these two actors feature prominently in the short history of Appellate Body jurisprudence. As of February 1, 2002, there had been only one Appellate Body case in which neither the EU nor the US was involved. One or the other has been the defendant in almost half the

disputes decided by the Appellate Body. Indeed, in the majority of cases these two parties have been on opposite sides of important issues in contention (whether as defendants, complainants, or third parties).⁵

We focus on three major characteristics of the interactions among the US, the EU, and the Appellate Body: strategic restraint (or the lack of it) by potential complainants in the cases they choose to file; strategic conciliation by the Appellate Body in decisions involving powerful defendants; and strategic bargaining between losing defendants and winning complainants outside of the DSU regarding the terms and timing of compliance.

First, government decisions on whether to pursue cases have had — and will continue to have — a marked bearing on the evolution of the WTO. The US and the EU have on occasion decided not to push contentious disputes through the WTO system for fear of de-legitimizing it. The best-known example is the EU's decision to withdraw its complaint against the U.S. Helms-Burton Act concerning trade between Cuba and third countries. After requesting the formation of a panel, the EU suspended the proceedings because it did not want to put WTO arbitrators in an invidious situation that inevitably would have damaged the DSU. A decision for the US would have been difficult to justify on legal grounds, whereas Washington openly threatened to defy any ruling against it.

The flip side of strategic forbearance — complainants doggedly pursuing sensitive, high-stakes cases — poses a significant threat to the future of the WTO. The ongoing *US – FSCs* and *EC – Beef Hormones* disputes are important instances of the breakdown of restraint. In high-profile cases such as these, the authority of the DSU is undermined when defendants fail to comply with adverse rulings in a timely fashion.

Second, the Appellate Body has been very active in modifying the decisions of *ad hoc* panels. It has reversed in whole or in part panel rulings of violation in a third of the cases it has heard, and it has modified the rationale behind panel rulings in another fifth of appeals. The Appellate Body has sharply altered the reasoning of many panels, often interpreting WTO rules in a manner that is deferential to powerful defendants. In a series of cases challenging EU and U.S. health and environmental regulations, for example, the Appellate Body effectively offered guidelines on how to impose trade-restrictive policies in ways that it would find consistent with WTO obligations (most notably, in *US – Shrimp* and *EC – Beef Hormones*).

Legal scholars might claim that the Appellate Body's activism represents nothing more than judges doing their job in cleaning up the legal reasoning of less professional *ad hoc* panels. Such a view, however, cannot account for frequent biases in Appellate Body reasoning in favor of powerful defendants. Instead, our interpretation is that the Appellate Body understands the importance of compliance to its evolving legitimacy. Hence it tilts its decisions, to the extent that legal norms allow, in favor of imposing less onerous obligations on powerful defendants.⁶ Of course, the Appellate Body must also seek to build a reputation for impartiality and consistency, rather than being blown by political winds. But since WTO rules frequently allow for multiple interpretations, the Appellate Body has considerable latitude to engage in strategic conciliation with powerful defendants.

Third, the compliance phase of dispute settlement (i.e., post-ruling) is not only lengthy, it is also largely beyond the control of the WTO. Losing defendants have often exceeded the prescribed "reasonable" period of time (typically 15 months or less) to comply with rulings. More importantly, disputing governments have taken advantage of WTO rules that allow them to arrange compensation or to reach settlements on what constitutes compliance, independent of WTO review. In the protracted bananas dispute, for example, the US and Ecuador eventually agreed to allow the EU to delay full implementation of the Appellate Body's ruling until 2006. With a settlement in hand, the US and Ecuador removed the bananas case from the WTO's agenda, despite the fact that compliance by the EU had yet to occur.

Post-decision negotiations between disputants over the terms and timing of compliance constitute an important source of flexibility in the WTO system. By essentially allowing the disputants one last chance to settle their grievances, the DSU has generated higher rates of "compliance" than would have been possible were Appellate Body decisions truly final and directly binding. Thus, in several WTO disputes that are seen as having been successfully resolved, the Appellate Body's ruling was either not complied with fully or not complied with in a timely fashion. The prevalence of bargaining between litigants after apparently "binding" rulings distinguishes the DSU from the prototypical legal realm.

We should emphasize that despite this strategic behavior in support of the WTO system by the Appellate Body and by powerful litigants, there remain temptations for all the relevant parties to deviate from this "cooperative" equilibrium. Cycles of tit-for-tat trade wars between the EU and the US, with protracted disputes and escalating retaliation, remain a very real possibility, particularly when the domestic

stakes are high. The Appellate Body could actively legislate from the bench, thereby undermining existing agreements and damaging its own legitimacy. Finally, winning complainants could insist on strict compliance and move quickly to impose sanctions even in politically sensitive disputes. With these and other risks still very much in play, the WTO remains some distance from the effective legalization of international trade politics.

The remainder of the paper is divided into five primary sections. Section 2 sketches the history of dispute settlement in the WTO and develops our theoretical framework for analyzing it. Section 3 analyzes the strategic behavior of the US and the EU in choosing when and when not to pursue trade disputes in the WTO. Section 4 examines decisions by the Appellate Body involving the US or EU as defendants in politically salient disputes. Section 5 explores the implementation of WTO rulings in the compliance phase of dispute settlement. We summarize our arguments and their implications for the future of the WTO by way of conclusion in Section 6.

2. LEGAL POLITICS IN THE WTO

Dispute Settlement and Trade Politics

The bulk of contemporary trade disputes in the WTO and elsewhere concern non-tariff barriers. When is a national law or practice the legitimate exercise of sovereign authority by a national government to regulate its domestic market, and when is it a violation of international trade rules? In neo-classical trade theory, governments should never cross the line from legitimate regulation to discriminatory barriers because unilateral openness increases aggregate social welfare. But the first line of the political economy of trade is that governments nonetheless have political incentives to protect their domestic markets — because the costs of trade liberalization are concentrated and intense, whereas the benefits are dispersed and small. The politics of international trade are thus often considered a prisoner's dilemma in which governments want secure access to foreign markets, but they also want to be able to close their domestic markets when politically influential interest groups demand protection.

The outcome of this one-shot trade game, of course, would be mutual closure. Since the trade game is repeated indefinitely, however, an open regime may emerge (so long as governments do not discount the future too heavily). But the emergence of free trade also requires that all parties know which

behaviors constitute “openness” and “closure” and how other participants have behaved in the past. Institutions enter the story at this point by providing information that can grease the wheels of trade liberalization.

A group of governments could try to agree *ex ante* to an exhaustive set of rules of the trade game to govern their interactions — detailing, among other things, all behaviors that should be considered violations. In practice, it is extremely difficult if not impossible to write such "complete" contracts. Incomplete contracts establishing broad governance principles rather than exhaustively detailed rules can still be effective, but this requires delegating to an independent third-party arbitrator the authority to apply these contracts in specific disputes. Arbitrators need not possess sanctioning authority. Simply painting scarlet letters on violators may be sufficient for tit-for-tat retaliation (and other trigger strategies) to produce free trade.

This line of argument has been applied to the emergence and operation of several international trading regimes, ranging from law merchants in medieval Europe (Milgrom, North and Weingast 1990) to the European Court of Justice in the contemporary EU (Garrett, Kelemen and Schulz 1998, Garrett and Weingast 1993). Here we adapt and extend this type of reasoning to dispute settlement in the WTO.

The WTO Dispute Settlement System

The WTO is an international trade regime with three primary features. First, the GATT and other covered WTO agreements represent a set of incomplete contracts about multilateral trading rules. Second, the member governments have delegated the arbitration of disputes over the application of these contracts to *ad hoc* panels and the Appellate Body under the DSU. Third, the enforcement of decisions made pursuant to the DSU is decentralized. If losing defendants do not comply with rulings, winning plaintiffs can impose retaliatory sanctions. Moreover, agreement between the complainant and defendant is sufficient to define compliance, even after the Appellate Body has made a decision.

The basic legal principles governing the WTO (like GATT before it) are reciprocity and non-discrimination, which together are designed to expand market access (Hoekman and Kostecki 1995, 24-33).⁷ However, the WTO also includes rules designed to ensure that competition is “fair” and grants several explicit exceptions to the principle of progressive trade liberalization. Separate WTO agreements govern

the protection of intellectual property rights and the use of subsidies, safeguards, technical barriers to trade, and countervailing and anti-dumping duties. GATT Article XX explicitly allows for exemptions regarding domestic policies "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources."

The coexistence of the broad principle of multilateral trade liberalization with fair competition provisions and Article XX exceptions creates the potential for trade disputes as to the application of treaty provisions in specific cases. When, for example, is a trade barrier legitimately designed to promote public health rather than to grant protection? When is the imposition of anti-dumping duties legitimate? The DSU provides an institutional forum within which to resolve questions of this type.

The Uruguay Round agreements removed at least one glaring weakness in the GATT system of dispute resolution. The GATT "consensus" (i.e., unanimity) decision rule allowed losing defendants to veto both the adoption of reports by *ad hoc* arbitral panels and the authorization of sanctions. Under the DSU, only if all governments present at a meeting of the Dispute Settlement Body (DSB) agree can they block the formal adoption of a WTO ruling or the authorization of sanctions.⁸ This new "negative consensus" rule means that the winning disputant must agree to set aside a decision — an extremely unlikely scenario that has yet to occur in practice. To allay concerns about capricious or erroneous decisions by the newly empowered *ad hoc* panels, the DSU also established the Appellate Body as a standing judicial body to which any disputing parties could appeal.⁹

Dispute settlement in the WTO moves through several stages. As is common in international law, only member governments have standing to file complaints under the DSU. The process begins with a formal period of intergovernmental consultations. If these talks fail to resolve the dispute within a specified period of time, the complainant can proceed directly to request the establishment of an *ad hoc* panel. Panelists are nominated by the WTO Secretariat and drawn primarily from a roster of eligible experts, but the disputing parties must approve them.¹⁰

Panel decisions may be appealed to the Appellate Body, where cases are heard by rotating divisions of three (drawn from the pool of seven) judges. Appellate Body appointments are for four years (renewable once) and are made by WTO governments in the DSB. The Appellate Body can uphold, modify, or reverse the legal conclusions of panels, but not findings of fact (DSU Articles 17.6 and 17.13).

Losing defendants are obliged to comply with final WTO decisions within a “reasonable” period of time (at most fifteen months). Winning complainants can request panel review of the implementation of decisions after a claim of compliance by losing defendants (DSU Article 21.5). Though not specified in the DSU, the Appellate Body has decided that it should accept appeals of these Article 21.5 panel rulings.¹¹

If the defendant does not comply with an Appellate Body decision within the reasonable time period, the complainant can request authority from the DSB to impose sanctions. The level and composition of retaliatory sanctions are themselves subject to arbitration (DSU Article 22.6). When a defendant contends that it has complied with WTO recommendations, this arbitration on sanctions may take place concurrently with a review of the replacement measure (i.e., the Article 21.5 process).¹²

The History of DSU Jurisprudence

Between the founding of the WTO on January 1, 1995 and February 1, 2002, 244 requests for consultation (comprising somewhat fewer distinct matters) were filed under the DSU.¹³ Only 60 disputes had resulted in panel rulings as of February 1, 2002.¹⁴ Consultations were still in progress in 93 disputes. Panel or Appellate Body proceedings were active but incomplete in 16 disputes. Finally, 58 disputes were formally classified as settled or inactive, more than a quarter of which (16) were resolved after a panel had been established by the DSB.

Among the 60 disputes that led to a panel ruling, 54 resulted in decisions that the defendant had indeed violated WTO rules.¹⁵ No fewer than 44 original panel decisions have been appealed, along with 6 Article 21.5 panel reports on compliance. Losing defendants have filed almost all appeals, but frustrated complainants have requested review in some cases that they nominally won, and many disputes include cross-appeals by both parties. As of February 1, 2002, the Appellate Body had issued 46 rulings in 41 distinct disputes.¹⁶

Table 1 summarizes all Appellate Body decisions, identifying the contending parties, the general policy measures at issue, all third parties, the legal result (i.e., whether the panel and/or the Appellate Body issued a ruling of violation), and whether compliance (if required) has occurred. Three features of the table deserve emphasis.

Table 1 about here

First, nearly half of the Appellate Body's distinct disputes (19 of 41) alleged that either the US or the EU violated WTO rules, often with the other party participating as complainant (9) or interested third party (8). In addition to their numerical weight in the Appellate Body's agenda, US-EU cases are doubly important to the operation of the DSU in virtue of the protagonists' importance to the WTO as the two largest economies and two largest traders in the world.

Second, the Appellate Body has been very active in its jurisprudence. It has wholly reversed or set aside the decision of an *ad hoc* or compliance panel only three times (*EC – Computers*, *Guatemala – Cement*, and *Canada – Dairy 21.5*); it has reversed in part more than a quarter of panel decisions (13 of 46). The Appellate Body modified the legal basis of panel decisions, often in quite significant ways, in another 10 rulings. The Appellate Body therefore upheld the decisions of *ad hoc* panels without alterations in fewer than half of its rulings (20 of 46).

Third, compliance has been formally achieved in the vast majority of Appellate Body rulings where it has been required and the legal process has run its course (26 of 30 cases).¹⁷ Winning complainants imposed sanctions in only two cases: by the United States and Ecuador in *EC – Bananas*, and by the United States and Canada in *EC – Beef Hormones*. The right to impose sanctions was formally requested but voluntarily suspended or delayed in a handful of other cases, usually pending Article 21.5 reviews or further negotiations.¹⁸

How should we interpret this record of WTO dispute settlement? One view would be that the DSU represents the successful legalization of international trade politics. According to this view, litigants have made frequent use of the system. *Ad hoc* panels have issued many rulings of violation. Though the Appellate Body has altered numerous panel rulings, it arguably has done so using legal principles rather than bowing to political pressures. Finally, governments have tended to comply with adopted rulings. In the remainder of the article, we question such a sanguine interpretation, underscoring instead the political underpinnings of the WTO legal system's apparent successes.

Complainants, Defendants, and Judges in the DSU

How should we think about the dynamics of dispute settlement in the WTO? International law scholars tend to focus on formal jurisprudence inside the DSU — that is, on the reasoning behind decisions of *ad hoc* panels and the Appellate Body. This is essential, but it is only the beginning of a complete

understanding of the operation of the WTO. The more encompassing approach we develop here also takes into account the behavior of litigant governments both before (in choosing whether to litigate trade disputes) and after (in bargaining over the terms of compliance) the legal rulings are issued. Only by analyzing these three phases of the dispute settlement game as a whole can one assess the extent to which the WTO legal system rests on political foundations.

We restrict our analysis to the three actors that have been, and will in all likelihood continue to be, of greatest importance to the evolution of WTO dispute settlement: the EU, the US, and the Appellate Body. The EU and the US are the twin titans of the international economy. Their continuing support for the DSU system is vital to its long-run prospects. Hence we expect the Appellate Body, the final voice on questions of law in the WTO, to be especially attentive to the political context and consequences of high-stakes cases against the EU and the US as defendants. Decisions that are abided by, particularly when a powerful defendant complies with a ruling of violation, will do the most to increase the legitimacy of the Appellate Body and the DSU system. Conversely, Appellate Body decisions that are defied by these powerful defendants will do the most harm to the perceived authority of the DSU. Cases that pit the twin titans on opposing sides — as disputants or interested third parties — are even more important and more difficult to resolve. If the Appellate Body is seen to accommodate the interests of a powerful defendant in such a case, an equally powerful complainant may be provoked to abandon the system and take matters into its own hands through unilateral action.

Of course, the EU and the US understand this strategic environment. Given that they both benefit from the existence of an effective system of dispute settlement — helping them gain market access by enforcing rules that they in many instances authored — the EU and the US would suffer if the DSU were to become ineffective in furthering the trade liberalization agenda of the Uruguay Round. Nonetheless, both actors know, as does the Appellate Body, that there are situations in which the US and the EU would be unlikely to follow an adverse ruling — notwithstanding the damage this might do to the DSU.

These assumptions imply that, absent uncertainty, there is a cooperative equilibrium in which Appellate Body rulings of violation are indeed accepted, in particular by the US and the EU as defendants. Disputes that would prove too difficult to resolve satisfactorily within the DSU framework are addressed outside of it (either before a final ruling or through post-decision bargaining). To the extent that we observe

the converse outcome — a series of adverse rulings that are not observed by the trade titans — we would have to infer that damage has been done to the legitimacy of the Appellate Body, the DSU, and ultimately the WTO. Moreover, noncompliance could trigger a spiral of retaliatory cases or unilateral actions, further damaging the WTO. Such breakdowns of bargaining could occur either because the actors did not accurately understand each other's preferences and constraints or because domestic political considerations created an essentially empty set of acceptable outcomes in the international bargaining game.

There are three sets of strategic behavior that help contribute to an equilibrium of mutually desirable outcomes in which powerful defendants comply with Appellate Body rulings of violation. First, the EU and the US could decide not to push trade disputes through the DSU process when they expect the outcome to be one in which the defendant would not comply with a ruling of violation. Second, even if a complainant (the US, the EU, or other WTO members with arguably less interest in strategic restraint) insists on filing a sensitive case, the Appellate Body could try to craft its decision either to accommodate the challenged policy or to reduce the obstacles to compliance for the defendant. Finally, even if the Appellate Body upholds a costly adverse ruling, the complainant and defendant can agree, *ex post*, to settle the dispute and remove it from the WTO agenda without insisting on strict compliance.

In sum, there are several potential “safety valves” built into the WTO dispute settlement system. In our view, active use of these controls by the world’s major traders and the Appellate Body has been of critical importance to the success of the DSU, bolstering the nascent legitimacy of the system. However, these safety valves have not been utilized in all instances, and the exceptions cloud the future of the WTO system (as we discuss in the empirical sections below).

Our understanding of the dispute settlement game is presented graphically in Figure 1. In the first phase, the would-be complainant (which we assume has a *prima facie* case that the defendant has violated WTO rules) must choose whether to pursue a case against a defendant (which we assume will suffer some cost if it alters its behavior in accordance with the complainant’s request). If, as in the Helms-Burton dispute, the complainant exercises self-restraint or a settlement is reached at any point before a WTO ruling is adopted, the legitimacy of the DSU is unaffected but the complainant forgoes whatever additional leverage a ruling might have provided.

Figure 1 about here

The second phase begins if the Appellate Body is asked to review a panel ruling against the US or EU. Our premise is that the members of the Appellate Body are forward-looking and strategic. Their objective is to increase their authority over international trade disputes, which requires that WTO member governments utilize the DSU and respect its decisions. The members of the Appellate Body are interested in developing a reputation both for jurisprudential coherence and for authoritative decision-making. They understand, however, that it may be hard simultaneously to further both goals when rulings adversely affect defendants — the governments of sovereign states and customs territories — that might choose to ignore, evade, or countermand them. The Appellate Body cannot be seen to depart blatantly from widely accepted legal principles; at the same time, its members must be wary of issuing rulings that defendants will almost certainly defy. In crafting their decisions, the members of the Appellate Body must walk a fine line between these twin goals of coherence and compliance.

In some instances, the clarity of the violation leaves the Appellate Body little choice but to uphold a panel ruling (as in *US – FSCs*, for example). In cases where it has more legal latitude, the Appellate Body may choose to conciliate with the defendant directly by reversing a panel ruling of violation (as in *EC – Computers*) or indirectly by re-framing an adverse decision in a way that facilitates compliance (as in *US – Shrimp*). In such an outcome, the complainant may have a grievance, and the Appellate Body may be vulnerable to claims that it acted politically by interpreting WTO rules in a manner that is deferential to the defendant, but the odds of protracted noncompliance are substantially reduced or eliminated.

The final compliance phase begins when a ruling of violation is adopted. The losing defendant (in our framework, either the EU or the US) must decide whether to comply within the reasonable time period. If it chooses to remove or amend the challenged measure (as in *US – Wheat Safeguards*), the dispute ends successfully with transparent compliance. But if the defendant takes no action or enacts a replacement measure that the complainant and the WTO deem inadequate, the winning complainant faces a difficult choice regarding retaliation.

One option is for the complainant to delay or forgo sanctions beyond the reasonable time period while pursuing negotiations to end the dispute (as in *US – FSCs* and *US – Anti-Dumping Act*). Such a move implies a reluctance to escalate the dispute, but still leaves it formally unresolved. If instead the complainant imposes sanctions that are costly to both sides, it can then either settle the dispute by accepting

compensation or partial compliance (as in *EC – Bananas*) or maintain the sanctions and prolong the dispute while insisting on full compliance (as in *EC – Beef Hormones*). Whatever its decision on sanctions, however, the complainant may prefer to settle if it believes the defendant is unlikely to comply and hence that the only consequence of keeping the case on the WTO agenda will be to undermine the authority of the DSU.

In summary, both the complainant and the Appellate Body have ample opportunities to avoid a crisis in cases where a losing defendant is unlikely to comply with an adverse decision. *Ex ante*, the complainant can exercise self-restraint by not pressing the case; *ex post*, it can settle by accepting partial compliance or compensation. We expect these options to be particularly attractive to the US and the EU given their extensive stakes in the overall success of the WTO. For its part, the Appellate Body can craft its jurisprudence to conciliate with the defendant by rendering decisions that facilitate or remove the need for compliance. Of course, there is also a strategic decision to be taken by losing defendants — whether to comply with adverse rulings. For the major players in the WTO, the costs of non-compliance (in terms of damaging the credibility of the system) may be quite high. The point of our analysis, however, is that there are important decision points that arise before a losing defendant must make the ultimate decision about compliance.

If our understanding of the DSU game is correct, we should see evidence of self-restraint by the EU and the US as complainants in cases where the other party is defendant, conciliation by the Appellate Body in cases with either party as defendant, and settlements that fall short of full compliance in the post-decision phase. We now explore in detail the history of the DSU to assess the accuracy of these expectations.

3. MEMBER GOVERNMENT RESTRAINT

In the early years of the WTO, the US and EU engaged in a series of tit-for-tat disputes. Aggressive U.S. tactics in the bananas and beef hormones cases were followed by a wave of EU complaints against various U.S. laws and trade remedy actions. To some observers, these transatlantic WTO disputes represented a failure of political leadership within the multilateral trade system and a potential threat to broader US-European relations.¹⁹ What these critics overlook, however is that the US and the EU managed to keep many of the most explosive and potentially destabilizing cases out of the WTO system.

There are several dimensions on which the US and EU exercised strategic restraint. First, they explicitly delayed the inclusion of some intractable issues under the WTO. The so-called peace clause in the Uruguay Round Agreement on Agriculture, for example, protected many domestic agricultural subsidies from legal challenge from January 1, 1995, until December 31, 2003.²⁰ This clause, literally titled "Due Restraint," was a last-minute compromise between U.S. and EU negotiators in 1993. In exchange for a pledge not to challenge EU farm subsidies, the US received improved access to European markets for a number of U.S. farm products.²¹ The expiration of this provision will certainly prompt further negotiations, since there is still no mandate to undo the complex systems of agricultural protection either in Europe or in the US (where the 2002 farm bill increased the level of subsidization).

Second, the EU and the US have tacitly agreed not to file cases in other politically sensitive areas under the WTO umbrella where protracted litigation and unresolved differences could undermine the legitimacy of the system. In some instances, both sides were vulnerable to legal challenges in the same realm. The most obvious example has been the absence of suits contesting large-scale government subsidies to Airbus and Boeing (by far the world's leading two commercial aircraft manufacturers), despite considerable saber rattling in both Brussels and Washington.²² In other cases, the legal vulnerability was on one side only, but the likely winner nonetheless opted not to bring suit for fear of a Pyrrhic victory that could cause collateral damage to the WTO. The US, for example, despite growing frustration with the EU's ban on genetically-modified organisms, has chosen not to litigate the issue in the WTO because of widespread concerns about food safety in Europe — and hence the likelihood of noncompliance, as occurred in the beef hormones dispute.²³

Third, strategic self-restraint also took place in several instances after a case was brought under the DSU but before the process was carried through to completion. In the best-known example, the EU withdrew its complaint against the U.S. Helms-Burton legislation before requesting the formation of a panel, despite the law's apparent violation of WTO rules.²⁴ Citing historical tensions with Cuba, the US defended this controversial statute on the basis of the national security exception of GATT — and threatened to boycott any DSU proceedings that challenged it.²⁵ The EU might have chosen to call this bluff. But it demurred, most likely to protect the WTO from the political fallout of an adverse ruling that the US would not follow. In another sensitive case, both the EU and the US declined to appeal an *ad hoc*

panel decision on the consistency of deadlines in prominent U.S. trade legislation known as Section 301 with DSU Article 23 and other WTO rules. Both sides claimed victory after the panel ruling. The panel found that Section 301 did not violate WTO rules, but only because the US had explicitly undertaken not to utilize it in a manner inconsistent with WTO procedures. The systemic implications of the dispute were considerable, with no fewer than 16 WTO members engaged as third parties. Nonetheless, neither the US nor the EU chose to jeopardize the panel's delicate compromise by appealing the decision.²⁶

Our interpretation of all these cases is the same. The EU and the US have a large stake in the success of the WTO. Both sides benefit considerably from a system of dispute settlement that gives them a *de facto* tool for opening foreign markets (particularly in the developing world) through forceful application of WTO rules. Given their preponderance in global trade coupled with dramatic differences in domestic law and politics, however, it is not surprising that EU-US clashes are common. Nonetheless, both sides have exercised considerable restraint in not pushing through cases as complainants — despite high economic and political stakes — where the likely outcome is a ruling of violation that the defendant would not comply with. The potential costs of protracted conflict, noncompliance, and retaliatory actions have loomed so large — in terms of harming the legitimacy of the WTO and the DSU process — as to outweigh even substantial domestic gains from high-profile litigation. With encouragement from the business community, US and EU officials went so far as to establish an "early warning" mechanism in 1999 to promote early settlements.²⁷ EU Trade Commissioner Pascal Lamy reported that this consultative process has been efficient in "preventing dispute escalation in several instances."²⁸

It should be clear, however, that strategic forbearance is inherently unstable and fragile. If either the EU or the US pursues its narrow, short-term interests in a single major case, whether out of venality or frustration, the outcome could harm the WTO. Two transatlantic disputes, *EC – Bananas* and *US – FSCs*, stand out as examples of failed restraint. There are several parallels between the cases. Both disputes trace their histories back to GATT, as prior panels had ruled against preferential banana import systems in the EU and tax subsidies for exports in the US. Both measures represented unambiguous violations of basic WTO rules, but with little prospect of defendants observing these rules. Moreover, the defendants did not believe their policies would be challenged. EU officials did not expect the US to press a claim against an import scheme that affected no products originating within U.S. borders (and unsuccessfully challenged

their standing to do so before the Appellate Body) — much less to make it a test case for WTO sanctions. U.S. officials believed a 1981 agreement with Europe exempted its tax system from WTO rules (and unsuccessfully urged the Appellate Body to rely on that history). When this implicit truce broke down, recriminations followed. EU frustration with the banana case reportedly prompted it to challenge the FSC statute and other U.S. trade policies.

In *EC – Bananas*, the US joined several Latin American countries in challenging the EU’s banana import regime. That system, established in 1993, favored bananas from former European colonies and from developing countries with special access to the EU market under the Lomé Convention. Five Latin American countries challenged the EU regime, and in 1994 a GATT panel issued a ruling of violation. The EU, however, blocked adoption of the ruling and reached an agreement with four of the five complainants that offered improved market access in return for a pledge not to pursue further litigation until 2003 — a clear sign of the regime's inconsistency with multilateral trade rules. US-based Chiquita, whose Latin American operations were adversely affected, lobbied the Clinton administration and Congress to pursue the case. The US, Ecuador, Guatemala, Honduras, and Mexico requested a WTO panel in 1996, alleging multiple violations.²⁹

The *ad hoc* panel found the EU regime to be discriminatory and thus in breach of several WTO commitments.³⁰ On appeal, the Appellate Body found additional violations while upholding most of the panel's conclusions.³¹ The dispute became even more complex and contentious during the implementation phase, as the US (and Ecuador) moved aggressively to impose sanctions, rejecting repeated alterations in the EU banana regime as inadequate. As WTO panels ruled on the level of retaliation and the legality of modifications to the EU system, the EU launched a separate challenge against the manner in which the US imposed its sanctions. Several systemic issues, including the proper sequencing of compliance reviews and sanctions, were the object of intense disagreement between the US and the EU in the banana case — placing the DSU in some jeopardy. In April 2001, nearly four years after the original panel ruling, the US reached a settlement with the EU that provided for its gradual transition to a tariff-only regime by 2006.³²

The acrimony of the banana dispute spilled over into other transatlantic conflicts, most notably *US – FSCs*, a complaint by the EU against legislation that offers tax subsidies to major U.S. exporters.³³ It is by far the most important failure of strategic restraint in the WTO to date. The US taxes income earned by

U.S. corporations worldwide, whereas many European countries employ a territorial system, taxing only corporate income earned within their borders.³⁴ U.S. officials contend that territorial systems privilege European multinationals by exempting income earned abroad from taxation. In response, U.S. laws give a lower tax rate to export income earned by qualifying offshore corporations. These “foreign sales corporations” (FSCs) are shells established in tax havens such as the Bahamas and the Cayman Islands for the sole purpose of routing export transactions through them on paper in order to receive sizable tax breaks.³⁵

The US and Europe have been arguing about the taxation of multinational firms for thirty years. In 1981, after a decade of litigation, the GATT Council endorsed a settlement that the US believed would protect the FSC statute (enacted in 1984) from challenge under GATT subsidy rules.³⁶ After the Uruguay Round, however, the EU brought a case against the US tax scheme under new WTO rules. The US Trade Representative at the time, Charlene Barshefsky, argued that “the WTO was not the proper forum in which to discuss domestic tax policy” and described the EU case as “destabilizing” and “unfortunate.”³⁷

The *ad hoc* panel found that the FSC legislation constituted an illegal export subsidy under the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM, Articles 1 & 3).³⁸ The US then appealed the case to the Appellate Body. The US did not contest the fact that the FSC measure exempted foreign-source export income from taxes that would otherwise apply. It simply argued that FSCs had been permitted as an exception to the general export subsidy rules since 1981 and urged the Appellate Body to “take account of the historical background.”³⁹

The Appellate Body, like the panel, did not find these arguments compelling because there was simply no legal basis for the U.S. position. It upheld the panel’s ruling that the 1981 GATT Council action did not constitute a “decision” under GATT 1994 and thus was not incorporated into the WTO Agreement as a binding legal instrument. The central question, according to the Appellate Body, was not whether WTO rules obligate members to tax foreign-source income (it emphasized that members are clearly free to tax or not tax any categories of income), but rather whether the US, having decided to tax certain foreign income in its worldwide system, can “carve out an export contingent exemption.”⁴⁰ What made the FSC measure objectionable was that it restricted this tax exemption specifically to exports, in clear violation of Article 3.1 of the SCM Agreement.

Not surprisingly, the compliance phase of this dispute has been drawn out and difficult. The outcome remains uncertain, but a process of bilateral negotiation is underway to determine the form and timing of U.S. compliance — which, as in the bananas case, is likely to involve further delay and some form of settlement (see section 5 below). Absent a compromise, the US could retaliate by pressing cases against the EU on agriculture, aircraft subsidies, and aspects of European tax systems with similarly high stakes.

The banana and FSC disputes expose the risks associated with major clashes between the EU and US. Cases of this magnitude place the Appellate Body in a difficult predicament in which it must make invidious choices. If it conciliates with defendants despite strong legal claims of violation, it may jeopardize its reputation for impartiality and thereby limit its future effectiveness. If, on the other hand, the Appellate Body upholds rulings of violation, as it chose to do in these cases, its decisions could lead to a spiral of retaliatory sanctions and further disputes between the WTO's largest members, doing grave damage to the institution. How the major powers manage transatlantic conflicts will significantly influence the extent to which the Appellate Body is able to expand its legitimacy and authority over time. If the EU and US fail to exercise restraint in resorting to litigation, the Appellate Body may confront an increasingly difficult trade-off between its twin goals of coherence and compliance.

It is not always the case, however, that the breaches of WTO rules are as obvious as they were in the banana and FSC disputes. In cases where the treaty principles are less clear-cut, the Appellate Body has often used the legal wiggle room available to it to craft decisions that effectively conciliate with the US and EU as defendants. We analyze the universe of other Appellate Body cases filed against them in the next section.

4. CONCILIATION IN APPELLATE BODY JURISPRUDENCE

This section analyzes Appellate Body decisions in all cases filed against the US and the EU (apart from *EC – Bananas* and *US – FSCs*, which were discussed in the previous section). Within our framework, cases filed against the twin titans of the international economy are likely candidates for conciliation by the Appellate Body. We begin with examples of direct conciliation, in which the Appellate Body directly reversed core elements of panel rulings. Then we detail instances of indirect conciliation, in particular a series of environmental, health, and safety cases where the Appellate Body opened the door to WTO-

consistent trade restrictions. Finally, we turn to a series of cases where the Appellate Body has not conciliated in the ways we would anticipate: a set of disputes regarding the application of trade remedy laws (in the form of safeguards, anti-dumping duties, or countervailing duties).

Direct Conciliation: Encouraging More Complete Contracts

In *EC – Computers*, the US charged that the tariff reclassification of certain computer networking equipment by several EU members violated basic GATT provisions on tariff bindings.⁴¹ The EU had pledged in 1994 to reduce its tariffs on automatic data processing (ADP) machines, which ordinarily includes all computer equipment. Customs authorities in the EU later reclassified local area network (LAN) adapter cards and other items as telecommunications equipment, thereby increasing their tariffs — in some instances almost doubling the original rates. The *ad hoc* panel sided with the US, finding that the US government had "legitimate expectations" that the EU and its members would continue to treat networking equipment as ADP machines (i.e., computers) for tariff purposes.

After an EU appeal, the Appellate Body completely reversed the decision by holding that the panel had inappropriately applied the concept of "reasonable expectations," which emerged in the context of non-violation complaints under Article XXIII:1(b) of GATT, to a case in which a concrete violation was alleged.⁴² The Appellate Body suggested that the terms of the agreement, rather than the expectations of a single party, should be determinative: "The security and predictability of tariff concessions would be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone."⁴³

Moreover, the Appellate Body held that the panel incorrectly placed the burden of clarifying the extent of tariff concessions on the importing party (the EU), when that responsibility should properly rest with both parties: "Tariff negotiations are a process of reciprocal demands and concessions, of 'give and take'. It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs."⁴⁴ Thus, the burden was on the US to find out whether the EU would treat networking equipment as computers rather than as telecommunications equipment, which it failed to do during a period of tariff schedule verification designed for that very purpose.⁴⁵

In effect, the *EC-Computers* ruling was a model of judicial restraint. The Appellate Body argued that WTO rules should be based on negotiations among WTO members, not judicial determinations. But at the same time, the decision provided important cover for protectionist behavior in the EU in a critical high-tech sector. Some observers feared that the ruling would invite protectionist reclassification of tariff categories by other governments.⁴⁶ The Appellate Body, however, proved willing to take that risk in order to avoid interjecting itself in a sensitive, high-stakes dispute between the largest WTO members.

This type of restraint was even more evident in *US – Import Measures*, in which the Appellate Body refused to decide a fundamental procedural issue on which the US and EU sharply disagreed.⁴⁷ In this case, the EU disputed the way in which the US imposed sanctions after its victory in *EC – Bananas*, challenging a bonding requirement imposed in anticipation of subsequent tariff increases. Although the measure in question had already expired, the *ad hoc* panel found it to be a violation by the US, and the Appellate Body agreed. The far more significant aspect of the panel ruling, however, was its treatment of the proper sequence of WTO arbitrations regarding compliance and sanctions. The DSU does not clearly specify whether complainants have the right to impose sanctions before the WTO has completed its review of a replacement measure. In favor of the US, the panel found that any arbitrators appointed under DSU Article 22.6 to review sanctions also have the authority to rule on the compatibility of an implementing measure with WTO rules, which is ordinarily the responsibility of compliance panels under DSU Article 21.5.

With support from Japan and India as third parties, the EU challenged this decision on appeal and prevailed. The Appellate Body declared that part of the panel ruling to have "no legal effect."⁴⁸ The proper relationship between Articles 22.6 and 21.5 has been a source of enduring controversy among WTO members. Several governments have proposed new treaty language, but nothing has won consensus support. In this context, the Appellate Body ruled that it was not appropriate for it to resolve an "important systemic issue" that remained under negotiation. In reversing the panel, the Appellate Body pointedly stated: "Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO."⁴⁹ By chiding the panel in *US – Import Measures* for going beyond its proper mandate, the Appellate Body openly dodged a sensitive issue on which any decision was certain to antagonize either the US or the EU.

Indirect Conciliation: Expanding GATT Exceptions on Environment, Health, and Safety

WTO rules allow members to deviate from their general free trade commitments in order to protect health or to conserve exhaustible natural resources. But as the protests in Seattle and elsewhere have demonstrated, environmentalists, consumer safety groups, and other activists in Europe and the US still view the WTO as a direct threat to hard-won domestic regulations. The Appellate Body has gone out of its way to accommodate the environmental concerns not only of NGOs but also of governments in the US and Europe in a series of important cases: *US – Gasoline Standards*, *US – Shrimp*, and *EC – Beef Hormones*. In each case, the Appellate Body upheld panel rulings of violations of GATT market access rules, but it significantly altered the legal rationale behind the judgments. The result has been to signal to WTO member states that such measures, if properly crafted, may very well survive future scrutiny by panels and the Appellate Body — as a French environmental ban eventually did in *EC – Asbestos*, which extended further protection for health and safety regulations.

Prior to the creation of the WTO, GATT panels had often ruled environmental laws, particularly those in the US, to be inconsistent with GATT obligations.⁵⁰ The relevant paragraphs of Article XX of GATT provide exceptions for measures "(b) necessary to protect human, animal or plant life or health" or "(g) relating to the conservation of exhaustible natural resources."⁵¹

The first Article XX case to reach the Appellate Body was *US – Gasoline Standards*.⁵² In this dispute, Brazil and Venezuela challenged an Environmental Protection Agency (EPA) regulation that gasoline available for sale in the US should be no dirtier than that available in 1990. However, the EPA allowed US (and some foreign) refineries to use baselines that were less stringent and more flexible than those applied to most foreign refineries.⁵³ Brazil and Venezuela argued that the EPA's behavior violated the national treatment principle of GATT. The *ad hoc* panel sided with Brazil and Venezuela, in a ruling whose logic was very similar to several earlier GATT panel reports [Ala'i 1999, 1156].

The US, however, appealed the case — focusing on paragraph (g) and the panel's general interpretation of Article XX.⁵⁴ The Appellate Body responded favorably to the US in two important respects. First, it reversed the panel's view that the EPA regulations did not fulfill the requirements of paragraph (g). The Appellate Body held that the EPA's rules were legitimately “related to” the objective of

clean air. The Appellate Body also found that Article XX (g) requires "even-handedness," not "identical treatment," making it easier for measures to qualify as exceptions.⁵⁵

Second, in marked contrast with the panel decision, the Appellate Body privileged the list of exceptions in Article XX over its introductory "chapeau," which prohibits measures that constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction" on trade. In the Appellate Body's words: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning."⁵⁶ It went on to define a two-tiered test for cases involving Article XX. First, does the disputed measure fit within one of the exceptions listed in paragraphs (a) to (j)? If not, the measure cannot be justified under Article XX. If so, does the manner in which the measure is applied meet the requirements of the chapeau?

In the end, the Appellate Body ruled that the U.S. measures were inconsistent with the chapeau because they were unjustifiably discriminatory and constituted a disguised restriction on trade. Nevertheless, the *US – Gasoline Standards* ruling expanded the scope of Article XX by requiring panels to take a case-by-case approach to measures that may qualify under its exceptions. The Appellate Body went out of its way to show that it is not hostile to environmental objectives, declaring that "WTO Members have a large measure of autonomy to determine their own policies on the environment."⁵⁷

The Appellate Body's resolve on this issue was soon tested in *US – Shrimp*, with nearly identical results.⁵⁸ India, Malaysia, Pakistan, and Thailand jointly filed a complaint against U.S. legislation banning imports of shrimp harvested in a manner adversely affecting endangered species of sea turtles. U.S. shrimp trawlers have been required to use Turtle Excluder Devices (TEDs) since 1990, and this provision, Section 609, was subsequently extended by Congress to foreign shrimp trawlers, prompting the dispute with several Asian exporters.⁵⁹ The complainants alleged that Section 609 was an illegitimate extension of extraterritorial jurisdiction by the US government that violated GATT's prohibition on quantitative restrictions. The US contended that the regulations were not discriminatory, given the identical standards for foreign and domestic shrimp trawlers, and that the program was justified as an exception under paragraphs (g) or (b) of Article XX. The *ad hoc* panel sided with the Asian complainants, claiming that the

U.S. measures, "irrespective of their environmental purpose, were clearly a threat to the multilateral trading system."⁶⁰

Again, while the Appellate Body ultimately affirmed the ruling of violation, it nonetheless also aggressively changed the rationale behind the decision. With support from two influential third parties, the EU and Australia, the Appellate Body chided the panel for ignoring the simple two-step test it defined in *US – Gasoline Standards*. The Appellate Body found that sea turtles are "exhaustible natural resources" (per paragraph (g)) and the certification process of Section 609 — although unilateral — was properly "related to" the conservation of sea turtles. Similarly, the U.S. legislation was properly implemented "in conjunction with" restrictions on domestic shrimp trawlers.⁶¹

Turning to the chapeau, the Appellate Body found that Section 609 was discriminatory on two counts. First, it required other WTO members to adopt TEDs when other measures might prove equally effective.⁶² Second, the U.S. regulations did not allow the import of shrimp harvested by commercial vessels using TEDs if the vessels in question were trawling in the waters of countries that have not been certified by the State Department.⁶³ This result was consistent with the stated positions of no fewer than five third parties: Australia, Ecuador, the EU, Hong Kong, and Nigeria.⁶⁴

Nonetheless, the Appellate Body again went to considerable lengths to stress that it is not anti-environment and that the Article XX exceptions are meaningful.⁶⁵ Indeed, it explicitly supported the notion that WTO members can unilaterally impose restraints on trade pursuant to those exceptions. To rule otherwise, it concluded, would render the exceptions "inutile," a result it considered "abhorrent."⁶⁶ Of course, what the Appellate Body considered abhorrent was exactly the conclusion reached by previous GATT and WTO panels, which presumably had some legal basis for their findings. It seems clear, however, that such a result would have been politically abhorrent to influential environmental groups in the US and elsewhere. The opposition of these groups, if intensified, would call into question the legitimacy of the WTO system. The Appellate Body's decision in *US – Shrimp* instead allowed the US to make minimal changes to its legislation and then declare its ban to be consistent with WTO rules. A compliance panel and the Appellate Body itself subsequently agreed, ending the dispute.⁶⁷

The Appellate Body's next important Article XX case was *EC – Beef Hormones*.⁶⁸ This case differed from the previous two in at least three salient ways. First, it directly concerned human health and

safety rather than the environment. Second, in this case the EU, not the US, was the defendant. Finally, the US and Canada — rather than some developing countries — were the complainants. This last point in particular was likely to make it a particularly contentious case, as it has proven to be.

The EU imposed a ban in January 1989 on imported beef containing growth hormones widely utilized in North America. Retaliatory sanctions by the US led to an interim agreement, but this truce collapsed and the US (joined by Canada) took the dispute to the WTO, alleging violations of the Sanitary and Phytosanitary Standards (SPS) Agreement. The *ad hoc* panel ruled against the EU ban, finding that it was based neither on sound science nor on existing international standards and that it was arbitrary and discriminatory.⁶⁹

The EU appealed on multiple grounds, claiming that the panel had: incorrectly placed the burden of proof on the EU; misinterpreted the SPS Agreement regarding the harmonization of standards; failed to require the US to make a *prima facie* case regarding the EU's alleged failure to conduct a risk assessment; and erred by refusing to justify the EU measures under the precautionary principle (a customary international law doctrine of erring on the side of protection in the face of scientific uncertainty).⁷⁰

The Appellate Body rejected the broadest EU claims, holding that it failed to demonstrate a scientific risk associated with hormone-treated beef. However, the Appellate Body also reversed or modified a number of other panel findings, in ways that were supportive of the EU. First, the Appellate Body assigned the initial burden of proof to the US, requiring it to make a *prima facie* case of violation.⁷¹ Second, the Appellate Body interpreted Article 3.3 of the SPS Agreement as providing WTO member states an "autonomous right" to impose protective measures that are higher than international standards, so long as they offer some scientific justification (which the EU had failed to do in this case).⁷² Third, the Appellate Body relaxed these scientific standards. It claimed that the obligation to conduct risk assessments does not "exclude *a priori*, from the scope of the risk assessment, factors which are not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences."⁷³ It also relaxed the required connection between the risk assessment and the protective measure, making it easier for existing regulations — enacted before the Uruguay Round — to survive scrutiny.⁷⁴

Finally, in interpreting the relevant WTO provisions in this case, the Appellate Body invoked the deferential principle of *in dubio mitius*, which holds: "If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation." In refusing to require any rigid adherence to least-common-denominator international guidelines, the Appellate Body declared, "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation."⁷⁵

In each of these three cases, to summarize, the challenged measures had strong interest group support in the defendant countries, the EU and the US. The Appellate Body responded by acknowledging that the three particular measures at issue were in fact violations, but at the same time stressing that it is eminently possible to enact stringent environmental, health, and safety regulations that lawfully restrict market access. Despite considerable public criticism of the rulings by activists, this point was not lost on close observers of the WTO. In the words of one legal scholar, these Appellate Body rulings suggest that environmentalists may have lost the battle, but "the prospects look good for winning the war" [Ala'i 1999, 1171].

Evidence soon materialized in support of this prediction. In *EC – Asbestos*, a health regulation that clearly restricted trade was upheld as a justifiable exception under Article XX for the first time in the history of the multilateral trade regime.⁷⁶ In this case, Canada challenged a 1996 French decree banning the manufacture, sale, and import of all forms of asbestos. The EU defended the French measure as necessary to protect human health from a known carcinogen. Canada argued that the asbestos in question posed no risk under properly controlled use and that the ban contravened multiple WTO agreements. The *ad hoc* panel ruled that the French ban constituted a violation of the national treatment rule in GATT Article III:4, but after applying the Appellate Body's interpretive framework from *US – Gasoline Standards* and *US – Shrimp* it concluded that this violation was justified under paragraph (b) and the chapeau of Article XX.⁷⁷

Canada appealed the panel report, challenging the panel's scientific findings and arguing that a "controlled use" regime would protect public health and be less trade restrictive than an outright ban. The Appellate Body, however, reiterated that WTO rules permit France to choose whatever level of protection it considers appropriate. In this case, France's policy goal was to "halt" the spread of asbestos-related health

risks, and the Appellate Body considered the ban to be a legitimate means of pursuing that objective, which had a clear scientific basis in studies of the toxicity of asbestos.⁷⁸

In addition to upholding the panel's central findings, the Appellate Body extended further protection to national health and safety regulations by reversing its "like products" analysis. Environmental groups sharply criticized the *ad hoc* panel's conclusion that asbestos fibers and their commercial substitutes were like products under Article III of GATT, because it ignored the fact that only the former are carcinogenic. With support from the US as a third party, the EU took up the cause of the environmentalists on appeal and prevailed. The Appellate Body sharply noted: "[A]s we have said, in examining the 'likeness' of products, panels must evaluate *all* of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent."⁷⁹ Moreover, the Appellate Body shifted the burden of proof to the complainant, Canada, to demonstrate that the products were in fact similar. The net effect is to extend an extra margin of protection for health and safety measures, making it easier to defend them as non-discriminatory. For environmentalists and consumer safety advocates, the Appellate Body decision represented an unqualified triumph — built on the foundations of the earlier Article XX cases.

In one additional case, *US – Section 211*, the Appellate Body pursued a similar strategy of indirect conciliation. This transatlantic dispute pertained to intellectual property rights, not environmental law, but the Appellate Body again upheld a ruling of violation while radically altering the rationale — in a way that should facilitate compliance by the US. The case has its roots in a lengthy legal battle between two foreign companies over the rights to a Cuban rum trademark ("Havana Club") that was confiscated by the Castro regime in 1959. The U.S. statute in dispute, drafted by lobbyists for Bermuda-based Bacardi, sought to prevent a joint venture between the French company Pernod Ricard and the Cuban government from registering the trademark in the US.⁸⁰ It barred U.S. courts from enforcing confiscated trademarks without the owner's permission. The EU challenged the statute as a violation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). While rejecting many of the EU claims, an *ad hoc* panel agreed that certain aspects of Section 211 violated TRIPS by denying access to fair and equitable judicial procedures.⁸¹

Both sides challenged the panel ruling, and the Appellate Body modified several of its core holdings. First, with support from both the EU and the US, the Appellate Body overturned the panel's finding that trademarks were not covered by TRIPS. Second, siding with the US, it reiterated that laws denying protection to confiscated trademarks did not necessarily violate WTO rules, stressing that members were free to set their own criteria for trademark registration. Finally, it reversed the panel's ruling of violation on equitable judicial procedures, finding instead that Section 211 violated TRIPS only insofar as it singled out Cuban holders of confiscated trademarks (and their successors) for less favorable treatment than U.S. and other foreign nationals.⁸² U.S. officials applauded this result and suggested that Congress could easily amend Section 211 to remove its discriminatory provisions without compromising the law's central objectives.⁸³ The reasonable period for implementation ends December 31, 2002.

No Conciliation: Tightening Trade Remedy Laws

As in any principal-agent relationship, there is a risk that the Appellate Body could abuse its delegated authority and effectively rewrite WTO rules. Any such move, of course, could damage the Appellate Body's legitimacy if aggrieved members object or refuse to comply with its decisions. Lawyers for import-competing industries in the US allege that the Appellate Body has legislated from the bench in several cases challenging U.S. and EU trade remedy actions.⁸⁴ In our view, these criticisms are overstated — although we acknowledge that the political risks in this area for the Appellate Body and the WTO will remain acute, with high-profile cases on steel safeguards and other trade remedies looming on the horizon.

There have been no fewer than ten relevant Appellate Body decisions on trade remedies — eight against the US and two against the EU. Six cases have dealt with safeguard actions, while three pertain to anti-dumping laws and one to a countervailing duty.⁸⁵ In light of the overwhelming support for unfair trade laws and safeguards on Capitol Hill and in Europe, these disputes might appear to be likely candidates for conciliation. Moreover, under pressure from domestic industry, the US obtained a more deferential standard of review for anti-dumping determinations in the Uruguay Round — precisely to provide legal cover for conciliatory decisions in anti-dumping disputes.⁸⁶ Yet the Appellate Body upheld panel rulings of violation in all ten cases. In only one instance did the Appellate Body conciliate with a defendant at all: in

EC – Poultry, it reversed part of a panel report in a way that may facilitate certain safeguard actions under the WTO Agriculture Agreement.⁸⁷

In the majority of these cases, the Appellate Body simply endorsed the panel's central findings. But in a handful of disputes, the Appellate Body actually reversed aspects of panel reports that deferred to the defendant, finding new violations of WTO rules. In *US – Japanese Steel*, the Appellate Body rejected the panel's endorsement of the U.S. "captive production" provision, which excludes trades within vertically integrated companies during the injury analysis in anti-dumping cases. In *US – Underwear*, the Appellate Body found that the panel erred in accepting the retroactive application of U.S. clothing safeguards. Finally, in both *US – Wheat Safeguards* and *US – Lamb Safeguards*, the Appellate Body reversed the standard applied by the panels in evaluating U.S. injury analyses. While the panels endorsed the U.S. assessment of imports alone as a cause of injury to domestic producers, the Appellate Body insisted that the US also analyze the impact of other potentially relevant factors, presumably so as to avoid any spurious correlation between increased imports and struggling industries. In all four cases, the Appellate Body thus rejected certain U.S. practices — all of which favored domestic firms seeking protection — that panels had found to be consistent with WTO rules.

In our view, this series of rulings has not yet harmed the DSU or seriously jeopardized the Appellate Body's legitimacy. This is because all of the cases involving trade remedies have been low-stakes disputes. With one exception, the complaints have not directly challenged U.S. trade remedy laws; they have questioned only the application of those laws in specific instances, where the dollar amounts and broader implications were limited. The exception is *US – Anti-Dumping Act*, but even that case dealt with a minor and rarely utilized statute, not the main U.S. unfair trade laws. Although these WTO rulings potentially have implications for similar cases, they are binding only with respect to the specific measures in dispute. Prospective complainants eager to capitalize on a favorable precedent must first bear the costs and delay of litigation.⁸⁸ Because remedies in the WTO are only prospective, moreover, the disputed measures may very well have achieved their desired effect by the time the implementation period has ended. This is especially so with safeguards, whose maximum duration is four years in any event.

Perhaps the best indicator of the low stakes involved in these cases is the almost perfect record of compliance by the US and the EU. Only in *US – Anti-Dumping Act*, which requires legislative action by

Congress, has implementation not occurred. Among the other disputes involving trade remedies, there are five cases of full compliance, only one of which was delayed; two cases in which no action was required because the measure in dispute had expired; one case whose outcome is unknown; and one case in which the reasonable period for implementation has not ended (see Table 1).

Despite this impressive record, the risks for the Appellate Body and the WTO in disputes involving trade remedies should not be underestimated. Unfair trade laws and safeguards provide a safety valve for governments struggling to balance the costs and benefits of trade liberalization in the domestic political arena. Protectionist abuse of these instruments is a threat to the WTO, but so is noncompliance — and existing rules are highly valued by import-competing sectors. The prospect of trade remedy reform in future WTO negotiations, for example, has been an obstacle to trade promotion authority in Congress.⁸⁹ The litany of complaints from domestic industry about past rulings will mean increased scrutiny of several high-profile disputes that remain in the early stages of the WTO process, in particular the cases against U.S. steel safeguards. The Appellate Body will thus remain in a precarious position. If trade remedy reform is pursued through litigation rather than negotiation, the legitimacy of the DSU is likely to suffer — and the exceptional record of compliance in that area is likely to deteriorate. In the next segment, we evaluate the less impressive record of implementation in other WTO disputes.

5. COMPLIANCE BARGAINING

The compliance phase of WTO dispute settlement does not always produce timely and effective implementation of adopted rulings, for two principal reasons. First, compliance reviews under Article 21.5 and *ad hoc* procedural agreements between disputants in practice extend the deadline for implementation and delay the imposition of sanctions well beyond the strict timetable that governs the prior stages of WTO disputes. Defendants can thus drag out proceedings for months, all the while shielding themselves from the force of adverse rulings. Second, and more importantly, disputing governments are free to reach settlements that are contrary to WTO rules even after a legally binding Appellate Body report has been adopted. In both respects, the WTO compliance process involves a continuation of bargaining — not in the shadow of the law as conventionally understood (i.e., with uncertainty about a future judgment), but in the context of conventional international politics.

The formal record of compliance in WTO disputes that reach the Appellate Body is impressive. Table 1 reports only four cases of clear and continuing noncompliance. But this record does not take into account the fact that in more than one quarter of the successfully resolved cases (7 of 26), compliance did not occur within the reasonable period agreed upon by the disputants or determined by an arbitrator. The average delay in those seven cases (316 days, more than 10 months) was not insignificant, especially when one adds that interval to the already generous implementation period of up to 15 months.⁹⁰ If these cases were coded as a form of noncompliance, the record of the WTO would look much worse, with compliance not occurring on time in more than one third of Appellate Body cases (11 of 30).

These delays are attributable in part to the way in which the WTO system monitors compliance with adopted rulings. The procedural details of compliance reviews are not well articulated in the DSU, leaving them open to *ad hoc* bargaining. Under DSU Article 21.5, complainants enjoy the right to challenge replacement measures by referring them to a panel for an expedited review of their consistency with WTO rules. The text of the DSU sets a strict timetable of 90 days for such reviews, which is much less time than the six to nine months given to original panels.⁹¹ In practice, however, the compliance review process routinely takes much longer. One source of delay is for appeals of Article 21.5 panel reports. The DSU makes no explicit provision for such a step, but in July 2000 the Appellate Body decided on its own initiative to accept Brazil's appeal of the compliance panel decisions in its regional aircraft subsidy disputes with Canada, setting a precedent that other defendants have been eager to utilize. Other delays have occurred even after an Article 21.5 appeal is complete, as disputants request a second compliance panel either to analyze claims not adjudicated by the Appellate Body or to review a subsequent replacement measure.⁹² The danger, of course, is that a repeating loop of compliance reviews not explicitly envisioned by the DSU will become standard practice.

The fact that the sequencing of compliance reviews and sanctions under the DSU remains unclear only exacerbates the costs of delay in the Article 21.5 process. The US forcefully moved to apply sanctions in the bananas case at the end of the reasonable period for implementation, refusing to wait for an Article 21.5 review. In most other cases, however, disputants have reached *ad hoc* procedural agreements that delay the imposition of sanctions until the compliance review process is complete — or even longer. As a

defendant, the US has been the beneficiary of such pacts in cases filed by the EU, most notably in *US – FSCs*, which illustrates the delays that characterize the compliance phase of WTO disputes.

Officials in Washington initially pledged to comply with the FSC decision by amending the US tax code.⁹³ The Clinton administration then set to work with Capitol Hill to draft new legislation. The bill, however, did not make it through Congress within the WTO timetable for implementation. The US was able to reach a last-minute procedural agreement with the EU to extend the deadline and delay the implementation of sanctions that would be very costly to both sides.⁹⁴ Shortly thereafter, Congress passed the replacement legislation.⁹⁵ That law was soon challenged by the EU and referred under DSU Article 21.5 to a compliance panel, which found that the revised scheme was still an illegal export subsidy. U.S. officials then exercised their right to appeal the compliance panel's ruling, but the Appellate Body upheld its main findings in January 2002, concluding the WTO review process — more than five years after the original request for consultations.⁹⁶

Although legal proceedings are complete, both sides remain eager to avoid any immediate escalation in the FSC case. Both Brussels and Washington have faced criticism for bringing the WTO to the brink of a transatlantic trade war.⁹⁷ While reserving their right to impose sanctions after an arbitrator determines the level of harm, EU officials have acknowledged the complexity of the case and expressed a willingness to work with the US to find a solution. In the wake of the final WTO decision, EU Trade Commissioner Pascal Lamy noted the need to be "realistic" about the timetable for compliance, implying that the EU would not impose sanctions as soon as the 60-day period for implementation expires. U.S. Trade Representative Robert Zoellick in turn pledged "to respect our WTO obligations and to seek to come into compliance with the ruling" through consultations with Congress and business groups.⁹⁸ Negotiations between the two sides continue, with no timetable in place for further action.

The FSC dispute stands alone in terms of the magnitude of the potential retaliation and the resultant harm to the international economy, which arguably accounts for the repeated delays on the part of the EU. Nevertheless, the EU has shown similar forbearance regarding sanctions in other cases against the US. In *US – Anti-Dumping Act*, the EU and Japan agreed to extend the original deadline for implementation until the end of the relevant session of Congress. When compliance still did not occur, they again agreed to postpone retaliation — not tariffs, but the adoption of similar legislation — during further negotiations. In a

pending case against U.S. steel safeguards, the EU similarly threatened to retaliate even before the WTO had issued an initial ruling and specified a prospective target list of politically sensitive U.S. exports. When its announced deadline arrived, however, the EU again agreed to forgo sanctions in exchange for a US pledge to exempt additional steel products from the safeguard tariffs.

By postponing sanctions, *ad hoc* procedural agreements of this sort reduce the incentives for prompt compliance in cases where a final ruling of violation has been adopted by the WTO. Complainants, of course, benefit by delaying or avoiding the costs of sanctions on domestic importers and consumers. Moreover, the mere authority to retaliate also generates some degree of bargaining leverage for complainants in negotiations regarding both the dispute at hand and other matters. Some observers suggest, for example, that the EU's pursuit of the FSC case was a strategic move to improve its position in talks with the US regarding agricultural subsidies and other items on the WTO agenda.

The second key dimension of post-decision bargaining concerns not the timing of compliance, but the terms. In practice the authority to define compliance ultimately rests with the disputing governments, not the Appellate Body, even after a ruling of violation has been adopted. WTO decisions do not specify exactly how compliance should be achieved. The Appellate Body merely "recommends that the DSB request" that the defendant brings its policies into conformity with WTO rules. As a matter of law, although DSU Article 22.1 expresses a preference for full implementation, it also establishes a clear legal basis for compensation as a second-best outcome. The text suggests that any compensation should be temporary and consistent with WTO rules, but it imposes no further constraints.

More importantly, as a matter of customary practice, disputing governments are free to reach settlements that tolerate ongoing violations of WTO rules even after formally binding rulings have entered into force. If in agreement, disputants have the right to request that the issue of implementation be removed from the agenda of the DSB without disclosing the specific terms of their settlement, which may or may not conform to WTO rules. Only if another WTO member challenges the arrangement is it subject to further review under the DSU.

After a ruling of violation, of course, winning complainants often have pragmatic incentives to use the WTO system to press for full implementation. Compensation may also be difficult for defendants to arrange, given the WTO norm of nondiscrimination and domestic obstacles to trading concessions in one

sector for protection in another. Nevertheless, because the nominal obligation to comply can be evaded if a compromise favorable to both sides is struck, defendants have incentives to propose settlements even after a binding ruling has been adopted. In particularly difficult disputes, side deals may be reached.

Among cases heard by the Appellate Body thus far, there have been at least two and perhaps three important instances of settlements that delay or deny full implementation of DSB recommendations. The most significant example is *EC – Bananas*, in which the US and then Ecuador agreed to a deal in which the EU increased access for their producers during its gradual transition toward a WTO-compliant regime. The tariff-only scheme that constitutes full compliance will not be in place until 2006, more than eight years after the ruling of violation entered into force.⁹⁹ A second compromise involving compensation occurred in *Turkey – Textiles*. The Turkish government insisted on maintaining quantitative restrictions on 19 categories of Indian textile imports. In exchange, Turkey offered India a series of tariff concessions on other goods. Their settlement does not specify when, if at all, Turkey will move to comply fully.¹⁰⁰ In a third and final example, Thailand and Poland agreed to request that the DSB remove the issue of implementation in *Thailand – Iron & Steel* from its agenda without specifying the terms of any settlement.¹⁰¹ It could involve full implementation, but it seems likely that if compliance had occurred, Thailand would seek to claim credit for it.

These settlements illustrate the way in which WTO rules allow disputes to be resolved and removed from the DSB agenda short of full compliance. Among transatlantic disputes, only *EC – Bananas* has ended in an agreement of this sort, but negotiations continue in three other cases in which compliance has yet to occur: *EC – Beef Hormones*, *US – Anti-Dumping Act*, and *US – FSCs*. In the beef hormones dispute, the contending sides have discussed (but never agreed on) compensation arrangements that would enable the EU ban to remain in place. The magnitude of potential sanctions and the political obstacles to revising the US tax code suggest that the FSC dispute could also end in a settlement that falls short of strict compliance, but only time will tell.

6. CONCLUSION

Political scientists have come in recent years to pay considerable attention to international law with respect to areas as diverse as the environment, human rights, and trade. The legal realm is often seen

as one in which international cooperation has flourished and in which national governments have been willing either to pool their sovereignty or to allow international institutions to constrain their sovereign prerogatives. It is thus not surprising that scholars have pinned considerable hopes on the WTO, and particularly its dispute settlement system, for the legalization of international trade. Given the heavy caseload of the WTO system and the impressive rate of compliance with Appellate Body decisions, it is equally unsurprising that some have been tempted to depict the DSU as a triumph of legalism over traditional diplomacy and power politics.

In this article we have cast doubt on such interpretations of the early history of the WTO, emphasizing instead the political underpinnings of its nascent legal system. Our analytic focus — a triangle defined by the US, the EU, and the Appellate Body — captures the interactions we believe to be most significant in shaping the future of the DSU. We have demonstrated that the formal record of success in the WTO legal system to date is in large part the product of strategic behavior by these three actors. First, complainants have often chosen not to press cases when it is unlikely that defendants would comply with adverse rulings. Such disputes are thus postponed or “resolved,” but primarily because litigants do not want to risk harm to the WTO system. Second, the Appellate Body has been very active in tailoring its rulings, often to facilitate compliance by losing defendants. This conciliation represents a tacit acknowledgment by the Appellate Body of political constraints on its authority and perceived legitimacy. Finally, even after a final ruling of violation has entered into force, the DSU gives litigants considerable discretion in determining the timing and form of compliance. Disputing governments have strategically utilized this latitude to postpone retaliation and to reach settlements that fall short of full implementation.

Each of these behaviors reflects two underlying realities of the WTO system. On the one hand, the Appellate Body does not yet have the reputational clout to take compliance for granted in high-stakes cases against powerful defendants. At this early stage in the history of the WTO, the institutional reforms and substantive commitments of the Uruguay Round remain politically contested both in Europe and in North America. On the other hand, all the major players — the US and the EU, as well as the Appellate Body — want the DSU to develop into an authoritative system that enforces WTO rules heavily influenced by negotiators from Washington and Brussels. For all concerned, the best way to proceed is with sensitivity to

underlying political realities, even if this means strategically departing from the strict application of WTO obligations and procedures.

At the same time, there are substantial risks inherent in the political foundations of the WTO legal system. Several transatlantic disputes, especially regarding U.S. tax credits and the EU beef hormone ban, continue to pose a threat to the perceived authority of the DSU and the WTO. Given the current political climate, in which the Bush administration's decisions to grant protection to domestic steel producers and farmers elicited very negative reactions in European capitals, the safest prediction is that the Appellate Body's job will become more difficult, not easier, in the foreseeable future. If the emerging WTO system is to weather such storms, strategic restraint, conciliation, and settlements will continue to be required.

BIBLIOGRAPHY

- Abbott, Kenneth W. and Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. 2000. The Concept of Legalization. *International Organization* 54 (3):401-19.
- Ala'i, Padideh. 1999. Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization. *American University International Law Review* 14:1129-71.
- American Bar Association. 1994. Uruguay Round. *International Lawyer* 28 (2):565-72.
- Axelrod, Robert. 1984. *The Evolution of Cooperation*. New York: Basic Books.
- Bayard, Thomas O. and Kimberly Ann Elliot. 1994. *Reciprocity and Retaliation in US Trade Policy*. Washington, DC: Institute for International Economics.
- Bello, Judith H. 1997. Some Practical Observations About WTO Settlement of Intellectual Property Disputes. *Virginia Journal of International Law* 37 (Winter):357-67.
- Bhagwati, Jagdish and Hugh T. Patrick (eds). 1990. *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*. Ann Arbor: University of Michigan Press.
- Bhala, Raj. 1999a. The Myth about *Stare Decisis* and International Trade Law. *American University International Law Review* 14:845.
- _____. 1999b. The Precedent Setters: *De Facto Stare Decisis* in WTO Adjudication. *Florida State University Journal of Transnational Law and Policy* 1 (forthcoming).
- Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court: A Political Theory of Legal Integration. *International Organization* 47 (Winter):41-76.
- Busch, Marc L. 1999. Democracy, Consultation, and the Paneling of Disputes Under GATT 1947. Paper presented at the Annual Meeting of the American Political Science Association, Atlanta, Georgia (September).
- Cooter, Robert D., and Tom Ginsburg. 1996. Comparative Judicial Discretion. *International Review of Law and Economics* 16:295-313.
- The Economist*. 2001. A Fruity Peace. April 21: 68.
- Ferejohn, John, and Charles Shipan. 1990. Congressional Influence on Bureaucracy. *Journal of Law, Economics and Organization* 6:1-20.

- Franck, Thomas M. 1995. *Fairness in International Law and Institutions*. New York: Oxford University Press.
- Garrett, Geoffrey. 1992. International Cooperation and Institutional Choice: The European Community's Internal Market. *International Organization* 46:533-560.
- _____. 1995. The Politics of Legal Integration in the European Union. *International Organization* 49:171-81.
- Garrett, Geoffrey, R. Daniel Kelemen, and Heiner Schulz. 1998. The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization* 52 (1):149-76.
- Garrett, Geoffrey, and Barry R. Weingast. 1993. Ideas, Interests and Institutions: Constructing the European Community's Internal Market. In *Ideas and Foreign Policy*, edited by Judith Goldstein and Robert O. Keohane. Ithaca: Cornell University Press.
- GATT Secretariat. 1994. *The Results of the Uruguay Round Trade Negotiations: The Legal Texts*, reprinted in 33 *International Legal Materials* 1140 (1994).
- Goldstein, Judith. 1996. International Law and Domestic Institutions: Reconciling North American 'Unfair' Trade Laws. *International Organization* 50 (4):541-64.
- Goldstein, Judith, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter. 2000. Introduction: Legalization and World Politics. *International Organization* 54(3): 385-400.
- Goldstein, Judith, and Lisa L. Martin. 2000. Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note. *International Organization* 54(3): 603-632.
- Hampson, Fen Osler and Michael Hart. 1995. *Multilateral Negotiations: Lessons from Arms Control, Trade, and the Environment*. Baltimore: Johns Hopkins University Press.
- Hoekman, Bernard and Michel Kostecki. 1995. *The Political Economy of the World Trading System: From GATT to WTO*. Oxford: Oxford University Press.
- Hudec, Robert E. 1993. *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. Salem, New Hampshire: Butterworth.
- _____. 1999. The New WTO Dispute Settlement Procedure: An Overview of the First Three Years. *Minnesota Journal of Global Trade* 8 (Winter):1-53.

- Jackson, John H. 1978. The Crumbling Institutions of the Liberal Trade System. *Journal of World Trade Law* 12:93-106.
- _____. 1990. *Restructuring the GATT System*. New York: Council on Foreign Relations.
- Kelemen, R. Daniel. 1999. The Limits of Judicial Power: Trade-Environment Disputes in the EU, NAFTA, and GATT/WTO. Paper presented at the Annual Meeting of the International Studies Association, Washington, D.C. (February).
- Keohane, Robert O., Andrew Moravcsik and Anne-Marie Slaughter. 2000. Legalized Dispute Resolution. *International Organization* 54(3): 457-488.
- Montaña i Mora, Miquel. 1993. A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes. *Columbia Journal of Transnational Law* 31 (1):103-80.
- Moravcsik, Andrew. 1998. _____
- Patterson, Eliza. 2001. The US-EU Banana Dispute. ASIL Insights (February).
- Reinhardt, Eric. 2001. Adjudication without Enforcement in GATT Disputes. *Journal of Conflict Resolution* 45 ():174-95.
- Smith, James McCall. 2000. The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. *International Organization* 54 (1):137-80.
- Steinberg, Richard H. 1995. Consensus Decision-Making at the GATT and WTO: Linkage and Law in a Neorealist Model of Institutions. Berkeley Roundtable on the International Economy Working Paper 72 (January).
- Stewart, Terence P. (Ed.) 1993. *The GATT Uruguay Round: A Negotiating History (1986-1992), Volume II -- Commentary*. Boston: Kluwer.
- Stone Sweet, Alec. 1999. Judicialization and the Construction of Governance. *Comparative Political Studies* 32: 147-184.
- Tsebelis, George. 1989. *Nested Games*. Berkeley: University of California Press.
- Tsebelis, George, and Geoffrey Garrett. 1999. The Institutional Determinants of Supranationalism in the European Union. Manuscript. UCLA.
- Yocis, David A. 2001. Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations. *New York University Law Review* 76: 1259-95.

Young, Michael K. 1995. Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats.
International Lawyer 29 (5):389-409.

Table 1. WTO Appellate Body Reports (1 January 1995 - 2 February 2002)

CASE NAME	DATE ^a	DEFENDANT and ISSUE ^b	COMPLAINANTS	THIRD PARTIES ^c	PANEL	APPELLATE BODY	COMPLIANCE ^d
<i>US – Gasoline Standards</i>	4-29-96	US – Standards for Reformulated and Conventional Gasoline	Brazil, Venezuela	EU, Norway	violation	upheld, but on modified basis	yes – 456 days
<i>Japan – Alcohol Taxes</i>	10-4-96	Japan – Taxes on Alcoholic Beverages	Canada, EU, US	none	violation	upheld	yes – 434 days
<i>US – Underwear</i>	2-10-97	US – Restrictions on Imports of Cotton and Man-made Fibre Underwear	Costa Rica	India	violation	upheld, accepting narrow appeal by complainant on retroactivity	yes – 30 days
<i>Brazil – Coconut</i>	2-21-97	Brazil – Measures Affecting Desiccated Coconut	Philippines	EU, US	no violation	upheld	N/A
<i>US – Shirts and Blouses</i>	4-25-97	US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India	India	none	violation	upheld, rejecting narrow appeal by complainant	not required (measure had expired)
<i>Canada – Periodicals</i>	6-30-97	Canada – Certain Measures Concerning Periodicals	US	none	violation	upheld	yes – 457 days
<i>EC – Bananas</i>	9-9-97	EC – Regime for the Importation, Sale and Distribution of Bananas	Ecuador, Honduras, Guatemala, Mexico, US	Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Japan, Nicaragua, Saint Lucia, St. Vincent & the Grenadines, Senegal, Suriname, Venezuela	violation	upheld, but on modified basis	yes – 1357 days ^e
<i>India – Patents</i>	12-19-97	India – Patent Protection for Pharmaceutical and Agricultural Chemical Products	US	EU	violation	upheld	yes – 434 days
<i>EC – Beef Hormones</i>	1-16-98	EC – Measures Concerning Meat and Meat Products (Hormones)	Canada, US	Australia, New Zealand, Norway	violation	upheld, but on modified basis	no
<i>Argentina – Footwear, Textiles and Apparel</i>	3-27-98	Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel & other Items	US	EU	violation	upheld	yes – 403 days
<i>EC – Computers</i>	6-5-98	EC – Customs Classification of Certain Computer Equipment	US	Japan	violation	reversed, finding no violation	N/A
<i>EC – Poultry</i>	7-13-98	EC – Measures Affecting the Importation of Certain Poultry Products	Brazil	Thailand, US	violation	upheld in part, reversed in part ^f	unknown ^g
<i>US – Shrimp</i>	10-12-98	US – Import Prohibition of Certain Shrimp and Shrimp Products	India, Malaysia, Pakistan, Thailand	Australia, Ecuador, EU, Hong Kong, Nigeria	violation	upheld, but on modified basis	yes – 447 days
<i>Australia – Salmon</i>	10-20-98	Australia – Measures Affecting Importation of Salmon	Canada	EU, India, Norway, US	violation	upheld, but on modified basis	yes – 558 days
<i>Guatemala – Cement</i>	11-2-98	Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico	Mexico	US	violation	dismissed, as the matter was not properly before the panel	N/A
<i>Korea – Alcohol Taxes</i>	1-18-99	Korea – Taxes on Alcoholic Beverages	EU, US	Mexico	violation	upheld	yes – 683 days
<i>Japan – Agricultural Products</i>	2-22-99	Japan – Measures Affecting Agricultural Products	US	Brazil, EU	violation	upheld	yes – 287 days
<i>Brazil – Aircraft</i>	8-2-99	Brazil – Export Financing Programme for Aircraft	Canada	EU, US	violation	upheld	yes – 480 days
<i>Canada – Aircraft</i>	8-2-99	Canada – Measures Affecting the Export of Civilian Aircraft	Brazil	EU, US	violation	upheld	yes – 90 days
<i>India – Quantitative Restrictions</i>	8-23-99	India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	US	none	violation	upheld	yes – 192 days ^h
<i>Canada – Dairy</i>	10-13-99	Canada – Measures Affecting the	New Zealand, US	none	violation	upheld in part, reversed in part	under review

		Importation of Milk and the Exportation of Dairy Products					
<i>Turkey – Textiles</i>	10-22-99	Turkey – Restrictions on Imports of Textiles and Clothing Products	India	Hong Kong, Japan, Philippines	violation	upheld, but on modified basis	yes – 595 days
<i>Chile – Alcohol Taxes</i>	12-13-99	Chile – Taxes on Alcoholic Beverages	EU	Mexico, US	violation	upheld	yes – 394 days
<i>Korea – Dairy</i>	12-14-99	Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products	EU	US	violation	upheld in part, reversed in part	yes – 129 days
<i>Argentina – Footwear Safeguards</i>	12-14-99	Argentina – Safeguard Measures on Imports of Footwear	EU	Indonesia, US	violation	upheld in part, reversed in part	yes – 44 days
<i>US – FSCs</i>	2-24-00	US – Tax Treatment for "Foreign Sales Corporations"	EU	Canada, Japan	violation	upheld in part, reversed in part	no
<i>US – Steel</i>	5-10-00	US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom	EU	Brazil, Mexico	violation	upheld	not required (measure had expired)
<i>Canada – Autos</i>	5-31-00	Canada – Certain Measures Affecting the Automotive Industry	EU, Japan	Korea, US	violation	upheld in part, reversed in part	yes – 244 days
<i>Brazil – Aircraft 21.5^h</i>	7-21-00	Brazil – Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU	Canada	EU, US	violation	upheld	N/A
<i>Canada – Aircraft 21.5^h</i>	7-21-00	Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU	Brazil	EU, US	no violation	upheld, but on modified basis	N/A
<i>US – Anti-Dumping Act</i>	8-28-00	US – Anti-Dumping Act of 1916	EU, Japan	India, Mexico	violation	upheld	no
<i>Canada – Patents</i>	9-18-00	Canada – Term of Patent Protection	US	none	violation	upheld	yes – 245 days
<i>US – Import Measures</i>	12-11-00	US – Import Measures on Certain Products from the European Communities	EU	Dominica, Ecuador, India, Jamaica, Japan, St. Lucia	violation	upheld in part, reversed in part	not required (measure had expired)
<i>Korea – Beef</i>	12-11-00	Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef	Australia, US	Canada, New Zealand	violation	upheld in part, reversed in part	yes – 243 days
<i>US – Wheat Safeguards</i>	12-22-00	US – Definitive Safeguard Measures on Imports of Wheat Gluten from the EC	EU	Australia, Canada, New Zealand	violation	upheld in part, reversed in part	yes – 133 days
<i>EC – Bed Linen</i>	3-1-01	EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India	India	Egypt, Japan, US	violation	upheld in part, reversed in part, finding new violation	to be reviewed ¹
<i>Thailand – Iron & Steel</i>	3-12-01	Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland	Poland	EU, Japan, US	violation	upheld, but on modified basis	yes – 291 days
<i>EC – Asbestos</i>	3-12-01	EC – Measures Affecting Asbestos and Asbestos-Containing Products	Canada	Brazil, US	no violation	upheld, but on modified basis	N/A
<i>US – Lamb Safeguards</i>	5-1-01	US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia	Australia, New Zealand	EU	violation	upheld, but on modified basis	yes – 183 days
<i>US – Japanese Steel</i>	7-24-01	US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan	Japan	Brazil, Canada, Chile, EU, Korea	violation	upheld in part, reversed in part	pending
<i>US – Yarn Safeguards</i>	10-8-01	US – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan	Pakistan	EU, India	violation	upheld in part, reversed in part	yes – 4 days
<i>US – Shrimp 21.5^h</i>	10-22-01	US – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia	Malaysia	Australia, EU, Hong Kong, India, Japan, Mexico, Thailand	no violation	upheld	N/A
<i>Mexico – Corn Syrup 21.5</i>	10-22-01	Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse	US	EU	violation	upheld	no

		to Article 21.5 of the DSU by the US					
<i>Canada – Dairy 21.5^b</i>	12-3-01	Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Article 21.5 of the DSU by New Zealand & the US	New Zealand, US	EU	violation	reversed, as error of law ^j	N/A
<i>US – Section 211</i>	1-2-02	US – Section 211 Omnibus Appropriations Act of 1998	EU	none	violation	upheld in part, reversed in part	pending
<i>US – FSCs 21.5^b</i>	1-14-02	US – Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities	EU	Australia, Canada, India, Japan	violation	upheld	N/A

^a Date on which the Appellate Body report was issued, not adopted.

^b The formal WTO name for each case.

^c This list refers to "Third Participants" as defined in Rule 24 of the Appellate Body's Working Procedures.

^d The compliance period begins when the DSB adopts the ruling and ends when the disputants reach a settlement or the WTO finds that implementation occurred.

^e Implementation begins July 1, 2001, with the onset of the transitional regime accepted by the US and Ecuador; full compliance is delayed by agreement until January 1, 2006.

^f Both decisions rejected the bulk of Brazil's allegations, making compliance largely moot, but the Appellate Body upheld one narrow finding of violation regarding the EU's use of representative prices in calculating additional safeguard duties. It reversed another narrow panel finding of violation by the EU regarding the trigger price for safeguards.

^g On certain goods, the mutually agreed settlement allows India an additional 365 days to come into compliance.

^h These Article 21.5 appeals are not distinct matters from the Appellate Body's previous rulings in the same disputes.

ⁱ The EU altered its measure within the reasonable time period. India then announced its interest in referring the matter to an Article 21.5 panel, but it has yet to do so.

^j The reversal of the Article 21.5 panel ruling does not imply the measure is WTO-consistent; with an incomplete factual record, the Appellate Body could not analyze other claims of violation. As a result, the United States and New Zealand requested referral of these claims to a second Article 21.5 panel, whose work is pending.

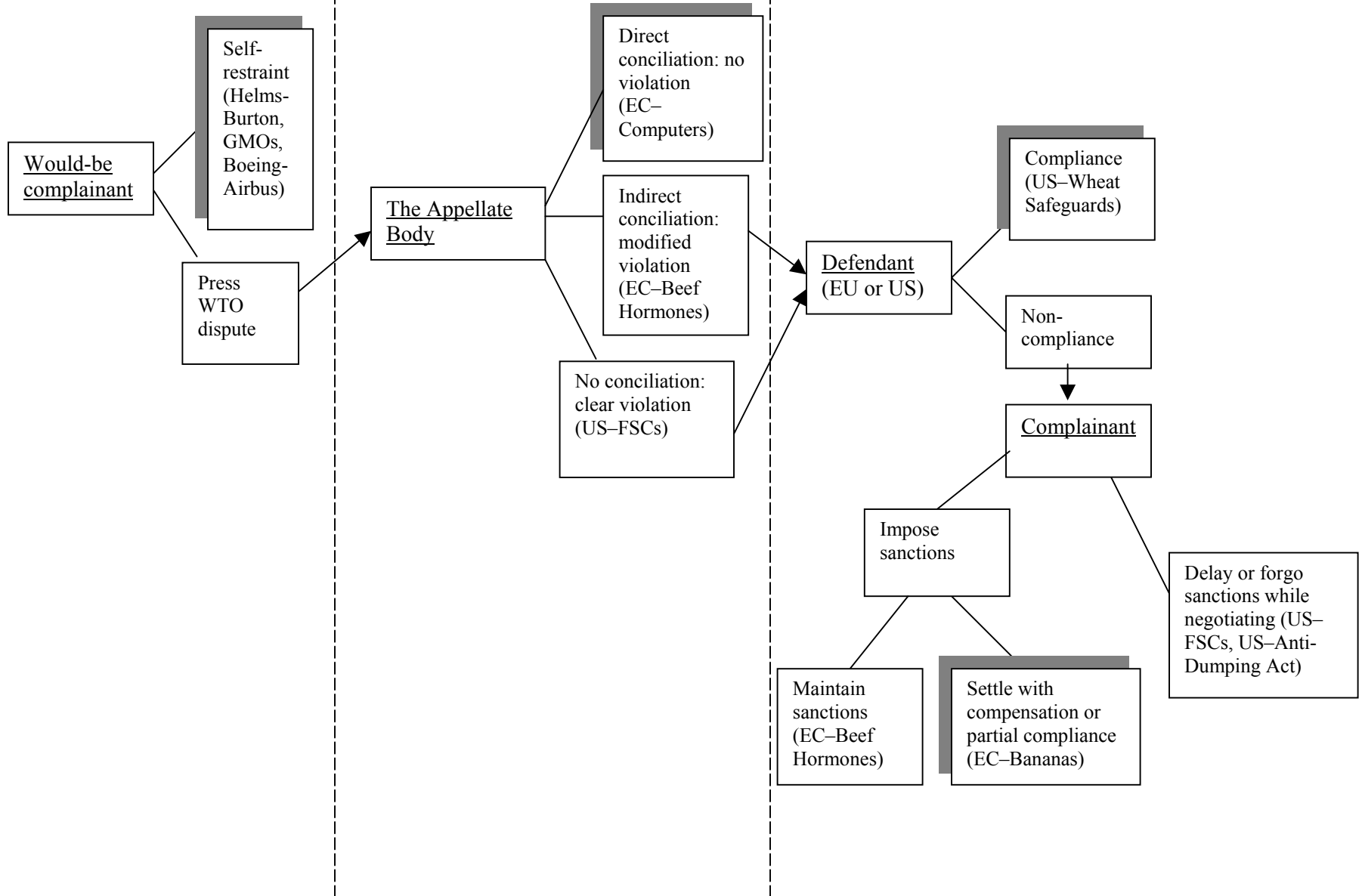
SOURCE: Panel and Appellate Body reports are available online at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

Figure 1. The Dispute Settlement Game

I. Pre-DSU Phase

II. DSU

III. Compliance Phase



Endnotes

¹ The principal new substantive obligations of the Uruguay Round were the liberalization of services, the incorporation of intellectual property rights, and the gradual deepening of agricultural reform.

² The full name is the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (hereinafter "DSU"). For the complete text of the DSU and other Uruguay Round agreements, see GATT Secretariat 1994.

³ Goldstein and Martin (2000) propose this as the acid test of the institution's effectiveness. The evidence seems mixed on first blush. Less developed countries have brought and won cases against developed nations under the DSU, but the high costs of litigation and the reliance on sanctions are obstacles for developing countries.

⁴ The Commission of the European Communities is the sole representative of the 15 member states of the European Union in the WTO. We refer to this as the European Union to be consistent with common usage, but the official name used in WTO proceedings (reflected in case names) remains the European Community.

⁵ WTO rules allow members to act as "third participants" in appeals (under Rule 24 of the Appellate Body's Working Procedures, and DSU Article 17.4). They have the right to participate fully during oral hearings, to submit written arguments, and to receive copies of all communications between the disputants and the Appellate Body.

⁶ In *EC – Beef Hormones*, the Appellate Body explicitly invoked the deferential principle of *in dubio mitius*.

⁷ Historically, pairs of signatory states agreed to reciprocal openings of each other's markets. These market access agreements were then extended without discrimination to other member governments through grants of Most Favored Nation status (GATT Article I) and guarantees of national treatment (GATT Article III).

⁸ Despite its distinct name, the DSB is identical to the WTO General Council, which is composed of representatives of all WTO members. It becomes the DSB when meeting to discuss dispute settlement issues. Participation rates are high, but not all WTO members attend DSB meetings consistently.

⁹ Uruguay Round negotiators also extended the application of the DSU system to all of the covered GATT agreements, integrating the various procedures of the Tokyo Round's non-tariff codes within a single institutional framework. There are a limited number of special or additional rules that apply to certain agreements; for a list, see DSU Appendix 2.

¹⁰ The process of panel formation has often been bitterly contested [Hudec 1999, 36]. When the parties are unable to agree, the WTO Director-General has the authority to appoint panelists and avoid undue delays (if requested to do so by one of the disputing governments).

¹¹ This precedent was established after Brazil filed notices of appeal regarding the Article 21.5 rulings in its aircraft subsidy cases against Canada. The Appellate Body upheld both decisions, one of which rejected Brazil's replacement measure while the other endorsed Canada's new policy as consistent with WTO rules.

¹² The DSU is ambiguous on the proper sequencing of the different arbitration procedures under Article 22.6 (regarding the level and composition of sanctions) and Article 21.5 (regarding the consistency of implementation measures with WTO rules). This divisive question has arisen repeatedly — during the bananas and FSC disputes, in the ongoing DSU review negotiations, and in the Appellate Body's *US – Import Measures* decision — but it remains formally unresolved. In several disputes, complainants have agreed to postpone the imposition of sanctions until an Article 21.5 review is complete.

¹³ See "Update of WTO Dispute Settlement Cases," WTO Document WT/DS/OV/4 (6 February 2002), which the WTO Secretariat updates regularly at http://www.wto.org/english/tratop_e/dispu_e/.

¹⁴ In addition to the 57 adopted panel or Appellate Body reports, two panel reports were on appeal and one was in circulation as of February 1, 2002. See WTO Document WT/DS/OV/4 (6 February 2002).

¹⁵ There are several potential reasons for this high rate of violation. Some cases ultimately decided by the WTO were in fact holdovers from the GATT regime, where panels had already ruled against defendants (such as *EC – Bananas*). Other cases have involved longstanding practices that only became breaches of WTO rules under the expanded commitments of the Uruguay Round – and some complainants, led by the United States, wanted to demonstrate the benefits of the new agreement to their exporters (e.g., by pursuing intellectual property rights violations in *India – Patents*). Moreover, it may be the case that complainants only choose to pursue relatively clear cases of violation because of the now very high transactions costs of litigation.

¹⁶ The number of appellate rulings (46) is smaller than the combined number of appeals (50) because two cases remained pending as of February 1, 2002, and because four panel reports were consolidated at the appellate level into two cases (*US – Anti-Dumping Act* and *EC – Beef Hormones*).

¹⁷ See WTO Document WT/DS/OV/4 (6 February 2002).

¹⁸ These disputes include: *Australia – Salmon*, *Brazil – Aircraft*, *Canada – Dairy*, *US – Anti-Dumping Act*, *US – FSCs*, and an EU case challenging a U.S. copyright statute where the panel report was not appealed. See WTO Document WT/DS/OV/4 (6 February 2002).

¹⁹ See "Taxing the WTO to the Limit," *Financial Times* (3 September 2000).

²⁰ See Article XIII of the Agreement on Agriculture in GATT Secretariat 1994.

²¹ See "US and Europe Reach Compromise on Trade," *Christian Science Monitor* (8 December 1993), 1.

²² See Fred Bergsten, "America's Two-Front Economic Conflict," *Foreign Affairs* (March/April 2001), 16.

²³ See "US Steps up Pressure on Brussels over Modified Crops," *Financial Times* (December 18, 2001), 16.

²⁴ See "Trade Clash on Cuba is Averted," *Washington Post* (April 12, 1997), A1.

²⁵ For the national security provisions, see Article XXI of GATT. For the US threat, see "US Vows to Boycott WTO Panel," *Washington Post* (February 21, 1997), A1.

²⁶ For responses from the disputants, both claiming victory, see "WTO Report on Section 301: A Good Result for the EU and the Multilateral System," EU Commission Press Release (24 December 1999); and "WTO Adopts Panel Findings Upholding Section 301," USTR Press Release 00-06 (27 January 2000).

²⁷ See "US and Europe to Seek Trade 'Warning System,'" *Financial Times* (12 May 1999), 6; and "Clinton and EU Move to Head Off Trade Disputes," *Washington Post* (22 June 1999), E1.

²⁸ Among the examples cited by Lamy are a settled dispute regarding airplane hush kits and the continuing negotiations on Spanish clementines. See "EU-US Trade: Friends or Foes?" (26 June 2002) online at <http://europe.eu.int/comm/chat/lamy8/index_en.htm>.

²⁹ For a useful summary, see Patterson 2001.

³⁰ See WTO Documents WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA (22 May 1997).

³¹ The full case name and citation is *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Document WT/DS27/AB/R (9 September 1997).

³² See "U.S., EU Reach Pact on Bananas," *Washington Post* (12 April 2001), E1.

³³ The full case name and citation is *United States – Tax Treatment for "Foreign Sales Corporations"*, WTO Document WT/DS108/AB/R (24 February 2000).

³⁴ These ideal types conceal the fact that most tax systems combine both worldwide and territorial features.

³⁵ By one estimate, the FSC exemption was worth \$130 million to Boeing and \$55 million to Cisco Systems in 1998 alone. See "House Holds Trade Bill Hostage to Tax Cut; Failure to Act May Cost Companies \$4 Billion," *Washington Post* (2 November 2000), E01.

³⁶ The 1981 Council action stated: "The Council adopts these reports on the understanding that with respect to these cases, and in general, economic processes (including transactions involving exported goods) located outside the territorial limits of the exporting country need not be subject to taxation by the exporting country and should not be regarded as export activities in terms of Article XVI:4 of the General Agreement. It is further understood that Article XVI:4 requires that arm's-length pricing be observed. . . . Furthermore, Article XVI:4 does not prohibit the adoption of measures to avoid double taxation of foreign source income." See *Tax Legislation*, GATT Document L/5271, BISD 28S/114 (7-8 December 1981).

³⁷ "Discussion with Members and Guests of EU Committee of US Chamber of Commerce," Brussels, Belgium (19 October 1998).

³⁸ For the text, see GATT Secretariat 1994.

³⁹ *US – FSCs*, ¶ 19, 95.

⁴⁰ *US – FSCs* ¶ 98-99.

⁴¹ The full name and citation: *European Communities – Customs Classification of Certain Computer Equipment*, Document WT/DS62/AB/R (5 June 1998).

⁴² *EC – Computers*, ¶ 80.

⁴³ *EC – Computers*, ¶ 82.

⁴⁴ *EC – Computers*, ¶ 109.

⁴⁵ U.S. officials did not make the same mistake in negotiating the Information Technology Agreement, which supplanted the disputed segments of the EU's schedule in January 2000, reducing its tariffs on nearly all electronic goods to zero. The new agreement specifies a "positive list" of covered goods (including networking equipment) that are subject to its terms no matter how they are classified for tariff purposes. Its entry into force reduced the cost of the WTO ruling to the United States, but the Appellate Body nevertheless gave U.S. competitors in Europe's sizable and growing network equipment sector additional time to build market share behind higher tariff walls.

⁴⁶ John Maggs, "WTO Sides with EU on Classifying Equipment," *Journal of Commerce* (5 June 1998), 3A.

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- ⁴⁷ The full case name and citation is *United States – Import Measures on Certain Products from the European Communities*, WTO Document WT/DS165/AB/R (11 December 2000).
- ⁴⁸ *US – Import Measures*, ¶ 90.
- ⁴⁹ *US – Import Measures*, ¶ 92.
- ⁵⁰ The most prominent example is the "tuna-dolphin" controversy engendered by the US Marine Mammal Protection Act of 1972. Its enforcement led to two unadopted panel reports in the early 1990s, both of which found the US legislation inconsistent with GATT. For summaries see Ala'i 1999, 1145-53.
- ⁵¹ For the full text, see GATT Secretariat 1994.
- ⁵² The full case name and citation is *United States – Standards for Reformulated and Conventional Gasoline*, WTO Document WT/DS2/AB/R (29 April 1996).
- ⁵³ Domestic refineries and foreign refineries that shipped at least 75 per cent of their gasoline to the US market in 1990 had three alternative methodologies. Method 1 utilized quality data and volume records from 1990. Where that information was not available, Method 2 relied on blendstock quality data and volume records from 1990. Lacking that information, Method 3 utilized alternative sets of post-1990 data to estimate an individual baseline. Under no circumstances was the statutory baseline imposed on these refineries, provided they were operating in 1990. For most overseas refineries, however, the statutory baseline was automatically imposed whenever Method 1 data from 1990 were unavailable.
- ⁵⁴ The EU (and Norway) filed an amicus brief in support of the *ad hoc* panel's interpretation of paragraph (g), having argued before the panel that exceptions to GATT should be strictly interpreted (*US – Gasoline Standards*, 10).
- ⁵⁵ *US – Gasoline Standards*, 20-21 (emphasis in original).
- ⁵⁶ *US – Gasoline Standards*, 22-23.
- ⁵⁷ *US – Gasoline Standards*, 30.
- ⁵⁸ The full case name and citation is *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Document WT/DS58/AB/R (12 October 1998).
- ⁵⁹ The relevant law is Section 609 of Public Law 101-162, with all its implementing regulations, guidelines, and judicial rulings. See Endangered Species Act of 1973, sec. 609, *16 USC. secs. 1531, 1537* (1989).
- ⁶⁰ *US – Shrimp*, ¶ 12.
- ⁶¹ *US – Shrimp*, ¶ 132-4, 141.
- ⁶² *US – Shrimp*, ¶ 161-4.
- ⁶³ *US – Shrimp*, ¶ 165.
- ⁶⁴ *US – Shrimp*, ¶ 53-78.
- ⁶⁵ *US – Shrimp*, ¶ 185 (emphasis in original).
- ⁶⁶ *US – Shrimp*, ¶ 121 (emphasis in original).
- ⁶⁷ "US Wins WTO Case on Sea Turtle Conservation," USTR Press Release 01-87 (22 October 2001).
- ⁶⁸ The full case name and citation is *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Document WT/DS26/AB/R (16 January 1998).
- ⁶⁹ The relevant SPS Agreement provisions are Article 5.1 on risk assessment; Articles 3.1 and 3.3 on international standards; and Article 5.5 on disguised restrictions on international trade. For the text, see GATT Secretariat 1994.
- ⁷⁰ *EC – Beef Hormones*, Section II.
- ⁷¹ *EC – Beef Hormones*, ¶ 102.
- ⁷² *EC – Beef Hormones*, ¶ 171-2.
- ⁷³ *EC – Beef Hormones*, ¶ 253 (j).
- ⁷⁴ *EC – Beef Hormones*, ¶ 180-93.
- ⁷⁵ *EC – Beef Hormones*, ¶ 165.
- ⁷⁶ The full case name and citation is *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Document WT/DS135/AB/R (12 March 2001).
- ⁷⁷ See WTO Document WT/DS135/R (18 September 2000).
- ⁷⁸ *EC – Asbestos*, ¶ 155-75.
- ⁷⁹ *EC – Asbestos*, ¶ 113 (emphasis in original).
- ⁸⁰ Bruce Rubenstein, "Havana Club's Makers Yet to Taste Victory," *Corporate Legal Times International* (March 2002), 1.
- ⁸¹ See WTO Document WT/DS176/R (6 August 2001).
- ⁸² The full case name and citation is *United States – Section 211 Omnibus Appropriations Act of 1998*, WTO Document WT/DS176/AB/R (2 January 2002).

⁸³ See "WTO Issues Report Upholding Key Aspects of U.S. Law in Trademark Dispute," USTR Press Release 02-01 (2 January 2002); and .

⁸⁴ See Alan Wm. Wolff, "WTO Dispute Settlement and Trade Remedies" (11 June 2002), available online at <http://www.db.com>.

⁸⁵ The safeguard cases, which include those arising under the agriculture and textile agreements, are *US – Underwear*, *US – Shirts & Blouses*, *EC – Poultry*, *US – Wheat Safeguards*, *US – Lamb Safeguards*, and *US – Yarn Safeguards*. The anti-dumping cases are *US – Anti-Dumping Act*, *EC – Bed Linen*, and *US – Japanese Steel*. The countervailing duty case is *US – Steel*. See Table 1.

⁸⁶ This standard instructs panels to endorse the decisions of national authorities as long as their establishment of the facts was proper and their evaluation was unbiased and objective, even if the panel might have reached a different conclusion. Where WTO rules are subject to multiple interpretations, it further calls on panels to endorse any measures that rest on one of the permissible interpretations. See Article 17.6, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in GATT Secretariat 1994.

⁸⁷ It rejected the panel's finding that the EU should have included customs duties in its calculation of the reference price for safeguard actions. See *EC – Poultry*, Section IX. In another case, *Guatemala – Cement*, the Appellate Body — with active encouragement from the US as a third party — effectively overturned a panel ruling that threatened to constrain anti-dumping duties by finding that the matter was not properly before the panel. Mexico, the complainant, was forced to file the case again, and the second *ad hoc* panel issued a less controversial decision. Some observers suggest that the political implications of the first panel report factored into the Appellate Body's unusual procedural finding. See Yocis 2001.

⁸⁸ Despite its victory in *US – Steel*, for example, the EU was forced to file a dozen or more related complaints regarding U.S. countervailing duties against formerly state-owned companies.

⁸⁹ The Senate amended its trade promotion authority bill to exempt trade remedy laws, so that Congress would retain a separate veto over any proposed reforms. See "Senate Approves Trade Authority," *Washington Post* (24 May 2002), A1.

⁹⁰ Implementation or settlement was late by 52 days in *US – Shrimp*; 93 days in *Thailand – Iron & Steel*; 137 days in *Turkey – Textiles*; 246 days in *EC – Bed Linen*; 316 days in *Australia – Salmon*; 388 days in *Brazil – Aircraft*; and 982 days in *EC – Bananas*.

⁹¹ See DSU Articles 12 and 21.

⁹² In *Canada – Dairy 21.5*, the Appellate Body could not complete the legal analysis of two alleged violations due to an inadequate factual record from the original Article 21.5 panel. The complainants then requested a second Article 21.5 proceeding to review those claims. In *Brazil – Aircraft*, after losing in the first Article 21.5 review, Brazil implemented a second replacement measure, which Canada submitted to a second Article 21.5 panel.

⁹³ See USTR Press Release 00-13 (24 February 2000).

⁹⁴ "US-EU Reach Agreement on FSC Procedures," USTR Press Release 00-65 (30 September 2000).

⁹⁵ The statute, known as the "FSC Repeal and Extraterritorial Income Exclusion Act of 2000" (H.R. 4986), was approved by the Senate on November 1, the extended deadline. After Republican leaders detached the bill from broader tax cuts the White House had pledged to veto, the House of Representatives finally approved the legislation on November 14. President Clinton quickly signed it two days later.

⁹⁶ The full case name and citation is *United States – Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities*, WTO Document WT/DS108/AB/RW (14 January 2002).

⁹⁷ Commentators have deplored the FSC case as a "damning indictment of both US and EU trade policy." See "Taxing the WTO to the Limit," *Financial Times* (3 September 2000).

⁹⁸ See "US Ready to Abide by WTO Tax-Break Ruling," *Financial Times* (25 January 2002).

⁹⁹ See WTO Document WT/DS27/58 (2 July 2001).

¹⁰⁰ See WTO Document WT/DS34/14 (19 July 2001).

¹⁰¹ See WTO Document WT/DS122/11 (23 January 2002).