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Not So Member-driven After All: The GATT-Era Origins of the WTO's System of Remedies

Geraldo Vidigal

A. Introduction

THE PREVAILING UNDERSTANDING OF THE World Trade Organization (WTO) is that, more so than other international organizations, it is “member-driven.”¹ As a book drafted by the WTO Secretariat explains, “the WTO is a member-driven, consensus-based organization”; it is “different from some other international organizations [in that] power is not delegated to a board of directors or the organization’s head.”² Instead, “the WTO is run by its member governments.”³ These elements are reflected in the WTO’s constitutive agreement, which provides the two highest organs, both composed of all Members, with “exclusive authority to adopt interpretations” of WTO Agreements, while requiring them to follow, whenever possible “the practice of decision-making by consensus followed under GATT 1947.”⁴

1 See, e.g., Manfred Elsig, “The World Trade Organization at Work: Performance in a Member-Driven Milieu” (2010) 5:3 *Review of International Organizations* 345 at 346.

2 WTO Secretariat, *Understanding the WTO*, 3rd ed (Geneva: World Trade Organization, 2005) 104.

3 *Ibid.*

4 *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 arts IX:2 and IX:1 (entered into force 1 January 1995).

The notion that the WTO is a Member-driven organization, and that this feature was inherited from the 1947 *General Agreement on Tariffs and Trade* (GATT 1947), is ingrained in thinking about the WTO. Indeed, one of the prevailing explanations for the demise of the Appellate Body is that the Appellate Body ignored this organizational principle. More than its substantive rulings—many were concerned with “judicial activism” and “judicial overreach” even before the Appellate Body was composed⁵—a significant portion of the grievance developed by the United States over the years concerned the Appellate Body’s self-understanding and attitude to its role in dispute settlement procedures. The idea that the WTO Appellate Body was “a world trade court,”⁶ eventually leading to two decades of “governance by judiciary,”⁷ was perceived by many as a significant, if not determinative, reason for the mounting dissatisfaction in the US government with the Appellate Body’s “rise to prominence.”^{8,9}

This chapter sets aside discussion of the recent past and potential futures of WTO dispute settlement.¹⁰ Instead, it seeks to challenge the idea that the development of WTO dispute settlement itself was primarily “mem-

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- 5 John H Jackson, “The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results” (1997) 36 *Columbia Journal of Transnational Law* 157 at 182–83.
 - 6 Claus-Dieter Ehlermann, “Six Years on the Bench of the ‘World Trade Court’: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization” (2002) 36:4 *Journal of World Trade* 605; H  l  ne Ruiz Fabri, “La juridictionnalisation du r  glement des litiges   conomiques entre   tats” (2003) 3 *Revue de l’arbitrage* 881.
 - 7 Robert Howse, “The World Trade Organization 20 Years On: Global Governance by Judiciary” (2016) 27:1 *European Journal of International Law* 9.
 - 8 Peter Van den Bossche, “From Afterthought to Centrepiece: the WTO Appellate Body and its Rise to Prominence in the World Trading System” in Giorgio Sacerdoti, Alan Yanovitch, & Jan Bohanes, eds, *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 289.
 - 9 See Joost Pauwelyn, “The WTO 20 Years On: ‘Global Governance by Judiciary’ or, Rather, Member-driven Settlement of (Some) Trade Disputes between (Some) WTO Members?” (2016) 27:4 *European Journal of International Law* 1119; Robert McDougall, “The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance” (2018) 52:6 *Journal of World Trade* 867.
 - 10 See on this Geraldo Vidigal, “Re-Imagined Communities: The WTO Appellate Body and the Communitization of WTO Law” in H  l  ne Ruiz Fabri et al, eds, *International Judicial Legitimacy: New Voices and Approaches* (Baden-Baden: Nomos, 2020); Geraldo Vidigal, “Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis” (2019) 20:6 *Journal of World Investment & Trade* 862.

ber-driven.” As I will argue, the key features of the WTO dispute settlement system as we know it were largely developed by the Secretariat of the GATT 1947, in the 1950s and 1960s, based on a handful of early dispute settlement reports. The system of remedies formulated then, with its approach often termed “prospective” or “forward-looking,” decisively influenced the design of WTO dispute settlement and is now reproduced in virtually every trade agreement. In this system of remedies, dispute settlement does not offer retrospective reparation for injury but focuses on securing a change in conduct and a return to substantive compliance with agreed rules.¹¹

B. From Suspension of Concessions to Retaliation in the GATT

THE CURRENT SYSTEM OF WTO remedies originates from the compliance control procedure under the GATT 1947. The GATT’s single provision on dispute settlement, Article XXIII, provided that, following unsuccessful consultations between parties, disputes could be referred to the “Contracting Parties.”¹² The Contracting Parties—an organ composed of representatives of all the parties to the GATT acting collectively—were empowered under Article XXIII:2 to “investigate any matter . . . referred to them,” make “appropriate recommendations” and “give a ruling, as appropriate.” In case of “serious enough” circumstances, they could “authorize a contracting party or parties to suspend the application” of GATT concessions and obligations towards the offender.¹³ The authorization to suspend concessions was therefore asso-

11 See Geraldo Vidigal, “Re-Assessing WTO Remedies: The Prospective and the Retrospective” (2013) 16:3 *Journal of International Economics* 505 and the literature cited therein.

12 *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 art XXIII:2 [GATT 1947] (disputes “may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate . . . If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.” The GATT 1947 uses uppercase to refer to the Contracting Parties as an organ, acting collectively).

13 *Ibid.*

ciated not with the failure to comply with previous decisions but rather with particularly grievous circumstances.

While the GATT is silent regarding the purpose of suspensions of concessions, it is likely that this was not initially intended as a means of exerting pressure on the wrongdoer. Writing in 1949, Clair Wilcox, who chaired the negotiations leading to the GATT, noted that authorizing the reciprocal suspension of concessions was regarded by negotiators “as a method of restoring a balance of benefits and obligations” between the parties.¹⁴ The underlying view was that trade agreements are instruments permitting reciprocal concessions in trade liberalization. Following this view, a violation—or rather, the “nullification or impairment” of negotiated trade benefits—would allow the other party to suspend equivalent concessions, permitting the parties to move on with the same balance of concessions. In other words, authorized suspension of concessions was not seen as a “retaliation,” in the sense of a sanction aiming at restoring compliance by a rule violator. Instead, it was envisaged as a permitted reciprocal downgrading of the level of trade benefits agreed between two parties.

At the same time, Wilcox himself predicted already in 1949 that this instrument would “operate in fact as a sanction and a penalty.”¹⁵ This would take place if the instrument of suspension of concessions was seen not as a mechanism for rebalancing the agreement—viewed as contract that can be violated “efficiently,” provided an equivalent price is paid—but as a retaliation instrument, permitting harm to the interests of the violator. As discussed below, the instrument itself is indifferent to these functions; it is the way in which the parties use it that determines its perceived function.

C. The Early Years: Retaliation in GATT Practice

THE GATT 1947 DISPUTE SETTLEMENT mechanism enjoyed an early success in the late 1940s and early 1950s, with a number of Working Parties—which would later evolve into GATT panels—established by the Contracting Parties to assess trade irritants and propose solutions. This was also the only time the Contracting Parties authorized suspension of concessions under Article XXIII:2. In 1951, a dispute settlement report found that US restrictions on dairy imports were impairing GATT benefits of Netherlands and Denmark.

¹⁴ Clair Wilcox, *A Charter for World Trade* (London: MacMillan, 1949) 159.

¹⁵ *Ibid.*

This report stated that the circumstances of the violation were serious enough to justify suspension of concessions.¹⁶ Rather than authorizing this response, however, the Working Party counselled the two claimants “to afford to the United States Government a reasonable period of time . . . to rectify the situation.”¹⁷ In deferring the authorization to suspend concessions, the Working Party already hinted at the treatment that would be given to reciprocal suspension of concessions: not as a sufficient remedy in and of itself (i.e., as a means of reparation for trade injury and rebalancing of the scales) but as a subsidiary possibility, available in case the offender failed to “rectify” its conduct.

In 1952, considering that the United States had not complied with the first report in *US—Dairy Products*, the Netherlands requested authorization to suspend concessions, restricting its imports of wheat flour from the United States in the following year to 57,000 tons. A follow-up Working Party was constituted to address the appropriateness of the request. The terms of reference, drafted by the Contracting Parties, indicated that this Working Party should assess the “equivalence of the measure proposed to the impairment” caused by the violation.¹⁸ The 1952 Working Party found that the response proposed by the Netherlands was not unreasonable. Conducting an “independent review”¹⁹ of the matter, it authorized the Netherlands to limit its imports of wheat flour from the United States in 1953 to 60,000 tons.²⁰

Despite its success from a legal perspective, this early instance of GATT-authorized suspension of concessions did not lead to actual retaliation. In subsequent cases, the Contracting Parties never authorized retaliation

16 GATT, *United States Import Restrictions on Dairy Products—Resolution* GATT Doc CP/130 (1951) at 14, online (pdf): docs.wto.org [perma.cc/VJ9K-QRRE] [*US—Dairy Products*].

17 *Ibid* at para 1.

18 GATT, *Summary Record of the Tenth Meeting*, GATT Doc SR.7/10 (1952) at 9, online (pdf): docs.wto.org [perma.cc/74X6-FKL7].

19 GATT, *Working Party 8 on Netherlands Action under Article XXIII:2, Report to Contracting Parties*, GATT Doc L/61 (1952) at para 6, online (pdf): docs.wto.org [perma.cc/TF5C-PXVR].

20 *Ibid* at para 7. The report was adopted by the Contracting Parties with both parties to the dispute abstaining while declaring that they considered the report to be satisfactory. See GATT, *Summary Record of the Sixteenth Meeting* GATT Doc SR.7/16 (1952), online (pdf): docs.wto.org [perma.cc/5ETF-YPB3] (two other contracting parties, New Zealand and Czechoslovakia, questioned whether the Working Party should have second-guessed a proposal that it considered not to be unreasonable).

again, instead emphasizing the need for compliance.²¹ The procedure nonetheless was codified and developed through a mix of documents issued by the Secretariat, Working Party documents, and panel reports, later consolidated in decisions by the GATT Contracting Parties.

Thus, a 1955 Working Party rejected, in the context of a review of the GATT, a proposal favouring permanent rebalancing measures as a response to non-compliance, which would be established by the Contracting Parties and aimed at “the maintenance of a general level of reciprocal and mutually advantageous concessions.” The Working Group esteemed that this proposal “would not accord with the intent and spirit” of Article XXIII, since it would amount to accepting “that the provision of appropriate compensation, on the one hand, and the removal of a measure inconsistent with the Agreement, on the other hand, are fully equivalent and satisfactory alternatives.”²² The Working Party stated, in this context, that the primary objective of the GATT Contracting Parties, following a finding of inconsistency, should be “to secure the withdrawal of the measures,” offering as an alternative the possibility of temporary compensation for the damage suffered.²³

In subsequent disputes, GATT dispute settlement Working Groups and panels continued to seek the removal of measures, while often proposing the negotiations and the provision of a reasonable period of time for respondents to adjust their domestic laws and measures to their GATT commitments, consolidating the prospective nature of remedies. Even panels that identified clear breaches of GATT provisions recommended negotiation and withdrawal of GATT-inconsistent measures.²⁴ In *France—Import Restrictions*, the Panel went beyond addressing the respondent with recommendations and recommended to the United States, the claimant, “that it refrain, for a

21 For the attempt to do so in *US—Superfund*, see below note 41.

22 GATT, *Report of Review Working Party IV on Organization and Functional Questions*, GATT Doc L/327/Rev 1 (1955) at para 62, online (pdf): docs.wto.org [perma.cc/A9YU-LYCG].

23 *Ibid* at para 64.

24 *Italy—Discrimination Against Imported Agricultural Machinery (Complaint by the United Kingdom)* (1958), GATT Doc L/833, 7th Supp BISD (1958) 60 at para 25, online (pdf): docs.wto.org [perma.cc/7U25-N9NF]; *French Assistance to Exports of Wheat and Wheat Flour (Complaint by Australia)* (1958), GATT Doc L/924, 7th Supp BISD (1958) 46 at para 12, online (pdf): docs.wto.org [perma.cc/V7EJ-QN]8].

reasonable period, from exercising its right . . . to propose suspension of the application of equivalent obligations or concessions.”²⁵

A further development and consolidation of the prospective approach to GATT remedies arose in the context of the 1962 dispute *Uruguayan Recourse to Article XXIII*. This Panel found a number of violations of the GATT by the various respondents against whom Uruguay brought the dispute. Rather than authorizing retaliation, the Panel established what it termed a “two-stage procedure.” It recommended the removal of the GATT-inconsistent measures, followed by “the possibility of further action, in case of non-fulfilment.” Failing compliance by the respondents within a reasonable period of time, Uruguay would “be entitled immediately to ask for the authorization of suspension of concessions or obligations.”²⁶

In follow-up proceedings, Uruguay did not request an authorization to retaliate, though. It focused instead on seeking findings of non-compliance with the previous rulings and recommendations for substantive compliance. A 1963 report, identifying persistent violations of GATT rules, recommended their withdrawal by the wrongdoers, highlighting that Uruguay was entitled to request the suspension of concessions.²⁷ A subsequent report restated this view, specifying that “the relevant recommendations [for compliance] would *ipso facto* have become inoperative with the disappearance of the restrictive measures.”²⁸

In short, GATT Article XXIII:2 enabled adjudicators to follow recommendations with an immediate determination of authorized retaliation under GATT, based on the seriousness of situations. However, Working Groups, Panels and the contracting parties largely adopted a prospective approach to remedies, favouring demands for substantive compliance. The Panels in *US—Dairy Products* and *France—Import Restrictions* withheld the requested authorization, instead awarding the offender a “reasonable period” to comply with its rulings. In *Uruguayan Recourse to Article XXIII*, the claimant itself preferred a declaration of non-compliance in respect of the challenged measures, over

25 *France—Import Restrictions (Complaint by the United States)* (1962), GATT Doc L/1921, -11th Supp BISD (1962) 94 at para 7, online (pdf): docs.wto.org [perma.cc/ZZ4P-VY9Z] [*France—Import Restrictions*].

26 *Uruguay—Recourse to Article XXIII* (1962), GATT Doc L/1923, 11th Supp BISD (1962) 95 at paras 19–21, online (pdf): docs.wto.org [perma.cc/2H28-L3FZ].

27 *Uruguay—Recourse to Article XXIII* (1963), GATT Doc L/2074, 13th Supp BISD (1963) 35 at para 6, online (pdf): docs.wto.org [perma.cc/85M7-V65W].

28 *Uruguay—Recourse to Article XXIII* (1964), GATT Doc L/2278, 13th Supp BISD (1964) 45 at para 6, online (pdf): docs.wto.org [perma.cc/6SXX-J9ZY].

the Panel's offer that it request authorization to retaliate. Retaliation was therefore not seen, by parties or panels, as a means of "reparation" or "rebalancing of concessions" but as potential instruments to enforce rulings and obtain substantive compliance.

The two decades following *Uruguayan Recourse to Article XXIII* saw the rise of an "antilegalistic" sentiment at the GATT.²⁹ As Rajesh Babu put it, "[a]fter having processed 59 claims up to mid-1963, the GATT adjudication system simply vanished. No formal legal claim at all was filed from 1963 to 1969."³⁰ One important trade dispute at the time, the so-called *Chicken War*, was addressed through recourse to an *ad hoc* panel. This dispute, between the United States and the European Economic Communities (EEC), arose when the EEC's import regime for poultry replaced West Germany's lower duties on chicken in 1962. The *ad hoc* Panel was tasked with issuing an "advisory opinion" determining the value of lost exports for the United States as a result of West Germany's "unbindings concerning this product."³¹

The *Chicken War* Panel was perhaps the only one that led to a permanent "rebalancing" of trade concessions. The *ad hoc* Panel understood its mandate as arising from GATT Article XXIV:6, which requires "compensatory adjustment" for increased trade barriers following the formation of customs unions, rather than Article XXIII. The panel's determination of a dollar amount for US lost exports was followed by corresponding increases in US tariffs on light trucks, brandy, potato starch, and dextrin, all on a most-favoured-nation (MFN) basis rather than on the EU alone.³² One commentator praised this "improvisation," noting that "the amount of the incidental injury [from the MFN increase] appears to be minor [since] third-country trade in the products selected is less than a million dollars, dispersed among several suppliers."³³ The fact that, sixty years later, the United States continues to apply its 25 percent "chicken" tariff on light trucks, shows the problematic potential of the idea of permanent authorized rebalancing.

29 Kenneth W Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970) 356.

30 Rajesh Babu, *Remedies under the WTO Legal System* (Leiden: Martinus Nijhoff, 2012) 25.

31 *Panel on Poultry (Complaint by the United States)* (1963), GATT Doc L/2088, online (pdf): docs.wto.org [perma.cc/M8GS-PgZG].

32 Herman Walker, "The Chicken War" (1964) 58:3 *American Journal of International Law* 671 at 681.

33 *Ibid* at 681 and 683.

D. Legalized Dispute Settlement and Unilateral Retaliation

THE LULL OF REGULAR GATT adjudication in the 1960s did not prevent the procedure developed in the previous decade from being consolidated, through the Secretariat's work, as well as through discussions among the Contracting Parties. In 1965, a Note from the GATT Secretariat, directed at securing "compensation for less developed contracting parties for loss of trading opportunities" owing to the residual application of quotas, reaffirmed the two-phase structure set out by the Panel in *Uruguayan Recourse to Article XXIII*. The Note stated that "the normal course" of disputes involved one phase for adjudication and the other for determination of authorized retaliation.³⁴

This structure was then picked up by the Contracting Parties when dispute settlement once again started operating, in the 1970s.³⁵ It was consolidated in the 1979 Tokyo Round Understanding on Dispute Settlement (TRUDS). TRUDS and its Annex, the "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement," codified and gave legal status to adjudicatory panels (which are not mentioned in the GATT) as well as to the compliance-oriented two-phase approach to remedies. Prior to TRUDS, therefore, this entire construction was based on the embryonic practice of the 1950s and early 1960s, codified by the GATT Secretariat.

TRUDS required GATT dispute settlement panels to make "an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement" and issue "findings in a written form."³⁶ If the

34 GATT, *Note by the Secretariat*, GATT Doc COM.TD/5 (1965) at paras 8–10, online (pdf): docs.wto.org [perma.cc/7WSW-XWUG].

35 Babu, above note 30 at 26.

36 GATT, *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Doc L/4907 (1980), arts 16–17, online (pdf): docs.wto.org [perma.cc/QL6N-83HF] [TRUDS]; See John H Jackson, "The Birth of the GATT-MTN System: A Constitutional Appraisal" (1980) 12:1 *Law & Policy in International Business* 21 at 42 (John Jackson notes that many panels had responded to the antilegalistic sentiment of the 1960s and 1970s by "tr[ying] to play the role of conciliators . . . assisting the negotiation in reference to the power positions of the disputing parties and not with reference to the interpretation or application of an agreed-upon rule"); See also *Jamaica—Margins of Preference (Complaint by the United States)* (1971), GATT Doc L/3485, 18th Supp BIDS (1971) 183 at paras 15–17, online (pdf): docs.wto.org [perma.cc/436D-G5NN] (in one case involving Jamaican preferences, the Panel effectively recommended the adoption of a waiver to accommodate for temporary non-compliance).

panel found a violation, the party found in breach should resume compliance with its commitments. A negotiated arrangement, or an authorization to retaliate, could be available “as a temporary measure” if “immediate withdrawal of the [violating] measure is impracticable.”³⁷ The “last resort” in this system or remedies was to authorize bilateral responses, in the form of Article XXIII:2 suspension of concessions or other obligations “on a discriminatory basis vis-à-vis the [wrongdoer].”³⁸

Despite having the approval of the GATT Contracting Parties, the highly codified TRUDS rules governing dispute settlement were never used to their full extent—that is, they never led to authorized retaliation. In 1988, following US non-compliance with the panel report in *US—Superfund*,³⁹ the European Communities and Canada sought authorization to retaliate against the United States. The United States, however, opposed the request. Arguing that “legislation to achieve compliance with the Panel’s recommendation was imminent,” the United States representative stated that it was “inappropriate to consider retaliatory withdrawal of tariff concessions.”⁴⁰ It then blocked Canada’s proposal to establish “a small group, perhaps along the lines of a panel, to examine Canada’s request.”⁴¹

Even though no authorization to retaliate was ever granted after 1952, the instrument of retaliation itself was threatened and used. In *EEC—Oilseeds*, a 1990 Panel found that the EEC’s measure undermined the “reasonable expectations” of the United States but suggested allowing the EEC a reasonable period of time to adjust.⁴² Two years later, a follow-up panel found that benefits accruing to the United States continued to be impaired and

37 This adjustment, labelled “compensation,” should not be confused with the homonymous remedy under general international law.

38 TRUDS, above note 36, Annex at para 4. This provision originated Article 3.7 of the *Dispute Settlement Understanding*. Subsequent clarifications were added in 1989. GATT, *Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Dec L/6489, 36th session (1989) BISD 61.

39 *United States—Taxes on Petroleum and Certain Imported Substances (Complaint by the European Communities and Canada)* (1987), GATT Doc L/6175, 34th Supp BISD (1987) 136, online (pdf): docs.wto.org [perma.cc/UWB2-W767] [*US—Superfund*].

40 GATT, *Communication from the European Communities*, GATT Docs C/W/540, C/W/540/Add.1 (1988), online (pdf): docs.wto.org [perma.cc/M858-Q7SJ]; GATT, *Minutes of Meeting*, GATT Doc C/M/236 (1989) at 18, online (pdf): docs.wto.org [perma.cc/Y3DR-HBGS].

41 *Ibid* at 20.

42 *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (Complaint by the United States)*

recommended that, unless the dispute were resolved expeditiously, “the CONTRACTING PARTIES should, if so requested by the United States, consider further action under Article XXIII:2 of the General Agreement.”⁴³

Rather than complying with the recommendation, the EEC blocked adoption of the latter panel report and sought to renegotiate its schedule of concessions.⁴⁴ The United States objected to the EEC’s calculation of the injury and announced its intention to “restore the balance unilaterally upset by the Community” by imposing 200 percent *ad valorem* tariffs on EC imports of white wine, rapeseed oil and wheat gluten—a clearly retaliatory, rather than restorative, measure.⁴⁵ The process culminated in December 1993 with the signature of the Oilseeds Agreement, which set new rules for the products involved.⁴⁶

Retaliation in *EEC—Oilseeds* was exceptional for its time, not because it was applied but because it was preceded by GATT adjudication. In the late years of the GATT 1947, contracting parties increasingly invoked an entitlement to resort to responses outside the GATT system. Pointing to the fundamental weakness of the GATT’s otherwise quasi-judicial mechanism for dispute settlement—the need for consensus among the GATT Contracting Parties at each stage of the procedure—throughout the 1980s, the United States increasingly resorted to unilateral reactive measures. Employing US laws permitting its government to react to unfair trade practices, the United States imposed retaliation on alleged offenders based on its own assessment of breach. Jadish Bhagwati labelled this practice “aggressive unilateralism”

(1989), GATT Doc L/6627, 37th Supp BISD (1989) 86 at paras 148, 157, online (pdf): docs.wto.org [perma.cc/5BB3-594N].

- 43 *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (Follow-Up on the Panel Report)* (1992), GATT Doc DS28/R - 39S/91 at para 92, online (pdf): docs.wto.org [perma.cc/QT3W-QHVE].
- 44 GATT, *Proposal by the European Economic Community*, GATT Doc DS28/2 (1992), online (pdf): docs.wto.org [perma.cc/4UVL-THAT].
- 45 GATT, *Request by the United States for Establishment of an Arbitral Body*, GATT Doc DS28/3 (1992), online (pdf): docs.wto.org [perma.cc/T7FD-MGRC]; GATT, *Communication from the United States*, GATT Doc DS28/4 (1992), online (pdf): docs.wto.org [perma.cc/FF84-NPF8].
- 46 Giovanni Anania, Colin A Carter, & Alex F. McCalla, “Agricultural Policy Changes, GATT Negotiations, and the U.S.-E.C. Agricultural Trade Conflict” in Giovanni Anania, Colin A Carter, & Alex F. McCalla, eds, *Agricultural Trade Conflicts and GATT: New Dimensions in U.S.-European Agricultural Trade Relations* (New York: Routledge, 1994) 1.

and considered it a threat to the world trading system.⁴⁷ This aggressive unilateralism, Robert Hudec recalls, was the “precipitating event” of the Uruguay Round negotiations that established the WTO.⁴⁸ Andrew Stoler, the main negotiator for the United States, concurs that a major objective of all other contracting parties at the Uruguay Round was to prevent US unilateralism.⁴⁹ In other words, the WTO’s prospective system of remedies, including retaliation as a last resort, emerged not solely from the United States’ desire to employ retaliation but also from a fifty-year practice in which the relationship between retaliation and adjudication was in dispute.

The increasing resort to unilateral retaliation by the United States in the 1980s resulted, paradoxically, in a highly legalized WTO Dispute Settlement Understanding (DSU). The DSU, at least while it functioned as planned, ensured that WTO Members could resort to adjudication and obtain a final dispute settlement report, ultimately allowing them to obtain an authorization to retaliate in case of non-compliance. On the other hand, it legally prohibited resort by WTO Members to unilaterally determined trade retaliation.

The function of suspension of concessions remained in dispute even after the DSU consolidated it into a post-adjudicative remedy, with many claiming that it offered the possibility of “efficient breach,” allowing the harmed WTO Member to “take back” concessions it made in negotiations as a response to breaches.⁵⁰ It is true that the standard of suspending “substantially equivalent concessions”⁵¹ is similar to that which appears in a number of other GATT provisions as a means of “rebalancing” the agreement to a wronged party.⁵² In practice, however, neither under the GATT 1947 nor

47 See Jagdish Bhagwati & Hugh T Patrick, eds, *Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System* (Ann Arbor: University of Michigan Press, 1990). But see Alan O Sykes, “Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301” (1992) 23 *Law & Policy in International Business* 263.

48 Robert E Hudec, “Broadening the Scope of Remedies in WTO Dispute Settlement” in Friedl Weiss & Jochem Wiers, eds, *Improving WTO Dispute Settlement Procedures* (London: Cameron May, 2000) 345 at 373–74.

49 Andrew L Stoler, “The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?” (2004) 3:1 *World Trade Review* 99 at 103.

50 Eric Posner & Alan O Sykes, “Efficient Breach of International Law: Optimal Remedies, Legalized Noncompliance, and Related Issues” (2011) 110 *Michigan Law Review* 243.

51 GATT 1947, above note 12 arts XXVIII:3, XXVIII:4(d). See also GATT 1947, above note 12 arts XVIII:7(b), XVIII:21 and XIX:3(a).

52 GATT 1947, above note 12 art XXVIII (a state may respond to a withdrawal of concessions with a reciprocal withdrawal of “substantially equivalent concessions”).

under the WTO have adjudicators or parties treated retaliation as a satisfactory substitute for compliance. Reciprocal suspension of concessions is used as a means of retaliating against, or sanctioning, the non-complying party, and pressuring it to comply with its commitments.⁵³

E. Conclusion

SO-CALLED WTO RETALIATION—OR RATHER, THE authorization to suspend concessions in case of persistent non-compliance—has its roots in a long-standing practice under the GATT 1947. The GATT 1947 foresaw collective authorization to suspend concessions as a possible consequence of a particularly egregious nullification or impairment of GATT benefits. In the practice under the agreement, the contracting parties and adjudicators showed a clear preference for treating retaliation as a last resort, privileging the ability of panels to offer legal interpretation and specify compliance duties. Despite the lack of practical use, both the GATT Secretariat and various Working Groups and panels reinforced the idea that GATT retaliation remained a threat against wrongdoers. Even in 1970, after a decade in which GATT contracting parties rarely resorted to its dispute settlement system, Kenneth Dam found that suspension of concessions was “the heart of the GATT enforcement system.”⁵⁴

This design of the WTO system of remedies, now replicated in virtually every international trade agreement, was first constructed in practice. This system operates very differently both from the set of remedies usually associated with international adjudication, geared towards the award of reparation for injury, and from that which the GATT negotiators seemingly intended, geared at restoring the balance of concessions by permitting reciprocal withdrawal of benefits. This system did not emerge through legislative action by the GATT Contracting Parties, as one could expect in a “member-driven” institution. Instead, a decades-long dialogue, involving adjudicators in Working Parties and GATT panels, parties to disputes, and the drafting hand of the GATT Secretariat, resulted in an original system that privileges future compliance over redress for past injury.

53 See Gregory Shaffer & Daniel Ganin, “Extrapolating Purpose from Practice: Rebalancing or Inducing Compliance” in Chad P Bown & Joost Pauwelyn, eds, *The Law, Economics, and Politics of Trade Retaliation in WTO Dispute Settlement* (Cambridge: Cambridge University Press, 2009).

54 Kenneth W Dam, *The GATT: Law and International Economic Organization* (Chicago: Chicago University Press, 1970) at 364