
Remedies in the WTO Legal System: Between a Rock and a Hard Place

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Abstract

There is a considerable discrepancy in legal and economics scholarship as to the effectiveness of the new WTO dispute settlement system. The former usually suffers from selection bias that is not predicated on any empirical analysis. Bob Hudec produced a remarkable empirical account of how the GATT dispute settlement fared, but no corresponding study with respect to WTO has so far taken place. Maybe it is still too soon. The recent avalanche of compliance panels though, has cast considerable doubt on the initially celebrated effectiveness of the system. This paper is not the equivalent to Hudec's study for the WTO. It uses representative case law from the WTO to make the point that the effectiveness of the WTO remedies depends on the relative 'persuasive' power of the WTO member threatening with countermeasures.

1 Stating the Issue

A *The Ex Ante and Ex Post Function of Remedies*

Legal philosophy seeks to explain, sometimes convincingly and sometimes unconvincingly, why we respect law. Remedies are part of this discussion. The purpose of this paper is to analyse the remedies available in the WTO dispute settlement system from a positivist angle, without discussing the quality of the legal regime established by the WTO agreements.

Remedies perform two functions: *ex post facto*, they aim at redressing an illegality; *ex*

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ante, they act as a ‘credible threat’ against potential violators. There is, of course, a direct link between the two functions in the sense that the severity of the remedy *ex post* will significantly influence the behaviour of the actors *ex ante*.

B *Judicial Discretion with Respect to Remedies in the Context of Customary International Law*

Very often, legal regimes do not provide for specific remedies. In such cases, it is left to the discretion of the judiciary to decide the appropriate remedies. This was expressed in an authoritative manner by the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ) in its *Chorzow Factories* jurisprudence, where it stated that:

it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore, is the indispensable complement of a failure to apply a convention *and there is no necessity for this to be stated in the convention itself*.¹

In the context of public international law, the judge is not left without guidance, since there is a substantial body of customary international law available. This law is in the process of being codified by the International Law Commission (ILC). The Draft Articles on State Responsibility (hereafter ILC codification) deals with remedies available to injured parties where an internationally wrongful act has been committed.

Article 37 of the ILC codification, entitled ‘Lex specialis’, reads:

The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.²

C *The Relevance of Customary International Law for WTO Law on Remedies*

From the above, we may conclude that recourse must (assuming it is a faithful codification of customary international law) be made to the ILC codification only to the extent that a particular treaty regime does not contain specific provisions dealing with the issue of remedies.³ The WTO regime is vague on this issue. A new article (Article 19) has been inserted in the WTO Dispute Settlement Understanding (DSU), which reads as follows:

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or

¹ See 1929 PCIJ Series A, No. 8, 4, at 21 (emphasis added).

² See UN GA Doc. A/CN.4/L.528/Add.2 (16 July 1996).

³ Indeed, claims to the opposite can hardly be sustained. The ILC codification in this respect is almost exclusively *de lege lata*.

Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

The second sentence of Article 19(1) DSU does not prejudice the form of remedies that the WTO adjudicating bodies can suggest. To the extent, consequently, that the WTO regime does not provide for specific remedies, the ILC codification is relevant. This is so because the WTO is an international treaty and, consequently, acts committed in violation of its provisions are internationally wrongful acts.

Of course it could be argued that the WTO should be construed as a 'self contained' regime and hence insulated from general public international law. The term 'self contained' regime itself stems from the rather controversial judgment of the ICJ in the notorious *Hostages* case, a dispute between the United States and Iran.⁴ For the purposes of this paper, suffice it to say that the WTO Appellate Body took significant steps in construing the WTO contract not as a 'self contained' regime in the recent *Shrimps-Turtles* litigation between the United States and a number of shrimp exporters to the US market.⁵

D Organization of the Paper

The starting point of our analysis is the ILC codification. This approach enables us to see what is potentially available as a remedy for injured parties where a WTO member violates its obligations. We will then go on to discuss the WTO regime by means of a detailed presentation of Article 19 DSU as well as of articles of the WTO agreements dealing with the same issue.

As already stated, the ILC codification deals only with remedies where an internationally wrongful act has been committed. The GATT/WTO regime, however, deals with three different types of legal actions available to WTO members wanting to safeguard their rights: violation complaints; non-violation complaints; and situation complaints. For the purposes of this paper, the last two options will be viewed from the same angle, since situation complaints, like non-violation complaints, do not envisage an internationally wrongful act.

The ILC codification is irrelevant as far as non-violation and situation complaints are concerned. However, the ILC has also been active in codifying customary international law in the area of international liability for injurious consequences arising out of acts not prohibited by international law.⁶ The ILC's work in this context is not as advanced as it is with regard to its codification work on responsibility for internationally wrongful acts. Article 1 of the draft defines its *ratione materiae* jurisdiction in the following terms:

⁴ See ICJ Reports (1980) 3 *et seq.*

⁵ See *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R of 12 October 1998.

⁶ See UN GA Docs A/CN.4/459; 468 and 475 and Add.1.

The present articles apply to:

- a. activities not prohibited by international law which involve a risk of causing significant transboundary harm; and
- [b. other activities not prohibited by international law which do not involve a risk referred to in subparagraph (a) but nonetheless cause such harm through their physical consequences.]⁷

Consequently, the ILC's draft articles on injurious acts not prohibited by international law is irrelevant for the purposes of this paper, since there is no overlap between a GATT/WTO non-violation complaint (where the complaining party essentially aims at re-establishing a playing field which corresponds to its legitimate expectations) and the type of acts viewed in this codification. Viewed from this perspective, non-violation complaints are a GATT/WTO specificity.

The discussion on remedies is part of a more general discussion on enforcement. In the broad sense of the term, 'enforcement' should be understood to cover the subjects of enforcement as well as the mechanisms aimed at achieving enforcement. The WTO regime has opted for third party adjudication in the event of a dispute regarding the actual content of the law. Moreover, the WTO agreement, contrary to what takes place before the International Court of Justice (ICJ), permits of no alternative to third party adjudication. Article 23(2) DSU imposes an unambiguous obligation on all WTO members to submit their disputes to WTO panels;⁸ as a consequence, countermeasures remain an option in the WTO only to the extent that they are multilaterally authorized by the WTO. The discussion in this paper focuses on remedies recommended by the WTO adjudicating bodies as a means to redress actions illegal under the WTO regime and hence to enforce WTO law.

What follows is divided into three sections. In Section 2 we discuss remedies in public international law. Section 3 deals with the regulation of remedies in the WTO from the inception of the GATT to the present day. Finally, some concluding remarks are made in Section 4.

2 Remedies in Public International Law

A *The ILC Draft Articles on State Responsibility*

The basis for our evaluation are the ILC Draft Articles on State Responsibility. The ILC was requested to codify customary international law in the field of state responsibility. Customary international law binds every state, which has not persistently objected, to the formation of the custom in question.⁹ States may, however, through conventional means deviate from customary rules. Indeed, the Vienna Convention on the Law of

⁷ Sub-paragraph (b) was effectively deleted.

⁸ This point was underlined in the recent dispute between the European Community and the United States on the conformity of US section 301 with the relevant WTO rules. See *United States — Sections 301–310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R, 22 December 1999.

⁹ Persistent objector, though, is hardly a factor in this context.

Treaties declares invalid only those treaties which contradict a peremptory norm of international law (*jus cogens*).¹⁰

Knowledge of the state of the art in the field of customary law is useful even in cases where states have adopted regimes which clearly deviate from the general paradigm: it can help explain to what extent the world community accepts that in a particular case more stringent remedies are required; or, conversely, to what extent the existing remedies are too stringent. Customary international law is not always the common denominator of the world community. It is, however, evidence of a rather generalized state practice in a particular field.

A draft treaty prepared by the ILC can be open to signature. The ILC Draft Articles on State Responsibility is not the final draft yet.¹¹ The world community, though, has time and again demonstrated how seriously it takes the work of the ILC. At this stage, independently of the intellectually persuasive force of the current draft, there is evidence that in practice at least parts of it have been observed: international adjudicating bodies have been inspired by the work of the ILC on state responsibility, even at this stage when the final product is still unknown.¹²

According to the ILC codification (Articles 41 and 42), a state which is the author of an illegal act has two obligations:

- 1 an obligation to stop the illegal act; and
- 2 an obligation to provide a form of reparation to the injured party(ies).

Doctrine customarily distinguishes between primary and secondary obligations with respect to observance of international law: the former refers to the obligation to respect what has been agreed to (*pacta sunt servanda*), whereas the latter refers to obligations stemming from non-respect of the *pacta sunt servanda* rule. The obligation to stop the illegal act is often termed 'cessation of wrongful conduct'.¹³ It essentially means that the author of the illegal act must immediately stop the illegal act. The effects of this obligation are prospective (*ex nunc*). Moreover, this obligation runs independently of a prior specific request by the allegedly injured party or parties to this effect. In public international law the *non ultra petita* rule circumscribes the ambit of the powers of the adjudicating body: according to this rule, an adjudicating body cannot decide more than it has been asked to.

The wording of Article 41 of the draft speaks of an obligation to stop the illegal act, while Article 42 of the draft speaks of a right to request reparation in addition to the obligation to stop the illegal act. This means that adjudicating bodies can decide on

¹⁰ See Articles 53 and 64 of the Vienna Convention on the Law of Treaties.

¹¹ It appears, however, that this draft will not be open to signature. It might take the form of a UN GA declaration.

¹² See the comments on the arbitration award in *Rainbow Warrior* by Charpentier, 'L'affaire du Rainbow Warrior', *AFDI* (1986) 873; and Apollis, 'Le règlement de l'affaire du Rainbow Warrior', *RGDIP* (1987) 9.

¹³ According to some authors, 'cessation' is equivocal as between primary and secondary obligations since it is the other side of *pacta sunt servanda*.

cessation of the illegal act even in the absence of such a request by the allegedly injured party; adjudicating bodies will do so in cases where they are persuaded that the act they are examining is illegal.

An injured party can claim, in addition to the cessation of the illegal act, reparation for the damage suffered. In this event, the judge has to respect the *non ultra petita* rule. As the Special Rapporteur himself notes, nothing limits the discretion of the injured state with respect to the form of reparation. The relevant passage from his report reads:

In particular the victim of an internationally wrongful act is, under normal circumstances, entitled to elect compensation rather than restitution in kind, to forgo claims on satisfaction, or indeed to focus on cessation and future performance rather than seeking reparation at all.¹⁴

Reparation can take the following forms: *restitutio in integrum*, restitution by equivalent (compensation), satisfaction and/or guarantees for non-repetition. The objective of *restitutio in integrum* is to bring the legal situation in question to its *status quo ante*, that is to the state that existed before the illegal act was committed. If this is not feasible, adjudicating bodies will recommend restitution by equivalent (compensation), whereby the adjudicating body will essentially quantify the damage done. The damage can cover both actual damage (*damnum emergens*) as well as profits that were not realized because of the occurrence of the illegal act (*lucrum cessans*). In addition, interest can be awarded.¹⁵ Satisfaction is recommended either as a stand-alone remedy or in conjunction with other forms of reparation. As a stand-alone remedy, it would be recommended, for example, in cases of moral damage. In conjunction with other forms of reparation, satisfaction is granted, for example, when the state author of the illegal act, by accepting the decision proclaiming the illegality of its actions, accepts the illegality of its actions. A guarantee for non-repetition is a request addressed to the author of the illegal act to provide assurances that it will not repeat the act in the future. Satisfaction and guarantees for non-repetition in practice often go hand in hand.

B The Hierarchy among Forms of Reparation

Articles 43 and 44 of the ILC codification establish that recourse to restitution by equivalent will be made only in cases where *restitutio in integrum* is not feasible. These articles reproduce a famous passage from the decision of the PCIJ in the *Chorzow Factories* case, where the Court stated that:

¹⁴ See Third Report on State Responsibility by James Crawford, Special Rapporteur, UN GA Doc. A/CN.4/507 of 15 March 2000, at 15.

¹⁵ The corresponding Draft Article 44(2) reads in this respect: 'any . . . damage . . . may include interest'. This provoked a reaction from the United States. The US, in their recently published version of their comments to the draft ((1998) ILM 468–487), expressed the view that Article 44(2) is in clear contradiction with the principle of full reparation which is accepted in Article 42 of the draft. In the view of the US, this principle is overwhelmingly supported in international jurisprudence (*SS Wimbledon*, 1923 PCIJ Series A, No. 1, at 15 and 33; *Chorzow Factories*, *supra* note 1, at 47; *Illinois Central Railroad Co. v. United Mexican States*, 4 RIAA 134, at 137 (6 December 1926)). Consequently, the US recommends redrafting Article 44(2) so as to provide that interest must always be taken into account.

Reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹⁶

C *The Fallacy of Full Recovery*

Does reparation always amount to full recovery of the damage done? There is no absolute answer to this question. Re-establishment of the *status quo ante* is often very difficult to achieve and might even involve causing damage to *bona fide* third parties. Standing case law in international jurisprudence argues in favour of compensation where re-establishment of the *status quo ante* is excessively onerous. This reality is captured in the passage of the *Chorzow Factories* judgment cited above and in Articles 43 and 44 of the ILC codification.

The re-establishment of the *status quo ante* though serves as a guide for the calculation of the damage. Although assessment of damages is the task of the judge, calculation of the damage is essentially a quantification exercise, that is, essentially the task of the economist. The ILC codification gives only one guideline to the person entrusted with the quantification exercise: the damages awarded cannot be higher than the addition of *damnum emergens* plus *lucrum cessans*. Quantifying the *lucrum cessans* though can sometimes be a less than precise exercise. This largely explains why courts normally have a tendency to downplay requested damages.

The fact though that full recovery is, in practice, sometimes hard to calculate, does not render the reparation exercise meaningless.¹⁷ This point was captured in an oft quoted passage of the *Chorzow Factories* judgment, where the Court stated that:

Reparation must, *as far as possible*, wipe out all consequences of the illegal act.¹⁸

Consequently, reparation is lawfully granted even if it can only partially address the inflicted injury. This means that it is quite possible that secondary obligations (the obligation to provide reparation) in public international law are not always the best means to guarantee respect of the primary obligation (to always respect the law).

D *International Practice*

A decision by an adjudicating body will normally encompass three elements: (i) a declaration of the illegality of the act in question; (ii) the appropriate remedy; and (iii) some form of guarantees for non-repetition.¹⁹ A telling example is provided by the

¹⁶ See *Chorzow Factories*, *supra* note 1, at 21.

¹⁷ In the past, in some GATT/WTO quarters, the argument was raised that, since the reimbursement of anti-dumping duties cannot repair the whole damage done to exporters, no reimbursement of duties should ever be recommended. This argument is not only totally unreasonable, but is also at odds with public international law.

¹⁸ See *Chorzow Factories*, *supra* note 1, at 12 (emphasis added).

¹⁹ This is, however, not always the case.

decision of the ICJ in the *Hostages* case where the Court, after declaring that the Iranian actions in question were unlawful under international law, held that the author of the illegal act, that is Iran:

- (a) must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff.

and also that:

the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter.²⁰

By the same token, the ICJ in the *Nicaragua* case, after having found that the United States was at breach of its international obligations, stated that:

the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations²¹

and

the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above.²²

The remedies described above are applicable in cases where the illegal act is qualified as a delict. In fact, the ILC codification distinguishes, in the context of illegal acts, between delicts and crimes. A list of illegal acts which could constitute a crime is included in Article 19.²³ Any act which is illegal and which is not a crime is a delict. According to the draft, crimes are punished in a more stringent manner than delicts. The legal consequences of crimes though are irrelevant for our purposes, since, in the context of the WTO, we are dealing exclusively with delicts.

E The Function of Remedies in the Draft

The function of remedies has a much debated philosophical dimension: to what extent should remedies simply attempt strictly to 'remedy' a situation or to what extent should they provide a means to avoid eventual violations. In this context, the discussion on the availability of so-called 'punitive damages' is central. Punitive damages are a well-known legal institution in some domestic laws. In essence, punitive damages are damages that go beyond the actual damage incurred by the injured party; for example, one of the best known remedies in US antitrust law is the

²⁰ See *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, ICJ Reports (1980) 3, at 44–45.

²¹ See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, Judgment, ICJ Reports (1986) 14, at 149.

²² *Ibid.*

²³ Article 19 includes the following acts: aggression, acts aimed against self-determination, genocide, apartheid, and massive pollution of the atmosphere and the seas. The list in Article 19 is an indicative one. Other illegal acts can in future be added to the list, arguably by the ICJ.

treble damages remedy.²⁴ International practice also shows examples of punitive damages granted by adjudicating bodies.²⁵ Punitive damages, to some extent, bridge the gap between actual damage incurred and the appropriate remedy that would ensure no repetition of the unwanted behaviour in the future. Implicitly, such remedies acknowledge that a mere redress of the *status quo ante* does not guarantee non-repetition of the unwanted behaviour in the future; in other words, in such cases, redressing the original situation does not amount to providing a credible deterrent effect against potential future violators.

Remedies do not and should not have a unitary solution in all fields of law. In penal law, there is an argument against the use of punitive damages in that it tends to prevent the rehabilitation of criminals; such a line of thinking is, however, scarcely sustainable in international relations among states.²⁶

The ILC codification rejects the notion of punitive damages in the field of state responsibility with respect to delicts. It provides a comprehensive scheme in order to ensure that damage caused will be compensated. Article 43(c) provides that injured parties have the right to request *restitutio in integrum* provided that such form of reparation:

would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation.

Consequently, the draft establishes a link between *restitutio in integrum* and compensation. Compensation, however, is, as we saw above, limited to *damnum emergens* plus *lucrum cessans*. This in turn means that, since punitive damages are not included in the compensation, they should not be included in *restitutio in integrum* either.

F Countermeasures

One of the most important aspects of the ILC codification concerns the use of countermeasures in customary international law. According to the draft, countermeasures remain an option (Article 48), provided that Article 54 has been complied with. Article 54 reads:

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon request of any of them, seek to settle it amicably by negotiation.

²⁴ See M. Handler, R. Pitofsky, H. J. Goldschmid and D. Wood, *Trade Regulation, Cases and Materials* (1997) 135 *et seq.*

²⁵ In the award in the *Rainbow Warrior* case, for example, the arbitrator fixed the amount of compensation at US\$7million without quantifying in a precise manner the damage done. Such cases of lump-sum compensation can hardly qualify as strict compensation. See on this issue Decaux, 'La responsabilité dans le système international', in *Colloque du Mans: Responsabilité et réparation* (1991) 149.

²⁶ We note, however, that, during the Nuremberg trial, domestic institutions of the German Nazi state were condemned as well.

Moreover, where recourse is made, according to Article 49:

countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Two issues are of interest for the purposes of this paper: first, the link between Article 48 and Article 54 of the draft (that is, the conditions under which countermeasures are legal). Schachter²⁷ correctly, to my mind, described the link between these articles of the draft as the most important aspect of the ILC codification. Countermeasures become the procedural consequence of state responsibility, in the sense that countermeasures come into play only when the state committing the illegal act refuses to negotiate an amicable solution as a means of persuading the said state to negotiate.²⁸ Then, there is the issue of the permissible extent of countermeasures. In order to answer this question, the question of the proportionality of countermeasures is crucial. The appropriate measurement of proportionality remains, however, an unresolved issue. More specifically, the question that arises is the following: to what should countermeasures be proportional? A series of alternatives seems plausible in this respect. Two of them appear in the text of Article 49 of the ILC codification: (i) countermeasures should be proportional to the damage suffered; and (ii) they should be proportional to the gravity of the illegal act. A further alternative has been suggested, but not adopted, namely, that countermeasures should be proportional to whatever is required in order to re-establish the *status quo ante*; consequently, they must be related to the degree of inducement necessary to satisfy the original debt.²⁹ This alternative, at its extreme, arguably seems to introduce considerations relating to 'punitive damages' by the back door.

A quantification of damages according to each of the two adopted alternatives might (and, in practice, often does) lead to divergent results. Negligence, for example, might lead to massive environmental pollution. Were one to quantify damages in proportion to the gravity of the act (negligence) or in proportion to the resulting damage (massive environmental pollution), one could end up with very divergent outcomes.³⁰

International practice does not shed enough light on this issue. There are cases where international courts and arbitrators have stated that a link must be established between the 'gravity' of the illegal act and the request for damages. In the *Naulilaa* case, for example, it was stated that countermeasures must be linked to the 'act

²⁷ Schachter, 'Dispute Settlement and Countermeasures in the International Law Commission', 88 *AJIL* (1994) 471.

²⁸ On this issue see Hudec, 'Thinking About the New Section 301: Beyond Good and Evil', in J. Bhagwati and H. Patrick (eds), *Aggressive Unilateralism: America's 301 Policy and the World Trading System* (1990).

²⁹ See the comprehensive chapter on equity and proportionality in R. Higgins, *Problems and Process in Public International Law* (1995); see also the US comments on the ILC draft, *supra* note 15.

³⁰ The same could be said in the field of WTO law with respect, for example, to anti-dumping. An anti-dumping investigation is a routine procedure (indeed, carelessly routine in most administrations) which can end up in *de facto* withdrawal from the market of particular economic operators. What remedy is proportional in cases where the whole investigation is subsequently deemed to have been based on wrong allegations and facts?

motivating them'.³¹ By the same token, in the *Air Services* arbitral award, countermeasures were said to require 'some degree of equivalence with the alleged breach'.³²

However, these decisions which link reparation to the 'gravity' of the act seem to adopt a rather 'relaxed' standard of proportionality. In *Naulilaa*, for example, it was stated that countermeasures are excessive only when they are 'out of all proportion to the act motivating them'.³³ By the same token, the *Air Services* award states that countermeasures in the case in question 'do not appear to be clearly disproportionate'.³⁴

Moreover, the concept of 'gravity'³⁵ of the illegal act is a very imprecise concept and has been criticized in the literature.³⁶ Should 'gravity' be read in conjunction with the distinction operated in the draft between delicts and crimes (Article 19)? And what if this distinction, as seems increasingly to be the case, is eventually eliminated? At any rate though, as already stated above, violations of WTO law can only be qualified as delicts. To distinguish between breaches of different delicts and decide that some are more serious and some less serious is an awkward task. This is an area where the distinction between discretion and arbitrariness (except for some extreme cases) will be (and indeed has been)³⁷ blurred.

The terms of Article 49 seem to suggest that it is plausible to distinguish even between delicts. It is left up to the judiciary to establish coherent criteria that will persuade the addressees that decisions have been taken within the parameters of discretion, without trespassing the outer limits of discretion and thus becoming arbitrary. As will be shown later, no such dilemmas exist in the WTO context, since countermeasures have to be equivalent to the inflicted damage.³⁸

³¹ See 2 RIAA 1011, at 1028 (*Portugal v. Germany*, 1928).

³² See *Air Services Agreement (United States v. France)*, arbitral award of 9 December 1978, 18 RIAA 417, at 443.

³³ See *Naulilaa*, 2 RIAA 1011, at 1028.

³⁴ *Air Services Agreement*, *supra* note 32, at 444. This point has been reproduced in the comments by the US to the draft at 473.

³⁵ We note that, at this stage, nothing much can be said about the 'effects [of the internationally wrongful act] on the injured States' which constitutes the other point of reference to measure proportionality in the body of Article 49 of the Draft. The ICJ, in a very recent judgment, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September 1997, at para. 85, limited itself to the rather Pythian consideration that 'the effects of a countermeasure must be commensurate with the injury suffered, taking into account the rights in question', without any further substantive elaboration.

³⁶ On this issue see, for example, E. Zoller, *Peacetime Unilateral Remedies* (1984).

³⁷ Some of the 'ineffective' remedies routinely recommended in previous GATT case law in the field of anti-dumping have been justified on the ground of the rather 'harmless' nature of the breach.

³⁸ See Article 22(4) DSU. Moreover, in the WTO, the possibility of using countermeasures as a device to force WTO members to submit their disputes to third party adjudication (procedural consequence) is simply absent: in a sense, the new DSU establishes a multilateral optional clause since WTO members have to submit all their trade disputes to the WTO (Article 23(2) DSU).

G Partial Conclusion

The ILC codification is applicable only to the extent that a particular international regime does not provide for particular remedies. Contractual autonomy of the parties is therefore fully respected. In essence, the ILC codification seems to exclude, with respect to delicts, the possibility of punitive damages, limiting the ambit of remedies to a wiping out of the consequences of the illegal act:³⁹ according to the ILC draft, injured parties will normally have the right to request *damnum emergens* and *lucrum cessans* in addition to the obligation of states authors of the illegal act to cease immediately the illegal act.

3 Remedies in the WTO

A The Pre-WTO Phase

Neither the General Agreement on Tariffs and Trade (GATT) nor the various side agreements signed at the Tokyo Round (the 'Tokyo Round Codes') contained any specific provisions dealing with remedies in cases of violations. This was not an anomaly. As already noted above, it often happens that drafters of a treaty do not regulate this matter. It is left to the discretion of the adjudicating body to recommend the appropriate remedy, the only constraint being the already mentioned *non ultra petita* rule. Hence, the relevance of an examination of the case law.

1 The 'Usual' GATT Remedy . . .

An examination of the case law relating to the GATT is quite revealing. In fact, the GATT case law in this field was to a large extent reflected in the 1979 'Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance'.⁴⁰ The relevant passage reads:

The aim of the CONTRACTING PARTIES has always been to secure a positive solution to the dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking these procedures is the possibility of suspending the application of consensus or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to the authorization by the CONTRACTING PARTIES of such measures.⁴¹

It follows that the 'usual GATT remedy', that is cessation of the illegal act, had a mere *ex nunc* function. In practice, GATT panels would either recommend that the

³⁹ When it comes to crimes, although it does not explicitly state so, Article 52 of the draft seems to allow room for punitive damages.

⁴⁰ See GATT Doc. L/4907, adopted on 28 November 1979, BISD 26S/210 *et seq.*

⁴¹ *Ibid.*

losing party brought its measures into compliance with its obligations or that it ceased the illegal act. The former recommendation does not pre-empt the function of the remedy: the losing GATT contracting party could very well on its own initiative provide for a remedy with an *ex tunc* effect. In a case, for example, where a quantitative restriction was found to be illegal under Article XI GATT, the contracting party imposing that restriction could very well revoke the measure in question as from the time that it was promulgated and reimburse all injured parties, at least to the extent that injury was quantifiable.⁴² In practice, however, 'to bring its measures into compliance' has always been understood by GATT contracting parties, authors of an illegal act, to have a purely *ex nunc* effect.⁴³

2 ... And Some 'Unusual' Deviations

One point has to be stressed in this respect: the 'usual GATT remedy' should not be equated to the 'only available GATT remedy'. GATT panels for a long time were not presented with demands requesting more than cessation of the illegal act. Consequently, GATT panels were operating within the parameters described above in the discussion of customary international law (on the one hand, they recommended cessation of the illegal act; on the other hand, they respected the *non ultra petita* rule).

Post-1979, however, the case law in the field of the Tokyo Round Codes is added to the existing GATT case law. In this field, one can observe a remarkable departure from the usual GATT case law. Petersmann⁴⁴ and Komuro and Vermulst⁴⁵ have examined the entire case law in this field. On a number of occasions, GATT panels were presented with requests to the effect that illegally imposed (anti-dumping or countervailing duties) orders be revoked and illegally imposed duties be reimbursed. In total, five panels, all of them dealing with anti-dumping/countervailing duties, departed from the standard *ex nunc* remedy and recommended revocation and reimbursement of illegally imposed duties.⁴⁶ In essence, these panels actually implemented *restitutio in integrum* in the GATT context. Aiming at a re-establishment of the *status quo ante*, the panels, first, pronounced the illegality of the act in question; and, secondly, they specified a time at which the act before the panel was judged to have been illegal. Panels took the view that the anti-dumping/countervailing duties orders in question were illegal when they were enacted. Hence, they had to be revoked as of then (that is, the point in time when they were enacted). Finally, based on the principle that no legal act can stem from an illegality (*ex injuria non oritur jus*), panels

⁴² No such examples are reported, however.

⁴³ See on this issue the remarkable study, R. E. Hudec, *Enforcing International Trade Law* (1993), which constitutes the only comprehensive study of GATT history in this respect.

⁴⁴ Petersmann, 'International Competition Rules for the GATT/WTO World Trade and Legal System', 27 *Journal of World Trade* (1993) 35.

⁴⁵ Komuro and Vermulst, 'Antidumping Disputes in the WTO: Navigating Dire Straits', 31 *Journal of World Trade* (1997) 5–44.

⁴⁶ The first panel which recommended revocation and reimbursement and which dealt with an illegal imposition of anti-dumping duties was a panel established not under the Code but in the context of the GATT to examine the conformity of anti-dumping duties with the relevant GATT (Article VI) rules. See *New Zealand v. Finland* (the *Transformers* case), as cited in Petersmann, *supra* note 44.

recommended the wiping out of all consequences stemming from the proclaimed illegal act (that is, reimbursement of duties imposed as a result of the enactment of the anti-dumping/countervailing duties orders).

It is true that, were one to quantify the damage caused by the imposition of such duties, one would eventually end up with a different quantum. First, importers can and do pass the additional cost imposed on to consumers. On the other hand, exporters often incur substantially more damage than merely the amount of duties paid: from the day an anti-dumping investigation starts (or even is announced), there is an effect on the market. Exporters start looking for other markets; distributors (in the case of non-vertical integration) start looking for other suppliers, and so on. *Restitutio in integrum*, however, knows of those limits. It is unrealistic to believe that all damage will always, under any circumstances, be fully repaired. Rather, a conscious effort is made to repair as much as possible. Only punitive damages can, in principle, repair the whole of the damage, since by definition their objective function is not limited simply to redressing an anomaly.

3 Deviating from the 'Usual' GATT Remedy was Limited to Anti-Dumping/Countervailing Duties Practice: The Trondheim Experience

The case law in the field of anti-dumping/countervailing duties is a unique example in GATT history. No such remedies have been recommended in any other area. Even in a case where the panel realized that the 'usual GATT remedy' was less than satisfactory, it refrained from recommending a remedy along the lines of the remedies recommended by panels dealing with anti-dumping: in a remarkable case, the United States complained that Norway, by not following the procedures in the Government Procurement Agreement (GPA), had illegally awarded to a Norwegian company the construction of a toll ring system in the city of Trondheim. The panel found that Norway had indeed acted in violation of its international obligations. Since the toll ring system was, however, already in place by the time its decision was pronounced, the panel merely asked Norway to accept the illegality of its act and to provide guarantees for non-repetition.⁴⁷

⁴⁷ For a critique of the panel's recommendation, see Mavroidis, 'Government Procurement Agreement, The Trondheim Case: The Remedies Issue', 48 *Aussenwirtschaft* (1993) 77. Hudec, *supra* note 43, at 583, states: 'The Oslo procurement award was allowed to stand, but the losing US bidders' preparation costs were reimbursed, and Norway made certain undertakings about future compliance with code rules and procedures . . . In 1991, the US brought a second complaint charging violations of a somewhat different character with regard to Norwegian procurement of a toll collection system for the city of Trondheim; the panel ruled that Norway had failed to comply with code obligations (GPR.DS2/R, 28 April 1992).' Three points with respect to remedies seem warranted in this respect. First, the *identity* of injured parties is unknown in such cases: in principle, any company of any GPA signatory could have won the contract had the procedures taken place in conformity with the GPA. Secondly, the compensation paid to US bidders possibly addresses the *damnum emergens* but falls short of addressing any claim based on *lucrum cessans*: Thirdly, and most importantly, precisely because the reparation paid was minimal, Norwegians had the incentive to continue the same practices notwithstanding their unilateral declaration to the effect that no such practices would ever be repeated again. This case is a good argument in favour of effective remedies.

4 *The GATT Years in a Nutshell*

As a conclusion on the GATT regime of remedies, the following seems pertinent:

- 1 The GATT did not contain a specific provision dealing with remedies, leaving it up to the adjudicating bodies to recommend on a case by case basis the appropriate remedy.
- 2 GATT panels usually, at least until the end of the Tokyo Round in 1979, through their recommended remedies, aimed at securing withdrawal of the illegal act (the 'usual GATT remedy'). Consequently, recommended remedies had a clear *ex nunc* effect.
- 3 Post-1979, some GATT panels in the field of anti-dumping/countervailing duties, faced with a request to this effect, start recommending remedies with *ex tunc* effect (revocation and reimbursement).
- 4 This is not, however, a generalized practice. GATT panels, as the Trondheim experience clearly shows, even when they realized the ineffectiveness of the 'usual GATT remedy', preferred not to deviate from it.

B *The WTO Phase: The General Rule*

1 *In General*

At first glance, one of the remarkable innovations of the Uruguay Round which led to the establishment of the WTO was the inclusion of an agreement designed to regulate dispute settlement: the DSU constitutes an antidote to the procedural deficiencies of Articles XXII and XXIII of the GATT. The DSU to a large extent codifies the evolution of GATT practice in relation to Articles XXII and XXIII (from the 1979 Understanding to the so-called 'Montreal Rules' of 1989) and also provides some important innovations. It is a comprehensive set of rules which aims at providing predictability and legal security as far as the organization of panel (and now Appellate Body as well) procedures are concerned. The DSU provides for remedies for all three types of complaints known in the WTO system, and this is yet another innovation.

2 *Violation Complaints: The WTO Remedies*

(a) **Some general introductory remarks**

i) Legal interest as a condition for standing (*locus standi*) before the WTO adjudicating bodies

Before we move to a presentation of Article 19 DSU, we need to see what conditions have to be met for a WTO member to bring forward a violation complaint. In this respect, we note that, in line with public international law,⁴⁸ a recent panel ruled that

⁴⁸ According to the ILC draft, the responsibility of states in the event of commission of an internationally wrongful act is independent of the resulting damage to other states (Article 1 of the ILC codification). The *Bananas* ruling reproduced here, to a large extent, crystallizes the GATT case law in this field.

WTO members do not have to show trade effects as a condition for bringing forward a violation complaint. The Appellate Body confirmed this interpretation. The relevant passage of its report which upheld the panel report reads as follows:

We agree with the panel report that ‘neither Article 3(3) nor 3(7) of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a legal interest as a prerequisite for requesting a panel’. We do not accept that the need for a legal interest is implied in the DSU or in any other provision of the WTO Agreement.⁴⁹

ii) Recommendations and suggestions in Article 19 DSU: an inventory of the issues raised

In Article 19 DSU, negotiators, as noted above,⁵⁰ agreed, for the first time, to include an article which specifically addresses the issue of remedies to be recommended (or suggested, as we will see) by the WTO adjudicating bodies (that is, by both the panels and the Appellate Body).

Article 19 DSU follows a two-tiered approach:

- 1 on the one hand, it imposes an obligation on all WTO adjudicating bodies to recommend that the WTO member whose measures have been found not to be in conformity with the relevant WTO rules bring its measures into compliance with their international obligations; and
- 2 on the other hand, it gives WTO adjudicating bodies the opportunity (but imposes no legal obligation to this effect) to *suggest* ways in which WTO members found not to be in conformity with their international obligations could bring their measures into compliance with their international obligations.

Two issues are to be examined in the following: first, the issue whether recommendations and suggestions are binding on their addressees; and, secondly, whether WTO remedies can be retrospective (*ex tunc*) as well as prospective (*ex nunc*).

(b) Recommendations and suggestions: an analysis

i) Recommendations and suggestions: binding or not?

The rationale for Article 19 DSU. At first glance, it seems that the very insertion of Article 19 DSU in the WTO agreements shows that WTO members, or at least some of them, did not ‘digest’ the five panel reports in the anti-dumping/countervailing duties field⁵¹ recommending revocation and reimbursement. The United States has consistently opposed reimbursement, and refused to adopt the report in *Stainless Steel Hollow Products from Sweden* for this reason.⁵² There, a panel established by the Committee on Anti-Dumping Practices recommended that the United States ‘revoke the anti-

⁴⁹ See *EC — Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, 9 September 1997, at para. 132.

⁵⁰ See section 1.C above.

⁵¹ See, on this issue, J. H. Jackson, *The World Trading System* (1997) 55 *et seq.*

⁵² *United States — Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, ADP/47 (20 August 1990), unadopted. The United States took the position that correction of the error prospectively would suffice: see Hudec, *supra* note 43, at 253–254.

dumping duties imposed' and 'reimburse the anti-dumping duties paid'.⁵³ In *Cement from Mexico*, also unadopted, the panel was even more specific:

The Panel recommends that the Committee request the United States to revoke the anti-dumping duty order on grey portland cement and cement clinker from Mexico and to reimburse any anti-dumping duties paid or deposited under this order.⁵⁴

The European Community (EC), as relevant practice shows, appears to agree with the United States on this issue. As complaining party before a countervailing duty panel conducted under the Tokyo Round Subsidies Code, the EC originally asked for reimbursement and then, halfway through the proceedings, it changed its position.⁵⁵

Hence, the European Community, the United States and like-minded WTO members pushed during the Uruguay Round negotiations for the insertion of Article 19 DSU in the final text. At first glance, the argument could be made that the insertion of Article 19 DSU represents a victory for *ex nunc* remedies.

The distinction between recommendations and suggestions, however, needs further exploration. It has already been pointed out that WTO adjudicating bodies, by simply recommending to losing parties to bring their measures into compliance, provide losing parties with ample discretion to choose the appropriate remedy.⁵⁶ What does or does not constitute an appropriate remedy does not depend solely on the appreciation of the losing state, since, eventually, as demonstrated below, implementing action can be challenged before the WTO adjudicating bodies.

Practice shows that, with two notable exceptions,⁵⁷ panels do not go beyond the recommendation stage. On those two occasions, panels recommended cessation of the

⁵³ *United States — Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, *supra* note 52, at para. 5.24.

⁵⁴ *United States — Anti-Dumping Duties on Grey Portland Cement and Cement Clinker from Mexico*, ADP/82 (9 July 1992), para. 6.2.

⁵⁵ *Brazil — Imposition of Provisional and Definitive Duties on Milk Powder and Certain Types of Milk from the European Economic Community*, SCM/179 (27 December 1993, adopted on 28 April 1994), para. 200: 'The EEC initially requested that the Panel also recommend that Brazil reimburse any provisional and definitive countervailing duties levied on those imports. Subsequently, the EC indicated that it was no longer seeking such a recommendation, on the ground that it should generally be left to a signatory found to have acted inconsistently with its obligations under the Agreement to determine the means by which to bring its measure into conformity with its obligations.'

⁵⁶ See Hoekman and Mavroidis, 'Policy Externalities and High-Tech Rivalry: Competition and Multilateral Cooperation Beyond the WTO', 9 *Leiden Journal of International Law* (1996) 273–318.

⁵⁷ See WTO Panel Report, *United States — Textiles, Complaint by Costa Rica*, WT/DS24/R, 8 November 1996; and *Guatemala — Antidumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, 19 June 1998. On the issue of whether 'withdrawal of the illegal act' should be understood as part of a suggestion and not as part of a recommendation, see our comments below. Panel reports in the context of subsidies/countervailing duties suggest that withdrawal of illegal subsidies should be discounted. The reason is that Article 4(7) of the WTO Agreement on Subsidies/Countervailing Measures explicitly provides that illegal subsidies must be withdrawn. Hence, panels have no discretion in this respect: a finding that a subsidy is illegal must be accompanied by a suggestion that the scheme in question is withdrawn since, even in the absence of such a suggestion, WTO members are under the unambiguous obligation to withdraw the illegal subsidy.

illegal act with respectively an undeniable *ex nunc* effect in the first case and a potentially *ex tunc* effect in the latter.⁵⁸

'Usual' Remedies in WTO practice: So far, a remedies issue has not arisen before the Appellate Body. The very nature of the current functioning of the WTO dispute settlement system favours a practice whereby panels stick to the rather 'innocent' recommendation stage without entering the potentially 'provocative' suggestions stage.

Various reasons help explain this phenomenon. Most persuasively though, the answer lies in the institutional structure of panels. Panels, contrary to the Appellate Body, lack a permanent composition. Continuity in GATT case law has, to a large extent, depended on the GATT/WTO legal office.⁵⁹ Traditionally, panellists are divided between 'governmentalists' and 'non-governmentalists' (in the GATT/WTO parlance), the former being preferred to the latter in the overwhelming majority of the cases. Practical considerations are more prevalent in the minds of governmental panellists who know and understand political concerns. Practical (pragmatic) considerations generally disfavour remedies that might 'rock the boat'. And the WTO boat can be rocked easily. It is not a secret, and it clearly emerges from the quoted passages of panel reports in the anti-dumping/countervailing duties field, that the major players in the trading scene have a substantial trade interest in their domestic market and are prime users themselves of the anti-dumping instrument, never hiding their dislike of the remedies recommended by the GATT panels in the anti-dumping/countervailing duties context before the entry into force of the WTO.⁶⁰ A recommendation against a major player to bring its measures into compliance is already, in the political realist's argument, too much of an intrusion on national sovereignty.

The distinction between recommendations and suggestions has consequently been implemented in the overwhelming majority of WTO relevant practice in the sense that the latter remains truly optional.

To follow panels' suggestions: What if panels do suggest something specific? What is of interest to us is whether losing parties have to follow suggestions advanced by panels. We will use an example from practice, the above-mentioned *United States — Restrictions on Imports of Cotton and Manmade Fibre Underwear*⁶¹ case. There the panel stated:

We, consequently, recommend that the [Dispute Settlement Body] requests the United States to

⁵⁸ In the Guatemala case, the panel suggested that Guatemala revoke the anti-dumping duty imposed. Revocation, in principle, is distinguished from withdrawal, in the sense that the latter has an undeniable *ex nunc* effect whereas the former should be acknowledged as having an *ex tunc* effect.

⁵⁹ Similar points have been made by Davey, 'Dispute Settlement in GATT', 11 *Fordham International Law Journal* (1987) 51; and Hudec, *supra* note 43.

⁶⁰ As we will see later, our argument is that the current structure of remedies in the WTO clearly favours WTO members with substantial economic power.

⁶¹ See WTO Doc. WT/DS24/R of 8 November 1996.

bring the measure challenged by Costa Rica into compliance with US obligations under the ATC [Agreement on Textiles and Clothing]. We find that such compliance can best be achieved and further nullification and impairment of benefits accruing to Costa Rica under the ATC best be avoided by prompt removal of the measure inconsistent with the obligations of the United States. We further suggest that the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by immediately withdrawing the restriction imposed by the measure.

In this case, the panel suggested a particular remedy to the losing party (the United States), namely, cessation of the illegal act. The United States acted in accordance with what the panel 'suggested'. In such cases, that is where there is implementation of panels' suggestions, there should be an irrebuttable presumption of compliance with panels' decisions. In other words:

- 1 any time a panel, in addition to a recommendation, suggests a way for the WTO member concerned to bring its measures into compliance with its international obligations; *and*
- 2 the WTO member in question implemented the panel's suggestion,

then there must be an irrebuttable presumption that the WTO member in question has complied with its international obligations.

And to follow panels' recommendations: What if the panels then suggest nothing? In this case, WTO members are, in principle, free to adopt any conduct they deem necessary in order to bring their measures into conformity with their international obligations. The WTO DSU provides for a forum where other members can question the adopted conduct. The only limits imposed to their discretion are those imposed by the principle of good faith: as we argue in more detail below, members whose measures are found to be inconsistent with their WTO obligations must at any rate withdraw these particular measures and not repeat them again.

Recommendations: binding or not? It is worth recalling that recommendations (that always accompany a WTO adjudicating body's decision that an illegality has been committed) and suggestions (that might accompany such a decision) are to be distinguished from the WTO adjudicating body's finding that an illegality was indeed committed. Article 19 pertinently reads in this respect:

Where a Panel or the Appellate Body conclude that a measure is inconsistent with a covered agreement, it shall recommend . . .

Hence, a recommendation is predicated on a finding of inconsistency. Since recommendations always form part of a panel's or the Appellate Body's decision that an illegality has been committed,⁶² they will *ipso facto* form an integral part of the WTO

⁶² Yves Renouf has made the point that a 'ruling', as the term appears in the DSU, is precisely a finding by a panel that a violation has been committed (or that the conditions for non-violation have been met).

adjudicating body's decision in any dispute submitted to it. Consequently, they will have the force that any Dispute Settlement Body (DSB) decision to adopt a panel/Appellate Body report has.

In this respect, we should note, however, that the legal status of DSB decisions concerning adoption of reports has not been clarified in WTO law. The Appellate Body in the cited *Japan — Taxes on Alcoholic Beverages* jurisprudence rejected the idea advanced in the appealed panel report that adopted GATT panel reports are an integral part of the 1994 GATT agreement (Article 1(b)(iv)). Instead, it opted for a different route and, acknowledging that GATT adopted panel reports have a persuasive force and will prove to be a source of inspiration in dealing with the same subject matter, classified them under the (still to be fully explored) notion of GATT *acquis* (obviously originating, at least with respect to its semantics, from the European Community legal order, but with not, as yet, a precise definition in the WTO legal order).

In a very recent report, the Appellate Body, without explicitly stating so, seemed implicitly to accept the idea advanced by the panel that GATT adopted panel reports are part of Article XVI of the WTO Agreement (establishing that decisions by GATT contracting parties — but not necessarily Article XXV decisions, as in the opinion of the panel in *Japan — Taxes on Alcoholic Beverages* — can provide useful guidance to future WTO work). In its report on *United States — Tax Treatment for 'Foreign Sales Corporations'*, the Appellate Body judges:

recognize[d] that as 'decisions' within the meaning of Article XVI(1) of the WTO Agreement, the adopted panel reports in the Tax Legislation Cases, together with the 1981 Council action, could provide 'guidance' to the WTO.⁶³

The Appellate Body has not had the opportunity though to pronounce on the legal status of WTO adopted panel and Appellate Body reports. Moreover, the WTO Agreement does contain provisions concerning decision-making in the WTO, but does not include any reference to the binding nature of such decisions or, more specifically, to DSB decisions. Formalistic grounds though should not take anything away from the fact that respecting the decisions on illegality by WTO adjudicating bodies is part of the *pacta sunt servanda* obligation imposed on all WTO members: such an obligation stems particularly from the fact that in Article 23(2) DSU, WTO members agreed to assign compulsory third party adjudication to resolve their trade-related disputes in favour of the WTO adjudicating bodies. To state now that such adjudicatory outcomes do not have to be observed (because no WTO provision unambiguously states that such decisions are binding) amounts to denouncing the *effet utile* of Article 23(2)

⁶³ See *United States — Tax Treatment for 'Foreign Sales Corporations'*, AB-1999-9, WT/DS108/AB/R of 24 February 2000, at para. 115.

DSU.⁶⁴ Consequently, in this line of thinking, a DSB decision adopting a panel/Appellate Body report that an illegality has been committed, and its ensuing recommendation, is binding on its addressee.

Since, however, recommendations are formulated in very general terms, the question can legitimately be raised as to what exactly do they bind their addressees. It is submitted that it would be erroneous to state that the system would not suffer at all from a complete absence of recommendations. A recommendation is synonymous with the idea that something must be done, that a public pronouncement by the competent multilateral adjudicating body that an illegality has been committed is simply not enough. In fact, such a pronouncement is not unknown, as we saw, in public international law: a court stating that an illegality has been committed has by its decision granted *satisfaction* to the complaining party. The drafters of the WTO Agreement, apparently in their attempt to guarantee that maximum discretion in favour of the author of the illegal act with respect to the appropriate remedy be institutionalized (and, consequently, that the WTO adjudicating bodies will not be too intrusive on national sovereignty) ended up eliminating, at least formally, the possibility for the least intrusive remedy: satisfaction as a sole remedy not accompanied by another form of reparation.

In fact, recommendations can open the door to retroactive remedies. Such remedies would be particularly interesting to counteract 'hit and run' practices: imagine, for example, that a WTO member imposed a quantitative restriction on imports of wheat between January and March 1998. Following the WTO procedures, the Appellate Body decision comes as early as January 2000 and that the Appellate Body agrees with the complainant that indeed Article XI GATT has been violated. The Appellate Body, in compliance with Article 19 DSU will, *in addition to* the finding that an illegality has been committed, recommend that the WTO member author of the illegal act must bring its measures into compliance with its international obligations. In such a case, for its recommendation to have meaning, it must be associated with some form of damages to be paid to the WTO members injured by the illegal act,⁶⁵ for cessation of the illegal act has already occurred.

It seems that the only argument against the thesis advanced above would be that the issue (the 'hit and run' practice) is now moot. This is hardly the case though. For a practice which has in the past created undeniable trade damages which have not been recovered does not correspond to the concept of mootness.

The meaning of recommendation could be different in cases where the wrongful act is still continuing at the time that the WTO adjudicating body reaches its decision:

⁶⁴ Regrettably, the absence of an unambiguous statement to the effect that decisions by the DSB with respect to adoption of panel/Appellate Body reports are binding on WTO members has helped some of its members (and most notably, the European Court of Justice) to reach decisions of very doubtful legality (but of unambiguous political expediency) on the relations between European Community law and WTO law. See the very recent decision of the ECJ in Case C-149/96, *Portugal v. Council*, judgment of 23 November 1999, not yet published, available on the ECJ's website <www.curia.eu.int>.

⁶⁵ The argument that recommendations here could be implemented through guarantees for non-repetition must be rejected. The latter constitute a promise not to repeat a wrongful act and do not in any way operate to bring a WTO member's measures into compliance with the WTO regime.

imagine, for example, that a quantitative restriction on imports of wheat is still in place when the WTO adjudicating body reaches its decision.⁶⁶ In such a case, a recommendation could, for example, mean that the illegal act must be discontinued. In fact, a recommendation in such cases must mean *at least* that the illegal act must be stopped. For no matter whether the WTO member author of the illegal act decides to modify or to cease entirely the act found to be illegal, it must *in any event* stop doing what it had been doing until the moment it was judged to be illegal by the competent WTO body.

Suggestions: binding or not? Textual arguments aiming at responding to the question presented here are inconclusive. First, neither the term ‘suggestions’ nor the term ‘recommendations’ implies binding force. However, only excessive formalism would dictate a legal outcome based solely on the title of the legal act. And, in most cases, excessive formalism has no place in international law. The answer to the question whether the term ‘suggestions’ has a certain binding force must take into account their function in WTO dispute settlement.

According to the text of Article 19 DSU, the WTO adjudicating bodies may ‘suggest ways in which the Member concerned *could* implement the recommendations’.⁶⁷ In fact, the word ‘could’ seems to suggest that the panels’ suggestions are not binding upon WTO members and that, consequently, concerned members can always look for appropriate solutions beyond the suggestions advanced by panels: in other words, there could be ways not included in the panels’ suggestions that could, if adopted, ensure compatibility with the multilateral rules.

Contextual arguments, on the other hand, argue in the opposite direction. Article 26(1)(c), dealing with suggestions by panels in the realm of non-violation complaints, states:

... such suggestions shall not be binding upon the parties to the dispute.

The contextual argument advanced here runs as follows: in the realm of non-violation complaints, the DSU explicitly states that panels’ suggestions are not binding upon the parties to a dispute. In the realm of violation complaints, no such provision exists. *A contrario*, therefore, one could conclude that, in the realm of violation complaints, suggestions are binding upon parties.

A contrario arguments, however, are not very persuasive. At the end of the day, in cases of ambiguity the judge will not draw far-reaching conclusions based on the silence of the text. Indeed, especially in international law, the transfer of sovereignty must never be presumed.

⁶⁶ There is lot of discussion in public international law as to the meaning of the term ‘continuing acts’. The ILC report favours an interpretation according to which an act is continuing even where only its effects are still in place. In this scenario, an expropriation which took place in the past is a continuing act if it has never been compensated. Pauwelyn, ‘The Concept of a “Continuing Violation” of an International Obligation: Selected Problems’, *British Yearbook of International Law* (1995) 415 casts doubt on this definition. The example we use here though meets the test of ‘continuing act’ under both definitions.

⁶⁷ Emphasis added.

Moreover, from the wording of Article 19 DSU it appears that, with respect to implementation, the basic obligation imposed on WTO members is an obligation of result: the means to reach the sought outcome (compliance with the WTO contract) are not prejudged. This is the function of recommendations. On the other hand, a suggestion is an obligation of conduct, in the sense that it prejudices the means to reach the result. If there are various ways to reach the outcome sought, a suggestion cannot be perceived as an obligation to follow a certain conduct. This is so because the WTO member concerned might be in a position to follow a different path than the one suggested and still reach the sought outcome. At this point, the WTO contract shows its preference for result over conduct.

The only WTO panel that has had the opportunity to pronounce on this issue reached the conclusion that suggestions are not binding: in a recent case involving the imposition of anti-dumping duties, the complaining party (Mexico) requested the panel to rule that the defending party, where the imposition of anti-dumping duties was found to be inconsistent with the relevant WTO rules, should revoke and reimburse the imposed duties.⁶⁸

The panel, after quoting Article 19 DSU, reached the following conclusion:

Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member. Thus, in a dispute where a panel concludes that a Member has violated the provisions of the ADP Agreement [Agreement on Antidumping], it is constrained by the language of Article 19(1) to recommend that the Member bring its actions, or its measure, as the case may be, into conformity with the provisions of the ADP Agreement. In addition the panel could, at most, suggest ways in which it believes the Member could appropriately implement that recommendation. In the first instance, however, the modalities of implementation of a panel, or Appellate Body, recommendation are for the Member concerned to determine. This is confirmed by the language of Article 21(3) of the DSU, which provides: 'At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB'. In our view, this language clearly establishes a distinction between the recommendation of a panel, and the means by which that recommendation is to be implemented. The former is governed by Article 19(1), and is limited to a particular form. The latter may be suggested by a panel, but the choice of means is decided, in the first instance, by the Member concerned. Of course, it is possible, that the prevailing Member in the dispute may not be satisfied with the Member's implementation. The DSU recognizes this possibility, and provides for recourse to the dispute settlement procedures to resolve any such disagreements.⁶⁹

The quoted passage probably reached the correct solution, although its reasoning seems flawed. In particular, the panel confuses the discretion of a panel to suggest with the legal force of its decision to exercise discretion in this respect. The fact that panels are free to suggest does not automatically lead to the conclusion that suggestions are not binding. Moreover, the panel failed to address arguments like the *a*

⁶⁸ See the panel report on *Guatemala — Antidumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, 19 June 1998 (hereinafter *Mexico v. Guatemala*).

⁶⁹ *Ibid.*, at paras 8.2–8.3 (emphasis in the original).

contrario argument described above. The panel's conclusion, however, seems to be correct especially in light of its implicit interpretation of Article 21(3): the panel implicitly accepted that Article 21(3) covers situations both where a panel has simply recommended and where a panel has suggested ways to perform the recommendation.

In a recent dispute between Japan and the United States concerning the conformity of the US anti-dumping legislation with the relevant WTO rules, the issue arose again. The panel report on *United States — Antidumping Act of 1916*⁷⁰ seems to argue in favour of the view that suggestions are not binding. Japan requested the panel to suggest that, where it found the US legislation to be inconsistent with the WTO rules, the United States would have to repeal the legislation. The panel indeed found that the US legislation was inconsistent with the relevant WTO rules and went on to suggest the following:

As a result we suggest that *one way* for the United States to bring the 1916 Act into conformity with its WTO obligations *would be* to repeal the 1916 Act.⁷¹

Thus, the report, by using the words emphasized in the above quote, seems to take the view that suggestions are not binding on their addressees.

It is submitted, however, that the issue whether suggestions are binding or not should be completely detached from the issue of what are the legal effects of suggestions. One should point out that, even if the conclusion reached above were warranted (that is, that suggestions are not binding), panels' suggestions are nevertheless not devoid of legal consequences: were the member concerned to follow the panel's suggestions, its actions would have to be deemed to have brought its measures into compliance with its obligations under the WTO. In other words, a suggestion by a panel creates an irrefutable presumption of legality for any subsequent action aimed at implementing the suggestion within its ambit.⁷² Were, to the contrary, a WTO member not to follow a panel's suggestion, it would eventually (that is in case of disagreement with the WTO member concerned) carry the burden of proof to show that its chosen implementing action did satisfy its basic obligation to bring its measures into compliance with its WTO obligations.

To request a suggestion: a setback in WTO case law: For the reasons already explained, WTO panels, unless confronted with the issue, will not in all likelihood be inclined to make suggestions in addition to their recommendations. Hence, it is up to WTO members to push panels to do this in order to avoid ambiguities with respect to implementing actions later. In such a case, panels would have to address such a claim: accept it or reject it, but address it anyway. The only limit imposed on panels' control is that imposed by the *non ultra petita* rule described above. However, in a recent dispute between Mexico and Guatemala, the panel report casts doubt on the validity of this sentence as well. The panel decided to address only parts of the complaint by Mexico

⁷⁰ See WTO Doc. WT/DS162/R, 29 May 2000.

⁷¹ *Ibid.*, at para. 6.292 (emphasis added).

⁷² See on this point the analysis by Hoekman and Mavroidis, *supra* note 56.

for reasons that were not explained in the report. The relevant passages of the report read as follows:

Mexico argues that the consequences of the invalid initiation must be undone, and requests us to recommend that Guatemala (1) revoke the anti-dumping measure imposed on imports of grey portland cement from Cruz Azul, and (2) refund those anti-dumping duties already collected. This we decline to do.⁷³

And later:

we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation.⁷⁴

Apparently, what the panel 'declined to do' was to recommend reimbursement of duties illegally imposed, since it did not decline to suggest revocation of the order imposing them. The panel report is disappointing in this respect.

First, the panel does not explain at all why it declines to suggest reimbursement. The only explanation offered in the report is that suggestions are optional and do not bind the addressee.⁷⁵ But, even if this were the case, the panel seems to be confusing two distinct issues: the discretion of the addressee to implement a suggestion and the discretion of the panel to entertain or not some of the issues brought forward by the parties to the dispute. Panels are bound only by one rule: *non ultra petita*, that is an upwards ceiling according to which, as stated above, they cannot address issues not raised by the parties. But panels have to address all issues raised by parties; they can avoid addressing some of them only for reasons of judicial economy.⁷⁶ Judicial economy considerations, however, are completely inappropriate at the recommendations stage. Judicial economy comes into play when the same result can be achieved through some of the arguments advanced. For reimbursement to come into play in the case in question following the panel's suggestion, it must be the automatic consequence of a revocation of the order under Guatemalan, and not under international, law. Through its suggestion, the panel cannot guarantee this outcome. Consequently, it is at best uncertain that the same result can be guaranteed by suggesting only revocation.

Secondly, the report in this respect is unclear. How should one understand the panel's suggestion that Guatemala revoke the order imposing duties? As having an *ex nunc* or as having an *ex tunc* effect? According to Mexico's request, there seems to be no doubt: were Guatemala to revoke the order, such action should have an *ex tunc* effect. Since the act giving rise to the collection of duties is found to be illegal, all its

⁷³ See *Mexico v. Guatemala*, *supra* note 68, at para. 8.1.

⁷⁴ *Ibid.*, at para. 8.6.

⁷⁵ *Ibid.*, at paras 8.2–8.6. At the same time, though, the panel states that, to its eyes at least, the *only* appropriate means of implementing the recommendation is by revoking the order. If its suggestion is merely hortatory, as the panel claims it to be, it is hardly reconcilable with the language chosen.

⁷⁶ On the issue of how panels understand judicial economy, see D. N. Palmeter and P. C. Mavroidis, *The Law and Practice in the World Trade Organization* (1998).

consequences, in accordance with the above-mentioned principle laid down in the *Chorzow Factories* case, will have to be wiped out. Collection of duties is one of the consequences of the original illegal act and, as a result, it will have to be wiped out, namely, by reimbursing the duties already collected. The panel's suggestion could hence be interpreted in two ways:

- 1 either in line with Mexico's argument as explained above; in this case, all the complaining party has to do is request reimbursement of duties illegally paid by using domestic (Guatemalan) legal means once the initial order imposing those duties has been revoked;⁷⁷
- 2 or as meaning that revocation of the order, in the panel's sense, amounts to a mere withdrawal of the illegal act, that is an act having a clear *ex nunc* effect.

If the latter is the case, then the panel report has not accepted any of Mexico's requests for recommendation without giving reasons for its decision. If the former is the case, then it is puzzling why the panel refused to go all the way since, were Guatemala to act in good faith and revoke the order,⁷⁸ all Mexico would have to do is request reimbursement of duties illegally paid following domestic procedures (to the extent permissible) to this effect.

This precedent is quite unfortunate from a legal perspective and one can only hope that it will not be repeated in the future.

A partial conclusion: What emerges from the analysis above may be described as follows:

- 1 Recommendations are binding on their addressees. The precise meaning of recommendations is to be defined by the addressee. Recommendations can have a precise meaning (reparation for damages) when used in the context of 'hit and run' practices.
- 2 Suggestions are not binding on their addressees. This conclusion, however, is not tantamount to a statement that they are void of any legal consequences: in fact, were a WTO member to follow a suggestion addressed to it, it would *ipso facto* have complied with its international obligations. Hence, following panels' and the Appellate Body's suggestions is a highly recommended legal strategy.

⁷⁷ To the extent, of course, that reimbursement is an option under Guatemalan law.

⁷⁸ The plain meaning of the term 'revocation' suggests an *ex tunc* effect. Moreover, if this were not the case, the panel could very well have used the term 'withdrawal' which has an undeniable *ex nunc* effect. If this is the case, then where in future revocation is suggested by panels, reimbursement will be an option dependent solely on domestic procedures. This in turn means that, were panels to continue this practice and stop at the 'revocation' stage, they will in effect be suggesting a different remedy (depending on whether domestic procedures allow or do not allow for reimbursement) for identical violations (illegally imposed anti-dumping orders giving rise to collection of duties).

ii) Prospective and retrospective remedies: the time function of WTO remedies

*Does Article 19 DSU limit WTO remedies in time?*² In the above discussion, we indicated that, at first glance, the insertion of Article 19 DSU seems to represent a victory for *ex nunc* remedies. Appearances, though, can be deceiving.

It is true that when panels do not go further than the 'recommendations' stage, they leave ample discretion to the WTO members concerned to choose the appropriate way to implement the recommendations. Limits to such discretion are imposed by a WTO scheme concerning multilateral surveillance of implementation of panels' recommendations. In this respect Article 21(5) DSU so far as relevant reads:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to dispute settlement procedures, including wherever possible resort to the original panel.

In practice, this could mean that parties might disagree as to the *ex nunc* or *ex tunc* function of remedies depending on the case examined. This could in turn lead to the formation of state practice with respect to remedies in particular fields of WTO law. And eventually, relevant state practice will be codified by WTO members (as already occurred in 1979 and 1994).

Moreover, as we noted above, logically, recommendations in the context of 'hit and run' practices can only have a retroactive effect.

Hence, it is reasonable to conclude that, independently of the eventual intentions of the parties drafting Article 19 DSU, the said article on its face does not prejudge the time function of WTO remedies.

Article 19 DSU does not disallow retroactive remedies, says a WTO panel: The issue of whether Article 19 DSU should be construed so as to disallow retroactive remedies was put squarely before a WTO panel acting as arbitrators in a dispute between the United States and Australia concerning subsidies by the latter to exporters of automotive leather. The United States disagreed with the action undertaken by Australia to comply with the recommendations of the panel (which had found that indeed the Australian schemes constituted export subsidies and recommended that Australia immediately withdraw them in accordance with Article 4(7) of the WTO Agreement on Subsidies and Countervailing Measures (SCM)) and requested the establishment of an Article 21(5) DSU panel to examine whether the measures taken were adequate for Australia to bring itself into compliance with the WTO regime. In *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, the panel which had originally established the illegality of the Australian measures in the first place reconvened under Article 21(5) DSU in order to examine whether the Australian implementing action taken post-adoption of the report was adequate.⁷⁹

Interestingly, both the complainant (the United States) and the defendant (Australia) did not disagree on the fact that Article 4(7) SCM (which calls for

⁷⁹ See WT/DS126/RW of 21 January 2000.

immediate withdrawal of illegal subsidies) is limited to purely prospective action: they disagreed as to the point in time from which calculations must be made (adoption of the report as opposed to the end of a reasonable period of time). It came as no surprise either that the European Community followed the same line of reasoning and argued that WTO remedies can only be prospective.

The panel disagreed. Based on the Vienna Convention on the Law of Treaties,⁸⁰ but also on the 'effectiveness' of the remedy,⁸¹ it advanced the thesis that retroactive remedies can very well exist within the WTO legal system. In this respect, the panel unambiguously rejected the argument by the United States that Article 19 DSU circumscribes the time function of WTO remedies. The relevant passage⁸² reads:

However, we do not believe that Article 19(1) of the DSU, even in conjunction with Article 3(7) of the DSU, requires the limitation of the specific remedy provided for in Article 4(7) of the SCM Agreement to purely prospective action.⁸³

The panel's statement came as a shock. Unsurprisingly, when it was submitted for adoption to the DSB, a number of important WTO players criticized its findings vehemently.⁸⁴ One can only wonder though at such reactions. The panel's findings are sound when viewed from a public international law angle; and the WTO is a public international law contract. Moreover, contrary to what has been argued by some delegates before the DSB, the panel's findings are not at all at odds with GATT/WTO practice. As mentioned above, a series of panel reports in the field of anti-dumping/countervailing duties has opted in the past for retroactive remedies. Since, as seems to be the case, adopted GATT reports can provide useful guidance to future work (and even unadopted panel reports can exercise some persuasive power), the instant panel report can be seen as part of a *continuum* in this respect.

On the other hand, purely prospective remedies hardly constitute a deterrent effect against potential violators. Guided by effectiveness considerations as well, so necessary to ensure that the WTO contract will be observed (*pacta sunt servanda*), the panel reached the conclusion that retroactive remedies were appropriate in this context.

Overall, on both legal reasoning and economics considerations the panel reached the correct decision in this report.⁸⁵

C Non-violation and Situation Complaints: The WTO Remedies

Petersmann⁸⁶ expressed doubts as to the *raison d'être* of situation complaints and, based on state practice, made the point that such complaints had fallen in *desuetudo*. It

⁸⁰ Paras 6.26 *et seq* of the report.

⁸¹ *Ibid.*, at para. 6.38.

⁸² *Ibid.*, at para. 6.31.

⁸³ Emphasis added.

⁸⁴ See, for example, the angry reactions by the delegates of the United States, Australia, Canada and the European Community in WT/DSB/M/75, 5 *et seq.*

⁸⁵ It must be added, though, at this point that the Appellate Body has not yet pronounced on the issue.

⁸⁶ Petersmann, 'Violation and Non-Violation Complaints in Public International Trade Law', 34 *German Yearbook of International Law* (1991) 175.

is difficult to understand what could come under a situation complaint, taking into account that in the GATT/WTO context injured parties can attack both illegal (violation complaints) as well as legal acts (non-violation complaints), to the extent that the latter cause damage. There is no reported case of a situation complaint. The EC once threatened to submit such a case (the so-called 'Japanese way of life' case),⁸⁷ but the threat never materialized. Technically, however, such complaints are still possible, since the negotiators, following their overall practice,⁸⁸ did not delete any of the existing provisions. A revival of situation complaints seems unlikely and at any rate, although there is a total absence of case law in this field, one cannot imagine how the discussion on remedies in such cases could be any different from that in the context of non-violation complaints. Consequently, our analysis will focus only on non-violation complaints where there is ample practice.

The recent *Kodak/Fuji* dispute captures perfectly the nature of non-violation complaints. It states that:

both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated as an exceptional instrument of dispute settlement . . . The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.⁸⁹

According to standing GATT case law,⁹⁰ three conditions have to be met for a non-violation complaint to be successful:

- 1 a prior consolidated tariff commitment;
- 2 a subsequent governmental action; which
- 3 negatively affects the reasonable expectations created by the consolidated tariff commitment.⁹¹

Typically, a subsidy scheme would be viewed under (2). Recently, however, the *Kodak/Fuji* dispute made it plain that other governmental measures (in the case in question, an arguably government-induced restrictive business practice) could come into play.⁹² The WTO case law has added one more condition: according to the report of the panel on the *Kodak/Fuji* case, non-violation complaints can cover measures that

⁸⁷ See Hoekman and Mavroidis, 'Competition, Competition Policy and the GATT', 17 *World Economy* (1994) 121–150, at 137.

⁸⁸ It is remarkable, for example, that, although the WTO agreement has entered into force, Article XXIX of the GATT, which provided the link between the GATT and the International Trade Organization — which as of 1 January 1995 will no longer be able to come into force — was not deleted.

⁸⁹ See the panel report on *Japan — Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44/R, 31 March 1998, 381, at para. 10.36.

⁹⁰ See, for example, the *Oilseeds* case, *EEC — Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, BISD 37S/86, at paras 147 *et seq.*

⁹¹ On this score, see the analysis by Petersmann, *supra* note 86.

⁹² This point was first argued in the literature by Hoekman and Mavroidis, *supra* note 87, where the argument was advanced that government-induced restrictive business practices could very well find their way before a GATT adjudicating body in the context of a non-violation complaint.

have a continuing effect⁹³ and not just measures that have ceased to exist. Only the latter can be contested in the context of a violation complaint, where it is the violation as such that is put into question and not the resulting nullification and impairment.⁹⁴

The *Kodak/Fuji* panel states:

the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied.⁹⁵

And this is the distinguishing factor between violation and non-violation complaints: in the first case, the emphasis is put on the violation as such; there is a presumption of nullification and impairment of benefits accruing to WTO members any time the agreement/s is/are violated. In the second case, the emphasis is put on the actual nullification and impairment, independently of whether trade damage also results. This means that, contrary to what we have seen in the context of violation complaints, WTO members bringing forward a non-violation complaint will have to show the existence of damage (in the form of the nullification or impairment of the reasonable expectations created).

One should keep in mind that, in the case of non-violation complaints, what is essentially being questioned is an internationally *legal* act. In such cases, the withdrawal of the act would be disproportionate, precisely because of the compatibility of the act in question with the international obligations of the WTO member author of the act. This is presumably why the DSU does not provide for such a remedy and merely favours a solution where the *effects* of the act will be mitigated without the *act itself* being put into question at all. The relevant DSU provision (Article 26(1)(b)) provides in this respect:

where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment.

In the *Kodak/Fuji* case, the panel rejected the claim advanced by the United States and no appeal was filed against it.⁹⁶ Post-*Kodak/Fuji*, no other non-violation complaint lodged before a WTO adjudicating body has been successful. Consequently, there is so far no case law to make the rather vague term ‘mutually satisfactory adjustment’ more precise. What will be determinative in future practice in such cases is the obligation to ensure that such adjustments will not violate the MFN clause. As noted above, panels can advance suggestions on how to reach a mutually satisfactory adjustment, but such suggestions are not binding on the parties.

⁹³ Using apparently the term as per Pauwelyn, *supra* note 66.

⁹⁴ See the panel report on *Superfund, United States — Taxes on Petroleum and Certain Imported Substances*, BISD 34S/160, at para. 5.2.2.

⁹⁵ Para. 10.57.

⁹⁶ Actually, this is the only case so far where no appeal has been filed against a panel report. It seems that no appeal will be filed against the panel report on *Indonesia — Certain Measures Affecting the Automobile Industry*, WT/DS54/R, 2 July 1998.

D Implementation of Recommendations and Suggestions

1 Disagreement between the Parties to the Dispute as to the Implementing Measures: The DSU System

The DSB is the forum where issues relating to the implementation of panel reports can be raised. Losing parties have a reasonable period of time from the date of the adoption of the panel (or the Appellate Body, where an appeal has been launched) report to implement the panel report (Article 21(3) DSU). On three occasions to date, the appointed arbitrator decided that the WTO member concerned should bring its measures into compliance within 15 months from the date of adoption of the report.⁹⁷ Practice seems to emerge according to which the extent of the reasonable period of time depends on the prior question whether legislative action according to domestic constitutional channels is necessary for the act found to be illegal to be brought into conformity with the WTO contract.⁹⁸ Article 21(6) DSU establishes a continuous finger-pointing against recalcitrant WTO members, in the sense that they have to report continuously their intentions to implement the WTO adjudicating body's recommendations and, eventually, suggestions.

One can distinguish between two situations in this context. First, the WTO adjudicating body provided suggestions in its report. In this case, were the losing party to follow the suggestion, it will have implemented in good faith the report. Were it not to do so though and choose another way to bring its measures into compliance with its WTO obligations, the question of implementation would have to be treated in the same way as in the second alternative. The second situation is where the WTO adjudicating body has not advanced any suggestions or its suggestions have not been followed. In this case, the losing WTO member has the widest possible discretion to choose what it deems to be the appropriate means to bring its measures into compliance with its WTO obligations.⁹⁹

In case of disagreement¹⁰⁰ between the parties to the dispute as to the adequacy of

⁹⁷ See *EC — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 of 29 May 1998; *EC — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/15 of 7 January 1998; and *Japan — Taxes on Alcoholic Beverages*, WT/DSS/15, WT/DS10/15, WT/DA11/13 of 14 February 1997. However, in the *Canada — Measures Affecting the Auto Industry* (WT/DS139 and 142) dispute between Canada, on the one hand, and Japan and the European Community, on the other hand, the panel recommended that corrective action be taken within 90 days because such corrective action, in accordance with domestic constitutional procedures, did not involve any legislative action.

⁹⁸ See the panel report on *United States — Tax Treatment for Foreign Sales Corporations*, WT/DS108/R of 8 October 1999, at para. 8.8.

⁹⁹ The only limit being, of course, the principle of good faith. However, since there is no WTO case law in this respect, it is difficult to delineate with precision the limits imposed on state discretion by the good faith principle.

¹⁰⁰ One should not deduce *a contrario* that, in the case of agreement between the parties to the dispute, there is an automatic end to the dispute. For the implementing action in question must not only be adequate for the member concerned to bring its measures into compliance with the WTO but also consistent with the WTO regime. Hence, all amicable solutions will be presented and discussed before the DSB, and any WTO member will have the right to challenge measures that do not respect the requirement to conform to the WTO contract (Article 3(5) DSU).

the implementing measures, the complaining party can request a panel (if possible, the original panel) to pronounce on this issue (Article 21(5) DSU). Such a panel in WTO parlance is called a ‘compliance panel’.

Losing parties can effectively obstruct recourse to countermeasures by the winning party by doing *something* to meet the panel’s recommendation to bring their measures into compliance with their WTO obligations. If this *something* is not considered adequate by the winning party, then all the winning party can do is request a panel (if possible, the original one) to pronounce on the adequacy or the inadequacy of the *something*. This is so, since, at this point in time there is a dispute between the two parties as to the adequacy of the implementing action and no multilateral finding, in accordance with Article 23(2) DSU, that the *something* offered by the WTO member author of the illegal act is inadequate. Unless there is a multilateral finding that the *something* is inadequate, that is unless there is a multilateral finding that the WTO member concerned failed to bring its measures into compliance, no request for countermeasures can be entertained. Indeed, Article 22(6) DSU makes it plain that a request against countermeasures will be tabled when a WTO member has failed to bring its measures into compliance.

Bad faith (*mala fides*) losing parties that want to procrastinate implementing action for domestic policy reasons have the incentive to do *something* following a panel’s recommendation instead of doing *nothing*. Thus, on the one hand they can keep, for some time at least, regulatory choices at the domestic level largely unaffected, while not running the risk of being subjected to countermeasures. This is the more so since nowhere in the body of Article 21(5) DSU is it stated that the compliance panel’s decisions cannot be appealed. The two-tiered adjudication called for in the DSU finds its application in this context as well: we note in this respect that Article 17(1) DSU makes it plain that the Appellate Body will hear panels’ cases without any further qualification; hence, all panel cases, be they original panel cases or Article 21(5) DSU cases, can be appealed.

To rule otherwise would amount to diminishing the rights of WTO members, a ruling contrary to Article 3(2) DSU which clearly circumscribes the role of the judge in WTO cases. The rights of WTO members in the context of the DSU by definition cover both substantive and procedural rights.

Can WTO members procrastinate implementation forever by always doing *something*? The better view rejects this possibility: imagine that country D (defendant) at the end of the reasonable period of time did something to bring its measures into compliance, which was deemed inadequate by country C (complainant). The dispute will be forwarded to an Article 21(5) DSU panel which will rule on the issue. Let us admit, for the sake of argument, that the panel finds D’s implementing action inadequate. D will appeal the issue. The Appellate Body’s mandate in such a case will be to examine whether D’s implemented action during the reasonable period of time was or was not adequate. Hence, if the Appellate Body confirms the panel report in this respect, the decision is the end of the story. In other words, there is nothing akin to a second reasonable period of time for a particular dispute.

It is submitted that examples like the one mentioned make the case for retroactive

remedies even more persuasive. For, even if D keeps changing its implementing actions, D remains liable for the damage inflicted on C by not having implemented the panels' rulings and recommendations in the first place. Moreover, were one to accept that a changing implementing action is part of the original 'matter' before the panel (and good arguments can be advanced against such a thesis) and that such new implementing action is adequate, liability for past non-implementation remains intact.

2 A 'Muscular' Way to Get Out from the Vicious Circle: The Bananas Litigation

The United States Government in its recent *Bananas* dispute took the view that any time a WTO member is unhappy with the way the defendant has implemented its obligations, it can automatically request authorization to impose countermeasures even without a prior finding by a compliance panel that the implementing action was inadequate.

The facts of the case are well known. The EC banana regime has been under attack before the GATT/WTO adjudicating bodies for almost 10 years. The European Community has lost all of its legal battles on this front (panels have essentially found that the discriminatory EC banana regime violates the GATT non-discrimination principle) and keeps changing its policies without, however, removing the discretionary character of the regime. During the last round of litigation, the United States, apparently unhappy with the EC tactics in this respect, requested authorization to take countermeasures against the EC before a panel had previously established whether the last modification of the EC banana regime was adequate implementation of the panel's recommendations.

In the end, the United States requested compensation before an Article 21(5) DSU panel had completed its appreciation of whether the new EC regulation constituted adequate implementation.¹⁰¹

The main argument advanced by the United States was that, unless one accepts that there is only one reasonable period for implementation, WTO members winning their case before the WTO adjudicating bodies are deprived of their right to take countermeasures. This is so, the US argued, because according to Article 22(6) DSU the winning WTO member has to request authorization for adoption of countermeasures within 30 days from the end of the reasonable period of time.

The US argument operates as a way out from the vicious circle that comes into play whenever a recalcitrant WTO member does something but not enough to avoid countermeasures taken against it. The European Community, however, protested against this thesis: according to the EC argument, no request for countermeasures can be legitimately entertained by a WTO adjudicating body, unless a compliance panel has previously established that the implementing actions by the author of the illegal act are inadequate. Hence, according to the EC argument, a sequence exists between Article 21(5) DSU and Article 22(6) DSU. Consequently, the European Community asked the arbitrators responsible to decide on the US request for countermeasures to

¹⁰¹ See WTO Doc. WT/DS27/43.

suspend their meeting. The arbitrators rejected the EC argument and implicitly accepted the US thesis according to which no sequence between Article 21(5) and Article 22(6) DSU can be established in the current draft of the DSU. The relevant passage reads:

In a letter dated 22 February 1999, the European Communities requested that we suspend this arbitration proceeding until 23 April 1999, i.e., until 10 days or so after the date set for the completion of the pending proceedings brought by Ecuador and the European Communities pursuant to Article 21(5) of the DSU in respect of the revised EC import banana regime. However, in light of Article 22(6) of the DSU, which requires that an arbitration thereunder 'shall be completed within 60 days after the date of expiry of the reasonable period of time', or 2 March 1999, we decided that we were obligated to complete our work in as timely a fashion as possible and that a suspension of our work accordingly would be inappropriate.¹⁰²

The panel in fact invoked the latter part of Article 22(6) DSU, namely, that an arbitration has to be completed within 60 days, to justify its thesis.

What followed was an honourable effort to minimize the damage done to the system. The report authorizing the United States to adopt countermeasures was circulated on 9 April 1999,¹⁰³ whereas the report concluding that the EC implementing action was inadequate was circulated on 12 April 1999, that is three days later.¹⁰⁴ It should be noted that the same arbitrators issued the two reports. In other words, the arbitrators first accepted the US request to take countermeasures and shortly thereafter established that such countermeasures were justifiable since the European Community had failed to bring its measures into compliance.

It is submitted that this decision is wrong: at the point in time when the arbitrators accepted the US request, no WTO adjudicating body had, in accordance with Article 23(2) DSU, established that indeed the EC action was inadequate. Article 23(2) DSU clearly calls for multilateral findings with respect to each and every trade-related dispute. The issue whether the EC implementing action was adequate in the instant case is a dispute between the United States and the EC and must be resolved only through recourse to a panel.

The arbitrators in fact rejected the idea that a sequence exists between a compliance panel (Article 21(5) DSU) and a request for countermeasures (Article 22(6) DSU). And this is a blow to the system. They rejected the EC claim to suspend their procedure until a panel (and, eventually, the Appellate Body) had previously established that the EC implementing actions were inadequate. The quoted passage supports the proposition that the 30-day deadline in Article 22(6) DSU runs independently from any other DSU provision. In fact, according to their findings, Article 21(5) DSU is read to redundancy, since complaining parties can, by simply contesting the adequacy of implementing action by the defendant, request (and according to the *Bananas* precedent, will be granted) retaliation at the end of the reasonable period of time. The exceptional

¹⁰² See WT/DS27/ARB of 9 April 1999, at 3, para. 2.9 (footnote omitted).

¹⁰³ See WTO Doc. WT/DS27/ARB.

¹⁰⁴ WT/DS27/RW/ECU. As was pointed out to me, the two texts were circulated on the same day (6 April 1999) but were released on different dates because of delays concerning their translation.

character of countermeasures (as laid down in Article 22 DSU) becomes the automatic next step after the end of the reasonable period of time.

The basic argument against the thesis advanced by the arbitrators is provided by the principle of effective treaty interpretation, the cornerstone of the Vienna Convention on the Law of Treaties. According to this principle, the interpreter should not interpret to redundancy terms of the treaty and should aim at giving meaning to each one of them. The US argument was effectively a negation of this principle. Viewed from this angle, it would amount to something like this: 'I lose my right to take countermeasures under Article 22(6) DSU if I observe my obligations under Article 21(5) DSU.'

This is simply wrong since it is perfectly possible to give meaning to both Article 21(5) DSU and Article 22(6) DSU: the former refers to cases where *some* implementing action has been taken and there is no agreement as to its adequacy; the latter refers to cases where either *no* such action has been taken at all, or *some* action has been taken and it has multilaterally been established (through recourse to Article 21(5) DSU) that such action was simply inadequate. If this approach is taken, Article 22(6) DSU will not be deprived of its meaning.

Indeed, Article 22 DSU comes into play only 'if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith'. Such a situation will always exist when the author of the illegal act has taken no action to bring its measures into compliance with its WTO obligations.

It can of course also exist if the implementing action is not deemed adequate by the complainant. In such a case, however, there will be a dispute. And disputes must always be submitted to the WTO adjudicating bodies (Article 23(2) DSU). A presumption that a WTO member did not observe its obligations is simply not enough. In fact, there is now WTO case law which holds for the opposite paradigm. In the *Hormones* dispute, the arbitrators concluded that:

WTO Members, as sovereign entities, can be presumed to act in conformity with their WTO obligations. A party claiming that a Member has acted inconsistently with WTO rules bears the burden of proving that inconsistency.¹⁰⁵

Consequently, the United States would have to rebut the presumption that the European Community acted inconsistently with its obligations by not adequately implementing the panel's report by submitting a complaint to a compliance panel (Article 21(5) DSU). Hence, a sequence between a compliance panel and a request for countermeasures is in fact already established in the DSU.¹⁰⁶

A rather different approach was taken in the very recent dispute between the EC and the United States concerning a claim by the former that the latter imposed countermeasures against it without first awaiting a formal multilateral authorization. The panel report on *United States — Import Measures on Certain Products from the*

¹⁰⁵ See WT/DS26/ARB of 12 July 1999, at para. 9.

¹⁰⁶ A similar approach in favour of a sequence has been very recently advocated by Valles and McGiven, 'The Right to Retaliate under the WTO Agreement — The "Sequencing" Problem', 34 *Journal of World Trade* (2000) 63.

*European Communities*¹⁰⁷ first accepted that, without multilateral authorization, no countermeasures can be legitimately imposed. Such authorization, according to the panel's reasoning, is predicated on a multilateral finding that the implementing action by the WTO member author of an illegal act has been judged inadequate for the member concerned to comply with its international obligations. One would expect that the panel would reverse the solution advanced in the *Bananas* litigation. But, surprisingly, the panel found that a judgment on the adequacy or inadequacy of implementing actions does not necessarily have to be performed by a 'compliance panel' in accordance with Article 21(5) DSU; an arbitration panel can eventually perform this task. The relevant passage reads:

we consider that the WTO compatibility determination mandated by the first sentence of Article 21(5) can be performed by the original panel *or* other individuals through the Article 22(6)–(7) arbitration process. We find that an Article 22(6) Arbitration panel is a valid WTO adjudicating body to perform the tasks mandated by Articles 23(2)(a) and 21(5) of the DSU.¹⁰⁸

The opinion expressed in this panel report unfortunately fails to persuade for a number of reasons: first, the wording of Article 21(5) DSU does not support such a finding. Indeed, Article 21(5) DSU makes it clear that there is only one institution mandated by the DSU to act as 'compliance panel', that reflected in Article 21(5) DSU. Secondly, were one to adopt this understanding, Article 21(5) DSU would be read to redundancy — that is, the very essence of the principle of 'effective interpretation' would be defeated — since complaining parties would, in all likelihood, prefer to have recourse to arbitration rather than to establishment for a very good reason: such recourse would enable them to reach a speedier outcome. This is especially so, since a 'compliance panel' has to deliver its judgment within 90 days whereas an arbitrator acting in the context of Article 22(6) DSU has to deliver an award within 60 days. It is indeed remarkable that the panel did not pay attention to this point which by itself would argue against the adoption of the panel's thesis. Thirdly, the panel simply disregarded the objective function of arbitration in the context of Article 22(6) DSU: the arbitrator, in accordance with the unambiguous wording of Article 22(6) DSU, will be requested to offer his/her services 'if the Member concerned objects to the level of the suspension proposed, or claims that the principles and procedures set forth . . . have not been followed'. It is clear, therefore, that the arbitrator comes into play only when a dispute no longer exists as to the right of the injured party to request countermeasures. Disagreements as to the adequacy or inadequacy of implementing actions, however, amount to a dispute as to the above-mentioned right. Finally, the panel disregarded the fact that, whereas Article 21(5) DSU panel decisions can be appealed, this is not the case for decisions of arbitrators. In a nutshell, the two provisions are not 'interchangeable' since they pursue a different objective function.¹⁰⁹

¹⁰⁷ See WTO Doc. WT/DS165 of 19 April 2000.

¹⁰⁸ *Ibid.*, at para. 6.124 (emphasis added).

¹⁰⁹ This point was first made by Joost Pauwelyn at a conference.

Consequently, this approach must be rejected as well.¹¹⁰

No one can deny that *mala fide* WTO members can (ab)use the system in this respect. This possibility undeniably exists. However, the role of the judiciary is not to substitute the legislature. Especially in the context of international law, where agency costs are high, it makes eminent sense for the judiciary to adopt a rather minimalist attitude and defer issues like this to the legislature.¹¹¹

The source of the distortion, however, as we pointed out, is the wide discretion given to the losing party to bring its measures into compliance in the context of Article 19 DSU. And the US point of view seems to neglect this fact: instead of tightening the conditions *ex ante* (panels must always suggest), they try to punish recalcitrant members *ex post* (through their interpretation of Article 21(5) DSU), without taking into account that the system as such does not give the incentive to comply to those who cannot afford to.

3 *And Common Sense Finally Prevails: The DSU Review*

Three points emerge from the ongoing (at the moment of writing) negotiations in the context of the DSU review:

- 1 that a sequence must be established between a compliance panel and a request for countermeasures, in the sense that a request for countermeasures can be examined only if a compliance panel has previously pronounced on the inadequacy of an implementing action;
- 2 that compliance panels should be treated like arbitrators, in the sense that their decisions are not appealable; and
- 3 that decisions by compliance panels will be the *ultima ratio*, that is WTO members will only have one reasonable period of time to bring their measures into compliance with respect to the matter brought before the original panel.

If ultimately endorsed, the current proposal would be an important step forward not only because it would clarify the already existing sequence between compliance panels and requests for countermeasures but also because it would largely contribute to the effectiveness of the system by rendering compliance panels' decisions unappealable and establishing only one reasonable period of time.

At the same time, the action is laudable from an institutional perspective as well: issues like this are better left to the discretion of legislators than to the discretion of the judiciary. No matter the ad hoc character of judiciary decisions, negative spillovers to comparable cases can hardly be avoided.

¹¹⁰ Remarkably, it seems that the panel did not have to provide findings on this issue. Indeed, based on judicial economy considerations, it could very well stop its exercise before entertaining this claim. The unfortunate inspiration to continue its review of all claims put forward to it added to the existing confusion on the issue we deal with in this section.

¹¹¹ See, on this issue, the excellent account provided by C. R. Sunstein, *One Case at a Time* (1999).

E *Compensation and Suspension of Concessions*

1 *Some Introductory Remarks*

In the event that the losing party has not implemented the report (either because it took no action to this effect or because a compliance panel has found the action undertaken to be inadequate and no action was taken subsequently) the complaining party can request the suspension of concessions.¹¹² With the coming into being of the 'negative consensus' rule, a request suffices for multilateral authorization of countermeasures to be granted. As an alternative, compensation may be granted to the complaining party. Compensation, however, is voluntary. Both compensation and suspension of concessions are temporary measures pending implementation of the report (Article 22(1) DSU).

On the other hand, Article 22(1) DSU makes it plain that both compensation and suspension of concessions are *not* preferred options to full implementation. In other words, a WTO member should not be presumed to be in compliance with its international obligations when it continues an illegal act and at the same time either it agrees to pay compensation or concessions in its favour are suspended. In such a case, the WTO member author of the illegal act continues the illegality and has not fulfilled its international obligations. Compensation and suspension of concessions, in other words, are the means that induce eventual compliance with the WTO contract. In fact, they have a function very comparable to that of countermeasures in the ILC Draft Articles on State Responsibility: they constitute a procedural consequence of illegality aiming at providing the incentive to authors of the illegal act to comply with their international obligations. In fact, we can safely argue that compensation and suspension of concessions is WTO parlance for countermeasures.

2 *Measuring Countermeasures in the GATT Era*

According to Article 22(4) DSU countermeasures must be equivalent to the level of nullification of impairment. From a technical point of view, the term 'equivalent' makes it plain that there is no room for punitive damages in the WTO context. Moreover, it is questionable whether there is room for 'proportionate' damages: 'equivalent' is a stricter term than 'proportionate'. Equivalence is to be judged by reference to the level of nullification and impairment.¹¹³

It is interesting to note that in the GATT regime the term used in the place of 'equivalent' was 'appropriate' (GATT Article XXIII(2)). There is only one reported case where recourse to countermeasures was envisaged in the GATT era. The Netherlands was authorized to limit imports of wheat flour from the United States to 60,000 tons based on a determination by a working party:

1. that the measure proposed by the Netherlands Government is appropriate in character, and

¹¹² On this issue, see the excellent account provided by Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules — Toward a More Collective Approach', 94 *AJIL* (2000) 335–347.

¹¹³ As we pointed out earlier, proportionality of countermeasures in the WTO context is to be judged by reference to the effects rather than to the gravity of the act.

2. that, having regard to
 - (i) the value of the trade involved,
 - (ii) the broader elements in the impairment suffered by the Netherlands, and
 - (iii) the statement of the Netherlands Government that its principal objective in proposing the measure in question is to contribute to the eventual solution of the matter in accordance with the objectives of the General Agreement . . .¹¹⁴

This matter was discussed again in the aftermath of the adoption of the panel report on *Superfund* at the GATT Council, following an EC request to adopt countermeasures against the United States since the latter had not implemented the panel report. There, the Legal Adviser to the Director General of the GATT advanced the following point of view:

there were a few provisions in the General Agreement where retaliation was foreseen. In two of those, Articles XIX and XXVIII, retaliation was defined as the withdrawal of substantially equivalent concessions. In the case of Article XXIII, the wording was wider, referring to measures determined to be appropriate in the circumstances, which meant that there was a wider leeway in calculating the retaliatory measures under Article XXIII than under Articles XIX or XXVIII . . . A working party in the present case would examine whether the retaliatory measures proposed by the Community would be appropriate in the circumstances; that would include the question of *how* to calculate the damage and the compensation.¹¹⁵

Against this background, Article 22(4) DSU is arguably a setback in comparison to Article XXIII(2) GATT when it comes to measuring the permissible extent of countermeasures, since it imposes a strict equivalence between damage incurred and level of countermeasures.

3 *Measuring Countermeasures: WTO Practice*

Recent WTO practice has dramatically changed the GATT picture: countermeasures have so far been authorized in two highly publicized cases, the *Hormones* dispute between the United States and the European Community and the *Bananas* dispute between Ecuador and the United States on the one hand and the European Community on the other.¹¹⁶ There is an imminent risk that countermeasures will be requested in other cases as well. For the purposes of this section, we can use the report in the *Bananas* arbitration¹¹⁷ as the basis for a positive account of how countermeasures are regulated in the WTO regime. Such a choice does not suffer from selection-bias-type weaknesses since on the one hand arbitrators had to face a comprehensive set of requests (and consequently had to deal with almost each and every issue regarding regulation of countermeasures in the WTO) and on the other it appears that this approach will serve as a basis for future experience in the field. When

¹¹⁴ See *Netherlands — Measures of Suspension of Obligations to the United States*, BISD 1S/32–33.

¹¹⁵ See GATT Doc. C/M/220, at 36. The quoted passage is reproduced in the *GATT Analytical Index, Guide to Law and Practice* (1994) 651.

¹¹⁶ At the time of writing, Canada's request to impose countermeasures against Brazil is still pending. The 'compliance panel' has already established that Brazil did not, through its implementing action, bring its measures into compliance with the WTO (*Brazil — Export Financing Programme for Aircraft — Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW of 9 May 2000) and Brazil has appealed the report.

¹¹⁷ See WT/DS27/ARB/ECU of 24 March 2000 (hereinafter the *Bananas* arbitration).

necessary, we will refer to the report in the *Hormones* arbitration¹¹⁸ which with respect to some issues complements the *Bananas* arbitration.

It is necessary to remember that requests for countermeasures are submitted to arbitrators (preferably, the original panel, Article 22(6) DSU) and that arbitrators' decisions in this context are final (Article 22(7) DSU).

(a) The objective function of countermeasures

The *Bananas* arbitration underscores that the objective of countermeasures is to induce compliance by the recalcitrant WTO member and, unless such compliance is induced, the enforcement mechanism of the WTO dispute settlement system cannot function properly.¹¹⁹

However, unlike the ILC Draft Articles on State Responsibility, where the issue of whether proportionality of countermeasures will be measured against their objective function (that is, to induce compliance) is still open, in the context of WTO law, the means to achieve the objective stated are circumscribed in a precise manner: Article 22(4) DSU calls for countermeasures substantially equivalent to the level of nullification and impairment. It seems fair to argue, however, that nothing in the language of Article 22(4) DSU precludes nullification and impairment from covering not only *damnum emergens* and *lucrum cessans* but also interest.

(b) The burden of proof

A WTO member requesting authorization to impose countermeasures will submit a list of concessions it wishes to suspend (Article 22(3) DSU). The *Hormones* arbitration established the principle that it is up to the party challenging that the complainant has respected its obligations to rebut the submission of the member requesting authorization.¹²⁰ This formula has been reproduced verbatim in the *Bananas* arbitration.¹²¹

If there is no challenge (no matter how unlikely this possibility may be), the complainant must still abide by the Article 22(4) DSU standard, that is to guarantee that countermeasures are equivalent to the level of nullification and impairment. In other words, arbitrators will not give rubber stamp approval to any request for suspension of concessions. It is their duty, in accordance with Article 22(7) DSU, to ensure that the relevant provisions of the DSU (effectively Articles 22(3) and 22(4) DSU) have been complied with.

(c) The judicial review standard

Article 22(7) DSU essentially requests arbitrators to verify two things:

- 1 whether the member requesting authorization has complied with the rules and procedures laid down in Article 22(3) DSU; and
- 2 whether the proposed countermeasures are equivalent to the level of nullification and impairment as requested by Article 22(4) DSU.

¹¹⁸ See WT/DS26/ARB of 12 July 1999 (hereinafter the *Hormones* arbitration).

¹¹⁹ See the *Bananas* arbitration, at para. 76.

¹²⁰ See the *Hormones* arbitration, at paras 9–11.

¹²¹ See the *Bananas* arbitration, at paras 37–41.

The wording of Article 22(7) DSU makes it clear that arbitrators have the power to modify the submitted list of concessions and that addressees of their decisions have to accept the arbitrators' award as final.

The standard of review when examining compliance with Article 22(3) DSU or Article 22(4) DSU though cannot be the same. The terms used in the two paragraphs differ substantially. With respect to Article 22(4) DSU, the text of the DSU imposes an unconditional obligation to respect a certain level. The operative legal consequence must be that arbitrators have maximum discretion to eventually downsize over-ambitious submissions. The opposite is not true though. If a WTO member decides to suspend concessions lower than the level of nullification and impairment, arbitrators cannot increase it to the level of nullification and impairment. This is so for two reasons: first, the Article 22(4) DSU threshold operates as a ceiling beyond which actions are illegal, but within which actions are perfectly legal. Secondly, because, as already mentioned in Section 2 above, in accordance with customary international law, the judge is bound by what has been requested and cannot add to it (*non ultra petita*). Both the *Hormones* and the *Bananas* arbitration reflect this point.

With respect to Article 22(3) DSU, however, the issue is different. Article 22(3) DSU gives the possibility to WTO members to request authorization in the same sector (Article 22(3)(a) DSU), or in a different sector under the same agreement (Article 22(3)(b) DSU) or in a different agreement altogether (Article 22(3)(c) DSU). There is an escalation of procedural obligations if the party wants to move away from imposing countermeasures in the same sector:

- 1 in all cases, WTO members must take into account the trade in the agreement where the original violation was committed (Article 22(3)(d) DSU);
- 2 if a WTO member wishes to impose countermeasures in a different sector but under the same agreement (i.e., a violation has been committed in the textiles sector and the affected WTO member wishes to take countermeasures in agricultural products) it must, in addition to its obligation under Article 22(3)(d) DSU, state the reasons for doing so (Article 22(3)(e) DSU), notify its request to the relevant councils (Article 22(3)(e) DSU) and must consider that it is 'not practicable or effective to suspend concessions or other obligations with respect to the same sector(s)' (Article 22(3)(b) DSU);
- 3 if a WTO member wishes to impose countermeasures under another agreement (i.e., a violation has been committed in textiles and the affected WTO member wishes to take countermeasures in TRIPs), it must, in addition to the obligations under Article 22(3)(b), (d) and (e) DSU described above, further consider that the circumstances are serious enough to mandate such action (Article 22(3)(c) DSU).

The arbitrators in the *Bananas* arbitration distinguished between the obligations included in Article 22(3)(d) and (e) DSU on the one hand (where the DSU requests a particular action, namely, to show that certain factors have been taken into account and reasons are provided for a decision to take countermeasures under a different sector or agreement) and the obligations included in Article 22(3)(b) and (c) (namely, the decision to take countermeasures under a different sector or agreement). In the

words of the arbitrators, a ‘slightly different’ margin of review is called for in the latter case.¹²²

Intuitively, one would expect that what follows from this distinction is an ‘intrusive’ standard of review with respect to the procedural obligations (Article 22(3)(d) and (e)) and a pro-deference attitude with respect to substantive decisions (Article 22(3)(b) and (c)). Such a reading is in conformity with the wording of Article 22 DSU: this is the only place in the DSU where the words ‘if that party considers’ appear. These words unambiguously demonstrate the intention of the drafters of the DSU to allow for maximum discretion by the WTO member requesting authorization to move to another sector and/or agreement.

In the words of the arbitrators with respect to judicial review of actions under Article 22(3)(b) and (c) DSU:

the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector.¹²³

This is not necessarily the case though. By examining, following the ‘intrusive’ standard, the reasons set forth for moving to another sector, the arbitrators put into question the decision of the WTO member to move to another sector or agreement. They in fact substitute their concept of effectiveness for that of the member. Hence, under this approach, it comes as no surprise that at the end of the day the arbitrators decide that Ecuador should take countermeasures under GATT, GATS and TRIPs¹²⁴ when Ecuador had requested action only under GATS and TRIPs.¹²⁵

To the defence of the arbitrators one could advance the argument that the DSU is not clear in this respect. Should one see a mere procedural obligation in Article 22(3)(e) for example or should one interpret it as an obligation by WTO members adequately to motivate their decisions in this respect? The attitude of the arbitrators in this respect clearly opts for the latter.

(d) The basis for the calculation of countermeasures

The *Hormones* arbitration addressed the issue of the limitation in time of remedies. The facts are important in this respect. The EC measure found to be inconsistent with the WTO (import ban on hormone-treated beef) had been in place since 1989. The WTO Sanitary and Phytosanitary Agreement entered into force on 1 January 1995. The panel, applying the maxim *nullum crimen nulla poena sine lege*, rejected the idea of extending the remedies prior to 1 January 1995. However, without any explanation, it accepted as a cut-off date 13 May 1999 (marking the end of the reasonable period of time). It then calculated the level of suspension of concessions by asking itself one question: ‘what would annual prospective US exports of hormone-treated beef and

¹²² See *ibid.*, at para. 54.

¹²³ See *ibid.*, at para. 52 (emphasis added).

¹²⁴ See *ibid.*, at para. 100.

¹²⁵ See *ibid.*, at para. 2.

beef products to the EC be *if the EC had withdrawn the ban on 13 May 1999?*¹²⁶ It then concluded that ‘this question, like any question about future events, can only be a reasonable estimate’.¹²⁷

A similar attitude is reflected in the *Bananas* arbitration. Once again the arbitrators measured the level of nullification and impairment by constructing a counterfactual basis: the European Community adopts a WTO-consistent bananas import regime. Then they calculated the difference between the counterfactual situation and the actual situation in order to decide the amount of equivalent countermeasures.

As already stated above, the idea that only prospective remedies are compatible with the nature of the WTO contract has already been rejected in the panel report of *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, a report which was issued subsequent to the *Hormones* arbitration case law.

Both the *Bananas* and the *Hormones* arbitration take the view that countermeasures must be calculated using lost trade as the benchmark. This is not, however, an economically sound approach, at least not always. Trade among goods often involves added value from various origins. What the WTO member always loses when it faces an illegal trade practice is its domestic added value. For the rest, it should be obliged to show that it purchased foreign value for one purpose: to export to the particular market.

Finally, we should note here that the WTO Agreement on Subsidies and Countervailing Measures (SCM) contains its own provisions on the issue. Article 4(10) SCM allows WTO members to take countermeasures appropriate to the damage inflicted.¹²⁸ A footnote to Article 4(10) SCM explains that proportionate means not disproportionate. Beyond this explanation, no further clarification as to the benchmark of proportionality to be used is offered in the text.

It is striking that Article 4(10) SCM uses the term ‘countermeasures’ and not ‘suspension of concessions’. It is submitted, however, that the substance does not change. The DSU makes it clear that special and additional rules will apply to the extent that they deviate from the general rules laid down in the DSU. In the absence of any qualification of the term ‘countermeasures’, it is difficult to conceive what the drafters had in mind other than suspension of concessions. Practice seems to confirm this point: on 22 May 2000,¹²⁹ Canada requested the right to suspend concessions against Brazil as a response to the latter’s illegal export subsidies granted to its aircraft industry.

There seems to be an ambiguity, however, as to the level of countermeasures against illegal subsidies. As stated above, the term used in Article 4(10) SCM is

¹²⁶ See the *Hormones* arbitration, at para. 38 (emphasis in the original).

¹²⁷ See *ibid.*, at para. 41.

¹²⁸ It should be noted in this respect that in the EC system the remedy for illegal subsidies is an obligation imposed on the subsidizing state to recoup the subsidy granted. In the WTO system, however, no such obligation exists. Injured states can take countermeasures up to the level of the damage inflicted on them (and not up to the level of the subsidy, which could arguably be higher). Consequently, whenever a subsidizing state values a subsidy more than the eventual countermeasures that other WTO members can take against it, it will continue to subsidize.

¹²⁹ The relevant WTO document has not been issued as yet.

‘proportionate’ and not ‘equivalent’ as in Article 22 DSU. Does this mean that the level of countermeasures is different depending whether they are aimed at counteracting an illegal subsidy or any other illegality in the WTO context?

The footnote to Article 4(10) SCM states that proportionate means not disproportionate. The only reasonable interpretation of the term is that punitive damages are to be excluded. But if damages are not punitive, what are they? Intuitively, one would support the thesis that, because of the footnote, for proportionate countermeasures to be calculated one should use the actual damages suffered as the proper benchmark. And maybe small deviations, in accordance with the discussions following the EC request to take countermeasures in the *Superfund* litigation cited above, will be tolerated. But, at any rate, the benchmark must be the damages suffered.

At the time of writing, no practice in this field is reported. As stated above, Canada very recently requested authorization to adopt countermeasures and this request is the first in the field of illegal export subsidies. It seems unlikely, however, that arbitrators will move drastically away from the *Bananas* and *Hormones* outcomes.

(e) The case for cross-retaliation

As mentioned above, the arbitrators in the *Bananas* arbitration disagreed with Ecuador’s request to take countermeasures only in GATS and TRIPs and obliged it to take countermeasures in GATT as well. To reach this conclusion, the arbitrators accepted a rather convoluted distinction offered by Ecuador between consumer and primary goods (the first referring to goods destined for final consumers, the latter referring to goods destined for the domestic processing industry). They then went on to accept that Ecuador’s arguments in favour of no countermeasures in GATT were persuasive with respect to primary goods but not with respect to consumer goods.¹³⁰

Such an approach, however, can only make sense if viewed from a purely mercantilist perspective, that is if one were to agree that harm to producers equals or is more important than harm to consumers. Of course, it is not up to a WTO adjudicating body to impose sound economic policy on any WTO member. To the extent that they respect their obligations, governments can be ‘shooting themselves in the foot’ as often and as hard as they wish. What is puzzling here though is that the decision by the arbitrators to reject Ecuador’s argument is based precisely on a very artificial distinction. Moreover, the attitude of the arbitrators in this respect underscores a point already made in this section: that arbitrators, by imposing a meaningful judicial review standard with respect to the procedural obligations contained in Article 22(3) DSU, will effectively put into question (albeit in a rather relaxed manner) the decision by a WTO member to take countermeasures in a different sector or agreement.

4 Countermeasures: How Effective?

Countermeasures are the *ultima ratio* of the system. WTO members will eventually be persuaded to abandon their WTO-inconsistent practices if countermeasures (or the

¹³⁰ See the *Bananas* arbitration, at para. 100.

threat thereof) is indeed a credible threat. Game theory suggests that a threat is credible if players know *ex ante* that it will materialize. It goes without saying that, unless countries lose more by keeping their illegal practices intact than *vice versa*, they will hardly have an incentive to comply.

On the other hand, we should take note of the fact that the WTO is a decentralized system of enforcement: it knows of no *ex officio* complaints and of no multilateral sanctions. Finally, as noted above, the level of countermeasures must be limited essentially to the damage done. This means that every time the profit of a member violating the WTO contract is higher than the damage done, it has no incentive to comply. And beauty is in the eyes of the beholder: some governments (especially non-transparent ones) can be tempted to equate the profit of some societal segments to national welfare and act accordingly. To a large extent, a decision by a WTO adjudicating body calling for an end to an illegal trade practice is a decision to redistribute wealth within a particular society. Redistribution of wealth might sometimes run counter to aspirations of re-election and matter less in the incentive structure of the interested parties.¹³¹ The point here is that by limiting the level of countermeasures (the procedural mechanism, it is worth remembering, to induce compliance with the WTO contract) to the damage done (rather than to the profit made) WTO members might often not have an incentive then to comply at all.

Moreover, although formally there seems to be a situation of perfect symmetry among the various WTO players when it comes to adopting countermeasures (since countermeasures are limited to the value of damage and do not extend beyond it), in fact the effectiveness of countermeasures depends on the relative economic importance of the party adopting them. Countermeasures effectively mean exclusion from (or difficult access to) markets. By definition countries depending on international trade will be hurt more. An additional complicating factor in this context is the attraction of a particular market for exporters. Not all markets have the same value. The EC and the US markets (because of their overall size and the high-income consumers living there) are not easily replaceable.

Export diversification can be crucial as well. Imagine, for example, a situation where country A exports only to country B, whereas country B exports to country A but also to 50 other markets. A decision by B to take countermeasures against A can be fatal to A, especially if the latter is heavily dependent on export income. The opposite is not necessarily true.

Most importantly, countermeasures are bad policy. It is commonplace in economics that countermeasures amount to 'shooting oneself in the foot'. Interestingly, the *Bananas* arbitration acknowledges this point.¹³² Through countermeasures, a WTO member imposes an additional cost on society. Precisely because of the budgetary constraints, adoption of countermeasures is simply not an option for the poorer WTO members.

¹³¹ See, on this issue, the excellent paper by Busch, 'Democracy, Consultation and the Panelling of Disputes under GATT', 44 *Journal of Conflict Resolution* (2000) 425.

¹³² See the *Bananas* arbitration, at para. 86.

As a result, those WTO members that can afford either to take or to see taken against them countermeasures will be in a better position: when acting as complaining parties, they will use the threat and/or imposition of countermeasures in order to induce compliance; when acting as defendants, they will have at least the luxury of weighing the pros and cons between *changing* the domestic policies at stake (in order to avoid imposition of countermeasures) or simply *keeping* the domestic policies at stake intact (and see countermeasures imposed on them).

In a recent interview, the EC Commissioner responsible for international trade issues, Pascal Lamy, perfectly captured this point by stating that: ‘As long as you pay the penalties, you can go on as you are.’¹³³ Lamy did not have to address questions such as how difficult it is for other weaker WTO members to pursue such policies.¹³⁴

What emerges from the analysis above is that countermeasures are often ineffective and, most importantly, do not always guarantee *paritas armis* among the WTO players. It is true that, following the events in the *Bananas* arbitration, some balance has been restored. Ecuador, by taking countermeasures on TRIPs, accomplished two things: on the one hand, it ‘hit’ the European Community on products where profits are quite substantial (since protected by intellectual property rights); on the other, it created a risk that TRIPs could evolve as the preferred area for developing countries to take retaliatory action against developed ones. It is perhaps this latter risk — let us call it the ‘institutional’ risk — which can prove effective. Developed WTO members are the *demandeurs* in the TRIPs context and any effort to undermine the reach of the TRIPs agreement will not be easily tolerated by domestic TRIPs-connected lobbies in Brussels and Washington DC.

However, one should not over-emphasize this point. It is highly unlikely that the European Community will change its banana-import regime because of the Ecuadorian countermeasures in TRIPs.

F *The WTO Phase: A General Rule with Some Exceptions*

Article 19 DSU is applicable to all disputes to the extent that nothing more specific has been inserted in an agreement. Some specific language has been inserted though here and there. There are two notable examples: one which indirectly addresses the issue of remedies and one which directly does so. We start with the former.

The WTO Agreement on Antidumping contains a novel (in international practice) standard of judicial review which unambiguously favours the WTO member imposing anti-dumping duties. The argument has already been made in a persuasive manner that this standard which promotes ‘permissible interpretations’ is impermissible

¹³³ See Press and Communication Service Brussels, No. 3036, 23 May 2000.

¹³⁴ At this point, it should be made clear that it is not the WTO’s mandate to deal with all inequalities between players which pre-existed the WTO contract and are in any event hidden behind a concept that has probably lost touch with reality altogether by now: sovereign equality. It is the WTO’s mandate, though, to ensure that, with respect to its quintessential function — the adjudication of disputes — all necessary steps will be taken to guarantee that inequalities will not adversely affect the rights of the states concerned.

itself.¹³⁵ We could only add that a very relaxed standard of review like the one incorporated in Article 17(6) of the WTO Agreement on Antidumping coupled with a remedy which does not go beyond the recommendation stage makes it quite unlikely to reach findings against the authority imposing anti-dumping duties, one of the most protectionist tools.

The WTO GPA goes in the opposite direction. This is an area where the interests of the major players are not to protect (as in anti-dumping) but to open up markets. Consequently, two notable innovations were included: first, the challenge procedures whereby quick relief mechanisms are provided in order to avoid repetitions of the Trondheim experience; and, secondly, parties to the GPA are explicitly enabled to request panels to allow them to negotiate remedies that go beyond the list of Article 19 DSU. And here is the trick: one could well expect that parties to a dispute could explicitly request a suggestion from the panel. This is not the case though. The drafters of the relevant GPA article apparently did not wish to grant panels that much liberty (with the eventual possibility of spillovers in other than the GPA agreements) and preferred to keep the 'suggestion' at the bilateral level.¹³⁶ The only limit in such bilateral solutions is that imposed by Article 3(6) DSU.¹³⁷

4 The Case for Renegotiating Remedies

Hudec accomplished a remarkable study with respect to the implementation record of panel reports in the GATT era where remedies were less effective (since, for example, contracting parties to the GATT could block establishment of a panel or adoption of a report).¹³⁸ His overall conclusion is that the GATT record is rather satisfactory. Moreover, his study shows that notwithstanding two such requests, never in the GATT history has recourse been made to countermeasures.¹³⁹

Hudec's study though is not an absolute statement on the effectiveness of GATT remedies. His study should rather be understood as a comprehensive statement on the relative effectiveness of the GATT contract: his single most important point is that the GATT record, contrary to what has been the popular idea, is no worse than that of other international jurisdictions. But Hudec himself is the first to accept, as his study indeed demonstrates, that there were cases where no panel was established or cases where the report was not adopted. And, indeed, in his work, Hudec does not ask the

¹³⁵ See the contributions by Croley and Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 90 *AJIL* (1996) 193; and Palmetier, 'United States Implementation of the Uruguay Round Antidumping Code', 29 *Journal of World Trade* (1995) 39.

¹³⁶ This argument has been made in B. M. Hoekman and P. C. Mavroidis, *Law and Policy in Public Purchasing: The WTO Government Procurement Agreement* (1997).

¹³⁷ It is a transparency requirement to notify all solutions reached at the bilateral level so that third parties can check the consistency of such solutions with the multilateral rules.

¹³⁸ See Hudec, *supra* note 43.

¹³⁹ The *Netherlands* case, *supra* note 114; and the *Superfund* case, *supra* note 94.

question how the fact that consensus was needed for a panel to be established, the panel report to be adopted and countermeasures to be authorized, influenced the decision of GATT contracting parties to submit their disputes to the GATT system in the first place.

Moreover, Hudec himself admits that the picture started changing in the late 1980s. Panels were called to address politically more ‘sensitive’ issues, which largely explains the high rate of unadopted panel reports in those years compared with the previous GATT years.¹⁴⁰ The overall good GATT record would arguably be influenced were it to be examined from this perspective.

The issue why GATT contracting parties (and now WTO members) respect the contract has been raised time and again. And it is indeed remarkable, as Hudec points out, that the contract has been respected in a satisfactory way notwithstanding the fact that the very establishment of a panel could be blocked. A series of explanations have been invariably offered.¹⁴¹

According to the ‘managerialist–neofunctionalist’¹⁴² argument (essentially, that members will behave in a WTO-consistent way even in the absence of effective remedies, out of an enlightened self-interest greatly facilitated by the interaction within an international regime) offers a different reason why countries obey legal regimes without the necessary ‘teeth’ to ensure compliance.¹⁴³

Reputation costs could also explain why the WTO contract is obeyed even by those WTO members that can afford to disregard it. For some WTO members, the WTO contract corresponds precisely to their idea of justice (law) and hence they would respect it anyway, even in the absence of legal compulsion. Or, for others, the WTO contract is simply part of a wider cooperative game: states interact on many fronts, trade relations being just one of them. Vested interests in other fronts would eventually be undermined, if the WTO contract were disregarded.

The problem with all these explanations is that a good counter-argument always exists: reputation costs, for example, can easily play second fiddle to other interests; we can even very well imagine situations where inconsistencies can be explained without the reputation of the inconsistent member suffering at all (essentially by pointing to the uniqueness of a dispute). Moreover, it is certainly factually inaccurate to state that the WTO contract corresponds to everyone’s idea of justice: it is hard to explain the ever-rising number of disputes otherwise.¹⁴⁴ And it is also factually incorrect to argue

¹⁴⁰ This point has been made orally to the author by William J. Davey. I reproduce it here with his permission, since I fully share his point of view.

¹⁴¹ Most of the writings in this respect are by economists and political scientists. With the exception of Hudec’s study, there is, to our knowledge, no other comprehensive contribution by lawyers in this respect.

¹⁴² Compare A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 27.

¹⁴³ G. Maggi, ‘The Role of Multilateral Institutions in International Trade Cooperation’ (mimeo, 1998), apparently inspired by ‘deep integration’ schemes, proposes the introduction of multilateral sanctions at the WTO as an appropriate means to ensure compliance.

¹⁴⁴ See, on this issue, H. Horn af Rantzen, P. C. Mavroidis and H. Nordstrom, ‘Is the Use of the WTO Dispute Settlement System Biased?’ (CEPR Discussion Paper Series No. 2340, 2000).

that each and every WTO member has important vested interests in other fields and hence the WTO contract must always be respected because of them.

All these grounds thus advanced have indeed helped our understanding with respect to compliance with (international) obligations. But they all refer to *individual* reasons why a contract is respected. Hence, compliance for the reasons mentioned depends on subjective grounds. However, legal security (transactions cost) aims at preserving a situation where the contract will under all circumstances be observed, independently of individual grounds for respecting it. In other words, for legal security to be served, *institutional* rather than individual grounds must be agreed and inserted in the contract that will guarantee respect at all times.

And this is exactly the role that remedies are called to play: remedies are the institutional guarantee that a contract will always be observed.

WTO countermeasures, the *ultima ratio* of the system, fails on both effectiveness and impartiality grounds. Sometimes they can and sometimes they simply are not a structure that will induce compliance. In all cases, economic theory suggests that the country adopting them 'shoots itself in the foot' by imposing costs on its society. Indeed, what has been the gain for Ecuador since it imposed countermeasures against the European Community other than the fact that its TRIPs-violating industry might have made some extra profit? Wisely, Bhagwati has proposed that any time a developing country wins its case before the WTO, instead of requesting countermeasures, it should be allowed to negotiate (applying Article XXVIII GATT or Article XXI GATS) concessions from its developed WTO partner in a field other than the field where the illegal action took place. Such proposals unfortunately have yet to find their way into the WTO legal system.

At this point in time, it is impossible to provide a quantitative account of whether the WTO contract has been respected. Missing information about a number of issues (ranging from absence of notifications of bilateral settlements to information concerning the nature of implementation of panels' recommendations) does not allow such conclusions. Moreover, the absence of a public prosecutor, a supranational watchdog in the WTO system, can have as a side-effect the mutual tolerance of illegalities. With these caveats in mind, there is evidence that the contract is not always respected. Remedies are there to ensure that the contract will under all circumstances be respected. Thus, remedies must be effective and, as we attempted to show, this is not always the case in the WTO context. Remedies on the other hand, in an integration system between unequal players like the WTO, are there to 'equalize' inequalities and to ensure, to paraphrase Henkin, that all players at all times will respect all of their obligations. The WTO remedies fail on this account too. Although it is true that the new DSU is an important step forward, the avalanche of Article 21(5) DSU disputes reported in recent months has opened the door to the next issue to be discussed in the multilateral context.

Postscript: Punitive Damages in the WTO?

Very recently, in the *Brazil–Aircraft* litigation, the arbitrators dealt with a request by Canada to impose countermeasures against Brazil. The request came following a finding by a compliance panel that Brazil had not brought its measures into conformity with its WTO obligations. Consequently, as stated in Article 4.10 SCM, Canada was entitled to take ‘appropriate countermeasures’ (i.e., not disproportionate countermeasures, as the footnote to that article makes clear). It is questionable whether the injury suffered by Canada in this case was tantamount to the level of subsidy paid by Brazil. The arbitrators did not consider arguments advanced by Brazil to the effect that for technical reasons, even in the absence of export subsidies, many clients would still buy Brazilian planes. Instead, they calculated the level of countermeasures using the export subsidy paid as benchmark.¹⁴⁵

Actually given that export subsidies usually operate with a multiplying effect (a given amount allows a company to make a number of sales, thus gaining a foothold in a given market with the possibility to expand and gain market shares), we are of the view that a calculation based on the level of nullification or impairment would, as suggested by the calculation of Canada based on the harm caused to its industry, produce higher figures than one based exclusively on the amount of the subsidy. *On the other hand, if the actual level of nullification or impairment is substantially lower than the subsidy, a countermeasure based on the level of nullification or impairment will have less or no inducement effect and the subsidizing country may not withdraw the measure at issue* (para. 3.54, emphasis added).

...

for the reasons set out above, we conclude that, when dealing with a prohibited export subsidy, an amount of countermeasures which corresponds to the total amount of the subsidy is appropriate (para. 3.360).

In the absence of market analysis, it is simply impossible to understand whether the arbitrators’ recommendation amounts to punitive damages. The emphasized passage above, though, holds for the proposition that the appropriate remedy in the case of export subsidies is that which will persuade violators to abandon their illegal practices and not that which will simply remove the damage suffered by injured parties.

This is a first in WTO law. The arbitrators implicitly understand the remedy in the case of export subsidies (in the case of prohibited subsidies, since they insist on the illegality of the activity at hand) as an exception to Article 22.4 DSU, which calls for countermeasures equivalent to the damage suffered. Article 22.4 DSU leaves no doubt that punitive damages are simply not an option in WTO law. Now, what justifies this difference? Probably, the fact that in the case of prohibited subsidies, it is the legislator who pronounces the illegality; in all other cases, it is the adjudicating body. The arbitrators effectively distinguished between *legislative* and *judicial prohibition*. Follow-

¹⁴⁵ See *Brazil–Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WTO Doc. WT/DS46/ARB of 26 August 2000.

ing this distinction, they admitted that in the former case (exceptionally) punitive damages are not an impossibility.¹⁴⁶

In the case under review, there was no injured third party.¹⁴⁷ But suppose there had been. What would be the amount that a potential injured third party could countervail in the event of a successful complaint? The arbitrators did not reflect upon this issue at all. It would be quite odd, in such a case, to go back to Canada and request that it countervails less so that it leaves some room for the EC to countervail as well. Unless one accepts the emphasized passage above as reflecting the arbitrators' conviction to allow for punitive damages in this context, the EC (potentially successful complainant) would be left without the possibility to countervail.

¹⁴⁶ This decision is to some extent in line with Becker's (1968) explanation that if the sanction is not maximal, enforcement costs can be saved by raising the sanction and reducing enforcement effort. On this issue see also Kaplow and Shavell, 'Accuracy in the Determination of Liability', 37 *Journal of Law and Economics* (1994) 1.

¹⁴⁷ This point emerged from discussion with Tom Snels who first made the point to me *quid* in case of a subsequent successful complaint against Brazil.