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GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?

Sung-joon Cho*

INTRODUCTION

The current non-violation provisions¹ under the World Trade Organization (WTO)² dispute settlement system present several disadvantages, both to panels attempting to resolve disputes under these provisions and to the WTO system as a whole. These disadvantages include, *inter alia*, their inherent ambiguity and the concomitant risk that they might be misused. Although efforts have been made to overcome these problems during the half-century history of the General Agreement of Tariffs and Trade (GATT),³ they continue to persist. The recent photographic film dispute between the United States and Japan vividly illustrates many of these problems.

The United States has long complained about the alleged restrictive business practices against foreign suppliers in the Japanese film market. These practices, the United States believes, are the main reason for the

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1. See GATT 1994, *infra* note 5, art. XXIII, ¶ 1(b); GATS, *infra* note 6, art. XXIII, ¶ 3.

2. See Marrakech Agreement Establishing the World Trade Organization, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, RESULTS OF THE URUGUAY ROUND, 6, 6-18; 33 I.L.M. 1140, 1144-53 (1994) [hereinafter WTO Agreement]. For a historical background of the creation of the WTO, see generally WORLD TRADE: TOWARD FAIR AND FREE TRADE IN THE TWENTY-FIRST CENTURY (Marie Griesgraber & Bernhard G. Gunter eds., 1997); ASIF H. QURESHI, THE WORLD TRADE ORGANIZATION (1996); BRUCE E. MOON, DILEMMAS OF INTERNATIONAL TRADE (1996); PHILIP RAWORTH & LINDA C. REIF, THE LAW OF THE WORLD TRADE ORGANIZATION: FINAL TEXT OF THE GATT URUGUAY ROUND AGREEMENTS (1995).

3. General Agreement on Tariffs and Trade, October 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT 1947].

chronic poor performances of United States film manufacturers like Kodak in the Japanese market.⁴ In October 1996, the United States filed a complaint with the WTO against Japan, arguing that laws, regulations and requirements of the Japanese government negatively affected the distribution, offering for sale, and internal sale of imported consumer photographic film and paper. The thrust of the U.S. argument was that Japan had violated Article III (National Treatment) of the General Agreement on Tariffs and Trade 1994 (GATT 1994),⁵ Article III (Transparency) and Article XVI (Market Access) of the General Agreement on Trade in Services (GATS).⁶ Alternatively, the United States contended that *even if* there was no violation, the practices regarding anti-competitive barriers directly or indirectly harmed the United States under the GATT 1994 and GATS within the meaning of the "non-violation" provisions. In other words, the United States argued that in the event that the regulations of the Japanese government governing the Japanese film market were GATT 1994- or GATS-legal, the benefits to the United States as a GATT 1994 or GATS Member were nevertheless nullified or impaired.⁷

4. See *Kodak Chief Urges Japanese Government to Dismantle Systematic Barriers to Film*, 12 INT'L TRADE REP. (BNA) 23, at 974 (June 7, 1995). On May 18, 1995, Eastman Kodak filed a complaint under Section 301 of the Trade Act of 1974, arguing that anti-competitive practices by Fuji film blocked Kodak's access to the photographic paper and film markets in Japan. See Trade Act of 1974, §§ 301–310, 19 U.S.C. §§ 2411–2420 (1994) [hereinafter Section 301]. However, the Japanese government refused to negotiate under Section 301 with the United States, maintaining that this dispute, in itself, should be resolved between two private parties: Fuji and Kodak. The United States stopped pursuing this case under Section 301. C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 274 (1997); Fujifilm, *WTO Film Case* (visited Aug. 18, 1997) <<http://home.fujifilm.com/wto/index.html>>.

5. General Agreement on Tariffs and Trade 1994, April 15, 1994, art. XVII, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, RESULTS OF THE URUGUAY ROUND 20, 20–38; 33 I.L.M. 1153, 1180 (1994) [hereinafter GATT 1994]. WTO Agreement Annex 1A incorporates a document labeled GATT 1994, which is essentially GATT 1947, as amended through the Uruguay Round, along with all the ancillary agreements pertaining to GATT 1947, as modified. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS—CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 290–91 (3d ed. 1995).

6. General Agreement on Trade in Services, Dec. 15, 1993, arts. III, XVI, 33 I.L.M. 44 [hereinafter GATS].

7. See *Japan—Measures Affecting Consumer Photographic Film and Paper*, Request for Consultations by the United States (June 21, 1996), WT/DS44/1, G/L/87 [hereinafter *Fuji-Kodak*]; *Japan—Measures Affecting Distribution Services*, Request for Consultations by the United States (June 20, 1996), WT/DS45/1, S/L/22 [hereinafter *Fuji-Kodak II*]. On March 31, 1998, the *Fuji-Kodak* panel released its final report in which it rejected almost all the arguments made by the United States, both violation (Article III:4 & X:1) and non-violation (Article XXIII:1(b)) claims. See *Japan—Measures Affecting Consumer Photographic Film and Paper*, Panel Report circulated on March 31, 1998, WT/DS44, WTO, Dispute Settlement/Overview of the State-of-Play of WTO Disputes (visited Apr. 3, 1998) <<http://www.wto.org/wto/dispute/bulletin.htm>> [hereinafter *Fuji-Kodak Panel Report*].

The *Fuji-Kodak* (1998) case undoubtedly posed a difficult problem for the panel. For example, it raised the question of whether a Member country could nullify or impair benefits of another without breaching any obligations. Furthermore, even if the panel believed that U.S. benefits were nullified or impaired without any violation by the Japanese government's regulations, it would be difficult for the panel to make such a finding when the non-violation provisions in the GATT 1994 and GATS themselves do not directly address this issue. If the Japanese government argues that it has the sovereign right to implement any domestic policy as long as it observes international obligations under international agreements like the WTO, it is debatable whether the panel should or could rule against Tokyo. In addition, there is still a question of whether such a panel decision would be acceptable to Japan or other WTO Members.

In fact, it has been very difficult for the panel to establish a unified and clear set of norms regarding this concept of non-violation nullification or impairment due to the provisions' inherent ambiguity. Nevertheless, contracting parties have insisted on invoking the non-violation provisions, because their ambiguity allows for broad jurisdiction over parties' complaints.⁸ Any measure that does not appear to directly violate the provisions of the GATT, but is nevertheless disadvantageous to the exports of one country, can fall within the category of non-violation complaints.

This persistent ambiguity of the non-violation provisions will inevitably lead to heavy burdens on future panels. Moreover, as discussed below, so-called *wrong cases* of non-violation could come before a panel, which might then be unable to persuade a losing party to observe its decision and compensate the winning party. This phenomenon would undoubtedly damage the legitimacy and stability of the WTO dispute settlement system. Furthermore, the uncertainties surrounding the non-violation provision will be exacerbated when countries try to take advantage of the uncertainty by seeking to apply the non-violation concept to newly emerging areas, such as competition policies, which the current WTO legal text cannot effectively cover.

In order to prevent the adverse effects of non-violation cases and keep the WTO on a rule-oriented track, the use of non-violation cases should be restricted. Accordingly, this Article offers an approach that transforms non-violation cases either into violation cases or into cases for settlement by inter-governmental cooperation. In addition, it proposes that private parties have direct access to a WTO panel as one pragmatic way of minimizing non-violation cases and their impact.

8. See *infra* Part II.B.

Part I reviews the evolution of non-violation cases through the GATT's half-century history. Part II examines how non-violation cases may embarrass a future panel and further damage the WTO dispute settlement system. In particular, it explores how the initial problems embedded in the non-violation cases could be exacerbated in the context of newly emerging areas, such as the GATS and competition policies. Finally, Part III proposes that the current violation regime be fine-tuned, that some sensitive non-violation cases be taken out of the domain of the WTO dispute settlement system, and that a panel process be instituted to allow direct access to a panel by private parties on a selective basis.

I. EVOLUTION OF NON-VIOLATION CASES

A. *Drafting History of Non-Violation Provision* (GATT Article XXIII:1(b))

After the Second World War, world economic order was re-established under the banner of the Bretton Woods system, initiated by the United States.⁹ One crucial pillar of the Bretton Woods system was the GATT 1947, the goal of which was to promote free trade through tariff reduction. Naturally, much of the "form and substance" of the GATT 1947 originated from U.S. bilateral trade agreements in the decades immediately preceding World War II, particularly from the U.S. trade agreements negotiated in the decade after 1935. Such agreements emphasized bilateral tariff reductions as well as a bargained-for exchange, namely "reciprocity."¹⁰

Once tariff reduction through negotiations was achieved, the next step was to preserve the results and prevent any backsliding. Therefore, the architects of the GATT 1947 established a legal mechanism in which schedules of tariff concessions were binding and their value or effect could be guaranteed with the help of various general obligations,

9. For the historical background of post-war global economic circumstances and the birth of the GATT, see generally GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* (1992); A.G. KENWOOD & A.L. LOUGHEED, *THE GROWTH OF THE INTERNATIONAL ECONOMY 1820-1970* (3d ed. 1992); ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990); KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970).

10. Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615, 616-36 (1970); Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948*, 31 COMMON MKT. L. REV. 1157, 1171 (1994); ERNST H. PREEG, *TRADERS AND DIPLOMATS: AN ANALYSIS OF THE KENNEDY ROUND OF NEGOTIATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 23-24* (1970); Edwin Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements*, 29 J. WORLD TRADE 131, 136 (1995).

such as those mandated by national treatment principles.¹¹ In addition, procedures for dispute settlement were established, taking into account these legal obligations.¹² It should be noted that legal obligations were originally just one option among various kinds of diplomatic instruments intended to maintain the tariff concessions.¹³ In other words, what the GATT framers really wanted to achieve through legalism was the preservation of the value of tariff concessions and smooth dispute settlement, rather than the establishment of a unified and integrated set of norms and its resulting structure.

Nonetheless, the legalism embedded in the GATT 1947 was imperfect due to the agreement's institutional defects. In fact, this was largely by design, as the GATT 1947 was not intended to provide the requisite institutional framework for governing world trade. Such a role was to have been played by the stillborn International Trade Organization (ITO), which failed to survive a U.S. Congressional veto. The ITO's draft charter included more elaborate dispute settlement mechanisms and allowed for appeal to the World Court (International Court of Justice).¹⁴ Only a small portion of this framework, however, was actually reflected in the GATT 1947.¹⁵

It is not surprising that concerns remained in the minds of the GATT 1947 drafters that Member states might take actions to circumvent binding tariff reductions, whose integrity could not be fully protected by the agreement's general obligations. The fear was that this would dilute "reciprocity" between GATT Members. Under the above approach, in which legal obligations were regarded as just one option among various diplomatic instruments, drafters of the GATT 1947 devised an expansive and ambiguous yet convenient provision. This "non-violation" provision¹⁶ entitled a contracting party—even in the absence of a breach of obligations by another contracting party—to argue that their benefits had been nullified or impaired under the GATT 1947. The aggrieved country would thus be authorized to receive compensation. The GATT 1947 architects' most important

11. GATT 1994, *supra* note 5, art. III.

12. *Id.* art. XXIII.

13. Hudec, *supra* note 10, at 624.

14. See, e.g., CLAIR WILCOX, A CHARTER FOR WORLD TRADE 159, 305–08 (1949); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL RELATIONS, 113–14 (2d ed. 1997); U.N. Charter, arts. 92–96.

15. *Id.*

16. GATT 1994, *supra* note 5, art. XXIII ¶ 1(b). This Comment deals only with XXIII:1(b) non-violation complaints. Regarding XXIII:1(c) complaints, often cited as "situation" complaints, there have been very few traces in the former GATT panel history. See Ernst-Ulrich Petersmann, *Violation-Complaints and Non-Violation Complaints in Public International Trade Law*, 34 GERMAN Y.B. INT'L L. 175, 192 (1991). There have been no GATT panel decisions recognizing non-violation claims based on Article XXIII:1(c). JACKSON ET AL., *supra* note 5, at 364.

concern seemed to be whether a specific measure in question affected (nullified or impaired) any benefits accruing from tariff concessions, regardless of the distinctions between "breach of obligation" (violation cases) and "other" cases (non-violation cases).

B. Development of Non-Violation Cases in the GATT History

During the half-century history of the GATT, the dispute settlement procedure has tensely oscillated between two positions or tendencies—one that encourages minimal use of non-violation cases ("restraintism") and another that advocates more extensive use of non-violation cases ("activism").¹⁷ The parties in dispute have inconsistently but naturally swung between the two positions, depending on which position served their purposes more at a particular time.

1. Restraintism

Most GATT panel decisions seem to favor restraintism¹⁸ and most GATT panels have consistently tried to narrow the scope of non-violation cases to prevent possible misuse. In doing so, the panels have tried to impose a certain level of discipline on this vague provision by requiring that the measure in dispute meet certain criteria before a non-violation case exists. Measures that do not violate any GATT obligation but allegedly nullify or impair the benefits of other contracting parties may be challenged by the contracting parties if certain requirements are met.¹⁹

First, the measure in question cannot reasonably have been anticipated by the complaining party at the time the concession was negotiated. For instance, in *Oilseeds* (1988),²⁰ the panel ruled that the United States was assumed to have based their tariff negotiations with the European Community (EC) on the expectation that the price effect of the tariff concessions would not be systematically offset.²¹ The panel further ruled that EC production subsidies neutralizing the price effect of the tariff concessions nullified or impaired the value of duty-free tariff bindings for oilseeds, and that the value of tariff bindings was

17. This tension seems to elucidate the reason why GATT failed to develop an "extensive jurisprudence" of non-violation nullification or impairment. HUDEC, *supra* note 9, at 166.

18. Most international trade law scholars also seem to share this position. See, e.g., JACKSON ET AL., *supra* note 5, at 363–64; ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM at 7 (1993); Petersmann, *supra* note 10, at 1188.

19. *Id.* at 1201. See, e.g., EEC—Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, L/5778, C/W/476 [hereinafter *Canned Fruits*].

20. *Payments and Subsidies Paid to Processors and Producers of Oilseeds Related Animal-Feed Proteins*, Jan. 25 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991) [hereinafter *Oilseeds*].

21. *Id.*

reasonably to be expected by the United States from the reciprocal exchange of tariff concessions.²² What is important here are the "tariff concessions" that form the basis for that expectation. Such a reasonability requirement connected with the tariff concessions serves to prevent possible misuse that could result from an inquiry into subjective expectations.²³

Second, the measure in question must have damaged the competitive position of the imported product concerned.²⁴ In *Sardines* (1952), the panel concluded that the Norwegian government had reason to assume during negotiations that preparations of the type of clupeoid in which they were interested would be no less favorably treated than other preparations of the same family and that this situation would not be modified by unilateral action of the German government.²⁵ In that case, the panel noted that granting more favorable treatment to similar imported products upset the competitive position of the imported product concerned.²⁶ The case demonstrates that a party need not use actual trade flows, such as changes of trade volume before and after the measure, in proving a claim that a certain measure worsened a competitive position. Rather, it is sufficient to prove that the measure, in terms of the price mechanism of a market economy, resulted in distortion of a competitive relationship between two products in question.²⁷

22. *Id.*

23. For instance, in *Fuji-Kodak* (1998), Japan (Fuji) defended its position emphasizing this element. It maintained that

By the 1960's, Japanese film manufacturers and importers, including Kodak, had adopted single-brand distribution and acquired or contracted with existing wholesalers to build single-brand distribution networks. This process was largely completed by 1967 and the universal norm by 1979, and did not change through 1994, when the tariff concessions were negotiated, respectively. Given this very public process and the fact that single-brand distribution is the norm in virtually every film market worldwide, the United States simply could not have anticipated anything other than single-brand distribution in Japan.

Fujifilm, *Comments by Fuji Photo Film concerning Government of Japan WTO Submission in the Film Case* (visited Aug. 18, 1997) <<http://www.fujifilm.co.jp/eng/special/sp030.html>> [hereinafter *Fujifilm, Comments*]. According to the final report of the *Fuji-Kodak* panel, this argument by the Japanese government seemed to be accepted by the panel. The panel ruled that since the Japanese measures technically existed before the United States negotiated tariff reductions on film and photographic papers, the United States should not have anticipated more market access as a result of the tariff concessions. See *Fuji-Kodak Panel Report*, *supra* note 7, ¶ 10.103, .111, & .126.

24. See, e.g., *Canned Fruits*, *supra* note 19.

25. *Treatment by Germany of Imports of Sardines*, Oct. 31 1952, GATT B.I.S.D. (1st Supp.) at 53 (1953) [hereinafter *Sardines*].

26. *Id.*

27. In *Fuji-Kodak*, Japan tried to highlight this aspect in its defense against the United States complaint. It argued that "The key question posed by this case is whether the conditions of competition in the Japanese film and paper markets were upset after 1967, 1979, or 1994. The United States failed to demonstrate that they were. Japan has shown that they were not. Even assuming that the United States claims that actions by the Government of Japan were actually 'measures' under WTO rules, the market situation is better now than at any time in the past." *Fujifilm, Comments*, *supra* note 23.

Thus, a complaining party must only prove an abstract adverse change in competition, not an actual decline in imports.²⁸

Since the concept of non-violation nullification or impairment is inherently ambiguous, it is important as a practical matter to determine who bears the burden of proof and to what extent.²⁹ The GATT codified its practices relatively early, requiring a complaining party who brought a non-violation case to submit a "detailed justification" supporting its case.³⁰ This practice is also reflected in the current WTO system.³¹ "Justification" must also be tangible and concrete, going beyond a mere description of the measure at issue.³² In this context, it seems clear that substantiation of a causal relationship between the invoked measures and nullified or impaired benefits is required.³³

Non-violation cases that meet these three elements may be labeled "supplementary-mode" cases³⁴ since they seem to fill in the "legal gap" with a view towards re-balancing the original value of the tariff concession. For example, the products in question in non-violation cases seem to have a relatively close relationship; they are "identical" or "directly competitive" products.³⁵ That phenomenon implies that to some extent supplementary-mode non-violation cases, which have been established through the panel practices, play a pragmatic role of filling in the gap left by the general obligations in the GATT, including the Article III (national treatment) obligations.³⁶

28. See *Oilseeds*, *supra* note 20. This so-called "competition" analysis can also be found in violation cases. See, e.g., *United States—Taxes on Petroleum and Certain Imported Substances*, June 17, 1987, GATT B.I.S.D. (34th Supp.) at 136 (1988).

29. See, e.g., *European Community—Refunds on Exports of Sugar*, Oct. 25, 1979, GATT B.I.S.D. (26th Supp.) at 290 (1980) [hereinafter *Sugar*]; *U.S.—Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions*, November 7, 1990, GATT B.I.S.D. (37th Supp.) at 228 (1991) [hereinafter *Waiver*].

30. See *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement*, ¶ 5, which is an Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT B.I.S.D. (26th Supp.) at 210 (1979).

31. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, *supra* note 2, art. 26 [hereinafter DSU].

32. See *Japan—Trade in Semi-Conductors*, May 4 1988, GATT B.I.S.D. (35th Supp.) at 116 (1989) [hereinafter *Semi-Conductors*]; *Waiver*, *supra* note 29; The *Fuji-Kodak* panel also ruled that the United States bore the burden of proving a "detailed justification" for its non-violation claim. See *Fuji-Kodak Panel Report*, *supra* note 7, ¶ 10.32.

33. See, e.g., *Semi-Conductors*, *supra* note 32, at 161, ¶ 131.

34. For an overview of this mode of non-violation cases in the GATT history (1948–1990), see Annex: *Overview of Non-Violation (GATT Art. XXIII:1(b)) Cases: 1948–1990* [hereinafter Annex].

35. See, e.g., *Australian Subsidy on Ammonium Sulphate*, Apr. 3, 1950, GATT B.I.S.D. (2d Supp.) at 188 (1952) [hereinafter *Australian Subsidy*]; *Sardines*, *supra* note 25; Armin Von Bogdandy, *The Non-Violation Procedure of Article XXIII: 2, GATT—Its Operations Rationale*, 26 J. WORLD TRADE 95, 102 (1992).

36. Practically speaking, it would be fair to say that the notion of "identical or directly competitive products" found in *Australian Subsidy* and *Sardines* largely overlaps that of "like

2. Activism

In spite of the efforts by most GATT panels to establish discipline in coping with non-violation cases, there do exist non-violation cases that do not meet the above-mentioned criteria. Indeed, some such cases lack the most important criterion of all, a connection between tariff concessions and an expectation therefrom.³⁷ For example, in *Nullification and Impairment of Benefits* (1983),³⁸ the EC, without establishing any connection to tariff concessions, simply argued that persistent trade imbalances between the EC and Japan constituted both nullification and impairment of benefits. These imbalances, which resulted from a network of government and private impediments to imports, were seen as an impediment to the attainment of GATT objectives.

A lax approach was also undertaken by the panel in *Citrus* (1982),³⁹ resulting in a decision apparently at odds with the restraintism approach discussed above. In *Citrus*, the panel ruled that the non-violation nullification or impairment concept also protects the broader balance of benefits that governments had a right to expect as a result of reciprocal undertakings to observe the obligations in the GATT itself. This open-ended type of non-violation case may be labeled an "independent-mode" case in that this type of case does not call for the existence of specific tariff concession or its connection with a reasonable expectation as the basis for invoking a complaint.⁴⁰

Surprisingly, some proponents of non-violation cases have advocated the use of this "independent-mode" case to be applied in newly emerging areas, such as competition policies⁴¹, which the GATT text could

products" or "directly competitive or substitutable products" found in Article III of GATT. However, this conceptual similarity never leads to substitutability between Article III violation and non-violation cases. Although the supplementary-mode non-violation complaints complement the role that the Article III violation clause should have played but did not, the utility of those non-violation complaints must not be exaggerated because the inherently fluid nature of non-violation complaints could not be compatible with the rule of law that the GATT/WTO has been pursuing and will pursue, see GATT 1994, *supra* note 5, art. III, ¶¶ 2, 8(b).

37. According to Professor Hudec, the contracting parties "seized the occasion to establish their authority in this borderline area, and to give some substance to the shadowy legal concepts outlined by the GATT/ITO draftsmen." HUDEC, *supra* note 9, at 159.

38. *Japan—Nullification and Impairment of Benefits and Impediment to the Attainment of GATT Objectives*, L/5479, C/M/167 [hereinafter *Nullification and Impairment of Benefits*].

39. *EEC—Tariff Treatment of Citrus Products from Certain Mediterranean Countries*, Feb. 7, 1985, L/5776, C/M/186 [hereinafter *Citrus*].

40. For an overview of this mode of non-violation cases in the GATT history (1948–1990), see *supra* note 34.

41. "[A]s formal tariff and regulatory restrictions on imports gradually disappear, market access disputes are likely to focus increasingly on allegations of private anti-competitiveness practices and insufficient foreign enforcement." William H. Barringer & James P. Durling, *Point-Counterpoint: Trade Dispute in the Japanese Photographic Film Market, Out of Focus: The Use of Section 301 to Address Anticompetitive Practices in Foreign Markets*, 1 UCLA J. INT'L L. & FOREIGN AFF. 99, 137 (1996).

not fully cover. To them, the non-violation provisions are regarded as a source of hope.⁴²

3. Uruguay Round Negotiations

The ambiguity of the non-violation provision has led to attempts in the Uruguay Round to specify the possible scope of its application. Initially, negotiators considered clarifying the requirements for invoking a non-violation complaint in the Dispute Settlement Understanding (DSU), including an explanation of reasonable expectation.⁴³ In the "Understanding on the Interpretation and Application of Article XXII and XXIII of the General Agreement on Tariffs and Trade (Draft Understanding)," which was part of the "Draft Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations (Brussels Draft Final Act)" there was a provision stating that:

The general dispute settlement procedures shall apply, subject to the following qualifications, in the case of complaints that a [reasonable] [legitimate] expectation by a complaining party in respect of a benefit accruing to it through the operation of a market access concessions [or other commitment], [other obligation,] [or derogation [under Article XXV] therefrom], has been frustrated by the introduction or intensification of a measure, not in conflict with the General Agreement, [upsetting the conditions of competition] [having an adverse effect on trade], and thereby nullifying or impairing a GATT benefit.⁴⁴

The EC also proposed that in the non-violation complaints no opportunity to appeal be given unless the parties otherwise agree that binding arbitration or conciliation be available, and that panel rulings be adopted by consensus.⁴⁵ However, the United States strongly op-

42. Bogdandy, *supra* note 35, at 98–99. For the proponents of the use of this type of non-violation complaints, see generally David A. Daul, *A Picture Worth Far More than a Thousand Words: A Unique Cause of Action at the World Trade Organization to Enforce American Trade Rights against Japan*, 17 *HAMLINE J. PUB. L. & POL'Y* 121 (1995); Robert Howse & Michael J. Trebilcock, *The Fair Trade Debate: Trade, Labor, and the Environment*, 16 *INT'L REV. L. & ECON.* 61 (1996); Brian Hindley, *Competition Law and the WTO: Alternative Structures for Agreement*, in 2 *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 333 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Tracy M. Abels, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 *UCLA L. REV.* 467 (1996).

43. 2 *THE GATT, URUGUAY ROUND: A NEGOTIATING HISTORY* (1986–1992) 2785–86 (Terence P. Stewart ed. 1993).

44. *Id.* at 2783–86; GATT Secretariat, *Understanding on the Interpretation and Application of Article XXII and XXIII of the General Agreement on Tariffs and Trade, Draft Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/ 35 (Dec. 3, 1990) [hereinafter *Brussels Draft Final Act*].

45. 1 *THE GATT, URUGUAY ROUND: A NEGOTIATING HISTORY* (1986–1992) 62 (Terence P. Stewart ed. 1993).

posed a different procedure for non-violation complaints than for violation complaints. Therefore, the non-violation clause remains unchanged.⁴⁶

Finally, the non-violation clause, which was originally in the GATT 1947, has now been directly applied to new sectors, such as trade in services and intellectual property through the GATS⁴⁷ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).⁴⁸ In the process, little consideration has been given to sectoral characteristics, thus leaving potential for future problems.⁴⁹

II. PROBLEMATIC FEATURES OF NON-VIOLATION CASES

A. Unaddressed Inherent Ambiguity

As discussed earlier, the non-violation provision is a relic of the diplomatic system.⁵⁰ It is likely that the architects of the GATT 1947 intended to protect the burgeoning world trading system, which was based on the compilation of tariff negotiations, from being diluted by the various circumvention measures that would be subsequently invented by the governments. Such a concern probably appeared quite plausible, at least initially.

However, considering that the world trading order was in an inchoate stage during the late 1940s, the GATT architects should have been more circumspect. They should have given the GATT system enough time to further evolve and to accommodate those circumvention measures within the scope of legal obligations. In other words, instead of

46. *Id.* The position of the United States seems to derive from a long tradition in international trade negotiations that emphasizes tariff concessions and reciprocity. This tradition dates back to the United States international trade agreement with foreign countries in the 1920s and 1930s. See *supra* Part I.A. Moreover, it should be noted that Section 301 of the Trade Act of 1974 also provides a variety of causes of action in the name of "unreasonable" acts, policy, or practice that include the toleration by a foreign government of systematic anti-competitive activities by enterprises or among enterprises in the foreign country. See Section 301, *supra* note 4.

47. GATS, *supra* note 6, art. XXIII, ¶ 3.

48. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) explicitly prohibits the non-violation provision in the GATT 1994 from being applied to the dispute settlements under the TRIPs for a period of five years from the date of entry into force of the WTO Agreement. See Agreement on Trade-related Aspects of Intellectual Property Rights, Annex 1C of the WTO Agreement, *supra* note 2, art. 64, ¶ 2 [hereinafter TRIPs]. Likewise, the North American Free Trade Agreement (NAFTA), although it employs the notion of non-violation nullification or impairment, it does put some limitation on invoking this kind of complaint. See Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 899 n.161 (1997); North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (containing chs. 1-9), 32 I.L.M. 605 (containing chs. 10-22), Annex 2004 (1), (2), at 699 [hereinafter NAFTA].

49. See *infra* Part II.B.1.

50. See *supra* Part I.A.

inserting a murky provision like "non-violation" in the early GATT 1947, complicated "non-tariff" measures should have been discussed, intensively and extensively, in the later rounds of negotiations under the auspices of the GATT. The results of those negotiations would have been reflected and incorporated in the GATT system through amendments or creation of side agreements.⁵¹ At the very least, the trade diplomats should have dealt with the non-violation cases outside of the GATT, through traditional diplomacy.⁵²

Nevertheless, the GATT architects ambitiously inserted a non-violation provision in the middle of a legal structure. They may not have fully recognized that legalism was not simply one diplomatic tool among many, but could enhance predictability and impartial dispute-settlement. Or perhaps they did not want such a transparent system. Rather, they might have desired a dispute settlement system in which diplomacy would play an important role in the course of a closed-door, yet flexible, process.⁵³

The inherent ambiguity surrounding the non-violation provision remains unresolved, confusing complainants about its proper use. In many non-violation cases, there has been no prominent distinction between violation and non-violation complaints.⁵⁴ Moreover, at the initial complaint-filing stage, the non-violation provision does not provide an independent and definite cause of action. It has played only an auxiliary role as a precaution against the failure to win the first violation argument. It is noteworthy that non-violation complaints are, in many cases, preceded by the phrase "even if no violation exists." Moreover, the complaining party often makes little effort to distinguish between a violation claim and a non-violation claim.⁵⁵ For instance, in *Citrus* (1982) the United States claimed that the EC's preferential tariffs on citrus imports from certain Mediterranean countries

51. Belatedly, after three decades had passed from the launch of the GATT, non-tariff measures (NTBs) were beginning to be discussed in the Tokyo Round, and some side agreements such as the Standard Code were created. However, the legal nature of these side agreements was controversial in some situations since the hierarchy of legal obligations both in the GATT and in these side agreements was not clear-cut. Moreover, these side agreements entered into force only among the states that accepted them and this optional situation led to the criticism of "GATT a la carte." Finally, there was no unified dispute settlement system across the GATT and these side agreements provided the possibility of "forum shopping". JACKSON ET AL., *supra* note 5, at 296-97. See also JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1995).

52. Vermulst & Driessen, *supra* note 10, at 136.

53. JACKSON, *supra* note 51, at 83-88.

54. Hudec, *supra* note 10, at 618; GENERAL AGREEMENT ON TARIFFS AND TRADE, ANALYTICAL INDEX—GUIDE TO GATT LAW AND PRACTICE 610 n.64 (1994) [hereinafter ANALYTICAL INDEX].

55. See *supra* note 34. In 14 out of 24 non-violation complaints (1947-1990), complaining parties filed a non-violation claim as an alternative to a violation claim. See also *infra* Part III.A.

generally caused nullification or impairment, with no distinction between violation and non-violation.⁵⁶ In the future, that murkiness may lead a future complaining party to misuse or rely too heavily on the non-violation provision.

More importantly, the GATT panel rulings on the non-violation cases up to now have not always been consistent, clear, and reasonable. Among the twenty-four non-violation cases from 1947 to 1990,⁵⁷ while seven resulted in affirmative panel rulings, only three panel reports, all of which involved "supplementary-mode" complaints, were adopted.⁵⁸ Of course, GATT panels have attempted to limit the scope of non-violation cases by establishing some criteria for the "supplementary-mode" cases, emphasizing the link between tariff concessions and reasonable expectations.⁵⁹ However, it is unclear to what extent the reasonable "expectation" that the value of tariff concessions would not be affected should be legitimized in a particular case. It seems unreasonable that a previously determined balance of tariff concessions and resulting expectations should be thought to last for an indeterminate period of time.⁶⁰ In addition, it is questionable whether those expectations, based upon reciprocity or the balance of bilateral tariff concessions, should be applicable to a third country that did not actually negotiate tariff concessions with a complaining party.⁶¹

The more serious problem with regard to uncertainty arises in the "independent-mode" cases, which are not linked to tariff concessions. There are no fallback provisions or explanatory notes detailing the meaning of Article XXIII:1(b), nor are there any sufficient precedents in the GATT panel decisions to establish uniform criteria for independent-mode non-violation cases. In such cases, ambiguity seems to culminate in "non-discipline." For instance, it would be highly speculative to judge whether the attainment of an objective of the Agreement is impaired as a result of a certain non-violation measure.⁶²

56. See *Citrus*, *supra* note 39.

57. See *Annex*, *supra* note 34.

58. According to Professor Petersmann, the blockage of adoption by the GATT Council of these reports reflected an attempt to avoid legally wrong interpretations or to keep open interpretative issues that the defendants continued to challenge, rather than a breakdown of the GATT dispute settlement process. Petersmann, *supra* note 10, at 1192-93.

59. See *supra* Part I.A.2.

60. See JACKSON ET AL., *supra* note 5, at 364.

61. Since actual tariff negotiations are performed "bilaterally," reasonable expectation derived from tariff negotiations would also be bilateral. However, multilateralization in the current international trade regime, represented by the WTO system, is geared towards the notion of "rule of law." The contract-like bilateralism embedded in the concept of "expectation" imposes its own set of limitations. See *id.*

62. See, e.g., *Nullification and Impairment of Benefit*, *supra* note 38; The Cuban Liberty and Democratic Solidarity Act (request for the establishment of a Panel by the European Community), WT/DS38/2 (Oct. 8, 1996).

Although there is no adopted panel decision for this mode of non-violation case, the panel in *Citrus* (1982) strongly implied the possibility of the above position. The *Citrus* panel ruled that the non-violation nullification or impairment remedy also protects the *broader* balance of benefits that governments legitimately expect, due to reciprocal commitments to observe the obligations in the General Agreement itself.⁶³ One could imagine a future case similar to *Citrus* (1982) coming before the WTO panel. Despite the absence of *stare decisis* in the GATT panel reports, a panel could nevertheless look to the reasoning of an unadopted panel report that it considered persuasive and relevant.⁶⁴ In that context, these independent-mode non-violation cases could potentially be misused. Any Member country could nonetheless rely on the independent-mode non-violation complaint method to present an invalid complaint if it was unable to identify a violation under the WTO system against a specific measure by another Member state. For such a country, the non-violation provision would be a panacea.⁶⁵

The liberal application of the provision may further weaken efforts by the Member countries to determine the precise meaning of legal obligations within the WTO system. Whenever a Member is faced with a sophisticated and challenging legal question as to the validity of a specific measure under the WTO, it may be tempted to file a non-violation complaint. A panel facing this type of complaint could be highly embarrassed and any affirmative ruling based on this vague proposition would be neither welcomed nor followed by the losing party and other Members. Such a situation could potentially harm both the stability and credibility of the WTO.

B. Expansion of the Scope of Ambiguity

1. GATS⁶⁶

One of the eventual goals of the newly launched WTO system is to integrate service arrangements into its regime through the creation of the GATS. The GATS is now in its initial developmental stages and is accordingly full of uncertainties. The huge differences in the nature of goods and services will generally make it difficult for the GATS to rely entirely on the GATT for guidance.⁶⁷ The GATS, nonetheless, has

63. See *Citrus*, *supra* note 39.

64. See Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, Oct. 1, 1996, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R [hereinafter *Alcoholic Beverages*].

65. See *supra* note 62.

66. See WILL MARTIN & L. ALAN WINTERS, *THE URUGUAY ROUND: WIDENING AND DEEPENING THE WORLD TRADE SYSTEM* (1995) (an overview of the GATS framework).

67. See Lisa Sue Klaiman, *Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed with Caution*, 11 U. PA. J. INT'L BUS. L. 657, 659 (1990).

directly imported the GATT dispute settlement system, including non-violation complaints.⁶⁸

The GATS's reliance on the GATT dispute settlement system would aggravate ambiguities in the non-violation regime from which the GATT already suffers. First, there is no concept of "tariff binding" in service negotiations. Instead, each Member submits, on a sector by sector basis, a *Schedule of Specific Commitments* that includes market access commitments as well as national treatment conditions and qualifications according to the varying degrees of development under the "progressive liberalization" principle.⁶⁹ Against this backdrop, the notion of "reasonable expectation," which at the time of tariff negotiations rested on the principle of reciprocity, would be diluted or even absent.⁷⁰ Without a reasonable expectation requirement, supplementary-mode non-violation cases would be irrelevant because the minimum requirement of a connection between tariff concessions and reasonable expectation therefrom cannot be demonstrated.⁷¹ Therefore, with respect to non-violation cases, the GATS regime would produce only "independent-mode" cases for which there are no specified precedents or discipline.⁷²

Furthermore, several aspects of the GATS make it more difficult to determine whether a specific measure, especially a regulatory policy, violates the GATS.⁷³ For example, under the GATS, Members have "the right to regulate and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives."⁷⁴ Moreover, any "inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers" are beyond the scope of national treatment obligations.⁷⁵ These nebulous aspects of the GATS require Member countries to depend more on non-violation claims than on claims of violation. Such

68. See GATS, *supra* note 6 art. XXIII; DSU, *supra* note 31, art. 22. In fact, the unification of dispute settlement procedures is regarded as one of the merits of the new dispute settlement system. See JACKSON ET AL., *supra* note 5, at 340.

69. See, e.g., GATS, *supra* note 6, art. XVI (Market Access), XVII (National Treatment), XVIII (Additional Commitments), XIX (Negotiation of Specific Commitments), and XX (Schedules of Specific Commitments).

70. See Petersmann, *supra* note 10, at 1231.

71. See *supra* Part I.C.

72. *Id.*

73. In this context, some scholars argue that the provisions of national treatment in GATS should be specified in terms of the service providers' sectoral characteristics. See, e.g., Christopher Bail, *Conceptual Problems and Possible Elements of Multilateral Framework for International Trade in Services*, in *PROGRESS AND UNDERCURRENTS IN PUBLIC INTERNATIONAL LAW 6: LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT* (Philip Sacerdoti ed., 1990).

74. See GATS, *supra* note 6, pmb. While trade in goods is mainly governed by border measures, trade in services is regulated by domestic laws and regulations. See Taylor, *supra* note 4, at 304.

75. See GATS, *supra* note 6, art. XVII n.10.

reliance then causes difficulties for the panel that must decide whether there has been nullification or impairment of benefits.

An example is illustrative. Let us assume that country X, which is a Member of the GATS, has made a specific commitment to permit the establishment of a foreign bank branch within its territory, and that country Y, which is also a GATS Member, has several bank branches in country X. Then, without warning, X enacts a statute purported to reinforce supervision over foreign bank branches by requiring them to comply with more complex and burdensome procedures than those required of domestic banks. Since introducing a new regulation is at least facially consistent with GATS, if Y wants to challenge X's statute under the WTO regime, Y will be compelled to file a non-violation complaint, arguing that the statute nullifies or impairs the benefits accruing to Y under X's commitments in its schedule.⁷⁶ On the other hand, X may counter-argue that Y's competitive disadvantage, if any, derives from the inherent character of Y's foreignness and thus no nullification or impairment of benefits exists.⁷⁷ Given this situation, it would be very difficult for a panel to decide whether a non-violation nullification or impairment has occurred. In this context, it is noteworthy that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) explicitly prohibits the non-violation provision in the GATT 1994 from being applied to dispute settlements under TRIPs for a period of five years from the date of entry into force of the WTO Agreement.⁷⁸

2. Competition Policies

One key area that could generate independent-mode non-violation complaints *en masse* is the area of competition policies.⁷⁹ Generally speaking, competition policies are infrequently mentioned in the former GATT and the WTO context. Concern over the frequent occurrence of competition policy cases led the 1960 Report to strongly recommended direct consultations between contracting parties with a view toward eliminating the harmful effects of particular restrictive

76. See *id.*, art. XXIII, ¶ 3.

77. See *supra* note 75. See GATS, *supra* note 6, art. XVII n.10.

78. See TRIPs, *supra* note 48.

79. Competition policies are usually defined to include laws and regulations that govern private producer behavior and the market structure within which interactions between producers take place; first, practices of *individual* firms (e.g., pricing and advertising); second, *horizontal* arrangements, which refer to those between firms selling the same product or group of products (e.g., price-fixing, output restriction, and cartelization) and *vertical* arrangements, which refer to those between manufacturers and their suppliers and distributors. See NAHEED KIRMANI, THE INTERNATIONAL MONETARY FUND, INTERNATIONAL TRADE POLICIES: 2 THE URUGUAY ROUND AND BEYOND, BACKGROUND PAPERS 68 (1994) [hereinafter IMF].

practices.⁸⁰ However, only a small number of cases actually concerned with competition policies or restrictive business practices were brought before the panel in the half decade history of the GATT. Moreover, the focus of these cases was simply to determine whether a specific measure involved "governmental intervention" that suggested a violation of the GATT 1947.⁸¹ Accordingly, it would be fair to say that the GATT 1947 did not delve into competition policies.⁸² The GATS does have an independent provision on "Business Practices," but the content is abstract and hortatory, merely encouraging consultations and cooperation.⁸³

Potential competition policy conflicts are more serious now than ever before.⁸⁴ As the world economy becomes more interdependent and international trade has a more direct impact on individual economies, competition policies can no longer be viewed as purely domestic. For instance, competition policies have recently drawn public criticism in some specific cases regarding market access to Japan (particularly for the United States).⁸⁵ Furthermore, future conflicts over competition policies are likely to occur in the context of North-South tension.⁸⁶ With respect to industrial countries, the relatively weak or even non-existent competition policies of developing countries could be viewed as "trade barriers," even though developing countries would argue that they are entitled to such industrial development policies.⁸⁷ In addition, loose enforcement of domestic anti-competition policies, including the toleration of restrictive business practices by private companies, could be viewed as an unfair comparative advantage for domestic industries vis-à-vis foreign exporters.⁸⁸ Given that it is debatable whether the above policies or practices would constitute "social dumping"⁸⁹ or a

80. 1960 Report of the Group of Experts on Restrictive Business Practices—Arrangements for Consultations, June 2, 1960, GATT B.I.S.D. (9th Supp.) at 170–71 (1960) [hereinafter 1960 Report].

81. See, e.g., *Semi-Conductors*, *supra* note 32; *Measures Affecting the World Market for Copper Ores and Concentrates*, L/6456, Jan. 31, 1989, GATT B.I.S.D. (36th Supp.) at 200–01 (1989).

82. Interestingly, the Havana Charter, which contained antitrust provisions, failed to enter into force precisely due to these provisions. Bogdandy, *supra* note 35, at 106; JACKSON ET AL., *supra* note 5, at 1092–93.

83. GATS, *supra* note 6, art. IX.

84. *Id.* at 73.

85. Many trading partners of Japan, led by the United States, have been arguing that the structural uniqueness of Japan's domestic distribution system functions as a powerful block against market access by foreign competitors. See IMF, *supra* note 79, at 68–70.

86. Of course, future conflicts in the *competition policy* areas could arise in the dimension of North vs. North or South vs. South, but more salient conflicts would probably occur between the North and South since their interests in the area of competition policies seem to collide, at least for the time being.

87. IMF, *supra* note 79, at 73.

88. JACKSON ET AL., *supra* note 5, at 1092.

89. "Social dumping" can occur when import prices are low because of lax enforcement of domestic anti-competition regimes. *Id.* at 683.

"subsidy,"⁹⁰ even in the new WTO regime,⁹¹ obviously they do not seem to constitute violation cases.⁹² Hence, industrial countries may feel compelled to argue "non-violation nullification or impairment" as a second-best option.⁹³

A second source of conflict may arise from developing countries, whose main concerns over anti-competition practices seem to derive from the possible abuse of market-controlling power by multinational enterprises.⁹⁴ For example, in the middle of the Uruguay Round investment negotiation (Agreement on Trade-Related Investment Measures⁹⁵), many developing countries expressed concerns about the negative impact of competition-stifling practices of multinational enterprises. These include the requirement that subsidiaries purchase imports from their parent company rather than source their needs locally and the prevention of exports by subsidiaries in order to segment world markets.⁹⁶ Since no rules effectively govern that kind of practice within the GATT, developing countries may rely on the pliable concepts of non-violation nullification or impairment to protect their competitive position.

In summary, as the interdependence of the world economy grows, competition policies once regarded as pure domestic policies will have greater international meaning and implications. This situation may cause industrial and developing countries to raise new kinds of claims against each other. Under the WTO regime those claims would probably fit within the category of non-violation nullification or impairment. It is obvious that a flood of anti-competition claims into the dispute settlement system will increase and exacerbate the ambiguity embedded in so-called "independent-mode" non-violation nullification or impairment cases. It would be difficult, in many cases, to accept that the complicated impact of current competition policies must be assessed in terms of reasonable expectations derived directly from tariff concessions made two or three decades ago.⁹⁷ It would be enormously

90. It is sometimes suggested that loose enforcement of a domestic anti-competition regime could in fact function as an unfair advantage to domestic producers and thus be the object of countervailing duties. *Id.* at 1092.

91. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1A of the WTO Agreement, *supra* note 2, art. 2 (Determination of Dumping); Agreement on Subsidies and Countervailing Duties, Annex 1A of the WTO Agreement, *supra* note 2, art. 1 (Definition of a Subsidy) [hereinafter Subsidies Agreement].

92. See *infra* Part III.A.2.

93. See, e.g., *Fuji-Kodak*, *supra* note 7; *Nullification and Impairment of Benefits*, *supra* note 38.

94. JACKSON ET AL., *supra* note 5, at 1062.

95. Agreement on Trade-Related Investment Measures, Annex 1A of the WTO Agreement, *supra* note 2.

96. IMF, *supra* note 79, at 73.

97. See *supra* Part I.B.

burdensome for a panel to handle this situation without any substantive rules, practices, or precedents on which to base its ruling.

C. Crisis of the Dispute Settlement Mechanism

1. Squeezing a Panel or Appellate Body

The ambiguity surrounding the concept of non-violation nullification or impairment may serve to over-extend the jurisdiction of the WTO dispute settlement mechanism.⁹⁸ This is because "ambiguity" in some cases produces "versatility." Any complaining party would naturally invoke the non-violation nullification or impairment provision when the party faces a situation in which another party does not "technically" breach any obligation under the WTO regime, but still should be considered "responsible" for the situation. Thus, to a complainant in this situation, the non-violation provision is a source of hope.⁹⁹

It should be noted, however, that very expansive jurisdiction may jeopardize the dispute settlement system to the extent that an inundation of non-violation complaints would overwhelm a panel.¹⁰⁰ First, the question will arise as to whether the panel *can* deal with all cases it will receive. For example, as mentioned above, without any substantive rules, practices, or guidelines, the panel is not likely to make an appropriate and justifiable decision on non-violation nullification or impairment with regard to "anti-competition" issues in the WTO dimension.¹⁰¹ Likewise, the panel will not be free to determine whether a chronically low labor standard in a developing country has resulted from under-enforcement of its domestic labor law, since no specific obligation concerning this area exists in the WTO regime. Second, it is not clear whether a panel *should* decide all cases coming before its consideration. It would be problematic if a panel were to examine sensitive issues, such as policies related to "sovereign determination," simply because they appear idiosyncratic or unacceptable and thus result in nullification or impairment of another party's benefits. Simi-

98. Petersmann, *supra* note 16, at 192.

99. Bogdandy, *supra* note 35, at 96.

100. *See supra* note 42.

101. International norm-making in the competition policy area, even in the form of soft law (guidelines or recommendations), does not seem easily achievable. Compliance with those norms is challenging. Within the OECD, discussion on how to cope with "competition policy and trade" issues has been quite active, centering around the Committee on Competition Law and Policy and the Trade Committee. The OECD did establish a consultation and conciliation mechanism in its "Revised Recommendation of the Council Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade," but it has been largely ignored by Member countries. *See* Barringer & Durling, *supra* note 41, at 140.

larly, in many cases, a panel should not be forced to second-guess the underlying logic of the domestic regulatory regime of a country.¹⁰²

2. Proliferating *Wrong Cases*

According to Professor Hudec, under the current dispute settlement mechanism there is a possibility that undesirable and inappropriate cases could damage the WTO trading system.¹⁰³ These are the so-called "wrong cases." Wrong cases seem to be particularly problematic when they are initiated with respect to an issue on which the WTO community has either not yet reached a consensus or on which past consensus has broken down.¹⁰⁴ It seems quite probable that wrong cases would proliferate if a panel tried to rule on issues that it should not handle. These cases include issues where current Members have not yet established relevant substantive norms on which panel decisions can be based or cases in which sovereign questions arise as to whether a panel should second-guess the policy determination of a Member country.¹⁰⁵ Such cases pose a "risk of over-adjudication"¹⁰⁶ or a "risk of politicization," resulting in a loss of legitimacy of the dispute settlement mechanism and harm the legitimacy of the WTO system as a whole.¹⁰⁷

When improvements in the WTO dispute settlement mechanism that emerged from the Uruguay Round are considered, these concerns become more serious. In the former GATT dispute settlement system, any contracting party, including the losing party itself, could block the adoption of a panel report regardless of the ruling. This screening mechanism in some sense functioned to expel irrelevant cases,¹⁰⁸ even though it was generally criticized for weakening the rule of law in the dispute settlement system. In contrast, most procedures in the new

102. See JACKSON ET AL., *supra* note 5, at 363; Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 193-94 (1996).

103. Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159 (1980); see also William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 67-78 (1987).

104. See *id.*

105. See *supra* Part II.C.1. Professor Hudec argued that, as seen in the *DISC* case, panel decisions on non-traditional areas like trade in services would be difficult for domestic government officials to accept, and this would hinder panel decisions from being implemented by the losing party. See Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC case*, 72 MINN. L. REV. 1443, 1508-09 (1988).

106. Bogdandy, *supra* note 35, at 110 n.88.

107. Philip M. Nichols, *Participation of Non-government Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Non-government Third Parties*, 17 U. PA. J. INT'L ECON. L. 295, 327 (1996).

108. See Petersmann, *supra* note 10, at 1192-93.

WTO dispute settlement system are designed to be more expeditious, more automated, and more enforceable,¹⁰⁹ giving a panel and the Appellate Body more power as well as making it extremely difficult to block the adoption of any panel or Appellate Body reports.¹¹⁰ Therefore, once a non-violation complaint is accepted by a panel (Appellate Body), however unreasonable and unjustifiable it may be, the ruling is almost automatically adopted.

Moreover, if the two parties concerned in a dispute still fail to reach a "mutually satisfactory adjustment" after a determination that a measure nullifies or impairs benefits without violation,¹¹¹ the winning party will rely on enforceable remedies, namely "compensation and suspension of concessions."¹¹² Why the losing party (or other Members for that matter) will choose to tolerate the ensuing sanctions is unclear, since it would then be forced to compensate the prevailing party or have its tariff concessions suspended by that party. Although a panel or Appellate Body report has no formal *stare decisis* effect, when considered in light of the practical role of panel reports in guiding and steering subsequent cases, the above situation would severely undermine not only the credibility and stability of the dispute settlement system, but the entire WTO system.

3. The Dilemma

One might argue that a panel would simply have to refuse to judge sensitive issues that might develop into wrong cases, thus keeping them out of the dispute settlement system. However, abandonment cannot be the end of the story. Although the WTO is a "trade" organization that effectively governs the world "trade" system, if it fails to deal with emerging trade-related issues, such as competition policies and conflicting interests of various power groups, including domestic constituencies, it will destabilize the WTO regime. The system would be criticized for its mediocre problem-solving capacity.¹¹³

Concomitantly, Member countries pressured by interest groups would be compelled to exercise unilateral measures of their own. Such a unilateral response would take two forms. First, the Member countries

109. See, e.g., DSU, *supra* note 31, arts. 6.1, 8.7, 15, 16, and 17.

110. According to the DSU, it requires a consensus of all Member countries, including the victorious party, to block a panel (Appellate Body) decision, which seems nearly impossible. It is frequently called "negative consensus." DSU, *supra* note 31, art. 16; JACKSON ET AL., *supra* note 5, at 343.

111. DSU, *supra* note 31, art. 26 ¶ 1(b).

112. GATT 1994, *supra* note 5, art. XXIII ¶ 2; DSU, *supra* note 31, arts. 22, 26, ¶ 1(d).

113. Robert E. Hudec, *International Economic Law: The Political Theater Dimension*, 17 U. PA. J. INT'L ECON. L. 9, 10 (1996).

might attempt to expand extraterritorial jurisdiction of their domestic anti-competition laws.¹¹⁴ Recently, for instance, the United States Supreme Court appears to have broadened the extraterritorial jurisdiction of the United States antitrust law (the Sherman Act) in a 5 to 4 decision in *Hartford Fire Insurance Co. v. California* in 1993.¹¹⁵ Second, the Member countries might seek to mobilize a certain unilateral trade sanction pursuant to their own trade laws in order to fulfill their own policy goals. In the *Fuji-Kodak* (1998) case, for example, the United States asserted that the use of unilateral sanctions in Section 301 was not inconsistent with the WTO, because the WTO did not cover competition policy issues.¹¹⁶ The United States has traditionally maintained this approach in the international trade area and recently reaffirmed its stance in the process of implementing the Uruguay Round.¹¹⁷ This approach is legitimized by the so-called "self-help" theory advocated by Professor Hudec, who maintains that if the GATT (WTO) fails to govern a specific area, the complaining party may freely rely on "self-help" in some circumstances.¹¹⁸ Although this approach has received harsh criticism,¹¹⁹ it is unlikely that the United States will change its stance in the near future. Moreover, it is argued that the United States can effectively shape the agenda at the negotiating table by threatening to use Section 301.¹²⁰

114. See Renee Hardt, *Kodak v. Fuji: A Test for the Extraterritorial Application of the Sherman Act*, 15 B.U. INT'L L.J. 309, 309-10 (1997).

115. *Id.*; 509 U.S. 764 (1993). In this case, the Supreme Court did not resort to traditional "comity analysis" as established in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* when it held that the United States courts should not take into account foreign interests unless there is a "true conflict" between the United States law and the law of the foreign state. Hardt, *supra* note 114, at 311. However, this approach is likely to impose substantial litigation costs on a plaintiff as well as the risk of losing the suit. Even if the plaintiff wins, the court's decision may not be enforceable, *id.* at 312. Therefore, without confidence about its claim against a foreign company, no U.S. company would easily rely on this approach rather than a safer political process like a Section 301 petition, *id.* at 339.

116. See Abels, *supra* note 42, at 523. Eventually, the United States made no case under Section 301 primarily because Japan refused to negotiate under Section 301 with the United States. Instead, the United States went to the WTO dispute settlement mechanism. Considering the *Auto and Auto Parts* case, Japan would have once again filed a complaint with the WTO panel against the United States' threat of the Section 301 sanction if the United States relied on Section 301 in this case. See Taylor, *supra* note 4.

117. See, e.g., GEN. ACCT. OFF., THE GENERAL AGREEMENT ON TARIFFS AND TRADE—URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS, July 29, 1994, GAO/GGD 94-83A, 1994 WL 836267 (F.D.C.H.); OFF. U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. PRESIDENT, THE URUGUAY ROUND AGREEMENT ACT, STATEMENT OF ADMINISTRATIVE ACTION: UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, Sept. 27, 1994.

118. Taylor, *supra* note 4, at 227 n.86; Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM 113, 130 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

119. See, e.g., JAGDISH BHAGWATI: WORLD TRADING SYSTEM AT RISK (1991).

120. Taylor, *supra* note 4, at 291.

In summary, if a panel accepts broad jurisdiction over non-violation complaints, it will soon face problems as to whether it can or should make a decision. These problems may undermine the predictability and transparency of the dispute settlement system. If, in turn, a panel simply sidesteps the aforementioned issues, it may provoke a preemptive reaction by some countries and imperil the future credibility and stability of the WTO. Future panels face such a dilemma.

III. METHODOLOGICAL SUGGESTIONS FOR TACKLING THE PROBLEMS

A. From Non-Violation to Violation ("Violationize")¹²¹

1. Positive use of General Obligations

As discussed earlier, under the current WTO regime, when a measure by another government does not explicitly breach any obligation, a complaining party that feels deprived of its legitimate benefits can easily bring a non-violation nullification or impairment case. However, even if a regulatory measure is on its face neutral and non-discriminatory, it could in fact have an import-restrictive impact, thus violating national treatment obligations in the form of disguised discrimination.¹²² In other words, many future complaints that may be raised under the non-violation provision should be interpreted as violation cases if a panel fully exercises its interpretative capacity in the context of the general obligations embodied in the GATT.¹²³ By doing so, a

121. In fact, the origin of this kind of effort could be found in the GATT panel history. The panel sometimes restricted itself to violation when the real issue was non-violation. See e.g., Vermulst & Driessen, *supra* note 10, at 136; PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT (1991); *Semi-Conductors*, *supra* note 32; *Sugar*, *supra* note 29. I use "violationize" to refer to a positive and intentional shift in perspective from bilateral (contract-like) reciprocity to adjudicated rule of law. See Vermulst & Driessen, *supra* note 10, at 137; JACKSON ET AL., *supra* note 5, at 364.

122. *Id.* at 522-50. It would not be exaggerating to say that most recent cases of Article III (National Treatment) of the GATT 1994 are regarded as disguised discrimination. In coping with this type of discrimination, the panel seems to rely largely on the interpretation of paragraph 1 of Article III, in particular the phrase of "so as to afford protection to domestic production". See, e.g., *Alcoholic Beverages*, *supra* note 64.

123. The interpretation here, of course, is different from "definitive interpretation" or "authoritative interpretation". See WTO Agreement, *supra* note 2, art. IX, ¶ 2; DSU, *supra* note 31, art. 3.9. In *Alcoholic Beverages*, the Appellate Body made it clear that an adopted panel report would not constitute a definite interpretation of the relevant provisions of GATT 1947 as well as GATT 1994, citing Article IX:2 of the WTO Agreement and Article 3.9 of the DSU. (It should be noted that a quorum of three-fourths majority necessary for a decision of such a definitive interpretation is as difficult to achieve as that of an amendment of the WTO charter, see WTO Agreement, *supra* note 2, art. X). However, the Appellate Body further noted that adopted panel reports create "legitimate expectations" among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute, see *Alcoholic Beverages*, *supra* note 64. Therefore,

Panel or Appellate Body would shift focus from the rather rigid language of the general obligations (e.g., national treatment) to the objectives and purposes of the GATT provisions.

At this point, much attention should be paid to the exceptions to the general obligations (i.e., Article XX of the GATT 1994). Defending parties that are alleged to have violated general obligations can choose to rely on Article XX. This Article insulates from inquiry measures designed to protect human health, public morals, or cultural values (among other things) because of domestic sovereignty.¹²⁴ However, Article XX incorporates a safety net against potential overuse or misuse of these general exceptions, namely the "Chapeau" or preamble to Article XX.¹²⁵ In other words, even if the defending parties succeed in arguing that their measures fall within the scope of general exceptions, they would still have to prove that their measures would not constitute "arbitrary or unjustifiable discrimination" or "disguised restriction."¹²⁶ The Chapeau as final gatekeeper would help broaden the operational scope of general obligations, and thus "violationize" potential non-violation cases. Furthermore, these general obligations would be particularly effective in coping with the so-called "independent-mode" non-violation cases¹²⁷ since the obligations (e.g., national treatment) would also extend to products not bound under Article II.¹²⁸

Such a positive approach would also be applicable, to some extent, to cases concerning *competition policies*, which are likely to produce many future non-violation cases. For example, suppose that according to country A's business practices, domestic firms in a specific industry exchange important business information among themselves and sometimes provide each other with raw materials at a relatively cheap price.¹²⁹ Then suppose that country B, which exports competitive goods to country A, argues that its benefits are nullified or impaired

although these panel or Appellate Body reports are not technically "binding", they have a certain "legal" effect, functioning as a quasi-precedent or practice, see PIERRE PESCATORE ET AL., *supra* note 121; John H. Jackson, *The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections*, in 1 TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS 149 (1994).

124. GATT 1994, *supra* note 5, art. XX.

125. *Id.*

126. For example, in the first Appellate Body Report of the WTO (*Reformulated Gas*), the Appellate Body concluded that the regulation of the Environmental Protection Agency (EPA) of the United States, although it fell within the scope of general exceptions (Article XX(g)), eventually constituted an "unjustifiable" discrimination against foreign refiners because the United States had not pursued the possibility of entering into "cooperative arrangements" with foreign governments. Appellate Body Report: *U.S.-Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WT/DS2/9 [hereinafter *Reformulated Gas*].

127. See *supra* Part I.B.2.

128. See, e.g., *Alcoholic Beverages*, *supra* note 64, at 12 n.38.

129. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), 1976 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: THE 1984 REVIEW OF THE 1976 DECLARATION AND DECISIONS

by the restrictive business practices and subsequently files a non-violation complaint under the WTO dispute settlement system. In this hypothetical case, the crucial issue that the panel should focus on is the existence of government intervention or interference. If the outwardly restrictive business practice stems from the "purely commercial" nature of the issue, then it would be beyond the scope of dispute settlement procedure of the WTO. If, however, private practices are encouraged or promoted by some kind of government bias against foreign competitors that can be evidenced by "administrative guidelines," "administrative action,"¹³⁰ or at least persistent "practices" by the government, it should be interpreted as disguised discrimination designed to protect domestic firms from competition. If protection is the underlying motivation behind the government intervention, then the panel could legitimately rely upon the national treatment provision.¹³¹ Another question regarding competition policies would arise in cases of mere inaction or acquiescence by the government facing these private restrictive business practices. In this situation, however, it seems very controversial to argue that violation of the national treatment obligation has occurred because there exists no clear nexus with the governmental action.¹³² Thus, it would be wiser to deal with such issues outside the domain of the WTO system. Therefore, there is a limit to the extent that a panel should "violationize" a case.

2. Expanding the Scope of "Substantive Norms" beyond General Obligations

a. Hard Law

Considering the likely complexity of future cases, in order to guarantee rationality and legitimacy when transforming non-violation cases into violation cases, a panel would need to rely on even more sophisticated "substantive rules" beyond the general obligations of the GATT and GATS as a basis for its interpretation. As a result, the scope of legal obligations under the WTO system would be substantially expanded.

In the above context, a useful example of the sequential development of substantive rules could be found in the subsidy area where there is

9 (1984); UNITED NATIONS, SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES, U.N. Doc. TD/RBP/10 (1980); JACKSON ET AL., *supra* note 5, at 1094-95.

130. See GATS, *supra* note 6, art. XXVIII.

131. See Taylor, *supra* note 4, at 236.

132. Instead of violation approach, some activists of competition policies suggest that under-enforcement by the government of anti-competition practices provides an unfair advantage and thus should be designated as a "subsidy". John H. Jackson, *Alternative Approaches for Implementing Competition Rules in International Economic Relations*, 2 SWISS REV. INT'L ECON. REL. 2, 2-25 (1994).

a sequence of cases and report, culminating in one side agreement. This sequence is as follows: *Australian Subsidy* (1949), Working Party Report of the 1954-55 Review Session (1955),¹³³ *Oilseeds* (1988), and Agreement on Subsidies and Countervailing Duties (1994).¹³⁴ Originally, Article III, para. 8 of the GATT 1947 legitimized the introduction of domestic subsidies without any restriction. Likewise, in *Australian Subsidy* (1949),¹³⁵ although the working party concluded that the unexpected removal of a pre-existing subsidy on one of two competing products constituted impairment of the value of a tariff concession granted to Chile, the then-working party strongly reaffirmed the general acceptability of introducing a new subsidy without any possible nullification or impairment, noting that:

The situation in this case is different from that which would have arisen from the granting of a new subsidy on one of the two competing products. In such a case, *given the freedom under the General Agreement of the Australian Government to impose subsidies and to select the products on which a subsidy would be granted*, it would be more difficult to say that the Chilean Government had reasonably relied on the continuation of the same treatment for the two products.¹³⁶

However, during the 1954-55 Review Session, a GATT Working Party reversed the previous position in *Australian Subsidy* (1949), concluding that:

So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assured, for the purpose of Article XXIII, to have a *reasonable expectation*, failing evidence to the contrary, that the value of concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent *introduction or increase* of a domestic subsidy on *the product concerned*.¹³⁷

In line with this report, in *Oilseeds* (1988)¹³⁸ the panel solidified the previous position in the 1954-55 Report (1955), concluding that the introduction of "product-specific" domestic subsidies did impair the benefits from tariff binding, finding that:

133. Working Party Report of the 1954-55 Review Session, GATT B.I.S.D. (3d Supp.) at 224 (1955) [hereinafter 1954-55 Report].

134. Subsidies Agreement, *supra* note 91.

135. See *Australian Subsidy*, *supra* note 35.

136. *Id.* (emphasis added).

137. 1954-55 Report, *supra* note 133, at 224 (emphasis added).

138. See *Oilseeds*, *supra* note 20.

benefits accruing to the U.S. under Art. II of the GATT in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired *as a result of subsidy schemes* which operate to protect Community producers of oilseeds completely from the movement of prices of imports.¹³⁹

The findings in the 1954-55 Report (1955) and *Oilseeds* (1988) seem especially significant because they clearly demonstrated a substantial shift away from the position in the earlier *Australian Subsidy* (1949) case on the introduction of domestic subsidies. Although the findings did not go so far as to recognize the legal obligation of prohibiting or restricting the introduction of certain subsidies, one could say that the findings represented an *evolved* position. They diluted the impact of the subsidy exception to national treatment obligation and established legal discipline in such a traditionally sensitive area.

Real codification in the subsidy area took place during the Uruguay Round.¹⁴⁰ According to the Subsidies Agreement, the introduction of "product-specific" domestic subsidies shall constitute a "breach of international law obligation" when they are invoked by a Member country under this agreement.¹⁴¹ From this Agreement, the non-violation issues on subsidies found in *Oilseeds* (1988) have been *fossilized* to a considerable degree.¹⁴²

Side agreements aiming at "elaborating rules for the application"¹⁴³ or "furthering the objectives of the GATT"¹⁴⁴ should be more actively employed and used to cover a broader range of legal obligations. Throughout the Tokyo and Uruguay Round some side agreements, such as the "Agreement on Technical Barriers to Trade" (TBT), the "Agreement on the Application of Sanitary and Phytosanitary Measures" (SPS), and the "Agreement on Import Licensing Procedures" (ILP) were established to rationalize and fine-tune legal rights and obligations under the GATT. No doubt, these agreements are quite delicate and technical. Yet, despite their usefulness, up to now they

139. *Id.* (emphasis added).

140. The first attempt at codification in the subsidy area was conducted in the Tokyo Round. However, the Subsidies Code, which emerged during the Tokyo Round, was legally porous and deficient. See *supra* note 51.

141. See Subsidies Agreement, *supra* note 91, arts.5, 7; JACKSON ET AL., *supra* note 5, at 769.

142. Bogdandy, *supra* note 35, at 108. However, the new Subsidies Agreement largely exempts *agricultural* subsidies, leaving them to the Agreement on Agriculture. JACKSON ET AL., *supra* note 5, at 771. In this context, non-violation regime on subsidies could still have some meaning in that it puts some discipline to agricultural subsidies.

143. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Annex 1A of the WTO Agreement on Import Licensing Procedures, *supra* note 2, pmbl. [hereinafter SPS].

144. Agreement on Technical Barriers to Trade (TBT), Annex 1A of the WTO Agreement, *supra* note 2, pmbl. [hereinafter TBT]; Agreement on Import Licensing Procedures (ILP), Annex 1A of the WTO Agreement, *supra* note 2, pmbl.

seem to have been infrequently cited and applied in the actual panel reports. One reason for this lack of use is that panels may have mainly focused on the interpretation of the GATT provisions themselves, while paying less attention to the possible use of technical provisions. However, responding to future cases, which would likely be more puzzling and exacting, may require a more stringent framework of substantive rules in order to "violationize" the potential non-violation cases and thus discourage such cases. In this context, it is noteworthy that a recent panel based its ruling on the specific obligations of the SPS; the *Hormone* (1997)¹⁴⁵ panel concluded that the EC violated Article 3.1, 5.1, and 5.5 of the SPS.¹⁴⁶

b. Soft Law

In addition to taking full advantage of the possibility of the above-mentioned "hard law" (i.e., side agreements), quasi-rule-making through "soft laws"¹⁴⁷ without binding force should be pursued in technical areas, such as non-tariff barriers and competition policies. It would, of course, be ideal to think that the above emerging areas can be sufficiently and effectively covered by amending the WTO agreement or establishing new side agreements. However, considering the double difficulty of amending the current WTO Agreement¹⁴⁸ (legal difficulty) as well as coordinating the Member countries' various interests (political difficulty), there may be no other practical choice, at least in the short-run. As we have witnessed, no matter what their legal nature, various types of recommendations, declarations, or guidelines of various international organizations, such as the "Organization for Economic Cooperation and Development (OECD),"¹⁴⁹ the "International Labor Organization

145. EC—Measures Concerning Meat and Meat Products (*Hormones*): Complaint by the United States, Aug. 18, 1997, WT/DS26/R/USA [hereinafter *Hormones*].

146. Another question would arise regarding the relationship between obligations in the different agreements. The relationship or legal hierarchy between the *general* obligations in the GATT 1994 and the *specific* obligations in the side agreements (TBT or SPS) is still controversial. According to *General interpretive note to Annex 1A* (Multilateral Agreements on Trade in Goods) of the WTO Agreement, in the event of a "conflict" between a provision of GATT 1994 and a provision of side agreements, the provision of the latter shall prevail to the extent of the conflict. Nonetheless, in the real cases, it would not be so simple to identify or determine whether there exists a "conflict" or not. Thus far, recent panels (Appellate Body), regardless of the identification or determination of that conflict, seem to adopt a discretionary approach with regard to which provision—a provision of GATT 1994 (*general* obligation) or a provision of the side agreements (*specific* agreement)—it should rely on first. In addition, it seems that once a panel (Appellate Body) has given a conclusion based on either of the agreements (provisions), it would not return to the other simply because there is no *necessity* for it. See *Reformulated Gas*, *supra* note 126; *Hormones*, *supra* note 145.

147. Frederic L. Kirgis, Jr., *Specialized Law-making Process*, in UNITED NATIONS LEGAL ORDER 109, 143–54 (O. Schachter & C. Joyner eds., 1995).

148. See WTO Agreement, *supra* note 2, art. X.

149. See, e.g., Declaration on International Investment and Multinational Enterprises, Annex

(ILO),”¹⁵⁰ and the “International Civil Aviation Organization (ICAO),”¹⁵¹ are influential despite their non-binding nature. Indeed, formality is not a critical component of soft law. Instead, what is crucial is that there exists flexibility so that Member countries feel a lesser political burden to draft and implement such soft norms. Nevertheless, by drafting such norms, they set common standards that harmonize their conduct.¹⁵²

Flexibility is especially important when these norms are related to technical and professional areas. Initially, these norms should converge on so-called “common denominators” without losing sight of the differences in perspective and culture that inevitably exist among Member countries.¹⁵³ Progressively, the scope of the common denominators will expand. Once the soft norms are established, in spite of their non-binding nature, Member countries would likely be strongly encouraged to comply with the norms, and the panel would begin to cite them to support its ruling just as adopted panel reports have been frequently cited by later panels. Hence, the normative effect of the soft laws does not necessarily depend on the degree to which the Member countries are formally bound.¹⁵⁴ By taking advantage of soft law the panel could effectively avoid fuzzy non-violation claims and steer the dispute settlement system toward a more predictable and transparent path.

c. Strategic Co-optation

In addition to examining the utility of both hard law and soft law, the desirability of “strategic co-optation”¹⁵⁵ of other international or-

to the OECD Declaration on International Investment and Multinational Enterprises, Jun. 21, 1976, 15 I.L.M. 967 (1976).

150. See, e.g., Recommendation Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, ILO Recommendation No. 90, Jun. 29, 1951, International Labor Conventions and Recommendations 1919-1991, at 531 (1992).

151. See, e.g., Annex 11 (Air Traffic Services: Establishment and Operation of Air Traffic Control, Flight Information and Alerting Services) to the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S.1591, 15 U.N.T.S. 295, as amended through 1991, ¶ 3.7.1.2, at 18 (9th ed., 1990).

152. Kirgis, *supra* note 147, at 159.

153. Jackson, *supra* note 132, at 19-22; Diane P. Wood, *International Competition Policy in a Diverse World: Can One Size Fit All?*, in EC AND U.S. COMPETITIVE LAW AND POLICY 71-85 (Barry Hawk ed., 1992); JACKSON ET AL., *supra* note 5, at 1090-1100.

154. Kirgis, *supra* note 147, at 151. Moreover, the soft norms could be “hardened” through formal legislative mechanisms, such as amending the WTO Charter and making side agreements. For instance, in *Hormones*, the panel noted that even if international standards, such as *Codex Standards*, may not be binding on Members, Article 3.1 requires Members to base their sanitary measures on these standards. See *Hormones*, *supra* note 145; SPS, *supra* note 143, art. 3.1.

155. According to Selznick, it is “the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence.” RONALD S. BURT, *CORPORATE PROFITS AND COOPTATION* 5 (1983). In the context of the WTO dispute settlement, this means that a panel or Appellate Body should try to

ganizations, which are capable of providing technical and professional support to the panel in specific areas, should be investigated. There are and will be many areas requiring panels to depend on specialized organizations for fact-finding when it is trying to determine whether a Member country has breached a specific obligation (e.g., national treatment) or not. Former GATT panels have already recognized the necessity of this dependence. In *Thai Cigarette* (1990), the panel consulted the World Health Organization (WHO) on factual issues related to links between health and cigarettes. This was the first time a GATT panel had referred to outside experts in a dispute settlement proceeding.¹⁵⁶

As a result of the Uruguay Round Negotiations the DSU explicitly entitles a panel to seek information and technical advice from any body that it deems appropriate.¹⁵⁷ Further, the SPS agreement requires a panel handling scientific and technical issues to seek advice from experts and at the same time authorizes a panel to consult relevant international organizations, at the request of either party to the dispute or on a panel's own initiative.¹⁵⁸ In line with these provisions of the SPS, the *Hormone* (1997) panel sought technical advice from outside experts with regard to the effect on human health of the use of natural and synthetic hormones for growth promotion purposes.¹⁵⁹

Reliance on outside experts can also be fruitful in the area of competition policies. Since the OECD is known to be a repository of much experience and expertise¹⁶⁰ in this area, a panel could consult with the OECD about detailed factual features of anti-competitive measures or practices in question. In particular, if a dispute related to competition policies occurs between the OECD Member countries, it would be both more relevant and convenient for a panel to refer to the OECD for detailed information in this area. Moreover, it is conceivable that some guidelines or recommendations adopted by the OECD Member countries in the area of competition policies would even be cited by a panel in a future dispute between the OECD Member countries.

In conclusion, by actively taking advantage of strategic co-optation, a panel's ability to determine whether a country has breached a specific obligation will be improved, thereby constraining the use of non-vio-

incorporate views, findings, and technical knowledge of other international organizations into its decision-making (interpretative) process. This will enhance its problem-solving capacity and, therefore, defend the system as a whole from external criticism.

156. *Thailand—Restriction on Importation of and Internal Taxes on Cigarettes*, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 224 (1991) [hereinafter *Thai Cigarette*]; JACKSON ET AL., *supra* note 5, at 357.

157. DSU, *supra* note 31, art. 13.

158. SPS, *supra* note 143, art. 11.2.

159. See *Hormones*, *supra* note 145.

160. IMF, *supra* note 79, at 74.

lation complaints, while at the same time enhancing the reliability and legitimacy of its ruling.

3. Institution Building to Allow for Violationization

Turning to the institutional framework of the WTO, there is still much work to be done to strengthen the normative structure in its operation and thus enable a future panel to transform non-violation complaints to violation cases, i.e., *violationize*.

First, it is essential that the composition of a panel be chosen more selectively in order to effectively cope with complex, often technical, disputes and to justly *violationize* them. According to the DSU, a panel is likely to be composed of two kinds of groups. The first group consists of "trade diplomats" who had the experience of representing their countries in the former GATT Council or other related Committees under the side agreements, while the second comprises "trade bureaucrats" who have served as senior trade policy officials of the Member countries.¹⁶¹

Although the diplomatic and bureaucratic experiences of a panelist should not be undervalued, the possibility of selecting as panelists "technicians" or "professionals" who may better determine a specific factual issue shaping the basis of a panel's ruling should also be investigated. In this manner, at least one panelist of the three would be chosen according to the professional nature of the case before a panel.¹⁶² Similarly, a panel should establish an "expert review group" or an "advisory technical expert group" whose mission is to provide the panel with technical assistance needed to decide cases involving technical questions.¹⁶³ In accordance with this view, in the *Hormone* (1997) case, the panel properly utilized the scientific advice of experts in justifying its own opinion.¹⁶⁴ In addition, from a practical standpoint, it should also be noted that the amount of "financial compensation" to those experts would determine their quality.¹⁶⁵

Another important impetus that could enhance the legal standing within the institution would be to invigorate the "WTO Committees" that have been established for specific purposes. The WTO Agreement explicitly anticipates the future existence of various functional Committees.¹⁶⁶ These Committees would be especially significant since they

161. DSU, *supra* note 31, art. 8.1.

162. Nichols, *supra* note 107, at 328.

163. DSU, *supra* note 31, art. 13.2, app. 4; TBT, *supra* note 144, art. 14.2; SPS, *supra* note 143, art. 11.2.

164. See *Hormones*, *supra* note 145.

165. See Vermulst & Driessen, *supra* note 10, at 154.

166. WTO Agreement, *supra* note 2, art. IV, ¶¶ 2, 7.

would be the locus at which the above-mentioned "soft laws" (guidelines and recommendations) could be established.¹⁶⁷ The epistemic¹⁶⁸ nature and flexible operation of the Committees could facilitate the institution of norms that would be formally non-binding but actually cited by a panel. It would also substantially guide the behavior of a Member country, with few political overtones.¹⁶⁹

In addition, as Professor Jackson maintains, an indirect but effective way exists to improve the "legal integrity" of the WTO system and thereby expand the scope of legal obligations: "surveillance".¹⁷⁰ To this end, committees or working groups under the umbrella of the WTO may be used. However, considering the relatively weak institutional nature of committees or working groups, it would be more relevant to use the "Trade Policy Review Mechanism (TPRM),"¹⁷¹ which is regarded as one of the most important achievements of the Uruguay Round. The purpose of the TPRM is to encourage "improved adherence" by all Members to "rules, disciplines, and commitments" made under the Multilateral Trade Agreements, thus achieving greater "transparency."¹⁷² This enhanced transparency is expected to induce the Members to recognize a more precise legal meaning and status under the WTO regime of their own trade policies as well as those of other Members', thereby reducing ambiguities in their legal complaints and restricting potential non-violation disputes.

Finally, it should be stressed that "international bureaucrats" at the Secretariat should play an active role in providing the necessary infrastructure for the efficient operation of the WTO. It is the Secretariat that assists and supports a panel or Appellate Body to produce its rulings. Therefore, in order for a panel or Appellate Body to *violationize* future non-violation cases, much practical assistance—both advisory and administrative—from the Secretariat would be necessary. One impediment to this support, as many scholars note, is that the current WTO Secretariat is seriously understaffed. Its size is reportedly only eight percent of that of the World Bank and twenty-three percent of that of the International Monetary Fund (IMF).¹⁷³ Although the Secretariat of the former GATT was also understaffed, the Secretariat of

167. See *supra* Part III.A.2.

168. See generally Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L L. ORG. 1 (1992).

169. See *supra* Part III.A.2.

170. JACKSON, *supra* note 51, at 113.

171. Trade Policy Review Mechanism, Annex 3 of the WTO Agreement, *supra* note 2 [hereinafter TPRM].

172. *Id.*

173. See Critical Issues before the WTO Ministerial Meeting in Singapore: A Declaration by an International Group of Economists, December 2, 1996 [hereinafter Declaration]; Vermulst & Driessen, *supra* note 10, at 154.

the WTO is now even more problematically understaffed in light of its greater responsibilities.¹⁷⁴ Therefore, in order for the Secretariat to carry out its role, it should be substantially strengthened through practical means, such as expanding contributions from the Member countries and increasing the WTO budget.¹⁷⁵

B. From Non-Violation Nullification or Impairment to "Non-Nullification or Impairment"

1. Standards of Review

Although the recent trend in international trade is "standardization," some issues can still be assessed and determined only by domestic authorities or courts. An example is measures concerning "regulatory policies." In some cases, it may be difficult for other countries or institutions to refute the logic behind a specific regulatory policy (e.g., banking regulation) since most countries have their own peculiar policy goals and priority structure among different policies.¹⁷⁶

In that context, questions may arise when a panel faces a case in which the decision of whether or not to second-guess or reassess what domestic authorities have already legitimately determined constitutes an essential part of the case.¹⁷⁷ If issues in question fall into a rather technical or scientific area, the panel could turn to other impartial professional bodies in handling a particular factual question. That was the approach taken in *Thai Cigarette* (1990).¹⁷⁸ However, when issues involve value judgments or are related to cultural characteristics or high-level policy considerations, the panel should be more cautious in ruling for nullification or impairment. Those are situations where a "reasonable and nuanced" approach by a panel is called for.¹⁷⁹ Of

174. See Declaration, *supra* note 173.

175. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 271-85 (1995); see also Declaration, *supra* note 173.

176. For example, since financial transactions tend to have a great impact on the macroeconomic policy of each country and, therefore, are the object of regulatory supervision, the policy goal of free trade in financial services can often conflict with the policy goals of other domestic economic policies (e.g., protecting the balance of payments).

177. JACKSON ET AL., *supra* note 5, at 364.

178. See *supra* Part III.A.2-3.

179. Croley & Jackson, *supra* note 102, at 212-13. A meaningful analogy to this standard of review question would be found in the context of the European Convention of Human Rights. According to the European Court of Justice, national authorities remain free to choose the measures that they consider appropriate in those matters governed by the Convention (this is the "principle of subsidiarity"). They are in principle better situated than the international judge to appreciate what is "in the public interest" because of their direct knowledge of their society and its needs (this is the "doctrine of margin of appreciation"). Rolv Ryssdall, *Opinion: The Coming of Age of the European Convention on Human Rights*, 1 EUR. HUM. RTS. L. REV. 18, 24-25 (1996).

course, when a certain decision by a national authority explicitly appears to be so arbitrary and unjustifiable under the current WTO regime that it transgresses an unwritten but agreed-upon boundary, a panel should be able to strike down the initial decision of the national authority by applying violation clauses. However, if the national authority's initial decision does not appear to conflict with the current WTO regime and makes it difficult to resort to violation provisions, a rash panel decision of non-violation nullification or impairment enforced against the losing party would likely frustrate the parties and be a cause of concern for most Members. The dispute settlement mechanism would then be a target of harsh criticism, which in turn could threaten the stability of the still young WTO.¹⁸⁰ It should be noted that during the first decade of GATT's existence, the contracting parties were careful not to overtax the fragile GATT system, by avoiding overly aggressive use of the dispute settlement system.¹⁸¹

2. Necessity of Cooperation

Even though a panel may on its own accord restrain itself from making judgments on sovereignty-related or culture-specific issues, the possibility still exists that a complaining party will be dissatisfied if it feels benefits afforded it have been nevertheless nullified or impaired. In such a case, a mere declaration by a panel that a particular pending case is beyond its capacity would not address the problem facing the Members concerned; in fact, this decision could sometimes make things worse. Moreover, deciding whether to defer fact finding to a national authority or interfere with that determination would be quite difficult for a panel, especially when confronted with the likely problem of policies having different roots. Historically different policies, such as competition policies, cannot be easily reconciled or harmonized between the Member countries.

Under such circumstances, the judicial approach should give way to "cooperation" or "coordination" between disputants.¹⁸² In other words, closer cooperation between the parties concerned and rational compromise through mutually satisfactory adjustments in position would decrease the possibility of the panel process being tested by ambiguous non-violation cases. Already, the 1960 Report¹⁸³ noted that:

180. JACKSON ET AL., *supra* note 5, at 212.

181. Davey, *supra* note 103, at 62.

182. See GATS, *supra* note 6, art. IX (Business Practices); Klaiman, *supra* note 67, at 677; Vermulst & Driessen, *supra* note 10, at 137.

183. See 1960 Report, *supra* note 80.

the Group agreed to recommend that the CONTRACTING PARTIES should *encourage direct consultations between the contracting parties* with a view to the elimination of the harmful effects of particular restrictive practices.¹⁸⁴

This report further noted that the majority of experts agreed on the necessity of preventing any action under the GATT Article XXIII, observing that:

the majority were convinced that, *regardless of the question whether Article XXIII could legally be applied, they should recommend to the CONTRACTING PARTIES that they take no action under this Article*. Such action would involve the grave risk of retaliatory measures under the provisions of paragraph 2 of that Article, which would be taken on the basis of judgments which would have to be made without adequate factual information about the restrictive business practice in question¹⁸⁵

Paradoxically, this type of judicial restraint would probably be one of the ways in which the rule-oriented nature of a panel process could survive future wrong cases. In the same context, in *Canadian Import Quotas on Eggs* (1975), the working party recommended cooperative settlement of the issue involving the use of a wrong base period for calculating the size of a quota, stating that they were unable to determine that the quota had nullified or impaired the benefits from tariff binding.¹⁸⁶ Likewise, a future panel should, with its own voice, actively recommend "cooperative settlement" of the non-violation complaint when it deems it necessary to do so.

The settlement of non-violation cases through consultation or cooperation, rather than adjudication, should not be limited to mere resolution of a specific case. If the Member countries focus on purely diplomatic case-oriented settlement, no cross-nationally harmonized regulatory structure will develop, especially in highly sophisticated regulatory areas like competition policies. In other words, although diplomatic problem solving on a case-by-case basis would help avoid overwhelming a panel with non-violation claims, it would not root out the possibility that similar non-violation cases would repeatedly emerge. This is because Member countries would have no obligation to with-

184. *Id.* ¶¶ 4, 5 (emphasis added).

185. *Id.* ¶ 8 (emphasis added). However, in the past, some complaining parties tried to resort to Article XXIII: 1(b) in order to challenge restrictive business practices of the foreign country. See, e.g., *Nullification and Impairment of Benefits*, *supra* note 38.

186. *Canadian Import Quotas on Eggs*, Feb. 17, 1976, GATT B.I.S.D. (23d Supp.) at 91 (1977).

draw the disputed measure in the absence of common rules or principles governing those areas.

The inability to control for the possibility of recurrence of some non-violation cases is the very reason why the Member countries need an "inter-governmental regulatory network," something beyond the current system of ephemeral diplomatic compromise in those regulatory areas. Pragmatically speaking, the importance of classical sovereignty is diminished if this approach is taken. More importantly, transnational communication between actual regulators would replace old-fashioned diplomatic sovereignty in a new interdependent world economy.¹⁸⁷

In such an arena, the fact that regulators from various countries would meet, talk to, and exchange valuable information with each other would increase the density of their communication.¹⁸⁸ Moreover, the more the world economy becomes integrated, the greater the likelihood that common problems would be solved by the harmonization or convergence of domestic regulatory regimes.

Eventually, this dense transgovernmental regulatory cooperation would lead to a consensus on rule making, no matter how formal the agreement. Initially, regulators would likely draft and adopt a "guideline" or "recommendation" that would not be legally binding (soft law).¹⁸⁹ Of course, as occurred in the *Codex Alimentarius*, the "normative impact" of soft law is not necessarily undercut by its non-binding nature.¹⁹⁰ Even though a norm is not technically binding, the degree of

187. See generally Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

188. With regards to how transnational communication (in particular, trans-executive communication dealing with policy formulation and quasi-legislation) occurs, varying patterns seem to exist. Four patterns may be listed in the order of the "density" of communication: *persuasion*, *negotiation*, *strategic co-optation*, and *epistemic sympathization*. Assume that A is a government agency of country X and B is an agency of country Y. First, A can persuade B to change its policy stance by providing better information or more advanced technology. This frequently happens between a developed and an underdeveloped country. Second, in many cases, A and B can negotiate over a common subject and reach an agreement on the basis of reciprocity. Third, strategic co-optation can take place. "Strategic co-optation," according to Selznick, is the process of absorbing new elements into the leadership of the policy-determining structure of an organization as a means of averting threats to its stability or existence. See *supra* note 155. For example, A can invite an official from B to be a policy advisor in a highly sophisticated regulatory sector because of A's needs and lack of capacity. Finally, A and B can formulate common guidelines or regulations through epistemic sympathization. Both of them, as specialists or experts in their field, may share the same policy goal as well as the same instrument by which to achieve that goal. This phenomenon can be found in cases of BIS (Bank for International Settlements, an organization of central banks) or the ICAO. It should be noted that what matters in these patterns is the "substance," not the "label." For instance, epistemic sympathization can also occur in a form of negotiation. Importantly, the outcome of these transnational communications could easily constitute a type of "soft law" in the initial stage, which could calcify with the passage of time. See generally Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, at 2426 (1991).

189. See Kirgis, *supra* note 14748, at 160-62.

190. *Id.* at 151.

compliance with it is not reduced.¹⁹¹ Here, one can characterize the law not by its "subject or source," but by its "purpose and effect."¹⁹² More surprisingly, soft law could also evolve into formal legislation through a "hardening" process,¹⁹³ and, as Professor J. Weiler maintains, this transformation could be facilitated by a "bi-directional" relationship between law and politics.¹⁹⁴

Regulatory regimes that have undergone the process of inter-governmental cooperation would be more transparent, predictable, and reliable in a transnational society, thereby diminishing the possibility that Member countries would raise nebulous non-violation complaints in the future.

*C. Fast Track (Direct Access by a Private Party in Some Policy-Related Areas)*¹⁹⁵

1. Necessity of De-Politicization in Initiating a Complaint

Many scholars have asserted that as the world becomes economically more interdependent, economic affairs tend to affect more citizens directly than do political affairs.¹⁹⁶ Thus, a change in the trade policy stance of country A, without any buffer, would directly impact the business communities of its trading partner, country B. This impact would be more acute with regard to "regulatory policies" in which a specific regulation directly burdens foreign suppliers of goods and services. This argument is supported by the fact that the framework of the GATS is based on the relationship not only between Members but also between a Member and foreign suppliers of services.¹⁹⁷ For example, a foreign bank branch would suffer enormously if the supervisory authority of a host country subjected it to increased regulatory burdens, like increased minimum capital requirements or submission of additional reports on operational status, for no legitimate purpose other than tighter supervision. Policy measures of this type are likely to

191. *Id.*

192. See Slaughter, *supra* note 187, at 516.

193. See *supra* note 154.

194. See Weiler, *supra* note 188, at 2426.

195. The notion of "direct access" by a private party used here is different from "direct effect" established in the European Community jurisprudence. In the EC context, direct effect (and resultant "direct invocability" by an individual) can be said to be a constitutional product that was created in the course of interpreting the EC Treaty, which is totally different from the other international treaties. However, direct access discussed here is essentially a technical and procedural concept. For a discussion on direct effect, see generally JO SHAW, *LAW OF THE EUROPEAN UNION* (Marise Cremona ed., 2d ed. 1996).

196. See JACKSON, *supra* note 51, at 87; see also John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, at 332 (1992).

197. See, e.g., GATS, *supra* note 6, art. VI.

constitute non-violation cases since the introduction of regulation does not easily constitute a technical violation of the GATS provisions.¹⁹⁸

Under the current DSU in the WTO system, when a private company that has been directly affected by a foreign country's policy change seeks any kind of remedy, including a non-violation remedy, the company is subject to a tortuous political procedure called "championing." This requires the company to attempt to persuade its government to file a formal complaint with the WTO on its behalf.¹⁹⁹ In most cases, the company must lobby relevant government officials, which is a costly and time-consuming process. Even if the complaint is successfully filed with the WTO, the burden on the company continues. Throughout the dispute settlement process, the company must continue to educate its government and provide it with specific information, which can be of a sensitive nature, so that the government can appropriately represent the firm's interest.

Another undesirable impact of the indirect way a private party accesses the WTO panel is that this championing and governmental representation process may result in increased tension between the two countries involved in a dispute. This is especially true if the panel process addresses subjects beyond the trade arena. In that case, the political interests of the filing government may transform the nature of the original dispute into a politically motivated one—a move that the private party (company) may not have originally wished. The filing government may even reject a proposed settlement offered by the counterpart government with which the company would have been quite satisfied.

Significant transaction costs and undesirable political inefficiencies could be prevented if a private party had direct access to the WTO panel.²⁰⁰ In this way, a private company, as a direct party to the dispute without an intermediary, could more efficiently participate in the panel process by presenting the most up-to-date information. A panel would then be able to make a more relevant ruling. Moreover, in the course of the panel process, a private party would be in a more suitable position to settle, releasing the panel from the burden of ruling on non-violation nullification or impairment. Furthermore, the governments would no longer bear the political burden of the WTO dispute, since they would neither file the complaint nor participate in the panel process.²⁰¹

198. See *supra* Part II.B.1.

199. Tycho H.E. Stahl, *Liberalizing International Trade in Services: The Case for Sidestepping the GATT*, 19 YALE J. INT'L L. 405, at 439 (1994).

200. See, e.g., NAFTA, *supra* note 48, ch. 19.

201. JACKSON, *supra* note 51, at 111–12.

2. A Realistic Suggestion: A Two-Tiered Approach in Filing Non-Violation Cases

Direct access to the panel process would not be without challenges. For instance, institutional reform would be needed to allow direct access by a private party under the current WTO regime since the DSU does not explicitly authorize it. Furthermore, more sweeping allowance of this new complaint method would probably inundate the WTO with complaints as well as produce side effects such as misuse of the dispute settlement system. Therefore, selective but rational criteria and some screening mechanism would be necessary in order for direct access to work.

Direct access could be feasible under a two-tiered approach. In the first tier, in the absence of any particular circumstances that would justify direct access, the traditional championing mode should be applied. In the second tier, however, private parties directly concerned in disputes would be granted direct access to a panel when they have a "substantial" interest in doing so. Some candidates for this method are discussed below.

First, consider the example of a number of foreign exporters or foreign suppliers of services that have the same complaint against the same importing country or host country. Supposing these exporters or foreign suppliers of services provide over half of the total imports of one like product²⁰² or over half of the total of foreign supplies of one service, they would most likely have substantial interests in having direct access to the WTO panel. For instance, if half of the foreign bank branches in one country have the same complaint against a certain supervisory measure introduced by their host country's monetary authority, they could directly file a complaint with the WTO without being championed by their own governments. In this hypothetical case, two possible procedural options could be considered: filing one complaint by foreign banks as "multiple complainants"²⁰³ or initially filing an individual complaint by one foreign bank and later participation by the other foreign banks as "third parties."²⁰⁴

Second, if a multi-national enterprise has a complaint against one country, it may have a substantial interest in obtaining direct access because there may not be one particular country that could represent such an enterprise.²⁰⁵

202. See GATT 1994, *supra* note 5, art. III for a definition of like product.

203. See DSU, *supra* note 31, art. 9.

204. *Id.* art. 10.

205. See Stahl, *supra* note 199, at 439.

Some additional but important aspects of the above-mentioned process should be recognized. First, domestic administrative and judicial procedures should be exhausted before direct access to the WTO panel is permitted.²⁰⁶ This constraint would help reduce the number of actual cases that come before the WTO panel by providing an opportunity for smooth settlement between domestic regulators and foreign suppliers of goods and services with relatively less political noise. Second, technical filtering by a panel to prevent spurious complaints would also be needed.²⁰⁷ Finally, *ex post* intervention by governments should be guaranteed to respond to the possible necessity of securing the integrity of domestic policies following the judgment.²⁰⁸

CONCLUSION

Throughout the half-century history of the former GATT and the newly launched WTO system, the GATT/WTO has been pursuing what seems to be a mostly rule-oriented international trade regime. This is evidenced by a number of panel reports, both adopted and unadopted, which are frequently cited in later cases. Regardless of the debate over their legal nature, it seems clear that many panel reports are contributing to the creation of a certain legal framework under which the GATT/WTO can be properly interpreted.²⁰⁹ A good number of side agreements, understandings, and other legal materials have also been promulgated with the intent to clarify obligations and rights of the contracting parties (Members).

Non-violation cases, however, seem out of sync with this trend since the notion of non-violation cases itself presupposes that no breach of obligation exists. The key principle of non-violation cases that the panel has tried to establish in three adopted panel reports merely "re-balances" the unbalanced reciprocity on a rather ad hoc basis. Thus, no sense of an established and consistent international trade norm exists and any Member could insist on maintaining a problematic measure even if it repeatedly nullifies or impairs the benefits of other Members.²¹⁰ Undoubtedly, the primary appeal of a rule-oriented dispute settlement system is its predictability and transparency. This would allow Members of the WTO to better manage their trade policies and enable private companies to design more secure long-term plans.²¹¹ Such an approach is especially reasonable considering that

206. See JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 207-09 (1984).

207. *Id.*

208. *Id.*

209. See JACKSON, THE WORLD TRADING SYSTEM, *supra* note 51; Jackson, *supra* note 123.

210. See DSU, *supra* note 31, art. 26.

211. See JACKSON, THE WORLD TRADING SYSTEM, *supra* note 51, at 87-88.

both the world economy and international trade are becoming more internationalized, interdependent and standardized.²¹²

One might counter-argue that the current WTO system has many legal loopholes that allow for sophisticated non-tariff barriers and even competition policies or labor standards, preventing the WTO from providing proper legal answers. Some might also wish to utilize non-violation complaints as "flexible" instruments to cover these loopholes.²¹³ However, legal loopholes should be closed by legal instruments rather than by the ambiguous flexibility embedded in the notion of non-violation cases. Therefore, efforts should be exercised to fine-tune the current "violation" regime, by "violationizing" cases, reducing the use of non-violation complaints, and establishing more sophisticated substantive rules.

In the past, the possibility of blockage of panel reports served to some extent as a means to filter undesirable non-violation cases.²¹⁴ Paradoxically, the current automatic adoption system could be more vulnerable to wrong cases made by panels or the Appellate Body.²¹⁵ This vulnerability is the very reason why panel composition should be more carefully crafted and a panel itself should be more circumspect in invoking the non-violation provisions in its ruling.

Finally, in the post-hegemonic era after the Cold War, no major country seems willing to play the role of "standard-bearer" of free trade.²¹⁶ Some countries may actually be more interested in representing the parochial voices of domestic constituencies or interest groups, and they might regard non-violation complaints as a new way of securing their goals. Unless changes are made, the non-violation provision could be the Achilles' heel of the WTO system.

212. *Id.* at 111; Abels, *supra* note 42, at 469.

213. *See supra* note 42.

214. Petersmann, *supra* note 10, at 1192.

215. *See supra* Part II.C.2.

216. *See, e.g.,* Reinhard Rode, *GATT: Revival or Decay?*, in *GATT AND CONFLICT MANAGEMENT* 117, 119 (Reinhard Rode ed., 1992).

Appendix

Overview of Non-Violation (GATT Art.XXIII:1(b)) Cases : 1948~1990

Case Title	Nature of Complaints	Mode of Non-Violation Complaints ⁱ	Ruling	Adoption	Result
1. U.S. v. Cuba: Restriction on Textile Imports (3, 3) ⁱⁱ	V→NV ⁱⁱⁱ	supplementary	N/A	N/A	settled(bi)
2. Chile v. Australia: Subsidy on Ammonium Sulphate (8, 8)	V→NV	supplementary	NV N or I	Apr. 3, 1950	settled(bi)
3. Norway v. Germany: Treatment of Import of Sardines (19, 18)	V→NV	supplementary	NV N or I	Oct. 31, 1952	settled(bi)
4. Benelux v. Germany: Import Duties on Starch and Potato Flour (36, 34)	V	N/A ^{iv}	NV N or I (in effect)	N/A (noted on Feb. 16, 1955)	settled(bi)
5. U.S. v. France: Auto Taxes (41, 40)	V→NV	supplementary	N/A	N/A	settled(bi)
6. U.S. v. Chile: Auto Taxes (45, 44)	NV	supplementary	N/A	N/A	settled(bi)
7. U.S. v. Canada: Import Quotas on Eggs (73, 75)	V→NV	supplementary	Neither V nor NV (bilateral settlement recommended)	Feb. 17, 1976	settled(bi)

Case Title	Nature of Complaints	Mode of Non-Violation Complaints	Ruling	Adoption	Result
8. U.S. v. EC: Programme of Minimum Import Prices (MIPS), Licenses, etc. for Certain Processed Fruits and Vegetables (74, 76)	V→NV	independent	V	Oct. 18, 1978	terminated(uni)
9. Australia v. EC: Licenses and Surety Deposits on Canned Peaches and Pears (75, 77)	V→NV	independent	N/A	N/A	terminated(uni)
10. Australia v. EC: Refunds on Exports of Sugar (82, 86)	V→NV	independent	V (Art. XXIII not considered due to lack of detailed submission)	Nov. 6, 1979	impasse
11. EC v. U.S.: Application of Countervailing Duties (84, 88)	NV	independent	N/A	N/A	terminated(uni)
12. U.S. v. Spain: Measures Concerning Domestic Sale of Soybean Oil (87, 91)	V→NV	supplementary	NV N or I	blocked ("noted", not "adopted")	not reported
13. EC v. U.S.: Import Duty on Vitamin B12 (95, 100)	V	N/A	NV N or I (in effect)	Oct. 1, 1982	impasse
14. Australia v. EC: Production Subsidy on Canned Fruits (96, 101)	NV	supplementary	N/A	N/A	settled(bi)

Case Title	Nature of Complaints	Mode of Non-Violation Complaints	Ruling	Adoption	Result
15. U.S. v. EC: Production Aids on Canned Peaches, Canned Pears, Canned Fruit Cocktail, and Dried Grapes (99, 107)	NV	supplementary	NV N or I	blocked	settled(bi)
16. U.S. v. EC: Tariff Treatment of Citrus Products from Certain Mediterranean Countries (102, 113)	not distinguishing	independent	V & NV N or I	blocked	settled(bi)
17. EC v. Japan: Nullification or Impairment of Benefits (108, 124)	NV	independent	N/A	N/A	Japan's unilateral liberalizing measures announced
18. South Africa v. Canada: Discriminatory Application of Retail Sales Tax on Gold Coins (113, 132)	V	N/A	NV N or I (in effect)	blocked	terminated(uni)
19. Australia v. EC: Operation of Beef and Veal Regime (115, 135)	NV	supplementary	N/A	N/A	terminated(uni)
20. Canada v. U.S.: Restriction on Imports of Certain Sugar-Containing Products (118, 140)	V→NV	supplementary	N/A	N/A	settled(bi)
21. Nicaragua v. U.S.: Trade Measures Affecting Nicaragua (120, 143)	V→NV	independent	NV N or I considered pointless (no positive ruling)	N/A	terminated(uni)

Case Title	Nature of Complaints	Mode of Non-Violation Complaints	Ruling	Adoption	Result
22. EC v. Japan: Restriction on Semiconductors (130, 156)	V→NV	independent	V	May 4, 1988	settled(bi)
23. U.S. v. EC: Payments and Subsidies on Oilseeds and Animal-Feed Proteins (151, 179)	V→NV	supplementary	NV N or I	Jan. 25, 1990	settled(bi)
24. EC v. U.S.: Restrictions under 1955 U.S. Waiver and under Headnote to U.S. Schedule XX (155, 186)	V→NV	independent	neither N nor NV (NV not supported by detailed justification)	Nov. 7, 1990	none required

ⁱ For a discussion of the various modes of non-violation complaints, see Pt. III, § 1-2 of the main text.

ⁱⁱ After the title of each case, a pair of parenthetical numbers appears, referring to the case's designation in the *GATT 1994 Analytical Index* and Robert Hudec's 1993 compilation, respectively.

ⁱⁱⁱ In cases denoted "V→NV," both violation and non-violation complaints were advanced.

^{iv} Although no non-violation complaint was made, the panel effectively issued a non-violation ruling. The same was true in EC v. U.S. (the *Vitamin B12* case) and South Africa v. Canada (the *Gold Coin Tax* case), *infra*.

Code of Abbreviations

V	Violation Complaint
NV	Non-Violation Complaint
NV N or I	Non-Violation Nullification or Impairment
N/A	Not applicable
settled (bi)	Bilaterally settled
terminated (uni)	Unilaterally terminated by the defendant party

