

# The Evolution of GATT/WTO Dispute Settlement

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## Introduction

Despite debuting to little fanfare under the General Agreement on Tariffs and Trade (GATT), dispute settlement under the World Trade Organization (WTO) has been called the “backbone of the multilateral trading system.”<sup>1</sup> Indeed, whereas GATT dispute settlement could scarcely have seemed more flawed,<sup>2</sup> the WTO’s Dispute Settlement Understanding (DSU) is widely touted for boosting confidence in an increasingly rules-based global economy.<sup>3</sup> Why such starkly different views of GATT and WTO dispute settlement? The conventional wisdom is that the GATT’s diplomatic norms have been supplanted by the WTO’s more legalistic architecture,<sup>4</sup> resulting in a system in which “*right* perseveres over *might*.”<sup>5</sup> Perhaps unsurprisingly, many observers insist that a wider variety of Members—and *developing* countries, in particular—are achieving more favourable results in dispute settlement due to the reforms introduced with the DSU and the WTO’s greater clarity of law.

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<sup>1</sup> Moore 2000.

<sup>2</sup> Castel 1989; Young 1995; Pescatore 1997.

<sup>3</sup> Petersmann 1997; Steger and Hainsworth 1998; Horn and Mavroidis 2001.

<sup>4</sup> See Jackson 1978; 1998.

<sup>5</sup> Lacarte-Muro and Gappah 2000, 401.

Is this account borne out by the data? And does the empirical record offer clues as to the likely efficacy of further refinements of the DSU?

This chapter takes up these questions, offering statistical evidence on patterns of dispute settlement under the GATT and WTO regimes. The results help disentangle two related hypotheses in the literature. The first hypothesis is that the WTO has had greater *success* than the GATT in inducing favourable policy outcomes in dispute settlement. At first glance, the data would appear to confirm this hypothesis: roughly three-fifths of disputes filed under the GATT resulted in at least partial concessions<sup>6</sup>, a percentage that increases to four-fifths under the WTO. But there are two important caveats to add here, one being that, unlike their richer counterparts, poorer complainants have not clearly received greater concessions from defendants in the WTO era, the other being that the WTO has fared no better than the GATT in resolving disputes between the US and European Communities (EC). Still, the bigger picture is that the WTO *has* improved on the GATT's surprisingly strong performance for an important category of cases, raising the question: Why?

The second hypothesis speaks to this question, attributing the WTO's successes to the DSU's legal reforms. In contrast to the GATT's diplomatic norms, which were criticized for lacking the "teeth" necessary to induce compliance, the DSU has been described as perhaps being "the most developed dispute settlement system in any existing treaty regime."<sup>7</sup> In particular, the DSU fills in where the GATT seemed to fall so terribly short, notably by formalizing a complainant's right to a panel, providing for the automatic adoption of panel reports (save by "negative consensus"), affording appellate review, and establishing a mechanism with unified jurisdiction over all disputes arising under the covered agreements. Many observers sub-

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<sup>6</sup> By concessions we mean measures by the defendant to liberalize its contested trade measure(s), conceding to some or all of the complainant's demands.

<sup>7</sup> Palmetier 2000, 468

scribe to the view that, as a result of these legal reforms, WTO dispute settlement unfolds differently than under GATT. The data tell a different story: *early settlement*, which we define as concessions negotiated in advance of a ruling, yields the most favourable policy outcomes under the WTO, much as it did under the GATT. Dispute settlement provides a forum in which Members bargain in the “shadow of the law;” while WTO adjudication yields less ambiguous and more binding legal decisions, the evidence suggests that the DSU’s reforms *per se* have *not* made early settlement more likely, as compared to the GATT system. In fact, certain aspects of these legal reforms have made early settlement *less* likely in key respects, placing developing countries, in particular, at a disadvantage.

This finding runs counter to conventional wisdom; the risk of pro-plaintiff rulings by panels and the Appellate Body (AB), which carry greater weight under the WTO, would be expected to induce *more* early settlement, yet this is not happening. Together with evidence on the lack of compliance with rulings more generally, this finding casts doubt on the hypothesis that the DSU’s legal reforms *per se* deserve credit for the WTO’s successes. Rather, the WTO’s improved record appears to owe more to the expanded scope of “actionable” cases under new agreements, and the propensity for wealthy complainants to prevail over developing countries, the latter being more likely to be defendants in WTO than GATT cases. These results warrant careful consideration in weighing proposals for dispute settlement reform in the Doha Development Agenda.

This chapter proceeds in five sections. Section II explains the logic of early settlement. Section III provides an overview of GATT dispute settlement, looking at the impact of legal reform on patterns of early settlement. Section IV turns to the DSU, paying special attention to the experience of developing countries and the transatlantic relationship. Section V takes up several of the more salient reforms proposed for dispute settlement under the Doha Development Agenda in light of these findings. Section VI concludes.

## Explaining Early Settlement

What explains early settlement in the shadow of “weak” law? In domestic litigation, the expectation is that plaintiffs withdraw cases lacking merit, and defendants plead meritorious cases. But this happens in the shadow of “strong” law, backed by credible enforcement. Under the GATT, which was long derided as a “court with no bailiff,”<sup>8</sup> rulings could hardly have been argued to carry much legal weight, assuming these rulings were adopted in the first place. Even under the WTO regime, where defendants are more likely to face binding rulings, compliance remains a question mark, given the difficulty of following through on authorization to retaliate, assuming the complainant even asks for such authorization.<sup>9</sup> What, then, explains early settlement in GATT/WTO disputes?

It has been shown that the answer is rooted in the way *uncertainty* about the disputants’ resolve enters into the bargaining process.<sup>10</sup> Consider, for example, a complainant that can file for dispute settlement or resort to unilateral retaliation with a domestic trade measure (e.g., Section 301), which may carry its own domestic political costs. The defendant, meanwhile, must weigh various considerations: the economic damage from potential retaliation; the desire to avoid the normative condemnation elicited by overtly breaking the trade rules; possible strategic concerns about setting a precedent which could, in turn, spark a wave of future non-compliance by others; or narrower tactical considerations (e.g., a defendant’s executive branch, or other liberalizing domestic groups, may be better able to overcome domestic protectionist opposition by “tying hands” with a ruling<sup>11</sup>). There is accordingly inherent uncertainty both as regards the complainant’s will to follow through on costly retaliation and as regards the defendant’s will to bear

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<sup>8</sup> Rossmiller 1994, 263

<sup>9</sup> Five such requests have been made under the WTO, versus one under the GATT.

<sup>10</sup> Reinhardt 2001.

<sup>11</sup> Reinhardt 2002.

the costs of non-compliance. Both the complainant and defendant seek to exploit this uncertainty concerning their own course of action to their own advantage, leveraging concessions or upholding the status quo, respectively. The complainant's (often low-probability) estimate that the defendant is going to concede in the event of an adverse ruling leads it to set a high bar for the kinds of early settlement offers that it will accept. At the same time, the defendant's desire to avoid normative condemnation, compounded by the desire to forestall potential retaliation, induces the defendant to meet the complainant's (high) demands and thus to offer more generous concessions up front than after a ruling. The increased value of concessions in early settlement is thus a product of the *anticipation* of both normative condemnation<sup>12</sup> and market punishment. The twist here is that the uncertainty about the defendant's preparedness to incur the costs of non-compliance ends once the ruling is issued and the defendant acts, or fails to act. Rulings thus eliminate the uncertainty that serves, *ex ante*, as the basis for the complainant's heightened resolve, and thus the defendant's richer early settlement offer. This *anticipation*, and not the *realization* of a ruling, is thus the system's most effective means of extracting market-liberalizing concessions.

Sometimes settlement talks fail, and the dispute goes to a ruling. This occurs when there is little *ex ante* expectation either that the defendant would prefer to avoid the appearance of overt non-compliance, or that the complainant would be willing to retaliate in any event. In such cases the window for settlement is too small, such that the parties escalate the dispute fully. A ruling against the defendant, then, is most likely when an adverse ruling is *least* likely to affect the defendant's behaviour.

Our perspective on the dynamics of GATT/WTO dispute settlement provides a wide range of testable insights. Most important in this regard, concessions are more likely in advance of a ruling. This is not to say that the direction of a ruling is in-

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<sup>12</sup> As Hudec explained it, "the basic force of the procedure [comes] from the normative force of the decisions themselves and from community pressure to observe them." Hudec 1987, 214.

consequential, for in fact these verdicts do matter to the extent that non-compliance, given the system's norms, can be costly. Still, there is likely to be a nontrivial level of *non*-compliance with adverse rulings; such instances would occur disproportionately where defendants care less about these costs. More generally, market power, or asymmetric dependence, should be only a partial predictor of the defendant's level of concessions, for all the reasons outlined above.

These predictions offer a window on the efficacy of likely reforms of the DSU. Most noteworthy, in this regard, is that, because retaliation depends on the resolve of the complainant, *not* the regime's official authorization, reforms such as those which eased approval for the suspension of concessions should have little impact on dispute outcomes. Similarly, because the regime's normative power lies in the interpretations of its rulings, not in their official legal force once adopted, reforms such as those which removed the defendant's ability to veto adoption should also have little effect. On the other hand, reforms that clarify the WTO's legal provisions should make panel decisions more predictable and GATT/WTO jurisprudence more coherent; this should *improve* the likelihood of realizing trade liberalizing. That said, reforms are unlikely to yield benefits to developing countries lacking the expertise required to navigate the complexities of the legal regime, especially if they favour recourse to litigation rather than to diplomacy and thus reduce the likelihood of early settlement, the stage of the process where concessions are most likely. In the sections below we discuss the empirical research to date on all of these separate implications of our model.

Before moving on, however, it is important to consider an objection to this entire line of reasoning: namely, that the "real action" may be unfolding long before a complainant brings a case to Geneva. This is the concern over *selection bias*: i.e., the possibility that unobserved factors distinguish those cases filed for dispute settlement from those dealt with through shuttle diplomacy, regional dispute settlement, or at other fora. If this were true, then inferences drawn from studies of dispute settle-

ment might be “biased” by the way these unobserved factors lead some cases to be litigated in Geneva, and not others.

The most immediate problem, of course, is that data on “non-cases” are not available for the full GATT/WTO membership over time. There are, however, ways for future work to test for likely sources of selection bias. For example, in the case of sanitary and phytosanitary (SPS) measures, attention is being paid to the issues brought to the dispute settlement mechanism of the International Plant Protection Convention (which has dealt with a single case to date), and to the issues addressed at meetings of the WTO’s SPS Committee and the Codex Alimentarius. These issues represent important leads, each with a paper trail, which hold promise as a way of distinguishing the types of cases that go to Geneva from those that do not, setting the stage for “selection effects” models. This research might look, for example, at whether questions debated at length under the Codex, or commented upon by a number of countries, are more likely to be filed for WTO dispute settlement. Along these lines, a recent study of US antidumping petitions finds that the determinations rendered by domestic agencies are strongly conditioned by the *threat* of foreign retaliation at the GATT/WTO, affording another angle on this question.<sup>13</sup> In the analyses below, selection effects models were estimated across stages *within* the life of filed disputes and were found wanting.

While it is obviously important to track down these “dogs that don’t bark,” the dogs that do bark also merit attention. In an important respect, dispute settlement is not an end *per se*, but a point of departure for key legal and political economy dynamics. Under the WTO, in particular, the question of “sequencing” with respect to the DSU Articles 21 & 22, the decision to follow through on authorization to retaliate, the process by which compliance is adjudicated after retaliation is authorized, and the political economy of designing and implementing new measures to replace old ones struck down, beg a closer look at dispute settlement as the starting point for interesting questions, rather than simply as the culmination of interesting questions.

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<sup>13</sup> Blonigen and Bown 2001.

## GATT Dispute Settlement

First codified in an annex to the *1979 Understanding on Dispute Settlement*, the process by which GATT adjudicated trade conflicts shares much in common with the system set out by the DSU. Then, as now, a case would first manifest itself in a request for consultations. If a mutually satisfactory solution to the dispute were not struck in consultations, a complainant would then request a panel proceeding. Of course, the wrinkle in this story is that, under the GATT, a defendant could *block* the complainant's request for a panel, a possibility long regarded as one of system's most glaring birth defects. Interestingly, few defendants blocked requests for a panel.<sup>14</sup> Rather, they more frequently blocked the *adoption* of panel reports, taking advantage of GATT's other notorious shortcoming. For example, in both GATT-era *Bananas* disputes, the European Communities (EC) blocked the adoption of panel reports, revealing the challenge of winning a ruling against a recalcitrant defendant. Given the prospect of being denied a panel proceeding, let alone a favourable panel report, one could be forgiven for wondering why complainants would ever have made use of GATT dispute settlement, never mind that they did so quite often, and often quite successfully.

The *1989 Dispute Settlement Procedures Improvements* closed the first of these loopholes, giving complainants the right to a GATT panel. Although the threat of non-adoption still loomed large, defendants could no longer block, or significantly delay, a panel request. In the GATT-era *Bananas* cases, for example, the EC conceded that the *Improvements* had removed the tactic of delay, and urged that the panel not proceed too quickly in hearing this complicated case.<sup>15</sup> In this sense, the *Improvements* gave complainants a way to escape the "power politics"

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<sup>14</sup> Van Bael 1988, 68; Vermulst 1995, 134; Vermulst and Driessen 1995, 135. That said, some of the GATT-era cases were pre-emptive blocked, *EC—Hormones* being among the more salient examples. See Busch and Reinhardt 2003a.

<sup>15</sup> GATT document C/M/264.

of the consultation stage. Perhaps not surprisingly, the *Improvements* were thus argued to have revitalized dispute settlement<sup>16</sup>, given GATT “teeth,”<sup>17</sup> and encouraged the paneling of disputes more generally.<sup>18</sup>

The data tell a different story. Looking at Table 1, the *Improvements* did not lead to a greater propensity to panel disputes. Overall, panels were requested in less than half of all GATT cases. In fact, rates of paneling before and after the *Improvements* were 43 percent and 45 percent, respectively, a statistically insignificant difference.

**Table 1. Patterns of GATT/WTO Dispute Escalation**

| Disputes Initiated ...  |               |               |               |               |
|-------------------------|---------------|---------------|---------------|---------------|
| Stage of Escalation     | 1948-<br>2000 | 1948-<br>1988 | 1989-<br>1994 | 1995-<br>2000 |
| Initiated               | 659           | 310           | 122           | 227           |
| ...of which             |               |               |               |               |
| Panel established       | 305           | 133           | 55            | 117           |
| ...of which             | (46.3%)       | (42.9%)       | (45.1%)       | (51.5%)       |
| Panel ruling issued     | 230           | 105           | 45            | 80            |
| ...of which             | (34.9%)       | (33.9%)       | (36.9%)       | (35.2%)       |
| Appellate ruling issued | —             | —             | —             | 60<br>(26.4%) |

Note: Since adjudication in the first years of the GATT relied less on formal panels than on other bodies (e.g., working parties or the entire Council) to issue judgments, the term “panel” above includes those alternative authorities as well. The figures in parentheses reflect the row’s percent of the total cases initiated in that period (column). Cases filed after December 31<sup>st</sup>, 2000 are not included.

Of course, it could be that the *Improvements* induced more early settlement, not more paneling. Here, the logic would be that the right to a panel motivated defendants to plead meritorious cases in consultations. However, recent empirical work

<sup>16</sup> Castel 1989.

<sup>17</sup> Montana i Mora 1993; Young 1995.

<sup>18</sup> Pescatore 1993, 29

suggests that neither the *Improvements* nor the *Understanding* helped sponsor more early settlement.<sup>19</sup>

Which pairs of disputants were most likely to settle early under the GATT? Interestingly, pairs of highly democratic states (measured on a 20-point scale) were especially likely to negotiate up front. Consider three hypothetical cases: US-Canada, India-Canada and Brazil-Canada, which, respectively, obtain the maximum, the 25<sup>th</sup> percentile and 10<sup>th</sup> percentile “joint democracy” score in a sample of all GATT cases. Controlling for other attributes of these cases, the US-Canada case would have been only 3 percent more likely to settle in consultations than the India-Canada case, but fully 21 percent more likely to settle early than the Brazil-Canada case. This is especially noteworthy in light of the finding that the US and Canada would have been *no* more likely to make concessions at the *panel* stage than other pairs of disputants.

Further empirical work shows this relationship occurs in WTO disputes as well. This suggests that pairs of highly democratic countries benefit from having more latitude to negotiate in consultations before the case gains visibility at the panel stage, where both international and domestic “audience costs,”<sup>20</sup> and thus electoral concerns, are likely to weigh heavily on these governments. True, an adverse ruling is likely to inspire greater concessions from a defendant than is a ruling upholding the status quo (see Table 2),<sup>21</sup> but the point is that the *overall* level of concessions after a ruling is expected to be lower than in cases ending prior to a ruling, just as the evidence presented earlier indicates.

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<sup>19</sup> Busch 2000.

<sup>20</sup> Fearon 1997.

<sup>21</sup> The one GATT-era case in which the defendant conceded despite a ruling fully in its favor was the US vs. Netherlands dispute, Action under Article XXIII:2. This case, an early GATT-era equivalent of a WTO 22.6 panel, concluded that the proposed Dutch retaliatory quantitative restriction on US wheat flour (57,000 metric tons) was the appropriate level. The Netherlands formally kept the quota on the books for 7 years but declined throughout to enforce it, allowing uncapped imports from the US in practice (Hudec 1993, 430).

The data also permit a closer look at *compliance* with rulings. With respect to the GATT era, many observers are of the view that non-compliance was relatively uncommon.<sup>22</sup> The data suggest otherwise. In just two-fifths of cases ending with a pro-plaintiff ruling did the defendant fully liberalize, while in another third of these cases the defendant failed to comply at all, opting to spurn these verdicts (including through non-adoption). The point is *not* that the institution was ineffective, but rather that, as above, whatever positive effect it had on a defendant's willingness to liberalize tended to occur before a ruling in the form of early settlement. Put most simply, the institution's effectiveness cannot be gauged by looking at compliance alone.

The key question, of course, is how *outcomes* of disputes vary across these different stages of dispute settlement. Following Robert Hudec,<sup>23</sup> outcomes are defined here as the policy result of a dispute, rather than the direction of a ruling *per se*. In other words, the issue is whether the defendant liberalized its contested trade measure(s), conceding to some or all of the complainant's demands, and not whether the ruling (if one was issued) favoured either the complainant or defendant (or was mixed). Using this benchmark, which has meaning at every stage of dispute settlement from consultations to a panel, Hudec codes the outcome of each dispute into one of three categories, depending on whether challenged practices were fully or partly liberalized, or the status quo prevailed. Data on outcomes for all GATT disputes are presented in Table 2.

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<sup>22</sup> Jackson 1989, 101; Chayes and Chayes 1993, 187-8; Davey 1993, 72; Hudec 1993, 278-9; Petersmann 1994, 1192-5. In contrast to Hudec (1993), for example, we include post-1989 disputes, in which he, too, observed a high level of non-compliance.

<sup>23</sup> Hudec 1993.

**Table 2. The Pattern of Dispute Outcomes, 1948-1994**

| Final Disposition of Case    | Level of Concessions |         |      | Total |
|------------------------------|----------------------|---------|------|-------|
|                              | None                 | Partial | Full |       |
| Panel not established        | 67                   | 53      | 54   | 174   |
| Panel established, no ruling | 7                    | 5       | 23   | 35    |
| Ruling for complainant       | 23                   | 29      | 49   | 101   |
| Mixed ruling                 | 6                    | 8       | 6    | 20    |
| Ruling for defendant         | 24                   | 0       | 1    | 25    |
| Total                        | 127                  | 95      | 133  | 355   |

Note: As in Table 1, since adjudication in the first years of the GATT relied less on formal panels than on other bodies (e.g., working parties or the entire Council) to issue judgments, the term “panel” above includes those alternative authorities as well. “Ruling” above refers to the issuance of reports and not their formal adoption by the Contracting Parties.

The data reveals that defendants offered full or partial concessions in two-thirds of all disputes brought to the GATT. Interestingly, the likelihood of a plaintiff obtaining concessions was actually greater before (65 percent) than after (63 percent) a ruling. Overall, the system was very efficacious, despite its legendary shortcomings. That said, in those cases that went the legal distance, 83 percent of the rulings handed down favoured the plaintiff, and yet concessions were offered in only 63 percent, pointing to the system’s weakness at the compliance stage. More telling still, of all the concessions made, 59 percent were the product of early settlement, emphasizing the relative importance of this stage in the GATT process. Indeed, defendants were especially likely to offer concessions *after* a panel had been established, but *before* it had ruled, regardless of which way the verdict went.

### **WTO Dispute Settlement**

Against the backdrop of the GATT, the DSU is viewed as a significant step forward in institutional design.<sup>24</sup> Indeed, the DSU has been heralded as “perhaps the most significant achievement

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<sup>24</sup> See Petersmann 1997; Steger and Hainsworth 1998; Horn and Mavroidis 2001.

of the Uruguay Round negotiations, *establishing what may be the most developed dispute settlement system in any existing treaty regime.*<sup>25</sup> By all accounts, it would be difficult to argue otherwise. After all, the DSU's much stricter timelines, the right to a panel (carried over from the *Improvements*), automatic adoption of reports (absent negative consensus), and review by a permanently-constituted Appellate Body (AB), to name the more salient provisions of the DSU, appear to correct many of the GATT's most obvious design flaws.

First, speedier procedures with strict time limits are thought to boost confidence in the DSU, delivering "justice" more promptly, and beating various unilateral measures to the punch; notably US Section 301, which worked on a notoriously faster clock than the GATT system. Second, the right to a panel removes the threat of blocking (save for one meeting of the Dispute Settlement Body), a tactic long regarded as the *sine qua non* of GATT-era power politics. Third, standard terms of reference, and the automatic adoption of panel reports, lend greater legal coherence to the system as a whole, and obviate the threat of a unilateral "veto" by a recalcitrant defendant.<sup>26</sup> Fourth, the potential for review by the AB promises more consistency across rulings and a better-informed body of case law with which to reason through the merits of a dispute *ex ante*.<sup>27</sup> Together, these reforms are widely expected to promote greater liberalization on the part of errant defendants in a timely manner.

Unfortunately, the DSU's legal reforms may also *raise* the transaction costs inherent in settling disputes by affording new opportunities for delay, increasing incentives for foot-dragging in litigation, and motivating defendants to delay concessions.<sup>28</sup> Granted, each separate stage of the process now operates according to a tighter timeline, but this is overwhelmed by the

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<sup>25</sup> Palmetier 2000, 468. Emphasis added.

<sup>26</sup> Palmetier and Mavroidis 1998.

<sup>27</sup> Howse 2000.

<sup>28</sup> Shoyer 1998; Reinhardt 2002.

new possibility—indeed, the *inevitability*<sup>29</sup>—of successive rounds of litigation in the same dispute, culminating in up to a 15-month grace period for implementation,<sup>30</sup> the possibility of an Article 21.5 “compliance” panel review (and possibly appeal thereof), and additional litigation under an Article 22.6 panel tasked with arbitrating the amount and form of retaliation. Put simply, a determined defendant can wring three years of delays from the system before facing definitive legal condemnation, more than enough time for “temporary” measures—like the 2002 US steel safeguards—to impair competition without possibility for *retroactive* compensation.<sup>31</sup> Further, the added stages of litigation, tight enforcement of terms of reference, the legal disincentives for disclosure, and the rules on standing, all put the onus on disputants and third parties to legally mobilize as soon as possible in order to avoid losses on technicalities (i.e., having the panel or AB deem a certain argument outside its terms of reference) later on.

At the outset of a dispute, the concern for post-ruling delays, in particular, has the effect of undermining early settlement.<sup>32</sup> This is especially true if the rush to litigation draws in third parties or additional disputants, whose involvement has been shown to reduce the prospects for concessions by a defendant.<sup>33</sup> In the wake of a ruling, the DSU’s superiority in eliciting compliance is also vastly overstated in relation to the GATT; the hurdle, in this regard, has never been obtaining legal authorization *per se*,<sup>34</sup> but mustering the political will—and having the

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<sup>29</sup> Of the eleven initial panel reports in the dataset of completed US-EC WTO cases below, only *Section 301* and *US Copyright Act* were not appealed. And in the latter case, no fewer than three separate arbitrations were invoked, under Articles 23.1(c), 25, and 22.6, governing the “reasonable period of time” for implementation, the level of nullification or impairment, and the level of retaliation.

<sup>30</sup> The grace period in *Australia—Salmon* was eight months, but generally it has been much longer.

<sup>31</sup> Mavroidis 2000; Pauwelyn 2000.

<sup>32</sup> Stewart and Burr 1998, 514.

<sup>33</sup> Busch 2000.

<sup>34</sup> Hudec 1999, 9-10; Mavroidis 2000; Valles and McGivern 2000; Reinhardt 2001.

market power—to retaliate. In this sense, as one noted observer puts it, “[t]he ‘legalization’ of disputes under the WTO stops, in effect, roughly where non-compliance starts.”<sup>35</sup> How, then, has the DSU influenced patterns of dispute settlement?

### *Developing countries*

A glance at the data on concessions between 1980 and 2000 reveals the WTO boasts a more favourable track record than the “mature” GATT period: overall, defendants have liberalized disputed policies more fully since the DSU came on line.<sup>36</sup> The data further reveals, however, that developing-country complainants have not benefited as much under the WTO as wealthier complainants. On the one hand, *developing*-country complainants gained full liberalization from defendants 36 percent of the time under the GATT, a figure that has risen to 50 percent under the WTO. On the other hand, this is far surpassed by the gains achieved by *developed*-country complainants, which secured full liberalization from defendants 40 percent of the time under the GATT, but 74 percent of the time under the WTO. Why are developing countries falling short? The answer is that these countries are failing to induce defendants to settle early, *not* that they disproportionately receive unfavourable verdicts, or that they lack the market power necessary to (credibly) retaliate.

Recent empirical work estimates the probability of full concessions by a defendant, looking at the influence of the WTO (versus the GATT) and the complainant’s level of development (i.e., per capita income). The complainant’s absolute market size (overall GDP) as well as the income and GDP of the defendant are controlled for, as is the question of whether a panel was formed, the direction of any ruling, whether the case had multiple disputants or third parties, whether the case centered on an agricultural policy, strictly discriminated against the complain-

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<sup>35</sup> Pauwelyn 2000, 338.

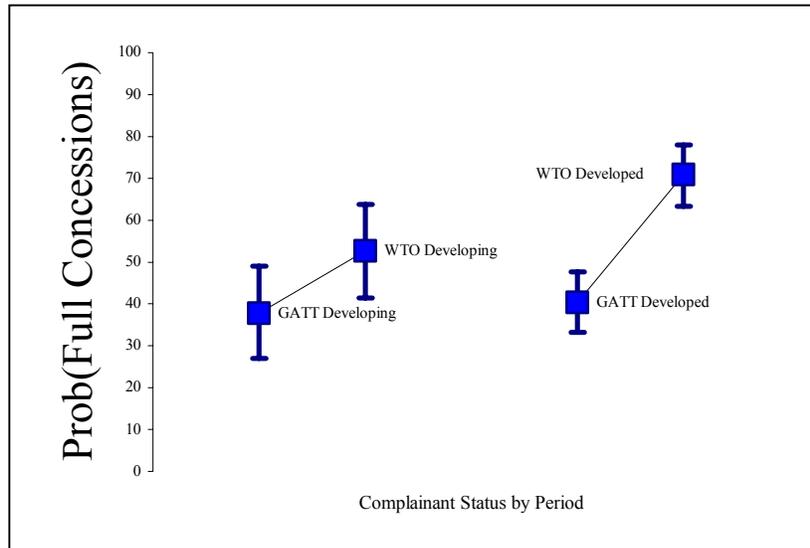
<sup>36</sup> Busch and Reinhardt 2003b.

ant, or was politically “sensitive” (i.e., a health and safety standard).

To identify the effect of the complainant’s level of development as conditioned by the WTO, this interaction term was also included. Importantly, the interaction term is positive and statistically significant, meaning that the WTO has *increased* the gap between developed- and developing-country complainants with respect to their ability to get defendants to offer concessions. In short, rich complainants have become significantly more likely to secure their desired outcomes under the WTO; for poorer complainants the situation is less clear.

Figure 2 graphically depicts this. Holding all other variables at their sample means, the predicted probability of a poorer complainant (with a 10<sup>th</sup> percentile GDP per capita value of about \$2,150) securing full concessions from a defendant was between 0.27 and 0.49 under the GATT, and is between 0.41 and 0.64 under the WTO. These ranges are 90 percent confidence intervals, so the fact that there is still wide overlap between them (from 0.41 to 0.49) is interesting. The data, so far, hints that developing countries have improved their performance as complainants, but they by no means allow any reasonable degree of certainty about this trend. At the same time, the situation for a wealthier complainant (with the 90<sup>th</sup> percentile GDP per capita value, of \$29,250) has unambiguously improved under the WTO. The predicted probability of full concessions for a country fitting this description was between 0.33 and 0.48 under GATT—which is on par with an equally-sized, poorer complainant—but has risen to between 0.63 and 0.78 under the WTO. Interestingly, this finding does *not* hold for US-EC disputes, which in fact have been *no more likely* to end favourably under the WTO (see below). The point to keep in mind is that these results regarding developing countries are not an artefact of the exceptional prominence of the US and EC as complainants.

**Figure 2. Probability of Full Concessions by Complainant Status and Period**



NOTE: Displays predicted probabilities from Model 1, holding all other variables at their sample means, moving *WTO* from 0 to 1 and *Complainant's Per Capita Income* from its 10<sup>th</sup> percentile value (\$2,152) to its 90<sup>th</sup> (\$29,251), with 90 percent confidence intervals.

The data tell the same story when the analysis is limited to WTO disputes. Once again, holding all other variables at their sample means, and varying the complainant's per capita GDP from its 10<sup>th</sup> to 90<sup>th</sup> percentile values, the predicted probability of the defendant offering full concessions more than doubles, shifting from 0.22 to 0.47. Consider the case of India and Australia, two countries with virtually identical GDPs in 2000 (467 vs. 457 billion 1995 US\$<sup>37</sup>) but very different per capita income levels of \$459 and \$23,837, respectively. The model predicts that India would have a 41 percent chance of getting the average defendant to concede, while Australia's comparable figure is a striking 73 percent.<sup>38</sup> As above, this model controls for the

<sup>37</sup> World Bank, World Development Indicators, 2002.

<sup>38</sup> Indeed, in Busch and Reinhardt's (2003b) sample, Australia induces defendants to concede in 3 of 3 WTO complaints, while India secures only

complainant's GDP, characteristics of the defendant, panel formation and rulings, and observable attributes of the dispute.

If there is a new gap, what accounts for it? Put differently, at what point in the escalation of a case does the complainant's level of development hamper its chances for obtaining full liberalization from a defendant?

To find out, consider the probability of early settlement in the 154 WTO disputes concluded to date. Again, the main variable of interest is the complainant's per capita income, controlling for its absolute market size and other attributes of the dispute. Here, too, this variable is positively signed and statistically significant; rich complainants are more likely to get defendants to settle early than are poorer complainants, holding GDP constant. This suggests that developing-country complainants disproportionately fail to negotiate concessions in advance of a panel ruling.

Could it be, instead, that these countries are disproportionately losing verdicts? The answer is no. Looking just at those WTO cases in which rulings are issued, and estimating the direction of a ruling with the same covariates outlined above, the complainant's income (and market size) has no effect on its prospects of winning a judgment, where one is issued. In other words, the gap in securing full concessions from a defendant is *not* a function of poor legal acumen once litigation is underway. Rather, the problem is that developing-country complainants are losing out in pre-litigation negotiations.

Finally, could the gap, instead, be a result of developing countries' failure to secure compliance by defendants against whom adverse rulings have been issued? After all, given their market size, would it not seem reasonable to suspect that these complainants' retaliatory threat is insufficiently credible? Here, too, the answer appears to be no. Looking just at the 41 cases in which a WTO ruling went fully against the defendant, the complainant's income has no effect. A rich complainant, in other words, has no discernable advantage over a poorer, but equally-

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partial liberalization in 3 of its 6 complaints, with no concessions whatsoever in a fourth.

sized, developing-country in eliciting compliance from a defendant that is found in violation of its WTO obligations.

Hence the picture that emerges is that poor complainants tend to have less well-prepared cases up front, losing out on the opportunity to use the “shadow of the law” effectively against defendants. With their larger share of weakly-briefed cases selected out, poor complainants fare no worse in those cases that end with further litigation. This problem has become particularly acute under the WTO, which has put a greater premium on legal argumentation in the early life of disputes.

### *The transatlantic relationship*

The importance of early settlement is no less evident in US-EC disputes. If Washington and Brussels fail to resolve their trade tensions prior to a panel ruling, the likelihood of concessions drops precipitously.<sup>39</sup> Indeed, concessions offered in the transatlantic relationship are typically had in advance of a ruling, or not at all. Most compelling in this regard is that, no matter how the panel rules, a verdict *reduces* the prospects for concessions, even under the WTO. In other words, the data suggest that the prospect of resolving a dispute falls when these two countries do not settle early. This supports the thrust of former WTO Director-General Renato Ruggiero’s observation that, while “[t]he WTO dispute settlement system is in some ways the first international economic court ... it is still preferable for the Member countries involved to discuss their problems and try to resolve them ... before actually resorting to a panel.”<sup>40</sup>

A quick tabulation of US-EC concessions under the GATT and WTO reveals greater concessions under the latter institution. Part of the challenge in making this assessment is that the WTO has extended its reach into intellectual property (IP) and traded services through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the General

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<sup>39</sup> Busch and Reinhardt 2003a.

<sup>40</sup> Director General Ruggiero’s 1998 speech at the University of Trieste [http://www.wto.org/english/news\\_e/sprr\\_e/triest\\_e.htm](http://www.wto.org/english/news_e/sprr_e/triest_e.htm)

Agreement on Trade in Services (GATS), respectively. As a result, more disputes are actionable under the DSU. This is not to say that disputes in IP and traded services eluded the GATT, for in fact GATT handled a small, but highly contentious, set of cases touching on these areas, with little effect on the status quo.<sup>41</sup> For its part, the WTO has adjudicated nine US-EC disputes in IP and traded services, as listed in Table 3.

**Table 3. US-EC IP and Services Disputes under the WTO**

| DS       | Start       | Compl. / Def. | Title  | End   | Level of Concessions |
|----------|-------------|---------------|--|-------|----------------------|
| 37       | 30-Apr-1996 | US vs. PT     | Patent Protection Under the Industrial Property Act                    | 1996  | Full                 |
| 80       | 2-May-1997  | US vs. BE     | Measures Affecting Commercial Telephone Directory Services             | 1998  | Full                 |
| 83       | 14-May-1997 | US vs. DK     | Measures Affecting the Enforcement of IP Rights                        | 2001  | Full                 |
| 86       | 28-May-1997 | US vs. SE     | Measures Affecting the Enforcement of IP Rights                        | 1998  | Full                 |
| 82, 115  | 14-May-1997 | US vs. EC, IE | Measures Affecting the Grant of Copyright and of Neighbouring Rights   | 1998  | Full                 |
| 124, 125 | 30-Apr-1998 | US vs. EC, GR | Enforcement of IP Rights For Motion Pictures and Television Programs   | 2001  | Full                 |
| 160      | 26-Jan-1999 | EC vs. US     | Section 110(5) of the US Copyright Act ("Irish Music")                 | 2002* | Partial*             |
| 174      | 1-Jun-1999  | US vs. EC     | Protection of Trademarks and Geographical Indications for Ag. Products | 2002* | Partial*             |
| 176      | 8-Jul-1999  | EC vs. US     | Section 211 Omnibus Appropriations Act ("Havana Club")                 | 2002* | Full*                |

\* denotes cases with apparent but still tentative policy outcomes.

<sup>41</sup> Neither did the US or EC budge as defendants in IP/services complaints brought by third parties under the GATT, e.g., Austria v. Germany *Truck Traffic Restrictions* (1990) and Canada v. US *Spring Assemblies* (1981).

A closer look at these IP and traded services disputes is revealing. In particular, five of these nine cases are US complaints designed to speed up passage of domestic legislation, designed to implement TRIPs obligations by individual EC member states (Portugal, Denmark, Sweden, Ireland, and Greece). It can thus be argued that these cases were much less acrimonious than most, given that the TRIPs commitments were already manifest in (proposed) domestic legislation. Indeed, not one of these disputes was paneled, the upshot being that, as Table 3 indicates, all ended in full concessions. In the other four IP and traded services disputes, the defendant conceded partially or fully, mostly before a panel ruling.

This is not to say that IP and traded services disputes are easily resolved. On the contrary, IP disputes are viewed as among the most technical and difficult, requiring a considerable outlay of resources on the part of the disputants (and the WTO). The point is that the TRIPs and GATS have induced, probably on a one-time basis, a special set of disputes distinguished by their direct relationship to these new commitments, and were thus ready-made for fuller concessions. In short, better dispute settlement procedures *per se* did not force the defendant's hand in these cases.

If the WTO's expanded scope is controlled for, does it still perform better than the GATT in settling US-EC disputes? Recent empirical work estimating the level of concessions offered by the defendant in the 85 GATT/WTO transatlantic disputes suggests not. The models include a variable reflecting whether the case was brought under the GATT or WTO procedures, involved WTO-era IP or traded services issues, whether a panel was established, the direction of a ruling (if one was rendered), whether the US was the complainant, and whether the dispute concerned agriculture, involved multiple complainants or third parties, a strictly discriminatory measure, and covered sensitive issues like health and safety standards. The results are revealing. While the variable for WTO-era disputes involving IP and traded services is positively signed and statistically significant, the WTO variable itself is not. The model indicates that, holding all other variables at their sample means, a dispute over IP

or traded services is 43 percent more likely to conclude in full concessions by the defendant under the WTO than under the GATT. In contrast, the probability of concessions by defendants, more generally, is *no more likely* than under the GATT.<sup>42</sup> Keep in mind that this result accounts for the differing legal dispositions of each case.

The model produces a number of other interesting quantitative results. Specifically, defendants are 22 percent *less* likely to concede in multilateral as opposed to purely bilateral disputes; 43 percent *less* likely to make concessions in SPS or cultural cases; yet 33 percent *more* likely to concede in cases involving purely discriminatory measures; and 24 percent *more* likely to make concessions in agricultural cases. Most telling, the defendant is far more likely to concede in *advance* of a ruling, rather than after, regardless of the direction of the ruling. Starkly, a ruling for the defendant reduces the probability of full concessions by 63 percent; a mixed ruling by 43 percent; and a ruling for the *complainant* by roughly 25 percent. Clearly, when the US and EC litigate to a verdict, concessions in transatlantic disputes are *less* likely.

One commonly held view in the literature is that the success of early settlement under the GATT is increasingly less evident under the WTO, especially in consultations.<sup>43</sup> While bargaining in the shadow of the law proved efficacious under the GATT's more diplomatic system, the argument is that the DSU's reforms may have made litigation attractive, motivating complainants to push for a definitive verdict. As evidence, many observers point not only to the caseload at the panel stage, but the frequency of appeals to the AB. Moreover, the received wisdom is that consultations are *pro forma* at best.

In fact, the proportion of cases paneled differs little across the GATT/WTO years; the WTO's greater caseload reflects growth in the institution's membership and in the volume of

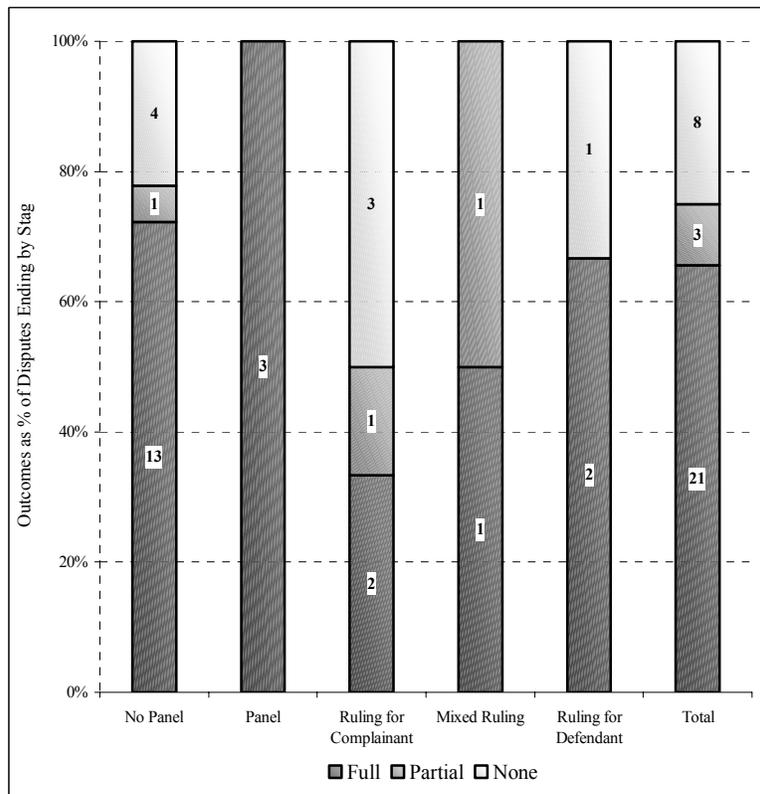
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<sup>42</sup> The coefficient of *WTO Case* in Table 3 is positive but hardly larger than its standard error, so we cannot with statistical confidence reject the very likely possibility the WTO has had no effect whatsoever.

<sup>43</sup> Wethington 2000, 587.

world trade.<sup>44</sup> In terms of the transatlantic relationship, more specifically, early settlement is perhaps more important than ever, a point quite evident in Figure 3, which graphs the level of concessions achieved in WTO disputes ending at various stages of escalation.

**Figure 3. Level of Concessions in US-EC WTO Disputes Ending at Different Stages of Escalation**



NOTE: Darker blue area represents percent of cases ending at the given stage (e.g., prior to panel establishment) in which defendant fully concedes. Numbers in bars denote the actual number of cases in each subcategory; the total is 32. The listed ruling direction is that of the Appellate Body, not the panel, in appealed cases.

<sup>44</sup> Busch and Reinhardt 2000.

The first point to make about US-EC disputes is that this dyad has tended to settle early at the GATT/WTO, with the defendant offering concessions in advance of a ruling 58 percent of the time. In the WTO years, this percentage stands at 66 percent (21 of 32 disputes). The more telling question, of course, is whether early settlement produces positive results. Of this there can be no doubt. The data tell a remarkable story: of the 21 US-EC disputes ending in *full* concessions at the WTO, 16 were resolved in advance of a panel ruling. If we set a lower bar and examine disputes in which *any* concessions were offered, the data favour early settlement by a margin of 17 to 7. In short, it is but a slight exaggeration to argue that favourable outcomes in US-EC disputes depend entirely on early settlement.

The obvious retort to this would be that early settlement is, itself, a reflection of the reforms ushered in by the DSU. In other words, the WTO's stronger law induces more early settlement. Although the logic is intuitively attractive, the data is entirely at odds with it. The key to this hypothesis would necessarily be that strengthened ability to induce compliance *ex post* is inspiring early settlement *ex ante*; yet there is no evidence that compliance is in any way more likely under the WTO than it was under the GATT.

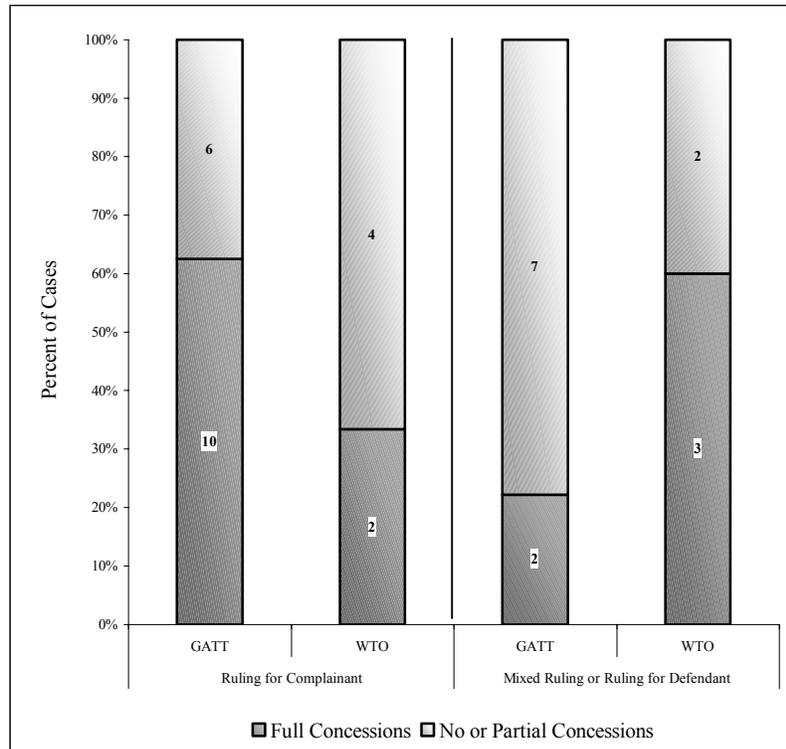
Consider Figure 4, which compares the level of concessions by the defendant in US-EC disputes under the GATT versus the WTO, depending on the direction of the ruling. Under the GATT, a ruling for the complainant resulted in full concessions 63 percent of the time (10 of 16 cases); under the WTO, facing an adverse ruling, the defendant has fully conceded just 33 percent of the time (2 of 6 disputes).<sup>45</sup> Granted, with just 6 WTO rulings unambiguously against the defendant, it is difficult to compare these institutions with statistical confidence, yet at first blush the WTO is thus far inducing *less* compliance with adverse rulings in US-EC disputes. Hence, because compliance remains a significant problem, the WTO's increased legalism is

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<sup>45</sup> *Bananas, Hormones, FSC, and Anti-Dumping Act of 1916* are the four WTO cases with no or partial compliance by this reckoning.

probably not responsible for the institution's continuing dependence on early settlement for most of its *successful* dispute outcomes.

**Figure 4. Level of Concessions by Ruling Direction under GATT and WTO, for US-EC Disputes**



Could the WTO's greater legalism have improved upon the GATT at least in the *easier* transatlantic cases, if not the most difficult ones? If so, the infrequency of compliance does not necessarily mean dispute settlement is less efficacious, since higher-stakes cases may disproportionately go to panels and beyond. The fact that all 7 of the highest-stakes conflicts in Table 4 gave rise to rulings is certainly consistent with this explanation. Nonetheless, this interpretation of the evidence misses the point. First, quite a few transatlantic WTO disputes have ended

with no, or limited, concessions by the defendant *without* being heard by a panel. For example, in *Flight Management Systems* (DS172), the US objected to a one-off \$25 million French subsidy to Sextant Avionique, a supplier of avionics to Airbus, and yet the dispute died on the table. Just because a dispute involves small stakes, or does not continue through the litigation process, does not mean it will end with concessions by the defendant.

**Table 4. High Stakes US-EC WTO Disputes**

| DS         | Start       | Compl. / Def.     | Title   | End   | Level of Concessions |
|------------|-------------|-------------------|---|-------|----------------------|
| 26         | 25-Apr-1996 | US vs. EC         | Measures Affecting Meat and Meat Products ("Hormones")            | 1999  | None                 |
| 27 (16)    | 5-Feb-1996  | US vs. EC         | Import Regime for Bananas   | 2001  | Partial              |
| 62, 67, 68 | 8-Nov-1996  | US vs. EC, UK, IE | Customs Classification of Certain Computer Equipment              | 1998  | Full                 |
| 108        | 18-Nov-1997 | EC vs. US         | Tax Treatment For Foreign Sales Corporations                      | 2002* | None*                |
| 136        | 9-Jun-1998  | EC vs. US         | Anti-Dumping Act of 1916  | 2002* | None*                |
| 152        | 25-Nov-1998 | EC vs. US         | Sections 301-310 of the Trade Act of 1974 ("Section 301")         | 2000  | None                 |
| 165        | 4-Mar-1999  | EC vs. US         | Import Measures on Certain Products from the European Communities | 2001  | Full                 |

\* denotes cases with apparent but still tentative policy outcomes.

Second, if procedural reforms have induced more early settlement in US-EC conflicts because they darken the shadow of the law in anticipation,<sup>46</sup> why does the complainant in this pair sometimes fail to pressure the other side with the threat of a rul-

<sup>46</sup> Jackson 2000, 174.

ing, even in promising cases? The defendant failed to fully concede in *Harbor Maintenance Tax* (DS118) and *Trademarks and Geographical Indications* (DS174), but no panel was requested. Two ongoing disputes stand out in this regard. Of the 14 concluded US-EC WTO cases that went before a panel, the median delay between the request for consultations and the establishment of a panel was just 5 months. But the EC has not made a panel request in *Section 337* (DS186) and *Section 306* (“Carousel Retaliation”, DS200), even 27 and 22 months, respectively, since the complaints were filed. If improved legalism is indeed responsible for early settlement, the EC seems to have missed a golden opportunity to use the threat of a ruling to leverage concessions from the US.

Third, if the most vaunted procedural reform—namely, removing the defendant’s veto of the adoption of a report—has made early settlement more likely (at least in the easier cases), then we would expect much less early settlement of US-EC conflicts under the GATT rules, where defendants could block adoption of reports and panel requests. Yet early settlement was the hallmark of the GATT. Clearly the normative power of a GATT ruling, regardless of its legal adoption, was most important in this regard.<sup>47</sup> Early settlement in the WTO era is probably driven by the same dynamic.

One final, but highly salient, benchmark against which to assess the DSU’s mettle would be to examine those GATT-era transatlantic cases that have been repeated under the WTO. If the DSU is truly an improvement over the GATT system, it might well be expected to induce better outcomes in those disputes that have recurred. Consider the 1972-1984 *Domestic International Sales Corporation (DISC)* and the 1997-2002 *Foreign Sales Corporations (FSC)* complaints by the EC against US tax practices that subsidize exports, along with the accompanying counter-complaints by the US against allegedly similar EC member state subsidies. The GATT-era *DISC* ruling, the adoption of which was blocked for many years, is legendary for

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<sup>47</sup> Hudec 1999.

its “faulty reasoning,”<sup>48</sup> and the dozen years before settlement speak poorly to the GATT’s efficacy as well.<sup>49</sup> The relative rapidity, legal professionalism, and lack of veto of the WTO rulings on the EC’s 1997 successor suit against the law implementing the *DISC* settlement, *FSC*, make the WTO shine in comparison.

But in other ways the WTO record in *FSC* is no better. WTO legalism has allowed the EC to force the issue, so that it now confronts the option to retaliate with a “nuclear weapon”<sup>50</sup> (from \$1-4 billion of sanctions per year), a costly proposition for both disputants. The EC’s recent appeasing statements contrast sharply with those on lower-stakes cases against the US, indicating a recognition that a settlement, even one that provides a fiction of compliance, may be preferred.<sup>51</sup> (In this sense the EC faces the same outlook as Canada in *Export Financing Programme*, DS46.) The WTO panel missed a reasonable opportunity to forge a compromise, one more acceptable to the US Congress, by treating the case as linked to the earlier *DISC* settlement. The *DISC* settlement may have achieved little, but at least it helped defuse a contentious issue that could have had negative effects for the institution. What counts most, of course, is that the WTO dispute has not induced any more change in US policy than did the GATT dispute, despite the clearest legal rulings the institution could produce.

*Hormones*, *Harbor Maintenance*, and *Bananas* offer comparable testimony. The EC blocked a US panel request in the 1987 *Animal Hormones Directive* complaint and, in response, the US blocked the EC’s request for a panel to rule against its subsequent unilateral retaliation.<sup>52</sup> Under the WTO procedures,

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<sup>48</sup> Jackson 1978, 781.

<sup>49</sup> Hudec 1993, 59-100.

<sup>50</sup> The term is US Trade Representative Robert Zoellick’s (*International Trade Reporter*, May 17<sup>th</sup>, 2001, 778).

<sup>51</sup> For instance, an anonymous European Commission official has suggested that compensation rather than strict compliance might be acceptable in the *FSC* case, saying, “[we want] to avoid this issue becoming a major dispute” (*Financial Times*, January 15<sup>th</sup>, 2002).

<sup>52</sup> Hudec 1993, 545, 574-575.

unlike under the GATT, the EC has been unable to block definitive legal condemnation of its policy, but the US has once again retaliated, and the EC ban remains in place, much as before. Similarly, the EC has twice disputed the US policy of taxing shipping to pay for harbour maintenance (constituting an effective import tax), first in 1992 (*Harbour Maintenance Fees*) and again in 1998 (*Harbour Maintenance Tax*, DS118). Neither case was brought before a panel. While the Clinton Administration proposed a change that may have satisfied the EC, the necessary legislation was not passed. The best hope for change in the status quo now lies in US domestic litigation, not in further WTO action. Likewise, in the two GATT complaints against the banana import regimes of the EC and its member states, the EC blocked adoption of two adverse panel reports in 1993 and 1994. The DSB, of course, succeeded in adopting the WTO *Bananas* reports, yet the resulting EC concessions leave much to be desired in their scope and timeliness, and are, in any case, most likely attributable to other factors. Thus, it would be hard to argue that the WTO boasts a more favourable track record in dealing with these recurrent cases.

### **Dispute Settlement Reform**

Under the auspices of the Doha Development Agenda, members have submitted a myriad of proposals for reforming WTO dispute settlement. Most of these proposals focus on dynamics at the panel stage, from constituting a permanent body of panelists<sup>53</sup> to assessing developing countries' legal costs to those developed-country complainants that fail to win their case.<sup>54</sup>

The main policy implication of this chapter is that *proposals should strengthen the prospects for early settlement*. Echoing this, former Director General, Mike Moore, explained that "I am of the view that Members should be afforded every opportunity to settle their disputes through *negotiations* whenever

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<sup>53</sup> TN/DS/W/1.

<sup>54</sup> TN/DS/W/19.

possible.”<sup>55</sup> Moore’s submission aimed at generating interest in DSU Article 5 “good offices, conciliation and mediation,” which several developing countries also emphasize. For example, Paraguay has proposed that recourse to Article 5 be “mandatory” in disputes with developing countries,<sup>56</sup> whereas Jamaica has simply called for “more frequent use” of this long-neglected text.<sup>57</sup> The fact that Article 5 has never been invoked should caution against making its use mandatory, given that disputants appear to be concerned about the signal its invocation sends.

Much the same is true of DSU Article 25 arbitration, which was used twice in the GATT years and once under the WTO, although as an Article 22.6 panel in this latter case (*US—Section 110(5) of the Copyright Act*).<sup>58</sup> Article 25.1 states that “[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.”

In light of the efficacy of consultations, it is somewhat surprising that Article 25 has not held out greater appeal as a cheaper and timelier mechanism. It may be that the rules, which are left to the discretion of the disputants, are too informal; alternatively, the efficacy of these negotiations may be hindered by virtue of the fact that they are an additional step removed from a panel. Disputants may also be concerned about an Article 25 arbitration award setting precedents inconsistent with the body of GATT/WTO jurisprudence,<sup>59</sup> despite the fact

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<sup>55</sup> WT/DSB/25. Emphasis added.

<sup>56</sup> TN/DS/W/16, pg 2.

<sup>57</sup> TN/DS/W/21, pg 1.

<sup>58</sup> WT/DS160/ARB25/1

<sup>59</sup> As referenced in the Article 25 arbitration award in *United States—Section 110(5)* (DS160), the Arbitrators, reflecting upon the issue of its own jurisdiction, noted that the “parties to this dispute only had to *notify* the DSB of their recourse to arbitration. No decision is required from the DSB for a matter to be referred to arbitration under Article 25. In the absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system.”

that recourse to DSU Articles 21 and 22 would remain in reserve (as set out in Article 25.4). Whatever the reason, it is puzzling that Article 25 has generated so little interest, especially in light of the proven efficacy of consultations.

As concerns consultations *per se*, there are a number of recommendations that, in light of the analysis here, would likely do more harm than good. Most notably, in this respect, is Jamaica's recommendation that "there should be a written report from the consultations prepared and submitted to the DSB by the party requesting the consultations."<sup>60</sup> Theory makes clear that disputants will not "deal" if offers made in pre-trial discovery can be introduced as evidence before a judge or jury,<sup>61</sup> and a written record of consultations delivered to the DSB would surely have this effect. In the same vein, the proposal that developed countries be required to submit, in their requests for a panel, a record of how they afforded developing countries "special and differential" treatment runs the same risk.<sup>62</sup> That is, if a developed country is required to *document* its offers in consultations as a way of complying with Article 4.10, fewer (proposed) concessions are likely to be forthcoming at precisely that stage of dispute settlement where poorer countries need them most. More generally, the spate of calls to make consultations more accessible to the public, or bring a panel into the process,<sup>63</sup> are mistaken for the same reason, and should not be entertained simply because "transparency" is very much in vogue.<sup>64</sup>

How, then, can developing countries be assisted to achieve more early settlement in consultations? To help overcome resource constraints, the proposal by the *LDC Group* to hold consultations in the capitals of developing countries, where possible, is a useful start.<sup>65</sup> Building legal capacity is also key; the establishment of the Advisory Centre on WTO Law, for example, is an important step in this direction, as are Article 27.2 and

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<sup>60</sup> TN/DS/W/21, p. 1.

<sup>61</sup> Daughety and Reinganum 1995.

<sup>62</sup> TN/DS/W/19, 3.

<sup>63</sup> Parlin 2000.

<sup>64</sup> See, for example, Davey and Porges 1998, 699.

<sup>65</sup> TN/DS/W/17.

Article 27.3, which make legal expertise and training courses available to developing countries, respectively. The aim is to facilitate an assessment of the merits of a case *ex ante*, and to frame the contours of an acceptable negotiated settlement in advance of litigation. However, the proposal to have developed countries pay the legal bills for developing countries where the latter prevail may backfire,<sup>66</sup> since there would then be incentive to litigate for the purpose of recouping expenses. Instead, greater resources should be available up front, both in terms of access to legal expertise and training.

Beyond this, recommendations for reform at the panel and post-ruling stages of dispute settlement also hold out promise.

One potentially useful recommendation, in this regard, is to do away with interim reports. A hold-over from the GATT years, this “peak behind the curtain” is not only redundant in light of appellate review under the WTO, but counterproductive. Designed to maximize the potential for early settlement, distributing draft panel reports has, by all accounts, been misused by the disputants for political grandstanding, entrenching, rather than softening, their positions. Indeed, “the public often becomes aware of a dispute’s outcome at the interim stage. ... [and] the chances of settlement at this stage, already low to begin with, decrease even further.”<sup>67</sup> In this light, interim reports may well do more harm than good.

To raise the prospects for early settlement, reforms should target post-ruling foot-dragging, in particular. Two recommendations stand out in this regard. First, while the “sequencing” question appears to have been (informally) answered, useful proposals have been made with respect to Article 21*bis*.<sup>68</sup>

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<sup>66</sup> TN/DS/W/19, 2; TN/DS/W/21, 3.

<sup>67</sup> Stewart and Karpel 2000, 640. As former Director General Ruggiero said, “The creation of... mis-impressions by selective leaks is highly undesirable because the mis-impressions are unlikely to be correctable later. Moreover, leaks reduce the likelihood of a mutually agreeable solution, which is the preferred result of the DSU and which is the basic reason for revealing the preliminary panel result to the parties in the first place” (WTO 1998, 32-33).

<sup>68</sup> Valles and McGivern 2000; WT/MIN(99)/8; TN/DS/W/1; TN/DS/W/21

These proposals would help streamline litigation in the post-ruling phase by: requiring a 21.5 compliance panel in advance of a 22.6 panel arbitrating the suspension of concessions, clarifying appeals of 21.5 panels, firming up the relevant timelines, and addressing how, after concessions have been suspended, a defendant's *subsequent* compliance is to be judged.<sup>69</sup> These recommendations would do much to reduce post-ruling foot-dragging, and would thus encourage more early settlement.

Second, while recognizing that the DSU is about compliance with obligations, *not* retaliation, the proposed reforms make clear that credible "enforcement" is a priority. To be sure, most recommendations nod to this concern; following through on authorization to suspend concessions is a daunting prospect, even for the US and EC, as *FSC* serves to remind. With respect to the hurdles facing developing countries, in particular, the possibility of "collective retaliation" has been proposed, the idea being that, "[u]nder this principle, all WTO Members would collectively have the *right and responsibility* to enforce the recommendations of the DSB."<sup>70</sup>

Less likely to raise collective action problems is the EC's proposal to allow for an errant defendant to offer "a compensation package for a value equal to the level of nullification and impairment...."<sup>71</sup> Such a payment might well diffuse trade tensions, but would appear to favour those who can pay over those who cannot, and in any case would leave standing measures that were in violation of WTO law, further lending to the appearance of a two-tier system. Alternatively, it has been proposed that, rather than tariffs, errant defendants be allowed to offer enhanced market access,<sup>72</sup> or that the complainant be allowed the right to choose the sector in which to suspend concessions, modeled on the experience in *EC—Bananas*.<sup>73</sup> While interest-

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<sup>69</sup> WT/MIN(01)/W/6.

<sup>70</sup> TN/DS/W/17. Emphasis added. See also Pauwelyn 2000.

<sup>71</sup> TN/DS/W/1, 5.

<sup>72</sup> TN/DS/W/21, 4.

<sup>73</sup> TN/DS/W/19.

ing, neither proposal directly addresses the incentives for foot-dragging in litigation.

To remedy this, a growing chorus of voices proposes that the WTO offer *retroactive damages*.<sup>74</sup> Retroactive damages would undermine the use of protection as a domestic political “freebie” in the lead-up to a WTO ruling, as observed by Mexico in its proposal for retroactive damages.<sup>75</sup> Mexico goes on to explain that provisions for “retroactivity” are included in the WTO’s Antidumping and Subsidies and Countervailing Measures agreements, and suggests that nullification or impairment could be assessed back to: “(a) the date of imposition of the measure; (b) the date of the request for consultations; or (c) the date of establishment of the Panel.”<sup>76</sup> Few proposals would do more to reduce legal foot-dragging than providing for retroactive damages, and thus stimulate early settlement.

## Conclusion

As was true under the GATT, early settlement is the engine of WTO dispute settlement. This is not to suggest that the system has failed to evolve. On the contrary, the DSU marks a substantial improvement over the GATT’s less integrated, and often implicit, architecture. Taken together with the WTO’s greater clarity of law, this bodes well for international trade. Indeed, there is much to admire about a more rules-based global economy, especially one backed by an institution like the WTO, which, despite its weaknesses, is better poised to adjudicate rights and obligations than its predecessor.

That said, it is just as important to appreciate the limitations of the system, particularly at the panel stage and beyond. The automaticity of panel reports brings pro-plaintiff rulings more within reach under the WTO, but by no means ensures market liberalization. Recognizing this, US Trade Representative Robert Zoellick explained that “[w]e must be more creative in

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<sup>74</sup> Mavroidis 2000; Pauwelyn 2000.

<sup>75</sup> TN/DS/W/23, 3.

<sup>76</sup> TN/DS/W/23, 4.

settling bilateral disputes.... *Litigation is not always the solution for solving every problem.*<sup>77</sup> In much the same spirit, former Director-General Moore noted that “*settlement ... is the key principle,*” without which “it would be virtually impossible to maintain the delicate balance of international rights and obligations.”<sup>78</sup>

Few long for a return to the power politics of the GATT era,<sup>79</sup> but it would be just as grave a mistake to overlook GATT-style diplomacy and fully embrace the WTO’s greater legalism. Indeed, the importance of early settlement that is brought out in this chapter should inform the proposals penned for the Doha Development Agenda, as well as the very decision by Members to bring a case for WTO dispute settlement.

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<sup>77</sup> *International Trade Reporter*, 17 May 2001, 778. Emphasis added.

<sup>78</sup> Moore 2000.

<sup>79</sup> Barfield 2001.

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